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## How to Assert State Sovereign Immunity Under the Federal Rules of Civil Procedure

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# NOTES

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## INTRODUCTION

Twenty years have passed since the Supreme Court announced dramatic changes to the doctrine of state sovereign immunity in *Seminole Tribe of Florida v. Florida*.<sup>1</sup> This doctrine prevents “suits by private parties against unconsenting States”<sup>2</sup> in recognition of the state’s power to govern itself and its citizens freely, as well as the financial impact lawsuits have on the state’s treasury.<sup>3</sup> Since *Seminole Tribe*, the Supreme Court has—in a series of contentious 5-4 decisions—increasingly allowed this doctrine to immunize states and their officers from suits arising under the federal laws and sometimes even the Constitution.<sup>4</sup> But while the Court has expanded state sovereign immunity’s substantive doctrine, it has neglected how state sovereign immunity should operate under the Federal Rules of Civil Procedure.

Without guidance from the Supreme Court, federal courts inconsistently apply state sovereign immunity claims to the Federal Rules, each of which can negatively impact the parties’ substantive and procedural rights. Some courts dismiss disputes because they lack jurisdiction (some say subject-matter jurisdiction over the dispute, others say personal jurisdiction over the state) without ever

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1. 517 U.S. 44 (1996).

2. *Id.* at 72.

3. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1430–32 (1987).

4. See Travis Gunn, *The Fourteenth Amendment: A Structural Waiver of State Sovereign Immunity from Constitutional Tort Suits*, 35 N. ILL. U. L. REV. 71, 73–74 (2014) (citing cases); *infra* Sections I.C, II.A.

considering the underlying merits of the plaintiff's claim.<sup>5</sup> Other courts acquire jurisdiction over the state defendant, thereby compelling the state to appear before a different sovereign's tribunal and defend itself.<sup>6</sup> Yet more courts will issue a judgment against a state defendant but cannot enforce that judgment because the state belatedly raises its immunity after the litigation's conclusion.<sup>7</sup> And many courts raise the state sovereign immunity question *sua sponte*, which denies both parties their right to determine how their litigation proceeds.<sup>8</sup> But all courts diverge in their treatment of the parties' rights because they inconsistently apply state sovereign immunity claims to the Federal Rules, not because of the specific facts at issue in any one case.

If the assertion of state sovereign immunity remains a series of ad hoc procedural determinations, then it threatens the very reason for having a unified set of procedural rules—"to secure the just, speedy, and inexpensive determination of every action."<sup>9</sup> Clear procedural rules promote accurate dispute resolution on the merits, respect the parties' rights, and ultimately support a just judicial system.<sup>10</sup> Unclear procedural rules, by contrast, prejudice the parties because unclear rules are inherently unpredictable, produce erroneous decisions, and undermine the public's faith in the justness of the judicial system.<sup>11</sup> State sovereign immunity is currently classified as the latter, which is a problem for individual litigants and states alike. The judicial system should not require plaintiffs to guess when state sovereign immunity can be raised or whether it is the defendant or the court that raises the defense. And the judicial system should decide if

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5. *E.g.*, *Hutto v. S.C. Ret. Sys.*, 899 F. Supp. 2d 457, 475–76 (D.S.C. 2012) (granting defendant's motion to dismiss for lack of subject-matter jurisdiction); *In re PEAKSolutions Corp.*, 168 B.R. 918, 922 n.10 (Bankr. D. Minn. 1994) ("[C]haracterization of the defense of sovereign immunity as going to subject-matter jurisdiction is not accurate. . . . [I]ts proper rubric, however, is under Rule 12(b)(2)—'lack of jurisdiction over the person.'"); *see* FED. R. CIV. P. 12(b)(1)–(2).

6. *E.g.*, *Seminole Tribe of Fla. v. Florida*, 801 F. Supp. 655, 663 (S.D. Fla. 1992) (denying defendant's motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6)); *see* FED. R. CIV. P. 12(b)(6).

7. *E.g.*, *Searcy v. Strange*, No. 14–0208–CG–N, 2014 WL 4322396, at \*6 (S.D. Ala. Aug. 28, 2014) (dismissing multiple state defendants after considering nonjoinder of parties through Rule 12(b)(7)); Memorandum from Chief Justice Roy S. Moore to Ala. Prob. Judges 23 (Feb. 3, 2015), [http://media.al.com/news\\_impact/other/Letter%20from%20Chief%20Justice%20Moore%20to%20probate%20judges.pdf](http://media.al.com/news_impact/other/Letter%20from%20Chief%20Justice%20Moore%20to%20probate%20judges.pdf) [perma.cc/G2QH-3XVU] (ordering state judges to disobey a federal court judgment because of sovereign immunity); *see also* FED. R. CIV. P. 12(b)(7).

8. *E.g.*, *Nail v. Michigan*, No. 1:12–cv–403, 2012 WL 2052109, at \*1 n.1 (W.D. Mich. May 9, 2012) (raising issue of state sovereign immunity *sua sponte*); *see* FED. R. CIV. P. 12(h)(1).

9. FED. R. CIV. P. 1.

10. *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 919 (1999).

11. *See id.* at 933–34.

states enjoy the procedural rights of sovereigns or of individual litigants, rather than oscillate between the two.

The Supreme Court continuously punts on questions that could clarify state sovereign immunity's relationship to the Federal Rules and how that relationship affects parties' procedural and substantive rights.<sup>12</sup> These questions divide along three lines: foundational questions—whether state sovereign immunity is or is not jurisdictional; procedural questions—how and when to raise state sovereign immunity claims; and practical questions—how to reconcile state sovereign immunity with multiparty lawsuits.

First, the foundational questions ask whether state sovereign immunity affects subject-matter jurisdiction, personal jurisdiction, or acts as a quasi-jurisdictional immunity from suit. The Court has acknowledged that “the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar,”<sup>13</sup> but it has also equivocated that the doctrine is neither “consistent with . . . practice[s] regarding personal jurisdiction,”<sup>14</sup> nor definitively a matter of subject-matter jurisdiction.<sup>15</sup> Indeed, the Court has also said the exact opposite: “[t]he Amendment, in other words, enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction.”<sup>16</sup> With such flimsy guidance, it is unsurprising that lower courts diverge as to whether state sovereign immunity is or is not jurisdictional.<sup>17</sup>

Second, the procedural questions ask at what point in proceedings states must raise their sovereign immunity, and whether the court can raise the issue. Were sovereign immunity a matter of Article III jurisdiction, courts would not just be allowed, but compelled, to raise it *sua sponte*.<sup>18</sup> But the Supreme Court has expressly disclaimed such a requirement, stating that “we have never held that it is jurisdictional in the sense that it *must* be raised and

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12. See, e.g., *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 391–92 (1998) (“Even making the assumption that Eleventh Amendment immunity is a matter of subject-matter jurisdiction—a question we have not decided . . .”); *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 515 n.19 (1982).

13. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974).

14. *Schacht*, 524 U.S. at 395 (Kennedy, J., concurring).

15. *Patsy*, 457 U.S. at 515 n.19.

16. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997).

17. Compare *United States v. Virgin Islands*, 363 F.3d 276, 284 (3d Cir. 2004) (“Eleventh Amendment immunity is relevant to jurisdiction . . .”), with *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 760 (9th Cir. 1999) (“We conclude[ ] that Eleventh Amendment immunity ‘should be treated as an affirmative defense.’”).

18. See FED. R. CIV. P. 12(h)(1).

decided by this Court on its own motion.”<sup>19</sup> Conversely, were sovereign immunity an affirmative defense, it would need to be asserted at some point before a decision on the merits.<sup>20</sup> The Supreme Court has evaded this question as well, as it allows state sovereign immunity to “be raised at any stage of the proceedings,” including for the first time on appeal.<sup>21</sup> The Court’s approach has bred inconsistent practices among federal courts, which consider state sovereign immunity at any and all points of the litigation, whether raised by defendants or on the court’s own motion.<sup>22</sup>

Third, the practical questions ask how federal courts should manage multiparty lawsuits that include both sovereign and non-sovereign entities. Here, the Supreme Court has provided some guidance in the foreign sovereign immunity context.<sup>23</sup> “[W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.”<sup>24</sup> But federal courts arrive at strikingly varied results when applying this principle because they do not weigh state sovereign immunity equally in all cases: some dismiss the entire action, while others dismiss only the sovereign and allow the litigation to proceed despite possible injury to the absent sovereign.<sup>25</sup>

This Note addresses these three lines of questions: the foundational aspects of state sovereign immunity, its procedural aspects within litigation, and practical questions of multiparty lawsuits. Upon answering these questions, this Note offers an approach for how state sovereign immunity should operate procedurally in federal courts.

Part I demonstrates the volatile history of the state sovereign immunity doctrine, from its importation into United States legal jurisprudence, to the impetus for passing the Eleventh Amendment, to the broadening of that Amendment’s text, and the doctrine as a whole,

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19. *Patsy*, 457 U.S. at 515 n.19 (emphasis added).

20. See *Wood v. Milyard*, 132 S. Ct. 1826, 1832 (2012).

21. E.g., *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998).

22. Compare *Nail v. Michigan*, No. 1:12-CV-403, 2012 WL 2052109, at \*1 n.1 (W.D. Mich. May 9, 2012) (“[I]t is appropriate for the court to raise the issue of Eleventh Amendment *sua sponte*.”), with *Katz v. Regents of Univ. of Cal.*, 229 F.3d 831, 834 (9th Cir. 2000) (stating that “[u]nless the State raises the matter, a court can ignore” state sovereign immunity issues).

23. *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 867 (2008).

24. *Id.* at 867; see *FED. R. CIV. P.* 12(b)(7), 19.

25. Compare *Diaz v. Glen Plaid, LLC*, No. 7:13-cv-853-TMP, 2013 WL 5603944, at \*8–9 (N.D. Ala. Oct. 11, 2013) (dismissing entire action in light of state sovereign immunity), with *Searcy v. Strange*, No. 14–0208–CG–N, 2014 WL 4322396, at \*6 (S.D. Ala. Aug. 28, 2014) (continuing action after dismissal of state sovereign).

by the twenty-first century. This controversial history shows that any solution must be adaptable to the two dominant and competing views of state sovereign immunity on the Supreme Court. Part II considers those two views on the Court and how they inform state sovereign immunity's many unique attributes. Part II also places the doctrine's attributes within the context of the Federal Rules of Civil Procedure in order to determine the technical aspects for asserting state sovereign immunity and assess how they impact the parties' rights. Part II concludes by considering an innovative approach courts deploy in multiparty suits involving misjoinder in the foreign sovereign immunity context.

Part III offers a three-part proposal for asserting state sovereign immunity. First, when a suit is based on diversity jurisdiction, that suit is outside the federal court's subject-matter jurisdiction and must be dismissed under Rule 12(b)(1) or *sua sponte* by the court.<sup>26</sup> Second, for all other suits against a single state, state sovereign immunity is a quasi-jurisdictional immunity from suit that must be evaluated through Rule 12(b)(6).<sup>27</sup> Third, when multiple parties are sued, including a state sovereign, Rule 12(b)(7) offers a framework for balancing the sovereign's interests against the plaintiff's desire for a remedy.<sup>28</sup>

## I. THE UNCLEAR HISTORY OF STATE SOVEREIGN IMMUNITY IN THE UNITED STATES

The doctrine of state sovereign immunity has a consistently turbulent history, stretching from the country's founding up to the present day. Various legal and political justifications have been offered since before the Constitution both for and against the state sovereign immunity doctrine. The lack of a clear consensus about state sovereign immunity's historical foundations and what role it should play in the United States generates uncertainty about how the doctrine should operate procedurally in the federal courts. This Part details the history of state sovereign immunity in the United States, as well as the Court's precedents and justifications for the doctrine, in order to show why federal courts are still struggling to deal with the doctrine's procedural aspects today.

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26. FED. R. CIV. P. 12(b)(1).

27. *Id.* 12(b)(6).

28. *Id.* 12(b)(7).

