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Twenty Questions (or the Hardest Course in Law School)

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TWENTY QUESTIONS (OR THE HARDEST COURSE IN LAW SCHOOL)

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Dear Professor Segall:

I have been studying for your Federal Courts examination for the last week. This has been the hardest course I have ever taken in law school or otherwise. No matter how hard I work, and how many sources I consult, I cannot answer the following questions. Please help me.[1]

1) I am going to start with the topics that we spent the most time on in class: The Eleventh Amendment to the United States Constitution and Section 1983. My first question is the most basic. The text of the Eleventh Amendment clearly and unambiguously applies only to lawsuits brought against a state by citizens of other states, and bars all suits against a state by citizens of other states.[2] Why do all nine of the current United States Supreme Court Justices ignore this clear text, especially those who consider themselves textualists like Justices Scalia and Thomas? No Supreme Court Justice advocates reading the Eleventh Amendment as it is written.[3] I thought constitutional text was important! Is text important?

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* Professor of Law, Georgia State University College of Law. I would like to thank Susan Bandes, Barry Freidman, James Pfander, and Tom Rowe for helpful comments. Although the letter in the form presented here is fictional, many of the questions contained in the letter have at one time or another been asked of me by my students.

1. I have followed the tradition of your field by including helpful footnotes, like this one. Also, please pardon the slightly sarcastic tone, but I have been doing nothing for days other than studying federal jurisdiction.

2. "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." U.S. Const. amend. XI (emphasis added).

3. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54, 93, 100 (1996). Conservative Justices apply the Amendment to suits brought by in-state citizens despite the Amendment's clear language that

2) How can a state officer be a state actor for purposes of the Fourteenth Amendment but not be a state actor for purposes of the Eleventh Amendment?[4] I know that law professors, lawyers and judges call this the *Young* fiction. Am I supposed to feel better about it for that reason? If so, please tell me how. Also, how would you like to be Young's grandchildren and have the most famous fiction in the law named after your grandfather?

3) Why is it that a lawsuit demanding that a state pay $100 trillion dollars pursuant to a request for a prospective injunctive decree is not a suit against a state barred by the Eleventh Amendment, but a suit asking a state to pay fifty cents in money damages is a suit against a state barred by the Eleventh Amendment?[5] Please tell me how to determine whether a lawsuit is one against a state. I would rather you not use the word "fiction" in your answer.

4) Why is a state officer not a "person" under Section 1983 when she is sued for money damages in her official capacity in state court, but she is a "person" under Section 1983 when she is sued for injunctive relief in her official capacity in state court?[6] *Isn't she the same person doing exactly the same thing to exactly the same person for exactly the same reasons?* If she is not a person, what is she? Is this somehow a religious question?

5) Why does the Court continue to apply a suit at law and suit in equity distinction in Section 1983 and Eleventh Amendment cases when the clear language of both Section 1983 and the Eleventh

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says it applies only to suits brought by citizens of "other" states. See id. at 72-73. The more moderate Justices would allow suits against a state by non-residents if authorized by Congress even though the Amendment bars "any" such suit. *See id.* at 83-84 (Stevens, J., dissenting); *id.* at 183 (Souter, J., dissenting).

4. *See Ex parte* Young, 209 U.S. 123, 140 (1908).
5. *See* Edelman v. Jordan, 415 U.S. 651, 664-67, 677 (1974).
6. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 & n.10 (1989).

Amendment treats suits at law and equity in exactly the same manner? I thought text was important! Is text important?

6) Why do Justices Kennedy and Rehnquist hate *Ex parte Young* so much?[7] Is it possible they want to allow the states to violate federal law without giving injured parties any redress at all, even injunctive relief? Do they live in this century?

7) The Court has said that the "very purpose" of Section 1983 was to "interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"[8] That being the case, how could the Court hold that Congress did not intend to take away the states' sovereign immunity when it passed Section 1983?[9] What was Congress trying to do when it passed Section 1983 if it was not subjecting people acting under color of state law to suits in federal court for the violation of federal rights? Was Congress just playing a practical joke on people injured by those acting under color of state law?

8) Is it possible that the Court's treatment of the Eleventh Amendment and Section 1983 can best be explained as a hostile reaction to the Justices' Federal Courts teachers? If so, is it fair to punish innocent students for this?

9) This is not technically a Federal Courts question, but wouldn't it make sense for law schools to teach the Eleventh Amendment in the basic Constitutional Law course because both involve the

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7. *See* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 272-85 (1997) (two person opinion) (suggesting that the *Young* remedy should be available only on a case-by-case basis).

