

CASES, CONTROVERSIES, AND THE TEXTUALIST  
COMMITMENT TO GIVING EVERY WORD OF THE  
CONSTITUTION MEANING

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ABSTRACT .....	180
I. THE INTRATEXTUAL ANALYSIS .....	182
A. <i>Professor Amar’s Two-Tiered Theory</i> .....	182
B. <i>Scholars Have Not Adequately Distinguished Between         “Cases” and “Controversies”</i> .....	184
C. <i>The Intratextual Analysis</i> .....	187
II. APPLYING THE DEFINITIONS OF “CASES” AND “CONTROVERSIES” .....	192
A. <i>Mandatory-Tier Disputes Comprise the Entirety of the         Supreme Court’s Jurisdiction</i> .....	192
B. <i>Distributing Disputes Between the Original and Appellate         Jurisdictions (Informed by the Intratextual Analysis)</i> .....	194
III. A CRITICISM OF PROFESSOR AMAR’S THEORY OF SUPREME COURT ORIGINAL JURISDICTION .....	197
IV. SHOULD PROFESSOR AMAR’S THEORY BE ACCEPTED OR REJECTED? .....	206

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## ABSTRACT

*Textualists contend that every word of the Constitution must be given meaning and that none should be read as surplusage. But no one takes that rule seriously when it comes to Article III as no scholar has put forward a satisfactory interpretation of Article III that distinguishes between the terms “cases” and “controversies.” This Note begins by exploring and criticizing the current theories for distinguishing between “cases” and “controversies.” Concluding that none is satisfactory, it undertakes an intratextual analysis of “cases” and “controversies” in Article III, and puts forward novel definitions of the terms. This Note reveals for the first time that the terms’ definitions overlap. The importance of these terms becomes clear once their definitions are extrapolated into a novel theory of Supreme Court jurisdiction one that undermines Professor Akhil Reed Amar’s vision of the Original Jurisdiction Clause. It also points out a rare discovery an instance of Professor Amar, the normally careful textualist, misquoting the Constitution when discussing these terms. Rather than overlook Professor Amar’s misquotation, which in other circumstances might be viewed as a meaningless scrivener’s error, this Note shows it to be a prime illustration of how Professor Amar and other commentators fail to give a separate meaning to both “cases” and “controversies.” The Note then goes on to explain how a proper understanding of the terms “cases” and “controversies” clarifies the distinction between “mandatory-tier” and “discretionary-tier” disputes that Professor Amar famously put forward. It concludes that this analysis compels rejection either of Professor Amar’s view of the Supreme Court’s jurisdiction or of the textualist rule that each word of the Constitution is to be given meaning.*

In arguing for his two-tiered theory of federal jurisdiction,<sup>1</sup> Professor Akhil Reed Amar writes that “each word of the Constitution is to be given meaning; no words are to be ignored

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1. See generally, Akhil Reed Amar, *Taking Article III Seriously: A Reply to Professor Friedman*, 85 NW. U. L. REV. 442 (1991) [hereinafter *Reply to Friedman*]; Akhil Reed Amar, *Reports of My Death are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651 (1990) [hereinafter *Reply*]; Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990) [hereinafter *Judiciary Act*]; Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) [hereinafter *Two Tiers*].

as mere surplusage.”<sup>2</sup> He and the vast majority of constitutional scholars fail, however, to distinguish between the terms “cases” and “controversies”<sup>3</sup> in Article III<sup>4</sup> and thereby fail to give each word of the Constitution meaning. According to Professor Amar’s two-tiered theory, Congress may remove “discretionary-tier” disputes from the jurisdiction of the federal courts, but it may not remove “mandatory-tier” disputes.<sup>5</sup> Using Professor Amar’s intratextualist interpretive techniques, and staying within his two-tiered theory, this Note puts forward a new interpretation of the terms “cases” and “controversies” and explains how the current imprecise interpretation of those two terms causes even careful textualists like Professor Amar to misunderstand and even misquote the Original and Appellate Jurisdiction Clauses.

Part I is an intratextual analysis<sup>6</sup> of the terms “cases” and “controversies” in Article III.<sup>7</sup> That analysis gives rise to definitions of the terms “cases” and “controversies” that are specific to Article III.<sup>8</sup> Applying those definitions to the Original and Appellate Jurisdiction Clauses, Part II shows that, contrary to received wisdom, Amar’s mandatory-tier disputes comprise the entirety of the Supreme Court’s jurisdiction.<sup>9</sup> In Part III this intratextual analysis reveals a criticism of Amar’s theory<sup>10</sup> that the Supreme Court’s original jurisdiction is

2. *Two Tiers*, *supra* note 1, at 242 (citing *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 334 (1816) (“It is hardly to be presumed that the variation in the language could have been accidental.”); *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.”)).

3. There are two dominant but unsatisfactory theories distinguishing “cases” from “controversies,” but scholars do not adhere to either theory rigorously. Instead, “cases” and “controversies” are often used interchangeably. *See infra* notes 29–30 and accompanying text.

4. U.S. CONST. art. III.

5. *See Two Tiers*, *supra* note 1, at 208–10:

In the first tier, comprising federal question, admiralty, and public ambassador cases, federal jurisdiction is mandatory: the power to hear all such cases must be vested in the federal judiciary as a whole. In the second tier, comprising categories of cases less critical per se to smooth national government, federal jurisdiction is discretionary with Congress.

6. For a thorough discussion of intratextualism, see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) [hereinafter *Intratextualism*].

7. U.S. CONST. art. III.

8. *See infra* notes 14–69 and accompanying text.

9. *See infra* notes 70–90 and accompanying text.

10. *See infra* notes 91–125 and accompanying text.

comprised partly of discretionary-tier lawsuits.<sup>11</sup> More importantly, it explores the extent to which he—like most other scholars—does not distinguish between “cases” and “controversies.”<sup>12</sup> Part IV concludes by considering the practical effects this argument might have both on theories of Supreme Court jurisdiction and constitutional interpretation.<sup>13</sup>

## I. THE INTRATEXTUAL ANALYSIS

This Part briefly explains the conceptual tools used in later sections, namely, Professor Amar’s two-tiered theory<sup>14</sup> and his intratextualist<sup>15</sup> interpretive techniques. Second, it performs an intratextualist analysis of the terms “cases” and “controversies” in Article III.<sup>16</sup> Finally, it explains how this analysis proves that some “cases” are also “controversies” and vice versa.

### A. Professor Amar’s Two-Tiered Theory

Professor Amar argues that there are two tiers of federal jurisdiction—mandatory and discretionary.<sup>17</sup> Article III<sup>18</sup> defines the federal judicial power.<sup>19</sup> It distributes that defined jurisdiction among nine legal dispute categories. These categories appear in Article III, Section Two, which reads as follows:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting

11. See Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 444 (“Congress does have authority . . . to reduce or even to eliminate the Supreme Court’s original jurisdiction over lawsuits ‘in which a State shall be Party.’”) [hereinafter *Section 13*].

12. See *supra* notes 126–42 and accompanying text.

13. See *supra* notes 143–48 and accompanying text.

14. See sources cited *supra* note 1.

15. See sources cited *supra* note 6.

16. U.S. CONST. art. III.

17. See *Two Tiers*, *supra* note 1, at 208–10:

In the first tier, comprising federal question, admiralty, and public ambassador cases, federal jurisdiction is mandatory: the power to hear such cases must be vested in the federal judiciary as a whole. In the second tier, comprising categories of cases less critical per se to smooth national government, federal jurisdiction is discretionary with Congress.

18. U.S. CONST. art. III.

19. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 1 (5th ed. 2007) (“Article III of the United States Constitution creates the federal judiciary and defines its powers.”).

Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.<sup>20</sup>

The first three categories, which are referred to as “cases” and are preceded by “all,” are (1) federal question “cases,” (2) ambassador “cases,” and (3) admiralty “cases.”<sup>21</sup> The last six categories, which are called “controversies” and are not preceded by “all,” are “controversies” (4) to which the United States shall be a party, (5) between two or more states, (6) between a state and citizens of another state, (7) between citizens of different states, (8) between citizens of the same state claiming lands under grants of different states, and (9) between a state, or the citizens thereof, and foreign states, citizens or subjects.<sup>22</sup>

While a wide variety of other evidence supports Professor Amar’s theory,<sup>23</sup> the key to the theory is a textual argument based upon the Framers’ use of the word “all” to modify only the first three categories.<sup>24</sup> The Framers repeated “all” before each of the first three categories but not before any of the last six.<sup>25</sup>

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20. U.S. CONST. art. III, § 2, cl. 1.

21. *Id.*

22. *Id.*

23. See *Two Tiers*, *supra* note 1, at 210 (“Section III [of this Article] demonstrates the basic consistency of this two-tier neo-Federalist model with the provisions of the Judiciary Act of 1789 and every subsequent jurisdictional regime.”).

24. See *id.* at 240 (arguing that the Framers’ selective use of the word “all” implies that “although the judicial power must extend to all cases in the first three categories, it may, but need not, extend to all cases in the last six”).

25. U.S. CONST. art. III, § 2, cl. 1:

The judicial Power shall extend to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to *all* Cases affecting Ambassadors, other public Ministers and Consuls;—to *all* Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

(emphasis added).

Professor Amar therefore concludes that federal jurisdiction over the first three is mandatory (because the Constitution says jurisdiction shall extend to “all cases”) but it is discretionary over the last six.<sup>26</sup> By “discretionary,” Professor Amar means that Congress is free to remove such disputes from federal jurisdiction, something it cannot do with respect to the mandatory-tier disputes.<sup>27</sup> To understand the rest of this Note it will be essential to remember that the first three categories of jurisdiction that Article III calls “cases” are mandatory-tier disputes, while the last six categories, which are referred to as “controversies,” are discretionary-tier disputes.<sup>28</sup>

B. *Scholars Have Not Adequately Distinguished Between “Cases” and “Controversies”*

Despite the textualist commitment to the idea that “each word of the Constitution is to be given meaning,”<sup>29</sup> constitutional scholars generally do not distinguish between “cases” and

26. See *Two Tiers*, *supra* note 1, at 208–10:

In the first tier, comprising federal question, admiralty, and public ambassador cases, federal jurisdiction is mandatory: the power to hear all such cases must be vested in the federal judiciary as a whole. In the second tier, comprising categories of cases less critical per se to smooth national government, federal jurisdiction is discretionary with Congress.

27. *Id.* at 229–30:

[T]he judicial power of the United States must, as an absolute minimum, comprehend the subject matter jurisdiction to decide finally all cases involving federal questions, admiralty, or public ambassadors . . . . [T]he judicial power may—but need not—extend to cases in the six other, party-defined, jurisdictional categories. The power to decide which of these party-defined cases shall be heard in Article III courts is given to Congress by virtue of its powers to create and regulate the jurisdiction of lower federal courts, to make exceptions to the Supreme Court’s appellate jurisdiction, and to enact all laws necessary and proper for putting the judicial power into effect . . . . Congress’s exceptions power also includes the power to shift final resolution of any cases within the Supreme Court’s appellate jurisdiction to any other Article III court that Congress may create. The corollary of this power is that if Congress chooses to make exceptions to the Supreme Court’s appellate jurisdiction in admiralty or federal question cases, it must create an inferior federal court with jurisdiction to hear such excepted cases at trial or on appeal . . . .

28. *Id.* at 244 n.128 (arguing that the distinction between “cases” and “controversies” has no substantive meaning beyond drawing an even clearer line between the mandatory and discretionary tiers of federal jurisdiction).

29. *Id.* at 242 (citing *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 334 (1816) (“It is hardly to be presumed that the variation in the language could have been accidental.”); *cf.* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.”)).

“controversies” in the Constitution.<sup>30</sup> If any distinction is made, it is typically in line with one of the following two interpretations, neither of which is satisfactory. The first interpretation, a minority position, is based on the assumption that “controversies” are a particular subgroup of “cases.”<sup>31</sup> This view bases the distinction between “cases” and “controversies” on whether the dispute is civil or criminal.<sup>32</sup> It argues that “controversies” must refer only to civil disputes because many disputes in the six categories called “controversies” deal with states as parties, and common law tradition held that the courts of one sovereign could not enforce the criminal laws of another sovereign.<sup>33</sup> This approach defines the subject-matter-based “cases,” on the other hand, as broadly as possible to encompass both civil and criminal disputes.<sup>34</sup> It is subject to two objections. First, why use such a roundabout way of expressing that seemingly simple concept?<sup>35</sup> If the Framers *really* meant “civil and criminal disputes” where they said “cases,” and they meant “only civil disputes” where they said “controversies,” why did they not just say that? Second, if the Framers used these terms rather than simply saying “civil” and “criminal,” then why do they refer to “[t]he Trial of all *Crimes*” a few sentences later?<sup>36</sup>

30. See e.g., CHEMERINSKY, *supra* note 19, at 6 (referring to disputes between a state, or its citizens, and a foreign country or its citizens as “cases” despite the fact that the Constitution refers to them as “controversies.” U.S. CONST. art. III, § 2, cl. 1.); RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 326 (5th ed. 2003) (referring to all of the nine categories of jurisdiction as “cases” despite the fact that six of those are categories of “controversies” not categories of “cases.” U.S. CONST. art. III, § 2, cl. 1.); *Two Tiers*, *supra* note 1, at 240 (failing to distinguish between cases and controversies by contending that “although the judicial power must extend to all cases in the first three categories, it may, but need not, extend to all *cases* in the last six”) (emphasis added).

31. James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 599 (“I contend that the ‘all Cases’ reference in the Original Jurisdiction Clause incorporates not only the ‘controversies’ in which states appear as parties but also the ‘cases’ that the menu describes as such.”).

32. *Id.* at 607 (“Article III . . . distinguishes between ‘cases’ that embrace both civil and criminal proceedings and ‘controversies’ that apply to civil proceedings alone.”).

33. See *id.* (arguing that the Framers defined “controversies” in a more limited way because at common law, courts lacked the power to enforce the criminal laws of another sovereign).

34. *Id.*

35. See *Reply*, *supra* note 1, at 1656–57 (“if the term ‘controversies’ simply means ‘civil cases’ the Framers could have said so with great ease”).

36. U.S. CONST. art. III, § 2, cl. 3 (emphasis added).

The second interpretation resists distinguishing between the two terms at all<sup>37</sup> but, if pressed, bases the distinction on whether the dispute is defined by subject matter or party composition.<sup>38</sup> It says that “controversies” refers to the six categories of federal jurisdiction defined in Article III by their party composition, whereas “cases” refers to the first three categories, each of which is defined by its subject matter. This interpretation also fails. If it were correct, one would expect that each time Article III referred to a party-composition-based dispute, it would utilize the term “controversy.” Yet, the Original Jurisdiction Clause refers to all “cases” “in which a state shall be a party.”<sup>39</sup> The Framers could have written “all controversies in which a State shall be Party” confirming the subject-matter/party-composition argument. But they did not. This objection gains more traction in light of the fact that Article III does mention “controversies to which the United States shall be party,”<sup>40</sup> proving that the Framers *could* have used “controversies” in the Original Jurisdiction Clause, had they so desired. To answer this objection, the proponent of the subject-matter/party-composition view might say that when the Framers wrote of state-party “cases” in the Original Jurisdiction Clause, “cases” referred back to both “cases” and “controversies.”<sup>41</sup> But if that is true, then the textualist commitment to giving every word in the Constitution meaning must be ignored because “controversies”

37. See e.g., FALLON ET AL., *supra* note 30 at 13 (recognizing a “linguistically striking divide” between “cases” and “controversies” but explaining it only later and indirectly on the basis of the distinction between subject-matter and party-composition based jurisdiction); *Two Tiers*, *supra* note 1, at 244 n.128 (noting but discounting an interpretation that tracks the civil/criminal distinction).

