

WAIVER BY REMOVAL? AN ANALYSIS OF STATE SOVEREIGN IMMUNITY

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The Supreme Court has never definitively outlined the theoretical underpinnings of state sovereign immunity. The unresolved circuit split over whether a state waives immunity that it would otherwise retain by removing a case from state court to federal court provides a helpful lens to consider the broader doctrinal strands of state sovereign immunity. Under any conception of sovereign immunity, courts should reject a blanket waiver by removal rule that would require states to give up all immunity upon removal. It is imperative that courts make a distinction between substantive immunity and jurisdictional immunity. Even if removal is sufficient to waive jurisdictional immunity, it should not affect the underlying presence (or absence) of a cause of action. Additionally, courts should be careful to distinguish between personal jurisdiction and subject matter jurisdiction aspects of immunity, because the way courts conceive of sovereign immunity can impact how they answer the waiver by removal question. Correspondingly, states must take care to protect their sovereign immunity. Merely forbidding state courts from hearing causes of action brought against a state may not be sufficient to protect state immunity upon removal to federal court. States need to protect their immunity with both substantive and jurisdictional means.

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* J.D. University of Virginia School of Law, 2015; B.A. Patrick Henry College, 2010. Special thanks to Professor Caleb Nelson for his invaluable guidance, advice, and feedback on this project. I also owe thanks to Jad Khazem and the staff of the *Virginia Law Review* for their excellent editing assistance.

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INTRODUCTION

STATE sovereignty is “residuary and inviolable”¹ and neither “derives from, nor is limited by, the terms of the Eleventh Amendment.”² The Supreme Court, however, has never explicitly defined the contours of state sovereign immunity. Drawing on various Court precedents, one could conceptualize state sovereign immunity as primarily a jurisdictional doctrine akin to either personal jurisdiction or subject matter jurisdiction, or one might argue that sovereign immunity is merely a matter of substantive law concerning the availability of a relevant cause of action that can be brought against the state. Alternatively, one could conceive of sovereign immunity as simply an affirmative defense. In

¹ *Alden v. Maine*, 527 U.S. 706, 715 (1999) (quoting *The Federalist* No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

² *Id.* at 713.

Lapides v. Board of Regents of the University System of Georgia,³ the Supreme Court left a significant sovereign immunity question unresolved—does a state that retains immunity in state court waive its sovereign immunity by removing a case to federal district court? The circuits are currently divided on this issue,⁴ and the waiver by removal question presents an excellent lens by which to consider the consequences of adopting various conceptions of sovereign immunity.

This Note proceeds in four parts. Part I outlines *Lapides* and the different approaches to the waiver by removal question taken by the circuit courts, and it also provides an overview of the various ways that both the Court and commentators have conceived of state sovereign immunity. Part II considers how the waiver by removal issue should be addressed under a jurisdictional conception of state sovereign immunity. Part II observes that if sovereign immunity is closer to personal jurisdiction, then there may be a stronger argument in favor of waiver than if sovereign immunity is akin to subject matter jurisdiction. Yet, it also notes that there are reasons under either approach for why immunity should not be waived. Part III considers how the waiver by removal question should be decided under a substantive understanding of sovereign immunity and argues that courts should respect substantive aspects of sovereign immunity even if they find that jurisdictional immunity has been waived. Part IV outlines additional reasons why courts might be hesitant to find that sovereign immunity has been waived when a state has immunity in state court but nevertheless removes a case from state court to federal court.

³ 535 U.S. 613 (2002).

⁴ Compare *Bd. of Regents of the Univ. of Wis. Sys. v. Phx. Int'l Software, Inc.*, 653 F.3d 448, 463–64 (7th Cir. 2011) (recognizing that removal waives sovereign immunity), *Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004) (same), and *Estes v. Wyo. Dep't of Transp.*, 302 F.3d 1200, 1203–04 (10th Cir. 2002) (same), with *Trant v. Oklahoma*, 754 F.3d 1158, 1173 (10th Cir. 2014) (holding that removal waives immunity from suit but not immunity from liability), *Stroud v. McIntosh*, 722 F.3d 1294, 1301 (11th Cir. 2013) (same), *Lombardo v. Pa. Dep't of Pub. Welfare*, 540 F.3d 190, 193 (3d Cir. 2008) (same), *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 254–55 (5th Cir. 2005) (same), and *New Hampshire v. Ramsey*, 366 F.3d 1, 15 (1st Cir. 2004) (same), with *Beaulieu v. Vermont*, 807 F.3d 478, 485–90 (2d Cir. 2015) (rejecting a waiver by removal rule), *Bergemann v. R.I. Dep't of Env'tl. Mgmt.*, 665 F.3d 336, 341–43 (1st Cir. 2011) (same), and *Stewart v. North Carolina*, 393 F.3d 484, 488–90 (4th Cir. 2005) (same).

I. BACKGROUND

Traditionally, states are protected by sovereign immunity from suit in federal court unless they have either consented to suit or Congress has validly abrogated their immunity by exercising its Section Five enforcement powers under the Fourteenth Amendment.⁵ A state's "consent to suit must be 'unequivocally expressed'" by a "'clear declaration' that it intends to submit itself" to federal jurisdiction, or a waiver may also be found "if the State voluntarily invokes" federal jurisdiction.⁶

The Court in *Lapides* added a significant piece to its voluntary invocation of jurisdiction strand of the sovereign immunity doctrine. *Lapides* involved a suit against the State of Georgia, brought in state court by a disgruntled state university professor alleging that university officials had placed allegations of sexual harassment in his file in violation of both state tort law and 42 U.S.C. § 1983.⁷ *Lapides* sued the university's board of regents and administrators in both their individual and official capacities.⁸ The defendants removed the case to federal district court, and then claimed Eleventh Amendment immunity from the state tort law claims while at the same time conceding that they had waived sovereign immunity from these claims in state court.⁹ The district court held that the state defendants had waived their claim to immunity by removing the case, but the U.S. Court of Appeals for the Eleventh Circuit reversed, holding that the state retained its ability to assert immunity.¹⁰

The Supreme Court reversed the Eleventh Circuit's judgment, and held that when a state abrogates its sovereign immunity from state law claims in state court, it also waives its Eleventh Amendment immunity from these claims upon removal to federal court.¹¹ The Court relied heavily on a line of cases that found a waiver of sovereign immunity when a state *voluntarily* became a party to the litigation.¹² The Court al-

⁵ *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999); see also *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 377 (2006) (holding that Article I's Bankruptcy Clause allows Congress to abrogate state sovereign immunity).

⁶ *Coll. Sav. Bank*, 527 U.S. at 675–76 (citations omitted).

⁷ 535 U.S. at 616.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 616–17.

¹¹ *Id.* at 617, 624.

¹² See *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947) (holding that New Jersey waived its sovereign immunity when it voluntarily filed a claim against a fund); *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906) (“[W]here a State voluntarily becomes a party to a

so rejected its earlier decision in *Ford Motor Co. v. Department of Treasury of Indiana*,¹³ which had permitted a state to raise a sovereign immunity defense for the first time on appeal to the Supreme Court.¹⁴ The Court's holding was limited to state law claims, however, because it determined that Lapidés's Section 1983 claim was invalid (since a state is not a "person" for Section 1983 purposes).¹⁵ More importantly, the Court's holding was also confined to the context of state law claims for which a state had waived its immunity in state court; the Court specifically declined to "address the scope of waiver by removal in a situation where the State's underlying sovereign immunity from suit has not been waived or abrogated in state court."¹⁶

A. *Waiver by Removal in the Circuit Courts*

Thus, whether a state waives its sovereign immunity by removing a case from state court to federal district court when it retains immunity in state court (for either state or federal law claims) is an unresolved issue. The circuits are divided on this question (and the First and Tenth Circuits appear to be split internally),¹⁷ but courts have generally taken three approaches: (1) removal constitutes a complete waiver of all state immunity; (2) removal does not waive immunity if a state would retain immunity in state court; or (3) removal waives some types of immunity but not others (the so-called "middle way").

1. *Complete Waiver*

The Seventh and Ninth Circuits have reasoned that removal to a federal forum creates a waiver of sovereign immunity regardless of whether a state would have maintained immunity from the claims in state court, and the Tenth Circuit appears to be divided on this issue.¹⁸ These circuits

cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment."); *Clark v. Barnard*, 108 U.S. 436, 447–48 (1883) (holding that Rhode Island waived its Eleventh Amendment immunity when it voluntarily became a party by presenting a claim to a disputed fund).

¹³ 323 U.S. 459, 469 (1945), overruled by *Lapidés*, 535 U.S. at 621, 623.

¹⁴ *Lapidés*, 535 U.S. at 617, 622–23 (discussing *Ford*).

¹⁵ *Id.* at 617.

¹⁶ *Id.* at 617–18.

¹⁷ See *supra* note 4.

¹⁸ See *Bd. of Regents of the Univ. of Wis. Sys. v. Phx. Int'l Software, Inc.*, 653 F.3d 448, 461 (7th Cir. 2011); *Embury v. King*, 361 F.3d 562, 564–65 (9th Cir. 2004); *Estes v. Wyo.*

based their holdings on limited analysis that made no attempt to distinguish between various types of sovereign immunity. Instead, the opinions focused on the voluntary conduct of a state in choosing removal and the perceived contradiction in both seeking and refusing federal jurisdiction in the same case.

