Washington and Lee Law Review

Volume 56 | Issue 3 Article 16

Summer 6-1-1999

Must Courts Raise the Eleventh Amendment Sua Sponte?: The Jurisdictional Difficulty of State Sovereign Immunity

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* For their invaluable assistance in the development of this Note, the author owes especial gratitude to Professor Laura S. Fitzgerald and Justin D. Flamm. He also expresses appreciation for Professor Frederic L. Kirgis's and William W. Maywhort's generous reviews of earlier drafts.

I. Introduction

The Eleventh Amendment to the United States Constitution confers extraordinary protection upon the states: immunity from suit in federal court without their consent.[1] Although old, as constitutional doctrine goes,[2] ascertaining to what extent the Eleventh Amendment incorporates the common-law principle of sovereign immunity[3] is the subject of a truly tortured line of cases.[4] Numerous academic commentators have addressed the question as well.[5]

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1. *See* U.S. CONST. amend. XI (stating 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"); *see also* Alden v. Maine, 119 S. Ct. 2240, 2246 (1999) (holding that Eleventh Amendment restricts right of private plaintiffs to sue unconsenting states in state court).

2. *See* JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 6 (1987) (stating that ratification of Eleventh Amendment occurred in 1795). A federal court first reported a decision construing the amendment in 1809. *See* United States v. Bright, 24 F. Cas. 1232, 1236 (D. Penn. 1809) (No. 14,647) (holding that Eleventh Amendment did not bar maritime or admiralty suits against state). The author of a 1987 book on the Eleventh Amendment described it then as still "one of the most obscure parts of the Constitution." ORTH, *supra*, at vii.

3. *See* Russell v. Men of Devon, 100 Eng. Rep. 359, 360 (1788) (declining jurisdiction over tort suit on sovereign immunity grounds).

4. *See, e.g.*, *Alden*, 119 S. Ct. at 2246 (holding that Congress may not abrogate state sovereign immunity in state courts pursuant to Article I); Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996) (holding that states did not waive their sovereign immunity with ratification of Commerce Clause); Edelman v. Jordan, 415 U.S. 651, 668-70 (1974) (deciding that Eleventh Amendment bars damage awards that state treasury would pay); *Ex parte* Young, 209 U.S. 123, 168 (1908) (allowing suit for injunctive relief against state officer to proceed notwithstanding Eleventh Amendment); Hans v. Louisiana, 134 U.S. 1, 14-15 (1890) (construing Eleventh Amendment to bar suit against state by its own citizens); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 477 (1793) (deciding that Constitution did not recognize state sovereign immunity); *see also* HOWARD FINK & MARK V. TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 137 (1984) (describing Eleventh Amendment jurisprudence as "replete with historical anomalies, internal inconsistencies, and senseless distinctions").

5. *See, e.g.*, Alan D. Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 HOUS. L. REV. 1, 6 (1967) (disputing that Eleventh Amendment concerns judicial power at all); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 549 (1977) (describing state sovereign immunity as common-law doctrine only); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1033-34 (1983) (disputing historical accuracy of Supreme Court's view of Eleventh Amendment); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1893 (1983) (asserting that modern interpretation of Eleventh Amendment differs from its drafters' original intent); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 6-7 (1988) (contending

This Note asks whether a federal court has a jurisdictional obligation to consider the Eleventh Amendment on its own motion even if a state defendant does not invoke the privilege. This Note argues that the Eleventh Amendment enjoys a textually-based constitutional status that, considered with the policies behind sovereign immunity, requires courts to consider state immunity just as courts consider subject matter jurisdiction: at all times and sua sponte if they detect a potential bona fide Eleventh Amendment issue in a pending case.[6] In Part II, this Note surveys the Eleventh Amendment's history and key jurisprudence.[7] Part III discusses the similarities between state sovereign immunity and traditional jurisdictional doctrines.[8] Part IV examines the current disagreement among federal courts of appeals on the issue of whether federal courts must raise the Eleventh Amendment on their own motion.[9] Part V presents two recent United States Supreme Court cases concerning the law of state sovereign immunity and explains their significance in determining whether states may waive their Eleventh Amendment protection by omission.[10] Part VI discusses the ways in which both the Eleventh Amendment and the traditional requirements of subject matter jurisdiction promote federalism, and it argues that this similarity provides additional support for their identical treatment in the federal courts.[11] Finally, Part VII of this Note summarizes the deficiencies of a court's decision that sua sponte consideration of state sovereign immunity is merely permissive, and, with the support of legal and prudential reasoning, Part VII promotes the adoption of

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that sovereign immunity is remedy-oriented rather than jurisdiction-oriented); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1345 (1989) (defending confinement of Eleventh Amendment's meaning to its text); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 67 (1989) (tying meaning of Eleventh Amendment to purpose of Tenth Amendment); John R. Pagan, *Eleventh Amendment Analysis*, 39 ARK. L. REV. 447, 453-98 (1986) (proposing analytical framework for Eleventh Amendment issues).

6. *See* Ponca Tribe v. Oklahoma, 37 F.3d 1422, 1427 (10th Cir. 1994) (declaring that "Eleventh Amendment imposes a constitutional limitation on the jurisdiction of Article III courts").

7. *See infra* Part II (surveying history of Eleventh Amendment and its key jurisprudence).

8. *See infra* Part III (discussing similarities between state sovereign immunity and traditional jurisdictional doctrines).

9. *See infra* Part IV (discussing current circuit split on question of whether sua sponte consideration of state sovereign immunity is mandatory).

10. *See infra* Part V (presenting two recent Supreme Court cases involving Eleventh Amendment and explaining their significance for determining whether states may waive sovereign immunity by omission).

11. *See infra* Part VI (comparing effects of Eleventh Amendment and subject matter jurisdiction on promotion of federalism).

a rule requiring mandatory sua sponte consideration of the Eleventh Amendment.[12]

II. The Love-Hate Relationship of the Eleventh Amendment and State Sovereign Immunity

A. The Love

The most basic premises of Eleventh Amendment doctrine run along two axes that demonstrate the origin of at least some of the puzzlement in this area of the law.[13] Study of the first axis reveals that courts have raised the Eleventh Amendment's bar to suits against states qua states beyond the protection that the text itself gives.[14] Read literally, the text of the Eleventh Amendment precludes only suits against a state that citizens of another state or that citizens of a foreign country bring in federal court.[15] Because the ratification of the Eleventh Amendment effectively overruled the 1793 decision of the Supreme Court in *Chisholm v. Georgia*[16] – a diversity action in which the Court refused to allow the state of Georgia to default on a private loan – the amendment's narrow language is not surprising.[17] The strict text of the Eleventh Amend-

12. *See infra* Part VII (summarizing jurisdictional status of Eleventh Amendment and reasons that sua sponte consideration of it should be mandatory).

13. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1480 (1987) (describing Eleventh Amendment case law as "incoherent"); Gibbons, *supra* note 5, at 1891 (describing Eleventh Amendment jurisprudence as "little more than a hodgepodge of confusing and intellectually indefensible judge-made law"); Pagan, *supra* note 5, at 450-51 (noting "theoretical and historical illegitimacy" of Eleventh Amendment doctrine). Among Professor Amar's illustrations of the Eleventh Amendment's "incoherence" is that the amendment "is a subject matter bar that – unlike all others – may be waived (despite the fact that the amendment nowhere suggests that 'consent' can cure a jurisdictional defect) and – unlike other waivable bars (like personal jurisdiction, venue, and service of process) – may be raised at any time in the lawsuit." Amar, *supra*, at 1480 n.223.

14. *See* Hans v. Louisiana, 134 U.S. 1, 15 (1890) (extending protections of sovereign immunity beyond language of Eleventh Amendment in order to avoid result "never imagined or dreamed of").

15. *See* U.S. CONST. amend. XI (precluding federal suits against states by citizens of other states or by citizens of foreign countries).

16. 2 U.S. (2 Dall.) 419 (1793).

17. *See* Alden v. Maine, 119 S. Ct. 2240, 2251-52 (1999) (explaining that sole purpose of Eleventh Amendment was to reverse *Chisholm* and thus "there was no reason to draft with a broader brush"); *see also* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 426 (1793) (interpreting Article III's suits against states provision to supersede preexisting state sovereign immunity). In *Chisholm*, the Supreme Court decided whether a citizen of South Carolina could recover money that the state of Georgia owed to him. *Id.* at 420. Alexander Chisholm was the executor of the estate of a South Carolina citizen who supplied materials to Georgia during the Revolutionary War. *Id.* at 421. The Georgia legislature appropriated the funds for this debt, but the state executive refused to pay it. *Id.* at 422. At the date of the case, the Eleventh Amendment

ment addresses the result in *Chisholm* point-by-point, just as the amendment's proponents intended it to do.[18] The Court eventually extended the amendment further by holding in *Hans v. Louisiana*[19] that permitting some federal court suits against states to proceed on the simple basis of the plaintiff's citizenship contravenes the most important policies behind the amendment.[20] Today, the Eleventh Amendment also bars federal suits against unconsenting states by Indian tribes and foreign nations, as well as suits in admiralty, although the text of the amendment itself confers none of these protections.[21]

B. The Hate

The second axis of Eleventh Amendment interpretation requires states to defend some federal suits even when they do not consent to the exercise of federal jurisdiction.[22] Over ninety years ago, in the seminal case of *Ex parte*

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did not exist; accordingly, the Court determined that the language of Article III's suits against states provision demonstrated a clear intent under the Constitution to permit suits against a state by citizens of another state. *Id.* at 451-52. Thus, the Court awarded Chisholm a judgment that the state treasury of Georgia paid. *Id.*

18. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.3, at 377 (2d ed. 1994) (explaining that proponents of Eleventh Amendment intended it to overrule Supreme Court's decision in *Chisholm*); Cullison, *supra* note 5, at 12-14 (same). Professor Cullison described the ratification of the Eleventh Amendment as "an attempt to wipe the slate clean – to dispel all traces of *Chisholm v. Georgia* from the legal universe, and nothing more or less." *Id.* at 16.

19. 134 U.S. 1 (1890).

20. *See* Hans v. Louisiana, 134 U.S. 1, 10 (1890) (attempting to prevent "anomalous" consequences of strict adherence to text of Eleventh Amendment). In *Hans*, the United States Supreme Court considered whether the Eleventh Amendment barred a suit against the state of Louisiana by one of its own citizens. *Id.* at 1. When Hans sought payment on bonds that the state had issued, Louisiana refused. *Id.* at 2-3. Louisiana asserted that the Eleventh Amendment prevented a private litigant from filing suit against a state in federal court. *Id.* at 9-11. The Court agreed, emphasizing statements by Alexander Hamilton that state sovereign immunity survived the enactment of Article III of the Constitution. *Id.* at 12-15. Moreover, the Court acknowledged no evidence that state suability existed at common law. *Id.* at 16. Although the text of the Eleventh Amendment addresses only suits brought against a state by citizens of another state, or by citizens of a foreign country, the Court expressed incredulity at the notion that the amendment intended to allow some federal court suits against states to proceed. *Id.* at 16-19. Thus, the Court extended the amendment's protection of states beyond the text and found that the amendment barred federal court jurisdiction over Hans's suit. *Id.* at 21; *see infra* Part III (discussing main purposes of Eleventh Amendment in federal jurisdiction); *infra* Part VI (discussing ways in which Eleventh Amendment promotes federalism).

21. *See* CHEMERINSKY, *supra* note 18, § 7.4, at 383-85 (discussing Supreme Court's extension of Eleventh Amendment bar to suits not mentioned in amendment's text); *see also Alden*, 119 S. Ct. at 2246 (interpreting Eleventh Amendment to prevent state court suits against unconsenting states although amendment's text contemplates federal court suits only).

22. *See* CHEMERINSKY, *supra* note 18, §§ 7.5-7.7 (describing methods by which courts may ensure state compliance with federal law notwithstanding Eleventh Amendment).

Young,[23] the Supreme Court first articulated its interpretation of the Eleventh Amendment that normally permits a suit for prospective relief against a state officer.[24] However, the Supreme Court recently acknowledged that even this idea constitutes a fiction under the law.[25] Nevertheless, the *Ex parte Young* action exemplifies the second axis of Eleventh Amendment jurisprudence by demonstrating that, notwithstanding sovereign immunity principles, federal courts sometimes can enforce federal law against recalcitrant states.[26] The theory behind the traditional *Ex parte Young* action insists that the injunctive relief sought, usually an injunction against enforcement of a state law that a plaintiff has challenged as violating the federal Constitution, will not actually issue against the state qua state.[27] Instead, the injunction issues against the relevant state office in the occupant's official capacity and remains valid as against the office even if the occupant changes.[28] This notion is inherently odd because the *Ex parte Young* plaintiff would not sue an individual state officer in the first place but for the officer's official capacity and the officer's official duties with respect to the challenged state law.[29] However, the court

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23. 209 U.S. 123 (1908).

24. *See Ex parte* Young, 209 U.S. 123, 168 (1908) (permitting federal jurisdiction over suit against state officer for injunctive relief). In *Ex parte Young*, the United States Supreme Court considered whether the Eleventh Amendment barred a suit in federal court against a state officer. *Id.* at 149. The plaintiffs in the case challenged the constitutionality of a Minnesota statute limiting railroad rates. *Id.* at 144. Rather than violate the statute and risk severe penalties, the plaintiffs sought an injunction against the Attorney General of Minnesota, Edward Young, to prevent him from beginning proceedings to enforce the challenged legislation. *Id.* at 145-49. The district court issued the injunction, but Young reacted by filing a mandamus action against the plaintiffs to compel their compliance with the law. *Id.* at 126. The district court subsequently held Young in contempt, and Young petitioned the Supreme Court for habeas corpus pursuant to the Eleventh Amendment. *Id.* at 126-27. The Supreme Court rejected his claim, holding that Eleventh Amendment immunity does not attach to an illegal act by a state officer because the act loses its official character for constitutional purposes. *Id.* at 167. The Court relied on its traditional powers of equity to reach this result. *Id.* at 162-63. Thus, federal courts may issue injunctions against the performance of unconstitutional state acts when the plaintiff names the state officer rather than the state itself as the defendant. *Id.* at 168.

25. *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 280, 281 (1997) (referring to *Ex parte Young* action as "fiction"); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) (acknowledging that *Ex parte Young* rests upon legal fiction).

26. *See Young*, 209 U.S. at 145-46 (enforcing supremacy of Fourteenth Amendment as against Minnesota state law).

27. *See id.* at 159 (stating that officer loses immunity of sovereign when engaged in unconstitutional act).

28. *See id.* at 168 (emphasizing that judgment in *Ex parte Young* action runs against state officer and not against state itself).

29. *See* Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 435 (1962) (describing mechanics of *Ex parte Young* action). Professor Davis facetiously explained that

issuing the injunction holds the state and not the individual state officer responsible for carrying out the judgment.[30]

Other decisions of the Rehnquist and Burger Courts over the last twenty-five years further qualify the holding of *Ex parte Young*[31] and in fact have spawned a remarkable revival of the academic debate concerning the precise meaning of the Eleventh Amendment.[32] However, a key dilemma in the practical administration of Eleventh Amendment sovereign immunity still exists: Is the amendment an irreducible limitation on the federal judicial power?[33] If so, the Eleventh Amendment is like other constraints on the federal courts' subject matter jurisdiction in that any party – or any court on its own motion – may raise it at any time.[34] If state sovereign immunity is not an irreducible

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> [w]hen you sue the government for an injunction or declaratory judgment, you must falsely pretend (in the absence of special statute) that the suit is not against the government but that it is against an officer. You may get relief against the sovereign if, but only if, you falsely pretend that you are not asking for relief against the sovereign. The judges often will falsely pretend that they are not giving you relief against the sovereign, even though you know and they know, and they know that you know, that the relief is against the sovereign.

