

EXHUMING THE “DIVERSITY EXPLANATION” OF THE ELEVENTH AMENDMENT

Thomas D. Rowe, Jr.*

*“The [Eleventh] [A]mendment has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the Court never been extended to suits brought against a State, by the citizens of another State, or by aliens.”*¹

*“[T]he diversity explanation of the Eleventh Amendment has . . . ceased to matter.”*²

This Symposium rightly celebrates the twenty-fifth anniversary of the publication of then-Professor William Fletcher’s illuminating article, *The Structure of Standing*.³ By coincidence, this year also marks three decades since Willy published the first of his outstanding works on what is known as the “diversity explanation”⁴ or “diversity interpretation” of the Eleventh Amendment to the United States Constitution.⁵ That reading would treat

* Elvin R. Latty Professor of Law Emeritus, Duke University School of Law. Disclosure: This Symposium’s honoree, Ninth Circuit Judge William A. (“Willy”) Fletcher, is my brother-in-law and long-time friend. But when he was a UC-Berkeley law professor I held his scholarship in the highest regard years before I met, fell in love with, and married his sister, Susan Fletcher French (in a ceremony at which Judge Willy officiated). Thanks to Judge Fletcher, Professors David Shapiro and Jim Pfander, and to participants in the conference at which the papers in this Symposium were presented for helpful comments on earlier drafts. Remaining errors are, of course, mine.

1. *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 857–58 (1824) (Marshall, C.J., dictum).

2. William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843, 857 (2000).

3. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1998).

4. 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 (1983) [hereinafter Fletcher, *A Historical Interpretation*]. See also William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989) [hereinafter Fletcher, *The Diversity Explanation*]; William A. Fletcher, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 131 (1990); Fletcher, *supra* note 2. For an article closely contemporaneous with Prof. Fletcher’s initial diversity-explanation piece that develops a strongly similar view, see John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

5. U.S. CONST. amend. XI (“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.”).

the Amendment as having everything to do with federal courts' constitutional jurisdiction⁶ and nothing to do with states' sovereign immunity from suit⁷—a view that is often contrary, at least in the latter respect, to over a century of (arguably misguided) Supreme Court precedent.

The organizers of this Symposium have graciously let me write about the aspect of Willy's work that I said I wanted to write about, rather than what their call asked invitees to address. I begin with the proposition that, in my view, no fully literal interpretation of the Eleventh Amendment is practically conceivable; I have long told my Federal Courts students that trying to proceed from the text of the Amendment (in other contexts, usually not a bad starting point), particularly given the directions taken by the Supreme Court for over a century now, will be a major impediment to understanding the law that has developed in the Amendment's judicial interpretations. For one thing, full literalism could require that exclusion from the "Judicial power" of "any suit in law or equity"⁸ properly commenced in a *state* court by a citizen of another state, or an alien, against a state but involving a *federal-law* matter, not be subject to review in the Supreme Court of the United States, no matter what the nature or importance of the point of federal law involved in the case as decided in state court, or differences of view in courts addressing the federal-law issue. The "Judicial power of the United States," after all, has to do with both original and appellate jurisdiction of the United States courts. Anything that is outside the "Judicial power" cannot come before the federal courts, whether as a matter of the district courts' original jurisdiction, or the Supreme Court's appellate jurisdiction,⁹ or for that matter the Court's limited original jurisdiction.

6. See, e.g., *Osborn*, 22 U.S. (9 Wheat.) at 857–58 (Amendment has "full effect" with respect to federal jurisdiction alone). To what *types* of jurisdiction—citizenship-based other-state citizen v. state and alien v. state only, or other bases of jurisdiction as well including that over federal-law claims by such plaintiffs—is a question not addressed in Chief Justice Marshall's statement. But, in modern application, the statement would have the Eleventh Amendment applying to jurisdiction solely (however broadly) and not at all to states' sovereign immunity.

7. See Fletcher, *The Diversity Explanation*, *supra* note 4, at 1298 (On the question "whether the states were intended to have sovereign immunity from suits brought by private individuals under federal law," the diversity explanation "tells us that the answer cannot be found in the Eleventh Amendment at all.").

8. U.S. CONST. amend XI.

9. Cf. Vicki C. Jackson, *The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 32–39 (1988) (discussing problems with finding federal appellate jurisdiction over citizen-state suits from state courts under prevailing interpretations of the Eleventh Amendment).

Such a reading of the Eleventh Amendment strikes me as technically, but not practically, conceivable. We aren’t going to say that the Supreme Court has no power to review possibly erroneous state-court decisions on federal constitutional or statutory law just because the case was in law or equity and was brought by a private party who isn’t a citizen of the same state¹⁰—and we haven’t.¹¹ For the lower federal courts, literal exclusion of “any suit in law or equity”¹² brought against a state by citizens of other states or aliens would also mean no possibility of original jurisdiction, whatever the basis (other than admiralty, which the Amendment’s text does not mention) on which such jurisdiction might rest—diversity between the private plaintiff and the state, or a complaint raising a federal question. (Such literalism would create the anomalous possibility of federal-question jurisdiction over suits against a state by its own citizens, while excluding suits presenting the same claim by citizens of other states or aliens.) Advocates of the diversity explanation, it seems to me, must confess that they read “any suit” in the text of the Amendment to have less than its full apparent, or at least possible, textual breadth.¹³

But that concession does not at all mean that diversity-explanation supporters are coming from behind; for, as we shall see,¹⁴ the leading alternatives are far, far, gnarlier—especially for those who like their constitutional interpretations to hew, at least more or less, as closely to the text as makes sense. I first try to set out the diversity explanation as concisely as I can. I then argue that its much greater cleanness in articulation and application than leading alternatives makes a powerful case for its being the most preferable approach, in that it sticks as closely as is sensible to the text while providing a workable and coherent interpretation—indeed a highly coherent one (particularly in contrast to

10. Remember, textually the Amendment has no application to suits not in law or equity (such as admiralty cases), nor to suits brought by citizens of the state being sued or by other governmental entities domestic or foreign.