For example, with relatively little discussion, the Ninth Circuit determined in *Embury v. King* that the reasoning of *Lapides* should be applied to both state and federal claims, regardless of any immunity the state might have otherwise in federal court.¹⁹ The state in *Embury* tried to claim immunity from the federal claims—which formed the anchor for federal court jurisdiction—while conceding that it had no immunity from pendent state law claims.²⁰ Under this circumstance, the Ninth Circuit contended that it would be strange for a state to allow a federal court to adjudicate state law claims “where federal jurisdiction cannot even be obtained but for federal claims asserted in the same case,” yet object to “federal jurisdiction over the federal claims.”²¹ Thus, removal constituted a waiver of immunity for all claims.

Likewise, in the context of a trademark dispute where the state plaintiff was trying to claim sovereign immunity from compulsory counterclaims, the Seventh Circuit in *Board of Regents of University of Wisconsin System v. Phoenix International Software* also opined that the *Lapides* rule should apply broadly to “all instances of removal initiated by a state.”²² The court emphasized the voluntariness of a “state’s choice of forum” as being the key to finding a waiver of immunity by litigation conduct.²³

Similarly, relying on the Court’s discussion of voluntary invocation of jurisdiction in *Lapides*, the Tenth Circuit first held in *Estes v. Wyoming Department of Transportation* that by removal, the state had waived its sovereign immunity from a claim brought under Title I of the Americans

Dep’t of Transp., 302 F.3d 1200, 1205–06 (10th Cir. 2002). But see *Trant v. Oklahoma*, 754 F.3d 1158, 1172 (10th Cir. 2014) (recognizing that removal only waives immunity from suit, while immunity from liability under state law may be retained).

¹⁹ *Embury*, 361 F.3d at 564–65.

²⁰ *Id.* at 564.

²¹ *Id.*

²² *Phoenix*, 653 F.3d at 461.

²³ *Id.* at 462. A more recent Seventh Circuit opinion suggested that *Phoenix* did not conclusively resolve the waiver by removal issue, and left open the possibility of a more nuanced approach to waiver by removal; however, the opinion expressly declined to resolve the issue. See *Hester v. Ind. State Dep’t of Health*, 726 F.3d 942, 950–51 (7th Cir. 2013).

with Disabilities Act (“ADA”).²⁴ While the court at times spoke in terms of broad waiver, the holding was arguably limited to federal law claims, and the Tenth Circuit has subsequently tried to distinguish *Estes* on this point.²⁵

2. No Waiver

In contrast, the Second and Fourth Circuits have held that removal to federal court does not waive claims to which a state would maintain immunity in state court, and the First Circuit is divided on this point (finding partial waiver in one case and no waiver in another).²⁶ These courts have emphasized the benefits of keeping the presence (or absence) of a state’s sovereign immunity consistent in both state and federal court.

Thus, in *Bergemann v. Rhode Island Department of Environmental Management*, which involved claims brought by state employees under the Fair Labor Standards Act (“FLSA”), the First Circuit focused on the Court’s concern in *Lapides* that the state would gain an unfair litigation advantage if it could regain sovereign immunity in federal court that had been waived in state court.²⁷ Because such unfairness is not present when a state maintains immunity in state court, the court rejected the blanket waiver by removal rule.²⁸

Similarly, while evaluating state law tort claims to which the state had been immune in state court, the Fourth Circuit in *Stewart v. North Carolina* rejected a comprehensive waiver by removal rule.²⁹ The court also

²⁴ 302 F.3d 1200, 1206 (10th Cir. 2002).

²⁵ See *Trant v. Oklahoma*, 754 F.3d 1158, 1173 (10th Cir. 2014); discussion *infra* Subsection I.A.3. In *Trant*, the Tenth Circuit argued that *Estes* dealt merely with waiver of immunity from suit under federal law, but did not apply to immunity from liability under state law. *Trant*, 754 F.3d at 1173.

²⁶ See *Beaulieu v. Vermont*, 807 F.3d 478, 485–90 (2d Cir. 2015); *Bergemann v. R.I. Dep’t of Envtl. Mgmt.*, 665 F.3d 336, 341–43 (1st Cir. 2011); *Stewart v. North Carolina*, 393 F.3d 484, 488–90 (4th Cir. 2005). But see *New Hampshire v. Ramsey*, 366 F.3d 1, 15 (1st Cir. 2004) (finding partial waiver). Some might add the D.C. Circuit to this list because it left open the possibility—in dicta in a footnote in a 2002 decision—that if a state retains immunity in state court, removal does not defeat this immunity. See *Watters v. Wash. Metro. Area Transit Auth.*, 295 F.3d 36, 42 n.13 (D.C. Cir. 2002). Nevertheless, the plaintiff in that case never argued that immunity had been waived via removal, and the court declined to consider that issue *sua sponte*. See *id.* Thus, the language in *Watters* is not conclusive, and the D.C. Circuit has yet to more fully evaluate the issue.

²⁷ 665 F.3d at 341–42.

²⁸ *Id.* at 342.

²⁹ 393 F.3d at 490.

emphasized the difference between *retaining* immunity in federal court and *regaining* immunity that had already been waived.³⁰

Most recently, in *Beaulieu v. Vermont*, the Second Circuit distinguished between a state's immunity under the Eleventh Amendment, which applies in federal court, and its more general immunity from suit in state court.³¹ According to the Second Circuit, Eleventh Amendment immunity protects "a state's treasury from claims for damages brought by private entities in federal courts," while general immunity applies "against *all* private suits, whether in state or federal court."³² Construing cases from other circuits and *Lapides*, the Second Circuit determined that removal waived Eleventh Amendment immunity but did not waive the state's general immunity; thus, any immunity the state retained in state court it would also retain in federal court.³³ Therefore, because Vermont had not expressly waived its immunity from suit under the FLSA under Vermont law, it retained its immunity from FLSA claims, notwithstanding its removal of the case to federal court.³⁴ In practice, by construing this waiver of Eleventh Amendment immunity as only covering claims for which a state had waived immunity in state court—as was the case in *Lapides*—but not claims for which a state retained immunity in state court, the Second Circuit's approach is essentially a no waiver position, even though it speaks in partial waiver terms.³⁵

3. Middle Way

By far the most interesting approach to the waiver by removal question, however, is the approach taken in decisions from the First, Third, Fifth, Tenth, and Eleventh Circuits.³⁶ Rather than finding a complete waiver or no waiver rule, these decisions attempted to distinguish between various types of sovereign immunity by making a distinction between immunity from suit and immunity from liability.

³⁰ *Id.*

³¹ 807 F.3d at 484–86.

³² *Id.* at 483.

³³ *Id.* at 487–90.

³⁴ *Id.* at 484–85, 490.

³⁵ *Id.* at 488.

³⁶ See *Trant v. Oklahoma*, 754 F.3d 1158 (10th Cir. 2014); *Stroud v. McIntosh*, 722 F.3d 1294 (11th Cir. 2013); *Lombardo v. Pa. Dep't of Pub. Welfare*, 540 F.3d 190 (3d Cir. 2008); *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236 (5th Cir. 2005); *New Hampshire v. Ramsey*, 366 F.3d 1 (1st Cir. 2004).

Thus in *Lombardo v. Pennsylvania Department of Public Welfare*, the Third Circuit accepted the “voluntary invocation” argument, holding that a state that “purposefully requests a federal forum . . . expresses a clear intent to waive immunity from suit.”³⁷ Such “immunity from suit” referred to a state’s ability to assert immunity from federal jurisdiction.³⁸ Therefore, while removal waived a state’s ability to claim jurisdictional immunity, the state still retained “all defenses it would have enjoyed had the matter been litigated in state court, including immunity from liability.”³⁹ At issue in *Lombardo* were claims brought against the state under the federal Age Discrimination in Employment Act (“ADEA”).⁴⁰ Because the state had “not specifically waived immunity for ADEA violations” under state law, it retained immunity from liability to the ADEA claims in federal court despite its waiver of immunity from suit.⁴¹

Likewise, in *Meyers ex rel. Benzing v. Texas*, the Fifth Circuit held that the “voluntary invocation principle” of *Lapides* should apply to “all cases for the sake of consistency, in order to prevent and ward off all actual and potential unfairness” in litigation.⁴² The court, however, also made a distinction between “immunity from suit and immunity from liability.”⁴³ Citing the historic concern that states that were subject to liability might have their treasuries drained through money damages, the court held that in a federal forum, “a state whose law provides that it possesses an immunity from liability separate from its immunity from suit” could show that waiver of one type of immunity did not “affect its enjoyment of the other.”⁴⁴ Thus, despite the state’s waiver of immunity from suit and submission to federal jurisdiction via removal, the court remanded the case for a determination of whether Texas was immune from liability under state law to the claim at issue that had been brought under Title II of the ADA.⁴⁵

Quoting *Meyers*, the Tenth Circuit also recently distinguished between immunity from suit and immunity from liability.⁴⁶ In *Trant v. Ok-*

³⁷ 540 F.3d at 197 (citation omitted).

³⁸ *Id.* at 199.

³⁹ *Id.* at 198.

⁴⁰ *Id.* at 193.

⁴¹ *Id.* at 195.

⁴² 410 F.3d 236, 249 (5th Cir. 2005).

⁴³ *Id.* at 252–53.