A. *Importation of State Sovereign Immunity and Chisholm v. Georgia*

English sovereignty principles initially informed the American colonists' understanding of sovereignty. In England, the idea of sovereignty initially arose out of its monarchical structure—a monarch that ruled by divine right.<sup>29</sup> The divine element suggested that the monarch's power was limitless and infallible, thus precluding citizen suits.<sup>30</sup> However, the American understanding of sovereignty evolved as the British Empire expanded and its governmental apparatus changed; by the eighteenth century, the monarch still enjoyed immunity because the “king can do no wrong,” but the monarch's royal officers could be liable in citizen suits for private wrongs.<sup>31</sup> The colonists' perceptions of sovereignty similarly evolved so that by the Revolutionary War the concept described “popular sovereignty” stemming from the people in the colonies, with limited powers delegated to the government.<sup>32</sup> Without a king, this made sense. But neither the Articles of Confederation nor the Constitution expressly defined the extent of sovereignty provided to the people, the states, or the federal government.<sup>33</sup>

Many colonists presumed that the state and federal governments preserved *some* immunity given the doctrine's roots in English common law.<sup>34</sup> To be sure, Alexander Hamilton's Federalist No. 81 echoed this sentiment by stating, “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.”<sup>35</sup> His statement assuaged the states' fears that the Constitution, once ratified, would abrogate their sovereign immunity and enable citizen suits for debts owed them from the Revolutionary War.<sup>36</sup>

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29. See Amar, *supra* note 3, at 1430–32.

30. See *id.*

31. John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1895–97 (1983); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2–8 (1963).

32. See Amar, *supra* note 3, at 1438–39; Gibbons, *supra* note 31.

33. The debate over whether sovereignty derives from the people of the United States or the people of the several states remains spirited today. Compare *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 (1995) (Stevens, J.) (“[T]he United States, therefore, is not a confederation of nations in which separate sovereigns are represented . . . but is instead a body composed of representatives of the people.”), with *id.* at 845 (Thomas, J., dissenting) (“Nothing in the Constitution deprives the people of each State of the[ir] power . . .”).

34. See Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned From King Henry III*, 49 ST. LOUIS U. L.J. 393, 477–80 (2005).

35. THE FEDERALIST NO. 81, at 399 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

36. JOHN PAUL STEVENS, *SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* 82–85 (2014).



Nevertheless, the Constitution's express text contravened this presumptive immunity. Article III provided for federal court jurisdiction in "all cases, in law and equity, arising under" the Constitution and federal laws and over "controversies between a state and citizens of another state."<sup>37</sup> The Supreme Court gave effect to the latter provision but declined to recognize state sovereign immunity when it decided *Chisholm v. Georgia* in 1793.<sup>38</sup> An executor from South Carolina sued the state of Georgia over debts.<sup>39</sup> The state declined to appear in court, arguing via written declaration that it enjoyed sovereign immunity and could not be sued without its consent.<sup>40</sup>

The Court held that Georgia lacked sovereign immunity.<sup>41</sup> Among the several justifications for its holding were that: Article III's text was a clear jurisdictional mandate that did not require addressing sovereignty;<sup>42</sup> English sovereign immunity was different from and incompatible with the American states, though it was unclear whether the federal government enjoyed common law immunity like the British Crown;<sup>43</sup> and, sovereign immunity was wholly incompatible with republican government.<sup>44</sup> Only Justice Iredell dissented, finding that the Constitution imported England's common law principles of sovereign immunity to the states, and the First Judiciary Act did not directly abrogate the states' immunity.<sup>45</sup>

### *B. The Eleventh Amendment and Its Interpretation*

The Supreme Court's *Chisholm* decision that Article III abrogated state sovereign immunity surprised state representatives and legislatures because their states could now be sued over war debts.<sup>46</sup> Shortly after *Chisholm*, Congress introduced multiple

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37. U.S. CONST. art. III, § 2, cl. 1.

38. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

39. *Id.* at 420–29.

40. *Id.*; see Amar, *supra* note 3, at 1467–68.

41. *Chisholm*, 2 U.S. at 479.

42. See *id.* at 450–52 (Blair, J.); *id.* at 466–68 (Cushing, J.).

43. See *id.* at 472, 479 (Jay, C.J.).

44. See *id.* at 461–66 (Wilson, J.).

45. See *id.* at 449–50 (Iredell, J., dissenting) ("Congress has provided no new law in regard to this case" and "there are no principles of the old law . . . that in any manner authorize the present suit, either by precedent or by analogy."); see also Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73 (1789). Notably, "the reasoning in Justice Iredell's dissent would not have prevented Congress from modifying or abrogating" state sovereign immunity. STEVENS, *supra* note 36, at 90.

46. See James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1333–43 (1998). But see Gibbons, *supra* note 31,

proposals to overrule the decision, one of which was ultimately ratified in 1798 as the Eleventh Amendment.<sup>47</sup> The Amendment provides that “[t]he 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.”<sup>48</sup> By its express terms, the Eleventh Amendment removes diversity suits from federal court jurisdiction.

However, the Eleventh Amendment’s text does not expressly limit federal court jurisdiction over any other suits against states or even recognize a general right to state sovereign immunity.<sup>49</sup> Indeed, Congress declined to adopt an alternative amendment with broader language that provided state sovereign immunity beyond diversity suits.<sup>50</sup> Nevertheless, nearly one hundred years after ratification the Court held that the Eleventh Amendment codified a sovereign immunity doctrine far broader than its bare text.<sup>51</sup>

In the 1890 case *Hans v. Louisiana*, a citizen of Louisiana sued his state for interest payments on bonds accumulated before the state amended its constitution to no longer authorize those payments.<sup>52</sup> While it is unclear what cause of action enabled federal court jurisdiction in *Hans*,<sup>53</sup> the Court’s ultimate grounds for dismissal were

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at 1893–94 (arguing that accounts are exaggerated regarding the public’s outrage over *Chisholm*).

47. See Pfander, *supra* note 46, at 1333–40..

48. U.S. CONST. amend. XI.

49. See *id.*; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 258–302 (1985) (Brennan, J., dissenting) (arguing that the Eleventh Amendment’s text and history compel an interpretation that the Amendment only limits diversity jurisdiction).

50. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 110–11 (1996) (Souter, J., dissenting). The proposed language stated that:

[N]o state shall be liable to be made a party defendant, in any of the judicial courts . . . under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States.

*Id.* at 111.

51. *Hans v. Louisiana*, 134 U.S. 1, 15 (1890); see also *Louisiana ex rel. Elliott v. Jumel*, 107 U.S. 711, 728 (1883). The Supreme Court discussed the Eleventh Amendment in dicta throughout the 1800s. See, e.g., *Ex parte Madrazzo*, 32 U.S. (7 Pet.) 627, 632 (1833) (holding that, in the absence of admiralty jurisdiction, the Eleventh Amendment bars a private party from bringing suit in the Supreme Court against a state); *Cohens v. Virginia*, 19 U.S. 264, 306 (1821) (stating that “the privilege of being parties in a controversy with a State, had been extended in the text of the [C]onstitution” only to “the case of a citizen of another State, or the citizen or subject of a foreign State” and that “it was necessary to take away that privilege” through the Eleventh Amendment).

52. *Hans*, 134 U.S. at 1–3.

53. Some suggest Louisiana’s renegeing of debt obligations enabled an implied right of action under the Contracts Clause. Amar, *supra* note 3, at 1476–78; see U.S. CONST. art. I, § 10, cl. 1 (“No State shall [make] any . . . [l]aw impairing the Obligation of Contracts . . .”).

clear: it lacked jurisdiction because the state of Louisiana enjoyed sovereign immunity from the Eleventh Amendment.<sup>54</sup> Because a literal reading of the Eleventh Amendment did not preclude the suit, the *Hans* Court relied on background assumptions about state sovereign immunity to reach its holding.<sup>55</sup> The Eleventh Amendment was intended to overrule *Chisholm* and reset the states' expectation that they enjoyed full rights as sovereigns upon ratifying the Constitution.<sup>56</sup> The Court reasoned that confining the Amendment's reach solely to diversity jurisdiction but still allowing citizens to sue their own states was "almost an absurdity on its face."<sup>57</sup>

*Hans* did not result solely from Eleventh Amendment background assumptions, but also from anti-federal government and pro-states' rights sentiments at the Reconstruction Era's end.<sup>58</sup> During the post-Civil War era, the federal government attempted to both improve the quality of life for freed slaves and sanction the former Confederate states.<sup>59</sup> But an economic panic, increasing racial violence, and a gridlocked presidential election all derailed the federal government's agenda.<sup>60</sup> This maelstrom of events caused public backlash against Reconstruction efforts.<sup>61</sup> To prevent further crisis, the major political parties brokered a deal to resolve the election that, in return, stopped the federal Reconstruction agenda.<sup>62</sup> The Supreme Court enforced this deal in *Hans* and other rulings that were pro-states' rights, limited the federal government's reach over the states, and prevented people from holding states and state actors liable.<sup>63</sup>

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54. *Hans*, 134 U.S. at 16–19.

55. See *id.* at 12–13 (quoting THE FEDERALIST NO. 81, *supra* note 35, at 399 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.")).

56. See *id.* at 13–17 (citing discussion at the Virginia Convention where it was declared that "no gentleman [should] think that a state will be called at the bar of the federal court").

57. *Id.*

58. STEVENS, *supra* note 36, at 91–92.

59. *Id.* at 86–87.

60. *Id.* at 86–89.

61. *Id.* at 89.

62. *Id.* at 87–88.

63. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 25 (1883) (holding that Congress had no authority to pass legislation preventing private entities from discriminating on the basis of race); *United States v. Cruikshank*, 92 U.S. 542, 549–53 (1875) (holding that the original Bill of Rights did not apply to state action through the Fourteenth Amendment); *The Slaughter-House Cases*, 83 U.S. 36, 55–56 (1873) (limiting the scope of the Privileges and Immunities Clause and declaring that neither the Thirteenth nor Fourteenth Amendment impairs the general police power of the states) (1873).

### 1. The *Ex Parte Young* Exception

The Court did not infinitely broaden state sovereign immunity. Just 18 years after *Hans*, the Court created an exception to the Eleventh Amendment for suits against state officials acting within their official capacities.<sup>64</sup>

In *Ex parte Young*, shareholders of a railroad company sued to enjoin enforcement of a Minnesota law setting state railroad rates.<sup>65</sup> The shareholders argued that enforcement of the law violated their due process rights because the statute included harsh penalties, and outright disobedience of the law meant “subject[ing] themselves to the ruinous consequences which would inevitably result.”<sup>66</sup> The lawsuit named the state’s attorney general, who claimed sovereign immunity.<sup>67</sup> The Court enjoined enforcement of the law because a state cannot engage in actions that violate the Constitution or federal law, as both are supreme over the states.<sup>68</sup> Thus, the Court held that state sovereign immunity does not protect a state official who engages in unconstitutional actions.<sup>69</sup>

The *Ex parte Young* doctrine exists today but is riddled with exceptions.<sup>70</sup> Although plaintiffs may seek injunctive relief against state officials, that relief must be prospective, not retrospective.<sup>71</sup> And the type of relief sought limits the doctrine’s application, such that a claim is barred where the injunctive relief too closely resembles a suit for monetary damages.<sup>72</sup> These exceptions to *Ex parte Young* raise questions about state sovereign immunity’s foundations. First, given that states indemnify suits against their officials, what purpose does it serve to permit suits against state officials but not against states

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64. See *Ex parte Young*, 209 U.S. 123, 166–68 (1908).

65. *Id.* at 126–32.

66. *Id.* at 130.

67. *Id.* at 131, 149.

68. See *id.* at 152, 166–68; see also U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.”).

69. See *Ex parte Young*, 209 U.S. at 159–61 (“The state has no power to impart to [a government official] any immunity from responsibility to the supreme authority of the United States.”).

70. See *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254–57 (2011) (“*Ex parte Young* cannot be used to obtain an injunction requiring the payment of funds from the State’s treasury . . . or an order for specific performance of a State’s contract . . .”).

71. *Edelman v. Jordan*, 415 U.S. 651, 666–68 (1974).