11. See *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 27 (1990) (unanimous opinion) (“We have repeatedly and without question accepted jurisdiction to review issues of federal law arising in suits brought against States in state court.”); cf. *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996) (“[T]his Court is empowered to review a question of federal law arising from a state-court decision where a State has consented to suit.”).

12. U.S. CONST. amend. XI (emphasis added).

13. As Prof. Fletcher did. See Fletcher, *The Diversity Explanation*, *supra* note 4, at 1278–79 (acknowledging absence from Eleventh Amendment of textual limit to jurisdiction based on character of parties). *But see id.* at 1276–79 (pointing to proposed but unsuccessful constitutional amendments in 1805–1807 that would have abolished most citizenship-based jurisdictions entirely, using language identical to key parts of the Eleventh Amendment without textual limit to such jurisdictions; inferring, from express understanding at time that these amendments would have abolished constitutional basis for diversity-type jurisdictions but not federal-question jurisdiction, a similar understanding that Eleventh Amendment did not eliminate constitutional basis for federal-question—or, presumably, admiralty—suits against states by citizens of other states or aliens).

14. See *infra* text accompanying notes 29–43.

much Eleventh Amendment and state-sovereign-immunity case law on the books). I bracket a major issue, the historical arguments over the status of state sovereign immunity around the time of the Constitution's framing and ratification and, shortly afterward, the context in which the Eleventh Amendment was adopted and its framers' intentions. That is a huge debate, with its ground much worked over in Supreme Court opinions¹⁵ and academic commentary;¹⁶ I am not equipped to review the historical research already done by others or to offer anything new to the historical debate. I conclude with observations on whether the case for the diversity explanation is strong enough to justify overruling the Supreme Court's numerous decisions on the Eleventh Amendment and state sovereign immunity, which I believe it is.

The heart of the diversity explanation is the view that the Eleventh Amendment, in addition to leaving issues of state sovereign immunity to other law (common, statutory, or—from *non*-Eleventh Amendment text or structural principles—constitutional), applies solely to suits in law or equity that would *ground federal jurisdiction* (original or appellate) on the citizenship status—citizen of another state or an alien—of a private plaintiff seeking to sue a state in federal court, excluding those actions, and those alone, from the Article III judicial power. Thus “diversity,” in the sense of a private plaintiff against a state being from elsewhere, could not constitutionally be a basis for federal jurisdiction, as original Article III could be read to allow¹⁷ and as the Supreme Court interpreted Article III in the case that led to the proposal and ratification of the Eleventh Amendment, *Chisholm v. Georgia*.¹⁸ The one-way focus of the Amendment would leave states free to bring diversity-based suits in law or equity against private *defendants* from elsewhere, at least—with respect to federal trial courts' original jurisdiction—to the extent that Congress so provided by statute.¹⁹ That view of the Amendment, diversity theorists have

15. See, e.g., *Alden v. Maine*, 527 U.S. 706, 712–27 (1999) (reviewing state sovereign immunity around time of founding and history of proposal and ratification of Eleventh Amendment); *id.* at 762–94 (Souter, J., dissenting) (same, reaching opposite conclusions); *Seminole Tribe v. Florida*, 517 U.S. 44, 101–16 (Souter, J., dissenting).

16. See, e.g., the Fletcher articles cited *supra* notes 2, 4; Gibbons, *supra* note 4; Jackson, *supra* note 9; James E. Pfander, *History and State Suability: An “Explanatory” Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998). For leading articles taking issue in varying degrees with the diversity explanation, see Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989).

17. See U.S. CONST. art. III, § 2 (“The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State . . . and between a State . . . and foreign States, Citizens or Subjects.”).

18. 2 U.S. (2 Dall.) 419 (1793).

19. An issue that might have to be faced should the diversity explanation ever become law would be whether, in the case of a state's diversity-based suit in law or equity in federal court against a private

contended, would correct *Chisholm*'s mistaken interpretation of Article III as providing for either-way federal judicial power over citizenship-based suits in law or equity involving a state as defendant as well as when it was plaintiff.²⁰

Notice the cleanness of interpretation produced by the diversity explanation. For *state-law* suits in law or equity by private parties against states (such as those relying on state contract law to collect on state debts), with the adoption of the Eleventh Amendment as read by the diversity explanation, all such suits are outside the federal judicial power: those by same-state plaintiffs because there is no diversity (and no other basis for federal jurisdiction), and those by other-state plaintiffs or aliens because the Eleventh Amendment excludes their actions. For *federal-law* suits in law or equity, the citizenship status of a private party is irrelevant to federal constitutional jurisdiction—the Eleventh Amendment not applying—and can be similarly irrelevant to federal statutory jurisdiction to the extent that Congress chooses to make it so. No anomalies: same-state, other-state, and alien plaintiffs against state defendants suing in law or equity are either all constitutionally out (when diversity would provide the only basis of jurisdiction)²¹ or all constitutionally in (when the case comes within federal-question jurisdiction, however Congress chooses to define it statutorily for the federal trial courts).²²