⁴⁴ *Id.* at 253.

⁴⁵ *Id.* at 255–56.

⁴⁶ *Trant v. Oklahoma*, 754 F.3d 1158, 1172 (10th Cir. 2014).

lahoma, the Tenth Circuit explained that while removal waived immunity from suit, a state still could retain immunity from liability.⁴⁷ Although the court was not entirely clear, this distinction between immunity from suit and immunity from liability appeared to track the difference between immunity under federal versus state law.⁴⁸ The court attempted to distinguish its earlier holding in *Estes* by contending that that case dealt only with immunity from suit, not immunity from liability.⁴⁹ The court observed that the defending state in *Trant* had filed a “Notice of Non-Objection of Removal,” in which it reserved its immunity “to future claims, not *all* claims.”⁵⁰ The court then clarified that waiver should be evaluated at the time of removal, and the defending state might be able to claim immunity from subsequent claims added to the suit after removal.⁵¹ Ultimately, the Tenth Circuit remanded the case to the district court to determine under state law if the state had waived its immunity from liability for damages.⁵²

In *Stroud v. McIntosh*, the Eleventh Circuit also made a distinction between immunity from suit and immunity from liability.⁵³ Agreeing with the reasoning of *Lapides* that it would be “inconsistent for a State . . . to invoke federal jurisdiction” and also “claim Eleventh Amendment immunity,” the court held that removal to a federal forum constituted a waiver of immunity from suit.⁵⁴ The claim brought against the State of Alabama in *Stroud* was also under the ADEA. Thus, “notwithstanding [the state’s] removal of the case” and the corresponding waiver of “forum immunity,” the court held that the state could still “raise an objection to liability on the basis that Congress did not abrogate its sovereign immunity.”⁵⁵ Indeed, because the Supreme Court had held in *Kimel v. Florida Board of Regents*⁵⁶ that the ADEA was “unconstitutional as applied to the states”—since Congress did not validly abrogate states’ sovereign immunity “under section 5 of the Fourteenth

⁴⁷ Id. at 1173.

⁴⁸ See id. (distinguishing *Estes* as a case dealing with federal law).

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id.

⁵² Id. at 1173–74.

⁵³ 722 F.3d 1294, 1301 (11th Cir. 2013).

⁵⁴ Id. at 1302 (quoting *Lapides*, 535 U.S. at 619).

⁵⁵ Id. at 1303.

⁵⁶ 528 U.S. 62 (2000).

Amendment”—Alabama retained its immunity in federal court.⁵⁷ The Eleventh Circuit added that Alabama’s immunity was “nearly impregnable” under state law;⁵⁸ removal did not change its ability to bring this “affirmative defense” to the ADEA claim.⁵⁹

In an earlier case that dealt with waiver of sovereign immunity through litigation conduct (though not in the context of waiver by removal), the First Circuit also distinguished between immunity from suit and immunity from damages.⁶⁰ In complicated proceedings, the State of New Hampshire argued that a suit brought against it by a blind group of vendors in federal district court should be dismissed because the vendors had not exhausted all of the administrative remedies available under the statute.⁶¹ When the blind vendors subsequently pursued state administrative adjudication, New Hampshire participated in the proceedings, yet later attempted to raise an Eleventh Amendment immunity defense when the vendors appealed the state administrative tribunal’s decision to a federal arbitration panel.⁶² After an adverse ruling from the arbitration panel, the State sought review of the panel’s decision in federal district court and again claimed sovereign immunity protection.⁶³ The First Circuit held that by its “litigation conduct”—encouraging and participating in administrative adjudication, and voluntarily invoking the jurisdiction of “the federal courts in review of the agency determination”—the State had waived any immunity that it may have had from “federal proceedings (forum immunity) and from prospective equitable relief (substantive liability immunity)” that the state agency was authorized to grant.⁶⁴ Despite these waivers, however, the court still held that the State was immune to liability for damages since New Hampshire had “consistently asserted its immunity from damages when at issue.”⁶⁵

In the context of removal, while a position of complete waiver or no waiver may seem more straightforward, it is the middle approach—making a distinction between jurisdictional and substantive immunity—that poses the more challenging questions. Differentiating among the

⁵⁷ *Stroud*, 722 F.3d at 1303.

⁵⁸ *Id.* (citation omitted).

⁵⁹ *Id.*

⁶⁰ *New Hampshire v. Ramsey*, 366 F.3d 1, 15 (1st Cir. 2004).

⁶¹ *Id.* at 9.

⁶² *Id.* at 10–12.

⁶³ *Id.* at 12–13.

⁶⁴ *Id.* at 15–16.

⁶⁵ *Id.* at 21.

various types and aspects of immunity is critical, and the waiver by removal issue offers fresh insights into the complex doctrine of state sovereign immunity.

B. Various Ways of Conceiving of Sovereign Immunity

The sovereign immunity protected by the Eleventh Amendment is an amorphous doctrine. In some cases, the Court has treated sovereign immunity as akin to subject matter jurisdiction;⁶⁶ in others, the Court has treated it as closer to personal jurisdiction;⁶⁷ and in other instances, the Court has spoken of sovereign immunity as merely an affirmative defense.⁶⁸ Commentators have similarly disputed whether sovereign immunity is a jurisdictional bar or an affirmative defense.⁶⁹

1. Jurisdictional Immunity

Historically, as the Subsections below illustrate, sovereign immunity usually has been understood as a jurisdictional protection. Whether the sovereign immunity protected by the Eleventh Amendment is more akin to subject matter jurisdiction or personal jurisdiction, however, is unresolved.⁷⁰ It may have elements of both.⁷¹

a. Subject Matter Jurisdiction

Textually, sovereign immunity might be considered a doctrine of subject matter jurisdiction. Because it specifies the types of cases and con-

⁶⁶ See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (employing a subject matter approach to immunity that is based in Article III).

⁶⁷ See, e.g., *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring) (acknowledging that in “certain respects, the [sovereign] immunity bears substantial similarity to personal jurisdiction requirements, since it can be waived and courts need not raise the issue *sua sponte*”).

⁶⁸ *Id.* at 389 (majority opinion) (explaining that “the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so”).

⁶⁹ Compare Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 *Harv. L. Rev.* 1559, 1609–11, 1653–54 (2002) (explaining that under current Court doctrine sovereign immunity can be considered a hybrid of personal and subject matter jurisdiction), with Katherine Florey, *Comment, Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity as an Article III Doctrine*, 92 *Calif. L. Rev.* 1375, 1438 (2004) (arguing that the Court should treat sovereign immunity as an affirmative defense rather than a doctrine of subject matter jurisdiction).

⁷⁰ Florey, *supra* note 69, at 1378–79.

⁷¹ See *id.* at 1379–80, 1416; Nelson, *supra* note 69, at 1653–54.

troveries that federal courts can hear, Article III outlines the constitutional boundaries of subject matter jurisdiction that can be exercised by federal courts.⁷² The Eleventh Amendment was specifically enacted in response to the Court's decision in *Chisholm v. Georgia*, where the Court held that it had jurisdiction under Article III over a suit brought against a state by citizens of another state.⁷³ The text of the Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."⁷⁴ By restricting the Article III boundaries—overriding the text in Article III that allowed the judicial power of the United States to extend to "Controversies . . . between a State and Citizens of another State"⁷⁵—the Eleventh Amendment thus appears to be a limit on subject matter jurisdiction. As a restriction on the subject matter jurisdiction of federal courts, the Eleventh Amendment could have a narrow application, applying only to situations like *Chisholm*, or to cases brought under diversity jurisdiction.⁷⁶

Of course, an obvious problem with viewing sovereign immunity as a species of subject matter jurisdiction is that the Supreme Court has repeatedly allowed states to consent to suit in federal court.⁷⁷ Under the Federal Rules of Civil Procedure, however, an absence of subject matter jurisdiction is not a waivable objection, and federal courts are required

⁷² See U.S. Const. art. III, § 2.

⁷³ 2 U.S. (2 Dall.) 419 (1793).

⁷⁴ U.S. Const. amend. XI.

⁷⁵ *Id.* art. III, § 2, cl. 1.

⁷⁶ On its face, the Eleventh Amendment does not cover suits brought against a state by its own citizens, and a "literal" reading of the Amendment would limit its application to situations like the one in *Chisholm*. See Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 *Duke L.J.* 1167, 1174 (2003) ("A literal reading of the amendment might, therefore, lead to the conclusion that the amendment bars *all* suits in law or equity brought in federal court against a state by a citizen of another state, but permits suits in federal court against a state by its own citizens—provided, of course, that they are otherwise within the federal jurisdiction."). Similarly, proponents of the "diversity" interpretation of the Eleventh Amendment, who contend that the protections of the Amendment extend only to suits brought before federal courts under the fount of diversity jurisdiction, also implicitly base their argument on an assumption that the Eleventh Amendment is primarily a restriction on subject matter jurisdiction. *Id.* at 1175–76.

⁷⁷ See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999) (noting that a "State may waive its sovereign immunity by consenting to suit" (citing *Clark v. Barnard*, 108 U.S. 436, 447–48 (1883))).

to dismiss a case *sua sponte* if they lack subject matter jurisdiction.⁷⁸ Since actual subject matter jurisdiction is a grant of structural power, it might seem strange for a party's consent to dictate whether a court has subject matter jurisdiction.⁷⁹ Of course, one could argue instead that a subject matter jurisdiction approach carries with it a notion of consent—federal courts have subject matter jurisdiction over states that have consented to suit, but lack jurisdiction over unconsenting states. Therefore, consent could be part of a subject matter jurisdiction approach to immunity.

