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Text as Truce: A Peace Proposal for the Supreme Court's Costly War Over the Eleventh Amendment

Cover Page Footnote
Law Clerk to Justice Richard A. Posner, United States Court of Appeals for the Seventh Circuit, 2005-2006. J.D., Stanford Law School, 2005; B.A., University of Wisconsin, 2000. I thank Lawrence Lessig and William Skinner for insightful discussion of this project in its early stages; Judge Posner for helpful comments on an earlier draft; and William and James Coan for critical feedback throughout the drafting process. All views—and of course errors—are my own.

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ESSAY

TEXT AS TRUCE: A PEACE PROPOSAL FOR THE SUPREME COURT’S COSTLY WAR OVER THE ELEVENTH AMENDMENT

Andrew B. Coan*

INTRODUCTION

Courts and commentators have debated the original meaning of the Eleventh Amendment for more than 100 years. This debate has a peculiar characteristic, however. It has paid remarkably little attention to the text of the Eleventh Amendment. That text reads as follows: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

Read against the background of Article III, Section 2, which grants federal courts jurisdiction over “all Cases, in Law or Equity, arising under this Constitution [and] the Laws of the United States,” this text appears to extinguish federal jurisdiction over all suits against states by citizens of another state, while leaving intact jurisdiction over suits arising under the Constitution or federal laws where the parties are not so aligned—most notably, suits by citizens against their own states.

Neither the presently dominant nor the main competing interpretation of the Eleventh Amendment reads the Amendment in this way. The currently ascendant judicial interpretation of the Eleventh Amendment holds that the Amendment stands not so much for what it says as for the presupposition it confirms—that states are not amenable to suits by individuals without their consent.

The main competing interpretation, known as the “diversity theory” and embraced consistently for the last twenty years by a four-


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2. U.S. Const. amend. XI.

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Justice minority of the Supreme Court and by a majority of academic commentators, holds that the Eleventh Amendment does not limit federal question jurisdiction at all; rather, it provides a limiting construction to the citizen-state diversity head of jurisdiction, barring its application to cases where states are defendants.

The historical debate between proponents of these two interpretations has been vigorous but ultimately inconclusive. This Essay argues that this debate (and the originalist approach of judges and commentators on all sides of it) has had significant costs. It has produced a legal doctrine rife with internal inconsistencies, and it has, for two decades, divided the Supreme Court along transparently political lines, creating the appearance that the Court's Eleventh Amendment jurisprudence is driven more by the personal views of the Justices than constitutional principle. Given the Amendment's irresolvably ambiguous history, it is simply not productive for the Court to maintain its present course. Consequently, this Essay calls for a truce in the war over the Eleventh Amendment's original meaning. By adopting a textualist interpretation of the Eleventh Amendment, the Court can achieve a more coherent doctrine and restore the appearance that its decisions are grounded in principle rather than politics.

I. THE WAR

In this part, I survey the historical debate over the original meaning of the Eleventh Amendment. I do not take sides in this war. I simply report the positions of the various parties with an eye to promoting a peaceful settlement.

A. First Shots

The first shots of the war were fired in 1890 in Hans v. Louisiana, the first case to devote serious attention to the original meaning of the Eleventh Amendment. In that case, plaintiff Hans attempted to sue the state of Louisiana to collect an unpaid debt and argued that his case should be heard in federal court under the Contracts Clause. Because he was a citizen of Louisiana, the text of the Eleventh Amendment did not clearly bar his suit.

7. See, e.g., id. at 6.
9. See infra Part II.A.
10. See infra Part II.B.
11. To the extent I have sympathies, they lie with the textualist provocateurs discussed in Part I.B.3, especially John Manning. But each side's cause has merits and weaknesses.
12. 134 U.S. 1 (1890).
Nevertheless, the Supreme Court held that the Eleventh Amendment could not have intended to bar suits against states by citizens of another state, while leaving states open to suit by their own citizens.\textsuperscript{14} The Amendment was important, the Court held, not so much for what it said but for the presupposition it confirmed: that states are not amenable to suit by individuals without their consent.\textsuperscript{15}

B. Waging History

\textit{Hans} was adhered to more or less without event for the next seventy-five years, at which point its interpretation of the Eleventh Amendment came under pressure, initially from a slim majority of the Court\textsuperscript{16} and eventually from a series of increasingly vigorous dissents advancing the diversity theory.\textsuperscript{17} From 1989 to 1996, something like the diversity theory carried the day, based on the decision of a four-Justice plurality in \textit{Pennsylvania v. Union Gas}.\textsuperscript{18} In \textit{Seminole Tribe of Florida v. Florida},\textsuperscript{19} however, a five-Justice majority overruled \textit{Union Gas}, embracing the \textit{Hans} view that the Eleventh Amendment stands for a broad "constitutional principle" of state sovereign immunity, which Congress cannot abrogate pursuant to its Article I powers.\textsuperscript{20} Justice David Souter's stinging dissent embraced the diversity theory,\textsuperscript{21} and the battle has been raging in the Supreme Court and law journals ever since.\textsuperscript{22} The following subsections briefly review the principal arguments for each theory, along with the arguments of two provocative scholars who are the only significant commentators to advocate

\begin{itemize}
\item \textsuperscript{14} \textit{Hans}, 134 U.S. at 10-11.
\item \textsuperscript{15} Id. at 15.
\item \textsuperscript{16} Cf. Parden v. Terminal Ry. of Ala. State Docks Dep't, 377 U.S. 184, 198 (1964) (Brennan, J., writing for a five-Justice majority) (holding Alabama had constructively consented to suit under the Federal Employers Liability Act ("FELA") by operating a railroad when Congress had conditioned participation in that activity on amenability to suit).
\item \textsuperscript{18} Pennsylvania v. Union Gas, 491 U.S. 1, 5-23 (1989) (Brennan, J.) (plurality opinion) (holding that Congress could abrogate state sovereign immunity pursuant to its Article I powers). While some commentators speak of the diversity theory and the abrogation view embraced in \textit{Union Gas} as distinct, the two theories do not differ meaningfully in their view of the Eleventh Amendment, which both read as imposing a limiting construction on Article III's citizen-state diversity head of jurisdiction. The abrogation theory simply recognizes an antecedent common law principle of state sovereign immunity, which Congress may abrogate in the exercise of its enumerated powers. The discussion in this Essay therefore does not distinguish between the two theories.
\item \textsuperscript{19} 517 U.S. 44.
\item \textsuperscript{20} Id. at 64-65.
\item \textsuperscript{21} Id. at 100 (Souter, J., dissenting).
\item \textsuperscript{22} It was raging much earlier, too. See, e.g., William A. Fletcher, \textit{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 (1983) (advocating diversity theory).
\end{itemize}
a textualist interpretation of the Eleventh Amendment as an account of its original meaning.

1. State Sovereign Immunity

The primary argument for the state sovereign immunity view is the one the Court made in *Hans*. If states were motivated to ratify the Eleventh Amendment out of concern with bankrupting liability on their war debts, it did not make any sense for the Amendment to have barred suits against states only by citizens of another state, and not the states' own citizens. Recent courts have also pointed to the writings of Alexander Hamilton, as well as the arguments of John Marshall and James Madison at the Virginia ratifying convention, as evidence that states did not give up their traditional sovereign immunity when they entered the union. They enjoyed this immunity at common law, it is argued, and nothing in the "plan of the convention" necessarily deprived them of it.

Ironically, this debate at the ratifying conventions that is alluded to in Federalist 81 focused on the citizen-state diversity head of jurisdiction in Article III, which both the state sovereign immunity proponents and diversity theorists agree the Eleventh Amendment was intended to limit to suits where states were plaintiffs. The federal question head of jurisdiction, which has been the source of greatest controversy in debates over the Eleventh Amendment, was apparently not the subject of any pre-ratification debate—at least none that remains extant. Proponents of state sovereign immunity have therefore argued that this provision, which the text of the Eleventh Amendment does not address directly, could not have been understood as overriding state sovereign immunity. If it had been, they reason, it would have provoked the same kind of controversy provoked by citizen-state diversity jurisdiction. On this theory, the Eleventh Amendment merely returned the Constitution to its original pre-*Chisholm v. Georgia* meaning, under which, the sovereign immunity theorists claim, states were not amenable to suit by private citizens without their consent.