Id.

30. *See* CHEMERINSKY, *supra* note 18, § 7.5, at 392 (explaining that enjoining state officers will prevent state conduct in violation of federal law).

31. *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 287 (1997) (contending that some state interests may render *Ex parte Young* action unavailable); Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996) (holding that Article I of Constitution is not waiver of states' sovereign immunity); Hafer v. Melo, 502 U.S. 21, 29-30 (1991) (explaining differences between official and individual capacities of state officers for purposes of Eleventh Amendment); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) (preventing federal court from issuing injunction against state for alleged violation of state law); Edelman v. Jordan, 415 U.S. 651, 676-77 (1974) (explaining boundaries between prospective and retrospective relief).

32. *See, e.g.*, Fletcher, *supra* note 5, at 1034 (interpreting Eleventh Amendment not to affect federal jurisdiction at all); Gibbons, *supra* note 5, at 1891-93 (criticizing three 1981 Supreme Court cases concerning Eleventh Amendment); Jackson, *supra* note 5, at 104-26 (advocating values for future Eleventh Amendment jurisprudence); Marshall, *supra* note 5, at 1371 (advocating adherence to text of Eleventh Amendment); Massey, *supra* note 5, at 147-50 (discussing implications of recent Supreme Court decisions concerning Eleventh Amendment); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1275 (1998) (purporting to offer new analysis of history of Eleventh Amendment); Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1691 (1997) (attempting to reconcile recent Eleventh Amendment jurisprudence).

33. *Cf.* 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3524, at 167 (2d ed. 1988) (stating that Supreme Court has not determined Eleventh Amendment's precise jurisdictional status).

34. *See* FED. R. CIV. P. 12(h)(3) (requiring courts to consider subject matter jurisdiction on their own motions); *see also* Sosna v. Iowa, 419 U.S. 393, 398 (1975) (dismissing case for want of subject matter jurisdiction at Supreme Court level); Mitchell v. Maurer, 293 U.S. 237, 244

limit on the federal judicial power, a more useful analogy is one to personal jurisdiction so that a party permanently waives the immunity if the party fails to raise it in an initial filing.[35] This quagmire is the subject of a persistent division in the United States Courts of Appeals and the focus of this Note.[36]

III. How Sovereign Immunity Looks Like Jurisdiction

Article III and the Eleventh Amendment have similar functions in limiting the scope of matters before the federal courts. However, Article III is not self-executing.[37] Consequently, the heads of federal court jurisdiction that Article III describes merely provide Congress the authority to enact statutes giving plaintiffs the right to file appropriately styled actions in federal court.[38] Contrast the self-executing Eleventh Amendment and the well-known uproar in the wake of *Chisholm*.[39] The popular reaction against the decision strongly supports the notion of the Eleventh Amendment as "a jurisdictional trump card" because *Chisholm* led to text that, by its own terms, bars an otherwise

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(1934) (same); Mansfield, Cold & Lake Mich. Ry. v. Swan, 111 U.S. 379, 382 (1884) (same).

35. *See* FED. R. CIV. P. 12(h)(1) (designating objections to personal jurisdiction waived if not raised in parties' initial pleadings); New Jersey v. Chen (*In re* Chen), 227 B.R. 614, 622 (D.N.J. 1998) (finding sovereign immunity more like personal jurisdiction than like subject matter jurisdiction so that state's appearance in federal litigation constituted consent to suit).

36. *See* Bouchard Transp. Co. v. Florida Dep't of Envtl. Protection, 91 F.3d 1445, 1448 (11th Cir. 1996) (per curiam) (permitting but not requiring mandatory sua sponte consideration of sovereign immunity); Benning v. Board of Regents of Regency Univs., 928 F.2d 775, 777 n.2 (7th Cir. 1991) (same); *see also* Sullivan v. Barnett, 139 F.3d 158, 179-80 (3d Cir. 1998) (adopting mandatory sua sponte consideration of sovereign immunity), *rev'd on other grounds sub nom.* American Mfrs. Mut. Ins. Co. v. Sullivan, 119 S. Ct. 69 (1999); V-1 Oil Co. v. Utah Dep't of Pub. Safety, 131 F.3d 1415, 1420 (10th Cir. 1997) (same); Suarez Corp. Indus. v. McGraw, 125 F.3d 222, 227 (4th Cir. 1997) (same); Mascheroni v. Board of Regents of the Univ. of Cal., 28 F.3d 1554, 1559 (10th Cir. 1994) (same); Atlantic Healthcare Benefits Trust v. Googins, 2 F.3d 1, 4 (2d Cir. 1993) (same); Sindia Expedition, Inc. v. Wrecked & Abandoned Vessel, Known As "The Sindia," 895 F.2d 116, 119 (3d Cir. 1990) (same); Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc., 810 F.2d 869, 873 n.2 (9th Cir. 1987) (same); Morris v. Washington Metro. Area Transit Auth., 702 F.2d 1037, 1040-41 (D.C. Cir. 1983) (same); Whiting v. Jackson State Univ., 616 F.2d 116, 127 n.8 (5th Cir. 1980) (same).

37. *See* Palmore v. United States, 411 U.S. 389, 401 (1973) (describing Congress's control over federal jurisdiction).

38. *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 7, at 27 (5th ed. 1994) (stating that cases in federal court require both constitutional and statutory sources of subject matter jurisdiction). Because no general federal question statute existed until 1875, until then plaintiffs normally brought all such claims in state court. *See Palmore*, 411 U.S. at 401 (discussing fora for federal question lawsuits before 1875); WRIGHT, *supra*, § 17, at 100-03 (describing origins of federal question statute); *see also* STEPHEN C. YEAZELL, CIVIL PROCEDURE 210 (4th ed. 1996) (noting that small number of individual federal statutes passed before 1875 included narrow grants of federal jurisdiction).

39. *See* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 484 (1987) (relating that "reaction to *Chisholm* was swift and hostile").

proper federal suit from proceeding solely because of the identity of the defendant.[40] Implementing the amendment has never required any affirmative legislation by the Congress.

In any event, the traditional requirements of subject matter jurisdiction also dictate the conditions under which a party may properly maintain a federal action.[41] Over the entire course of a lawsuit, any party at any time may show that the court adjudicating the case lacks jurisdiction over the subject matter,[42] or the court itself may so determine on its own motion.[43] Upon such a determination, the court dismisses the case because the Constitution renders the court powerless to decide it.[44]

A party entitled to sovereign immunity may waive immunity so that a suit against it in federal court may proceed.[45] This proposition presents the principal difficulty for a decision that sua sponte consideration of sovereign immunity is mandatory.[46] Waiver may be only for the case at bar,[47] or waiver may

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40. See Texas Higher Educ. Coordinating Bd. v. Greenwood (*In re* Greenwood), Civ.A. 1:99-CV-088C, 1999 WL 605447, at *3 (N.D. Tex. July 23, 1999) (noting that "[i]n essence, the Eleventh Amendment operates as a jurisdictional bar to suits filed in federal courts by private individuals against an unconsenting state"); Massey, *supra* note 5, at 65 (describing Eleventh Amendment's function as "jurisdictional trump card"); *see also* Alden v. Maine, 119 S. Ct. 2240, 2252 (1999) (asserting that "more natural inference" from circumstances under which states ratified Eleventh Amendment "is that the Constitution was understood . . . to preserve the States' traditional immunity from private suits" and positing that amendment's drafters merely intended it to "clarif[y] the only provisions of the Constitution that anyone had suggested might support a contrary understanding"); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2223 (1999) (noting that "[t]hough its precise terms bar only federal jurisdiction over suits brought against one state by citizens of another state or foreign state, we have long recognized that the Eleventh Amendment . . . repudiated the central premise of *Chisholm*").

41. *See* CHEMERINSKY, *supra* note 18, § 5.1 (summarizing purposes of subject matter jurisdiction requirement). Professor Chemerinsky's treatise notes that "parties cannot bring matters to federal court where constitutional or statutory authority [for subject matter jurisdiction] is lacking" and that this fact "helps to limit the role of the judiciary in the federal system." *Id.* at 249.

42. *See* 28 U.S.C. §§ 1331-1364 (1994 & Supp. III 1997) (establishing categories of subject matter jurisdiction of federal courts); CHEMERINSKY, *supra* note 18, § 5.1 (explaining that court's "subject matter jurisdiction may be challenged at any point and by either party").

43. *See* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908) (discussing challenge to subject matter jurisdiction raised on Court's own motion).

44. *See id.* at 154 (dismissing case for want of subject matter jurisdiction after Court raised issue sua sponte).

45. *See* Parden v. Terminal Ry., 377 U.S. 184, 186 (1964) (allowing party to sue state with state's consent despite Eleventh Amendment).

46. *See* Kolpak v. Bell, 619 F. Supp. 359, 370-71 (N.D. Ill. 1985) (using availability of waiver to explain that although sovereign immunity is not "wholly jurisdictional (such as subject matter jurisdiction) . . . [it is] sufficiently jurisdictional that it may be raised by the court on its own motion").

47. *See* Gunter v. Atlantic Coast Line R.R., 200 U.S. 273, 284 (1906) (noting state's

occur when a statutory scheme permits all suits against the state that arise in the course of a certain enterprise.[48] One commentator reconciles this conflict by contending that a state's consent to suit in federal court does not constitute actual consent to the court's otherwise deficient subject matter jurisdiction, "but rather [constitutes] the privilege of enforcing a limitation on the exercise of jurisdiction otherwise possessed by the court."[49] Moreover, the *Ex parte Young* exception[50] may overcome the protection of the Eleventh Amendment, as may valid congressional abrogation.[51] Of course, when a state waives its right to sovereign immunity, suits against it may be for any type of relief, including damages, and the plaintiff may name the state as a defendant.[52]

Waiver of sovereign immunity and consent to personal jurisdiction are conceptually distinct.[53] Waiving immunity merely prevents a state defendant from relying on the Eleventh Amendment alone as a defense to suit or to any judgment that the court eventually renders against it.[54] A party can freely waive a court's assertion of personal jurisdiction because, in large part, personal jurisdiction serves to ensure that the plaintiff's choice of forum is not unfairly inconvenient to the defendant.[55] In contrast, the Eleventh Amendment ensures that the plaintiff cannot sue the state defendant in any federal forum without its consent.[56]

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waiver of sovereign immunity); Stewart A. Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139, 166-67 (1977) (discussing waiver by litigation).

48. *See* Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 306-07 (1990) (quoting state statutes that consent to all suits that private plaintiffs file against state transportation agency); Baker, *supra* note 47, at 167-69 (discussing waiver by statute).

49. Pagan, *supra* note 5, at 488-89.

50. *See* Edelman v. Jordan, 415 U.S. 651, 664 (1974) (adjudicating claims against state notwithstanding Eleventh Amendment because plaintiffs sought prospective relief and state officer was named defendant).

51. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (providing that Enforcement Clause of Fourteenth Amendment permits Congress to abrogate state sovereign immunity).

52. *See Feeney*, 495 U.S. at 308 (affirming judgment for damages against state entity).

53. *See* Victoria A. Carter, Note, *God Save the King: Unconstitutional Assertions of Personal Jurisdiction Over Foreign States in U.S. Courts*, 82 VA. L. REV. 357, 365-72 (1996) (articulating conceptual differences between personal jurisdiction and sovereign immunity).

54. *See id.* at 366 (discussing relationship between waiver of sovereign immunity and consent to personal jurisdiction).

55. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113-14 (1987) (discussing fairness of exercising personal jurisdiction over defendant); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (analyzing whether exercise of personal jurisdiction over defendant offends "traditional notions of fair play and substantial justice" (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))); Carter, *supra* note 53, at 366 (positing that "'[s]overeign immunity' . . . determines only *whether* [a state] may be sued, whereas 'personal jurisdiction' determines *where* a sovereign may be sued").

56. *See* Carter, *supra* note 53, at 366, 369-72 (supporting courts' consideration of propriety of personal jurisdiction in forum only after state defendant consents to suit anywhere by

Factors serendipitiously present in the lawsuit may not "trump" the rules for establishing jurisdiction over the subject matter, and the parties ordinarily cannot consent to subject matter jurisdiction when their dispute does not fulfill the statutory requirements for it.[57] For example, nondiverse parties may not bring their state-law contract claim to federal court simply because they style the action in a particular way or because other important interests are at stake.[58] But surely, the argument for justifying waiver by omission might proceed, the Eleventh Amendment cannot serve as a categorical bar to suits if states and other state entities are free to forego it, just as parties are free to forego challenges to personal jurisdiction.[59] Arguably, a bar that other characteristics of a lawsuit can trump is not a bright-line rule of the sort that the Eleventh Amendment's text suggests.[60]

Waiver of sovereign immunity and mandatory consideration of sovereign immunity by a federal court are not wholly irreconcilable concepts. Consent primarily deals with the expressed willingness of a party to be before a court;[61] sua sponte consideration of sovereign immunity concerns the ability of the court to render a judgment.[62] Whether to consent to a suit despite sovereign immunity thus is a party's determination to make independent of what the court thinks, and whether the court in fact has power to decide a case is for the court

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waiving its immunity); *see also* Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (emphasizing that Eleventh Amendment serves to prevent states from indignity of facing suit at all rather than merely from adverse judgment). Furthermore, a private lawsuit in *state court* against a state defendant pursuant to a federal cause of action passed under Article I may normally not proceed unless the state consents to the suit. *See* Alden v. Maine, 119 S. Ct. 2240, 2266 (1999) (deciding that Congress may not require state courts to decide cases not within federal judicial power). However, the Eleventh Amendment's limitations on *federal* jurisdiction are the primary concern of most of this Note.

57. *See* Seminole Tribe v. Florida, 517 U.S. 44, 82 n.9 (1996) (Stevens, J., dissenting) (discussing proposition that parties may not consent to federal court jurisdiction when case presents no federal question).

58. *See* 28 U.S.C. § 1332 (1997) (providing for federal court jurisdiction over cases in which citizenship of parties is diverse and amount in controversy exceeds $75,000); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (interpreting federal courts' diversity jurisdiction to require complete diversity among parties).

59. *See* Richard Mills, *Federal Practice*, 49 MERCER L. REV. 1045, 1052 (1998) (discussing party's right to consent to personal jurisdiction). Of course, personal jurisdiction without the consent of the party over which a court asserts it must comport with the Due Process Clause of the Fourteenth Amendment and the long arm statute of the forum. *See International Shoe*, 326 U.S. at 319-20 (describing constitutional limits of personal jurisdiction).

60. *See* U.S. CONST. amend. XI (stating that "the judicial power *shall* not be construed to extend" to certain specified cases) (emphasis added).

61. *See* BLACK'S LAW DICTIONARY 276 (5th ed. 1979) (defining consent as "an act of reason, accompanied by deliberation").