8. Mitchum v. Foster, 407 U.S. 225, 242 (1972) (quoting *Ex parte* Virginia, 100 U.S. 339, 346 (1879)).

9. *See* Quern v. Jordan, 440 U.S. 332, 341 (1979).

fundamental balance of power between the federal and state governments? I respectfully suggest that it replace the dormant commerce clause, which—for your information—causes many students to avoid Constitutional Law electives.

10) We also spent a lot of class time discussing the law of standing. In *Flast v. Cohen*,[10] the plaintiffs challenged the federal government's decision to provide books and money to parochial schools.[11] The Court held the plaintiffs had standing as federal taxpayers because they had the requisite personal stake in the outcome of the case.[12] In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,[13] the plaintiffs challenged the federal government's decision to give real property to a religious university.[14] The Court held the plaintiffs did not have standing as federal taxpayers because they were bringing a generalized grievance.[15] *Bowen v. Kendrick*[16] explicitly affirms both holdings.[17]

How can the Court allow standing in *Flast* but not in *Valley Forge* when in both cases the federal government gave something valuable to religious organizations and the taxpayer-plaintiffs had identical injuries? I really want to know the answer to this question, but please don't tell me it is because in *Flast* the government gave money, and in *Valley Forge* it gave property, or in *Flast* the ostensible decision maker was the Congress, and in *Valley Forge* it was the Executive Branch. Justice Brennan has already explained why those bizarre

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10. 392 U.S. 83 (1968).
11. *See id.* at 85-86.
12. *See id.* at 105-06.
13. 454 U.S. 464 (1982).
14. *See id.* at 469.
15. *See id.* at 485-87.
16. 487 U.S. 589 (1988).
17. *See id.* at 618-619 (upholding taxpayer standing in case challenging federal disbursements to religious organizations and affirming both *Flast* and *Valley Forge* in ways too unpersuasive and embarrassing to recount).

distinctions relied upon by the majority in *Valley Forge* make no sense.[18] Please provide me some way to reconcile these cases.

11) Speaking of standing, in *Allen v. Wright*,[19] the Court held that parents of children attending public schools did not have standing to challenge the IRS's granting of tax exemptions to private schools that discriminate on the basis of race.[20] But in *Coit v. Green*,[21] the Court granted standing to plaintiffs challenging tax exemptions given to racially discriminatory private schools in Mississippi.[22] In writing the *Allen* opinion, Justice O'Connor tried to distinguish *Green* on the basis that the plaintiffs had proven at trial that the exemptions furthered school segregation, while the plaintiffs made no such showing in *Allen*.[23] How could the plaintiffs have possibly made that showing in *Allen* when their case was dismissed before trial on jurisdictional grounds? Are we allowed to look at the merits when deciding standing questions? If we are not, why does the Court?

12) I am not just having trouble with the constitutional cases we have discussed, but also the statutory interpretation cases. In trying to understand when the Court will imply a private right of action under federal statutes, I came across the following statement from *Thompson v. Thompson*:[24]

> In determining whether to infer a private cause of action from a federal statute, our focal point is Congress' intent in enacting the statute. . . . Our focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting

18. *See Valley Forge*, 454 U.S. at 510-12 (Brennan, J., dissenting).
19. 468 U.S. 737 (1984).
20. *See id.* at 755, 765-66.
21. 404 U.S. 997 (1971).
22. *See* Green v. Connally, 330 F. Supp. 1150, 1164 (D.D.C. 1971).
23. *See Allen*, 468 U.S. at 764-65.
24. 484 U.S. 174 (1988).

> the statute, actually had in mind the creation of a private cause of action.[25]

With all due respect, I dare you to explain this.[26]

13) I have read the opinion ten times, but I still do not understand Justice Souter's concurrence in *Nixon v. United States*.[27] How could he say that the Senate's decision to proceed by way of committee for the impeachment of Judge Nixon presented a political question, but if the Senate had flipped a coin, the case would not present a political question?[28] How does this approach differ from looking at the merits? You said you liked Justice Souter, so why did he write such a crazy opinion?

14) Why would any Federal Courts teacher who is not a sadist assign *Franchise Tax Board v. Construction Laborers Vacation Trust*?[29] I believe the ultimate holding of this case was that a defendant may not remove a suit filed against him in state court by a state agency on the basis that the suit is preempted under a federal law that gives the defendant a private cause of action *even though either the plaintiff or the defendant could have filed an original federal court action that would have arisen under federal law*![30] In fact, on the same day the Court decided *Franchise Tax Board*, the Court upheld jurisdiction in that very situation.[31] What federal values

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25. *Id.* at 179.

26. This statement also confused Justice Scalia. *See id.* at 188 (Scalia, J., dissenting). In particular, Justice Scalia stated he was "at a loss to imagine what congressional intent to create a private right of action might mean, if it does not mean that Congress had in mind the creation of a private right of action." *Id.*

27. 506 U.S. 224, 252 (1993) (Souter, J., concurring).