Indeed, it is possible to support a subject matter jurisdiction approach that includes consent by applying the protections of the Eleventh Amendment more broadly, as the Court did in *Seminole Tribe of Florida v. Florida*.⁸⁰ According to the Court in *Seminole Tribe*, the Eleventh Amendment stands for an underlying principle of immunity that applies to *all* of Article III.⁸¹ Therefore, one can read each of the listed cases or controversies in Article III with an implicit exception—they do not include suits brought against a state without the state's consent.⁸² This interpretation would extend the Eleventh Amendment to all suits in federal court. Indeed, such an understanding helps to explain why, since *Hans v. Louisiana*, the Court has construed sovereign immunity to protect a state from suit in federal court by its own citizens.⁸³

Yet this conception does not completely comport with the Court's other sovereign immunity precedents. Indeed, a later case took a contradictory approach. In *Idaho v. Coeur d'Alene Tribe of Idaho*, the Court declined to read the sovereign immunity protected by the Eleventh Amendment as a "nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction."⁸⁴ While the Eleventh Amendment might, "like the

⁷⁸ Fed. R. Civ. P. 12(b)(1), (h)(3).

⁷⁹ But see Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(1) (2012) (providing that a foreign state is not "immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived its immunity either explicitly or by implication"). Thus, the subject matter jurisdiction of federal courts can be tied to waivers of immunity in at least some instances.

⁸⁰ 517 U.S. 44, 54 (1996).

⁸¹ *Id.*

⁸² See *id.* (explaining that "[f]or over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States'" (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890))).

⁸³ 134 U.S. at 18–19.

⁸⁴ 521 U.S. 261, 267 (1997).

grant of Article III, § 2 jurisdiction,” appear to be “cast in terms of reach or competence, so the federal courts are altogether disqualified from hearing certain suits brought against a State,” such an “interpretation . . . has been neither our tradition nor the accepted construction of the Amendment’s text.”⁸⁵ Thus in *Coeur d’Alene*, the Court explicitly disclaimed a subject matter jurisdiction approach to sovereign immunity.

Likewise, if sovereign immunity is purely an issue of subject matter jurisdiction, why can Congress abrogate states’ sovereign immunity using its Section Five enforcement powers of the Fourteenth Amendment?⁸⁶ Of course, one could argue, as the Court does in *Seminole Tribe*, that by following the Eleventh Amendment, the Fourteenth Amendment altered the balance of power between the federal government and the states, permitting congressional abrogation of Article III immunity.⁸⁷ Yet, since the Fourteenth Amendment contains no language that appears to modify the provisions of Article III, this understanding seems difficult to square with the text.

There is another problem with taking only a subject matter jurisdiction approach to the Court’s understanding of sovereign immunity. In *Nevada v. Hall*,⁸⁸ the Court indicated that it will not find an Eleventh Amendment bar to prohibit the Court from exercising appellate jurisdiction over suits brought by citizens of one state in their own state courts against the government of another state, even though the state being sued refuses to consent to suit.⁸⁹ Likewise, if an unconsenting state were to be sued by its own citizens in the courts of another state, there would be nothing under current doctrine to stop the Court from exercising appellate jurisdiction over a decision from the highest court of the state where the suit was brought (assuming, of course, that a proper federal question existed). Obviously, if such suits were initiated in federal court, they would be barred by the Court’s Eleventh Amendment jurisprudence. Yet, if sovereign immunity is really a doctrine of subject matter jurisdiction, cases that would be barred by sovereign immunity in feder-

⁸⁵ *Id.*

⁸⁶ See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that under its Section Five enforcement powers of the Fourteenth Amendment, Congress can authorize private suits against states which would otherwise be barred). *Seminole Tribe* confirmed this holding. 517 U.S. at 59.

⁸⁷ *Seminole Tribe*, 517 U.S. at 59 (discussing *Fitzpatrick*, 427 U.S. at 452–56).

⁸⁸ 440 U.S. 410 (1979); see also *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 497 (2003) (reiterating *Hall*).

⁸⁹ *Hall*, 440 U.S. at 418–21.

al district court should also be barred in the Supreme Court when they are appealed from the state court system.

b. Personal Jurisdiction

Both of the above arguments suggest that there is another rationale for the Court's current doctrine of state sovereign immunity.⁹⁰ In *Alden v. Maine*, the Court suggested that state sovereign immunity both preceded and survived the federal Constitution: "[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. . . . [It] is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today"⁹¹ Thus, sovereign immunity could be rooted in general common law that is not affected by Article III. Under this approach, *Chisholm* was wrong even without the Eleventh Amendment.⁹²

Historically, there is a strong argument that the framers of the Constitution understood the doctrine of sovereign immunity in terms of personal jurisdiction.⁹³ Under general law, as it existed at the time of the American founding, sovereign states were exempt from the courts' authority to hale unwilling parties before them.⁹⁴ As *Alden* explains, this principle was well established in English common law, and "the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified."⁹⁵ As Professor Caleb Nelson observes, before a "Case" or "Controversy" could exist—and subject matter jurisdiction limitations apply—both parties must "voluntarily" appear or "be haled before the court."⁹⁶ On this understanding, "Article III did nothing to change this system: if a state did not

⁹⁰ See Nelson, *supra* note 69, at 1653–54 (arguing that conceiving of sovereign immunity as a species of personal jurisdiction drawn from general law explains why Congress has wider latitude to abrogate sovereign immunity under the exercise of its Fourteenth Amendment powers, and why the Court can review decisions from state courts that would otherwise be barred by immunity if originally filed in federal court—personal jurisdiction has been waived before the case reaches the Supreme Court).

⁹¹ 527 U.S. 706, 713 (1999).

⁹² Nelson, *supra* note 69, at 1563.

⁹³ *Id.* at 1592–93, 1599–601 (quoting statements from Madison and Marshall at the Virginia Ratifying Convention and resolutions passed by many state legislatures condemning the holding of *Chisholm*).

⁹⁴ *Id.* at 1574.

⁹⁵ 527 U.S. at 715–16.

⁹⁶ Nelson, *supra* note 69, at 1565.

consent to suit, there would be no ‘Case’ or ‘Controversy’ over which the federal government could exercise judicial power.”⁹⁷

Understanding sovereign immunity as a doctrine of personal jurisdiction explains why the Court has an expanded understanding of sovereign immunity that extends far beyond the text of the Eleventh Amendment.⁹⁸ If sovereign immunity simply prevents courts from requiring states to appear before them as party defendants, then states’ ability to consent to suit and waive their immunity under current doctrine also makes sense.⁹⁹ While consent ordinarily cannot remove a subject matter jurisdictional bar, it makes all the difference in the context of personal jurisdiction.

c. Hybrid of Personal and Subject Matter Jurisdiction

In light of the history and text, it is evident that state sovereign immunity has been understood as a jurisdictional issue. Whether it is better characterized as akin to subject matter jurisdiction or personal jurisdiction is uncertain; sovereign immunity may have elements of both. Considering the text alone, there is a strong argument that the sovereign immunity protected by the Eleventh Amendment is a limitation on the subject matter jurisdiction of federal courts.¹⁰⁰ Yet a subject matter jurisdiction approach to sovereign immunity does not explain all the features of current doctrine, and the common law history of sovereign immunity indicates that it may be more akin to personal jurisdiction.

Perhaps, as Professor Nelson postulates, state sovereign immunity has two strands—a subject matter jurisdiction component protected by the Eleventh Amendment and a personal jurisdiction component drawn from general law that preceded the Constitution.¹⁰¹ Under this approach, immunity in cases that fall within a literal reading of the Eleventh Amendment might be absolute—neither waivable nor subject to congressional abrogation—but immunity drawn from general law doctrines outside the text could be waived or modified by Congress.¹⁰²

⁹⁷ *Id.*

⁹⁸ See *Hans*, 134 U.S. at 18–19.

⁹⁹ Cf. Fed. R. Civ. P. 12(b)(2), (h)(1) (allowing a personal jurisdiction defense to be waived, and automatically finding it waived if not raised in a responsive pleading or by motion prior to a responsive pleading).

¹⁰⁰ Note that an earlier draft of the Eleventh Amendment was written in personal jurisdiction terms. See Nelson, *supra* note 69, at 1602–03.

¹⁰¹ *Id.* at 1615–17.

¹⁰² *Id.*

Indeed, the sovereign immunity currently protected by the Court appears to be a complex amalgam of subject matter and personal jurisdiction elements. As Justice Kennedy has observed, in “certain respects, the [Court’s understanding of sovereign] immunity bears substantial similarity to personal jurisdiction requirements, since it can be waived and courts need not raise the issue *sua sponte*.”¹⁰³ But, “[p]ermitting the immunity to be raised at any stage of the proceedings, in contrast, is more consistent with regarding the Eleventh Amendment as a limit on the federal courts’ subject-matter jurisdiction.”¹⁰⁴ It is possible to combine principles of personal and subject matter jurisdiction in a variety of ways.