72. *Id.* at 668; see *Ex parte Young*, 209 U.S. at 197 (Harlan, J., dissenting) (arguing that sovereign immunity still exists when “the state, although not named on the record as a party, is the real party whose action is sought to control”); cf. *In re Ayers*, 123 U.S. 443, 515–16 (1887) (denying plaintiffs suit for injunctive relief compelling state’s specific performance of contract).

themselves?<sup>73</sup> Second, are plaintiffs actually able to use the *Ex parte Young* doctrine to hold state officials democratically accountable through lawsuits?<sup>74</sup> These questions turn on whether state sovereign immunity is foundationally a jurisdictional or quasi-jurisdictional doctrine,<sup>75</sup> as well as on how the doctrine's application to the Federal Rules impacts the parties' rights in practice.<sup>76</sup>

## 2. The Section Five Exception

Another exception to the broad state sovereign immunity envisioned by *Hans* appeared in *Fitzpatrick v. Bitzer*.<sup>77</sup> *Fitzpatrick* considered whether state employees whom the state discriminated against were entitled to a remedy under Title VII of the Civil Rights Act.<sup>78</sup> Because the Fourteenth Amendment was enacted after the Eleventh Amendment, the Court found that the more recent Amendment altered the balance of power between the states and federal government, enabling congressional intrusion into "spheres of autonomy previously reserved to the States."<sup>79</sup> Accordingly, state sovereign immunity is inapplicable when Congress passes legislation pursuant to its Section Five enforcement powers under the Fourteenth Amendment.<sup>80</sup> The *Fitzpatrick* exception is also limited, such as by the requirement that congressional action must be "congruen[t] and proportional" to the violations it seeks to remedy.<sup>81</sup> *Fitzpatrick*, too, raises a question about the state sovereign immunity doctrine's underpinnings: if the Eleventh Amendment codified state sovereign immunity as a constitutional guarantee, how can "Congress, by enacting a statute," even if premised on its Fourteenth Amendment

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73. See Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113, 1172 (2001) (noting that a governmental officer sued in his individual capacity for damages would necessarily need to be indemnified by the state in order to be able to pay).

74. Additionally, 42 U.S.C. § 1983 (2012) authorizes suit against state and local officials who violate the Constitution or federal law, seemingly rendering *Ex parte Young* superfluous. However, plaintiffs must satisfy numerous hurdles to successfully sue under § 1983 as well. See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961). As this note considers the attributes of state sovereign immunity and its application to federal court procedures, § 1983 claims fall outside its scope.

75. See discussion *infra* Section II.D.

76. See discussion *infra* Section II.E.

77. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

78. *Id.* at 447–50.

79. *Id.* at 455.

80. See *id.* at 455–56 (declaring that state sovereign immunity is "necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment"); see also U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

81. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

powers, “nullify . . . part of the Constitution?”<sup>82</sup> This question bears on the foundational issue of whether the state sovereign immunity doctrine is truly a constitutional limit on federal court jurisdiction, or whether the doctrine operates as an affirmative defense to suit without any for consequence federal court jurisdiction.<sup>83</sup>

### C. The Twentieth Century: Defense from Congressional Abrogation

The twentieth century saw an expansion of federal statutory and administrative law, but for that new body of law’s expansion to be successful the states needed to also be accountable for its enforcement.<sup>84</sup> The states fought back against accountability by claiming invasions of federalism and violations of the Tenth Amendment, along with raising their sovereign immunity.<sup>85</sup> The Supreme Court gave Congress greater power over the states and their sovereign immunity in *Pennsylvania v. Union Gas*.<sup>86</sup> In *Union Gas*, a federal statute imposed severe liabilities on possessors of hazardous waste.<sup>87</sup> Individual owners of a waste site sued the state for liability and damages, but the state asserted immunity.<sup>88</sup> A bare majority of the Court determined that states could be liable for damages because Congress may abrogate state sovereign immunity to enforce federal legislation enacted pursuant to its Article I powers.<sup>89</sup>

Just seven years later, the Court overruled *Union Gas* and dramatically expanded state sovereign immunity with its decision in *Seminole Tribe of Florida v. Florida*.<sup>90</sup> In *Seminole Tribe*, a federal

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82. STEVENS, *supra* note 36, at 100.

83. See discussion *infra* Section II.D.

84. See STEVENS, *supra* note 36, at 98–106; PETER L. STRAUSS ET AL., GELLHORN AND BYSE’S ADMINISTRATIVE LAW 10–30 (11th ed. 2011) (describing the rise of the administrative state).

85. See, e.g., *Printz v. United States*, 521 U.S. 898, 925–33 (1997) (holding that the federal government “may not compel the States to implement, by legislation or executive action, federal regulatory programs”); *New York v. United States*, 505 U.S. 144, 177 (1992) (holding that a congressional statute “[lay] outside Congress’ enumerated powers” and “infring[ed] upon the core of state sovereignty reserved by the Tenth Amendment”); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246–47 (1985) (holding that state participation in federal statutory system did not waive sovereign immunity).

86. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

87. *Id.* at 7–13.

88. *Id.* at 5–6.

89. See *id.* at 13–20. (“The power to regulate commerce includes the power to override States’ immunity from suit . . .”). In concurrence, Justice White “agree[d] with the conclusion . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States,” but not “with much of [the plurality opinion’s] reasoning.” *Id.* at 56–57 (White, J., concurring in the judgment in part and dissenting in part).

90. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

statute required states to negotiate in good faith with Native American tribes that wanted to conduct their own gaming activities.<sup>91</sup> After an impasse in tribal-state negotiations, the Seminole Tribe sued Florida to compel negotiations in accordance with that statute.<sup>92</sup> In a 5-4 decision, the Court held that Congress could not abrogate state sovereign immunity through federal statutes enacted pursuant to its Article I powers.<sup>93</sup> Subsequent Supreme Court decisions extended *Seminole Tribe* to provide states immunity in other adjudicatory settings from suits based upon federal law.<sup>94</sup>

*Seminole Tribe's* abrupt overruling of *Union Gas* demonstrates the state sovereign immunity doctrine's continuing volatility.<sup>95</sup> Nearly 200 years after the Eleventh Amendment overruled *Chisholm*, the Supreme Court is still uncertain about what that Amendment's true reach is and whether state sovereign immunity is a constitutional requirement or a common law right.

## II. THE COMPLEX RELATIONSHIP BETWEEN STATE SOVEREIGN IMMUNITY AND THE FEDERAL RULES OF CIVIL PROCEDURE

Lurking beneath the Supreme Court's unclear state sovereign immunity jurisprudence are the Federal Rules of Civil Procedure. Established in 1938, the Federal Rules merged the procedures for suits in law and equity to bring uniformity to the federal courts.<sup>96</sup> However, the Rules are silent as to state sovereign immunity's procedural operation. Further, the federal courts do not consistently analogize the state sovereign immunity doctrine to the Federal Rules, which means the doctrine appears through a variety of procedural avenues, often to the surprise and frustration of litigants.<sup>97</sup>

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91. *Id.* at 47-50.

92. *Id.* at 51-52.

93. *See id.* at 58-68 (overruling *Union Gas* to hold that the Interstate Commerce Clause does not confer upon Congress power to abrogate sovereign immunity).

94. *See, e.g.,* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002) (barring suits in federal agency adjudications); Alden v. Maine, 527 U.S. 706 (1999) (barring suits in state courts on federal causes of action).

95. For instance, a post-*Seminole Tribe* decision held by a 5-4 vote that Congress may abrogate the state's powers when it enacts federal legislation pursuant to its Article I bankruptcy powers. *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 378-79 (2006) ("Congress' determination that States should be amenable to such proceedings is within the scope of its power to enact 'Laws on the subject of Bankruptcies.'").

96. *See* Charles E. Clark & James W. Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 387 (1935); *see also* FED. R. CIV. P. 1 advisory committee's note to 1966 amendment ("The 1938 rules abolished the distinction between actions at law and suits in equity . . .").

97. *See* discussion *infra* Sections II.B-D.

Typically, states assert sovereign immunity through a motion under one of four Federal Rules. The first is Rule 12(b)(1), dismissal for lack of subject-matter jurisdiction, which may be raised at any time or *sua sponte* by the court.<sup>98</sup> The second is Rule 12(b)(2), dismissal for lack of personal jurisdiction, which is a “threshold defense” that is waived unless the defendant raises it in the answer or a pre-answer motion.<sup>99</sup> The third is Rule 12(b)(6), dismissal for failure to state a claim upon which relief can be granted, which may be raised in subsequent pleadings, a motion for judgment on the pleadings, and at trial.<sup>100</sup> The fourth is Rule 12(b)(7), dismissal for failure to join a required party, which instructs a court to determine if a party is required by Rule 19(a) to be in the dispute and, if so, to join them; if the court cannot join the party, it conducts the Rule 19(b) balancing test to determine whether the litigation may still proceed “in equity and good conscience.”<sup>101</sup>

The varied analogies of state sovereign immunity to the Federal Rules show that federal courts are confused about how the doctrine applies procedurally. It is unclear at what phase of the litigation a state must assert its sovereign immunity or how courts should determine if a defendant is even entitled to state sovereign immunity in a dispute. What is more, uncertainty about state sovereign immunity breeds procedural unfairness to the parties. This is most acute when courts raise state sovereign immunity *sua sponte* despite no clear requirement to do so.<sup>102</sup> This unilateral action arguably violates both the plaintiff’s right to force the state defendant to raise and claim its immunity and the state’s right to waive its immunity if it so desires.

This Part outlines the Court’s two doctrinal approaches to state sovereign immunity, one of which interprets the Eleventh Amendment

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98. FED. R. CIV. P. 12(b)(1).

99. *Id.* 12(b)(2), (h)(1)(A); *id.* advisory committee’s note to 1966 amendment.

100. FED. R. CIV. P. 12(b)(6).

101. *Id.* 12(b)(7). The balancing test factors are:

- (1) [T]he extent to which a judgment rendered in the person’s absence might prejudice that person or the existing parties;
- (2) [T]he extent to which any prejudice could be lessened or avoided by:
  - (A) [P]rotective provisions in the judgment;
  - (B) [S]haping the relief; or
  - (C) [O]ther measures;
- (3) [W]hether a judgment rendered in the person’s absence would be adequate; and
- (4) [W]hether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

*Id.* 19(b).

102. *See infra* notes 154–160.



and the doctrine broadly, the other of which interprets them narrowly. It then analyzes state sovereign immunity's unique characteristics and procedural questions—waiver and consent, whether it must be raised *sua sponte*, at what point in the proceedings sovereign immunity must be considered, how to decide if a defendant is entitled to it, and whether an appeal may be taken from the denial of sovereign immunity. It also considers the Court's two doctrinal views on state sovereign immunity to see whether the doctrine is more of a constitutional or a common law right. All of these questions bear on whether state sovereign immunity is jurisdictional or not, which is necessary to creating an approach for asserting state sovereign immunity under the Federal Rules. Finally, this Part looks at foreign sovereign immunity in *Republic of Philippines v. Pimentel*<sup>103</sup> and how lower courts have applied that precedent to multiparty cases in which one party is a state sovereign.

#### A. Differences in Judicial Approaches to the Eleventh Amendment

Two competing interpretations of the Eleventh Amendment and state sovereign immunity emerge from the Supreme Court's decisions: a jurisdictional approach, which broadly interprets the Amendment and the doctrine, and a quasi-jurisdictional approach, which interprets both narrowly.<sup>104</sup>

##### 1. The Jurisdictional Approach

Articulated in *Seminole Tribe*, the jurisdictional approach to the Eleventh Amendment is currently the prevailing view of the Supreme Court. This approach interprets the Eleventh Amendment broadly, finding that the Amendment more than merely overruled *Chisholm*—it reinstated state sovereign immunity as a constitutional requirement. Ideologically, this approach favors states' rights,<sup>105</sup> as the states "retain the dignity, though not the full authority, of sovereignty."<sup>106</sup> The Eleventh Amendment is read to accord states their privileged immunity from all citizen suits absent their consent, no matter the basis for the federal court's underlying jurisdiction.<sup>107</sup>

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103. 553 U.S. 851 (2008).

104. Compare *Alden v. Maine*, 527 U.S. 706, 722–25 (1999) (employing jurisdictional approach), with *id.* at 792–95 (Souter, J., dissenting) (employing quasi-jurisdictional approach).

105. In cases like *Seminole Tribe* and *Alden*, Justices Kennedy, O'Connor, Rehnquist, Scalia, and Thomas observed the jurisdictional approach. See, e.g., *id.* at 722–25.

106. *Alden*, 527 U.S. at 715.

107. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58–68 (1996).