38. See FALLON ET AL., *supra* note 30 at 14–17 (basing the difference between those things referred to in Article III as “cases” and those things referred to as “controversies” on whether the basis of jurisdiction is subject matter or party composition). Note that Professor Pfander also recognizes a distinction based on subject matter versus party composition. See Pfander, *supra* note 31, at 605.

39. U.S. CONST. art. III, § 2, cl. 2.

40. *Id.* cl. 1.

41. This is in fact what most scholars think. To take just one example, consider Professor Amar’s statement that “‘those cases in which a state shall be party’ must refer to only a subset of the nine categories of cases and controversies spelled out in the menu . . . .” *Section 13*, *supra* note 11, at 489 (misquoting Article III, Section Two, Clause 2). Here, Professor Amar substantively misquotes the Constitution, incorrectly inserting “cases” between “those” and “in.” The quote should read, “those in which a State shall be Party.” U.S. CONST. art. III, § 2, cl. 2. Professor Amar’s misquotation is material to this discussion because it takes the word “cases” in the Original Jurisdiction Clause to refer not only to “cases” but also to “controversies,” failing to differentiate between the two distinct concepts. This passage, and the misquotation of the Constitution that it contains, are considered at length below. See *infra* notes 136–39 and accompanying text.

has no constitutional meaning independent of the term “cases.” Therefore, both of the more generally accepted views of “cases” and “controversies” are unsatisfactory.

Note, also, that Professor Amar advanced a view—in a footnote to his 1985 article—that the Framers here employed two terms where one would suffice not because they meant to imply a substantive difference, but only to underscore their intention to make “cases” mandatory-tier disputes and “controversies” discretionary-tier disputes.<sup>42</sup> Criticism of this view is omitted here because it is considered and refuted at length later in this Note.<sup>43</sup> In sum, though, Professor Amar cannot reconcile the view that “cases” means mandatory-tier lawsuits while “controversies” means discretionary-tier lawsuits with his argument that state-party *cases* mentioned in the Original Jurisdiction Clause are part of the discretionary tier of federal jurisdiction.

### C. *The Intratextual Analysis*

The inconsistent use of the terms “cases” and “controversies” in Article III creates an interpretive riddle for the textualist. The term “cases” is repeated three times in a row in Article III, Section Two, Clause One,<sup>44</sup> followed by mention of six types of disputes referred to as “controversies.”<sup>45</sup> A few sentences later, the Original Jurisdiction Clause reiterates Article III, Section Two, Clause One word for word: “In all cases affecting Ambassadors, other public Ministers and Consuls . . . the Supreme Court shall have original Jurisdiction.”<sup>46</sup> Thus “cases”

42. *Two Tiers*, *supra* note 1, at 244 n.128 (noting but discounting an interpretation that tracks the civil/criminal distinction and arguing instead that “cases” and “controversies” were only meant to reiterate the distinction between the mandatory and permissive tiers of federal jurisdiction).

43. *See infra* notes 102–05, 131–32 and accompanying text.

44. *See* U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; . . .”).

45. *See id.*

The judicial Power shall extend to . . . Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

46. *Id.* cl. 2.

is first repeated three times; then “controversies” refers to six types of disputes in a row; and then, confusingly, the Framers switch back to “cases” in the Original and Appellate Jurisdiction Clauses<sup>47</sup>—even repeating an earlier use of the term “cases” word for word.<sup>48</sup> Thus a puzzle arises: why did the Framers use two terms to describe legal disputes in Article III? Why did they switch back and forth? The two most common explanations or interpretations were discussed above but neither was found satisfactory. An intratextual analysis of the terms “cases” and “controversies” in Article III provides a more viable solution to this constitutional puzzle.

“Intratextualists read a word or phrase in a given clause by self-consciously comparing and contrasting it to identical or similar words or phrases elsewhere in the Constitution.”<sup>49</sup> The assumption is that the same term should be interpreted the same way within the same document. Thus, a preliminary question vexes the interpreter: if the term “cases” is to be given a consistent meaning throughout Article III, to start the project requires some sort of initial definition. Obviously, one might simply turn to the dictionary to define words. However, as *McCulloch v. Maryland*<sup>50</sup> shows, constitutional context is often more helpful than the dictionary in understanding a word’s constitutional meaning.<sup>51</sup> Professor Amar provides the key to unlocking this preliminary puzzle in his article on intratextualism<sup>52</sup> where he describes the intratextualist technique of using the Constitution itself as a dictionary for deriving the meaning of repeated words or phrases in the

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47. *See id.*

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

48. *Compare id.* cl. 1 (“The judicial Power shall extend to all Cases, . . . affecting Ambassadors, other public Ministers and Consuls”) with *id.* cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls”).

49. *Intratextualism*, *supra* note 6, at 748.

50. 17 U.S. (4 Wheat) 316 (1819).

51. *See Intratextualism*, *supra* note 6, at 756–57 (noting that in *McCulloch*, 17 U.S. (4 Wheat) 316, Chief Justice Marshall used the Constitution as “a kind of dictionary” to show “that ‘necessary’ can often mean useful”).

52. *Intratextualism*, *supra* note 6.

Constitution.<sup>53</sup> Professor Amar’s technique can be applied to “cases” and “controversies” in Article III. First, the term “cases” as used in Article III refers to federal question, admiralty and maritime, and ambassador disputes.<sup>54</sup> When providing for the final six categories of federal jurisdiction, the Framers refer to them as “controversies”—not “cases.”<sup>55</sup> Thus, using the Constitution as a dictionary, the definition of “cases,” for Article III purposes, is federal question, admiralty, or ambassador disputes.

This definition is confirmed two ways. First, after the Framers listed these subject-matter-based disputes, they listed the party-based disputes and called them “controversies.”<sup>56</sup> From this one can gather that those things referred to as “cases” are not coincidentally called “cases,” but are “cases” *as distinguished from* “controversies.”

Second, comparing the wording of Article III, Section Two, Clause One to that of the Original Jurisdiction Clause shows that the Framers’ use of two different terms was most likely intentional. Article III, Section Two, Clause One says:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to *all Cases affecting Ambassadors, other public Ministers and Consuls*;—to all cases of admiralty and maritime Jurisdiction . . . .<sup>57</sup>

Compare that to the Original Jurisdiction Clause, which says: “In all *Cases affecting Ambassadors, other public Ministers and Consuls*

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53. *Id.* at 756–57 (noting that in *McCulloch*, 17 U.S. (4 Wheat.) 316, Chief Justice Marshall used the Constitution as “a kind of dictionary” to show “that ‘necessary’ can often mean useful”).

54. See U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extended to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; . . .”).

55. See *id.*

The judicial Power shall extend to . . . Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

56. *Id.*

57. U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

and those in which a State shall be Party the Supreme Court shall have original jurisdiction.”<sup>58</sup> Several lines of text separate these *in haec verba* passages.<sup>59</sup> Between them, the Framers refer to six categories of legal disputes in a row as “controversies” without mentioning the term “cases” once.<sup>60</sup> This precise repetition makes coincidence unlikely. Unless one concludes that the Framers were being careless with words, there is substantive difference between “cases” and “controversies” in Article III.