2. Substantive Immunity

In addition to the jurisdictional aspect of immunity protected by the Constitution and general common law, it is also possible that immunity can be rooted in substantive law. These substantive limitations can exist apart from, and in addition to, jurisdictional style sovereign immunity protections. Even if a court has jurisdiction over a case, substantive law must also provide a suit that can be brought against a state in order for the claim to proceed.

a. Cause of Action Restrictions

In order for a plaintiff to bring suit, there must be a cause of action that can be employed against a state.¹⁰⁵ Just because a state has an underlying duty does not mean that there is a corresponding cause of action to remedy violations of this duty. If there is no recognized statutory or common law cause of action under state or federal law, a state that has waived its jurisdictional immunity still will be immune from suit. This seems to be the best interpretation of the Eleventh Circuit’s holding in *Stroud*,¹⁰⁶ and it is a critical distinction. There are a variety of ways that substantive law can protect sovereign immunity. A state could, for example, have a general ban that prohibits any cause of action from being brought against it, or it could have specific limitations on individual causes of action.

¹⁰³ Wis. Dep’t of Corr. v. Schacht, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring).

¹⁰⁴ Id.

¹⁰⁵ Nelson, *supra* note 69, at 1616.

¹⁰⁶ 722 F.3d at 1303.

b. Affirmative Defense

Finally, it is possible to consider sovereign immunity as simply an affirmative defense that a state can raise to a claim brought against it. Indeed, in *Wisconsin Department of Corrections v. Schacht*, the Court explained: “The Eleventh Amendment, however, does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense.”¹⁰⁷ Similarly, in *Blatchford v. Native Village of Noatak*, the Court implied that sovereign immunity could be raised as a defense even once jurisdiction over a case has been granted.¹⁰⁸ A sovereign immunity defense could be comprehensive—barring an entire cause of action—or limited, restricting the amount of damages that could be levied against a state. Much like personal jurisdiction, a sovereign immunity affirmative defense would be left to the state to raise; indeed in *Schacht*, the Court explained that if the defense was not brought up by the state, courts could ignore it.¹⁰⁹ While conceiving of sovereign immunity as merely an affirmative defense without a jurisdictional component (as some commentators do)¹¹⁰ seems hard to square with the text of the Eleventh Amendment or the understanding of sovereign immunity at the time of the founding, it is a possible interpretation of the Court’s modern jurisprudence. It is important to recognize that apart from jurisdictional immunity, substantive law can create a variety of limited sovereign immunity defenses—such as damages restrictions—in addition to restricting the availability of entire causes of action.

3. Summary

When discussing sovereign immunity, courts often do not make it clear which doctrinal basis for sovereign immunity they are assuming. As the preceding discussion has illustrated, even the Supreme Court has not articulated a consistent basis for sovereign immunity, treating it differently in different cases. Yet the theoretical foundation for sovereign

¹⁰⁷ 524 U.S. at 389.

¹⁰⁸ 501 U.S. 775, 786 n.4 (1991) (“The fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim.”).

¹⁰⁹ 524 U.S. at 389.

¹¹⁰ See, e.g., Florey, *supra* note 69, at 1438–39 (arguing that the Court should treat sovereign immunity as an affirmative defense rather than a doctrine of subject matter jurisdiction).

immunity becomes incredibly important when considering the waiver by removal question. In order to understand the impact of a waiver, one must first understand the contours of what is being waived. In evaluating the issue, courts must be careful to distinguish between the substantive and jurisdictional aspects of sovereign immunity. Even if a court finds that removal amounts to a waiver of jurisdictional immunity, it should still respect substantive limits on sovereign immunity.

II. EVALUATING WAIVER BY REMOVAL IN THE CONTEXT OF JURISDICTIONAL IMMUNITY

First, it is important to recognize that there may be valid reasons why a state that has been named as a defendant might want to remove a case to federal court but still retain its sovereign immunity for certain claims. For example, there may be federal question claims to which a state has already waived its immunity, and the state wants federal expertise on the issue,¹¹¹ or there may be multiple defendants in addition to the state for whom federal determination of a claim would be advantageous. Thus, in the context of multiple parties and multiple types of claims—some to which a state is immune and some to which it is not—a state might want to remove a case to federal court and retain sovereign immunity over some claims and not others. How a court conceives of sovereign immunity can impact how it resolves the waiver by removal issue. While it is possible to reach a waiver by removal rule under either a subject matter or personal jurisdiction conception of immunity, proponents of one view or the other may approach the question differently.

A. *Subject Matter Jurisdiction*

As discussed above, if the Court took a purely subject matter jurisdiction approach to sovereign immunity, the consent of a state would likely be irrelevant to a court's ability to hear a suit.¹¹² A strict subject matter jurisdiction conception of immunity (without a consent exception) would not allow a state to waive its immunity by removing a case to federal court.¹¹³ Waiver by removal would be irrelevant because waiver itself would be impossible. A sovereign immunity objection would be permissible at any stage of the litigation, much like the now-defunct rule

¹¹¹ See *Bergemann v. R.I. Dep't of Env'tl. Mgmt.*, 665 F.3d 336, 342 (1st Cir. 2011).

¹¹² Cf. Fed. R. Civ. P. 12(h)(3) (not permitting subject matter jurisdiction to be waived).

¹¹³ See discussion *supra* Subsection I.B.1.a.

stated in *Ford Motor Co. v. Department of Treasury of Indiana*,¹¹⁴ and a court should be able to raise it *sua sponte*.¹¹⁵ Yet in *Lapides*, the Court specifically objected to this rule, based on its potential unfairness to plaintiffs.¹¹⁶ Given the seemingly hybrid nature of sovereign immunity, which appears to draw from both subject matter and personal jurisdiction principles, it is unlikely that the Court will support such an interpretation any time soon.

The Court has made it clear that a state can consent to suit.¹¹⁷ Yet, if a subject matter jurisdiction approach to immunity includes a built-in consent requirement as discussed earlier (so that there is subject matter jurisdiction only if the state consents), a court might still want a state's consent to be "unequivocally expressed."¹¹⁸ As the Court explained in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, there are two ways by which a state can indicate consent: via a "clear declaration that it intends to submit itself" to federal jurisdiction, or the state can "voluntarily invoke[]" federal jurisdiction.¹¹⁹

Professor Jonathan Siegel characterizes this as a distinction between cases where a state affirmatively "*consent[s]*" to suit and cases where a state simply "*waive[s]*" its immunity from suit.¹²⁰ As Siegel explains, in consent cases the Court has "employed very strict, pro-state rules,"¹²¹ whereas in waiver cases the Court has applied a "much more pro-plaintiff[]" rule" overall.¹²² In consent cases,¹²³ the Court recognizes that

¹¹⁴ 323 U.S. 459, 468–69 (1945), overruled by *Lapides*, 535 U.S. at 623.

¹¹⁵ Cf. Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

¹¹⁶ *Lapides*, 535 U.S. at 623.

¹¹⁷ See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999) ("[A] State may waive its sovereign immunity by consenting to suit."). As explained above, this aspect of current doctrine indicates that a pure subject matter approach is probably an inadequate explanation for the Court's understanding of immunity, and it may be better to view sovereign immunity as an amalgamation of both personal and subject matter jurisdiction approaches. Alternatively, perhaps federal courts simply lack subject matter jurisdiction over unconsenting states along the lines of the Foreign Sovereign Immunities Act. See *supra* note 79.

¹¹⁸ *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984).

¹¹⁹ 527 U.S. at 675–76. Note that this is the Court's own summation of modern doctrine. Historically, the Court has alternated between a pro-plaintiff and pro-state approach to sovereign immunity. See Siegel, *supra* note 76, at 1187–88.

¹²⁰ Siegel, *supra* note 76, at 1172.

¹²¹ *Id.* at 1189.

¹²² *Id.* at 1196.

¹²³ See, e.g., *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857).

consent is completely “voluntary,” and states can “set conditions on any consent” that they choose, including the ability to be sued in state court but not in federal court.¹²⁴ State statutes granting consent are “narrowly” construed.¹²⁵ In contrast, in waiver cases a state can waive its immunity without explicit consent. For example, waiver can be implied from failure to assert an immunity defense at a proper time and can exist regardless of the intent of state officials.¹²⁶ Moreover, while consent to suit can be revoked by the state, waiver is irrevocable.¹²⁷

Siegel argues that consent cases involve matters of state law and should be treated as such—federal courts should ask whether the state has consented to suit under state law¹²⁸—whereas waiver cases are a matter of federal law.¹²⁹ Yet it is possible to take Siegel’s consent/waiver distinction a bit further; consent cases often implicate issues of subject matter jurisdiction, while waiver cases implicate issues of personal jurisdiction. On this understanding, by consenting to suit in its own courts under its state constitution,¹³⁰ a state like Arkansas grants *subject matter jurisdiction* to its courts over suits against the state.¹³¹ In contrast, by voluntarily filing a claim to a disputed fund in federal court, a state such as Rhode Island waives its *personal jurisdiction* to suit.¹³² Indeed, Siegel himself thinks that in waiver cases sovereign immunity should be considered akin to personal jurisdiction such that a state should be required to raise or waive its immunity immediately upon appearance in a federal forum.¹³³

Siegel appears to treat the consent and waiver cases as a distinction between substantive immunity (which arises under state law) and jurisdictional immunity (which is a matter of federal law).¹³⁴ Yet, because the archetypal consent case discussed by Siegel arises under state law in

¹²⁴ Siegel, *supra* note 76, at 1189.