Is it really all that simple? I think so,²³ in basic outline. So where does that leave state sovereign immunity, a major concern in Eleventh Amendment and related cases for over a century? The diversity explanation leaves state sovereign immunity from suit to other sources of law, first in state-law cases (in state or federal court) to states' own common, statutory,

diverse or alien party (an unlikely choice for a state to make even if a federal statute authorized it?), the private defendant could add a counterclaim that the Eleventh Amendment would have excluded from the federal judicial power if the private party had tried to initiate the same claim in federal court. Suppress any temptation to deal with the problem by finding waiver from the state's having chosen to sue in federal court; if the Eleventh Amendment is all about the Article III judicial power and not in any respect about state sovereign immunity, the usual rule that parties cannot waive restrictions on federal subject-matter jurisdiction, *see infra* note 38, would govern. The Amendment's ban on suits “commenced” against a state would not apply, but there could be room for debate about whether the counterclaim fell within the text's “or prosecuted” bar.

20. *See* Fletcher, *A Historical Interpretation*, *supra* note 4, at 1035 (suggesting that the Eleventh Amendment “was intended to require that the state-citizen diversity clause of article III be construed to confer federal jurisdiction only over disputes in which the state was a plaintiff”).

21. *See* Fletcher, *The Diversity Explanation*, *supra* note 4, at 1291 (stating that under the diversity explanation, “out-of-staters, foreigners, and in-staters are treated identically: there is no party-based jurisdiction for any of them.”).

22. *See* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 383 (1821) (Marshall, C.J.) (“[A] case arising under the constitution or laws of the United States, is cognisable in the courts of the Union, whoever may be the parties to that case.”). The same, incidentally, would hold for admiralty cases, whatever their sometimes-ambiguous jurisdictional status.

23. Prof. Fletcher did as well. *See* Fletcher, *A Historical Interpretation*, *supra* note 4, at 1035 (describing his proposed interpretation of the Eleventh Amendment as “strikingly simple”).

or constitutional law. In federal-law cases, the explanation does not *abolish* state sovereign immunity, but rather unpins it from the Eleventh Amendment. So states need not hasten—were the Supreme Court to embrace the diversity explanation—to seek constitutional overruling of that interpretation, should they be alarmed by the prospect of liability they have gotten used to not having, at least in principle, to worry about.²⁴ Federal courts on their own can recognize state immunities in federal-law cases as a matter of federal common law.²⁵ Whatever the federal courts (and state courts in federal-law cases, federal common law applying there as well²⁶) decide about state sovereign immunity as a matter of federal common law, Congress can fortify or weaken.²⁷ And the Supreme Court has shown that it can constitutionalize state sovereign immunity as well, should it be so minded.²⁸

24. The “at least in principle” qualifier reflects that personal damage liability of state officials sued in their individual capacity, combined with widespread governmental indemnity for such officials actually held liable, means that the states’ theoretical immunity from suit frequently does not keep them from being the ultimate source of a damage recovery. *See* John C. Jeffries Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49–50 (1998) (Given the suability of state officers and state-government indemnity for state officials held personally liable, the Eleventh Amendment “almost never matters.”). So any reduction in formal state immunity could often result in a more direct payment than under present law but not in actual drains on state treasuries that states do not now pay in any way. And as Judge Fletcher has added, local governments, which generally do not enjoy states’ Eleventh Amendment or sovereign immunity but do have some judicially recognized defenses to damage suits that would presumably be available to suable states as well, do not seem to have been “unreasonably burdened under the current regime.” Fletcher, *supra* note 2, at 851.

Moreover, under present law, states and state officials sued in their official capacity are not “persons” within the meaning of 42 U.S.C. § 1983 (2006), a principal vehicle for bringing suits for alleged state and local violations of federal rights. *Will v. Mich. Dept. of State Police*, 491 U.S. 58 (1989). The Eleventh Amendment was not directly at issue in *Will* because the suit was brought in state court, but concern for Eleventh Amendment immunity influenced the majority’s interpretation of the federal statute. *See Will*, 491 U.S. at 66–67 (“[I]n deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration”). *Will* was a 5-4 decision, however, and a Supreme Court majority prepared to embrace the diversity explanation of the Eleventh Amendment might also take a different view of *Will*’s interpretation of § 1983.

25. *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 85 (Stevens, J., dissenting) (speaking of state sovereign immunity in *Hans v. Louisiana*, 134 U.S. 1 (1890), as a “common-law presumption,” which “Congress had not, by legislation, attempted to overcome”); *id.* at 124 (Souter, J., dissenting) (viewing the suit by an in-state private plaintiff in *Hans* as “barred by a nonconstitutional common-law immunity”). *See generally* 17A JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 123.05[3] (3d ed. 2013) (discussing the theory of the Eleventh Amendment as restoring states’ common-law sovereign immunity).

26. *See* MOORE ET AL., *supra* note 25, § 124.40[1], at 124-119 (“The Supremacy Clause makes federal common law binding on both state and federal courts.”).

27. *See, e.g., Seminole Tribe*, 517 U.S. at 81 (Stevens, J., dissenting) (speaking of Congress’s authority to grant unconsenting “States a sovereign immunity defense,” at least in some types of cases); *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (“[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.”).