Having defined “cases,” defining “controversies” is now less vexing because, following the intratextualist technique, the constitutional dictionary supplies the definition. “Controversies” are, according to Article III, the six party-defined disputes. They are: controversies (1) to which the United States shall be a party, (2) between two or more states, (3) between a state and citizens of another state, (4) between citizens of different states, (5) between citizens of the same state claiming lands under grants of different states, and (6) between a state, or the citizens thereof, and foreign states, citizens, or subjects.<sup>61</sup>

Contrary to common scholarly interpretation, careful reading reveals a certain degree of overlap between the otherwise distinct definitions of “cases” and “controversies.” Some disputes that qualify as “controversies” fall under the mandatory tier because they involve federal questions, admiralty issues, or ambassadors.<sup>62</sup> Thus, some “cases” are also “controversies” and vice versa. This means that scholars who discuss Professor Amar’s two-tiered theory, and Professor Amar himself, are incorrect to call all disputes that fall under one of the six controversy categories “discretionary.”<sup>63</sup> In fact, many “controversies” are also “cases” and therefore fall within the mandatory tier.

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58. *Id.* cl. 2 (emphasis added).

59. *Id.*

60. *Id.* cl. 1.

61. *Id.*

62. *Intratextualism*, *supra* note 6, at 762 (arguing that the mandatory tier is made up of cases upon which “Congress must allow federal courts to pronounce the last word [:] . . . federal question, admiralty, and ambassador-related cases”).

63. *See e.g., id.* (arguing that the discretionary tier consists of “all diversity and other party-based lawsuits”).

Thus, the Constitution recognizes three types of dispute: 1) “cases,” 2) “controversies,” and 3) “controversies” that are also “cases.” An illustration of each is in order. An example of a pure case is a federal question case between citizens of the same state. It is a case because of the federal question.<sup>64</sup> It does not qualify as a controversy because it does not fit into one of the six party-defined controversy categories.<sup>65</sup> An example of a pure controversy is a contract dispute between two states. It is a controversy because it fits within the controversy category of “Controversies between two or more States.”<sup>66</sup> It does not contain a federal question or an admiralty element, nor does it affect an ambassador or other public minister or consul. Thus, it is not a case.<sup>67</sup> Finally, a federal question dispute between two states exemplifies a controversy that is also a case. It is a case because of the federal question,<sup>68</sup> but it is also a controversy because of its party composition—a dispute between two states is a controversy.<sup>69</sup>

To summarize, “cases” refers to a subset of the legal disputes to which the judicial power of the United States extends, namely, federal question, admiralty, and ambassador disputes. “Controversies” refers to other categories of disputes, namely, those (1) to which the United States shall be a party, (2) between two or more states, (3) between a state and citizens of another state, (4) between citizens of different states, (5) between citizens of the same state claiming lands under grants of different states, and (6) between a state, or the citizens thereof, and foreign states, citizens, or subjects. The content of

64. See U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .”).

65. See *id.*

The judicial Power shall extend to . . . Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

66. See *id.* (“The judicial Power shall extend to . . . Controversies between two or more States; . . .”).

67. See *supra* notes 48–52 and accompanying text.

68. See U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .”).

69. See *id.* cl. 1 (“The judicial Power shall extend to . . . Controversies between two or more States . . .”).

the two subsets overlaps and this overlap reveals a more precise conceptualization of the disputes to which the federal jurisdiction applies. There are pure “cases,” pure “controversies,” and “cases” that are also “controversies.”

## II. APPLYING THE DEFINITIONS OF “CASES” AND “CONTROVERSIES”

Applying these definitions to the clauses governing the Supreme Court’s jurisdiction further illuminates the importance of distinguishing between “cases” and “controversies.” The argument proceeds in two steps. The first step establishes that, based on the definitions of the terms “cases” and “controversies” argued for above, mandatory-tier disputes comprise the entirety of the Supreme Court’s original and appellate jurisdictions. The second step explains which mandatory-tier disputes the Framers distributed to the Court’s original jurisdiction and which they distributed to its appellate jurisdiction. Once these two steps are complete, a new vision of the Supreme Court’s jurisdiction emerges.

### *A. Mandatory-Tier Disputes Comprise the Entirety of the Supreme Court’s Jurisdiction.*

First, it is necessary to establish that mandatory-tier disputes comprise the entirety of the Supreme Court’s jurisdiction. This can be proven as follows: (1) the Original and Appellate Jurisdiction Clauses refer only to “cases.”<sup>70</sup> (2) Every dispute that is a “case” is a mandatory-tier dispute.<sup>71</sup> (3) Therefore, all disputes referred to in the Original and Appellate Jurisdiction Clauses are mandatory-tier disputes.

The Original and Appellate Jurisdiction Clauses refer only to “cases.” The Original Jurisdiction Clause says: “In all Cases affecting Ambassadors, other public Ministers and Consuls, and

70. See U.S. CONST. art. III, § 2, cl. 2:

In all *Cases* affecting Ambassadors, other public Ministers and Consuls, and *those* in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other *Cases* before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”

(emphasis added).

71. See *Two Tiers*, *supra* note 1, at 244 n.128 (arguing that the distinction between “cases” and “controversies” has no substantive meaning beyond drawing an even clearer line between the mandatory and discretionary tiers of federal jurisdiction); *id.* at 208–10 (arguing that everything Article III refers to with the term “cases”—federal question, ambassador, and admiralty “cases”—is part of the mandatory tier of federal jurisdiction).

those in which a State shall be Party, the supreme Court shall have original Jurisdiction.”<sup>72</sup> When referring to state-party disputes the Original Jurisdiction Clause does not say the word “cases” explicitly and instead says “*those* in which a State shall be Party.”<sup>73</sup> Does “those” necessarily mean “all cases”? “Those” is a pronoun, but what is its antecedent in the Original Jurisdiction Clause? There are only two choices: “cases” and “ambassadors.”<sup>74</sup> It is irrational in English to speak of “ambassadors in which a State shall be Party,” but it makes perfect sense to say “cases in which a State shall be Party.” Furthermore, in the very next sentence, the Constitution provides that “[i]n all the other cases before mentioned . . . .”<sup>75</sup> The reference to “other cases” would not make sense if “those” referred to “controversies” rather than “cases.” If the state-party disputes referred to in the Original Jurisdiction Clause were “controversies,” then the phrase “in all the other cases before mentioned”<sup>76</sup> in the next sentence would be less clear because readers would not know what to do with the other “*controversies*” before mentioned. Thus, the word “those” refers to “cases,” of which the Original Jurisdiction Clause lists two types: ambassador cases and cases in which a state shall be party.

The Appellate Jurisdiction Clause also only mentions “cases.” It says: “In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”<sup>77</sup> Therefore, “cases” comprise the entirety of the Supreme Court’s jurisdiction—original and appellate. Notice, though, that some of those “cases” will also be “controversies.”<sup>78</sup> However, every dispute in the Supreme Court’s jurisdiction—regardless of whether it is also a controversy—is a mandatory-tier dispute by virtue of being a case. This is simple to prove. All “cases” are mandatory-tier

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72. U.S. CONST. art. III, § 2, cl. 2.

73. *Id.* (emphasis added).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. See *supra* notes 56–63 and accompanying text.

disputes; this is Professor Amar's thesis.<sup>79</sup> Therefore, all "cases" that are also "controversies" are mandatory-tier disputes.