¹²⁵ *Id.*

¹²⁶ *Id.* at 1190, 1196.

¹²⁷ *Id.*

¹²⁸ *Id.* at 1224.

¹²⁹ *Id.* at 1243.

¹³⁰ See *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857).

¹³¹ Note that the issue in *Beers* was not whether the federal court had jurisdiction over the case, but whether the state could withdraw its consent to suit in state court (thus taking away subject matter jurisdiction from state courts). *Id.* at 528–29.

¹³² See *Clark v. Barnard*, 108 U.S. 436, 445–48 (1883).

¹³³ Siegel, *supra* note 76, at 1230.

¹³⁴ *Id.* at 1234.

state court,¹³⁵ it is important to recognize that consent to suit in state court requires both a grant of subject matter jurisdiction upon state courts and a substantive state law cause of action. Waiver cases involve questions akin to personal jurisdiction, while consent cases can involve issues of subject matter jurisdiction as well as a substantive cause of action. Under this understanding, the distinction between the way the Court has treated consent cases and the way the Court has handled waiver cases makes even more sense. Consent for surrender of subject matter jurisdictional immunity purposes might require a “clear declaration” on the part of the state,¹³⁶ while a waiver of personal jurisdictional immunity can be “inferred” where the state voluntarily seeks federal jurisdiction.¹³⁷ Not only should state laws regarding the presence (or absence) of a substantive cause of action be narrowly construed, but state laws granting state courts subject matter jurisdiction should also be carefully examined.

Indeed, in the original decision that outlined the “clear declaration” test, *Great Northern Life Insurance Co. v. Read*, the Court refused to read a state’s consent to suit in its own courts (and corresponding grant of subject matter jurisdiction) as applying to federal courts, absent a “clear declaration” that the state intended to “submit its fiscal problems to other courts than those of its own creation.”¹³⁸ It is certainly true that litigation conduct generally does not affect the state’s decision to grant (or withhold) subject matter jurisdiction for suits against itself in its own courts.¹³⁹ In contrast, if waiver cases involve issues of personal jurisdiction, then federal courts would have a lot more leeway to set rules regarding the effect of litigation conduct on immunity. Consent to suit in state court, as a grant of subject matter jurisdiction, is typically given by statute and is clearly articulated, while historically a waiver of personal jurisdiction could be found by conduct and need not be express (indeed, it often depended on the defendant’s appearance in court).¹⁴⁰ Of course, federal law determines the subject matter and personal jurisdiction of the

¹³⁵ *Id.* at 1189–90 (discussing *Beers*, 61 U.S. (20 How.) at 527–30).

¹³⁶ Note that the clear declaration requirement might similarly apply in determining whether state law has created a substantive cause of action that can be brought against the state, since the requirement arose in the line of cases that dealt with the extent of a state’s consent to suit in its own courts.

¹³⁷ Siegel, *supra* note 76, at 1217.

¹³⁸ 322 U.S. 47, 54 (1944).

¹³⁹ See *id.* at 53–57.

¹⁴⁰ See Nelson, *supra* note 69, at 1570.

federal court, and usually the only obvious state law question is whether there is a substantive cause of action. This may be why Siegel focuses on the difference between substantive and jurisdictional immunity as the key to consent and waiver cases.¹⁴¹

In state courts, consent for surrender of subject matter jurisdictional immunity is typically accomplished by constitution or statute, as was the case in *Beers v. Arkansas*.¹⁴² If a state's grant of subject matter jurisdiction over suits against itself in state court is "narrowly" construed under the consent line of cases, then consent for the purpose of subject matter jurisdiction in federal court could be similarly limited. Perhaps there should also be a corresponding requirement of written consent (a "clear declaration") for subject matter jurisdictional immunity in federal court.¹⁴³ This is the natural inference from *Great Northern Life Insurance Co.*¹⁴⁴ Thus, a subject matter jurisdiction understanding of immunity that includes consent—such that federal courts only have subject matter jurisdiction over consenting states—might not recognize removal to a federal forum as sufficient to count as consent. This arguably follows from the Court's explanation that the "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one."¹⁴⁵ Siegel contends that the Court is conflating consent and waiver cases with such statements.¹⁴⁶ Nevertheless, perhaps the best interpretation of the Court's rule in *College Savings Bank*—that waiver will be found only by voluntary invocation of, or a clear declaration of submission to, federal jurisdiction¹⁴⁷—is that there are two different tests: one for waivers of personal jurisdiction style immunity, and one for consent to subject matter jurisdiction.

Since the scope of federal subject matter jurisdiction must be a matter of federal law,¹⁴⁸ it is important to note that a rule which required a state statute or other "clear declaration" for consent to subject matter jurisdic-

¹⁴¹ Siegel, *supra* note 76, at 1234. Note that Siegel refers to jurisdictional immunity as "forum" immunity and substantive immunity as "immunity from liability." *Id.*

¹⁴² 61 U.S. (20 How.) 527, 529 (1857).

¹⁴³ See *Great N. Life Ins. Co.*, 322 U.S. at 54 (outlining the clear declaration test).

¹⁴⁴ *Id.*

¹⁴⁵ *Coll. Sav. Bank*, 527 U.S. at 675 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985)).

¹⁴⁶ Siegel, *supra* note 76, at 1206–07.

¹⁴⁷ 527 U.S. at 675–76.

¹⁴⁸ See, e.g., U.S. Const. art. III, § 2; 28 U.S.C. § 1331 (2012).

tion would still be a decision of federal common law.¹⁴⁹ State law would not be conferring jurisdiction on federal courts—it would simply be providing the necessary indicia of consent required by federal jurisdiction. Indeed, if consent is built into a subject matter jurisdiction conception of sovereign immunity, some exemplar of consent is necessary, and requiring a written declaration in state law is an easy solution. The Court is used to examining state law to see if the state has consented to suit in other contexts.¹⁵⁰ Since states typically grant subject matter jurisdiction via statute, it makes sense to require a similar written indication of consent for subject matter jurisdiction over state law claims in federal court.¹⁵¹

One might argue that this is the explanation for the Third Circuit's holding in *Lombardo v. Pennsylvania Department of Public Welfare*, which held that Pennsylvania waived its forum immunity by removing to federal court, yet retained its immunity from liability, because the State had “not statutorily waived its sovereign immunity for claims brought under the federal statute at issue” in the case.¹⁵² In that sense, the waiver of forum immunity was really a waiver of personal jurisdictional immunity, but the State had not granted the necessary written consent required to extinguish subject matter jurisdictional immunity.¹⁵³

In response to the suggestion that written consent should be required, one might contend that since under 28 U.S.C. § 1441(a) a case can be removed only if the “district courts of the United States” would have original jurisdiction over the entire suit,¹⁵⁴ by removing a case to federal court, the state is clearly indicating that it wants the federal court to exercise subject matter jurisdiction over the entire case. This might be a

¹⁴⁹ This is much like the alternative explanation advanced by Professor Caleb Nelson in his Federal Courts course at the University of Virginia School of Law for the holding in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), as incorporating into federal common law the choice of law rules of the state where the federal court sits.

¹⁵⁰ See, e.g., *Alden v. Maine*, 527 U.S. 706, 757–58 (1999) (looking to state law to determine if Maine had consented to suit under the FLSA).

¹⁵¹ Of course, states could allow for subject matter jurisdiction via other means, and rather than having a uniform federal rule, federal courts could merely follow state law on this issue.

¹⁵² 540 F.3d 190, 192, 198–99 (3d Cir. 2008).

¹⁵³ The federal claim at issue in *Lombardo* was brought under the ADEA. *Id.* at 193. Thus, one could also argue that the problem was that under *Kimel v. Florida Board of Regents*, 528 U.S. 62, 79 (2000), there was simply no substantive cause of action, and while the state waived all jurisdictional immunity by removing the case, a substantive bar remained. See discussion *infra* Section III.B.

¹⁵⁴ 28 U.S.C. § 1441(a) (2012).

plausible interpretation of *Lapides*'s claim that it would be "inconsistent for a State . . . to invoke federal jurisdiction" and "deny[] that the 'Judicial power of the United States' extends to the case at hand."¹⁵⁵ Of course such an argument ignores 28 U.S.C. § 1441(c), which states that if there are claims arising under federal law and additional claims that do not fall within the federal court's jurisdiction, removal is still permitted, and the claims for which the court does not have jurisdiction are severed.¹⁵⁶ Likewise, the Court made it clear in *Wisconsin Department of Corrections v. Schacht* that the presence of a claim barred by Eleventh Amendment immunity does not defeat removal if there are other justiciable claims.¹⁵⁷ Instead, the proper procedure is for federal courts to sever claims barred by sovereign immunity and to hear the remaining claims.¹⁵⁸ Thus, at least in cases where the anchor claim for removal arises under federal law, removal itself is not an unambiguous assertion that the state is seeking federal jurisdiction over all of the claims in a case.