Multiple sources beyond the Amendment support this approach. For instance, the original Judiciary Act implicitly imported sovereign immunity into the United States because the federal courts were only granted jurisdiction over suits in which the federal government was plaintiff, not in which it was defendant.<sup>108</sup> Additionally, James Madison and Alexander Hamilton's writings in the *Federalist* support the notion that the Constitution contemplated state sovereign immunity.<sup>109</sup> And the states' shock after *Chisholm* and the swift passage of the Eleventh Amendment are evidence of this original understanding.<sup>110</sup>

## 2. The Quasi-jurisdictional Approach

Illustrated in *Union Gas*, the quasi-jurisdictional approach narrowly interprets the Eleventh Amendment's text. Under this approach, the Amendment only reversed *Chisholm* and limited federal court diversity jurisdiction over suits by citizens against states. Ideologically, this approach favors the federal government's rights,<sup>111</sup> as the federal courts retain jurisdiction over suits against states arising under the federal laws. This approach acknowledges that the English common law imparted sovereign immunity to the colonies but finds that it was never elevated to constitutional law because the Constitution does not expressly authorize or require immunity.<sup>112</sup> Thus, the states' ratification of the Constitution signified their consent to private suits whenever Congress modified, amended, or abrogated their common law immunity from suit.<sup>113</sup> The quasi-jurisdictional approach finds support for its limited reading in the express text of the Eleventh Amendment, Congress's rejection of alternative language for the Eleventh Amendment that would have provided broader

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108. See Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73 (1789). The jurisdictional approach finds this reading to be analogous in the state context. See *Alden*, 527 U.S. at 722.

109. See THE FEDERALIST NO. 39, *supra* note 35, at 192 (James Madison); THE FEDERALIST NO. 81, *supra* note 35, at 339 (Alexander Hamilton). In Federalist No. 39, James Madison argued that the states, upon entering the Union, retained "residuary and inviolable sovereignty" in the ability to consent to suit. THE FEDERALIST NO. 39, *supra* note 35, at 192; see *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 752–53 (2002).

110. See *Alden*, 527 U.S. at 727–31.

111. In cases like *Seminole Tribe* and *Alden*, Justices Breyer, Ginsburg, Souter, and Stevens observed the quasi-jurisdictional approach. See, e.g., *id.* at 792–95.

112. See, e.g., *Fed. Mar. Comm'n*, 535 U.S. at 770–72 (Stevens, J., dissenting) ("[T]he Constitution does not immunize States from a federal court's process.").

113. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 86 (1996) (Souter, J., dissenting) ("Congress may create federal-court jurisdiction over private causes of action against unconsenting States brought by their own citizens.").

immunity, and the fact that states are more like citizens than kings and thus subject to the rule of law.<sup>114</sup>

### 3. The Constant: Turbulence and Disorder

This debate between the jurisdictional and quasi-jurisdictional approaches often results in 5-4 decisions and disjointed Supreme Court jurisprudence.<sup>115</sup> Before *Seminole Tribe*, Congress had the power (qualified only by the express limitations of the Eleventh Amendment) to abrogate state sovereign immunity through its Article I powers and enforcement powers under the Fourteenth Amendment.<sup>116</sup> Post-*Seminole Tribe*, Congress lacks the power to abrogate immunity through its Article I powers, so states are immune from suits arising under most all federal laws (absent their consent) in both state and federal adjudicatory proceedings.<sup>117</sup> In order to abrogate immunity through Fourteenth Amendment legislation, Congress must satisfy a stringent test of “congruence and proportionality.”<sup>118</sup> Despite all this, both approaches treat *Ex parte Young* as good law, which allows for suit against state officers who commit unconstitutional acts, such as disobeying federal laws that are “the supreme law of the land.”<sup>119</sup>

Many of the current Justices were not part of either the *Union Gas* or *Seminole Tribe* decisions, but the Court’s ideological affiliations are unchanged—a majority still endorsed the jurisdictional approach in the Court’s most recent decisions on state sovereign immunity.<sup>120</sup> However, both approaches rely on the same ambiguous historical

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114. *Alden*, 527 U.S. at 802 (Souter, J., dissenting); see STEVENS, *supra* note 36, at 82, 105–06; *supra* note 50.

115. Compare *Seminole Tribe*, 517 U.S. at 72 (5-4 decision) (holding that Congress may not abrogate pursuant to Article I powers), with *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 378–79 (2006) (5-4 decision) (finding that Congress may abrogate pursuant to Article I bankruptcy powers).

116. See *supra* Section I.C.

117. See *supra* Section I.C. Federal laws passed pursuant to Congress’s Article I bankruptcy powers are currently an exception to *Seminole Tribe*. See *Katz*, 546 U.S. at 378–79.

118. See, e.g., *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368–74 (2001) (holding that Title I of the ADA did not validly abrogate state sovereign immunity under Section Five of the Fourteenth Amendment); *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (holding that the Religious Freedom Restoration Act did not validly abrogate state sovereign immunity under Section Five of the Fourteenth Amendment); *supra* Section II.B.2.

119. See *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253–56 (2011).

120. Chief Justice Roberts and Justice Alito appear to follow the jurisdictional approach consistent with their conservative forebears, while Justices Kagan and Sotomayor follow the quasi-jurisdictional approach consistent with their liberal predecessors. See, e.g., *Coleman v. Ct. App. Md.*, 132 S. Ct. 1327, 1339 (2012); *Sossamon v. Texas*, 563 U.S. 277, 284 (2011). As of the writing of this Note, the successor to Justice Scalia had yet to be confirmed.

record to arrive at contradictory positions, although scholarly criticism appears directed more toward the jurisdictional approach than the quasi-jurisdictional approach.<sup>121</sup> As such, the jurisdictional approach's command of a majority is not guaranteed to continue, which Justice Scalia's recent passing has made all the more apparent. If Justice Scalia's replacement has different ideological views and supports the federal government's rights over the states' rights, then the Court could read the Eleventh Amendment's text literally again and the quasi-jurisdictional approach could reemerge as the law of the land. Accordingly, a proposal for asserting state sovereign immunity under the Federal Rules must be adaptable to any changes in the Court's views.

*B. Clear Consensus: State Sovereign Immunity  
Bars Federal Court Diversity Jurisdiction*

The Supreme Court is divided over how many suits the state sovereign immunity doctrine reaches and most questions as to how the doctrine bears on federal court procedure.<sup>122</sup> However, both camps agree on one specific point: the Eleventh Amendment's express text overruled *Chisholm* and limited the federal courts' Article III jurisdiction in all diversity actions.<sup>123</sup>

The federal courts have limited jurisdiction and can only entertain disputes involving subject-matter they are congressionally authorized to hear.<sup>124</sup> If courts determine they lack subject-matter jurisdiction over a dispute, they must dismiss *sua sponte* rather than wait for the parties to raise the defect.<sup>125</sup> Enabling courts to dismiss

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121. See, e.g., Joan Meyler, *A Matter of Misinterpretation, State Sovereign Immunity, and Eleventh Amendment Jurisprudence: The Supreme Court's Reformation of the Constitution in Seminole Tribe and Its Progeny*, 45 HOW. L.J. 77, 107–52 (2001); Pfander, *supra* note 46, at 1368–79; Thomas D. Rowe, Jr., *Exhuming the "Diversity Explanation" of the Eleventh Amendment*, 65 ALA. L. REV. 457, 469–72 (2013) (stating that the jurisdictional approach has led "to over a century of (arguably misguided) Supreme Court precedent"); *supra* Sections II.A.1–2.

122. See *supra* notes 13–22 and accompanying text.

123. Compare Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 771 (2002) (Stevens, J., dissenting) ("[T]he Eleventh Amendment is best understood as having overruled *Chisholm*'s subject-matter jurisdiction holding, thereby restricting the federal courts' diversity jurisdiction."), with *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (suggesting Eleventh Amendment is a subject-matter jurisdiction "limitation on federal judicial power of such compelling force that this Court will consider" state sovereign immunity "even though urged for the first time in this Court") (internal quotation marks omitted).

124. U.S. CONST. art. III, § 2; *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute . . .").

125. FED. R. CIV. P. 12(h)(3).

*sua sponte* diversity cases like *Chisholm* reinforces the Eleventh Amendment's purpose to constitutionally bar a specific type of federal court jurisdiction.<sup>126</sup> Because the jurisdictional and quasi-jurisdictional approaches both agree that the Eleventh Amendment limits federal court jurisdiction to hear diversity suits between citizens and states, Rule 12(b)(1) is appropriate for asserting state sovereign immunity in that context.<sup>127</sup>

### *C. Analyzing State Sovereign Immunity's Attributes and Their Procedural Operation*

Outside of the diversity context, then, how should federal court procedures accommodate state sovereign immunity? The answer turns largely on the extent that state sovereign immunity's attributes are or are not jurisdictional. To be sure, the historical account and the Judiciary Act of 1789 suggest state sovereign immunity has some truly jurisdictional qualities.<sup>128</sup> But some of the doctrine's unique characteristics suggest that it is more quasi-jurisdictional and conceptualized as a defense to or immunity from suit.

#### 1. Waiver and Consent

A state may *waive* its sovereign immunity in federal court by statute or by taking actions inconsistent with its immunity; it may also voluntarily *consent* to suit through affirmative conduct to remove its immunity.<sup>129</sup> These two attributes of state sovereign immunity are incompatible with subject-matter jurisdiction because only Congress may expand or contract the federal courts' jurisdiction, not the parties.<sup>130</sup> A state's right to waive its sovereign immunity or consent to suit resembles personal jurisdiction, as it impacts whether the court has power over the state.<sup>131</sup> Absent the defendant state's consent to

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126. See Pfander, *supra* note 46, at 1343–52.

127. Because it is highly infrequent for a state to be sued in diversity, there is not much of a dispute over whether Rule 12(b)(1) is appropriate. See, e.g., *Palotai v. Univ. of Md. Coll. Park*, 959 F. Supp. 714, 720 (D. Md. 1997) (granting defendant's Rule 12(b)(1) motion because "the explicit terms of the Eleventh Amendment restrict the diversity jurisdiction of the federal courts"); *Barry v. Fordice*, 814 F. Supp. 511, 516–18 (S.D. Miss. 1992) (discussing how the Eleventh Amendment bars suits against states).

128. See *infra* Section II.A.1.

129. See 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3524.4 (3d ed. 2015) (distinguishing consent and waiver).

130. See *supra* note 124.

131. See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) ("[A] court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant."); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal*

suit, any judgment against it would be invalid.<sup>132</sup> But two issues with the waiver and consent of state sovereign immunity show that those attributes are best analogized as a quasi-jurisdictional affirmative defense. First, waiver of state sovereign immunity is inconsistent with waiver of personal jurisdiction. Second, categorizing the Supreme Court's current jurisprudence on state sovereign immunity waiver as jurisdictional works unfairness to plaintiffs.

The Supreme Court's views on waiver of state sovereign immunity do not align with the waiver of personal jurisdiction. If a party fails to assert Rule 12(b)(2) either in the answer or by pre-answer motion, then that party waives its objections to personal jurisdiction and forfeits those objections on appeal.<sup>133</sup> By contrast, a state may assert its sovereign immunity later in the proceedings, or even for the first time on appeal, because of its unique status as a sovereign.<sup>134</sup> Courts are hesitant to find constructive waivers of sovereign immunity, so a state is generally under no obligation to plead its sovereign immunity at the litigation's outset.<sup>135</sup> Aligning state sovereign immunity with personal jurisdiction would place states on the same footing as individual litigants and require them to plead or waive their immunity.<sup>136</sup> But beyond one concurring opinion, the Supreme Court has not shown a desire to make state sovereign immunity consistent with personal jurisdiction.<sup>137</sup> In fact, the jurisdictional approach would oppose making state sovereign immunity waiver more like personal jurisdiction because that reform would subject states to greater federal court process and affront their dignity. Similarly, the quasi-jurisdictional approach would oppose this

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*Jurisdiction*, 115 HARV. L. REV. 1559, 1580–1608 (2002) (explaining that sovereign immunity at the time of the Constitutional Convention was largely conceived as a personal jurisdiction issue).

132. See Nelson, *supra* note 131, at 1568–74.

133. FED. R. CIV. P. 12(h)(1); see, e.g., *Gerber v. Riordan*, 649 F.3d 514, 518–20 (6th Cir. 2011) (holding defendant forfeited personal jurisdiction); *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 60–63 (2d Cir. 1999) (same).

134. See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999).

135. See, e.g., *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.18 (1982) (“The fact that the State appeared and offered defenses on the merits does not foreclose consideration of the Eleventh Amendment issue . . .”). But see *infra* notes 143–148 and accompanying text (discussing instances when federal courts should estop a state's belated assertion of its sovereign immunity).

136. One explanation for the lack of personal jurisdiction discussion is changed views: at the time of the Constitutional Convention, personal jurisdiction was a matter of “amenability to service of process”; today, it is a matter of “statutory authority and the constraints of due process.” Katherine Florey, *Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity as an Article III Doctrine*, 92 CAL. L. REV. 1375, 1434 (2004).