B. *Distributing Disputes Between the Original and Appellate Jurisdictions (Informed by the Intratextual Analysis).*

Next, it is necessary to explain which mandatory-tier cases belong in the Supreme Court's original jurisdiction and which belong in its appellate jurisdiction. The Constitution divides the Supreme Court's jurisdiction into only two parts—the Court's original jurisdiction and its appellate jurisdiction.<sup>80</sup> Thus, if a case is part of the Court's jurisdiction, it is either in the Court's original or appellate jurisdiction. The Original Jurisdiction Clause refers to two categories of cases: ambassador cases and state-party cases. The Appellate Jurisdiction Clause then says, "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . . ." Thus, some cases belong in the Court's original jurisdiction, and the remainder belongs in its appellate jurisdiction. Recall the definition of the term "cases"—legal disputes involving a federal question, an admiralty issue, or an ambassador, other public minister, or consul.<sup>81</sup> With an eye on that definition, reread the Original Jurisdiction Clause, plugging in that definition every time the word "cases" appears. The Clause itself singles out ambassador cases without reference to party.<sup>82</sup> Thus, state-party and non-state-party ambassador cases belong in the Supreme Court's original jurisdiction. To be clear, the term "cases," again, refers not only to ambassador disputes but also to federal question and admiralty disputes. However, by singling out ambassador cases, the Framers signal the exclusion of the other two types. Thus, "all Cases affecting Ambassadors, other public Ministers and Consuls" means all ambassador cases regardless of their party composition.

"[T]hose in which a State shall be Party,"<sup>83</sup> imposes no restriction on subject matter beyond that implied by the term

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79. See *Two Tiers*, *supra* note 1, at 208–10 (arguing that everything Article III refers to with the term "cases"—federal question, ambassador, and admiralty "cases"—is part of the mandatory tier of federal jurisdiction).

80. U.S. CONST. art. III, § 2, cl. 2.

81. See *supra* notes 48–52 and accompanying text.

82. U.S. CONST. art. III, § 2, cl. 2.

83. *Id.*

“cases” (the antecedent of “those”).<sup>84</sup> In other words, it does not single out ambassador, federal question, or admiralty subject matters. Instead, by using the term “cases,” it implies a reference to all three subject matters. However, while “those in which a State shall be Party” implies no subject matter restriction, it does imply a party restriction in that there must be a state party. Thus, “those in which a State shall be Party,” rightly understood, must mean “cases” in which a state shall be a party: federal question disputes with a state party, admiralty disputes with a state party, and ambassador disputes with a state party.<sup>85</sup>

The Appellate Jurisdiction Clause says: “In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . . .”<sup>86</sup> The question is, then: what are all the *other* cases before mentioned? Because the Original Jurisdiction Clause mentioned *some* “cases,”<sup>87</sup> it stands to reason that “all the other cases before mentioned” means all of the “cases” mentioned in Article III *except* those mentioned in the Original Jurisdiction Clause. Article III mentions three types of disputes that are “cases”—federal question, admiralty, and ambassador disputes.<sup>88</sup> From that set of disputes, subtracting those that comprise the Court’s original jurisdiction leaves precisely those “cases” that belong in the Court’s appellate jurisdiction.

Subtracting the disputes mentioned in the Original Jurisdiction Clause from the larger set of disputes that comprise the term “cases” in Article III as a whole, reveals that the Court’s appellate jurisdiction is comprised only of non-state-party admiralty and non-state-party federal question “cases.” Recall that the Court’s original jurisdiction is comprised of all ambassador “cases” and all cases “in which a State shall be Party.”<sup>89</sup> Removing ambassador “cases” from the group of disputes that comprise the term “cases” (federal question, ambassador, and admiralty disputes) leaves only federal question and admiralty disputes. Finally, removing the state-party “cases”—that is state-party federal question disputes, state-party

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84. See *supra* notes 73–76 and accompanying text.

85. See *supra* notes 54–60 and accompanying text.

86. U.S. CONST. art. III, § 2, cl. 2.

87. See *id.* (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party”).

88. *Id.* cl. 1.

89. See *supra* notes 81–85 and accompanying text.

ambassador disputes (these were already removed by the mention of all ambassador cases), and state-party admiralty disputes—leaves only non-state-party federal question and non-state-party admiralty cases in the Court’s appellate jurisdiction.<sup>90</sup> The chart below provides a visual illustration of this distribution.

Article III “Cases”:	1	2	3	4	5	6
	Federal question disputes with a state party	Admiralty disputes with a state party	Ambassador disputes with a state party	Federal question disputes without a state party	Admiralty disputes without a state party	Ambassador disputes without a state party
Supreme Court’s Original Jurisdiction: “In all cases affecting ambassadors . . . And those in which a State shall be Party . . . .”	X	X	X			X
Supreme Court’s Appellate Jurisdiction: “In all the other Cases before mentioned . . . .”				X	X	

90. Here is a complete list of all “cases” discussed in Article III: (1) federal question cases with a state party, (2) federal question cases without a state party, (3) ambassador cases with a state party, (4) ambassador cases without a state party, (5) admiralty cases with a state party, and (6) admiralty cases without a state party. U.S. CONST. art. III, § 2, cl. 1. To determine which “cases” comprise the Court’s appellate jurisdiction, remove from that list those that comprise the Court’s original jurisdiction: all ambassador cases (with a state party and without a state party—numbers three and four in the list above) and (2) all cases with a state party (federal question cases with a state party, ambassador cases with a state party, and admiralty cases with a state party—numbers one, three, and five in the list above). *See id.* cl. 2 (“In all the *other* Cases before mentioned, the supreme Court shall have appellate Jurisdiction”) (emphasis added). What remains are the cases that comprise the Court’s appellate jurisdiction: (1) admiralty cases without a state party and (2) federal question cases without a state party—numbers two and six from the list above. Thus, the Original Jurisdiction Clause deals with numbers one, three, and five, and the appellate jurisdiction (made up of “all the other Cases before mentioned”) is comprised of the remainder—numbers two and six.

### III. A CRITICISM OF PROFESSOR AMAR'S THEORY OF SUPREME COURT ORIGINAL JURISDICTION

This new theory of Supreme Court jurisdiction undermines Professor Amar's interpretation of the Original Jurisdiction Clause<sup>91</sup> and reveals why it is important to take the difference between "cases" and "controversies" seriously. Professor Amar, who acknowledges no substantive difference between "cases" and "controversies" for Article III purposes,<sup>92</sup> concludes that part of the Supreme Court's jurisdiction is discretionary—the part comprised of "cases" "in which a State shall be Party."<sup>93</sup> However, that conclusion is incorrect.

Professor Amar has discussed how his two-tiered theory results in his vision of the Supreme Court's original jurisdiction.<sup>94</sup> The majority view is that the Supreme Court's original jurisdiction is more or less set: *Marbury v. Madison*<sup>95</sup> says you may not add to it, and "subtractions are irrelevant because the Court can hear the cases [which fall within its original jurisdiction] despite the absence of statutory authority."<sup>96</sup> Professor Amar, to the contrary, concludes that Congress could virtually eliminate all Supreme Court jurisdiction, including its original jurisdiction, because the majority of the lawsuits that fall under the Court's original jurisdiction fall under Amar's discretionary tier of federal jurisdiction.<sup>97</sup>

91. See Section 13, *supra* note 11.

92. See *infra* notes 125–42 and accompanying text. But see *Two Tiers*, *supra* note 1, at 244 n.128 (arguing that the distinction between "cases" and "controversies" has no substantive meaning beyond drawing an even clearer line between the mandatory and discretionary tiers of federal jurisdiction).

93. See Section 13, *supra* note 11, at 444 ("Congress does have authority, under the 'necessary and proper' clause, to reduce or even to eliminate the Supreme Court's original jurisdiction over lawsuits 'in which a State shall be Party.'").

94. See *id.* ("In the course of reaching these conclusions about the Supreme Court's original jurisdiction, I hope to do more than just tidy up a messy and rather technical corner of federal jurisdiction law. For once the Supreme Court's original jurisdiction is examined in context, larger themes of federal jurisdiction emerge.").