Since the subject matter jurisdiction of federal courts is a matter of federal law, the Court need not require a "clear declaration" through written law as indication of consent in cases of removal. Indeed, under federal common law, the Court could take a variety of approaches to consent. There may be a valid reason for distinguishing between state and federal law causes of action. While traditionally Congress cannot force state courts to exercise subject matter jurisdiction over claims brought under federal law (although states cannot discriminate against federal law claims),¹⁵⁹ Congress might want to open up as many opportunities for suits under federal law as possible, and perhaps removal could be sufficient to count as consent for subject matter jurisdiction over federal claims. Thus, for state law claims in federal court, federal common law could incorporate state requirements for evidence of consent (indeed, it would be strange for a federal court to exercise jurisdiction over a state law claim when state courts were prohibited from doing so); meanwhile, federal common law could have a completely different

¹⁵⁵ 535 U.S. at 619. See also *Estes v. Wyo. Dep't of Transp.*, 302 F.3d 1200, 1206 (10th Cir. 2002) (discussing this statement in *Lapides*).

¹⁵⁶ 28 U.S.C. § 1441(c) (2012).

¹⁵⁷ 524 U.S. 381, 392–93 (1998).

¹⁵⁸ See *id.*

¹⁵⁹ See *Haywood v. Drown*, 556 U.S. 729 (2009); *Testa v. Katt*, 330 U.S. 386 (1947).

approach to consent for purposes of federal law claims. Thus, removal might be evidence of consent for some cases but not for others.

However, because a state may want to retain immunity from some claims but not others, under the “unequivocal expression” requirement for consent, removal is not a “clear declaration” that a state is seeking federal jurisdiction for all of the claims in a suit. Litigating a case all the way through a federal court system could be a clear expression of waiver,¹⁶⁰ but finding waiver immediately upon the appearance of a state in a federal forum is less convincing.

There are also federalism reasons to require an unambiguous declaration of consent to suit. The motivating factor in *Great Northern Life Insurance Co.* was respect for state sovereignty.¹⁶¹ States are sovereign entities, and it would disrupt the system of federalism to find consent to suit absent a “clear declaration.”¹⁶² Likewise, in *Seminole Tribe of Florida v. Florida*, where the Court focused on the subject matter jurisdiction aspects of immunity, the Court was motivated by the structural importance of federalism.¹⁶³ The Court there explained that sovereign immunity is critical because it protects the division of power between states and the federal government.¹⁶⁴

In other sovereign immunity cases where the Court has highlighted federalism concerns, the Court has also emphasized that a state’s consent to suit must “be unequivocally expressed.”¹⁶⁵ For example, the

¹⁶⁰ See *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 278–79, 287–89 (1906).

¹⁶¹ 322 U.S. at 53 (“The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government, while its rigors are mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign.”).

¹⁶² *Id.* at 54.

¹⁶³ 517 U.S. at 54 (emphasizing that “each State is a sovereign entity in our federal system” in its explanation of Eleventh Amendment immunity).

¹⁶⁴ *Id.* In contrast, *Lapides* does not mention federalism but focuses its inquiry on the fairness of a particular rule. 535 U.S. at 620.

¹⁶⁵ *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99–100 (1984) (explaining that its decision must be “guided by the principles of federalism that inform Eleventh Amendment doctrine” (alteration and citation omitted)); see also *Coll. Sav. Bank*, 527 U.S. at 676, 690 (explaining that a state must make “a ‘clear declaration’ that it intends to submit itself to our jurisdiction,” while emphasizing the importance of federalism (quoting *Great N. Life Ins. Co.*, 322 U.S. at 54)); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238–40 (1985) (explaining that the “Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States,” and stating that “a State will be deemed to have waived its immunity only where stated by the most express language” (citation omitted)), superseded by statute on other grounds, 42 U.S.C. § 2000d-7 (2006).

Court in *College Savings Bank*, while making federalism arguments, rejected the notion of a constructive waiver whereby states consented to suit by engaging in commercial activity.¹⁶⁶ Just as the Court was hesitant to extend a state's grant of subject matter jurisdiction in its own courts to federal court in *Great Northern Life Insurance Co.*, because of respect for state sovereignty, perhaps the Court should also require a "clear declaration" of consent for cases brought under federal law.¹⁶⁷ Thus, there are federalism reasons—rooted in the "clear declaration" line of cases—to require significant evidence of consent in the context of subject matter jurisdictional immunity.

B. Personal Jurisdiction

Under a personal jurisdiction approach to immunity, there may be less of an argument that removal should not count as evidence of waiver of immunity. Since personal jurisdiction is about the ability of a court to hale parties before it, one might think that by choosing to remove a case, a state is surrendering any objections it has to a federal court's jurisdiction. This seems to be the best rationale for *Lapides*'s oft-quoted line that "[i]t would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction . . . and (2) to claim Eleventh Amendment immunity" in a case.¹⁶⁸ Notably, the "waiver" or "voluntary invoking jurisdiction" line of cases is what the Court relies on in *Lapides*.¹⁶⁹ Thus, *Lapides* is probably best read as falling under the personal jurisdiction strand of sovereign immunity.

¹⁶⁶ 527 U.S. at 679, 690–91. It is not entirely clear that the Court was employing a subject matter jurisdiction approach to sovereign immunity in *College Savings Bank*, but the Court used the same federalism concerns to justify its holdings in *College Savings Bank* as it did in the subject matter jurisdiction case of *Seminole Tribe*. See *Seminole Tribe*, 517 U.S. at 47.

¹⁶⁷ Note that *Great Northern Life Insurance Co.* either has been implicitly overruled by *Lapides*—such that if a state grants its own courts subject matter jurisdiction over a suit, this action counts as a "clear declaration" of later consent in federal court, or the Court considers removal a sufficiently "clear declaration" of consent. Compare *Lapides*, 535 U.S. at 617, 624, with *Great N. Life Ins. Co.*, 322 U.S. at 54. Nevertheless, as discussed in Section II.B, *Lapides* seems to be based on the personal jurisdiction line of cases that merely requires *waiver* not *consent*. It thus seems likely that the Court was not considering the subject matter jurisdiction strand of sovereign immunity in *Lapides*.

¹⁶⁸ 535 U.S. at 619.

¹⁶⁹ *Id.* (noting that "more than a century ago this Court indicated that a State's voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity" (citing *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947); *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906); *Clark v. Barnard*, 108 U.S. 436, 447 (1883))).

With that said, the cases that the *Lapides* Court cites—*Gardner v. New Jersey*, *Gunter v. Atlantic Coast Line Railroad Co.*, and *Clark v. Barnard*—held that a state waived its sovereign immunity when it *voluntarily became a party* to the litigation pending in federal court.¹⁷⁰ Even under a personal jurisdiction understanding of immunity, voluntarily becoming a party and voluntarily removing a case to federal court are not necessarily equivalent. As discussed earlier, there are legitimate reasons why a defending state might want federal expertise for some types of claims, but still want to claim sovereign immunity for others.¹⁷¹ In contrast, one might think that if a state voluntarily chooses to participate in a suit, it does not object to a federal court exercising jurisdiction over it. Thus, removing a case to federal court is not inherently an unambiguous declaration that the state waives personal jurisdictional immunity from all of the claims in a case.

Indeed, it is possible that a court may have personal jurisdiction over a defendant for purposes of some claims but not others.¹⁷² Thus, it is not inconsistent for a state to claim personal jurisdiction style immunity from some claims and not others. It is also well settled that a party can make an appearance in a forum to contest personal jurisdiction.¹⁷³ Under

¹⁷⁰ See *Gardner*, 329 U.S. at 574 (holding that when New Jersey voluntarily filed a claim against a fund, it waived its sovereign immunity); *Gunter*, 200 U.S. at 284 (“[W]here a state voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.”); *Clark*, 108 U.S. at 447–48 (holding that because Rhode Island voluntarily became a party by presenting a claim to a disputed fund, it waived its Eleventh Amendment immunity). Note that although *Gunter* involved a state being sued as a defendant, the issue there was whether the state should be bound by a prior judgment of a federal court where the state, through its officers, had chosen to submit federal jurisdiction, litigate the case on its merits, and abide by the judgment. 200 U.S. at 278–79, 287–89. The Court repeatedly emphasized that by litigating the case, the state had by its “voluntary action . . . submitt[ed] its rights to judicial determination.” *Id.* at 292.

¹⁷¹ See discussion *supra* Part II.

¹⁷² This situation frequently arises when a plaintiff brings a federal claim under a statute that permits nationwide service of process, as well as a state law claim where the defendant does not fall within the ambit of the forum state’s long-arm statute. See 4A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1069.7, at 226–28 (3d ed. 2002).

¹⁷³ Historically, this was known as a “special appearance”; on the federal level, it has been largely superseded by the Federal Rules of Civil Procedure, which allow a defendant to raise a personal jurisdiction defense as part of a Rule 12(b)(2) motion. See Fed. R. Civ. P. 12(b)(2); W.E. Shipley, Annotation, *Litigant’s Participation on Merits, After Objection to Jurisdiction of Person Made Under Special Appearance or the Like Has Been Overruled, as Waiver of Objection*, 62 A.L.R.2d 937, 939 (1958).

the Federal Rules of Civil Procedure, a defending party is given the opportunity to raise a personal jurisdiction objection at the outset of a case through a motion or responsive pleading.¹⁷⁴ Perhaps then in the immunity context, courts should follow the procedure the Court outlined in *Schacht*—a court should dismiss claims barred by immunity and proceed to hear the claims for which it has jurisdiction.¹⁷⁵ When there are multiple claims, some for which a state wishes to maintain immunity and others for which it has no immunity, a personal jurisdiction approach to immunity could require that a defending state either raise a sovereign immunity objection immediately after removal or waive its claims to immunity. Indeed, Justice Kennedy first suggested this approach in a concurrence in *Schacht*.¹⁷⁶

Historically, a personal jurisdiction conception of sovereign immunity is founded on general common law principles as opposed to an Article III foundation, and the common law conception is premised on respect for sovereign authority.¹⁷⁷ A personal jurisdiction interpretation of immunity can be considered part of a larger structural backdrop that undergirds the entire Constitution.¹⁷⁸ Indeed, *Alden v. Maine*, which draws on the historical common law understanding of sovereign immunity,¹⁷⁹ discusses the “residuary and inviolable sovereignty” retained by states and the importance of federalism.¹⁸⁰ Thus, the federalism arguments discussed above in the context of subject matter jurisdictional immunity also apply to a personal jurisdiction understanding of sovereign immunity. If federalism is an important background constitutional principle, then courts may not want to find a waiver of immunity too easily.