137. See *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 394–95 (1998) (Kennedy, J., concurring).

reform because the states consented to suit in federal courts upon ratifying the Constitution and thus no longer can raise personal jurisdiction objections.

On the other hand, it is unfair to plaintiffs to call state sovereign immunity jurisdictional when the waiver doctrine “allow[s] States to proceed to judgment without facing any real risk of adverse consequences.”<sup>138</sup> This unfairness was on display in *Searcy v. Strange*, a 2014 constitutional challenge to Alabama’s same-sex marriage ban.<sup>139</sup> The plaintiffs sued the state and its officials, including the Governor, Attorney General, and a probate judge.<sup>140</sup> The officials filed a motion to dismiss but stipulated “the Attorney General will defend the validity of Alabama’s marriage laws in this case,” denoting the state’s consent to suit and any judgment.<sup>141</sup> But when the court ultimately held the same-sex marriage ban unconstitutional, the state retroactively asserted its sovereign immunity and ignored the court’s ruling.<sup>142</sup>

This type of behavior is procedurally unfair and hardly serves state sovereign immunity’s dignity justification. To counterbalance this, federal courts can estop state defendants that abuse their immunity in order “to achieve unfair tactical advantages.”<sup>143</sup> In *Lapides v. Board of Regents of the University System of Georgia*, the plaintiff sued the state entity in state court over false sexual harassment allegations.<sup>144</sup> A state statute waived the state’s immunity, so the state voluntarily removed the lawsuit to federal court and sought dismissal there on Eleventh Amendment grounds.<sup>145</sup> But the Supreme Court found the state’s voluntary invocation of removal waived any sovereign immunity it may have had in the

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138. *Id.* at 394.

139. *See Searcy v. Strange*, 81 F. Supp. 3d 1285, 1290 (S.D. Ala. 2015).

140. *See Searcy v. Strange*, No. 1:14-208-CG-N, 2014 WL 4322396, at \*1 (S.D. Ala. Aug. 28, 2014).

141. *See id.*

142. *See Searcy*, 81 F. Supp. 3d at 1290; Memorandum from Chief Justice Roy S. Moore, *supra* note 7 at 25–26. Notably, the state characterized its sovereign immunity as a subject-matter jurisdiction issue, not a personal jurisdiction one. Memorandum from Chief Justice Roy S. Moore, *supra* note 7, at 25. (“The Attorney General’s agreement to litigate this case with himself as the sole defendant cannot confer subject-matter jurisdiction that is otherwise not present.”).

143. *See, e.g., Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002).

144. *Id.* at 616.

145. *Id.* at 616–18.

federal court.<sup>146</sup> The Court estopped the state from reasserting its immunity as a way to escape liability.<sup>147</sup>

Given the above analysis, the waiver and consent attributes of state sovereign immunity are best analogized to Rule 12(b)(6). Unlike a Rule 12(b)(2) motion, the Rule 12(b)(6) motion may be used for dismissal throughout the litigation as more facts become available.<sup>148</sup> When deciding the motion, courts must determine if a statute waives immunity or the state has taken affirmative actions demonstrating consent to suit, such as the filing of counterclaims, submission of declarations, or participation in pretrial activities.<sup>149</sup> And even though Rule 12(b)(6) may be raised at any time, federal courts should estop states that belatedly raise their immunity “to achieve unfair tactical advantages” at later stages of the litigation or to avoid an adverse judgment.<sup>150</sup> Such a framework would serve state sovereign immunity’s many rationales, including recognition of state dignity, as well as minimize procedural unfairness to plaintiffs.

## 2. *Sua Sponte* Consideration

“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject-matter, the court shall dismiss the action.”<sup>151</sup> Thus, if state sovereign immunity goes to the federal courts’ Article III jurisdiction, it must be subject to *sua sponte* dismissal.

At times, the Supreme Court has implied that state sovereign immunity may implicate subject-matter jurisdiction because “[t]he Eleventh Amendment . . . sets forth an explicit *limitation on federal*

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146. See *id.* at 618–20, 622.

147. See *id.* at 622 (“[N]either those who wrote the Eleventh Amendment nor the States themselves . . . would intend to create . . . unfairness.”).

148. See FED. R. CIV. P. 12(h)(1).

149. See *In re Lazar*, 237 F.3d 967, 980 (9th Cir. 2001) (finding waiver of sovereign immunity because defendant “filed proofs of claim in the bankruptcy proceeding that arise out of the same transaction or occurrence”); *Katz v. Regents of Univ. of Cal.*, 229 F.3d 831, 834 (9th Cir. 2000) (finding waiver of sovereign immunity because the Court received “a declaration of the general counsel for the Regents of the University of California” stating such); *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 756 (9th Cir. 1999) (finding consent because defendant “participated in the pre-trial conference and filed trial materials including witness and exhibit lists, proposed jury instructions, and a trial memorandum”).

150. See *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906) (“[W]here a state voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment.”).

151. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506–07 (2006); see also FED. R. CIV. P. 12(h)(1).



judicial power of such compelling force.”<sup>152</sup> But at other times, the Court has said that the state sovereign immunity doctrine is inappropriately classified if called “a nonwaivable limit” on Article III jurisdiction.<sup>153</sup> The lower courts are understandably split on this issue: some hold that “a sovereign-immunity defense . . . may (and should) be raised by federal courts on their own initiative;”<sup>154</sup> others decline to require *sua sponte* dismissal.<sup>155</sup> Perplexingly, all of these courts seem to find support in the same opaque Supreme Court rulings that fail to categorize state sovereign immunity as an Article III constraint.<sup>156</sup>

On more than one occasion, the Supreme Court has chastised lower courts that articulate state sovereign immunity as an Article III issue or raise it *sua sponte*.<sup>157</sup> In *Lake Country Estates v. Tahoe Regional Planning Agency*, the parties did not raise state sovereign immunity, yet “the Court of Appeals decided that the Eleventh Amendment immunized” a bi-state agency from suit in federal court.<sup>158</sup> In acting *sua sponte*, the court ignored the very states that created the bi-state agency, which filed briefs in the suit “disclaiming any intent to confer immunity.”<sup>159</sup> The Supreme Court reversed the Court of Appeals for two reasons: the lower court committed legal error because federally created bi-state agencies do not enjoy state sovereign immunity; and, the lower court ignored the states’ desires to

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152. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (emphasis added).

153. *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997).

154. See, e.g., *Nair v. Oakland Cty. Cmty. Mental Health Auth.*, 443 F.3d 469, 474 (6th Cir. 2006); *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 227 (4th Cir. 1997) (“We believe that, because of its jurisdictional nature, a court ought to consider the issue of Eleventh Amendment immunity at any time, even *sua sponte*.”).

155. See, e.g., *Parella v. Ret. Bd. of R.I. Emps.’ Ret. Sys.*, 173 F.3d 46, 54 (1st Cir. 1999) (“Article III does not obligate” federal courts to “raise Eleventh Amendment questions *sua sponte*.”).

156. Compare *Nair*, 443 F.3d at 474 (citing *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 389 (1998)) (finding that courts should raise consideration of Eleventh Amendment *sua sponte*), with *Parella*, 173 F.3d at 55 (1st Cir. 1999) (citing *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 389 (1998)) (finding that Supreme Court precedent does not require *sua sponte* consideration of Eleventh Amendment).

157. E.g., *N. Ins. Co. of N.Y. v. Chatham Cty.*, 547 U.S. 189, 192–93 (2006) (reversing lower court that acted *sua sponte* to convert defendant’s motion to dismiss based on common law immunity to one based on sovereign immunity); *Lake Country Estates, Inc. v. Tahoe Reg’l Planning Agency*, 440 U.S. 391, 400–02 (1979) (reversing lower court’s finding that a bi-state agency was protected by state sovereign immunity); see also Florey, *supra* note 136, at 1426–31, n. 294 (citing five cases where the Supreme Court unanimously reversed dismissals pursuant to state sovereign immunity because the lower court misunderstood the doctrine’s relationship to Article III jurisdiction).

158. *Lake Country Estates*, 440 U.S. at 396.

159. See *id.* at 401 (“They point to provisions of their Compact that indicate that [the bi-state agency] is to be regarded as a political subdivision rather than an arm of the State.”).

waive any immunity that may have been conferred upon their bi-state agency.<sup>160</sup>

Requiring lower courts to raise state sovereign immunity *sua sponte* is often proposed and has strong appeal as a “bright-line” procedural rule.<sup>161</sup> This would make “a federal court . . . decide at the outset whether it ha[d] jurisdiction before reaching the merits” instead of issuing judgment *ultra vires*, which a state could later nullify through claiming immunity.<sup>162</sup> However, a *sua sponte* requirement just as easily produces bad outcomes. When the court grants or denies sovereign immunity at the litigation’s outset, it is based solely on the pleadings and relevant statutory law.<sup>163</sup> This is an inaccurate enterprise when the immunity inquiry is fact-intensive, such as when an entity claims to be an “arm-of-the-state.”<sup>164</sup> But *Lake Country Estates* shows that courts also err when state sovereign immunity is purely a question of law.<sup>165</sup>

Additionally, compelling courts to consider sovereign immunity *sua sponte* prejudices both parties. The plaintiff files suit seeking some form of relief. Perhaps the state defendant represented to the plaintiff that it would waive its sovereign immunity. Or, perhaps the plaintiff’s suit is premised on forcing the defendant to settle because there is a low probability that the court would find the defendant entitled to state sovereign immunity. Conversely, the state might want to consent to suit or waive its immunity, as in *Lake Country Estates*. A *sua sponte* requirement denies both parties their rights and creates unfair surprise. Despite its allure as a clear jurisdictional default rule, a *sua sponte* requirement is inaccurate and unfair to both parties. The

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160. *See id.* at 400–02.

161. *See, e.g.*, F. Ryan Keith, Note, *Must Courts Raise the Eleventh Amendment Sua Sponte?: The Jurisdictional Difficulty of State Sovereign Immunity*, 56 WASH. & LEE L. REV. 1037, 1075–78 (1999); Michelle Lawner, Comment, *Why Federal Courts Should Be Required to Consider State Sovereign Immunity Sua Sponte*, 66 U. CHI. L. REV. 1261 (1999).

162. Lawner, *supra* note 161, at 1286.

163. *See infra* Section II.C.3.a.

164. *See, e.g.*, U.S. *ex rel.* Ali v. Daniel, Mann, Johnson & Mendenhall, 355 F.3d 1140, 1147–51 (9th Cir. 2004) (reversing district court’s finding that defendant firm enjoyed sovereign immunity under state law and remanding to decide “genuine issues of material fact” about defendant’s liability); Manders v. Lee, 338 F.3d 1304, 1319–29 (11th Cir. 2003) (reversing district court’s finding that defendant was not entitled to state sovereign immunity given the factual circumstances).

165. *See, e.g.*, *Lake Country Estates*, 440 U.S. at 400–02; Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280–81 (1977) (holding that state law did not entitle school board to state sovereign immunity and district court erred when it found state law waived school board’s immunity).

doctrine is better viewed not as an Article III limitation, but as quasi-jurisdictional—a “sovereign immunity from suit.”<sup>166</sup>

### 3. The Point When States Should Raise Their Sovereign Immunity

Given the preceding discussion, state sovereign immunity does not appear to analogize to the trial level determinations of either subject-matter jurisdiction or personal jurisdiction.<sup>167</sup> As one court has summarized Supreme Court precedent, state sovereign immunity is not a hard-and-fast jurisdictional constraint but rather a pragmatic consideration where “courts should ‘not reach constitutional questions in advance of the necessity of deciding them.’”<sup>168</sup> So if the state need not raise its sovereign immunity at the jurisdictional stage, when should the state raise it?

Practically speaking, the appropriate time for dismissal should balance the state’s sovereign dignity against the plaintiff’s interest in obtaining a remedy and result in the most accurate disposition given the available facts. Requiring states to raise their sovereign immunity at the motion-to-dismiss phase respects sovereignty by avoiding trial all together, but it increases the risk that a court erroneously grants or denies immunity based solely on what is in the complaint.<sup>169</sup> Waiting until summary judgment means the court has additional facts available to more accurately assess whether immunity exists, but the state endures the costs of discovery.<sup>170</sup> Delaying sovereign immunity until trial gives the court the greatest amount of facts but subjects the state to the full burdens of litigation.<sup>171</sup> Undoubtedly, this latter option is untenable, as immunity in other contexts is “effectively lost if a case is erroneously permitted to go to trial.”<sup>172</sup>

Thus, it makes the most sense to raise state sovereign immunity for the first time in either a motion to dismiss or at summary judgment. This conclusion means that Rule 12(b)(6) is better for considering state sovereign immunity than Rules 12(b)(1) or

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166. *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997).