95. 5 U.S. (1 Cranch) 137, 174 (1803).

96. CHEMERINSKY, *supra* note 19, at 666.

97. See Section 13, *supra* note 11, at 479:

But the two-tiered thesis also has interesting implications for the Supreme Court's original jurisdiction . . . Indeed, half of the permissive tier categories fall within the Supreme Court's original jurisdiction over lawsuits 'in which a State shall be Party,' referring back to 'Controversies between two or more States; between a State and Citizens of another State; . . . and between a State

Professor Amar bases his conclusion that the Supreme Court's original jurisdiction is partly comprised of discretionary-tier disputes on the assumption that the terms "cases" and "controversies" refer to the same things. It is true that discretionary-tier disputes may be removed from federal jurisdiction.<sup>98</sup> However, as was shown above, there are no discretionary-tier disputes within the Supreme Court's jurisdiction, which only extends to "cases."<sup>99</sup> Professor Amar does not dispute that the Original Jurisdiction Clause refers only to "cases."<sup>100</sup> He does argue, however, that the Framers intentionally used the terms "cases" and "controversies" to refer to the mandatory and discretionary tiers of federal jurisdiction respectively.<sup>101</sup> If, as Professor Amar claims, "cases" means "mandatory tier," then it is clear that—even according to his own arguments—there are no discretionary-tier disputes in the Court's original jurisdiction.

Professor Amar's admission that the term "cases" refers to the mandatory tier is sufficient to show—in light of the fact that the Original and Appellate Jurisdiction Clauses refer to "cases" exclusively and not to "controversies"—that there are no discretionary-tier disputes in the Court's jurisdiction. Yet ending the analysis there ignores Professor Amar's own argument to the contrary. While Professor Amar agrees that the Court's original jurisdiction clearly extends to "all Cases affecting

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... and foreign States, Citizens or Subjects.' Given that such cases fall in the permissive tier, I argued that Congress could virtually eliminate all federal jurisdiction, including Supreme Court original jurisdiction, over them.

98. See *Two Tiers*, *supra* note 1, at 208–10:

In the first tier, comprising federal question, admiralty, and public ambassador cases, federal jurisdiction is mandatory: the power to hear such cases must be vested in the federal judiciary as a whole. In the second tier, comprising categories of cases less critical per se to smooth national government, federal jurisdiction is discretionary with Congress.

99. See *supra* notes 70–79 and accompanying text. Professor Amar all but admits this when he argues that cases and mandatory-tier disputes are one and the same. See *Two Tiers*, *supra* note 1, at 244 n.128 (arguing that the distinction between "cases" and "controversies" has no substantive meaning beyond drawing an even clearer line between the mandatory and discretionary tiers of federal jurisdiction).

100. See *Two Tiers*, *supra* note 1, at 244 n.128 (arguing that the distinction between "cases" and "controversies" has no substantive meaning beyond drawing an even clearer line between the mandatory and discretionary tiers of federal jurisdiction). To be clear, while Professor Amar does not dispute that the Original Jurisdiction Clause refers only to cases, because he fails to distinguish cases from controversies, he *does* dispute whether all disputes in the Court's original jurisdiction are mandatory-tier disputes.

101. *Id.*

Ambassadors,”<sup>102</sup> he believes the “those” in “those in which a State shall be Party”<sup>103</sup> refers back only to “cases” and not “all cases” and for that reason concludes that the Framers intended the Supreme Court’s original jurisdiction to extend only to *some* of the “cases” in which a state shall be party.<sup>104</sup>

He claims that “those” must refer back just to “cases” for three reasons. First, he says that if the Framers had wanted to say “all cases in which a State shall be Party,” they could have easily just said it.<sup>105</sup> They repeated “all” in other parts of Article III very carefully—what reason is there to believe they are careless with it here? Second, they could have left “those” out, and the “all cases meaning” would have been clearer.<sup>106</sup> Third, he says that the “all cases” reading of the State-Party Clause would, taken alone, seem to mean that the Supreme Court has original jurisdiction in a purely state-law case brought by a state against its own citizens.<sup>107</sup> Yet, he says, “that surely cannot be right, for such a case does not even fall within the Article III jurisdictional menu, which limits the ‘judicial power’ to only nine categories of ‘Cases’ and ‘Controversies’ that federal courts may (and in some cases must) hear.”<sup>108</sup>

First, his strained-reading criticism fails for several reasons. Professor Amar says that the Framers could have written “all those in which a State shall be Party,” which is true. It is, however, plainly unnecessary and redundant when the pronoun refers back to “cases,” which is itself modified by “all.”<sup>109</sup> If one were to say, “bring me all foods that are fruits and those that are vegetables from the table,” it would not make sense to return with all of the fruits and only some of the vegetables. One need not repeat “all” in order to effectuate the command. Further, the Original Jurisdiction Clause says that the Supreme Court “shall have original Jurisdiction.”<sup>110</sup> Professor Amar, like most other constitutional scholars, interprets “shall” as “must.”<sup>111</sup> He

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102. U.S. CONST. art. III, § 2, cl. 2.

103. *Id.*

104. *Section 13, supra* note 11, at 480–81.

105. *Section 13, supra* note 11, at 480.

106. *Id.*

107. *Id.* at 481.

108. *Id.*

109. U.S. CONST. art. III, § 2, cl. 2.

110. *Id.*

111. *See Two Tiers, supra* note 1, at 239 n.118 (arguing and citing a wide range of authority for the proposition that “‘shall’ generally means ‘must’ in Article III”).

might say that the Court “must” have jurisdiction over some state-party cases and not others, but, if that is so, how does one draw any coherent line between the mandatory-tier state-party disputes and the discretionary-tier state-party disputes?

Professor Amar often avoids using the term “state-party cases” even though his argument about the proper antecedent of “those” in the Original Jurisdiction Clause necessarily implies that “those” refers to “cases.”<sup>112</sup> The only conflict he considers is whether “those” refers to “cases” alone or to “all cases.” Under one reading, then, the Court’s original jurisdiction would include “cases in which a State shall be Party,” while under the other it would include “all cases in which a State shall be Party.” Either way, “state-party cases” is an accurate description; and all of the disputes in the Court’s original jurisdiction are “cases,” which are mandatory-tier disputes, even according to Professor Amar. Yet, at one point Professor Amar says, “although Supreme Court original jurisdiction extends to ‘all’ ambassador cases, it does not explicitly extend to all *lawsuits* in which a state shall be party.”<sup>113</sup> Despite the fact that he discussed only two options for the antecedent of “those”—*cases* and all *cases*—here he switches to a term the Constitution never uses—*lawsuits*.<sup>114</sup> Thus, as Professor Amar admits elsewhere, the Framers use the term “cases” to refer to mandatory-tier disputes, and yet he does not use that term when making an argument that “cases” are *discretionary-tier* disputes.<sup>115</sup> Thus, he uses the term “lawsuits”—which never appears in Article III—to disguise a textual inconsistency in his argument.

Perhaps Professor Amar would respond that in other parts of Article III, the Framers repeated “all,” and thus not repeating it here is of special significance.<sup>116</sup> That argument fails for at least two reasons. In Article III, Section Two, Clause One, the Framers describe nine categories of disputes in complex phrases separated by semicolons, which makes repeating “all” necessary to underscore the fact that federal jurisdiction over them is

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112. See Section 13, *supra* note 11, at 480–81 (arguing that “those” in the Original Jurisdiction Clause refers to “cases” rather than “all cases”).

113. *Id.* at 480 (emphasis added).

114. *Id.*

115. See *Two Tiers*, *supra* note 1, at 208–10 (arguing that everything Article III refers to with the term “cases”—“federal question, ambassador, and admiralty “cases”—is part of the mandatory tier of federal jurisdiction”).