62. *Cf. id.* at 767 (defining "jurisdiction of the subject matter" as "[p]ower of a particular court to hear the type of case that is then before it").

to determine independent of the expressed will of the parties.[63] When a court raises the Eleventh Amendment on its own motion, the court does not necessarily have to decide that the Eleventh Amendment actually bars the suit.[64] Likewise, a court does not have to ignore completely the state defendant's consent to suit when raising the Eleventh Amendment on its own motion.[65] Rather, when a federal court raises the Eleventh Amendment question sua sponte, it merely acknowledges that, in cases against states, a condition precedent to the proper exercise of the federal judicial power exists: unless a state has *consented* to suit in federal court, the lawsuit may not proceed unless some exception to sovereign immunity applies.[66] More importantly, requiring sua sponte consideration of the Eleventh Amendment affirms that state sovereign immunity is too important to allow states sued in federal court to waive it by mere omission. This question – whether states can waive their sovereign immunity by omission – is at the heart of the decisions of the courts of appeals that confront the choice between the permissive and mandatory standards.[67]

IV. Can a State Waive Its Sovereign Immunity by Omission?: A Split in the Circuits

The chief legal difficulty in determining whether sua sponte consideration of sovereign immunity is permissive or mandatory arises from two decisions of the United States Supreme Court that treat the issue differently.[68]

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63. *See* Carter, *supra* note 53, at 367 (explaining doctrinal independence of sovereign immunity and personal jurisdiction).

64. *See infra* Part IV.B.1 (discussing cases that mandatorily raise Eleventh Amendment issues sua sponte and subsequently decide merits).

65. *See* Carter, *supra* note 53, at 370-71 (discussing judicial opinions that incorporate sovereign's consent to suit into court's analysis of propriety of personal jurisdiction).

66. *See* Edelman v. Jordan, 415 U.S. 651, 658, 667 (1974) (deciding that Eleventh Amendment does not bar suit against state officer for prospective relief although "the difference between the type of relief barred by the Eleventh Amendment and that permitted . . . will not in many instances be that between day and night"); *Ex parte* Young, 209 U.S. 123, 168 (1908) (deciding that Eleventh Amendment does not bar suit for injunctive relief against state officer engaged in unconstitutional conduct); ORTH, *supra* note 2, at 11 (discussing Eleventh Amendment's potential to bar plaintiff's requested relief against state). The Supreme Court recently has reiterated that courts should not interpret the Eleventh Amendment as a complete bar to suits against states. *See* Alden v. Maine, 119 S. Ct. 2240, 2266-67 (1999) (contending that "[s]overeign immunity . . . does not bar all judicial review of state compliance with the Constitution and valid federal law" but rather "strikes the proper balance between the supremacy of federal law and the separate sovereignty of the states"). There, the Court described the situations under which private parties may sue states as "[e]stablished rules [that] provide ample means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause." *Id.* at 2268.

67. *See infra* Part IV (discussing relation of whether states can waive sovereign immunity by omission to courts of appeals' treatment of sua sponte consideration of Eleventh Amendment).

68. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 119-20 (1984) (sug-

Because the Eleventh Amendment issue was not the primary question that either case presented, the cases' comments about the amendment are dicta.[69] The lower federal courts presently disagree in their resolutions of this issue,[70] and do not consistently treat either of the Supreme Court opinions as dispositive.[71] Moreover, in 1996 a court of appeals cited the earlier of the two decisions without even acknowledging the existence of the second decision as contrary authority.[72] In 1998, a concurring Justice of the Supreme Court followed suit.[73]

Patsy v. Florida Board of Regents,[74] the origin of the permissive standard, is the first of these two Supreme Court decisions.[75] In *Patsy*, the major-

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gesting that sua sponte consideration of sovereign immunity is mandatory); Patsy v. Florida Bd. of Regents, 457 U.S. 496, 515 n.19 (1982) (suggesting that sua sponte consideration of sovereign immunity is permissive).

69. *Compare Pennhurst*, 465 U.S. at 91 (stating issue of case as "whether a federal court may award injunctive relief against state officials on the basis of state law") *with Patsy*, 457 U.S. at 498 (stating issue of case as "whether exhaustion of state administrative remedies is a prerequisite to an action under 42 U.S.C. § 1983").

70. *Compare infra* Part IV.A (discussing courts that have ruled that sua sponte consideration of state sovereign immunity is permissive) *with infra* Part IV.B (discussing courts that have ruled that sua sponte consideration of state sovereign immunity is mandatory).

71. *Compare infra* Part IV.A (discussing courts preferring *Patsy* to *Pennhurst* and deciding that sua sponte consideration of state sovereign immunity is permissive) *with infra* Part IV.B (discussing courts preferring *Pennhurst* to *Patsy* and deciding that sua sponte consideration of state sovereign immunity is mandatory).

72. *See* Bouchard Transp. Co. v. Florida Dep't of Envtl. Protection, 91 F.3d 1445, 1448 (11th Cir. 1996) (per curiam) (citing *Patsy* only on question of whether court's sua sponte consideration of sovereign immunity is mandatory); *see also* Biggs v. Meadows, 66 F.3d 56, 60 (4th Cir. 1995) (same).

73. *See* Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring) (comparing Eleventh Amendment to personal jurisdiction inasmuch as "courts need not raise the issue *sua sponte*" and citing *Patsy*).

74. 457 U.S. 496 (1982).

75. *See* Patsy v. Florida Bd. of Regents, 457 U.S. 496, 515 n.19 (1982) (stating that Court need not raise Eleventh Amendment sua sponte). In *Patsy*, the United States Supreme Court decided "whether [the] exhaustion of state administrative remedies is a prerequisite to an action under 42 U.S.C. § 1983." *Id.* at 498. The plaintiff claimed that Florida International University (FIU) rejected her employment applications for more than thirteen positions. *Id.* She further claimed that FIU unlawfully discriminated on the basis of race and sex in hiring. *Id.* Plaintiff sought relief in the form of appointment to a future position or, alternatively, damages. *Id.* at 498 n.2. The district court dismissed the plaintiff's complaint for failure to exhaust her administrative remedies. *Id.* at 499. The court of appeals subsequently vacated the judgment and adopted a "flexible" exhaustion rule establishing elaborate requirements under which it instructed the district court to reconsider the plaintiff's case. *Id.* at 500. After an examination of the legislative intent of both § 1983 and 42 U.S.C. § 1997e, the Supreme Court determined that § 1983 did not require the exhaustion of state administrative remedies. *Id.* at 503-12. The Court deferred to Congress's ability to prescribe a precise administrative process for § 1983 claims if it wanted to do so rather than instruct federal courts to decide the nature of appropriate

ity's cursory treatment of the Eleventh Amendment – relegating its entire discussion, including a statement that federal courts need not consider sovereign immunity sua sponte, to a footnote in the opinion's penultimate paragraph[76] – caused Justice Powell to reply with a vehement dissent.[77] Subsequently, in *Pennhurst State School & Hospital v. Halderman*,[78] Justice Powell commanded a five-Justice majority for the proposition that sua sponte consideration of state sovereign immunity is mandatory even if the state defendant does not invoke the prospect of an Eleventh Amendment bar to the court's judgment.[79] Directly contradicting the decision of the *Patsy* Court two years before, the *Pennhurst* Court asserted that the purpose of the Eleventh Amendment is to "deprive[ ] a federal court of power to decide certain claims against States that otherwise would be within the scope of Art[icle] III's grant of jurisdiction."[80] Older cases of the Court somewhat equivocally characterize

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exhaustion requirements on an ad hoc basis. *Id.* at 513. Accordingly, the Court allowed the plaintiff's claim in *Patsy* to proceed without requiring her first to pursue any administrative relief against FIU. *Id.* at 516.

76. *See id.* at 515 n.19 (relegating case's Eleventh Amendment issues to single footnote in penultimate paragraph of opinion and stating that federal courts need not consider state sovereign immunity sua sponte). During oral argument, a Justice asked whether the Eleventh Amendment might bar the suit. *Id.* Nonetheless, the *Patsy* majority left the question unresolved in its opinion because the defendant specifically requested that the Court reach the case's exhaustion issue and because counsel for the state defendant otherwise did not argue or brief the Eleventh Amendment question. *Id.*

77. *See id.* at 519-32 (Powell, J., dissenting) (criticizing sharply majority's treatment of case's Eleventh Amendment issues).

78. 465 U.S. 89 (1984).

79. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 120-21 (1984) (discussing how Eleventh Amendment operates as limitation on federal jurisdiction). In *Pennhurst*, the United States Supreme Court considered whether a federal court may award injunctive relief against state officers on the basis of state law. *Id.* at 91. The plaintiffs – the United States, the Pennsylvania Department of Public Welfare, and a class of all present and prospective residents of the Pennhurst Hospital (Pennhurst), a state-operated facility for the mentally retarded located in Pennsylvania – sued Pennhurst on the grounds that its conditions violated the Eighth and Fourteenth Amendment rights of the class members, as well as provisions of several federal and state statutes. *Id.* at 92. After numerous decisions in the litigation, including one by the Supreme Court in 1981, Pennhurst returned to the Supreme Court to protest a federal court of appeals's order that it comply with Pennsylvania state law. *Id.* at 95. Reversing, the Supreme Court emphasized the notion of state sovereignty that underlies the Eleventh Amendment, as well as the fact that the rationale for the *Ex parte Young* exception to the Eleventh Amendment does not extend to enjoining state officers from violating state law because such conduct does not concern the federal Constitution. *Id.* at 105-06. Moreover, the Court held that federal courts must examine all claims over which they establish proper subject matter jurisdiction, including pendent state law claims, for possible Eleventh Amendment bars to judgment. *Id.* at 121. Thus, the court of appeals's injunction against Pennhurst violated the Eleventh Amendment. *Id.* at 124-25.

80. *Id.* at 119-20.

the Eleventh Amendment's jurisdictional status as well, and the opinions suggest that the Court has long struggled with conclusively deciding whether a state can waive its sovereign immunity by mere omission.[81]

A. Patsy*'s Permissive Standard: A Way to Reach the Merits*

Two federal circuits presently follow the permissive standard suggested in *Patsy*, considering raising the Eleventh Amendment sua sponte to be discretionary because sovereign immunity is distinguishable from subject matter jurisdiction.[82] In adopting the permissive standard, neither court dismissed the case as improperly before it,[83] dispositions that may suggest the presence of policy considerations impelling these courts to reach the merits of the suits at bar.[84] Adopting the permissive standard allowed these courts to cite Supreme Court precedent as controlling[85] and then to reach the cases' merits despite the presence of a colorable Eleventh Amendment issue.[86] As long as Congress may abrogate the Eleventh Amendment under certain conditions,[87] these courts imply, it necessarily follows that state sovereign immunity is not absolute and thus that state defendants can waive it by omission.[88]

In *Benning v. Board of Regents of Regency Universities*,[89] a case filed against employees of a public university, the United States Court of Appeals for the Seventh Circuit suggested that it is not compelled to raise the Eleventh

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81. *See* Edelman v. Jordan, 415 U.S. 651, 677-78 (1974) (stating that Eleventh Amendment "*partakes of the nature* of a jurisdictional bar") (emphasis added).

82. *See* Bouchard Transp. Co. v. Florida Dep't of Envtl. Protection, 91 F.3d 1445, 1448 (11th Cir. 1996) (per curiam) (adopting *Patsy* standard on sua sponte consideration of Eleventh Amendment sovereign immunity); Benning v. Board of Regents of Regency Univs., 928 F.2d 775, 777 n.2 (7th Cir. 1991) (same).

83. *See Bouchard*, 91 F.3d at 1449 (remanding case to district court); *Benning*, 928 F.2d at 778-80 (deciding merits of some of presented claims and directing plaintiffs to file others in state court).

84. *See infra* notes 89-101 and accompanying text (discussing *Benning*); *infra* notes 102-07 and accompanying text (discussing *Bouchard*).

85. *See Bouchard*, 91 F.3d at 1448 (citing *Patsy*); *Benning*, 928 F.2d at 777 n.2 (same).

86. *See Bouchard*, 91 F.3d at 1449 (reaching merits); *Benning*, 928 F.2d at 778-80 (same).

87. *See* CHEMERINSKY, *supra* note 18, § 7.7, at 411 (stating that "Congress has broad authority to abrogate the Eleventh Amendment"). Professor Chemerinsky published this edition of his treatise before a 1996 decision of the Supreme Court that made that authority somewhat narrower. *See* Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996) (holding that Congress may not abrogate state sovereign immunity pursuant to its Article I powers). *Seminole Tribe* overruled a relatively recent decision of the Court. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 5 (1989) (holding that Congress may abrogate state sovereign immunity pursuant to Commerce Clause), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

88. *See* CHEMERINSKY, *supra* note 18, § 7.4, at 385 (noting that "the Supreme Court has refused to apply the Eleventh Amendment in many instances").

89. 928 F.2d 775 (7th Cir. 1991).

Amendment sua sponte even if faced with the question directly.[90] A student, Matthew Benning, sued employees of the university after he sustained injuries while conducting an experiment in one of the school's chemistry laboratories.[91] The district court dismissed the action on jurisdictional grounds, citing both the Eleventh Amendment and a state statute that conferred exclusive jurisdiction over all tort claims against the state to a designated state court.[92]

On appeal, the unanimous three-judge panel interestingly expressed some reluctance toward placing substantial reliance on the Eleventh Amendment; at the beginning of its opinion, the panel announced that it was "cautiously ventur[ing] into the dense tangle of fictions shrouding the doctrine of sovereign immunity."[93] Although courts and commentators have debated whether the Eleventh Amendment protects state universities,[94] the *Benning* court elected to use *Patsy* as authority to avoid deciding the question.[95] According to the *Benning* court, the state university's entitlement to sovereign immunity need not be decided.[96] Curiously, the Seventh Circuit previously had determined that Eleventh Amendment immunity attached to a state univer-

90. *See* Benning v. Board of Regents of Regency Univs., 928 F.2d 775, 777 n.2 (7th Cir. 1991) (adopting *Patsy* standard on whether to consider state sovereign immunity on court's own motion). In *Benning*, the United States Court of Appeals for the Seventh Circuit considered whether the federal courts could exercise jurisdiction over a tort suit between parties of diverse citizenship when a state law conferred exclusive jurisdiction over tort claims against the state upon the state courts. *Id.* at 776. Matthew Benning was a student at Northern Illinois University (NIU), a public university, when he suffered injuries during an experiment in an NIU laboratory. *Id.* Benning sought damages from various employees of NIU, as well as a judgment declaring NIU's chemistry laboratories unsafe. *Id.* The Seventh Circuit affirmed the district court's dismissal of Benning's federal lawsuit, declining to decide whether Illinois's sovereign immunity attached to NIU and instead resting its decision upon the fact that state rules of immunity govern federal diversity actions. *Id.* at 777. The Seventh Circuit directed Benning to file his claims for monetary relief in the state court that the Illinois statute designated and decided that his claims for declaratory relief did not fall within the *Ex parte Young* exception to the Eleventh Amendment because of their basis in state law. *Id.* at 778-79.

91. *See id.* at 776 (stating facts of case).

92. *See id.* (describing proceedings below and findings of lower court).

93. *Id.*

94. *See* Thompson v. City of Los Angeles, 885 F.2d 1439; 1442-43 (9th Cir. 1989) (extending state sovereign immunity to state university); Kovats v. Rutgers, The State Univ., 822 F.2d 1303, 1312 (3d Cir. 1987) (denying state sovereign immunity to state university); *see generally* Frank H. Julian, *The Promise and Perils of Eleventh Amendment Immunity in Suits Against Public Colleges and Universities*, 36 S. TEX. L. REV. 85 (1995) (discussing whether state sovereign immunity properly attaches to state universities defending suits in federal court).

95. *See Benning*, 928 F.2d at 778 n.2 (citing *Patsy* to support proposition that "[w]e are not obliged to reach the Eleventh Amendment issue because the Eleventh Amendment doctrine of sovereign immunity, though often characterized as jurisdictional, does not function as a true jurisdictional bar").