28. *See Alden v. Maine*, 527 U.S. 706, 724 (1999) (“[T]he Constitution was understood, in light of its history and structure, to preserve the States’ traditional immunity from private suits.”).

I have already called attention to the interpretive cleanness of the diversity explanation of the Eleventh Amendment. Under the leading—and currently authoritative—contrary interpretation, at least since the 1890s the Court has viewed the Amendment as dealing not only with federal courts’ jurisdiction but also as entrenching some degree of state sovereign immunity (or recognizing already-existent, if not textually specified, immunity) at a minimum from suit in federal court, whatever the basis of the claim against the state. This view has required results that depart increasingly from the Amendment’s text. The following list summarizes briefly the key points that the sovereign-immunity view has led the Court to espouse and how they differ from the text or require legal fictions. As I have said many times to my Federal Courts students, welcome to the puzzle palace!

- 1) Despite the omission of plaintiff citizens of a defendant state from the text of the Eleventh Amendment, state sovereign immunity extends to suits by them as well as those by citizens of other states and citizens or subjects of foreign nations.²⁹
- 2) To ensure the enforceability of federal law, suits for prospective injunctive or declaratory relief against state officials (which, when successful, effectively keep the state from acting) are generally not barred by the Eleventh Amendment,³⁰ which requires the fictive contortion that the official’s challenged action is *not* action by the “state” for purposes of the Eleventh Amendment (the allegedly unlawful action being “ultra vires”) but *is* state action for purposes of applicability of the Fourteenth Amendment and other federal-law restraints on states’ policies and their officials’ conduct.³¹

29. *Hans v. Louisiana*, 134 U.S. 1 (1890). Whatever the extent to which the Court’s decision may ultimately have rested on federal common law of state sovereign immunity, *see supra* note 25, the *Hans* opinion rejected with an incredulous rhetorical question the possibility that the Eleventh Amendment left it open for citizens to sue their own state in federal court: “Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled?” *Hans*, 134 U.S. at 15.

30. *Ex parte Young*, 209 U.S. 123 (1908).

31. *Fletcher*, *supra* note 2, at 849 (“[A] state officer sued for prospective (i.e., injunctive) relief under federal law is not part of the state for purposes of the Eleventh Amendment, even though the rationale for the suit is that the officer’s behavior was state action under the Fourteenth Amendment.”); *see also Young*, 209 U.S. at 181–82 (Harlan, J., dissenting) (“[A]n order by the Federal court which prevents the State from being represented in its own courts, by its chief law officer, upon an issue involving the constitutional validity of certain state enactments” must be barred by the Eleventh Amendment “unless a suit against the Attorney General of a State, in his official capacity, is not one

- 3) Despite the textual reference to “any suit in law or equity,”³² private admiralty actions against states are barred as well.³³
- 4) Even though the Amendment’s text limits solely some private parties as plaintiffs against states (and Article III, Section Two, Clause One, uncontradicted by the Eleventh Amendment’s text, extends the federal judicial power to “Controversies . . . between a State . . . and foreign States”³⁴), suits by foreign countries against states are also barred.³⁵
- 5) Despite the judicial-power language in the Amendment and the strong rule that party consent cannot override limits on federal courts’ subject-matter jurisdiction,³⁶ states may under certain conditions consent to be sued in federal court or be held to have waived their sovereign immunity,³⁷ making the Amendment a hybrid that somewhat waters down usual jurisdictional approaches³⁸ (although a state can

against a State under the Eleventh Amendment when its determination depends upon a question of constitutional power or right under the Fourteenth Amendment. In that view I cannot concur.”).

32. U.S. CONST. amend. XI.

33. *Ex parte New York*, No. 1, 256 U.S. 490 (1921). The opinion referred to state immunity from suit as “a fundamental rule of jurisprudence . . . of which the Amendment is but an exemplification,” *id.* at 497, but the Court has since cited it, like *Hans*, as an Eleventh Amendment case. *See Fla. Dep’t of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.17 (1982):

Although the [Eleventh] Amendment does not literally apply to actions brought against a State by its own citizens, the Amendment long has been held to govern such actions. *Hans v. Louisiana*, 134 U.S. 1 . . . Nor does the Amendment literally apply to proceedings in admiralty. Again, however, the Court has found it to govern certain admiralty actions. *See In re New York*, 256 U.S. 490, 500.

34. U.S. CONST. art. III, § 2.

35. *See Principality of Monaco v. Mississippi*, 292 U.S. 313, 321 (1934):

[N]either the literal sweep of the words of Clause one of § 2 of Article III, nor the absence of restriction in the letter of the Eleventh Amendment, permits the conclusion that in all controversies of the sort described in Clause one, and omitted from the words of the Eleventh Amendment, a State may be sued without her consent.

36. *See, e.g.*, FED. R. CIV. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”).

37. *See, e.g.*, *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002) (stating that at least in some circumstances, a state’s removal of a case from state to federal court waives its sovereign immunity from suit there); *Gunter v. Atl. Coast Line R.R.*, 200 U.S. 273, 284 (1906):

Although a state may not be sued without its consent, such immunity is a privilege which may be waived, and hence where a state voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the [Eleventh] Amendment.