167. *See supra* Sections II.C.1–2; *see also* *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 389, 389 (1998) (“Unless the State raises the [state sovereign immunity] matter, a court can ignore it.”); *cf.* *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2, 749 (1998) (declining to address issues of jurisdiction presented by state sovereign immunity before dismissing the case on Article III grounds).

168. *See Parella v. Ret. Bd. of R.I. Emps.’ Ret. Sys.*, 173 F.3d 46, 55 (1st. Cir. 1999) (citing *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 62 (1999)).

169. *See Seminole Tribe of Fla. v. Florida*, 801 F. Supp. 655, 663 (S.D. Fla. 1992).

170. *See Lenzo v. School City of E. Chi.*, 140 F. Supp. 2d 947, 950–54 (N.D. Ind. 2001).

171. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

172. *See id.* (discussing absolute and qualified immunities).

12(b)(2)—more facts may be considered in a Rule 12(b)(6) motion, which is also converted into a motion for summary judgment if needed.<sup>173</sup> Which of these two phases is more appropriate for addressing state sovereign immunity depends upon the factual inquiry necessary to determine if state sovereign immunity exists and the burden of proof for establishing immunity.

*a. The Level of Factual Inquiry*

A Rule 12(b)(6) motion to dismiss is granted when the plaintiff's complaint lacks "sufficient factual matter" to "state a claim to relief that is plausible on its face."<sup>174</sup> Summary judgment is appropriate when "there is no genuine issue as to any material fact [such] that the moving party is entitled to a judgment as a matter of law."<sup>175</sup> Which procedure is more appropriate for assessing state sovereign immunity depends upon whether the court must determine a pure question of law, a pure question of fact, or a mixed question of law and fact. Pure questions of law should be considered in a Rule 12(b)(6) motion to dismiss, while both pure questions of fact and mixed questions of law and fact are more appropriately reserved for summary judgment.

Faced with a pure question of law, the court must decide "if state law entitles the defendant to sovereign immunity." In this inquiry, the court need only look to the relevant state law to determine if the defendant enjoys sovereign immunity or if it was waived.<sup>176</sup> This is appropriately handled through a Rule 12(b)(6) motion to dismiss because the truth of the facts pleaded in the complaint has no bearing on this legal determination. But a court faces a different question when facts are involved. For example, a court may need to decide "if the defendant was acting in a capacity that entitled them to sovereign immunity." This question is not easily answered solely by looking to state law, as it also depends upon "the specific context of the case."<sup>177</sup> The facts pleaded in the complaint bear on this question but their truth will be disputed, so ruling based solely

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173. When considering matters outside the pleadings, a Rule 12(b)(6) "must be treated as one for summary judgment under Rule 56." See FED. R. CIV. P. 12(d).

174. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

175. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986) (citing FED. R. CIV. P. 56(c)).

176. See *Jagnandan v. Giles*, 538 F.2d 1166, 1176–78 (5th Cir. 1976) (affirming lower court's dismissal because state statute did not waive immunity from suit).

177. See *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

on the complaint should be delayed until summary judgment to produce the most accurate result.

When a motion to dismiss based upon state sovereign immunity is a question of fact or a mixed question of law and fact, the court's analysis should mirror official immunity. Like sovereign immunity but for individual officers, official immunity is "an entitlement not to stand trial or face the other burdens of litigation" afforded at common law.<sup>178</sup> Because an official's entitlement to immunity turns upon that official's conduct and the circumstances at the time of the claim, this determination is typically delayed until summary judgment when sufficient facts will be available and not in dispute.<sup>179</sup> Using this type of analysis for a state sovereign immunity claim will ensure the most accurate disposition of the motion when facts are involved.

### *b. The Burden of Proof*

When a court typically considers a motion to dismiss, it views the pleadings in the light most favorable to the plaintiff.<sup>180</sup> But the facts pleaded in the complaint may not help the court reach the most accurate result when deciding a motion to dismiss based on state sovereign immunity: the plaintiff may not have access to the facts necessary to establish that a defendant is or is not a state entity, or even know if the defendant is entitled to state sovereign immunity. Given how inaccurate courts can be when deciding pure questions of law,<sup>181</sup> the plaintiff could plead that Congress passed the relevant federal law pursuant to its Fourteenth Amendment enforcement powers, and thus abrogated the defendant's immunity, in hopes of overcoming any possible motions to dismiss.<sup>182</sup> Allowing this pleading regime would hardly be fair to defendants. Courts do allow limited discovery when the defendant has unique access to facts required to

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178. *See id.* at 200.

179. To decide qualified immunity, the court asks: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* at 201. This question is the plaintiff's burden to prove, otherwise the defendant is entitled to summary judgment. *See id.* If the plaintiff has asserted an injury, "the next, sequential step is to ask whether the right was clearly established . . . in light of the specific context of the case," with an eye to its facts. *Id.*

180. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 589 (2007) (Stevens, J., dissenting).

181. *See supra* notes 164–165 and accompanying text.

182. *See Union Pac. R.R. Co. v. Burton*, 949 F. Supp. 1546, 1552 (D. Wyo. 1996) ("Resolv[ing] all factual issues in favor of a plaintiff . . . would allow any plaintiff to defeat claims of Eleventh Amendment immunity in the early stages of the case simply as a matter of clever pleading.").

establish jurisdiction.<sup>183</sup> However, that is an extreme procedural avenue confined to determining the court's jurisdiction, likely to be abused in a regime where the plaintiff must meet the burden of proof to overcome a motion to dismiss based on sovereign immunity.

It makes sense, then, why many courts place the burden of proof on the defendant to demonstrate its entitlement to state sovereign immunity.<sup>184</sup> The Supreme Court should endorse this burden-shifting regime for proving state sovereign immunity because it serves both parties' interests. The state "has far better access to the underlying facts," so requiring the state to be forthright in asserting its sovereign immunity ensures the state acts dignified and lessens concerns about discovery costs.<sup>185</sup> Shifting the burden onto the defendant also provides "a necessary counterweight" to potential abuses of the sovereign immunity defense by waiver and consent, ensuring fairness to plaintiffs.<sup>186</sup>

#### 4. Appeals from the Denial of State Sovereign Immunity

Denial of a state's claim of sovereign immunity is immediately appealable under the collateral order doctrine.<sup>187</sup> This doctrine gives appellate courts jurisdiction over district-court orders that "finally determine claims of right . . . collateral to . . . rights asserted in the action."<sup>188</sup> Immediate review is permitted because these claims are "too important to be denied review and too independent of the cause itself" such that the party would be unable to vindicate that right on appeal.<sup>189</sup> Allowing the appeal promptly vindicates the state's dignity interest as opposed to forcing the state to defend itself throughout litigation.<sup>190</sup> Additionally, the appeal is necessary because immunity's benefits decrease the closer litigation gets to an actual trial.<sup>191</sup>

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183. See, e.g., *Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1010–11 (2d Cir. 1986) ("[I]n resolving claims that they lack jurisdiction, courts have . . . required that the party asserting jurisdiction be permitted discovery of facts demonstrating jurisdiction, at least where the facts are peculiarly within the knowledge of the opposing party.").

184. See, e.g., *Del Campo v. Kennedy*, 517 F.3d 1070, 1075 (9th Cir. 2008); *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 237 (2d Cir. 2006); *ITSI T.V. Prods., Inc. v. Agric. Ass'ns*, 3 F.3d 1289, 1291 (9th Cir. 1993); *Florey*, *supra* note 136, at 1437 (citing cases).

185. See *Florey*, *supra* note 136, at 1437.

186. *Id.*

187. See *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993).

188. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

189. See *id.*

190. *P.R. Aqueduct*, 506 U.S. at 146.

191. See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("The entitlement is an *immunity from suit* rather than a mere defense to liability; and . . . , it is effectively lost if a case is erroneously permitted to go to trial.").

However, denials of most dispositive motions and summary judgment motions are not appealable under the collateral order doctrine.<sup>192</sup> For instance, the denial of a motion contesting the court's jurisdiction is not immediately appealable because it is the party asserting a "right not to be subject to a binding judgment of the court," which may be fully vindicated upon final judgment.<sup>193</sup> Similarly, the denial of a motion contesting the substantive validity of the plaintiff's claim is not immediately appealable under the collateral order doctrine for the same reasons.<sup>194</sup> So a state may appeal the denial of its claim of sovereign immunity under the collateral order doctrine, but that same state could not appeal the court's finding of jurisdiction over the dispute or the parties. This dichotomy suggests that state sovereign immunity is not wholly jurisdictional and favors conceiving the doctrine as quasi-jurisdictional.

*D. Analogizing the Court's Doctrinal Approaches to the Federal Rules*

The jurisdictional and quasi-jurisdictional approaches differ as to the foundations for state sovereign immunity. At one end, the jurisdictional approach views state sovereign immunity as a constitutional limit on federal court jurisdiction in suits against states, embodied in background assumptions about the Eleventh Amendment rather than its express text.<sup>195</sup> At the other end, the quasi-jurisdictional approach views state sovereign immunity as a common law right that Congress may abrogate, although in diversity suits the Eleventh Amendment's text compels sovereign immunity.<sup>196</sup> This Section demonstrates that, despite their ideological differences, both approaches more readily analogize state sovereign immunity to Rule 12(b)(6) than any other Federal Rule.

Both approaches' textual arguments are flawed. The Constitution's silence on the subject of state sovereign immunity and the Eleventh Amendment's minimal textual guidance weaken the jurisdictional approach's appeal. While the Amendment's text clearly overrules *Chisholm* and bars federal court jurisdiction in diversity

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192. See *Johnson v. Jones*, 515 U.S. 304, 314 (1995) (denying collateral appeal of summary judgment denial where "defendant simply wants to appeal a district court's determination that the evidence is sufficient to permit a particular finding of fact after trial"); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 526-27 (1988).

193. See *Van Cauwenberghe*, 486 U.S. at 526-27.

194. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Air Canada*, 727 F.2d 253, 256-57 (2d Cir. 1984).

195. See *supra* Section II.A.1.

196. See *supra* Section II.A.2.

cases, that text (and alternative text that was not adopted) fails to show that sovereign immunity applies in other jurisdictional contexts. Meanwhile, the quasi-jurisdictional approach fails to persuade because of an inferential stumble. At the time the Constitution was drafted, diversity jurisdiction was the primary justification for federal courts.<sup>197</sup> Federal-question cases were handled in state courts, where the states retained their immunity.<sup>198</sup> Congress did not grant the federal courts jurisdiction over federal-question cases until nearly one hundred years after the Constitution's ratification.<sup>199</sup> Thus, it was not foreseeable at the country's founding that Congress would create a gigantic body of federal law to be enforced against the states in federal court.<sup>200</sup> If that had been foreseeable, the Eleventh Amendment's text might have been drafted more broadly.

The Court's major precedents suggest state sovereign immunity sometimes limits subject-matter jurisdiction but oftentimes does not. *Hans* epitomizes the jurisdictional approach and "has formed one of the strands of the federal relationship for over a century."<sup>201</sup> *Ex parte Young* is consistent with both approaches because it protects the state's own sovereign immunity but can hold officers accountable for unlawful acts while in official duty to the sovereign.<sup>202</sup> *Fitzpatrick* is consistent with the quasi-jurisdictional approach. If Congress may abrogate a state's immunity through its Fourteenth Amendment enforcement powers, then the Eleventh Amendment cannot be an Article III bar to the federal courts' jurisdiction. Otherwise, *Fitzpatrick* allows an act of Congress to trump the Constitution.<sup>203</sup> And the waiver-and-consent attributes, affirmed in *Lapides*, suggest that state sovereign immunity is not related to Article III subject-matter jurisdiction. Indeed, "where original jurisdiction rests upon . . . 'arising under' jurisdiction, the Court has assumed that the presence of a potential Eleventh Amendment bar with respect to one claim, has not destroyed original jurisdiction over the case."<sup>204</sup>

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197. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69–70 (1996).

198. See *Alden v. Maine*, 527 U.S. 706, 728–54 (1999) ("In light of history, practice, precedent, and the structure of the Constitution, . . . the States retain[ed] immunity from private suit in their own courts.").

199. See *Seminole Tribe*, 517 U.S. at 69–70 ("[I]n light of the fact that the federal courts did not have federal question jurisdiction . . . until 1875[ ], it seems unlikely that much thought was given to the prospect of federal-question jurisdiction over the States.").