96. *See id.* (declining to decide whether Illinois's sovereign immunity attached to NIU because other grounds for declining federal jurisdiction existed).

sity.[97] However, the *Benning* court instead described the sovereign immunity issue as "delicate [and] fact-intensive" and thus largely avoided it.[98] After writing that nothing required the court to reach the Eleventh Amendment issue,[99] and thereby implying that it did not consider the amendment to be "jurisdictional" in that sovereign immunity precluded consideration of other issues in the case, the *Benning* court reiterated that it properly could base its decision upon other grounds.[100] The Illinois statute applied by both courts in the case was dispositive.[101]

Bouchard Transportation Co. v. Florida Department of Environmental Protection[102] is the second court of appeals case to employ the *Patsy* standard to some extent.[103] In *Bouchard*, the United States Court of Appeals for the Eleventh Circuit found that the district court abused its discretion when it reserved a ruling on the defendant's Eleventh Amendment claim and instead issued a pretrial mediation order.[104] Citing *Patsy*, the court presumably agreed with the *Patsy* majority that sua sponte consideration of the Eleventh Amendment is not mandatory because sovereign immunity is not fully jurisdictional.[105]

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97. *See id.* at 777 (citing Kashani v. Purdue Univ., 813 F.2d 843 (7th Cir. 1987)).

98. *See id.* (describing sovereign immunity issue as "delicate [and] fact-intensive" and largely avoiding it).

99. *See id.* at 777 n.2 (stating that court need not reach Eleventh Amendment issue).

100. *See id.* (announcing that court's decision does not rely upon Eleventh Amendment).

101. *See id.* at 777 (describing case as "easily decided upon" state law grounds).

102. 91 F.3d 1445 (11th Cir. 1996).

103. *See* Bouchard Transp. Co. v. Florida Dep't of Envtl. Protection, 91 F.3d 1445, 1449 (11th Cir. 1996) (per curiam) (adopting *Patsy* standard on whether to consider state sovereign immunity on court's own motion). In *Bouchard*, the United States Court of Appeals for the Eleventh Circuit decided whether a federal court may issue a mediation order against a state notwithstanding the Eleventh Amendment. *Id.* at 1446. Bouchard Transportation and two other companies, all owners of ships responsible for a spill of petroleum products into Florida's navigable waters, filed federal limitation of liability actions after the spill. *Id.* at 1447. After the district court enjoined litigation pending against the ship owners and notified the Florida Department for Environmental Protection (DEP) of its action, DEP in turn filed answers and affirmative claims for relief and Bouchard Transportation counterclaimed against it. *Id.* In the district court, DEP unsuccessfully argued that the Eleventh Amendment barred federal adjudication of Bouchard Transportation's counterclaims as well as the pretrial mediation that the court subsequently ordered. *Id.* Describing the Eleventh Amendment as a "threshold issue," the Eleventh Circuit ruled that courts should ordinarily consider sovereign immunity early in litigation. *Id.* at 1448. The court reasoned that "unnecessarily postpon[ing]" a ruling on Eleventh Amendment immunity violated principles of state sovereignty and that the district court in this case abused its discretion by delaying its ruling on it. *Id.* at 1448-49. Thus, the *Bouchard* court held that the Eleventh Amendment barred the district court's mediation order against DEP. *Id.* at 1449.

104. *See id.* at 1449 (deciding that reservation of ruling on sovereign immunity in order to issue mediation order constitutes abuse of discretion).

105. *See id.* at 1448 (citing *Patsy* for proposition that sua sponte consideration of Eleventh Amendment is merely permissive).

Nonetheless, the court of appeals decided that Eleventh Amendment immunity might attach to the state Department of Environmental Protection and remanded that question to the district court because the Department had not consented to suit.[106] The court chose not to elaborate further on the constitutional status of sovereign immunity and apparently did not consider the Eleventh Amendment to limit its subject matter jurisdiction.[107] Although the Eleventh Circuit has not considered the issue since, the court's ambivalence in *Bouchard* implies that a state defendant before it potentially could waive the state's sovereign immunity by omission. Other courts have found fault with this position.

B. Pennhurst*'s Mandatory Standard: Acknowledging a Constitutional Limitation When a State Is a Federal Defendant*

1. Raising the Eleventh Amendment Sua Sponte and Yet Deciding the Merits

The *Pennhurst* standard on the jurisdictional status of state sovereign immunity – that the Eleventh Amendment requires federal courts to raise sovereign immunity issues sua sponte – has emerged as the majority position on this issue.[108] The recent opinion of the United States Court of Appeals for the Third Circuit in *Sullivan v. Barnett*[109] marked it as the seventh circuit of the United States Courts of Appeals – and at least the ninth federal appellate decision – to adopt the *Pennhurst* standard when deciding whether it must raise the Eleventh Amendment sua sponte.[110] Only three of these courts,

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106. *See id.* (describing one of Eleventh Amendment's central purposes as protecting states from "indignity of [private litigants] haling states into federal court").

107. *See id.* (declining to discuss Eleventh Amendment as aspect of court's subject matter jurisdiction because court decided not to address Eleventh Amendment issue for first time on appeal).

108. *See* Joan Steinman, *Crosscurrents: Supplemental Jurisdiction, Removal, and the ALI Revision Project*, 74 IND. L.J. 75, 91 & n.61, 92 (1998) (noting that "weight of authority . . . seems to [be] that the Eleventh Amendment *is* jurisdictional" and summarizing circuit split in which "it appears that more [courts] . . . regard[] it as appropriate to raise Eleventh Amendment immunity sua sponte, because of its jurisdictional nature").

109. 139 F.3d 158 (3d Cir. 1998).

110. *See* Sullivan v. Barnett, 139 F.3d 158, 179-80 (3d Cir. 1998) (adopting *Pennhurst* standard on whether to consider state sovereign immunity on court's own motion), *rev'd on other grounds sub nom.* American Mfrs. Mut. Ins. Co. v. Sullivan, 119 S. Ct. 69 (1999). In *Sullivan*, the United States Court of Appeals for the Third Circuit considered whether provisions of the Pennsylvania Workers' Compensation Act (the Act) violated the complaining claimants' due process rights. *Id.* at 162. A 1993 amendment to the Act created a process under which a medical provider could review an injured employee's medical treatment for reasonableness and necessity, and the Act permitted the automatic suspension of an injured employee's payments. *Id.* at 162-63. The court's opinion began by designating all of the named defendants in the case

however, then have used their sua sponte consideration of sovereign immunity to dismiss the action and avoid the merits of the case.[111] In other words, the majority of courts that have considered themselves bound to raise state sovereign immunity sua sponte concluded that no such jurisdictional bar existed in the particular case, and thus they went on to decide the merits of the plaintiff's claim.[112] This treatment of the question goes far to render their mandatory sua sponte consideration of sovereign immunity consistent with consent, with *Ex parte Young*, and with congressional abrogation because it demonstrates that courts can be cognizant of the prescribed limits of their judicial power without dismissing every case before them. The unwillingness of these federal courts to allow states to waive sovereign immunity by omission suggests that they consider it to be a component of their subject matter jurisdiction.[113]

Sullivan poses an excellent example of this trend because the opinion explicitly declares that a court must consider the Eleventh Amendment sua sponte because it bears upon the court's jurisdiction.[114] The court decided that it could not determine whether the plaintiffs were suing the state defendants in their official or individual capacities, and thus the court could not determine whether the Eleventh Amendment actually barred the claims.[115] How-

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as state actors, concluding that the claimants had a property interest in payment under the Act, and determining that the Act thus implicated the Due Process Clause. *Id.* at 168-71. The court decreed that, at a minimum, the Act should grant employees undergoing review the opportunity to present evidence on their behalf during the state's review of their treatment. *Id.* at 172-73. As a final matter, the court of appeals raised the Eleventh Amendment on its own motion and dismissed the plaintiffs' complaints with instructions that the district court consider the effect of sovereign immunity on federal jurisdiction over the case's state defendants. *Id.* at 180; *see* V-1 Oil Co. v. Utah Dep't of Pub. Safety, 131 F.3d 1415, 1419 (10th Cir. 1997) (adopting *Pennhurst* standard on whether to consider state sovereign immunity on court's own motion); Suarez Corp. Inds. v. McGraw, 125 F.3d 222, 227 (4th Cir. 1997) (same); Mascheroni v. Board of Regents of the Univ. of Cal., 28 F.3d 1554, 1559 (10th Cir. 1994) (same); Atlantic Healthcare Benefits Trust v. Googins, 2 F.3d 1, 4 (2d Cir. 1993) (same); Sindia Expedition v. Wrecked & Abandoned Vessel, Known As "The Sindia," 895 F.2d 116, 119 (3d Cir. 1990) (same); Charley's Taxi Radio Dispatch v. SIDA of Haw., Inc., 810 F.2d 869, 873 n.2 (9th Cir. 1987) (same); Morris v. Washington Metro. Area Transit Auth., 702 F.2d 1037, 1040-41 (D.C. Cir. 1983) (same), *aff'd*, 781 F.2d 28 (D.C. Cir. 1986); Whiting v. Jackson State Univ., 616 F.2d 116, 127 n.8 (5th Cir. 1980) (same).

111. *See infra* Part IV.B.2 (discussing *Mascheroni*, *Charley's Taxi Radio*, and *McGraw*).

112. *See infra* Part IV.B.1 (discussing *Sullivan*, *Sindia Expedition*, *V-1 Oil*, *Whiting*, *Morris*, and *Googins*).

113. *See* Sullivan v. Barnett, 139 F.3d 158, 180 (3d Cir. 1998) (requiring district court to consider Eleventh Amendment as aspect of court's subject matter jurisdiction), *rev'd on other grounds sub nom.* American Mfrs. Mut. Ins. Co. v. Sullivan, 119 S. Ct. 69 (1999).

114. *See id.* at 179 (raising sovereign immunity sua sponte because "it is relevant to [the court's] jurisdiction").

115. *See id.* at 180 (remanding Eleventh Amendment issue to district court). The plaintiffs named the Commonwealth of Pennsylvania as a defendant in their complaint; however, the

ever, the *Sullivan* court failed to cite its own precedent. In *Sindia Expedition, Inc. v. Wrecked and Abandoned Vessel, Known as "The Sindia,"*[116] a 1990 case, the Third Circuit seemed to adopt the *Pennhurst* sua sponte standard as authority for its strong pronouncements on sovereign immunity.[117] Consequently, one might infer that the *Sullivan* court read *Sindia* narrowly and interpreted the case as not having decided exactly what jurisdictional obligations arise from the Eleventh Amendment.[118]

Notwithstanding the Third Circuit's omission in *Sullivan*, at least one other court has cited *Sindia Expedition* for the proposition that sua sponte consideration of sovereign immunity is mandatory.[119] In *Sindia Expedition*, the Third Circuit noted the parties' approval of the court's jurisdiction over the case but implied that the Eleventh Amendment required the court to undertake a more substantial constitutional inquiry.[120] Consequently, the court embarked on a lengthy treatment of the Eleventh Amendment's applicability to the case before concluding that the amendment did not bar the plaintiff's claims.[121] Perhaps because the district court in *Sindia Expedition* had decided

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court thought whether the plaintiffs sued the named state officials in their individual or official capacities was ambiguous. *Id.*

116. 895 F.2d 116 (3d Cir. 1990).

117. *See* Sindia Expedition, Inc. v. Wrecked and Abandoned Vessel, Known as "The Sindia," 895 F.2d 116, 119 (3d Cir. 1990) (adopting *Pennhurst* standard on whether to consider state sovereign immunity on court's own motion). In *Sindia Expedition*, the United States Court of Appeals for the Third Circuit decided whether the Eleventh Amendment deprives a federal court of jurisdiction under Rule 19(b) of the Federal Rules of Civil Procedure when a state, though a non-party, asserts an interest in pending litigation. *Id.* at 118. The petitioner, a maritime treasure hunter pursuing title to a shipwreck, filed an action for a declaration of title. *Id.* at 117. Although New Jersey also claimed ownership to the wreck, the petitioner failed to name any state, state agency, or state official in the complaint. *Id.* at 118. By letter, New Jersey informed the court of its claim and its refusal to consent to suit through appearance in the litigation. *Id.* The Third Circuit accepted the district court's finding that the state was an indispensable party in order to raise the Eleventh Amendment sua sponte. *Id.* at 119-20. According to the court, sovereign immunity did not bar the quiet title action because the petitioner did not seek damages from the state. *Id.* at 120-21. Furthermore, New Jersey remained free to assert its rights to the wreck against the successful party. *Id.* at 123. Thus, the court reinstated the petitioner's case and remanded it for a determination of superior rights to the shipwreck. *Id.*

118. *See id.* at 119-21 (discussing Eleventh Amendment and making no pronouncements on it beyond those necessary for decision in case).

119. *See* Mascheroni v. Board of Regents of the Univ. of Cal., 28 F.3d 1554, 1558 (10th Cir. 1994) (describing *Sindia Expedition* as "impliedly adopt[ing] th[e] mandatory rule").

120. *See Sindia Expedition*, 895 F.2d at 119 (asserting that "[a]lthough [the state of] New Jersey and the Expedition are satisfied that the federal court has jurisdiction [with regard to the Eleventh Amendment] over the action, we have 'a special [independent] obligation' to satisfy ourselves" that sovereign immunity did not bar petitioner's claims).

121. *See id.* at 120 (finding that plaintiff's claims were "not a circuitous *in personam* action to obtain jurisdiction over the State for purposes of money damages").

the case on other grounds,[122] the Third Circuit believed that it had not decided conclusively that it must raise the Eleventh Amendment sua sponte at the time that *Sullivan* came before it.[123]

When the *Sullivan* court adopted the *Pennhurst* standard, it primarily relied on *V-1 Oil Co. v. Utah State Department of Public Safety*,[124] a decision of the United States Court of Appeals for the Tenth Circuit.[125] In *V-1 Oil*, a nonresident owner of out-of-state liquified petroleum gas facilities challenged Utah's licensing and certification fees as they applied to his business.[126] The plaintiff conducted business in Utah, and the state contended that the plaintiff fell within the terms of the Utah Liquified Petroleum Gas Act, a public health and safety statute.[127] The plaintiff sued the state on the grounds that Utah's enforcement of the statute's requirements against the plaintiff constituted a violation of the Commerce Clause.[128]

On review, the Court of Appeals for the Tenth Circuit treated the applicability of the Eleventh Amendment as a threshold issue.[129] The court noted that the state of Utah specifically omitted a possible sovereign immunity defense from its substantive arguments in the case.[130] After wrestling briefly with

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122. *See id.* at 118 (stating district court's ground of decision as "that the State had colorable title [to the shipwreck] and, therefore, the [petitioner] had failed to join an indispensable party as required under Federal Rule of Civil Procedure 19(b)").

123. *See* Sullivan v. Barnett, 139 F.3d 158, 179-80 (3d Cir. 1998) (discussing Eleventh Amendment issue sua sponte and not citing *Sindia Expedition*), *rev'd on other grounds sub nom.* American Mfrs. Mut. Ins. Co. v. Sullivan, 119 S. Ct. 69 (1999).

124. 131 F.3d 1415 (10th Cir. 1997).