38. *See Pfander, supra* note 16, at 1373–74 (internal footnotes omitted):

Of the many debatable features of the Court’s Eleventh Amendment jurisprudence, perhaps none can match the curious notion that suits against the states, though nominally placed beyond the “judicial power” of the federal courts, may nonetheless be brought back within that power by the state’s consent to suit. Classical jurisdictional doctrine views the

sometimes raise its sovereign-immunity objection, like a jurisdictional objection, on appeal after losing at trial³⁹).

- 6) While Congress cannot give the federal courts subject-matter jurisdiction over cases not within the Article III judicial power,⁴⁰ it may in some situations abrogate state sovereign immunity and permit suits in federal court that the Eleventh Amendment would otherwise bar;⁴¹
- 7) Despite the judicial-power language in the Amendment, it does not bar appeals in other-state-citizen-v.-state cases or alien-v.-state cases, at least those involving federal-law matters, from state courts to the Supreme Court.⁴²
- 8) Even though federal administrative tribunals, not being Article III courts, do not exercise the Article III “judicial Power” of the United States that the Eleventh Amendment restricts, states’ sovereign immunity extends to private parties’ proceedings before such tribunals as well.⁴³

The extent to which these decisions sail against strong textual wind, require indulging in legal fiction, and involve departures from strong and widely followed jurisdictional rules justifies a nice remark by a bemused federal trial judge: “Doctrines, like people, are sometimes excused from the requirement of logical consistency when they are [several decades] old.”⁴⁴ The many contortions also highlight the simplicity and coherence of the diversity explanation; the contrast makes part of a strong case for the diversity interpretation as adhering more closely than the alternatives to

federal courts as courts of limited jurisdiction, with power to hear cases and controversies that affirmatively come within the defined limits of Article III, but without power to hear matters that extend beyond the scope of that grant. This strong rule against the expansion of federal judicial authority ordinarily applies even where the parties “consent” to the federal courts’ jurisdiction.

39. See *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (“[T]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court . . .”).

40. See, e.g., *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809) (A “statute cannot extend the jurisdiction [of the federal courts] beyond the limits of the constitution.”).

41. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (approving abrogation as exercise of Congress’s Fourteenth Amendment enforcement power); *Seminole Tribe v. Florida*, 517 U.S. 44, 57–73 (1996) (largely limiting abrogation to exercises of Congressional power under the Fourteenth, and perhaps some other post-Eleventh Amendment, constitutional provisions); *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 n.2 (2011) (“We have recognized that Congress may abrogate a State’s immunity when it acts under § 5 of the Fourteenth Amendment, but not when it acts under its original Article I authority to regulate commerce.”) (citations omitted).

42. See *supra* note 11 and text accompanying notes 10–11.

43. *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 754 (2002) (“[T]he sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment.”).

44. *Native Vill. of Venetie I.R.A. Council v. Alaska*, 687 F. Supp. 1380, 1384 (D. Alaska 1988).

canons of “strict construction”⁴⁵ and to what the framers of the Eleventh Amendment must have had in mind.⁴⁶ The nature of the ideological splits in many of the recent decisions and the departures from text to protect states’ sovereign immunity also make irresistible the temptation to point to this area as a prime illustration of conservative judicial activism.

Each of the foregoing eight items could be the jumping-off point for an explanation at some length, but such depth does not seem necessary for the purposes of this essay. For now, what seems important is to note that the Court has sometimes spoken as if it were interpreting the Eleventh Amendment⁴⁷ (however much it was departing from its text) and has at other times spoken in terms of background postulates⁴⁸ and structural principles.⁴⁹ The Court, speaking as has often been the case lately through a five-Justice majority with four persistent dissenters, largely resolved that tension in a case forced by the path down which it had been proceeding: with states often immune from suit in federal court and Congress limited in its ability to abrogate state Eleventh Amendment immunity, the next logical step was for plaintiffs to try enforcing federal-law rights against states in state courts. Not even the previous textual contortions seemed to make anyone feel that the Amendment could be extended to suits in state court, so the choice was stark: allow federal-law suits that could not be brought in federal court against unconsenting states to be brought in state court, or hold that state sovereign immunity not grounded in the Amendment (nor found elsewhere in the text of the federal Constitution⁵⁰) barred such suits as well as those in federal court.

Two state supreme courts had taken opposing views on this question,⁵¹ and the U.S. Supreme Court in a 5–4 decision split along familiar lines

45. Gibbons, *supra* note 4, at 2004.

46. Again, I am not trying to reopen the historical aspect of the debate over the diversity explanation, but its proponents also make a strong—if controverted—argument that the diversity view also fits much better than the alternatives with the historical evidence of the framers’ intent. *See, e.g., supra* sources cited in note 16.

47. *See, e.g., supra* note 33.

48. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–23 (1934) (footnote omitted) (internal quotation marks omitted):

Behind the words of the constitutional provisions [of Article III and the Eleventh Amendment] are postulates which limit and control. . . . There is . . . the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention.

49. *Alden v. Maine*, 527 U.S. 706, 728 (1999) (“[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself.”).

50. *See, e.g., Pfander, supra* note 16, at 1279 n.42. (“[T]he Constitution never mentions the word ‘sovereign’ and does not by its terms confer immunity on any government body.”).