26. *Id. at 419.*
27. One recent commentator has argued that, as originally understood, an Article III “case” or “controversy” did not exist where a court lacked personal jurisdiction over both parties, which it would never have had over an unconsenting state. See Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559 (2002). On this ground, Nelson reads all the Article III heads of jurisdiction as qualified by a background understanding of state sovereign immunity.
28. 2 U.S. (2 Dall.) 419 (1793). *Chisholm*, of course, is the case that provoked the adoption of the Eleventh Amendment by holding that citizen-state diversity jurisdiction authorized the federal courts to hear an assumpsit action brought by a citizen of South Carolina against the state of Georgia without its consent.
2. The Diversity Theory

The diversity theory, which at least four Supreme Court Justices have consistently embraced since 1985, was first articulated on the Court by Justice William Brennan in his solo dissent in Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare. There, Justice Brennan argued that the best way to make sense of the Amendment is to view it merely as enacting a limiting construction on the citizen-state diversity head of jurisdiction. In other words, the Amendment was meant to force courts to interpret citizen-state diversity jurisdiction just as Madison and Marshall both said it would be interpreted at the Virginia Convention—as only applying to states as plaintiffs, not as defendants. The Amendment was not, the diversity theorists argue, intended to have any effect on federal question jurisdiction. In fact, in their view, it even allowed federal courts to hear suits “against one of the United States by citizens of another state,” so long as they were independently grounded in federal question jurisdiction.

In this respect, the diversity theory directly conflicts with the text of the Eleventh Amendment, which on its face plainly bars such suits without regard to the asserted grounds for federal jurisdiction. In support of their contratextual reading, however, the diversity theorists point out that before sending the current version of the Eleventh Amendment to the states for ratification, Congress considered a different version, which would have established exactly the broad principle of sovereign immunity that the Court’s current majority endorses. Rejecting this version, Congress opted for the very precise text of the Eleventh Amendment as we know it today. It would be absurd, the diversity theorists argue, to read this precise text as equivalent to the draft Amendment that Congress rejected. Furthermore, if the Amendment was intended to bar all suits against non-consenting States, as the Court’s current majority claims, it was very ineptly drafted: It does not even mention suits against states by their own citizens.

32. This version read as follows:
   That no state shall be liable to be made a party defendant in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons whether a citizen or citizens, or a foreigner or foreigners, of any body politic or corporate, whether within or without the United States.
   Fletcher, supra note 22, at 1058.
33. See id. at 1060-61. The diversity theorists themselves, of course, are open to the same objection. If the Eleventh Amendment were only meant to affect citizen-state diversity jurisdiction, its apparent ban on “any suit against one of the United States by citizens of another state” would have to be considered fairly inept.
3. Textualist Provocateurs

Both the state sovereign immunity theory and the diversity theory take for granted that a textualist interpretation of the Eleventh Amendment would be absurd from an originalist perspective. The proponents of these views can envision no possible reason why the states that ratified the Eleventh Amendment to ban suits by citizens of other states would have chosen to leave themselves subject to suits by their own citizens. The virtual unanimity on this point is rather astonishing, given the oft-professed preference of some current Justices for plain text readings of statutes. The assumption of a textualist interpretation’s absurdity is so universal, however, that no majority or dissenting opinion since Hans has even taken time to spell out the reasons for it.34

Nor has the academic literature devoted any substantial attention to a textualist interpretation. Indeed, although Eleventh Amendment literature is one of the richest in modern legal scholarship, only two significant commentators have argued that a textualist interpretation makes sense—or at least deserves consideration—as an originalist matter. These two provocateurs are Professor Larry Marshall35 and Professor John Manning.36 Marshall’s and Manning’s arguments, while differing in emphasis, share a common core. Both argue that, for precise constitutional texts like the Eleventh Amendment (and Article III which provides the relevant background), a textualist reading deserves a strong presumption of validity as an expression of original meaning.37 Conversely, both argue that a very strong historical showing should be required to justify departing from the plain meaning of such texts based on “the ‘I know what was really intended’ excuse.”38 The upshot is that, so long as a textualist interpretation is not absurd from an originalist perspective, an originalist should be obliged to follow it.39

To demonstrate that a textualist interpretation of the Eleventh Amendment is warranted under this standard, Marshall makes a very game, and often convincing, argument that a plain text reading of the Amendment

35. See Marshall, supra note 1.
37. See Marshall, supra note 1, at 1349; Manning, supra note 36, at 1715-16.
38. See Marshall, supra note 1, at 1350.
39. The style of the argument expressed here is Marshall’s. Manning makes a similar substantive point in the jargon of public choice theory on statutory interpretation. See Manning, supra note 36, at 1715-16 (“For now, it suffices to note that because the legislative process is complex, path-dependent, and often opaque, textualists believe that it is difficult if not impossible for judges to go behind a statute to determine why the final text took the form that it did. . . . [T]here is little reason to believe that the shape of [constitutional] Amendments depends any less on the complexities of the legislative process.”).
is not, in fact, absurd as an account of its original meaning.\textsuperscript{40} There are, he points out, a number of reasons the drafters of the Eleventh Amendment may have intended it to be applied just as it reads. This is particularly apparent if we accept, as Marshall thinks we should, that the primary motive for the Eleventh Amendment was not a theological conception of state sovereignty but a very practical fear of bankrupting liability, which the Amendment’s drafters balanced against their desire to preserve as much government accountability as possible.\textsuperscript{41} Since many of the states’ biggest creditors were out-of-state or foreign speculators while most states’ violations of federal rights in 1795 would affect only their own citizens, the text of the Eleventh Amendment was, Marshall argues, a perfectly sensible—and certainly intelligible—means of striking the balance between immunity and accountability.\textsuperscript{42}

From this apparent historical plausibility, Marshall draws the strong conclusion that a textualist interpretation is the only approach to the Eleventh Amendment that withstands scrutiny. Manning does not go quite so far. While he agrees that the Amendment’s plain text precludes the view that the Amendment itself created a broad doctrine of state sovereign immunity,\textsuperscript{43} he equivocates on the more difficult question of whether such an immunity might be derived independently from some less precise constitutional source, such as Article III, the Tenth Amendment, or the structural principles of federalism.

Although Marshall and Manning, like this Essay, both argue for a textualist interpretation of the Eleventh Amendment, their arguments are very different from the argument advanced here. Essentially, Marshall and Manning add a provocative third perspective to the debate over the original meaning of the Eleventh Amendment. This is an important contribution, but it does nothing to address the costs of the Court’s sustained and highly politicized war over the original meaning of the Eleventh Amendment. In fact, it embraces the fundamental premise of that war—the view that, despite the Amendment’s ambiguous history, contemporary interpretation should focus on the Amendment’s original meaning. This Essay, by contrast, argues that the dominance, and fundamental indeterminacy, of originalist arguments is itself the principal problem with the Court’s post-\textit{Hans} Eleventh Amendment jurisprudence. Therefore, this Essay argues for a textualist interpretation—not on originalist grounds—but as an alternative to the costly, irresolvable debate originalism has produced.

\textsuperscript{40} As he points out, this is not setting the bar especially high, but previous (and most subsequent) commentators had thought meeting even such a low bar too difficult even to attempt.

\textsuperscript{41} See Marshall, \textit{supra} note 1, at 1354-55.

\textsuperscript{42} See id. Again, Manning’s argument is similar, but leans more on public choice jargon. Manning also focuses more on the broad theoretical point of how precise constitutional texts should be read in light of public choice insights, and thus makes less of an attempt to demonstrate the historical plausibility of a textualist interpretation of the Eleventh Amendment. See generally Manning, \textit{supra} note 36.

\textsuperscript{43} See id. at 1669-70.
C. Stalemate

These three positions—the state sovereign immunity theory, the diversity theory, and the approach of the textualist provocateurs Marshall and Manning—represent, in broad brush, the range of the current interpretive debate over the Eleventh Amendment. All of these positions, it bears emphasizing, operate within an originalist framework, which takes for granted that the interpretation of the Amendment should be guided by what its drafters intended or by what it was understood to mean at the time of its ratification. For all the vigor of this debate, however, it is now generally acknowledged that no originalist theory has anything like a knockdown argument.44

1. Irresolvable Ambiguity

The bottom line is this: The history of the Eleventh Amendment is fundamentally inconclusive. There is simply not enough available contemporaneous evidence to support a confident choice among the three competing views.46 In particular, the state sovereign immunity theory and the diversity theory are at their very core based on what might be called an “unsaid”—a set of assumptions taken for granted by the drafters and ratifiers of the Amendment, which are not reflected in the text because in their historical context they were understood without being articulated.47 The problem is that, if they did not need to be said in the text, these assumptions were unlikely to be said elsewhere either. And so the prospect of good historical evidence turning up to confirm or refute one of these theories is minimal.48

Even proponents of an originalist approach have acknowledged the inconclusiveness of this history, although academics have predictably been more willing to do so than judges. Then-Professor William Fletcher, for example, perhaps the most prominent diversity theorist, admitted that “neither the immunity nor the potential liability of the states to private suit

44. There is also a robust functionalist debate about the desirability of state sovereign immunity that this Essay does not attempt to address—partly for reasons of space and partly because injecting this debate into the judicial interpretation of the Eleventh Amendment would, even more than the Court’s current approach, create the appearance that the Court’s Eleventh Amendment jurisprudence is driven by the personal political views of the Justices, rather than constitutional principle.