125. *See Sullivan*, 139 F.3d at 179 (raising Eleventh Amendment sovereign immunity sua sponte (citing V-1 Oil Co. v. Utah Dep't of Pub. Safety, 131 F.3d 1415, 1419 (10th Cir. 1997))). In *V-1 Oil*, the United States Court of Appeals for the Tenth Circuit considered whether the imposition of licensing and certification fees upon an out-of-state company doing business in Utah constituted a violation of the Commerce Clause. *See* V-1 Oil Co. v. Utah Dep't of Pub. Safety, 131 F.3d 1415, 1418 (10th Cir. 1997) (stating case's issue). V-1 Oil protested Utah's assessment of fees on its facilities in Idaho and Wyoming on the ground that the fees discriminated against out-of-state commerce. *Id.* at 119. The court began its analysis with sua sponte consideration of Utah's Eleventh Amendment sovereign immunity and found that the amendment barred V-1 Oil's claims for retroactive monetary reimbursement of the licensing fees that it already had paid. *Id.* at 1422. However, the Eleventh Amendment did not bar V-1 Oil's constitutional claims against the individual state officers responsible for collecting the licensing fees in the future because those claims fell within the *Ex parte Young* exception to sovereign immunity. *Id.* The court of appeals rejected V-1 Oil's Commerce Clause claims and sustained Utah's licensing requirement as applied to V-1 Oil. *Id.* at 1427-28.

126. *See V-1 Oil*, 131 F.3d at 1419 (describing plaintiff's claims in case).

127. *See id.* at 1418 (describing statute's putative application to nonresident business).

128. *See id.* at 1419 (describing plaintiff's Commerce Clause claim).

129. *See id.* at 1419-22 (discussing as threshold issue Eleventh Amendment's application to case).

130. *See id.* at 1419 (relating court's suggestion at oral argument of Eleventh Amendment

whether sua sponte consideration of the Eleventh Amendment was nonetheless mandatory, the court ultimately concluded that no Supreme Court precedent controlled its decision.[131] The court finally cited a decision of its own as authority for raising the issue, without expressly adopting the standard of either *Pennhurst* or *Patsy*.[132] However, the court noted that a state's appearance in a lawsuit cannot alone constitute consent.[133] On its own initiative, the court also quoted a Utah statute that explicitly retains the state's Eleventh Amendment immunity while consenting to most suits in its own state courts.[134] This treatment of sovereign immunity by the Tenth Circuit fairly aligns it with the other federal circuits that adopt the *Pennhurst* standard.[135]

The United States Court of Appeals for the Fifth Circuit employed a somewhat different approach to the question in *Whiting v. Jackson State University*.[136] Neither party raised the applicability of the Eleventh Amendment to the defendant,[137] a state-supported university that employed the plaintiff until the president discharged him approximately eighteen months

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bar). "The State of Utah admitted it chose not to raise the potential constitutional limitation of [the court's] subject matter jurisdiction at either the district or appellate level." *Id.*

131. *See id.* (stating that "[t]he Supreme Court appears not to have decided whether consideration of the Eleventh Amendment bar is required or optional").

132. *See id.* at 1420 (citing Mascheroni v. Board of Regents of the Univ. of Cal., 28 F.3d 1554, 1558 (10th Cir. 1994)); *see also infra* notes 156-64 and accompanying text (discussing *Mascheroni*).

133. *See* V-1 Oil Co. v. Utah Dep't of Pub. Safety, 131 F.3d 1415, 1421 (10th Cir. 1997) (stating that state's defense of suit is not necessarily consent even though state does not dispute that it has not invoked Eleventh Amendment).

134. *See id.* at 1421-22 (discussing Utah's Governmental Immunity Act and noting provision stating that "consent to be sued in the state's own courts does not serve to waive [Utah's] Eleventh Amendment immunity" (citations omitted)).

135. *See* Steinman, *supra* note 108, at 91 n.61 (listing *V-1 Oil* among court of appeals cases adopting *Pennhurst* standard).

136. *See* Whiting v. Jackson State Univ., 616 F.2d 116, 127 n.8 (5th Cir. 1980) (raising Eleventh Amendment issue sua sponte in final paragraphs of opinion). In *Whiting*, the United States Court of Appeals for the Fifth Circuit reviewed a judgment in favor of a white employee of a predominantly black university who claimed that the university discharged the plaintiff because of the plaintiff's race. *Id.* at 120. Jackson State University (JSU), a public university, suspended the plaintiff without pay in the midst of a one-year contract and simultaneously informed the plaintiff that it would not rehire the plaintiff. *Id.* Both the district court and the court of appeals found that the plaintiff produced sufficient evidence of violations of Title VII, 42 U.S.C. § 1981, and 42 U.S.C. § 1983 so that the jury reasonably could find that the plaintiff's race was the sole reason for the plaintiff's firing. *Id.* at 120, 123-34. Accordingly, the court of appeals affirmed the rulings of the district court in all respects except that it remanded the case with instructions that the district court reconsider its award of attorney's fees and articulate reasons for its award. *Id.* at 127.

137. *See id.* at 127 n.8 (noting that state defendant did not raise Eleventh Amendment).

after he began to work there.[138] The plaintiff raised claims under three federal civil rights laws.[139] The court of appeals methodically reviewed each of the jury's determinations as to the facts of the case, only to reach the Eleventh Amendment question on the last page of the opinion.[140] By deciding the case in this way, the court reached the case's merits despite the Eleventh Amendment and affirmed the plaintiff's jury award.[141] The court's sua sponte consideration of state sovereign immunity demonstrated an acute awareness of its own limited judicial power, even if it ultimately determined that Congress validly abrogated the states' sovereign immunity when it enacted the statute providing the *Whiting* plaintiff's right to relief.[142] The court indicated its agreement with the other circuits adopting the *Pennhurst* standard by considering the Eleventh Amendment to be a limitation on the court's subject matter jurisdiction and by refusing to allow state defendants to waive it by omission.[143]

The United States Court of Appeals for the District of Columbia Circuit embraced the *Pennhurst* standard in *Morris v. Washington Metropolitan Area Transit Authority*.[144] In that case, the merits of the plaintiff's claims centered

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138. *See id.* at 120 (describing relationship among parties in case).

139. *See id.* (stating plaintiff's causes of action).

140. *See id.* at 127 & n.8 (affirming district court judgment in plaintiff's favor and finding no Eleventh Amendment bar to award of damages).

141. *See id.* (affirming jury award).

142. *See id.* at 127 n.8 (noting that university is state agency within coverage of Title VII and concluding that Title VII constitutes valid congressional abrogation of state sovereign immunity). In its determination that Title VII covered JSU, the court emphasized that JSU is a state-created political body under state law and receives state funding. *Id.*

143. *See id.* (describing Eleventh Amendment as "in the nature of a jurisdictional bar").

144. *See* Morris v. Washington Metro. Area Transit Auth., 702 F.2d 1037, 1040-41 (D.C. Cir. 1983), *aff'd*, 781 F.2d 218 (D.C. Cir. 1986) (including Eleventh Amendment among questions of federal subject matter jurisdiction that court must consider on its own motion). In *Morris*, the United States Court of Appeals for the District of Columbia Circuit reviewed evidentiary rulings that the trial court made in the plaintiff's unlawful discharge case. *Id.* at 1039. The defendant operated the subway and bus systems in the metropolitan area of Washington, D.C. pursuant to an interstate compact between the District of Columbia, Virginia, and Maryland. *Id.* Upon the plaintiff's firing after two years of employment, the plaintiff filed suit against the plaintiff's former employer. *Id.* at 1039-40. The court of appeals began its analysis by raising jurisdictional issues concerning sovereign immunity, federal preemption, and the availability of an implied right of action against a nonfederal defendant on the basis of the First Amendment, and the court remanded them all to the district court for resolution. *Id.* at 1040-42. The court then found that each evidentiary exclusion that the plaintiff challenged constituted an abuse of discretion on the part of the trial court, vacated the district court's judgment, and ordered a new trial. *Id.* at 1043-49. Because of its jurisdictional concerns, the court of appeals also instructed the trial court to grant leave to amend the pleadings as necessary to establish federal jurisdiction. *Id.*

on certain evidentiary rulings that the trial court made.[145] However, the court first raised, on its own motion, several jurisdictional concerns that it had with the plaintiff's pleadings in the case and indicated that it had an obligation to satisfy itself that federal jurisdiction over the case was proper.[146] The court's concerns included whether the Eleventh Amendment entitled the named defendant to sovereign immunity, whether Title VII preempted the plaintiff's claims, and whether an implied right of action on the basis of the First Amendment existed when the defendant was a nonfederal entity.[147] On the sovereign immunity question, the court noted that one of its earlier cases had decided that each state comprising the partnership had waived its sovereign immunity with respect to the defendant partnership's proprietary functions, but the *Morris* court reserved a decision on whether that case applied to *Morris*'s facts.[148] In the end, the *Morris* court found no Eleventh Amendment bar to its reaching the merits of the plaintiff's case and agreed that exclusion of certain testimony at trial was in error.[149]

In *Atlantic Healthcare Benefits Trust v. Googins*,[150] the United States Court of Appeals for the Second Circuit ruled against the plaintiffs; accordingly, *Googins* is to date the closest case of a *Pennhurst*-abiding circuit using the standard to avoid a case's merits.[151] However, the *Googins* court candidly

145. *See id.* at 1039 (summarizing plaintiff's claims that several of trial judge's evidentiary rulings were in error).

146. *See id.* at 1040 (stating that "[s]uch matters casting doubt upon the existence of federal subject matter jurisdiction are the proper subject of consideration on the court's own motion, as neither the consent or omission of the parties nor the acquiescence of the court can confer jurisdiction where none exists").

147. *See id.* at 1040-42 (discussing jurisdictional issues in case and including Eleventh Amendment sovereign immunity among them). If the defendant were an agency of the federal government rather than a joint venture between two states and the District of Columbia, Title VII would be the plaintiff's only remedy. *See id.* at 1040 (discussing possibility of federal preemption). If the defendant were an instrumentality of the states involved in its creation, their state sovereign immunity might have attached and barred the plaintiff's complaint. *See id.* at 1041 (discussing possibility of Eleventh Amendment bar). If 42 U.S.C. § 1983 were not available to a plaintiff seeking relief against state actors, whether a right of action based on the First Amendment would exist was a question that the Court of Appeals for the District of Columbia Circuit had not addressed as of the date of *Morris*. *See id.* at 1041-42 (deciding to treat claim against state entity as claim under § 1983).

148. *See id.* at 1041 (noting decision finding that defendant transit authority is agent of each sovereign signatory to compact and that compact waives signatories' sovereign immunity for transit authority's proprietary functions).

149. *See id.* at 1040-41 (assuming for sake of argument that Eleventh Amendment does not bar plaintiff's action and ruling in favor of plaintiff).

150. 2 F.3d 1 (2d Cir. 1993).

151. *See* Atlantic Healthcare Benefits Trust v. Googins, 2 F.3d 1, 4 (2d Cir. 1993) (disputing propriety of jurisdiction over plaintiff's claims against state agency). In *Googins*, the

disclosed that the plaintiffs simply erred by naming an unconsenting department of the Connecticut state government as a defendant in their federal lawsuit.[152] Neither the department itself nor the plaintiff raised the Eleventh Amendment in the case, but the court raised it sua sponte as a constitutional limitation on its subject matter jurisdiction.[153] The court did not find that the state department named as a defendant had waived its sovereign immunity in the case.[154] Nonetheless, the court did address the merits of the plaintiff's claims and ruled against them, although it did find that the plaintiffs had properly styled their *Ex parte Young* action against the Commissioner of Insurance.[155]

2. *Dismissing For Lack of Jurisdiction: Avoiding the Merits*

A decision like that of the United States Court of Appeals for the Tenth Circuit in *Mascheroni v. Board of Regents of the University of California*[156] poses a problem for proponents of mandatory sua sponte consideration of sovereign immunity.[157] The case's outcome demonstrates that some courts

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United States Court of Appeals for the Second Circuit reviewed the dismissal of claims for relief that would have prevented the state of Connecticut from regulating providers of health care benefits as insurance companies. *Id.* at 2. Two of the *Googins* plaintiffs were partners in a trust that provided medical benefits to members of one of the partners. *Id.* at 3. In 1991, the trust began to market its services in the state of Connecticut, and the state Department of Insurance (DOI) began to investigate it. *Id.* The counsel to DOI indicated that a failure to cooperate would result in unspecified further action against the trust. *Id.* The trust responded by filing a lawsuit and promptly moved for summary judgment on the ground that ERISA regulated the trust and thus preempted the state's efforts to do so. *Id.* On the basis of a 1993 amendment to ERISA that specifically authorized states to regulate certain trusts like the plaintiffs', the court of appeals affirmed summary judgment in favor of the state defendants. *Id.* at 4-6. The court raised the Eleventh Amendment sua sponte and declared that it barred the plaintiffs' claims against DOI, although the plaintiffs properly asserted an *Ex parte Young* action against DOI's commissioner. *Id.* at 4. On the case's merits, Connecticut could lawfully regulate the trust as an insurance company. *Id.* at 5.

152. *See id.* at 4 (dismissing claims against DOI for lack of subject matter jurisdiction because it did not consent to suit after court raised Eleventh Amendment on its own motion).

153. *See id.* at 4 (stating that "[a]lthough the parties do not address the Eleventh Amendment in their briefs, we raise it *sua sponte* because it affects our subject matter jurisdiction").

154. *See id.* (declining jurisdiction over plaintiffs' claims against DOI because DOI did not waive its sovereign immunity).

155. *See id.* at 6 (affirming district court's grant of summary judgment in favor of defendant Commissioner of Insurance although federal jurisdiction was proper under *Ex parte Young*).

156. 28 F.3d 1554 (10th Cir. 1994).

157. *See* Mascheroni v. Board of Regents of the Univ. of Cal., 28 F.3d 1554, 1557-59 (10th Cir. 1994) (considering whether court should raise Eleventh Amendment sua sponte). In *Mascheroni*, the court considered the validity of causes of action that a former employee levied against a state university. *Id.* at 1555-56. The plaintiff, Pedro Mascheroni (Mascheroni), worked

have used an unpleaded Eleventh Amendment issue to escape a difficult ruling on a case's merits.[158] In *Mascheroni*, the plaintiff worked as a physicist in a public university laboratory and alleged that the university discharged him due to his national origin.[159] After the university fired him, Mascheroni initiated multiple civil proceedings that the district court eventually joined together into a single case.[160] Treating the Eleventh Amendment as a threshold issue, the court of appeals elaborated on the "prolonged debate" as to whether courts should raise state sovereign immunity sua sponte.[161] The Tenth Circuit cited two cases from the 1980s in which it considered the Eleventh Amendment on its own motion.[162] Although the court stated that *Mascheroni* itself did not require the issue's resolution because the court would decide that state sovereign immunity attached to the laboratory regardless of whether the court explicitly adhered to *Pennhurst*, the *Mascheroni* court noted that neither the state defendant's litigation of the lawsuit nor its failure to consent explicitly to suit would constitute a waiver of its sovereign immunity.[163] The court proceeded to find that the Eleventh Amendment barred the plaintiff's state law claims for coercive relief in federal court and thus dismissed the claims for lack of jurisdiction.[164]

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for the Los Alamos National Laboratory in New Mexico, a facility that the University of California operated pursuant to a contract with the United States Department of Energy. *Id.* at 1556. After Mascheroni repeatedly criticized the laboratory's projects, the laboratory fired him from his position. *Id.* Mascheroni filed a federal court complaint alleging a violation of Title VII as well as state law claims which the state court had dismissed on the basis of forum non conveniens. *Id.* at 1557. The court of appeals determined that the Eleventh Amendment attached to the Board of Regents and barred a federal court from reaching the merits of Mascheroni's state law claims. *Id.* at 1557-60. The court also determined that the statute of limitations barred all violations of Title VII that Mascheroni alleged against the defendants. *Id.* at 1560-62. Accordingly, the court dismissed all of Mascheroni's state law claims for want of jurisdiction and affirmed the district court's dismissal of his Title VII claim as time-barred. *Id.* at 1563.