116. U.S. CONST. art. III, § 2, cl. 1.

mandatory.<sup>117</sup> In the Original Jurisdiction Clause, on the other hand, there are only two elements discussed—ambassador and state-party cases—there is no need for semicolons, and therefore no need to repeat “all.”<sup>118</sup> Thus, the differences in the sentences’ structures account for the different uses of the word “all.”

Second, Professor Amar argues that the Framers could have dropped “those” altogether if they had intended the “all cases” reading.<sup>119</sup> However, “those” was used to avoid a potential confusion: “in which a State shall be Party”<sup>120</sup> might incorrectly be read to refer to “*controversies*”—part of the discretionary tier.<sup>121</sup> Just as they were abundantly careful above—repeating “all” three times in a row<sup>122</sup>—here, the Framers underscored their desire to refer to state-party “cases” and not to state-party “controversies” by repeating the term “cases,” albeit through a pronoun reference.<sup>123</sup> Nevertheless, even the most textually sensitive constitutional scholars miss this point because they do not properly distinguish between “cases” and “controversies.”<sup>124</sup> Furthermore, if the Framers had dropped “those” so that the Original Jurisdiction Clause read, “[i]n all Cases affecting Ambassadors, other public Ministers and Consuls and in which a State shall be Party, the supreme Court shall have original Jurisdiction,” it would also appear that “in which a State shall be Party” referred to a subset of cases affecting ambassadors, other public ministers and consuls. This is not the reading for which Professor Amar or any other scholar argues.

Regarding Professor Amar’s third objection that the “all cases” reading of the State-Party Clause would, taken alone, seem to mean that the Supreme Court has original jurisdiction in a purely state-law claim brought by a state against its own citizens,<sup>125</sup> this objection reveals most clearly where Professor

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117. *Id.*

118. *Id.* cl. 2.

119. *Section 13, supra* note 11, at 480.

120. U.S. CONST. art. III, § 2, cl. 2.

121. *See Section 13, supra* note 11, at 479 (implying that the discretionary or “permissive” tier of federal jurisdiction is comprised of disputes referred to in Article III as “Controversies”); *Two Tiers, supra* note 1, at 244 n.128 (arguing that “controversies” refers to discretionary-tier disputes).

122. U.S. CONST. art. III, § 2, cl. 1.

123. *Id.*

124. *See infra* notes 125–42 and accompanying text.

125. *Section 13, supra* note 11, at 481.

Amar's theory diverges from the intratextual reading presented in this Note. It also reveals the extent of Professor Amar's belief that there is no distinction between "cases" and "controversies." He argues that the Court cannot possibly have jurisdiction in a purely state-law claim brought by a state against its own citizens "for such a case does not even fall within the Article III jurisdictional menu, which limits the 'judicial power' to only nine categories of 'Cases' and 'Controversies' that federal courts may (and in some cases must) hear."<sup>126</sup> Professor Amar refers to all nine jurisdictional categories in Article III as "cases," ignoring the fact that the Constitution refers to only three of them as "cases" and the other six as "controversies."<sup>127</sup> It was Professor Amar who said that we must give meaning to each word in the Constitution, ignoring none.<sup>128</sup> Yet, here he does not heed his own advice, and as a result he comes to the mistaken conclusion that the Supreme Court could not have original jurisdiction over a state-party "case" when the Constitution plainly says the exact opposite.

As another example of Professor Amar's belief that "cases" and "controversies" should be distinguished, consider this passage:

But once we keep in mind the centrality of the jurisdictional menu it becomes clear that even if the Supreme Court does have original jurisdiction over 'all' cases in which a state shall be party, that jurisdiction is itself qualified by the language of the menu. And the menu pointedly fails to require federal jurisdiction over 'all' state-diversity cases, *in sharp contrast to its treatment of mandatory tier cases—that is, ambassador, arising under, and admiralty cases.*"<sup>129</sup>

Here, Professor Amar refers to "state-diversity cases" as though they are a separate class of "cases" from "mandatory tier cases—that is, ambassador, arising under, and admiralty cases."<sup>130</sup>

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126. *Id.*

127. U.S. CONST. art. III, § 2, cl. 1.

128. *Two Tiers*, *supra* note 1, at 242 (citing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 334 (1816) ("It is hardly to be presumed that the variation in the language could have been accidental."); *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.").

129. *Section 13*, *supra* note 11, at 481 (emphasis added).

130. *Id.*

However, under the interpretation this Note espouses, all state-diversity “cases” are part of the mandatory tier of federal jurisdiction, not because of the state-diversity feature, but because they are “cases.”<sup>131</sup> The distinction between “cases” and “controversies” makes all the difference as “cases” refers to the mandatory tier of federal jurisdiction—federal question, admiralty, and ambassador cases—with or without a state party. In other words, it is not as though a federal question case suddenly moves from the mandatory to the discretionary tier simply because there happens to be a state party. As emphasized above, Professor Amar himself argued elsewhere that the Framers employed the term “cases” specifically to refer to the mandatory tier as distinguished from “controversies,” which was meant to refer to the discretionary tier.<sup>132</sup> Thus, when the Constitution provides for “cases” “in which a State shall be Party,” it refers to mandatory-tier disputes.

Perhaps the best example of Professor Amar’s misreading of the Original Jurisdiction Clause comes late in a section of *Marbury*, Section 13, and the *Original Jurisdiction of the Supreme Court* entitled “Fourth Question: Do ‘Cases . . . In Which a State Shall be Party’ Encompass More Than the Three State-Diversity Categories of the Jurisdictional Menu?”<sup>133</sup> The fact that Professor Amar found this question sufficiently complex to warrant making it a section title indicates a misunderstanding of the terms “cases” and “controversies.” The answer, under the theory this Note puts forward, is clearly and simply “yes.” While “[i]n which a State shall be Party” might appear, at first glance, to be a reference to the three state-diversity categories of federal jurisdiction, the term “cases” is a clear reference to the mandatory tier of federal jurisdiction—federal question,

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131. Professor Amar is plainly referring to the “discretionary tier” disputes when he says, “And the menu pointedly fails to require federal jurisdiction over ‘all’ state-diversity cases . . . .” *Id.* Yet he refers to them as “cases”—a term that is used in Article III to refer to mandatory-tier disputes exclusively. U.S. CONST. art. III, § 2, cl. 1; *see also Reply*, *supra* note 1, at 1657 (recognizing that “the judicial power shall extend to ‘all’ . . . cases in the first tier, but not necessarily all . . . controversies in the second”); *Two Tiers*, *supra* note 1, at 244 n.128 (arguing that the distinction between “cases” and “controversies” has no substantive meaning beyond drawing an even clearer line between the mandatory and discretionary tiers of federal jurisdiction).

132. *See Two Tiers*, *supra* note 1, at 244 n.128 (arguing that the distinction between “cases” and “controversies” has no substantive meaning beyond drawing an even clearer line between the mandatory and discretionary tiers of federal jurisdiction).

133. *Section 13*, *supra* note 11, at 488.

admiralty, and ambassador “cases.”<sup>134</sup> Thus, the most sensible conclusion is that “cases” “[i]n which a State shall be Party” refers to that subset of federal question, admiralty, and ambassador “cases” that has a state party. Professor Amar fails to take into account the overlap between “cases” and “controversies”<sup>135</sup> in that he appears to believe that no dispute between two states could *also* be a federal question, admiralty, or ambassador dispute. However, if the subject matter is a federal question, admiralty, or an ambassador issue, then, yes, jurisdiction is mandatory—even if there is a state party.