45. See, e.g., Manning, supra note 36, at 1674-75 (noting the indeterminacy of contextual evidence).

46. See Marshall, supra note 1, at 1350 (“Congressional debates on the Eleventh Amendment were not recorded nor were those in the state legislatures, so only a bare outline of the proceedings is available. Moreover, there are few references to the Amendment in the correspondence and other writings of those who took part in the deliberations.”) (quoting Clyde Jacobs, Prelude to Amendment: The States Before the Court, 12 Am. J. Legal Hist. 19, 19 (1968)).

47. For the diversity theorists, this “unsaid” is that federal question jurisdiction was assumed to override state sovereign immunity. For the sovereign immunity theorists, it is precisely the opposite.

48. See Marshall, supra note 1, at 1349-51.
in federal court under federal law was clearly established under the Constitution." Larry Marshall has made similar observations. Even Justice Lewis Powell, in arguing for the state sovereign immunity theory, admitted that the historical evidence is "ambiguous." The fact that the original meaning of the Eleventh Amendment has so divided the legal community for so long, and the crucial role played by the "unsaid" in the diversity and state sovereign immunity interpretations, suggests that this ambiguity may well be irresolvable.

2. War Everlasting?

Despite the apparently irresolvable ambiguity of the historical evidence, neither the diversity theorists nor the sovereign immunity proponents show any signs of relenting. This is true to a degree in the academic community. It is particularly true, however, and of course much more regrettable, on the Court. Traditionally, when one view loses in the Supreme Court, the next time the issue comes before the Court, the Justices holding that view will either follow the precedent established in the previous case or find a way to reframe the issue to distinguish it. The dissenters in the Court's recent Eleventh Amendment cases, however, have taken a much more direct—and much less temperate—approach. In College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, for example, Justice Stephen Breyer, joined by three other Justices, wrote in dissent that he was simply "not yet ready to adhere to the proposition of law set forth in Seminole Tribe." A year later, Justice John Paul Stevens, also joined by three other Justices, went further:

49. Fletcher, supra note 22, at 1077; see id. at 1069 ("The precise character of the state sovereignty that remained was not, and probably could not have been, made clear when the Constitution was adopted.").

50. See Marshall, supra note 1, at 1350 ("[T]here remain far too many unanswered questions and incongruities to support either of these theories as established historical fact.").


52. Marshall and Manning both argue that this situation militates in favor of adopting a textualist interpretation as the best approximation of original meaning. But a committed originalist need not, and perhaps should not, accept this view. The original meaning of any text—plain or otherwise—is always a function of historical context. Widely held political and philosophical presuppositions are often more significant determinants of meaning than dictionary definitions. Thus, especially in interpreting historically remote constitutional provisions, it makes little sense to accord text the kind of presumptive weight that Marshall and Manning argue for.


54. Of course, the Court's current majority took exactly the same approach—distinguished only by its success—in Seminole Tribe, where they seized the first opportunity to overrule Union Gas.


56. Id. at 699 (Breyer, J., dissenting).
"I am unwilling to accept *Seminole Tribe* as controlling precedent. . . . The kind of judicial activism manifested in cases like *Seminole Tribe, Alden v. Maine*, [etc.] . . . represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises."57 This language suggests that future Eleventh Amendment cases will continue to bitterly divide the Court. Indeed, in a very interesting analysis of recent Eleventh Amendment cases, Neil Siegel has offered a formal game theoretic argument showing that the Court's present cycle of tit-for-tat retaliation is likely to continue for the foreseeable future, or at least until the Court undergoes a substantial personnel change.58

II. CASUALTIES

So why not just let the war go on? Two reasons: First, the broad sovereign immunity principle embraced by the Court's current majority has produced an incoherent Eleventh Amendment doctrine—a doctrine that is internally inconsistent, difficult to reconcile with the constitutional text, and difficult for lower courts to administer. Second, the fact that the Court has been fighting the same fight for twenty years and that all its major Eleventh Amendment decisions during that period have been decided five-four (or even more narrowly), and that the alignment of Justices has fallen so predictably along political lines, has undercut the appearance that the Court's decisions in this area are the product of constitutional principle, rather than the personal political views of the Justices. These are the casualties of the Supreme Court's long war over the Eleventh Amendment, and they are substantial.

A. Doctrinal Coherence

The coherence of any constitutional doctrine is measured in two ways—by its own internal consistency and by its consistency with the applicable constitutional text and framing principles. The Court's current Eleventh Amendment jurisprudence fails badly on both of these measures.

1. The Ambiguous Origins of State Sovereign Immunity

The Court has never developed a consistent theory about the constitutional origins of the broad doctrine of state sovereign immunity articulated in its recent cases. A number of cases speak of the doctrine as synonymous with the Eleventh Amendment itself—as if that Amendment,
Despite its precisely limited text, nonetheless embodied a bar on all citizen suits against states without their consent.\textsuperscript{59} Other cases trace this broad sovereign immunity principle not to the Eleventh Amendment, but rather to the presuppositions that it confirmed.\textsuperscript{60} Still other cases rely on textually unmoored references to constitutional structure or the principles of federalism, the apparent idea being that the states entered the union "with their sovereignty intact" and that allowing states to be subject to suits by individuals in federal courts is inconsistent with that sovereignty.\textsuperscript{61} At least one case, \textit{Alden v. Maine}, traced the state sovereign immunity principle partially to the Tenth Amendment,\textsuperscript{62} which states that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people."\textsuperscript{63} The argument in \textit{Alden}, while somewhat free-form, seemed to be that subjecting states to suits by individuals without their consent was a power not delegated to the United States by the Constitution.

Each of these views has significant problems, as the Court's inability to settle on any one of them suggests.\textsuperscript{64} The Eleventh Amendment itself actually says nothing about sovereign immunity. By its plain terms, it is an absolute but narrowly limited jurisdictional bar, which does not, unlike the state sovereign immunity principle, admit consent to suit as an exception. Thus, the view that the Eleventh Amendment contains a broad sovereign immunity principle is particularly difficult to support. The presuppositions argument, too, is problematic because it rests on actively controverted historical evidence, and because it constitutionalizes unratified, taken-for-granted views whose legal status—common law doctrine or structural principle?—is deeply uncertain. The reliance on amorphous, extratextual principles of federalism suffers from the same defects, but to an even greater extent, given the broader scope and less precise definition of the principles invoked.

The Tenth Amendment argument advanced in \textit{Alden} and seldom mentioned since would, as Justice Souter's dissent points out, make the Eleventh Amendment mere surplusage.\textsuperscript{65} Moreover, there appears to be

\textsuperscript{59} See, e.g., \textit{Coll. Sav. Bank}, 527 U.S. at 669 ("[T]he Eleventh Amendment accomplished much more: It repudiated the central premise of \textit{Chisholm} that the jurisdictional heads of Article III superseded the sovereign immunity that the States possessed before entering the Union.").
\textsuperscript{62} Id. at 713-14.
\textsuperscript{63} U.S. Const. amend. X.
\textsuperscript{64} Cf \textit{Alden}, 527 U.S. at 761 (Souter, J., dissenting) ("The sequence of the Court's positions prompts a suspicion of error, and skepticism is confirmed by scrutiny of the Court's efforts to justify its holding. There is no evidence that the Tenth Amendment constitutionalized a concept of sovereign immunity as inherent in the notion of statehood, and no evidence that any concept of inherent sovereign immunity was understood historically to apply when the sovereign sued was not the font of the law.").
\textsuperscript{65} See id. at 760-61.
little logical relationship between the general Tenth Amendment conception that the federal government can only exercise powers delegated to it and the sovereign immunity question. To hold otherwise, the Alden Court was forced to adopt the tortured view that Congress cannot subject states to unconsented suits by citizens as a necessary and proper means of effectuating other congressional powers; instead, under the Tenth Amendment, such power must be independently delegated to Congress. This is not a convincing reading of that Amendment, especially so late in the day of the Court's sovereign immunity jurisprudence.