200. See *id.*

201. See *id.* at 183 (Souter, J., dissenting).

202. John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 997 (2008).

203. See STEVENS, *supra* note 36, at 100.

204. *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998).



While state sovereign immunity could be framed as personal jurisdiction, it would shift the debate's terms to the Due Process Clause and "the scope of Congress's power to subject states to compulsory process."<sup>205</sup> Current jurisprudence analyzes state sovereign immunity largely in terms of Article III jurisdiction, but there is compelling historical evidence that, at the time the Constitution was drafted, the doctrine merely protected the states "from being haled into court without their consent."<sup>206</sup> While valuable as a historical account, the modern Supreme Court is probably not interested in recasting the doctrine as personal jurisdiction. The jurisdictional approach disavows Congress's power to compel the states to consent to suit, as shown in *Seminole Tribe*.<sup>207</sup> And the quasi-jurisdictional approach believes the states waived any objections to suit upon ratifying the Constitution.<sup>208</sup> A state should not suddenly be allowed to use personal jurisdiction as a means to insulate itself from liability because "the government is not above [its citizens], but of them, its actions being governed by law just like their own."<sup>209</sup> It would take a seismic shift in the Court's two approaches for state sovereign immunity as personal jurisdiction to become tenable.

Although the Court's approaches do not analogize well to either a Rule 12(b)(1) subject-matter jurisdiction motion or a Rule 12(b)(2) personal jurisdiction motion, they analogize much better to a Rule 12(b)(6) motion for failure to state a claim. Here, the jurisdictional approach would lodge the biggest concern because making state sovereign immunity a matter of pleading could belittle the doctrine's supposedly constitutional foundation.<sup>210</sup> Allowing courts to acquire jurisdiction over states and then analyze a complaint's sufficiency relegates states to the level of individual litigants. This practice would be unfair to states because federal courts would fail to recognize their dignity as unique entities within the federal system.<sup>211</sup> But *Searcy*

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205. Florey, *supra* note 136, at 1434; see *Int'l Shoe Co. v. Wash. Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945) (finding that personal jurisdiction requires observing "traditional notions of fair play and justice").

206. See Nelson, *supra* note 131, at 1568, 1580–1608 (discussing "extensive evidence that sovereign immunity, as traditionally understood, had more to do with personal jurisdiction" than with subject-matter jurisdiction). This historical account explains why Georgia would decline to appear in federal court in *Chisholm*. See *supra* note 40 and accompanying text.

207. See discussion *supra* Section II.A.1.

208. See discussion *supra* Section II.A.2.

209. *Alden v. Maine*, 527 U.S. 706, 802 (1999) (Souter, J., dissenting).

210. See *id.* at 715 (majority opinion) ("[States] are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty."); *supra* Section II.A.1.

211. See *Alden*, 527 U.S. at 715.

shows how this dignity argument cuts both ways: a defendant that sits and waits to assert state sovereign immunity well past the pleadings is defending its suit but trying to retain immunity's benefits in case of a loss. Imposing a pleading requirement rectifies this unfairness. Further, the collateral order doctrine alleviates any remaining dignity concerns *ex post* because a state can immediately appeal a lower court's denial of its sovereign immunity claim.

### *E. State Sovereign Immunity in Multiparty Lawsuits*

When a court is confronted with a lawsuit in which a plaintiff seeks relief from multiple defendants, one of which claims state sovereign immunity, the court cannot just decide the state sovereign immunity claim. "[T]he presence of a potential Eleventh Amendment bar with respect to one claim [does] not destroy[ ] original jurisdiction over the case," so even if the court grants the state's sovereign immunity claim, the lawsuit may still be able to continue against the remaining defendants.<sup>212</sup> In deciding whether or not to allow the suit to continue against the remaining defendants, the court must balance the plaintiff's interest in relief against the absent sovereign's financial and dignity interests, along with any prejudice caused to the remaining parties.<sup>213</sup> But it is unclear what values a court should assign these interests when it conducts a balancing test. Here, the Supreme Court's foreign sovereign immunity jurisprudence informs courts how to weigh these interests on balance.

In *Republic of Philippines v. Pimentel*, victims of Philippine President Ferdinand Marcos's human rights atrocities secured a judgment against him for \$2 billion.<sup>214</sup> The victims wished to collect on their judgment from Philippine and United States banks.<sup>215</sup> One of the banks, Merrill Lynch, sought to avoid multiple judgments by filing an interpleader action naming the Republic of the Philippines.<sup>216</sup> The Philippines asserted its sovereign immunity and moved to dismiss the entire dispute pursuant to Rule 12(b)(7).<sup>217</sup>

The Court found, first, that the Philippines was materially interested in the litigation because it partly held President Marcos's assets and, second, that it could not be joined because the Philippines

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212. *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998).

213. *See* FED. R. CIV. P. 19.

214. *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 845–55, 858 (2008).

215. *See id.* at 857–59.

216. *See id.*

217. *Id.* at 855.

did not waive its immunity.<sup>218</sup> Accordingly, the Court applied the Rule 19 balancing test. On the one hand, the extent of prejudice to the Philippines would be great were it absent from the litigation, both because of the financial assets at stake and because any judgment would infringe its comity and dignity interests as a sovereign.<sup>219</sup> On the other hand, the Court recognized that dismissal would render the victims unable to enforce their judgment against the Marcos estate.<sup>220</sup> Ultimately, the Court decided that the Philippines' material interests, coupled with extensive precedent against suing foreign sovereigns absent their consent, outweighed the victims' interests and ordered dismissal.<sup>221</sup> But the Court recognized that its dismissal was a close call and "[t]he balance of equities may change in due course."<sup>222</sup>

*Pimentel* shows that Rule 12(b)(7) is appropriate if multiple parties are sued, including a sovereign entity, and the court wishes to fashion relief in a flexible manner. Rule 12(b)(7) expressly applies to state sovereign immunity claims when limited assets are at stake. For instance, in *Diaz v. Glen Plaid*, the plaintiffs' apparel company registered a trademark commonly associated with a state university.<sup>223</sup> That state university had entered into a licensing agreement with the defendant, but the apparel company sought to enjoin the agreement because the defendant's trademark looked similar.<sup>224</sup> The defendant filed a Rule 12(b)(7) motion to dismiss and argued that the university was a required party because of its interest in the licensing agreement and could not be joined because it had asserted its sovereign immunity.<sup>225</sup> Applying *Pimentel*, the *Diaz* court found that any judgment would injure the state university's interests in its licensing agreement, which favored dismissal.<sup>226</sup> But the *Diaz* court's dismissal was without prejudice because "changes could occur

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218. See *id.* at 859, 872–73.

219. See *id.* at 866 (describing the importance of comity and dignity interests in the case).

220. See *id.* at 871–72.

221. See *id.* at 865–66 (“[F]oreign sovereign immunity derives from ‘standards of public morality, fair dealing, reciprocal self-interest, and respect for the “power and dignity” of the foreign sovereign.’” (citing *Nat’l Bank of N.Y. v. Republic of China*, 348 U.S. 356, 362 (1955))).

222. *Id.* at 872–73 (noting that subsequent developments in the Philippine courts could make the Philippines’ “claims in some later interpleader suit . . . less substantial than they are now” and that the plaintiffs would have a more substantial interest if the Philippine court did “not issue its ruling within a reasonable period of time”).

223. *Diaz v. Glen Plaid, LLC*, No. 7:13-cv-853-TMP, 2013 WL 5603944, at \*1 (N.D. Ala. Oct. 11, 2013).

224. *Id.*

225. *Id.* at \*2–3.

226. *Id.* at \*8.

that may impact the balance of equities in this case” and would entitle the apparel company to a remedy.<sup>227</sup>

It is unclear that Rule 12(b)(7) should also apply when something other than assets are in dispute, such as an unconstitutional law or an individual official’s action. In these circumstances, the state is not likely a required party under Rule 19(a) because *Ex parte Young* held that suits concerning actions that “proceed[ ] in violation of the Constitution of the United States, [are] not suit[s] against a state.”<sup>228</sup> In practice, states indemnify their officers against suits, and the state’s treasury contains a finite amount of money, but that is unpersuasive to render the state a required party to be joined.<sup>229</sup> Thus, it is unclear that the court should reach the Rule 19(b) balancing test, which only applies “when joinder is not feasible.”<sup>230</sup>

But even if the balancing test is not mandatory, it is nevertheless useful for considering the plaintiffs’ interest in relief—even if only from some parties—against the absent sovereign’s comity and dignity interest. *Searcy v. Strange* shows how a state’s dignity interests permeate a dispute even when the state is absent.<sup>231</sup> Initially, the court acknowledged its uneasiness in reaching the Rule 19(b) balancing test because it was unclear that any of the state defendants were required parties when the plaintiffs challenged the constitutionality of Alabama’s same-sex marriage ban.<sup>232</sup> Despite its initial reservations, the *Searcy* court ultimately proceeded to Rule 19(b)’s test, where it balanced the plaintiffs’ interest in contesting the law’s constitutionality against the dignity interests of those state officials who did not actually enforce the law.<sup>233</sup> As a result of its analysis, the court’s dismissal order retained only the state’s attorney general as a defendant, who was aligned with the state’s interests to defend the state’s same-sex marriage ban.<sup>234</sup>

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227. See *id.* at \*9 (“If the USPTO upholds the plaintiffs’ mark in the University’s cancellation challenge, it increases the strength of the plaintiffs’ position and the risk of injury to any interest claimed by the University is less substantial.”).

228. *Ex parte Young*, 209 U.S. 123, 198 (1908) (Harlan, J., dissenting).

229. See Weinberg, *supra* note 73. Were the state’s indemnification of its officers enough to make it a required party, all suits against officers would in fact be suits against the state, which would render *Ex parte Young* a nullity.

230. See FED. R. CIV. P. 19(a)–(b) (describing parties to be joined if feasible and the factors to be balanced when joinder is not feasible to determine whether the action should proceed).

231. *Searcy v. Strange*, No. 14–0208–CG–N, 2014 WL 4322396 (S.D. Ala. Aug. 28, 2014).

232. See *id.* at \*5–6.

233. See *id.*

234. See *id.*

This Part has assessed the Supreme Court's opposing doctrinal approaches to state sovereign immunity's legal and historical foundations. It has also analyzed state sovereign immunity's many unique attributes, how those attributes operate procedurally in federal courts, how the doctrine bears on the parties' rights in litigation, both against a single state and in a multiparty litigation. In so doing, this Part has demonstrated that a coherent framework exists for applying state sovereign immunity to federal court procedures.

### III. HOW TO ASSERT STATE SOVEREIGN IMMUNITY UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

The Supreme Court has not clearly stated how the Federal Rules of Civil Procedure apply to state sovereign immunity, which has created a wealth of uncertainty for lower courts and for parties. Some courts think state sovereign immunity may be a jurisdictional limitation and look to either Rules 12(b)(1) or 12(b)(2) without considering the plaintiff's claim. Other courts treat state sovereign immunity as a quasi-jurisdictional immunity from suit, taking the Rule 12(b)(6) approach and asking whether state sovereign immunity makes the plaintiff's lawsuit plausible or not. And since *Pimentel*, Rule 12(b)(7) has emerged as a way for courts to balance the plaintiff's interests against non-joinder of the state.

To make sense of the precedent in this doctrinal area, the Court should adopt a new framework for asserting state sovereign immunity: Rule 12(b)(1) motions are appropriate for asserting state sovereign immunity in diversity cases;<sup>235</sup> Rule 12(b)(6) motions are appropriate to dismiss all other suits solely against state entities;<sup>236</sup> and Rule 12(b)(7) motions are appropriate for considering state sovereign immunity in suits brought against multiple parties, including the state or its officials.<sup>237</sup> The flexibility of this three-part proposal is preferable given the possibility that the Court could change its jurisprudential approach in the future.<sup>238</sup> Further, the introduction of the *Pimentel* precedent to multiparty suits gives courts a practical way to both account for state dignity interests and also allow plaintiffs some possibility of relief.<sup>239</sup>

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235. See FED R. CIV. P. 12(b)(1); *supra* Section II.B.