Professor Amar develops his answer to the “Fourth Question” of his section-heading as follows: “[o]nce we properly recognize that ‘those cases in which a state shall be party’ must refer to only a subset of the nine categories of cases and controversies spelled out in the menu, two possibilities remain.”<sup>136</sup>

Note that here Professor Amar misquotes Article III, Section Two, Clause Two.<sup>137</sup> His quotation “‘those cases in which a state shall be party’ must refer to only a subset of the nine categories of *cases and controversies* . . .” wrongly inserts “cases” between “those” and “in.” This should not be ignored as a mere scrivener’s error. Rather, it is a substantive misquotation that is highly material to this discussion. The error takes the word “cases” in the Original Jurisdiction Clause to refer not only to “cases” but also to “controversies,” thereby merging the two distinct concepts. This misquotation is a prime illustration of how Professor Amar and other commentators fail to give a separate meaning to both “cases” and “controversies.”

Filling out his argument, Professor Amar describes what he thinks are the only two remaining interpretive possibilities:

134. *Two Tiers*, *supra* note 1, at 244 n.128 (arguing that the distinction between “cases” and “controversies” has no substantive meaning beyond drawing an even clearer line between the mandatory and discretionary tiers of federal jurisdiction).

135. In *Two Tiers*, *supra* note 1, at 244 n.128, Professor Amar rejects the civil/criminal distinction between “cases” and “controversies,” arguing that the only reason the Framers used two words where one would suffice was to draw an even clearer line between the mandatory and discretionary tiers of federal jurisdiction. Yet, in the title of the section from his article mentioned above, he refers to discretionary-tier disputes as “cases,” contradicting his argument that “cases” was meant to refer to the mandatory tier while “controversies” was meant to refer to the discretionary tier.

136. *Section 13*, *supra* note 11, at 489.

137. Compare U.S. CONST. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors . . . and those in which a State shall be Party . . .”) (emphasis added), with *Section 13*, *supra* note 11, at 489 (“those cases in which a state shall be party”) (emphasis added).

First, the clause could be read to authorize original jurisdiction in any of the nine categories whenever a state happened to be a party. Under this ‘literal’ reading, for example, a federal question suit brought by a state against its own citizen would fall within the Court’s original jurisdiction. Second, the clause could be read simply to allow original jurisdiction only where the suit falls within the menu because the state is a party—i.e., only where the lawsuit is one ‘between two or more States;—between a State and Citizens of Another State; . . . [or] between a State . . . and foreign States, Citizens or subjects.’ Under this ‘state-diversity’ reading, a federal question suit by a state against its own citizens could not be brought originally in the Supreme Court, although that Court could hear the case on appeal.<sup>138</sup>

Professor Amar, however, does not account for a third possibility because his analysis assumes that when the Constitution says “cases,” it means “cases or controversies.” Look at Professor Amar’s first possible interpretation. He says the clause could be read to authorize jurisdiction in any of the nine categories whenever a state happens to be a party. However, only *three* of the nine categories are called “cases” in Article III—the other six are called “controversies.” Professor Amar’s second possible interpretation above—what he calls the “state-diversity” reading—applies the clause only to disputes referred to as “controversies” in Article III. This contravenes the Original Jurisdiction Clause itself, which refers not to “controversies in which a State shall be Party,” but to “cases” “in which a State shall be party.” As has been argued extensively above, there is a difference between “cases” and “controversies.”<sup>139</sup> That difference reveals that the text might mean exactly what it says: state-party cases means “cases” (federal question, ambassador, and admiralty disputes) with at least one state party. Professor Amar’s failure to distinguish between “cases” and “controversies” causes him to overlook this possibility.

A final example should make it clear that Professor Amar is not being taken out of context. Later in the same article he says, “we find a fundamental distinction between mandatory tier cases

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138. *Section 13, supra* note 11, at 489.

139. *See supra* notes 46–69 and accompanying text.

defined by subject matter of lawsuits and permissive tier cases defined by party status.”<sup>140</sup> Here, Professor Amar repeats his belief that because all “cases” are mandatory-tier disputes, all “controversies” (or party-defined suits) are discretionary-tier disputes.<sup>141</sup> As argued above, some party-defined disputes are in fact mandatory-tier disputes.<sup>142</sup> Professor Amar says “each word of the Constitution’s text must be given meaning.”<sup>143</sup> Yet, he fails to give every word of the Constitution’s text meaning by failing to distinguish between “cases” and “controversies.”

#### IV. SHOULD PROFESSOR AMAR’S THEORY BE ACCEPTED OR REJECTED?

This Note has assumed that Professor Amar’s two-tiered theory and his brand of intratextualism are correct. Using his own arguments and theories as tools, it has attempted to level a textual attack on his theory of the Supreme Court’s original jurisdiction. However, given the modern state of Supreme Court litigation, it seems implausible that the interpretation of its jurisdiction put forward in this Note could ever be put into practice. First of all, under this interpretation, the Court’s appellate jurisdiction would be drastically curtailed.<sup>144</sup> Not only would that make Supreme Court litigation exceedingly difficult, it would take power away from Congress, which has the power under the Exceptions Clause to remove cases from the Court’s appellate jurisdiction but not from its original jurisdiction.<sup>145</sup> Second, this Note’s interpretation greatly expands the scope of the Court’s original jurisdiction by reading “those in which a State shall be Party” to mean state-party federal question, state-party admiralty, and state-party ambassador “cases.” For both political and practical reasons, then, this conclusion is unlikely

140. *Section 13*, *supra* note 11, at 489.

141. *Two Tiers*, *supra* note 1, at 244 n.128 (arguing that the term “cases” refers to the mandatory tier of federal jurisdiction and the term “controversies” refers to the discretionary or permissive tier of federal jurisdiction).

142. *See supra* notes 62–69 and accompanying text.

143. *Two Tiers*, *supra* note 1, at 242 (citing *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 334 (1816) (“It is hardly to be presumed that the variation in the language could have been accidental.”); *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.”)).

144. *See supra* notes 89–90 and accompanying text.

145. U.S. CONST. art. III, § 2, cl. 2.

to be put into practice any time soon, regardless of any textual attractiveness it might have.

This does not mean that Professor Amar is correct in concluding that the Supreme Court's original jurisdiction is made up partly of discretionary-tier disputes. If it is true that no word in the Constitution should be read as surplusage, as he and most textualists argue,<sup>146</sup> then his reading simply cannot be correct. If interpretive theories that appeared inexpedient or impractical were immediately tossed aside, then constitutional law would acquiesce to political power and modern trends. There is a need for theories that reveal new insights into the Constitution's text or history regardless of their likelihood of soon being adopted by the Court.

This Note's conclusion that none of the modern interpretations of "cases" and "controversies" is satisfactory under close scrutiny is perhaps even more important than revealing a great tension in Professor Amar's interpretation of the Original Jurisdiction Clause. Hopefully, this Note will draw some attention to the fact that these terms have been neglected in constitutional scholarship, compelling scholars like Professors Amar, Pfander, and Meltzer, who have attempted to distinguish these terms (or who have attempted to explain why they should not be distinguished), to address some of the objections raised in this Note. Beyond that, it might prompt others interested in textualism to bring fresh eyes and insights to this constitutional riddle.

In the final analysis, then, this Note calls not for a revolution in Supreme Court jurisdiction, but instead for scholars to continue to try to distinguish between "cases" and "controversies," or to find historical evidence that will show conclusively that the Framers were simply careless when they used two words where one was sufficient. If that evidence should arise, then textualists should retract what has been put forward as a truism: that we must give meaning to each word of the Constitution's text, reading none as surplusage.<sup>147</sup>

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146. *Two Tiers*, *supra* note 1, at 242 (citing *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 334; *cf. Marbury*, 5 U.S. (1 Cranch) at 174 (1803).

147. *Id.*