2. The Chimerical Character of State Sovereign Immunity

The Court's attempts to define exactly what state sovereign immunity is have been equally problematic. At times it has been explained as a limit on subject matter jurisdiction, at others as a lack of personal jurisdiction, and sometimes as an immunity or affirmative defense. None of these individual conceptions would allow the doctrine to do everything that the Court wants it to do, or everything it would need it to do, in order to make the Court's historical and textual accounts of the Eleventh Amendment coherent. If sovereign immunity is understood as a question of personal jurisdiction, for example, a state would have to be understood to waive its claim to the defense simply by appearing to defend a suit. This result is inconsistent with the Court's case law and also with the text of the Eleventh Amendment, which states that the federal judicial power "shall not extend" to certain suits against states, without any exception for cases in which states voluntarily appear in court or otherwise waive their immunity.

On the other hand, if sovereign immunity is understood as a matter of subject matter jurisdiction, courts would be required to dismiss actions against states at any stage of litigation when the doctrine is asserted as a defense (and perhaps even sua sponte), results also inconsistent with the Court's case law. Further, a broad sovereign immunity doctrine cannot be a limit of subject matter jurisdiction because then states could never consent to suit; the requirements of subject matter jurisdiction cannot be waived by consent. Yet the historical sovereign immunity principles on which the Court's current doctrine is based clearly allowed for waiver by the state—in fact the principle's very essence is immunity from unconsented suits by individuals.

66. Katherine Florey, Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity as an Article III Doctrine, 92 Cal. L. Rev. 1375, 1378-79 (2004) ("[T]he Court has failed to decide whether state sovereign immunity is a question of subject matter jurisdiction . . . or something else entirely: an absence of personal jurisdiction, a right, an affirmative defense, an absolute immunity, a power reserved to the states under the Tenth Amendment, a common law doctrine, or simply a state of constitutional being . . . ").


68. Cf. Hans v. Louisiana, 134 U.S. 1, 17 (1890) ("Undoubtedly a State may be sued by its own consent . . . ").
Finally, the view of sovereign immunity as an affirmative defense or absolute immunity cannot be reconciled with the text of the Eleventh Amendment, which imposes an absolute restriction on the federal judicial power—a classic limitation on subject matter jurisdiction. Predictably, all of this has created tremendous confusion for lower courts which are obligated to dismiss cases over which they have no subject matter jurisdiction but cannot arbitrarily refuse to exercise jurisdiction if subject matter jurisdiction exists.

3. The Mystery of Supreme Court Appellate Jurisdiction

In addition to having a head of subject matter jurisdiction, the body of an affirmative defense, and wings of personal jurisdiction, the Supreme Court's Eleventh Amendment case law has created a mystery surrounding the Supreme Court's appellate jurisdiction over suits against states. As Larry Marshall and Professor Vicki Jackson have both noted, the Eleventh Amendment, in limiting the exercise of federal "judicial power," does not appear to allow any exceptions for the Supreme Court's exercise of that power. Nonetheless, the Supreme Court has historically been quite willing to exercise appellate jurisdiction over suits against states originating in state courts. Most of these decisions fail even to mention the Eleventh Amendment or sovereign immunity as a possible issue. Jackson has suggested that the only way to make sense of this mystery is to regard sovereign immunity generally as a common law forum allocation principle, requiring cases against states to be heard first in state court. As Jackson recognizes (but downplays), however, this view of sovereign immunity is inconsistent with the Court's theory and practice, and as she could not have known in 1988, is also in substantial tension with the Court's subsequent decision in Alden. The apparent Supreme Court exception to the Eleventh Amendment, then, adds just one more layer of internal inconsistency to the Court's doctrinal account and to its attempt to square the broad historical principle of sovereign immunity with the text of the Eleventh Amendment.

69. The only potential way to make some sense of the text of the Amendment and historical principle would be to regard the Eleventh Amendment and that principle as being of different kinds and imposing different limits, but this the Court has been unwilling to do.

70. Florey, supra note 66, at 1417-31. Compare, e.g., Seaborn v. Fla. Dep't of Corr., 143 F.3d 1405, 1407 (11th Cir. 1998) (holding that sovereign immunity defense is "essentially" a challenge to subject matter jurisdiction and hence must be decided before merits issues), with Parella v. Ret. Bd. of the R.I. Employees' Ret. Sys., 173 F.3d 46, 53-57 (1st Cir. 1999) (holding that judicial economy and the doctrine of constitutional avoidance may justify deciding the merits before the Eleventh Amendment question).

71. Florey, supra note 66, at 1417.

72. See Vicki C. Jackson, The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity, 98 Yale L.J. 1, 6 (1988); Marshall, supra note 1, at 1359.


74. She articulates this view as a supplement to the diversity theory of the Eleventh Amendment, perhaps mostly to make that view seems less revolutionary to Justices inclined to take a broad view of state sovereign immunity. See Jackson, supra note 72, at 7.
4. The Legal Fictions of *Ex Parte Young*\(^7\) and *Edelman v. Jordan*\(^7\)

As if these inconsistencies were not enough, the Court has felt compelled to carve out a significant exception to the Eleventh Amendment’s prohibitive reach, in order to prevent state governments from being wholly unaccountable for violations of individuals’ federal rights. This exception is commonly known as the *Ex Parte Young* fiction, an unflattering moniker the Court itself has recently applied. As its name suggests, this fiction arises from the case of *Ex Parte Young*, decided in 1908, in which the Court held that although individuals could not sue state governments directly for monetary damages, the Eleventh Amendment did not bar suits against individual state officials for equitable relief, even where such equitable relief required these individuals to undertake remedial action in their official capacities.\(^7\) The rationale articulated for this fiction—it was not, of course, originally admitted to be a fiction—is that state officials acting ultra vires are not state actors because the state government has no constitutional authority to violate federal law. The glaring flaw in this holding, which explains why it is now regarded as fiction, is that the violation of most federal constitutional rights requires the violator to be a state actor. Thus, taken to its logical conclusion, the holding would effectively mean that these individual rights cannot be violated, since violation requires a state actor, but when a state actor violates federal rights she automatically ceases to exercise the authority of the state. Nonetheless, the fiction was necessary, given that the Court’s broad interpretation of the Eleventh Amendment would otherwise leave states unaccountable for acknowledged violations of federal rights.

Over time, *Ex Parte Young* predictably prompted plaintiffs to attempt to characterize various forms of monetary relief as equitable, a development which in turn prompted the Court, in *Edelman v. Jordan*,\(^7\) to cabin the *Ex Parte Young* fiction with another fiction. That fiction was that “[w]hen the action is in essence one for the recovery of money [even if the relief sought is technically equitable], the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit.” \(^7\) Under the *Edelman* rule, a state official sued for nonpayment of federal benefits could be ordered to process benefits applications going forward, but could not be ordered to pay out past benefits owed, since that would “require[] the payment of funds from the state treasury.” \(^8\) As should be obvious, the ground for this distinction is fundamentally fictional. Suits against state officers for injunctive relief that they will perform in their official capacities are always essentially suits against the state, whether they seek to require the state to disgorge benefits improperly withheld or to process

\(^{75}\) 209 U.S. 123 (1908).
\(^{76}\) 415 U.S. 651 (1974).
\(^{77}\) *Ex parte Young*, 209 U.S. at 155-57.
\(^{78}\) 415 U.S. 651.
\(^{79}\) *Id.* at 663 (quoting Ford Motor Co. v. Dep’t of Treasury, 323 U.S. 459, 464 (1945)).
\(^{80}\) *Id.* at 677.
applications going forward that will require the state to pay more benefits in the future. The only justification for drawing this distinction is the practical one of shrinking the Ex Parte Young exception to Eleventh Amendment immunity. This fiction-upon-a-fiction is the icing on what Vicki Jackson has aptly described as "[t]he complexity, arcany and deviousness of modern Eleventh Amendment law."81

B. The Appearance of Principled Decision Making

The doctrinal incoherence of the Court's current Eleventh Amendment jurisprudence, together with the persistent and apparently political divisions among the Justices in this area, has wrought substantial damage on the Court's appearance as a principled decision-making body.82 This damage is most closely associated with the Court's abrupt reversal of Union Gas in Seminole Tribe after a change in the Court's membership. It is also underscored, however, by the mere fact that the Court has decided so many sovereign immunity cases by narrow margins, along such political lines, for such a long time.83

1. Union Gas and Seminole Tribe

As mentioned above, Union Gas,84 decided in 1989, was the only Supreme Court case in which something like the diversity theory prevailed. Decided 4-1-4, with Justice Brennan writing for the plurality and Justice Byron White concurring in the judgment, Union Gas held that even if there was a common law principle of sovereign immunity that Hans endorsed, Hans did not suggest this principle was immune to congressional abrogation.85 This abrogation applied not only to the broad non-textual sovereign immunity principle endorsed by the Court's current majority, but also apparently to cases within the literal terms of the Eleventh Amendment.86 When Seminole Tribe came before the Court seven years later, Justices Blackmun, Brennan, White, and Marshall were gone, and the conservatives seized the opportunity to explicitly reverse Union Gas. This reversal raises more than the ordinary question of stare decisis. Rather,