51. *Compare Alden v. State*, 715 A.2d 172 (Me. 1998) (upholding dismissal on ground of state sovereign immunity), *aff’d*, *Alden v. Maine*, 527 U.S. 706 (1999), *with Jacoby v. Ark. Dep’t of Educ.*,

resoundingly resolved it in favor of extratextual but constitutional state sovereign immunity in *Alden v. Maine*.⁵² It is that decision that led Judge Fletcher in his 2000 article to state that “the diversity explanation of the Eleventh Amendment has finally ceased to matter.”⁵³ That observation is accurate in the sense that the diversity explanation was offering a limited, jurisdiction-focused alternative to expansive, immunity-tinged interpretations of the Amendment. But as long as the Supreme Court conclusively grounds state sovereign immunity in structure and background postulates rather than the Eleventh Amendment’s text,⁵⁴ unconsenting states’ immunity holds no matter how one reads the Amendment.

So should I end my exhumation with a quick reburial, acknowledging that both the Supreme Court majority and the leading exponent of the diversity explanation have made it, or concluded that it is, kaput? I’m not inclined to give up so easily. First, the diversity explanation has often recently commanded and predicted four Supreme Court Justices’ votes.⁵⁵ While two of the most recent four (Justices Stevens and Souter) have left the Court, and their two successors have not expressed views of their own on the Amendment,⁵⁶ it is hardly unlikely that new Justices Sotomayor and

962 S.W.2d 773 (Ark. 1998) (rejecting defense of state sovereign immunity from federal-law claim in state court), *vacated*, 527 U.S. 1031 (1999).

52. 527 U.S. 706, 733 (1999) (“[T]he structure and history of the Constitution make clear that [states’ sovereign] immunity exists today by constitutional design.”). Justice Kennedy wrote the opinion of the Court, which was joined by Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas. Justice Souter’s dissent was joined by Justices Stevens, Ginsburg, and Breyer.

53. Fletcher, *supra* note 2, at 857.

54. *Id.* at 858 (“[T]he present Court has finally cleared away the text of the Eleventh Amendment.”).

55. See *Alden*, 527 U.S. at 760 (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.) (viewing Eleventh Amendment’s “limited codification” as “dealing solely with federal citizen-state diversity jurisdiction”); *Seminole Tribe v. Florida*, 517 U.S. 44, 110 (1996) (Souter, J., dissenting, joined by Ginsburg and Breyer, JJ.) (“The history and structure of the Eleventh Amendment convincingly show that it reaches only to suits subject to federal jurisdiction exclusively under the Citizen-State Diversity Clauses.”). The failure to mention alien-v.-state diversity cases was presumably an oversight.

56. The Court has decided only two Eleventh Amendment/state-sovereign-immunity cases since four new Justices joined the Court (with Chief Justice Roberts and Justices Alito, Sotomayor, and Kagan having succeeded to the seats of Chief Justice Rehnquist and Justices O’Connor, Souter, and Stevens respectively). The first was *Virginia Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632 (2011). Justice Scalia’s opinion for the Court, joined by Justices Kennedy, Thomas, Ginsburg, Breyer, and Sotomayor, upheld the applicability of the *Ex parte Young* exception to a case involving a suit by a state agency against state officials. Justices Ginsburg and Breyer, along with Justice Sotomayor, joined background statements of sovereign-immunity law established in decisions from which Justices Ginsburg and Breyer had dissented, but without any indication whether they would or would not vote to overrule those decisions were their continuing validity to come before the Court. See *id.* at 1637 (“[W]e have understood the Eleventh Amendment to confirm the structural understanding that States entered the Union with their sovereign immunity intact, unlimited by Article III’s jurisdictional grant. Our cases hold that the States have retained their traditional immunity from suit, except as altered by the plan of the Convention or certain constitutional amendments.”) (citations omitted) (internal quotation marks omitted). Chief Justice Roberts, joined by Justice Alito, dissented.

Kagan would align with diversity-explanation adherents Justices Ginsburg and Breyer.⁵⁷ Should they do so, one replacement of a Republican appointee by a Democratic President could provide a fifth vote for the diversity explanation. Were there such a majority, the same five Justices might also be inclined to overrule to some extent the hard, broad constitutionalization of state sovereign immunity by the recent majority, opening up questions about the extent of federal immunity on federal-law claims against states under federal common, statutory, and constitutional law.⁵⁸ Such a double overruling—reinterpreting the Eleventh Amendment and discarding what has become the non-Eleventh Amendment constitutionalization of state sovereign immunity—would be necessary to attain the greatest possible positive effect from adopting the diversity explanation.

But even short of such a twofer—both adopting the diversity explanation and retreating from the current sweep of federal constitutional

Justice Kagan did not participate, and Justice Sotomayor did not write separately (nor did either Justice Ginsburg or Justice Breyer).

The second case was *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012), in which the Supreme Court without a majority opinion held that an unpaid-leave provision in the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654, was not within Congress’s power under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity. Justices Sotomayor and Kagan joined Justice Ginsburg’s dissent, joined in full by Justice Breyer, but did not join a footnote in which she noted her continuing dissent from *Seminole Tribe* on Commerce Clause abrogation authority and another case narrowly construing Section 5 abrogation authority. *See Coleman*, 132 S. Ct. at 1339 & n.1. I hesitate to infer, from their declining to join the footnote while joining the rest of the dissent, any disagreement by the newest Justices with the underlying position of Justices Ginsburg and Breyer in a decision mostly involving disagreement with the rest of the Court over application of established abrogation precedent. *Coleman* was not a likely vehicle for Justices Sotomayor and Kagan to weigh in heavily on major Eleventh Amendment/state-sovereign-immunity issues.