158. *See id.* at 1559 (raising Eleventh Amendment sua sponte and finding it dispositive of plaintiff's state law claims); *see also infra* notes 165-87 and accompanying text (discussing Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc., 810 F.2d 869 (9th Cir. 1987) and Suarez Corp. Indus. v. McGraw, 125 F.3d 222 (4th Cir. 1997)).

159. *See Mascheroni*, 28 F.3d at 1556 (discussing origin of plaintiff's claims).

160. *See id.* (discussing procedural history of case).

161. *See id.* at 1557-59 (discussing jurisprudence concerning whether federal courts must consider Eleventh Amendment on their own motion).

162. *See id.* at 1558 (citing AMISUB v. Colorado Dep't of Soc. Servs., 879 F.2d 789 (10th Cir. 1989) and Esparza v. Valdez, 862 F.2d 788 (10th Cir. 1988)).

163. *See id.* at 1559-60 (declining to reaffirm mandatory sua sponte consideration of state sovereign immunity but finding that neither state defendant's litigation of suit nor its failure explicitly to invoke Eleventh Amendment constituted waiver of sovereign immunity).

164. *See id.* at 1560 (concluding that Eleventh Amendment "imposes a threshold jurisdictional bar" to state law claims brought in federal court).

The opinion of the United States Court of Appeals for the Ninth Circuit in *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*[165] is among the most explicit in adopting the *Pennhurst* rule.[166] Moreover, it avoids the merits of the plaintiff's case as well.[167] In *Charley's Taxi Radio*, the Ninth Circuit reviewed the district court's consideration of the Eleventh Amendment as a matter of its subject matter jurisdiction,[168] but, in a footnote, the court wrote that it could describe the amendment's effect as conferring either a state immunity from suit or a jurisdictional limitation on federal courts.[169] The court cited *Pennhurst* as authority for the proposition that the amendment is truly jurisdictional, and then commented on the seeming contradiction that the possibility of state consent to suit on the one hand and mandatory sua sponte consideration of state sovereign immunity on the other presents.[170] Consistent with the court's equivocation with regard to the Eleventh Amendment's function, the court then decided that, as a legal matter, it could refer properly to the function of the Eleventh Amendment as either an immunity or a juris-

165. 810 F.2d 869 (9th Cir. 1987).

166. *See* Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc., 810 F.2d 869, 873 n.2 (9th Cir. 1987) (stating that "the effect of the Eleventh Amendment must be considered *sua sponte* by federal courts" and citing *Pennhurst*). In *Charley's Taxi Radio*, the United States Court of Appeals for the Ninth Circuit considered whether various actions of an association of individual taxicab owner-operators, the State of Hawaii, the Hawaii Department of Transportation, and the state Director of Transportation constituted violations of the Sherman Antitrust Act. *Id.* at 872. The private operator of a large fleet of taxicabs sued the named defendants to challenge a contract that granted the exclusive right to provide service from Honolulu International Airport to the taxicab association. *Id.* First, the court of appeals found that the district court erred in exercising jurisdiction over the State of Hawaii and the Department of Transportation because of the Eleventh Amendment. *Id.* at 873-74. The court did not find consent to the suit by either party or by valid congressional abrogation of the parties' sovereign immunity. *Id.* Jurisdictionally, the plaintiff properly asserted an *Ex parte Young* claim for an injunction against the Director of Transportation's future enforcement of the contract. *Id.* at 874-76. However, the court of appeals ruled that the contract constituted valid state action and was thus immune from injunctive relief under principles of sovereign immunity. *Id.* at 875-76. Because the court did not find a Sherman Act violation, it remanded the claims against the state and the Department of Transportation to the district court with instructions to dismiss for want of jurisdiction. *Id.* at 876-79.

167. *See id.* at 879 (dismissing case on jurisdictional grounds).

168. *See id.* at 873 (describing state sovereign immunity as aspect of federal courts' subject matter jurisdiction).

169. *See id.* at 873 n.2 (discussing interpretations of Eleventh Amendment that describe it as state immunity from suit and jurisdictional limitation on federal courts).

170. *See id.* (comparing Eleventh Amendment to legal immunity and to subject matter jurisdiction). The court stated that "[l]ike a traditional immunity and unlike a jurisdictional bar, the protection afforded by the Eleventh Amendment may be waived. Like a jurisdictional bar and unlike a traditional immunity, however, the effect of the Eleventh Amendment must be considered *sua sponte* by federal courts." *Id.* (citations omitted).

dictional bar.[171] Regardless, the court did not allow any of the state defendants to waive their Eleventh Amendment protection by omission.[172] Although the court's sua sponte consideration of the Eleventh Amendment in *Charley's Taxi Radio* benefitted only the state Director of Transportation,[173] the Ninth Circuit had previously recognized – on its own motion – state sovereign immunity for a defendant whose entitlement to it was more ambiguous.[174] The court appeared to be following that precedent.

In *Suarez Corp. Industries v. McGraw*,[175] the United States Court of Appeals for the Fourth Circuit closely linked sua sponte consideration of Eleventh Amendment sovereign immunity to whether the court could raise the issue for the first time on appeal.[176] In *McGraw*, the defendants were two lawyers in the West Virginia Attorney General's office.[177] The state had filed a complaint against Suarez Corporation pursuant to the West Virginia Con-

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171. *See id.* (stating that "[b]ecause the operation of the Eleventh Amendment has aspects of both an immunity and a jurisdictional bar, we apply the terms interchangeably").

172. *See id.* at 873 (refusing to allow parties to waive sovereign immunity by omission and citing *Pennhurst*).

173. *See id.* at 874 (considering applicability of Eleventh Amendment to state Director of Transportation on court's own motion). Because the plaintiff named the director as a defendant only to seek an injunction against the future enforcement of the challenged contract, the court of appeals found that the plaintiff's claims against the director were jurisdictionally proper under *Ex parte Young*. *Id.* The court noted that the State of Hawaii and the Department of Transportation had asserted their sovereign immunity throughout the litigation. *Id.* at 873.

174. *See* Demery v. Kupperman, 735 F.2d 1139, 1149 n.8 (9th Cir. 1984) (declining to apply sovereign immunity to officers of state medical review board after raising Eleventh Amendment sua sponte). In *Demery*, the court fully considered the Eleventh Amendment issue, including aspects of it that the parties did not brief or argue. *Id.*

175. 125 F.3d 222 (4th Cir. 1997).

176. *See* Suarez Corp. Indus. v. McGraw, 125 F.3d 222, 226-27 (4th Cir. 1997) (discussing whether courts may raise Eleventh Amendment immunity for the first time on appeal and whether sua sponte consideration of Eleventh Amendment is mandatory). In *McGraw*, the United States Court of Appeals for the Fourth Circuit addressed the immunity claims of state officials sued after they filed a complaint against Suarez Corporation (Suarez) pursuant to the West Virginia Consumer Credit and Protection Act. *Id.* at 224-25. Suarez published a newspaper advertisement criticizing the state's case against it and alleged that the state's prosecution intensified after the advertisement appeared. *Id.* at 224. Suarez sought relief on the basis of 42 U.S.C. § 1983 and various state law causes of action. *Id.* at 225. On review, the court decided that it could exercise appellate jurisdiction over the denial of a motion to dismiss based on claims of absolute immunity and sovereign immunity. *Id.* at 225-28. The Eleventh Amendment barred only a claim seeking injunctive relief for the state defendants' alleged violation of state law because all of the other claims against which the defendants raised a sovereign immunity defense named them in their personal and not their official capacities. *Id.* at 229. The court concluded that it could raise the Eleventh Amendment issues in the case on its own motion and bar Suarez's claims as required. *Id.* at 230-31.

177. *See id.* at 224 (describing parties in case).

sumer Credit and Protection Act.[178] Suarez Corporation subsequently published a newspaper advertisement criticizing the state's case and sued the lawyers when it appeared that the state's prosecution of Suarez Corporation intensified after the advertisement appeared.[179] In response, the lawyers moved to dismiss the plaintiff's complaint based on absolute immunity, qualified immunity, and Eleventh Amendment sovereign immunity.[180] Although the court of appeals refused to consider the applicability of qualified immunity,[181] it found that its appellate jurisdiction over the absolute immunity and sovereign immunity claims was proper.[182] The court found that absolute immunity did not attach to the defendants' prosecution of the plaintiff,[183] and it concentrated the bulk of its analysis on the Eleventh Amendment question.[184] Like the *Charley's Taxi Radio* court, the *McGraw* court compared the immunity-like and jurisdiction-like attributes of the Eleventh Amendment.[185] In so doing, the court noted that the protection that the amendment confers is like an immunity because it bars suit in federal court and is like subject matter jurisdiction because a court ought to consider it at any time and, if necessary, on the court's own motion.[186] The *McGraw* court cited *Pennhurst* approvingly and stated that a court's discovery of an Eleventh Amendment bar in a case requires dismissal for lack of subject matter jurisdiction.[187] Although no

178. *See id.* (describing state's complaint against Suarez pursuant to West Virginia Consumer Credit and Protection Act).

179. *See id.* (describing state's prosecution of Suarez and content of Suarez's newspaper advertisement).

180. *See id.* at 224-25 (quoting district court's opinion denying defendants' motions to dismiss).

181. *See id.* at 226 (stating court's refusal to consider defendants' qualified immunity claims).

182. *See id.* at 226, 227 (determining that court had appellate jurisdiction over defendants' absolute immunity and sovereign immunity claims).

183. *See id.* at 230 (concluding that absolute immunity does not bar plaintiff's claims against defendants).

184. *See id.* at 226-27, 228 (discussing Eleventh Amendment's application to case).

185. *See id.* at 227 (comparing immunity-like and jurisdiction-like attributes of Eleventh Amendment). The court reiterated an observation made in an earlier Fourth Circuit case, that the Eleventh Amendment "is expressed as a limit on the jurisdiction of the federal courts." *Id.* (citation omitted); *see supra* note 171 and accompanying text (quoting *Charley's Taxi Radio* court's comparison of immunity-like and jurisdiction-like attributes of Eleventh Amendment).

186. *See* Suarez Corp. Indus. v. McGraw, 125 F.3d 222, 227 (4th Cir. 1997) (considering Eleventh Amendment like immunity because it bars suit in federal court and considering it like subject matter jurisdiction because court ought to consider it at any time and, if necessary, on its own motion).

187. *See id.* at 228 (citing *Pennhurst* and noting that discovery of Eleventh Amendment bar in case requires its dismissal for lack of subject matter jurisdiction).

citation to it appears in the *McGraw* opinion, the *McGraw* court's rule is consistent with the spirit of a major decision of the United States Supreme Court that, at the time, was just a year old.

V. The Direction of the Doctrine: Two Recent Cases

A. Seminole Tribe v. Florida: *Making Sovereign Immunity About Power*

The 1996 decision omitted in *McGraw*, *Seminole Tribe v. Florida*,[188] was one of the most meaningful Supreme Court decisions of recent years[189] because of its significant ramifications for Eleventh Amendment jurisprudence.[190] In the view of one commentator, it made no less than a "mess" of *Ex parte Young*,[191] but *Seminole Tribe* does provide helpful guidance in gauging the Supreme Court's current view of the jurisdictional status of the Eleventh Amendment.[192] In short, *Seminole Tribe* held that none of Congress's powers

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188. 517 U.S. 44 (1996).

189. *See generally* Vicki C. Jackson, Seminole Tribe, *the Eleventh Amendment, and the Potential Evisceration of* Ex parte Young, 72 N.Y.U. L. REV. 495 (1997) (discussing *Seminole Tribe*'s potential to make legal challenges to state conduct beyond reach of federal court); Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1 (same).

190. *See* Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996) (holding that congressional abrogation of state sovereign immunity is invalid if pursuant to Article I). In *Seminole Tribe*, the United States Supreme Court considered the constitutionality of provisions of the Indian Gaming Regulatory Act (IGRA). *Id.* Pursuant to the Commerce Clause, IGRA prevented Indian tribes from sponsoring gambling on their reservations without a compact between a tribe and the state in which its reservation is located. *Id.* IGRA also imposed upon the states a duty to negotiate in good faith with the Indian tribes and authorized the tribes to sue the states in federal court to compel the performance of that duty. *Id.* When the Seminole Tribe sued the state of Florida and its governor in federal court, the state defendants claimed that the suit violated the Eleventh Amendment. *Id.* at 51-52. The Court agreed with the plaintiffs that Congress had made its intent to abrogate state sovereign immunity "unmistakably clear." *Id.* at 56. However, the Court decided that no provision of the Constitution adopted prior to the ratification of the Eleventh Amendment could serve as the basis for a valid abrogation of state sovereign immunity. *Id.* at 65-66. The Court emphasized that the states must explicitly surrender their sovereign immunity in order for Congress to make them liable in federal court without their consent. *Id.* at 67-68. The Court then determined that the Seminole Tribe's *Ex parte Young* action against the governor was improper because IGRA included an alternative remedial scheme. *Id.* at 74. Accordingly, the Eleventh Amendment barred the suit against the governor as well, and the Court dismissed all of the Seminole Tribe's claims for lack of jurisdiction. *Id.* at 76.

191. *See* Vázquez, *supra* note 32, at 1717 (discussing *Seminole Tribe*'s effect on *Ex parte Young*).

192. *See id.* at 1717-22 (discussing whether, after *Seminole Tribe*, Eleventh Amendment confers merely immunity from liability or immunity from all federal court jurisdiction).

in Article I of the Constitution include the authority to abrogate the states' sovereign immunity from suit in federal court.[193] The majority opinion chiefly differed with the four dissenters on the Court's decision that the amendment's ratification merely "stand[s] . . . for the presupposition . . . which [the amendment] confirms."[194] The Court stated that this "presupposition" includes both a recognition that each state is a sovereign within the federal system and an understanding that immunity from suit without consent is attendant to sovereignty.[195]

The sweep of *Seminole Tribe* reaches a court's duty to consider the Eleventh Amendment sua sponte in at least three respects. First, the Court dismissed the plaintiffs' suit against the State of Florida for lack of jurisdiction.[196] This description of the disposition is not a mere term of art, but a statement by the Court that it in fact lacked the authority to decide the case's merits at all.[197] Second, the majority approvingly cited *Pennhurst* for the proposition that sovereign immunity limits the federal judicial power of

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193. *See Seminole Tribe*, 517 U.S. at 47 (voiding congressional abrogation of state sovereign immunity pursuant to Article I); *infra* note 239 (collecting sources advocating view that initial ratification of Constitution incorporated state sovereign immunity and that Supreme Court thus wrongly decided *Chisholm*).