81. See Jackson, supra note 72, at 73.
82. See id. at 125 ("[A]rticulated as a constitutional doctrine grounded in Article III and the Eleventh Amendment, the doctrine of state sovereign immunity . . . is so inconsistent with the establishment of judicial power over all federal questions cases . . . that it lacks credibility as a reasoned exegesis . . . [and] has detracted from the Court's ability to serve as a principled expositor of the Constitution."); id. at 52 (noting that the Court's current Eleventh Amendment approach does not serve "the image of judicial decisions flowing from discernible principles rather than from competing personal views about policy").
83. Even Justice Scalia, for example, has suggested that the pitched, "repetitive" battles of these cases have "despoiled our northern woods." Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 688 (1999).
85. See id. at 7.
86. The text of the Amendment, of course, does not seem to allow the federal judicial power to extend to these cases with or without congressional action.
what is particularly bothersome is that the majority in *Seminole Tribe* was a new majority, created by change in the Court’s personnel. As the Court suggested in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, reversing a controversial prior decision in the face of such a shift is exactly the type of action that creates the corrosive impression that the Court’s decisions are acts of political will rather than the product of constitutional principle.

2. Twenty Years of 5-4 Decisions

The appearance that the Court’s decisions in this area are unprincipled is reinforced by twenty years of Eleventh Amendment decisions dating back to *Atascadero State Hospital v. Scanlon*, in which the court has split 5-4, or more narrowly, along political lines. The impression is further underscored by the almost rebellious tenor of Justice Breyer’s dissent in *College Savings Bank* and Justice Stevens’s even more strident dissent in *Kimel v. Florida Board of Regents*. Together, these dissents constitute a barely veiled assertion that the current majority’s decisions on sovereign immunity are illegitimate products of politically motivated judicial activism and are therefore not worthy of the respect that they would normally be accorded under the doctrine of stare decisis. It is not a long step from the Court’s decisions not commanding the adherence of dissenting Justices to the Court’s decisions not commanding the respect of the people.

Furthermore, the recent personnel changes on the Court raise the possibility of a *Seminole Tribe* redux. If either Chief Justice John Roberts or Justice Samuel Alito, who replaced two of the Court’s conservative members, turns out by some quirk to be a closet diversity theorist, there is a distinct possibility that the Court might overturn *Seminole Tribe*, as it did *Union Gas*, raising the ugly specter of two reversals in ten years on the same issue, both triggered by changes in the Court’s personnel.

As it happens, Chief Justice Roberts has already strongly signaled that he does not subscribe to the diversity theory by joining Justice Clarence Thomas’s dissent in *Central Virginia Community College v. Katz*. In that case, a five-Justice majority, which included Justice Sandra Day O’Connor, held that a state community college could not assert sovereign immunity as a defense to a bankruptcy trustee’s suit to recover preferential transfers, repudiating dicta from *Seminole Tribe* in the process. The Court did not

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88. *See id.* at 864 (plurality opinion). The *Casey* opinion, of course, was coauthored by two members of the *Seminole Tribe* majority.
91. *See Siegel, supra* note 58, at 1170 (raising this possibility).
92. On the Eleventh Amendment, as on other states’ rights issues, this group includes Justice O’Connor.
94. *Id.* at 1004.
rest its holding on the diversity theory; instead it reasoned that, by ratifying
the Bankruptcy Clause, the clear purpose of which was to eliminate the
injustice created by conflicting state laws, the States had consented to suit
in proceedings brought under federal bankruptcy law. Thus, Roberts has
not actually voted against the diversity theory. But the strong embrace of
Seminole Tribe in Justice Thomas’s dissent is a telling sign that Roberts’s
allegiance lies with the sovereign immunity theorists.

Nevertheless, the willingness of the Katz majority to pare back Seminole
Tribe (and to retreat from Alden’s clear declaration that no Article I power
implies the states’ consent to suit) highlights the slender thread by which
those decisions—and thus the sovereign immunity theory—hang. Should
Chief Justice Roberts reconsider his position in a case that presents a
 squarer choice between the sovereign immunity and diversity theories or
should Justice Alito cast his lot with the diversity theorists, a radically
different Eleventh Amendment would become the law of the land. These
scenarios may seem unlikely, given the solidly conservative pedigrees of
Roberts and Alito and the rigors of the contemporary vetting process for
judicial nominees. But their very possibility gives life to the impression
that the Court’s decisions on the Eleventh Amendment and state sovereign
immunity are acts of political will by the majority Justices, not the kinds of
studied, principled, legal decision making that give the Court its legitimacy.

It might, of course, be argued that if the proper reading of the Eleventh
Amendment is a toss-up from the standpoint of conventional legal
materials, as Part I suggests, then the Justices can be excused for departing
from their conventional judicial role. Indeed, it might be argued that, under
such circumstances, they have no choice but to rely on their personal
political views, and there is little point in pretending otherwise. The next
part demonstrates that this is not the case.

III. TEXT AS TRUCE

We have now seen the problems that both sides of the war over the
Eleventh Amendment, the sovereign immunity proponents and the diversity
theorists, have created for themselves by sticking rigidly to their originalist
guns. They maintain their originalist reading even though the history of the
Eleventh Amendment is inconclusive, the resulting doctrine is inconsistent
both internally and with the constitutional text, and their ongoing struggle
creates the appearance that the Court is making political rather than judicial
decisions. One way for the Court to address these very serious problems—
one way, in other words, for the Court to achieve a more coherent doctrine
that has greater stability and fewer legitimacy costs—would be to adopt a

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95. Id.
96. Alden v. Maine, 527 U.S. 706, 748 (1999); see also Katz, 126 S. Ct. at 1005-06
(Thomas, J., dissenting).
textualist interpretation of the Eleventh Amendment, rather than a historical interpretation, as a kind of truce.

A. Truce Terms

The terms of such a truce would be set by the text of the Eleventh Amendment itself, read against the background of the Article III grant of jurisdiction over “all cases” arising under the laws or Constitution of the United States. The following subparts lay out these terms and provide the first comprehensive analysis of the many conflicts between current Supreme Court jurisprudence and the text of the Eleventh Amendment.98

1. The Contours of a Textualist Interpretation

It is helpful, in determining the contours of a textualist interpretation, to break the text of the Eleventh Amendment down into its operative elements, of which there are eight:

(1) The judicial power
(2) Of the United States
(3) Shall not be construed to extend
(4) To any suit
(5) In law or equity
(6) Commenced or prosecuted against one of the United States
(7) By citizens of another state
(8) Or by citizens or subjects of any foreign state.

Each of these elements, if read according to its plain meaning, would require the Court to modify some aspect of current Eleventh Amendment doctrine.

First, the Eleventh Amendment limits only the “judicial power.” A textualist interpretation of this element would thus require the Court to reach a different result in cases like Alden, where it held that state sovereign immunity limits Congress’s power to create causes of action under federal law in state courts,99 and Federal Maritime Commission v. S.C. State Ports Authority, where it held that the immunity implied by the Eleventh Amendment limited the power of federal administrative agencies to compel states to appear in quasi-adjudicative proceedings initiated at the behest of citizens.100 Of course, in cases where the Court is willing to hold squarely that a particular administrative proceeding constitutes an exercise of the federal “judicial power,” the Eleventh Amendment would apply to that

98. Marshall addresses a few of these conflicts, but most of the crucial cases were decided after 1987 when his essay was published. See generally Marshall, supra note 1. Manning wrote more recently but ignores outright most of the conflicts discussed in these subparts; those he does discuss he does not discuss in depth, presumably because he is more concerned with the Eleventh Amendment’s implications for interpretive theory than he is with the Eleventh Amendment itself. See generally Manning, supra note 36.
proceeding, even under a textualist interpretation. But in *Federal Maritime Commission*, the Court was unwilling to go so far.

Second, the Eleventh Amendment applies only to the judicial power of the "United States." A textualist interpretation of this element would require the court to reach a different result in *Alden*, which involved actions in state courts.