57. Justices Ginsburg and Breyer seem highly likely to adhere to their support of the diversity explanation. They have dissented in every case extending state sovereign immunity since they became members of the Supreme Court about two decades ago. *See Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 772 (2002) (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.); *Bd. of Trustees v. Garrett*, 531 U.S. 356, 376 (2001) (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 92 (2000) (Stevens, J., dissenting in part and concurring in part, joined by Souter, Ginsburg, and Breyer, JJ.); *Alden v. Maine*, 527 U.S. 706, 760 (1999) (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 693 (1999) (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 648 (1999) (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.); *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 297 (1997) (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.); *Seminole Tribe v. Florida*, 517 U.S. 44, 100 (1996) (Souter, J., dissenting, joined by Ginsburg and Breyer, JJ.). They joined Justice Souter’s express endorsements of the diversity explanation in *Seminole Tribe* and *Alden*. *See supra* note 55. The *Alden* dissent concluded with the prediction that “the Court’s late essay into immunity doctrine will prove the equal of its earlier experiment in laissez-faire [in cases like *Lochner v. New York*, 198 U.S. 45 (1905)], the one being as unrealistic as the other, as indefensible, and probably as fleeting.” *Alden*, 527 U.S. at 814 (Souter, J., dissenting).

58. *See, e.g.*, Gibbons, *supra* note 4, at 2004 (acknowledging “room for a federal doctrine of state sovereign immunity,” debated on “the practical policy level,” if diversity view of Eleventh Amendment were adopted).

state sovereign immunity from suit on federal claims—adoption of the diversity explanation could have some positive consequences. That explanation might still, in sum, matter even if state sovereign immunity from suit on federal claims (excluding those by the federal government and other states, to which it has never extended⁵⁹) remained heavily constitutionalized. Four possibilities come most prominently to mind.

First, with no bar in constitutional text to anyone’s suing a *state* on a federal-law claim in federal court, the suability of a state *official* in federal court for prospective relief as allowed by *Ex parte Young* would cease to require what is often regarded as a fiction. If you could constitutionally name the state as a defendant, there would be no need for fancy footwork to find a state official suable when the state was not; it would make no constitutional jurisdictional difference whether the plaintiff named one, the other, or both. Both, of course, would have any immunities or defenses recognized by federal law; but those would be the same for the state and its officials, in contrast to the present absolute bar to naming the state coupled with the ability to sue the official for prospective relief.⁶⁰

This change could amount to more than a conceptual nicety, because the sense that *Young*’s fictive nature is shaky has led to its being construed narrowly (related state-law claims may not tag along with *Young*-based federal-law claims, even though they would be within otherwise appropriate pendent or supplemental federal jurisdiction⁶¹) and the continued raising of questions whether it should be read narrowly in other respects.⁶² Taking *Young* out of the realm of shaky legal fiction would thus eliminate, or at least tamp down, one significant source of pressure for narrow construction of state officials’ suability on federal claims for injunctive or declaratory relief in federal court.

Second, consent and waiver would disappear from Eleventh Amendment jurisprudence, eliminating a major conundrum in present law.⁶³ With the Amendment solely about federal judicial power, no waiver

59. See, e.g., *Alden*, 527 U.S. at 755 (“In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government.”).

60. See, e.g., *Ex parte Young*, 209 U.S. 123 (1908); cf. *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) (“[O]fficial-capacity actions for prospective relief are not treated as actions against the State.”).

61. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

62. See, e.g., *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1645 (2011) (Roberts, C.J., dissenting, joined by Alito, J.) (stating that in holding “that a state agency may sue officials acting on behalf of the State in federal court . . . the Court extends the fiction of *Ex parte Young*—what we have called an ‘empty formalism’—well beyond the circumstances of that case”); *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 278 (1997) (Kennedy, J., joined by Rehnquist, C.J.) (opinion announcing judgment of Court) (advocating careful, case-by-case “balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case”).

63. See *supra* note 38 and text accompanying notes 36–38.

of its restriction on Article III jurisdiction would be possible.⁶⁴ But immunity law from whatever source—judge-made, statutory, or non-Eleventh Amendment constitutional—could have its own waivability lore unencumbered by tensions with judicial-power phraseology and limits.

Third, congressional abrogation issues would take a different form. Congress cannot expand the Article III judicial power with a mere statute,⁶⁵ so the constitutional limits imposed on that power by the Eleventh Amendment would be entirely beyond Congress's reach. But with state sovereign immunity grounded in other sources of law, the extent to which Congress could define or override it would depend on the immunity law's source and nature. To whatever extent abrogation issues are now affected by whether the power under which Congress seeks to act predates or postdates the Eleventh Amendment,⁶⁶ any pure temporality factor would lose its force. With the Amendment having nothing to do with state sovereign immunity, and such immunity grounded in sources having nothing to do with the Amendment or when it was adopted, the focus would be on the nature of the power under which Congress sought to act and how it related to a retained constitutional state sovereign immunity. Perhaps disturbingly, Congress should not be able to override a heavily constitutionalized state sovereign immunity under any power not directly or by strong implication addressing such immunity (and I know of no Article I power that does⁶⁷)—which makes part of a case against such heavy constitutionalization. But to whatever extent judicial articulations of immunity law left room for any congressional action, Congress could define, limit, and *expand* otherwise-defined state immunities—with any valid use of congressional authority, with no regard to whether it got into the Constitution before or after the decision to overrule *Chisholm* by constitutional amendment.