194. *Seminole Tribe*, 517 U.S. at 54 (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991)); *see id.* at 104-06 (Souter, J., dissenting) (disputing that state sovereign immunity survived ratification of Constitution); Pennsylvania v. Union Gas Co., 491 U.S. 1, 31-32 (1989) (Scalia, J., concurring in part and dissenting in part) (remarking that ratification of Eleventh Amendment reflected popular understanding that Constitution preserved sovereign immunity), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996). This debate intensified in three Eleventh Amendment decisions issued on the final day of October Term 1998, as the Court in each case divided 5-4 just as it had in *Seminole Tribe*; in dissent, Justice Souter exemplified the fairly caustic quality of this current debate with a pithy prediction that the majority's "late essay in immunity doctrine will prove the equal of its earlier experiment in laissez-faire, the one being as unrealistic as the other, as indefensible, and probably as fleeting." Alden v. Maine, 119 S. Ct. 2240, 2295 (1999) (Souter, J., dissenting) (comparing *Seminole Tribe* and Court's subsequent Eleventh Amendment decisions to Lochner v. New York, 198 U.S. 45 (1905)); *see* Nina Totenberg, *Recent Supreme Court Rulings Affect Balance of Power Between State and Federal Governments* (NPR radio broadcast, June 24, 1999) (describing Justice Souter's reading of *Alden* dissent from bench as "in a voice laced with sarcasm"). *See generally* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999) (debating origin and function of Eleventh Amendment); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199 (1999) (same).

195. *See Seminole Tribe*, 517 U.S. at 54 (describing meaning of Eleventh Amendment in Constitution).

196. *See id.* at 72-73 (dismissing case against state of Florida for lack of subject matter jurisdiction).

197. *See* The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913) (defining jurisdiction as "authority to decide the case either way").

Article III.[198] Last, the decision describes the Eleventh Amendment's limitation on federal court jurisdiction as "well established" and again cites *Pennhurst* to indicate that the state sovereign immunity embodied in the amendment deliberately constrains the meaning of Article III.[199] Although it never mentions *Patsy*, the *Seminole Tribe* decision for a brief time appeared to eviscerate completely any suggestion in *Patsy* that federal courts may ignore Eleventh Amendment issues simply because the parties do not raise the issues themselves.[200] However, the Court again breathed life into *Patsy* two terms later.

B. Wisconsin Department of Corrections v. Schacht

1. Patsy*'s Misguided Revival*

Seminole Tribe appeared to settle the Eleventh Amendment's status as a core jurisdictional doctrine until the Supreme Court handed down *Wisconsin Department of Corrections v. Schacht*,[201] a surprising decision in light of *Seminole Tribe*'s strong rhetoric about the jurisdictional significance of state sovereign immunity.[202] Two Justices used the occasion of *Schacht* to elabo

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198. *See* Seminole Tribe v. Florida, 517 U.S. 44, 68 (1996) (citing *Pennhurst* for proposition that "the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Article III" (quoting Pennhurst Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984))).

199. *See id.* at 64 (establishing meaning of Eleventh Amendment for purposes of federal jurisdiction).

200. *See* Wilson-Jones v. Caviness, 99 F.3d 203, 206 (6th Cir. 1996) (interpreting *Seminole Tribe* to "supersede" *Patsy*).

201. 524 U.S. 381 (1998).

202. *See* Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996) (describing state sovereign immunity as "background principle" of American jurisprudence); *see also* Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 392-93 (1998) (deciding that federal court may exercise jurisdiction over state law claims in lawsuit when defendant removes case to federal court and implicates Eleventh Amendment). In *Schacht*, the United States Supreme Court considered whether the Eleventh Amendment barred jurisdiction over claims properly removed to federal court pursuant to 28 U.S.C. § 1441. *Id.* at 383. After the defendants removed the plaintiff's claim under 42 U.S.C. § 1983, the district court granted the defendants' motion to dismiss the case on Eleventh Amendment grounds. *Id.* at 384-85. The court of appeals affirmed, holding that the presence of an Eleventh Amendment-barred claim in an otherwise removable case deprived federal courts of jurisdiction over the entire case. *Id.* at 385. The Supreme Court unanimously reversed, rejecting arguments that implicating the Eleventh Amendment automatically destroys federal jurisdiction. *Id.* at 386-91. The Court reasoned that it could consider the propriety of jurisdiction over each of the plaintiff's claims, and dismiss them individually as appropriate. *Id.* at 389-91. Thus, an Eleventh Amendment bar to some claims in a suit does not preclude a federal court from deciding the remainder of the claims when the defendant properly removes the entire case from state court. *Id.* at 392-93; *see* Michael C. Dorf, *Foreword: The*

rate on the tension between analogies to personal jurisdiction and to subject matter jurisdiction in analyses of Eleventh Amendment issues.[203] In *Schacht*, the Court considered whether sovereign immunity required the dismissal of an entire case when the state defendants removed it to federal court and then properly raised an Eleventh Amendment challenge to federal jurisdiction over some of the plaintiff's claims.[204] In his opinion for the Court, Justice Breyer stated that the precise jurisdictional status of Eleventh Amendment sovereign immunity remained an open question.[205] The Court carefully distinguished the Eleventh Amendment from other requirements of subject matter jurisdiction.[206] The majority opinion does not once cite *Seminole Tribe*, and it resurrects *Patsy* to support a state's ability to waive its sovereign immunity by omission.[207] Seemingly contrary to the holding of *Seminole Tribe*, the unanimous *Schacht* Court stated that the Eleventh Amendment is not a jurisdictional obstacle to the maintenance of a federal suit, at least under the circum-

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Limits of Socratic Deliberation, 112 HARV. L. REV. 4, 83 n.326 (1998) (describing *Schacht* as demonstrating Court's resistance to adoption of "most expansive view" of Eleventh Amendment's limitations on federal jurisdiction). This footnote implies that *Schacht* is a rejection of the broadest possible ramifications of *Seminole Tribe*. *Id.* However, the Supreme Court soon returned to strong rhetoric in an important decision significantly extending *Seminole Tribe*'s holding. *See* Alden v. Maine, 119 S. Ct. 2240, 2261 (1999) (insisting that "[t]he concerns voiced at the ratifying conventions, the furor raised by *Chisholm*, and the speed and unanimity with which the amendment was adopted . . . underscore the jealous care with which the founding generation sought to preserve the sovereign immunity of the States"). In *Alden*, the Court held that Congress's inability to abrogate state sovereign immunity in federal court pursuant to Article I disallowed Congress from abrogating state sovereign immunity in state court as well. *See id.* at 2246 (holding that Congress, pursuant to Article I, may not abrogate state sovereign immunity in state court).

203. *See Schacht*, 524 U.S. at 386-91 (discussing relationship of Court's Eleventh Amendment jurisprudence to law of federal jurisdiction); *id.* at 393-98 (Kennedy, J., concurring) (same).

204. *See id.* at 383 (stating that Court must decide whether sovereign immunity requires dismissal of entire case when defendant removes case from state court to federal court and implicates Eleventh Amendment).

205. *See id.* at 391 (stating that whether "Eleventh Amendment immunity is a matter of subject matter jurisdiction [is] a question we have not decided").

206. *See id.* at 388-91 (distinguishing between need for diversity of citizenship among parties or federal question in federal lawsuit and requirement that Eleventh Amendment not bar judgment). However, when a majority of the Court very nearly equated state sovereign immunity and subject matter jurisdiction one year later, Justice Breyer remarked that the Court had transformed the Eleventh Amendment into "an immutable constitutional principle more akin to the thought of James I than of James Madison." College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2240 (1999) (Breyer, J., dissenting) (criticizing majority's conception of Eleventh Amendment's jurisdictional function).

207. *See Schacht*, 524 U.S. at 388-91 (explaining that Eleventh Amendment need not require entire case's dismissal when defendant removes it to federal court).

stances of the case.[208] Thus, under *Schacht,* a federal court might remain free to ignore a state's constitutional entitlement to sovereign immunity simply because the state defendant has failed to raise it.[209]

Concurring, Justice Kennedy attempted to clarify the Court's rationale by stating that a court reasonably may treat a state's consent to a removal motion as consent to the jurisdiction of the federal forum, notwithstanding the Eleventh Amendment.[210] This observation does much to reconcile *Schacht* with *Seminole Tribe* if the state does in fact consent to the removal motion of a codefendant or if, as in *Schacht,* the state defendant files the removal motion itself.[211] Justice Kennedy also characterized present Eleventh Amendment doctrine as "hybrid."[212] According to him, the role of state sovereign immunity in the federal courts is substantially similar to the role of personal jurisdiction,[213] but it maintains characteristics that are "more consistent with regarding the Eleventh Amendment as a limit on the federal courts' subject matter jurisdiction."[214] Justice Kennedy recommended that federal courts explicitly bring the rules governing a state's waiver of sovereign immunity into accord with those governing consent to personal jurisdiction.[215] Under such a regime, a failure to raise an Eleventh Amendment defense at the outset of a suit would forfeit sovereign immunity for the duration of the proceeding and would preclude subsequent collateral attacks to the judgment.[216] Justice Kennedy would allow a state litigant to waive sovereign immunity by omis-

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208. *See id.* at 392-93 (concluding that Eleventh Amendment does not automatically destroy federal jurisdiction over case against state defendant when defendant removes to federal court).

209. *See id.* at 389 (comparing consent to suit and sua sponte consideration of sovereign immunity).

210. *See id.* at 393 (Kennedy, J., concurring) (treating state's consent to removal as waiver of sovereign immunity from suit in federal court). Justice Kennedy noted that, as a practical matter, the defendant typically files a case's removal motions. *Id.* (Kennedy, J., concurring).

211. *See id.* at 384 (noting that state defendant in *Schacht* filed removal motion).

212. *Id.* at 394 (Kennedy, J., concurring).

213. *See id.* (Kennedy, J., concurring) (observing that state sovereign immunity "bears substantial similarity to personal jurisdiction requirements").

214. *Id.* (Kennedy, J., concurring).

215. *See id.* at 395 (Kennedy, J., concurring) (proposing that rules governing waiver of state sovereign immunity be brought into accord with rules governing personal jurisdiction).

216. *See id.* (Kennedy, J., concurring) (proposing that state defendant's failure to raise Eleventh Amendment at outset of suit should constitute waiver of sovereign immunity for suit's duration); *see also* United States v. County of Cook, 167 F.3d 381, 385 (7th Cir. 1999) (noting that "[t]o create a sovereign-immunity exception to [bar to collateral attacks on jurisdictional grounds] would be to abolish [it]"); *cf.* Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525 (1931) (prohibiting collateral attacks on personal jurisdiction when court actually determines that personal jurisdiction is proper).

sion just as it may waive objections to personal jurisdiction.[217] He emphasized that such a rule would prevent states from "gaining an unfair advantage" in retaining the ability to raise sovereign immunity at any time, including after a court awards a judgment to a plaintiff.[218]

2. *Making Sovereign Immunity About Procedure*

Despite Justice Kennedy's *Schacht* concurrence, a survey of lower courts confronting this issue since the Supreme Court's announcements of *Seminole Tribe* and *Schacht* shows that most courts agree that sua sponte consideration of Eleventh Amendment sovereign immunity is now mandatory.[219] Perhaps this trend will reveal *Schacht* to be either an aberration in the jurisprudence of the Eleventh Amendment or a strict limitation on the procedure for removal.[220] After all, if the Supreme Court had decided *Schacht* differently, a state defendant could cause the dismissal of a plaintiff's entire case against it – even when the plaintiff deliberately filed in state court to avoid implicating the Eleventh Amendment in the first place – merely by removing to federal court.[221] That ability seems inequitable.[222] Although it addressed the question prior to *Schacht*, the United States Court of Appeals for the Sixth Circuit stated within months of *Seminole Tribe* that it considered *Patsy* "superseded" by the holding of *Seminole Tribe*.[223] Other courts

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217. *See* FED. R. CIV. P. 12(h)(1) (designating objections to personal jurisdiction waived if not raised in initial pleading).

218. *See* Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 395 (1998) (Kennedy, J., concurring) (proposing changes to Eleventh Amendment doctrine that would prevent states from having "unfair advantage" over private plaintiffs suing them).

219. *See infra* notes 225-29 and accompanying text (discussing courts' sua sponte consideration of Eleventh Amendment in wake of *Seminole Tribe* and *Schacht*).

220. *See* Detroit Edison Co. v. Michigan Dep't of Envtl. Quality, 29 F. Supp. 2d 786, 792 (E.D. Mich. 1998) (extending *Schacht* to render sua sponte consideration of Eleventh Amendment permissive when question is whether amendment should bear upon motion to remand case to state court).

221. *See* 28 U.S.C. § 1441(a) (1994) (allowing "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, [to] be removed by the defendant or the defendants, to the district court of the United States for the district . . . embracing the place where such action is pending").

222. *See* Pagan, *supra* note 5, at 452 (stating that "[a] plaintiff can avoid [E]leventh [A]mendment pitfalls by litigating in a state forum"). However, the Supreme Court recognized potential Eleventh Amendment bars in state court cases in 1999. *See* Alden v. Maine, 119 S. Ct. 2240, 2246 (1999) (holding that Congress may not subject unconsenting states to private suits for damages pursuant to Article I).

223. *See* Wilson-Jones v. Caviness, 99 F.3d 203, 206 (6th Cir. 1996) (discussing *Seminole Tribe*'s effect on *Patsy*). *Schacht* expressly rejected the next analogy made by the *Caviness* court: that sovereign immunity is "jurisdictional" just as is the complete diversity requirement. *See id.* (comparing jurisdictional quality of sovereign immunity to jurisdictional quality of

have agreed.[224]

One illustrative case, decided in 1998, provides a good example of the effect of *Seminole Tribe* on the obligation of federal courts to consider the Eleventh Amendment sua sponte.[225] In it, the state defendants successfully pleaded sovereign immunity as a defense even though the district court described the post-*Seminole Tribe* status of the Eleventh Amendment as "tantamount" to a jurisdictional matter such that the court would have considered it sua sponte if the defendants had not raised it themselves.[226] This district court also cited *Pennhurst* with approval but did not mention *Schacht* as qualifying the doctrine any further in this nonremoval context.[227] The United States District Court for the District of New Jersey accorded the question similar treatment in another post-*Seminole Tribe* and post-*Schacht* decision in which the court considered the Eleventh Amendment as an aspect of the court's subject matter jurisdiction.[228] Later that year, the same court reaffirmed that contention, emphasizing then that *Seminole Tribe* made the Eleventh Amendment equivalent to the complete diversity requirement and the well-pleaded complaint rule for jurisdictional purposes.[229] The next section of this Note provides a good reason why that comparison is sound.

VI. The Federalism Connection

One Supreme Court Justice has observed that the federal Constitution "split the atom of sovereignty,"[230] so that the states and the national govern-

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complete diversity requirement); *Detroit Edison Co.*, 29 F. Supp. 2d at 791 (interpreting *Schacht* to render *Caviness*'s comparison of Eleventh Amendment and complete diversity requirement inaccurate). However, the *Caviness* court's subsequent observation that the two are similar in that "neither the litigants' consent, nor oversight, nor convenience can constitutionalize a court's exercise of illegal power" remains tenable after *Schacht*. *Caviness*, 99 F.3d at 206.

224. *See In re* Kish, 212 B.R. 808, 813 (D.N.J. 1997) (considering *Patsy* superseded by *Seminole Tribe* and citing *Caviness*); Pieve-Marin v. Combas-Sancho, 967 F. Supp. 667, 671 (D.P.R. 1997) (same); *In re* Fennelly, 212 B.R. 61, 63 (D.N.J. 1997) (same); *In re* Tri-City Turf Club, Inc., 203 B.R. 617, 619 (Bankr. E.D. Ky. 1996) (same); Keller v. Dailey, 706 N.E.2d 28, 30 (Ohio App. 1997) (same).

225. *See* Vinson v. Clarke County, 10 F. Supp. 2d 1282, 1298-99 & nn.14-15 (S.D. Ala. 1998) (discussing Eleventh Amendment issues in case).