Third, the language of the Eleventh Amendment is mandatory ("shall not"), not permissive or conditional. A strict textualist interpretation of this element would therefore require overturning all cases which have held that sovereign immunity can be waived or that states can consent to suits that would otherwise be barred by the Eleventh Amendment. Because the Eleventh Amendment creates a binding limit on subject matter jurisdiction, its operation cannot be waived or consented to by states. For the same reason, there is no indication that it can be abrogated by Congress, at least under the powers Congress possessed at the time the Eleventh Amendment was ratified, or that an implied consent to suit "in the plan of the convention" can authorize federal courts to hear suits that otherwise fall within the plain scope of the Eleventh's Amendment's jurisdictional limitation. Finally, this element would bar the Supreme Court from exercising appellate jurisdiction in suits against states by citizens of another state initially brought in state court.

Fourth, the Eleventh Amendment bars the extension of the federal judicial power to "any suit." Arguably, a strict textualist interpretation of

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104. See *Cent. Va. Cmty. Coll. v. Katz*, 126 S. Ct. 990, 1004 (2006) ("States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'"). If the states' implied consent to suit in the ratification of the Bankruptcy Clause were the only ground for *Katz*, that decision too would have to be overturned, at least insofar as it applies to suits "against one of the United States by Citizens of another State." But, in addition to the states' implied consent to be sued under federal bankruptcy law, *Katz* also emphasizes that "bankruptcy jurisdiction, as understood today and at the time of the framing, is principally in rem jurisdiction." *Id.* at 1000. This classification may provide an alternate basis for upholding the decision under a textualist interpretation of the Eleventh Amendment, since a court's jurisdiction in an in rem action is premised on the res sought to be recovered rather than the "person" from whom it is sought (in *Katz*, the state of Virginia). It follows that the recovery of a preferential transfer in bankruptcy is, at least arguably, "not a suit against a State for purposes of the Eleventh Amendment." See *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 451 (2004); *id.* at 446-51 (discussing the in rem exception to Eleventh Amendment immunity); cf. *Katz*, 126 S. Ct. at 1002 n.10 ("We observe that the trustee in this case . . . seeks, in the alternative, both return of the 'value' of the preference, see 11 U.S.C. § 550(a), and return of the actual 'property transferred.'").
this element would require overturning Federal Maritime Commission, since the proceeding before the Federal Maritime Commission at issue there was not literally or even functionally equivalent to a suit. Rather, as Justice Breyer’s dissent argued, the administrative process at issue in that case simply provided citizens an opportunity to lodge complaints with a government agency about the actions of other parties, including states.\textsuperscript{105} If the agency, through a fact-finding procedure that resembled a traditional trial, found that the state was in fact violating federal law, the agency itself, not the citizen complainant, was authorized to seek damages from the state by suing the state in federal court. Thus, the only potential “suit” at issue in the case was not a suit by a citizen and thus clearly not one that would fall within the terms of the Eleventh Amendment.\textsuperscript{106}

Fifth, the Eleventh Amendment’s jurisdictional limitation applies only to suits “in law or equity.” Each of these terms had a settled legal meaning when the Eleventh Amendment was drafted, and neither included suits in admiralty jurisdiction, which was understood as distinct from jurisdiction in law or equity.\textsuperscript{107} A textualist reading of this element would therefore require a different result in the Court’s early twentieth-century decision of \textit{Ex Parte New York}, which held that the Eleventh Amendment barred a suit in admiralty against the state of New York by its citizens.\textsuperscript{108}

Sixth, the Eleventh Amendment bars suits “commenced or prosecuted against one of the United States,” not suits against state officials. A textualist interpretation of this element would thus require modification of the \textit{Ex Parte Young} doctrine to allow suits against state officials, regardless of the relief sought. This adjustment would not necessarily preclude an Edelman-like judgment that some suits against state officials are actually suits against states, subject to the jurisdictional limitations of the Eleventh Amendment. But it would require such a judgment to be based on principled grounds, rather than on the distinction between monetary and injunctive relief, which artificially limited suits against state officials, while adding nothing to the ability of courts to determine when suits against officials were really suits against states.

Seventh, the Eleventh Amendment restricts federal jurisdiction only with respect to suits against states “by citizens of another state,” not with respect to suits by a state’s own citizens. A textualist interpretation would therefore require abandoning the broad state sovereign immunity principle embraced by the Court’s current majority in favor of a precise limit on all suits against states by citizens of another state.\textsuperscript{109} Unlike the diversity theory, a textualist reading of this limit would encompass suits with this

\begin{itemize}
\item \textsuperscript{106} Provisions of Article III, Section 2, unaffected by the Eleventh Amendment grant federal courts jurisdiction over suits brought by the United States against a state.
\item \textsuperscript{107} See \textit{Marshall}, supra note 1, at 1355 n.53.
\item \textsuperscript{108} \textit{Ex parte New York}, 256 U.S. 490, 500 (1921).
\item \textsuperscript{109} See \textit{Marshall}, supra note 1, at 1350-51.
\end{itemize}
party alignment, even where a federal question provides an independent basis for federal jurisdiction.

Eighth, and finally, the Eleventh Amendment restricts federal jurisdiction over suits by "foreign citizens," not foreign states. On a textualist interpretation, therefore, the Amendment would not affect federal question jurisdiction in suits brought by foreign states, since these suits are not explicitly prohibited by the text of the Amendment. Even more to the point, it would leave intact the specific party-based jurisdiction that Article III, Section 2, grants to federal courts in cases between states and foreign states. For these reasons, a textualist interpretation would require a different result in *Monaco v. Mississippi*, where the Court held that broad "postulates" of state sovereign immunity derived from the Eleventh Amendment barred suits against states brought by foreign states.¹¹⁰

2. The Coherence of a Textualist Interpretation

To defend such a truce as a way to resolve the current deadlock, this Essay must further overcome the conventional wisdom that a textualist interpretation is incoherent or absurd. This conventional wisdom is based primarily on four perceived anomalies a textualist interpretation would produce. None of these, however, renders a textualist interpretation absurd or incoherent.

a. The Foreign Citizen/Foreign State Distinction

First, the conventional wisdom presumes that it would be anomalous for the Eleventh Amendment to bar suits against states by foreign citizens but not by foreign states. This is the easiest of the perceived anomalies to address and Larry Marshall effectively disposes of it. Although his response is explicitly originalist and attempts to explain why the distinction between suits by foreign states and foreign citizens might have made sense in the historical context of 1795, his explanation also has significant practical appeal today. Suits by foreign governments should be permitted because these suits implicate the foreign policy interests of the federal government in a way that suits by foreign citizens do not.¹¹¹ Furthermore, since suits by foreign citizens are likely to be more numerous and thus more costly than suits by foreign states, drawing the Eleventh Amendment line between foreign states and foreign citizens represents a practical way to protect states from excessive liability while minimizing the potential for states to interfere with federal foreign policy interests.

b. The Out-of-Stater/In-Stater Distinction

Second, it is perceived as anomalous that the Eleventh Amendment would bar suits against states by citizens of other states without similarly prohibiting suits by their own citizens. This perception has been perhaps the most significant obstacle to a textualist interpretation historically and it is the one on which the *Hans* Court relied in holding that the Eleventh Amendment stood for a broad principle of state sovereign immunity.

This feature of the Amendment’s plain text is perceived to be anomalous for two reasons: First, suits by a state’s own citizens are seen as offending state sovereignty just as much if not more than suits by out-of-state citizens. Second, suits against states by citizens of other states implicate the federal interest in interstate comity in a way that suits by a state’s own citizens do not.

An initial response to these objections is that both the broad state sovereign immunity view and the diversity interpretation of the Eleventh Amendment produce results that are at least as anomalous and also at odds with the Amendment’s plain text, as seen in Part II. A more substantive response, like the perceived anomaly itself, has two parts. First, it is possible to see the distinction between out-of-state and in-state citizens as a functional compromise, in the same way Larry Marshall argues that it was a historical compromise. In other words, this distinction balances the need for government accountability with the need to protect states from at least some kinds of liability. Since states today are still likely to violate the federal rights of their own citizens more frequently than they violate the federal rights of out-of-staters, allowing suits only by citizens may still be a good way to protect federal rights, while preserving some limits on states’ potential liability. Second, the citizens of one state in their collective capacity possess a sovereign interest vis-à-vis out-of-staters that a state government does not possess vis-à-vis its own citizens—whose consent, according to the principles of popular sovereignty, is the source and limit of its power. (There is an analogy to the sovereign authority of the United States over foreigners, which is subject to fewer Constitutional constraints than its sovereign authority over U.S. citizens.) Neither of these rationales provides a perfectly satisfying explanation, but the costs of maintaining the status quo, in terms of both doctrinal coherence and the Court’s image as a principled decision-making body, seem far higher.