28. *See id.* at 253.

29. 463 U.S. 1 (1983).

30. *See id.* at 7-12.

31. *See* Shaw v. Delta Airlines, Inc., 463 U.S. 85, 108 (1983).

could this "race to the courthouse" rule possibly serve?[32] Also, why are there virtually no law review articles on *Franchise Tax Board*?

15) Please explain why Congress has not passed a law allowing removal when a defendant pleads a federal defense. This solution seems like it would simplify most "arising under" questions, including those raised by *Franchise Tax Board*. Do you think this is a personal vendetta against Professor Doernberg?[33]

16) In *Verlinden B.V. v. Central Bank of Nigeria*,[34] a foreign citizen filed a breach of contract claim against a foreign country in federal court.[35] There was no diversity and the plaintiff had no federal claims.[36] Nevertheless, the Court held that the case arose under federal law pursuant to a federal statute dealing with suits against foreign countries.[37] I understand there was a question of sovereign immunity in the case, but the Court did not require that such a defense actually be raised, just that *it might be raised*.[38] Why would the possibility that a defendant might raise a federal defense be enough to justify "arising under" jurisdiction when the plaintiff's claims are non-federal? What if the defendant can not raise the defense of sovereign immunity because, under the facts, such a pleading would violate Rule 11?[39] Please do not use the phrase

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32. I guess I should have known I was in trouble when Justice Brennan began his opinion in *Franchise Tax Board* by stating that the holding had more to do with "history than logic." *Franchise Tax Bd.*, 463 U.S. at 4. Is history more important than logic?

33. *See generally* Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J., 597, 661 (1987) (proposing a jurisdictional statute that "ensure[s] that federal issues are adjudicated in the federal courts," regardless of the party that introduces the federal question or where in "the case the issue is technically located").

34. 461 U.S. 480 (1983).

35. *See id.* at 483-84.

36. *See id.* at 485.

37. *See id.* at 497.

38. *See id.* at 494 n.20.

39. FED. R. CIV. P. 11.

"protective jurisdiction" in your answer because the Court has never adopted it.[40]

17) What law gave the plaintiff a federal cause of action in *Ex parte Young*? In answering this, please remember the Court did not once mention Section 1983. This is not, by the way, an Eleventh Amendment or Section 1983 question.

18) Why did we spend an entire class on the question of congressional power to strip the federal courts of all jurisdiction over controversial issues like busing and prayer in school when Congress has never passed such a statute? Why is this even a question (assuming no other constitutional provision is violated) given that the unambiguous text of Article III of the United States Constitution gives Congress the power to create "such inferior courts as the Congress may, from time to time, ordain and establish," and to shape the appellate jurisdiction of the Supreme Court "with such exceptions, and under such regulations, as the Congress shall make."[41] I thought text was important. Is text important?

19) Why are there ten thousand law review articles (and a number of symposia) on the issue in question 18 when the Congress has never passed such a statute? Should not some of these Federal Courts professors be trying to work on an effective method of teaching *Franchise Tax Board* instead?

20) I want to end with the first, and what you said was the most important, case we discussed: *Marbury v. Madison*.[42] Thirty minutes into the discussion, I was already lost. I did not understand why Chief Justice John Marshall thought Congress conferred jurisdiction on the

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40. *See* Mesa v. California, 489 U.S. 121, 137 (1989) (noting that in the past, the Court has not found a need to adopt "protective jurisdiction" to support "arising under" jurisdiction under Article III).

41. U.S. CONST. art. III, §§ 1-2.

42. 5 U.S. (1 Cranch) 137 (1803).

Supreme Court to hear Marbury's case (thereby allowing him to address whether the Court should give effect to a statute that is inconsistent with the Constitution).[43]

To find that Congress intended jurisdiction, Justice Marshall relied on Section 13 of the original Judiciary Act.[44] This law, however, said the following in relevant part: "The Supreme Court . . . shall have power to issue . . . writs of *mandamus*, *in cases warranted by the principles and usages of law*, to any courts appointed, or persons holding office, under the authority of the United States."[45] There is nothing jurisdictional about this language, which simply allows the Court to issue a writ of mandamus in appropriate cases (those "warranted by the principles and usages of law").[46] The text of the statute does not even remotely justify Justice Marshall's reading that Congress intended to give the Court original jurisdiction over all cases involving writs of mandamus. He just made it up. I thought the plain text of statutes is important. Is text important?

Thank you very much for your assistance in answering these questions.

Your Very Frustrated Student,

Pleading N. Contendere

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43. *See id.* at 148-49.
44. *See id.* at 148.
45. *Id.* (quoting Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81 (1789)) (emphasis added).
46. *Id.*