226. *See id.* at 1299 n.14 (declaring that "the court would consider Eleventh Amendment immunity *sua sponte* since sovereign immunity is considered tantamount to a jurisdictional matter that can be raised at any stage of the litigation by the court or a party").

227. *See id.* at 1299 n.15 (citing *Pennhurst* with approval but not mentioning *Schacht*).

228. *See In re* Fennelly, 212 B.R. 61, 62 (D.N.J. 1997) (considering sua sponte whether Eleventh Amendment sovereign immunity deprives court of subject matter jurisdiction).

229. *See In re* Kish, 212 B.R. 808, 813 (D.N.J. 1997) (raising Eleventh Amendment sua sponte because *Seminole Tribe* makes sovereign immunity like subject matter jurisdiction requirements).

230. United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

ment share the various functions inherent in the service of the American citizenry. Consequences of this fact pervade the operation of each of the three branches of the national government,[231] but issues of federalism are especially important to discussions of the jurisdiction of federal courts.[232] As a constitutional provision specifically restricting the ability of the federal courts to consider cases against a state, Eleventh Amendment sovereign immunity implicates federalism significantly.[233] Similarly, the traditional requirements of jurisdiction over the subject matter of a lawsuit also protect the federal structure in important ways.[234] This connection provides further justification for treating these doctrines identically in the law of federal courts.

A litigant seeking the jurisdiction of a federal court has the burden of proving that federal jurisdiction is proper.[235] Federal courts have limited jurisdiction only, but most state courts are courts of general jurisdiction and a presumption exists in favor of a litigant's ability to bring a case in them.[236] The constitutional provisions and statutes conferring subject matter jurisdiction on the federal courts promote a juridical preference for state courts and reserve the federal courts for matters of truly national concern.[237] Consequently, federal subject matter jurisdiction protects the sovereignty and auton-

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231. *See* U.S. CONST. art. I, § 8 (enumerating limited powers of Congress); U.S. CONST. art. II, §§ 2-3 (enumerating limited powers of President); U.S. CONST. art. III, § 2 (enumerating outer boundaries of federal court jurisdiction).

232. *See* CHEMERINSKY, *supra* note 18, § 1.5 (discussing federalism as one of two underlying policy considerations in discussions of federal jurisdiction).

233. *See id.* § 7.1, at 368 (describing Eleventh Amendment as "particularly important in defining the relationship between the federal and state governments"); Baker, *supra* note 47, at 165 (describing Eleventh Amendment law as "primarily concerned with the structure of a federal system"); Vázquez, *supra* note 32, at 1685 (explaining that "[w]hile the Constitution itself imposes numerous legal obligations on the states and gives Congress the power to impose additional obligations, the Eleventh Amendment by its terms prevents the federal courts from entertaining suits against states brought by citizens of other states").

234. *See* Victory Carriers, Inc. v. Law, 404 U.S. 202, 212 (1971) (remarking that limited grants of federal court jurisdiction promote "[d]ue regard for the rightful independence of state governments" (quoting Healy v. Ralla, 292 U.S. 263, 270 (1934))); *cf.* John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1050-66 (1983) (discussing how rules for personal jurisdiction reinforce federalism).

235. *See* WRIGHT, *supra* note 38, § 7, at 27 (discussing fundamental principles of federal jurisdiction and noting that litigant seeking federal forum has burden of proving that federal jurisdiction is proper).

236. *See id.* (discussing differences between jurisdiction of state and federal courts).

237. *See* CHEMERINSKY, *supra* note 18, § 1.5, at 37 (discussing role of comity principles in federal jurisdiction); Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1144 (1988) (noting importance of federalism in Supreme Court's interpretation of federal jurisdictional statutes). Professor Fallon also noted that "the Court commonly reasons that Congress would have intended to respect state interests associated with the performance of traditional sovereign functions and especially to prescribe deference to state judicial proceedings." *Id.*

omy of the states, and its importance demands that courts raise defects in subject matter jurisdiction sua sponte.[238]

A central question in any historical consideration of the Eleventh Amendment is whether the sovereign immunity provision gave the states a new protection or merely restored a common-law immunity that the Supreme Court somehow overlooked in *Chisholm*.[239] Regardless of the answer,[240] the design of the federal system contains an inherent tension between the sovereign states and the sovereign nation of the United States.[241] The amendment's prohibition of suits against one sovereign in the judicial system of the other reinforces the meaning of federalism to our government.[242]

Protecting state interests is a central purpose of the Eleventh Amendment.[243] A strict adherence to state sovereign immunity in federal courts, as

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238. *See* CHEMERINSKY, *supra* note 18, § 1.5, at 37 (discussing role of comity principles in federal jurisdiction).

239. *See id.* § 7.2, at 369-72 (discussing whether Constitution preserved state sovereign immunity); ORTH, *supra* note 2, at 13-18, 22 (comparing opinions in *Chisholm*); MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 179-80 (2d ed. 1990) (summarizing scholarly debate concerning origins of state sovereign immunity).

240. *See* CHEMERINSKY, *supra* note 18, § 7.3, at 374-81 (summarizing three leading theories of history of state sovereign immunity).

241. *See* Amar, *supra* note 13, at 1426 (noting ability of state sovereignty to frustrate federal policy); Baker, *supra* note 47, at 159, 173 (noting that federal system requires accommodation of many competing sovereignties and that Eleventh Amendment "concern[s] tension between state autonomy and national authority"); Fletcher, *supra* note 5, at 1067 (describing concept of two coexisting sovereigns as difficult for some Framers to understand).

242. *See* Alden v. Maine, 119 S. Ct. 2240, 2263-64 (1999) (discussing importance of "essential principles of federalism" and "the special role of the state courts in the constitutional design" in determination of Eleventh Amendment's significance); Baker, *supra* note 47, at 165 (describing Eleventh Amendment jurisprudence as "trying to define the demands that federalism makes on the judiciary"); Fallon, *supra* note 237, at 1152-53 (discussing importance of state sovereignty to American federalism); Pagan, *supra* note 5, at 448-49 (describing Eleventh Amendment as "more [ ] a symbol of federalism than [ ] a text . . . like other species of positive law"); *cf.* Amar, *supra* note 13, at 1490 (noting that sovereignty entitles governments to legal privileges not available to private citizens). According to Professor Fallon's description of federalism, the Eleventh Amendment demonstrates the Framers' understanding that the states – including state courts – "were left the 'responsibility for dealing, and . . . [the] authority to deal, with the whole gamut of problems cast up out of the flux of everyday life.'" Fallon, *supra* note 237, at 1153 (citation omitted). In a recent decision, the Supreme Court made a substantial effort to posit the practical consequences of an absence of state sovereign immunity. *See Alden*, 119 S. Ct. at 2263-67 (discussing increased burden on states that would result from eradication of state sovereign immunity).

243. *See* Baker, *supra* note 47, at 172 (noting that "[c]onsiderations of federalism seem to underlie all aspects of the [E]leventh [A]mendment"); Fallon, *supra* note 237, at 1144 (discussing importance of federalism in judicial decisions "defining the constitutional scope of state sovereign immunity and fixing the meaning of the [E]leventh [A]mendment").

mandatory sua sponte consideration of the Eleventh Amendment promotes, advances that purpose.[244] When a state faces suit in federal court, that state is at the mercy of another sovereign.[245] The sovereign national government has no inherent interest in protecting the interests of any particular state, and its courts may not render judgments against states without offending the states themselves.[246] However, when a state faces suit in its own courts, the state receives the benefit of its own courts' willingness to protect the interests of the same sovereign.[247] Offense to the sovereign state by an unwanted, adverse judgment probably is less likely when the states enjoy immunity from unconsented suits in federal court, and this result holds the state's autonomy – indeed, its sovereignty – in higher regard.[248] Because these consequences serve much the same purpose as the requirement that a court properly have jurisdiction over a case's subject matter, the federal judiciary should treat the two issues alike.

VII. Conclusion

Courts adopting the *Patsy* standard may have good intentions. Dismissal on Eleventh Amendment grounds when the defendant does not plead sovereign immunity in the first instance would have additional consequences that these courts might be avoiding. First, dismissal would require the parties to endure litigation in state court when they expressed contentment with the federal forum.[249] This burden could place great expense and inconvenience upon the parties when the plaintiff chose federal court and the state defendant participated in the suit despite its sovereign immunity. Second, dismissal based on sovereign immunity would risk intrusion by the state courts upon an important federal interest: monitoring the interference of states in the affairs

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244. *See* Fallon, *supra* note 237, at 1193 (discussing connection of state sovereign immunity to federalism).

245. *Cf.* Fletcher, *supra* note 5, at 1069, 1072 (designating immunity from suit in court of another sovereign as fundamental attribute of true sovereign).

246. *See* Baker, *supra* note 47, at 175 (noting that states "would prefer to shield all [their] activities from federal jurisdiction"); Fletcher, *supra* note 5, at 1066-67 (noting that national government does not derive power nor legitimacy from states, but from people).

247. *See* Baker, *supra* note 47, at 175 (noting that states consider suits against them in their own court systems safer and more familiar); Field, *supra* note 5, at 548-49 (discussing tendencies of state judiciaries to exhibit bias against federal interests that plaintiffs assert against states).

248. *See* Field, *supra* note 5, at 548-49 (discussing tendencies of state judiciaries to exhibit bias against federal interests that plaintiffs assert against states).

249. *See* Pfander, *supra* note 32, at 1379-80 (discussing Eleventh Amendment as "forum-allocation principle"). However, Professor Pfander is skeptical that the drafters of the Eleventh Amendment intended it to direct otherwise proper federal suits into state courts. *Id.* at 1380.

of the national government.[250] As federal courts more strictly enforce state sovereign immunity, the recognition and enforcement of federal rights might depend increasingly on state courts' voluntary fidelity to the national government.[251] Furthermore, if the Eleventh Amendment obligates federal courts to look for sovereign immunity issues on their own motions, when doing so, the courts might tend to find that sovereign immunity often bars the case. Consequently, states may begin to find that the amendment insulates their own conduct from the reach of any court in which the states did not actually consent to suit.[252]

These seductive hypotheses do not justify permitting waiver by omission, however. In the *Patsy* case itself, the standard permitted the Supreme Court to decide an issue central to the plaintiff's right to relief.[253] From that day, *Patsy* has given federal courts license to pass over an otherwise inconvenient constitutional roadblock in order to serve other purposes with their decisions. However, these courts exceed their constitutional authority when they decline to consider the Eleventh Amendment's potential limitation on their jurisdiction.[254] Consequently, courts hearing subsequent collateral attacks in these cases by the state defendants should recognize that the defendants have strong Eleventh Amendment arguments for having the initial judgment set aside.[255]

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250. *See* Baker, *supra* note 47, at 172 (stating that "[n]o federal system can long survive if the states are free to encroach on national responsibilities without supervision").

251. *See* Alden v. Maine, 119 S. Ct. 2240, 2292-93 (1999) (Souter, J., dissenting) (doubting that states will comply voluntarily with federal statutes conferring individual rights); Baker, *supra* note 47, at 177 (asserting that "[i]f the [E]leventh [A]mendment cuts off access to federal court, federal rights would go unvindicated").

252. *See* Baker, *supra* note 47, at 177 (discussing circumstances under which no forum would be available for claims against states pursuant to federal law).

253. *See* Patsy v. Florida Bd. of Regents, 457 U.S. 496, 503-12 (1982) (deciding merits of case notwithstanding putative entitlement of state defendant to sovereign immunity).

254. *See* Seminole Tribe v. Florida, 517 U.S. 44, 63 (1996) (stating that "[t]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without [its] consent" (citation omitted)).

255. *Cf.* United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 514 (1940) (permitting collateral attack of judgment against Indian tribe on basis of tribe's sovereign immunity); RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. d (1980) (articulating arguments for permitting collateral attack on basis of challenge to court's subject matter jurisdiction when court does not expressly determine subject matter jurisdiction in original action); WRIGHT, *supra* note 38, § 16, at 94-95 (discussing ambiguity of Supreme Court's treatment of collateral attacks on basis of challenge to subject matter jurisdiction); Bennett Boskey & Robert Braucher, *Jurisdiction & Collateral Attack: October Term, 1939*, 40 COLUM. L. REV. 1006, 1008 (1940) (noting that application of normal res judicata rules to challenges to subject matter jurisdiction would "go far to obliterate all distinction between jurisdictional and non-jurisdictional questions").

The *Pennhurst* standard is both preferable as a matter of policy and more accurate as a matter of present Eleventh Amendment jurisprudence. The mandatory rule better promotes principles of federalism,[256] especially if one assumes that a court raising the question on its own motion is nearly certain to find that sovereign immunity bars the case from proceeding. Just as subject matter jurisdiction knows no permissive standard, neither should state sovereign immunity.[257]

Consent to suit, *Ex parte Young* actions, and congressional abrogation in the Eleventh Amendment context are important prerogatives, and any rule forbidding the waiver of sovereign immunity by omission should preserve them.[258] A federal court can maintain an obligation to determine the propriety of sovereign immunity independent of a state's consent to suit by deciding that a state cannot consent by mere omission.[259] The fact that a defendant somehow connected to a state[260] consents to litigation legitimately may enter into a court's opinion of whether it should decide that sovereign immunity in fact attaches to that party. However, the court must dismiss the action if it finds that the Eleventh Amendment bars it from rendering a judgment. Courts regularly dismiss cases on jurisdictional grounds if a plaintiff incorrectly styles a putative *Ex parte Young* action or if a congressional abrogation of sovereign immunity is improper. Thus, the recognition that the Eleventh Amendment restricts federal judicial power recurs throughout even the most convoluted portions of this extremely complicated doctrine. A strict requirement of federal courts' sua sponte consideration of the Eleventh Amendment

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256. *See supra* Part VI (discussing federalism's importance to Eleventh Amendment doctrine).

257. *See* FED. R. CIV. P. 12(h)(3) (stating that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action") (emphasis added).

258. *See* PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 814 (4th ed. 1998) (observing that "[t]he stakes involved in interpreting the Eleventh Amendment are potentially very high [because v]irtually the entire class of modern civil rights litigation might be barred by an expansive reading of the immunity of states from suit in federal court"); 17 CHARLES ALAN WRIGHT ET AL., *supra* note 33, § 4231, at 559 (designating *Ex parte Young* as one of three most important Supreme Court decisions ever).

259. *See* Pfander, *supra* note 32, at 1373 (describing ability of state defendants to consent to suit notwithstanding Eleventh Amendment as "curious"). Professor Pfander noted that consent permits suits "nominally placed beyond the 'judicial power' of the federal courts nonetheless [to] be brought back within that power." *Id.*

260. *See* Pagan, *supra* note 5, at 458-61 (discussing application of Eleventh Amendment to "arms of the state"). The reach of the arm of the state doctrine is ubiquitously debatable. *See id.* at 461 (proposing multifactored test for determining if party is arm of state and thus entitled to state sovereign immunity).

would bring a lingering maelstrom in sovereign immunity law into harmony with a fundamental tenet of federal jurisdiction: federal courts are courts of *limited* jurisdiction.[261] Waiver by omission has no place in a federal court when the scope of its judicial power constantly looms over its work.[262]

261. *See* CHEMERINSKY, *supra* note 18, at 39 (noting that "[i]t is frequently stated and widely accepted that federal courts are courts of limited jurisdiction"); WRIGHT, *supra* note 38, § 7, at 27 (stating that "[i]t is a principle of first importance that the federal courts are courts of limited jurisdiction").

262. *See* ORTH, *supra* note 2, at 11 (stating that "few legal doctrines affect modern American life as immediately as the rules governing the stretch of federal jurisdiction").