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112. See *Hans v. Louisiana*, 134 U.S. 1, 7, 14-15 (1890).
113. In the case of the state sovereign immunity view, see the long list of inconsistencies elaborated supra Part II.A. In the case of the diversity theory, the chief anomaly is an interpretation of the Eleventh Amendment flatly at odds with its plain text.
115. *Id.* at 1370.
Third, it is perceived as anomalous that the Eleventh Amendment would allow Congress to subject states to suit in their own courts. To proponents of the sovereign immunity theory, it makes little sense that the Amendment would deny Congress power to use federal courts to subject states to suit but allow it to engage in what immunity proponents view as the even more coercive practice of forcing a state to be sued in its own courts. In *Alden*, the Court attempts to give this view a historical pedigree by citing *McCulloch v. Maryland*116 for the proposition that the Constitution specifically opted for a federal government with power to act on individuals rather than a federal government with power to act on states.117 This argument, however, contains the seeds of the immunity theory's undoing. It is true that Federalists like Chief Justice Marshall argued that the federal government needed power to act over citizens directly, but they did so not to prevent it from trampling on state sovereignty but because the Articles of Confederation, which granted the national government power to act only on and through states, had rendered the federal government impotent.118 States, under the Articles, were at liberty to comply with federal commands if and when they chose to do so. With this background, an Eleventh Amendment that requires Congress to act through state courts to subject states to suit might easily be seen as less coercive, not more coercive than the alternative of allowing it to act through federal courts.119 Contrary to the assertions of the *Alden* majority,120 this approach would also be wholly

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118. Indeed, Chief Justice Marshall is making exactly this argument in the passage of *McCulloch* quoted by the *Alden* majority. See *McCulloch*, 17 U.S. at 422 (“No trace is to be found in the constitution, of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. . . . To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution.”).
119. The *Alden* majority certainly does not share Chief Justice Marshall’s concern that such a requirement would render the federal government impotent or give states free rein to flout federal authority as they did routinely under the Articles. Indeed, the *Alden* Court sees nothing exceptionable about a system in which “States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the Constitutional design,” which the federal government has no power to enforce against states through the authorization of citizen suits. *Alden*, 527 U.S. at 755. The “good faith of the States,” the Court argues, “provides an important assurance that “[t]his Constitution and the Laws of the United States, which shall be made in Pursuance thereof. . . . shall be the supreme Law of the Land.”” *Id.* (quoting U.S. Const. art. VI, cl. 2). It bears mentioning in this regard that, by limiting the appellate jurisdiction of the Supreme Court, as well as the original jurisdiction of lower federal courts, a textualist interpretation of the Eleventh Amendment would bar federal courts from hearing any appeals to state court judgments in the class of cases governed by the Amendment. In this sense, a textualist interpretation, too, would depend in significant part on the states’ good faith.
120. *See id.* at 752 (“If Congress could displace a State’s allocation of governmental power and responsibility, the judicial branch of the State, whose legitimacy derives from
consistent with the role and competence of state courts, which routinely interpret and apply federal law, pursuant to the Supremacy Clause.

d. Implications for Federal Sovereign Immunity

Finally, a textualist interpretation may be perceived as anomalous in that it would seem to presuppose that all sovereign immunity ought to be grounded directly in a constitutional text. Such a presupposition might call into question the justification for federal sovereign immunity, a doctrine with an impeccable historical pedigree that is very rarely questioned by courts. There are three responses to this objection.

First, federal sovereign immunity might be implicit in the constitutional text in a way that state sovereign immunity is not. The Constitution, after all, created federal sovereignty by limiting the sovereignty of states in important ways. Furthermore, it seems quite plausible that state sovereign immunity, which is directly addressed by the Eleventh Amendment, ought to be given contours consistent with and directly attributable to the specific constitutional text on point, whereas federal sovereign immunity, which is purely implied and does not find support in any particular textual provision, might not be so limited.

Second, even if adopting a textualist interpretation of the Eleventh Amendment somehow implied the nonexistence of federal sovereign immunity, it should not be assumed a priori that this would necessarily be a bad outcome. Professor Akhil Amar, for example, has argued there is good reason to think that federal sovereign immunity, like a broad principle of state sovereign immunity, is inconsistent with the popular sovereignty subscribed to by the Framers.121

Third, the fact that federal sovereign immunity is virtually uncontested and has produced few of the doctrinal inconsistencies that plague state sovereign immunity means that it does not create either of the problems created by the competing non-textualist approaches to state sovereign immunity. Thus, the justifications this Essay offers for adopting a textualist approach to the Eleventh Amendment should not undermine the doctrine of federal sovereign immunity.

B. Precedent

Having established that a textualist interpretation of the Eleventh Amendment is coherent and would address significant problems created by the Court’s current originalist approach to sovereign immunity issues, it remains to be shown that the textualist truce called for by this Essay is consistent with the Court’s historical practice. As evidence of this consistency, this sub-part considers three seminal cases in which the Court

abandoned or eschewed a non-textualist, originalist interpretation in favor of a textualist interpretation with an arguably inferior originalist pedigree. In each case, the Court was motivated by the same costs this Essay identifies with the Court’s current Eleventh Amendment jurisprudence—doctrinal inconsistency and the appearance that the Court was making political rather than principled decisions.

1. *NLRB v. Jones & Laughlin Steel Corp.*¹²²

In *Jones & Laughlin*, decided in 1937, the Supreme Court retreated from its pre-New Deal attempts to impose formalist non-textual limits on the exercise of the federal commerce power, when the political context of the Great Depression rendered it impossible for the Court to maintain its prior practices without appearing to decide cases according to politics rather than principle. This view of *Jones & Laughlin’s* famous “switch in time,” borrowed from Lawrence Lessig,¹²³ is directly parallel to the current Eleventh Amendment context in a number of respects. Like the Court’s attempt to impose non-textual limits on the commerce power prior to *Jones & Laughlin*, the Court’s recent attempt to establish a broad, non-textual state sovereign immunity principle is defended on originalist grounds but has produced serious doctrinal inconsistencies, perhaps even greater than the inconsistencies in the Court’s pre-New Deal Commerce Clause cases.¹²⁴ Even more important, like the Commerce Clause cases circa 1937, the Court’s sovereign immunity cases have created the appearance that its interpretation of the Eleventh Amendment is based on politics, not on principle. *Jones & Laughlin* shows that, under these circumstances, the Court has previously considered it appropriate to retreat to a stable, coherent textualist interpretation, which is arguably inferior on originalist grounds, in order to dispel the appearance of political decision making.

2. *Garcia v. San Antonio Metropolitan Transit Authority*¹²⁵

In *Garcia*, as in *Jones & Laughlin*, the Court abandoned a non-textual limit on federal power,¹²⁶ in favor of a textualist interpretation of Congress’s Article I powers, which at least one of the Justices in the

¹²². 301 U.S. 1 (1937).
¹²³. Lawrence Lessig, *Translating Federalism*: United States v. Lopez, 1995 Sup. Ct. Rev. 125, 177-78 (“Ordinarily, when a founding constitutional commitment is challenged, it is the duty of the Court to stand up to the challenge, and defend the founding commitment until changed by amendment. This minimum of courage is essential to a system of judicial review. But what the New Deal represents, I suggest, is an important exception to this principle. When the very act of defending this founding commitment has been rendered political, then the obligations of the Frankfurter constraint may trump the obligations of fidelity.”).
¹²⁴. See supra Part II.A.
¹²⁶. In *Garcia*, the limit at issue was the bar on congressional regulation of “states qua states” established in *National League of Cities v. Usery*. Id. at 547-48 (discussing Nat’l League of Cities v. Usery, 426 U.S. 833 (1976)).
majority believed was less consistent with framing values. Garcia, however, went one step beyond Jones & Laughlin in terms of candor. In overturning National League of Cities v. Usery, Justice Harry Blackmun placed particular emphasis on the Court's inability to apply the "states qua states" rule in a principled—i.e., a judicial—fashion. As mentioned above, this concern was present, though implicit, in Jones & Laughlin. In this respect, Garcia and Jones & Laughlin were both responding to concerns analogous to those this Essay has examined in the Eleventh Amendment context.

The situation faced by the Court in these cases, however, was not exactly parallel to the Court's current Eleventh Amendment predicament. In both Garcia and Jones & Laughlin, the Court's decisions had been made to appear political because they could no longer be applied to individual fact situations in a way that seemed principled over time. Therefore, the Court's judgments risked coming across as mere acts of political will that it was making up as it went along. This is analogous to the doctrinal incoherence created by the Court's current Eleventh Amendment jurisprudence and the administrability problems it has created for lower federal courts. But there is an additional reason for the appearance of political decision making in the Eleventh Amendment context, as the next sub-part will discuss at greater length.