236. See FED R. CIV. P. 12(b)(6); *supra* Sections II.C–D.

237. See FED R. CIV. P. 12(b)(7); *supra* Section II.E.

238. See discussion *supra* Sections II.A.3, II.D.

239. See discussion *supra* Section II.E.

*A. Rule 12(b)(1): State Sovereign Immunity  
as a Limit on Subject-Matter Jurisdiction*

Rule 12(b)(1) motions—dismissal for lack of subject-matter jurisdiction—are the appropriate means for states to assert sovereign immunity in diversity suits. These are suits in which a citizen plaintiff from one state sues a different state, invoking the federal courts' diversity jurisdiction.<sup>240</sup> The Eleventh Amendment imposed a constitutional limitation on federal court subject-matter jurisdiction by removing diversity cases against state defendants from the purview of the federal courts.<sup>241</sup> Currently, many federal courts recognize the use of Rule 12(b)(1) to raise sovereign immunity in diversity suits like *Chisholm*.<sup>242</sup> But the Federal Rules also compel courts to raise deficiencies in subject-matter jurisdiction *sua sponte*.<sup>243</sup> It is paramount, then, that federal courts recognize their lack of jurisdiction at the outset of litigation because of the Eleventh Amendment's constitutional limitation upon them. Doing so will serve the dignity rationales behind state sovereign immunity.

A common proposal is that courts should always consider state sovereign immunity *sua sponte*, which would mean limiting the doctrine to Rule 12(b)(1).<sup>244</sup> This proposal is impracticable for two reasons. First, the Supreme Court's precedent that states may waive their sovereign immunity or consent to suit is incompatible with the idea of subject-matter jurisdiction. The Constitution only allows Congress to enlarge or contract the federal courts' Article III jurisdiction.<sup>245</sup> If state sovereign immunity totally limits federal courts' subject-matter jurisdiction, yet states may still consent to suits, then this constitutional requirement is ignored because states effectively dictate the federal courts' jurisdiction over certain controversies. Second, imposing a bright-line requirement prejudices both parties' interests, as a plaintiff seeks a remedy from an opposing

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240. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 420 (1793). Cases invoking diversity jurisdiction through private suit of a state defendant, while rarely engaged in since the Eleventh Amendment's enactment, affirmed this principle. See, e.g., *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328–32 (1934); *Smith v. Reeves*, 178 U.S. 436, 445–49 (1900).

241. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 771 (2002) (Stevens, J., dissenting) (“This legislative history suggests that the Eleventh Amendment is best understood as having overruled *Chisholm*’s subject-matter jurisdiction holding.”); *supra* note 48 and accompanying text.

242. See cases cited *supra* note 127.

243. See FED R. CIV. P. 12(h)(3).

244. See *supra* notes 161–166 and accompanying discussion (evaluating pros and cons of proposals for courts to always consider sovereign immunity *sua sponte*).

245. See *supra* note 124.

party and may wish to force them, rather than the court, to raise the issue of immunity. Similarly, the defendant may not even wish to raise its immunity.<sup>246</sup> A *sua sponte* requirement sounds appealing in theory but should not be adopted at the expense of the parties' rights.

*B. Rule 12(b)(6): State Sovereign Immunity  
as a Dispositive, Affirmative Defense*

With Rule 12(b)(1) installed in the diversity context, a different approach must govern when states assert sovereign immunity in suits arising under the federal laws and the Constitution. There are several reasons why a Rule 12(b)(6) motion—dismissal for failure to state a claim upon which relief can be granted—best accounts for state sovereign immunity's unique characteristics.

First, states have no duty to waive their immunity or to consent to suit at the outset of litigation. So, conceiving of state sovereign immunity as a jurisdictional constraint under Rule 12(b)(2) does not align with the Supreme Court's personal jurisdiction jurisprudence. Rule 12(b)(6) has no such flaws; rather, it allows for a context-specific inquiry into dismissal, whether on the pleadings or at a later stage. This reflects the view that the state's immunity is more quasi-judicial. Second, Rule 12(b)(6) motions do not carry a *sua sponte* requirement for courts. Considering state sovereign immunity under this procedure avoids any possible unfairness that a *sua sponte* approach creates for both parties.

Third, the fact that state sovereign immunity may appear at any point throughout the litigation means that Rule 12(b)(6) is more appropriate for considering it. The state has the right to decide if and when to assert its immunity in litigation, which will vary from case to case. Accordingly, a Rule 12(b)(6) motion is available at the pleadings but may convert into a motion for summary judgment if the court or the parties wish to consider information outside the pleadings.<sup>247</sup> Fourth, a Rule 12(b)(6) motion is effective for assessing a state sovereign immunity claim that is a pure question of law, a mixed question of law and fact, or a pure question of fact. If the court must make a purely legal determination, it need not consider anything beyond the pleadings. But even if the court must make a factual

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246. See FED. R. CIV. P. 12(h)(3) (requiring courts to dismiss cases *sua sponte* if courts determine they lack subject-matter jurisdiction at any time).

247. Although Rule 12(b)(6) is also available at trial, in practice states will not delay asserting their immunity until trial because doing so effectively loses immunity's benefits. See *supra* notes 171–172 and accompanying text.

inquiry, converting a Rule 12(b)(6) motion into one for summary judgment is allowable. In fact, this mirrors the official immunity test.

Fifth, the burden of proof for assessing a Rule 12(b)(6) motion for dismissal based on sovereign immunity can be easily modified to provide more fairness to the parties: the party claiming immunity should be required to demonstrate sufficient facts showing it is entitled to that immunity. Finally, denials of sovereign immunity are appealable under the collateral order doctrine, which supports using Rule 12(b)(6) motions through negative implication. Appeals from the denial of personal-jurisdiction deficiencies are not available under the collateral order doctrine, which means that state sovereign immunity is not a full-throated jurisdictional requirement. Rather, it is quasi-jurisdictional and should be assessed through the Federal Rule that better accounts for that fact, which is Rule 12(b)(6).

The Supreme Court's jurisdictional and quasi-jurisdictional approaches could coalesce behind the Rule 12(b)(6) framework, which attempts to balance the states' sovereign dignity against the need to keep states democratically accountable to their citizens. The biggest concern with this framework is that rendering state sovereign immunity a pleading requirement would demean the states' dignity and their role in the federal system. However, placing states on notice that lawsuits will proceed until they assert their immunity incentivizes states to be dignified and promptly claim their immunity. Additionally, the foregoing procedural structure provides sufficient safeguards, such as appeals under the collateral order doctrine, to further protect the states' dignity.

### *C. Rule 12(b)(7): State Sovereign Immunity in Multiparty Suits*

Different considerations are present in a lawsuit against multiple defendants, including a state sovereign. The plaintiff may have a viable claim for relief against only some of the parties, or may have sued multiple parties because the plaintiff does not know who the responsible actor is. In these situations, a Rule 12(b)(7) motion—dismissal for failure to join a party—is the appropriate motion to raise sovereign immunity. The timing of Rule 12(b)(7) is consistent with Rule 12(b)(6), and thus the state may raise it at any time in the litigation.<sup>248</sup> The lower courts have translated the Supreme Court's *Pimentel* precedent into the state sovereign immunity context, which is useful for balancing the state's dignity interests against the

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248. See FED. R. CIV. P. 12(h)(2) (stating failure to join a party under Rule 19(b) may be raised during a Rule 7(a) pleading, by a Rule 12(c) motion, or at trial).



plaintiff's interest in relief.<sup>249</sup> This is so even where the state may not qualify as a required party under Rule 19(a).

A plaintiff's suit may name the sovereign, its officials, non-state entities, and private individuals as defendants. The state's claim to sovereign immunity should be analyzed as a Rule 12(b)(6) motion, as discussed in the previous section.<sup>250</sup> If the state's sovereign immunity claim is granted and dismissed, the remaining parties should not be dismissed outright because they may not enjoy sovereign immunity. Whether or not the remaining parties are dismissed turns upon what type of party the state is. If the state qualifies as a required party under Rule 19(a), the court should treat its sovereign status as dispositive under the Rule 19(b) factors and grant dismissal. *Diaz* is a case where the state university was a required party because of its monetary interest, yet it could not be joined, so the court appropriately dismissed the non-state parties given the state university's sovereign and fiscal interests.<sup>251</sup>

However, if the state does not clearly qualify as a required party, then the claims against the state officials may be able to proceed. In these instances, Rule 19(b) factors are not mandatory but still instructive, as they help balance the state's dignity interests against the plaintiff's interest in recovery. In *Searcy*, the court dismissed all but one of the state's officials because maintaining the plaintiff's constitutional challenge against the attorney general did not infringe the absent sovereign's interests.<sup>252</sup> In situations where the state is not a required party, the Rule 12(b)(7) motion echoes the *Ex parte Young* doctrine as the suit against the state official who violates federal law "does not affect[ ] the state in its sovereign or governmental capacity."<sup>253</sup>

## CONCLUSION

Currently, the haphazard ways state sovereign immunity is asserted in federal courts prejudice the substantive and procedural rights of plaintiffs and states alike. This Note's proposal for asserting state sovereign immunity protects those rights. First, Rule 12(b)(1) is

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249. See discussion *supra* Section II.E (weighing a state's comity and dignity interests heavily in the balancing test).

250. See *supra* Section III.B.

251. See *Diaz v. Glen Plaid, LLC*, No. 7:13-cv-853-TMP, 2013 WL 5603944, at \*8-9 (N.D. Ala. Oct. 11, 2013).

252. See *Searcy v. Strange*, No. 14-0208-CG-N, 2014 WL 4322396, at \*5-6 (S.D. Ala. Aug. 28, 2014).

253. See *Ex parte Young*, 209 U.S. 123, 159-61 (1908).

the appropriate motion for diversity jurisdiction cases. Second, Rule 12(b)(6) is the appropriate motion for cases against state defendants arising under the federal laws and the Constitution. Finally, Rule 12(b)(7) is the appropriate motion in multiparty suits, including a state, for courts to balance the various interests present.

This Note's proposal protects the rights of parties better than those proposals that argue for a singular approach to state sovereign immunity in all situations.<sup>254</sup> State sovereign immunity is appropriately viewed as a bar on subject-matter jurisdiction in diversity suits, and thus asserted under Rule 12(b)(1), but requiring the court to raise the issue *sua sponte* in other suits infringes both parties' rights. It is attractive to consider state sovereign immunity as personal jurisdiction, which is waived if not raised, but states are not required to assert their immunity in a Rule 12(b)(2) motion at the litigation's outset. Allowing states to belatedly assert immunity can prejudice plaintiffs, but federal courts should estop states that abuse their immunity "to achieve unfair tactical advantages."<sup>255</sup> This proposal accounts for those rights enumerated under the Supreme Court's jurisprudence: that the state is entitled to "a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction."<sup>256</sup> But this proposal also recognizes that, in some cases, the individual's interest in a remedy for constitutional or federal law violations must triumph over the state's sovereign immunity.

Additionally, this Note's proposal brings uniformity to what is a procedural boondoggle in the federal courts. It might sound alluring to just amend the Federal Rules by creating a new Rule devoted solely to state sovereign immunity. But that would miss the mark. The issue is not with the Federal Rules themselves, but rather how the courts read and apply state sovereign immunity to the Federal Rules. At present, lower courts differ as to how they apply the doctrine and adding a new Rule would not clarify their confusion. Further, the Supreme Court's views on state sovereign immunity are not likely to clarify themselves; the prevailing interpretation of the Eleventh Amendment depends on the composition of the Court and its view of the historical record, not on any controlling legal principle.<sup>257</sup> Justice

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254. See Keith, *supra* note 161, at 1037, 1075–78 (discussing whether courts should be required to raise sovereign immunity *sua sponte*); Lawner, *supra* note 161, at 1282–88 (arguing federal courts should be required to consider sovereign immunity *sua sponte*).

255. *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002).

256. See *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997).

257. See Pfander, *supra* note 46, at 1333–43 (describing the context of passage of the Eleventh Amendment as it originated from state legislatures and sought to explain Article III).

Scalia's recent passing makes changes to the state sovereign immunity doctrine all the more possible. If someone replaces Justice Scalia who endorses the quasi-jurisdictional approach, the Court's prevailing view on state sovereign immunity could shift to one that favored the federal government's power over the states. But even were the Court's views to change in that way, this Note's proposal would still be viable because it is adaptable.

Successful federal court procedures for asserting state sovereign immunity must make sense of the Supreme Court's doctrine, protect the parties' rights in practice, and be flexible enough should jurisprudence change. This Note's three-part proposal accomplishes all of those needs, and in so doing furthers the Federal Rules' purpose of "secur[ing] the just, speedy, and inexpensive determination of every action and proceeding."<sup>258</sup>

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258. FED R. CIV. P. 1.

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