64. See *supra* note 38.

65. See *supra* note 40 and accompanying text.

66. See *Seminole Tribe v. Florida*, 517 U.S. 44, 65–66 (1996) (internal citation omitted):

[T]he Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment. As the dissent in *Union Gas* made clear, *Fitzpatrick* cannot be read to justify “limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution.”

67. *But cf.* *Cent. Va. Comty. Coll. v. Katz*, 546 U.S. 356, 373 (2006) (The Article One Bankruptcy Clause gives Congress power to hold state agencies liable in cases “ancillary to the bankruptcy courts’ *in rem* jurisdiction.”); see also *id.* at 362–63 (“The history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena.”).

Finally, adopting the diversity explanation would banish any tension about the constitutional scope of the Supreme Court’s appellate jurisdiction over cases from state courts.⁶⁸ With the Amendment limiting the federal judicial power solely with respect to diversity-based suits brought by other-state citizens and aliens, appeals basing jurisdiction not on citizenship but on the presence of a federal-law matter would without issue come within the Court’s constitutional (and statutory⁶⁹) appellate jurisdiction. And state-court cases with no federal-law element that involve a citizen of another state or an alien suing a state would present no basis for exercise of federal review.

My argument thus far may make it seem that as a Supreme Court Justice, I would unhesitatingly vote to overrule the whole line of restrictive Eleventh Amendment/state-sovereign-immunity cases from *Hans v. Louisiana* on down. Precedent does, though, deserve respect; how much weight it should have is the key question. Professor David Shapiro wrestled with this issue in a characteristically thoughtful and measured general essay,⁷⁰ choosing as his testing case precisely this problem. For Shapiro, a strong critic of many of the Court’s decisions on the Eleventh Amendment and state sovereign immunity,⁷¹ the choice whether to overrule were he the deciding vote turned out to be a close one given his views on stare decisis, and he concluded that he would indeed not vote to overrule.⁷² For him, “[T]he mischief [that state-sovereign-immunity doctrine] is causing is too marginal to warrant a vote to overrule. To put it another way, the doctrine as it has evolved has so many loopholes and limitations that it seldom if ever stands in the way of implementing federal policy or vindicating federal rights.”⁷³ I can add that the Court’s decisions, while often sharply divided, have been fairly consistent over decades; and even Justice Souter,

68. *Seminole Tribe*, 517 U.S. at 113 (Souter, J., dissenting) (“The good sense of [the] early construction of the Amendment as affecting the diversity jurisdiction and no more has the . . . virtue of making sense of this Court’s repeated exercise of appellate jurisdiction in federal-question suits brought against States in their own courts by out-of-staters.”).

69. See 28 U.S.C. § 1257(a) (2006):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

70. David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929 (2008).

71. See *id.* at 952 n.97 (citing his articles and briefs critical of the Court’s decisions).

72. See *id.* at 947–57.

73. *Id.* at 956 (citing Jeffries, *supra* note 24, and Jesse H. Choper & John C. Yoo, *Who’s Afraid of the Eleventh Amendment? The Limited Impact of the Court’s Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213 (2006)).

a fierce critic of the Court's decisions during his service, was not prepared to overrule *Hans*.⁷⁴

I agree that the case on overruling is at least somewhat close, although not everyone sees it that way.⁷⁵ For me, several factors would probably lead me to vote to overrule. First, there is the strength of the historical case made by the proponents of the diversity explanation. Second, as this essay has described, the coherence and workability of the diversity approach would be a vast improvement over the mare's nest of current atextual doctrine; and beyond general coherence and workability, there would be the possibly significant specific consequences that my thinking for this essay has led me to identify.⁷⁶ Finally, the very point of limited mischief that for putative Justice Shapiro counted against overruling has the flip side that the likely effects of overruling should not be cause for alarm.⁷⁷

Many years ago a fortune cookie at the end of a Chinese meal gave me a message of a marvelous profundity rarely found in such tidbits: "No one is exempt from talking nonsense; the misfortune is to do it solemnly."⁷⁸ I have found more than one aspect of the Federal Courts course to which I thought that saying might apply. But I have invoked it more regularly with respect to the Supreme Court's Eleventh Amendment law and its jurisprudence of state sovereign immunity than for any other area of the course. Were the Court to adopt the diversity explanation of the Eleventh Amendment, I could retire that fortune—at least for this aspect of the course. I hope that at some point in the time that remains to this senior academic, I may be able to do so.

74. *Seminole Tribe v. Florida*, 517 U.S. 44, 130 (1996) (Souter, J., dissenting) ("I would not, as a matter of *stare decisis*, overrule *Hans* today . . .").

75. See Burt Neuborne, *A Comment on Professor David L. Shapiro's The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. SEE ALSO 51, 54 (2008), available at <http://www.texasrev.com/wp-content/uploads/Neuborne-86-TLRSA-51.pdf> ("Unlike Justice Shapiro, I would overrule the whole Eleventh Amendment mess in a New York minute . . .").

76. See *supra* text accompanying notes 59–69.

77. See *supra* note 24 and accompanying text.

78. The saying, for which my cookie acknowledged no source, appears to be from Michel de Montaigne. See W. GURNEY BENHAM, CASSELL'S BOOK OF QUOTATIONS, PROVERBS AND HOUSEHOLD WORDS 727 (rev. ed. 1914).