3. Planned Parenthood of Southeastern Pennsylvania v. Casey

Casey addresses the role of appearance in judicial decision making more explicitly than any other Supreme Court decision before or since. Decided in 1992, shortly after Justice Souter's appointment, the Court in Casey considered a Pennsylvania law severely restricting women's abortion rights. Prior to this case, the Court had been slowly undermining Roe v. Wade for several years. Meanwhile, Republican presidents Ronald Reagan and

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127. See Nat'l League of Cities, 426 U.S. at 856 (Blackmun, J., concurring).
128. 426 U.S. 833.
129. Garcia, 469 U.S. at 543, 544, 546 (describing the "states qua states" doctrine as "unworkable" and "result[ing] in line-drawing of the most arbitrary sort" and "inevitably invit[ing] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes").
130. Cf. Lessig, supra note 123, at 177.
131. Justice O'Connor's dissent in Garcia makes the analogy to the Eleventh Amendment context particularly clear. See Garcia, 469 U.S. at 580 (O'Connor, J., dissenting) (describing the Garcia Court as "survey[ing] the battle scene of federalism and sound[ing] a retreat").
132. The Eleventh Amendment is also different in another crucial respect. Because its original meaning remains irresolvably ambiguous, the obligations of fidelity to meaning that might weigh against adopting a textualist interpretation for institutional reasons are substantially weakened. This makes a textualist truce in the Eleventh Amendment context even more defensible than it was in the New Deal context.
George H.W. Bush had been appointing Justices to the Court with the specific intent of reversing Roe. Justices Anthony Kennedy and Souter, for example, had both been appointed at least partially with that motivation. Furthermore, it is generally believed that Justices Kennedy and O'Connor were opposed to the Court's decision in Roe before joining the Court. Yet in a truly remarkable joint opinion in Casey, these three Justices refused to overturn Roe, not because of that decision's correctness as a matter of constitutional principle, but rather on the grounds that the Court should not reverse its position in response to a change in its membership because that would create the impression that the court was deciding politically.

Applying this principle to the state sovereign immunity context, it is clear that the Court's reversal of Union Gas in Seminole Tribe, as a direct result of the Court's change in membership, creates exactly the appearance of unprincipled decision making that the joint opinion in Casey identified as a threat to judicial legitimacy. Furthermore, given the recent changes in Court personnel, along with the hair's-breadth division of the Court on state sovereign immunity issues, there is real reason for concern that this appearance of political decision making could be magnified in the near future. It is first and foremost to avoid this outcome, which the joint opinion in Casey rightly recognized as a disaster for the Court and for the rule of law, that this Essay proposes the textualist truce described above.


137. See, e.g., Tracey E. George & Robert J. Pushaw, Jr., How Is Constitutional Law Made?, 100 Mich. L. Rev. 1265, 1282 (2002) (book review) (noting the "previously expressed position [of Justices O'Connor and Kennedy] that Roe had been wrongly decided"); Michael Stokes Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?, 109 Yale L.J. 1535, 1559 (2000) ("For O'Connor and Kennedy, Casey was about stare decisis, not substantive due process."); cf. Casey, 505 U.S. at 871 (joint opinion) ("We do not need to say whether each of us, had we been Members of the [Roe] Court when the valuation of the state interest came before it as an original matter, would have concluded... that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.").

138. See Casey, 505 U.S. at 864 (joint opinion) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve." (quoting Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting))).


140. It is uncontroversial that, all else equal, it is better for the Court to be perceived as a principled expositor of the Constitution. Justice Scalia's Casey dissent, however, scoffs at the idea that the need to appear principled could ever justify departing from what constitutional principle itself requires. Casey, 505 U.S. at 998 (Scalia, J., concurring in the judgment in part and dissenting in part). This argument, as Deborah Hellman points out, is fundamentally question begging. If principled judicial decision making requires attention to appearances, the principled result cannot simply be determined by what principles other than the importance of appearing principled require. See Deborah Hellman, Judging by
C. Easing the Transition

The biggest hurdle remaining for this proposal lies in explaining how the Court can make the transition to a textualist interpretation without causing serious disruption, since adopting a textual interpretation would require the Court to overrule a significant number of cases. There are three principal ways for the Court—and thus this Essay—to clear this hurdle.

First, as Larry Marshall and John Manning have shown, there is enough historical support for textualist interpretation that the Court could use the cover of an originalist interpretation in adopting a textualist truce, much as it used an originalist cover to retreat from its pre-New Deal Commerce Clause doctrines in Jones & Laughlin. In particular Marshall and Manning show that there is reason to think that precise constitutional texts reflect pragmatic political compromise rather than grand principles like those relied upon by sovereign immunity and diversity theorists. This finding is sufficiently resonant with the Court’s statutory interpretation jurisprudence that it could at least provide rhetorical cover for a textualist truce, if the Court perceived such cover to be necessary.

Second, the Court might adopt the kind of case-law-sensitive approach to statutory construction in this area that Justice Antonin Scalia used in his Welch v. Texas Department of Highways & Public Transportation concurrence to avoid reaching the state sovereign immunity issue shortly after he joined the Court. Because a large number, if not a majority, of currently existing federal statutes were passed when Congress would have assumed that states enjoyed sovereign immunity from suits by individuals, the Court could—and indeed should—avoid reading these statutes as intending to subject states to suit wherever possible. This approach would substantially reduce the initial destabilizing effect of a textualist truce.

Third, and I do not think it necessary to go this far, the Court could soften the impact of a textualist truce by holding that the broad sovereign immunity principle as recognized in previous cases is a common law principle rather than a constitutional principle. Taking this view would effectively turn state sovereign immunity into a default rule. Wherever Congress has not expressly indicated its intent to modify the common law doctrine of sovereign immunity, the Court would find that this common law

Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem, 60 Md. L. Rev. 653, 672 (2001) (noting that, if appearance is significant at all, the “right [or in this case, principled] action [cannot be] that which is mandated by [factors other than appearance] only”).

141. See supra Part I.B.3 (describing the arguments of these two textualists).

142. Alternatively, the Court could persuasively rely on Brown v. Board of Education, 347 U.S. 483, 492 (1954), to hold that it is impossible to “turn the clock back,” in this case to 1795, when the Eleventh Amendment was adopted. Only eighty-six years had passed between the ratification of the Fourteenth Amendment and the Court’s decision in Brown. More than 200 years have passed since the ratification of the Eleventh Amendment.


144. See id. at 496 (Scalia, J., concurring).

145. This is essentially the view the plurality took in Union Gas and the view Justice Souter supports in his Seminole Tribe dissent.
principle bars suits against states by individuals without their consent. A similar approach has been endorsed by Vicki Jackson. The approach would also be consistent with the Court's treatment of common law doctrines of official immunity under 42 U.S.C. § 1983.

Together, these three impact-softening measures show that the destabilizing effect of a textualist truce could be substantially mitigated. In any event, some instability in this area would be a small price for the Court to avoid further casualties in the current war over the Eleventh Amendment. In this regard, it is worth noting that the Court has not shied away from effecting tectonic shifts in its approach to particular areas of constitutional law in attempting to avoid the appearance of political decision making. *Jones & Laughlin* is an obvious example. The Eleventh Amendment is not the Commerce Clause in the New Deal era, of course. But as earlier discussion has shown, the doctrine is rife with inconsistencies. These inconsistencies, together with the persistence of intensely political divisions on the Court for more than twenty years (and particularly its reversal of *Union Gas* in *Seminole Tribe* after a change in the Court's membership), have created the distinct appearance that the Court's jurisprudence in this area has been swayed by the personal preferences of the Justices, rather than constitutional principle. Even if a textualist truce would create a major upheaval, therefore, it might well be worth that price.

**CONCLUSION**

This Essay has proposed that the Supreme Court adopt a textualist interpretation of the Eleventh Amendment to eliminate the doctrinal incoherence created by its current approach and to reduce the appearance of political decision making produced by *Seminole Tribe*'s reversal of *Union Gas*, along with twenty years of 5-4 decisions in this area along political lines. A textualist truce is consistent with the Court's historical practice of abandoning non-textual originalist principles when the costs of maintaining such principles become too great. Furthermore, contrary to conventional wisdom, a textualist interpretation of the Eleventh Amendment is doctrinally coherent and would produce no more—and probably fewer—anomalous results than the current sovereign immunity approach or the diversity theory. These competing originalist approaches have dominated the judicial and academic discourse for more than 100 years, but they have not resolved the historical ambiguity surrounding the Eleventh Amendment's original meaning. Neither legal principle nor the Court's previous practice requires it to continue this costly and unproductive battle indefinitely. It is time for a textualist truce in the war over the Eleventh Amendment.

146. See Jackson, supra note 72, at 74-75.