Of course, one might argue that if the Court adopts a waiver by removal rule, states will be aware of it and alter their conduct accordingly. States who wish to maintain immunity simply will not remove suits against them to a federal forum but remain in state court. Thus, state

¹⁷⁴ Fed. R. Civ. P. 12(b)(2).

¹⁷⁵ 524 U.S. at 392–93.

¹⁷⁶ *Id.* at 395 (Kennedy, J., concurring).

¹⁷⁷ See *The Federalist* No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”).

¹⁷⁸ See Nelson, *supra* note 69, at 1580–85 (discussing the sovereignty of states after the Constitution).

¹⁷⁹ 527 U.S. 706, 728–29 (1999).

¹⁸⁰ *Id.* at 715 (quoting *The Federalist* No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

sovereignty and the federalist system would still be protected under a waiver by removal rule. The obvious response to this argument is based not on principles of jurisdiction, but on the right to federal adjudication and the corresponding unfairness of requiring a state to give up its immunity to obtain a hearing in a federal forum.¹⁸¹ Nevertheless, because a state can waive its immunity, and since the Court has allowed litigation conduct to count as evidence of waiver outside of *Lapides*,¹⁸² it is certainly possible that a personal jurisdiction approach to immunity could support a waiver by removal rule.

C. Hybrid

A hybrid approach to sovereign immunity that draws on concepts from both personal and subject matter jurisdiction could support or reject a waiver by removal rule. As the analysis above demonstrates, the hybrid approach seems closest to the Court's current precedent. If there are personal and subject matter jurisdiction components to immunity, one might argue that consent for purposes of subject matter jurisdictional immunity should mirror waivers of immunity for purposes of personal jurisdiction; as such, if removal waives personal jurisdictional immunity (as *Lapides* might seem to indicate), it should also be considered as consent for the waiver of subject matter jurisdictional immunity. Alternatively, if removal does not waive the personal jurisdiction strand of sovereign immunity, then it should not count as consent for the waiver of subject matter jurisdictional immunity either. Given the unfairness concerns that dominated the *Lapides* opinion,¹⁸³ it seems likely that the Court would be receptive to a blanket rule that requires a state to raise an objection immediately upon removal or else waive its immunity.

Interestingly, if the Court strictly followed the principles of subject matter and personal jurisdiction in its hybrid approach, then arguably in cases falling within the literal interpretation of the Eleventh Amendment (a suit brought against a state by citizens of another state or a foreign state), a state should never be able to consent to suit. Waiver by removal in these situations would be irrelevant. For all other sovereign immunity cases, which are based on the general common law rules enshrined in personal jurisdiction, a state could waive its immunity, and a court may

¹⁸¹ See *infra* Part IV.

¹⁸² See cases cited *supra* note 170.

¹⁸³ See *infra* Part IV.

or may not find removal as sufficient evidence of waiver. Of course the general common law principles of sovereign immunity, which permitted waiver, formed the background to the passage of the Eleventh Amendment,¹⁸⁴ thus despite the Amendment's subject matter jurisdiction language, it seems unlikely that the Court would ever prohibit a state from waiving its immunity, especially considering its long history of permitting consent.¹⁸⁵

Instead, perhaps the Court should follow the distinction between consent to suit for purposes of subject matter jurisdictional immunity and waiver of personal jurisdictional immunity discussed earlier.¹⁸⁶ Removal, as litigation conduct, could waive personal jurisdictional immunity but not subject matter jurisdictional immunity. Thus, even if the state waived personal jurisdictional immunity via removal, the only way a suit in federal court could proceed is if the state had also consented to suit via a "clear declaration." As noted earlier, *Lapides* could be read as an implicit overruling of *Great Northern Life Insurance Co.* such that if state law grants state courts subject matter jurisdiction over a suit, this is a sufficiently "clear declaration" of consent for federal subject matter jurisdictional immunity purposes.¹⁸⁷ Nevertheless, the logical corollary is that where states have not lifted subject matter jurisdictional immunity in state court (to state or federal law causes of action) via statute, it would not be lifted in federal court either, absent some other "clear declaration"—written evidence—of consent. In practice, such an approach would be similar to the no waiver rule adopted by some circuits,¹⁸⁸ because absent consent under state law, a state would retain immunity in federal court after removal.

Regardless of how the Court understands the jurisdictional aspects of sovereign immunity—as akin to personal jurisdiction, akin to subject matter jurisdiction, or as a hybrid—the Court could find that waiver by

¹⁸⁴ See Nelson, *supra* note 69, at 1602–08.

¹⁸⁵ See, e.g., *Coll. Sav. Bank*, 527 U.S. at 670 (“[A] state may waive its sovereign immunity by consenting to suit.” (citing *Clark*, 108 U.S. at 447–48)).

¹⁸⁶ See *supra* Section II.A.

¹⁸⁷ See *supra* note 167. It is important to underscore the extent to which *Lapides* flies in the face of past precedent, which had declined to extend states' written declarations of consent to suit in state court to federal courts. In addition to *Great Northern Life Insurance Co.*, *Lapides* is also in tension with *Smith v. Reeves*, 178 U.S. 436, 441 (1900), which held that a state's creation of a cause of action to recover improperly paid taxes only provides evidence of consent to suit in state courts.

¹⁸⁸ See *supra* Subsection I.A.2.

removal is permissible. Because the Court permits states to waive their immunity and consent to suit, it is theoretically possible for removal to effectuate a waiver of jurisdictional immunity. Thus, *Lapides* could be read broadly to indicate that states waive any type of jurisdictional immunity when they remove a case to a federal forum.¹⁸⁹ While there may be sound policy and structural arguments against such a rule—involving federalism and unfairness concerns¹⁹⁰—these reasons, unlike the justification for substantive immunity, are not an absolute bar that would prohibit waiver by removal.

III. EVALUATING WAIVER BY REMOVAL IN THE CONTEXT OF SUBSTANTIVE IMMUNITY

It is critical to distinguish between jurisdictional immunity and substantive immunity. Recognizing that a court has the power to hear a particular type of suit (subject matter jurisdiction), or allowing a court to hale you before it (personal jurisdiction), is very different from saying that substantive law has created a cause of action that can be brought against you.

Indeed, as Professor Siegel points out, the Court has long made a distinction between waivers of jurisdictional and substantive immunity.¹⁹¹ Thus, the Court has held that a state can waive all immunity (substantive and jurisdictional) in its own courts, while maintaining its jurisdictional immunity in federal courts.¹⁹² Although the Court has not always been precise about which type of immunity has been waived (jurisdictional, substantive, or both), or which type of immunity remains, it has certainly allowed a state to waive various aspects of immunity in one forum but not the other.¹⁹³ As Siegel argues, if a state can waive substantive im-

¹⁸⁹ 535 U.S. at 619–20.

¹⁹⁰ See *supra* Section II.B.

¹⁹¹ Siegel, *supra* note 76, at 1234.

¹⁹² See, e.g., *Smith*, 178 U.S. at 441 (“It is quite true the State has consented that its Treasurer may be sued by any party who insists that taxes have been illegally exacted from him under assessments made by the State Board of Equalization. But we think that it has not consented to be sued except in one of its own courts.”).

¹⁹³ See, e.g., *Sossamon v. Texas*, 131 S. Ct. 1651, 1658 (2011) (noting that “a State’s consent to suit in its own courts is not a waiver of its immunity from suit in federal court,” and explaining that “a waiver of sovereign immunity to other types of relief does not waive immunity to damages”); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (recognizing that “a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation,” and noting that a state does not “consent to suit in federal court merely by stating its intention to sue and be sued . . . or

munity in its own courts, but maintain jurisdictional immunity in federal court, surely the reverse should be true as well—a state can waive jurisdictional immunity in federal court but maintain the substantive immunity that existed in state court.¹⁹⁴

One might think that this principle is intuitive and obvious—conceding that a court has jurisdiction should not change the presence or absence of a substantive cause of action or affirmative defenses. Yet courts that have found a complete waiver of immunity by removal have not made this distinction, instead treating immunity as a unitary rather than a divisible concept.¹⁹⁵ This is presumably because the Supreme Court has not sufficiently distinguished the various theoretical components of sovereign immunity.

Even if a state has waived its jurisdictional immunity via the act of removal, any substantive law sovereign immunity bars should remain. The conduct of state officials in removal should not affect the presence or absence of an underlying cause of action.¹⁹⁶ Thus, if a state has not created a cause of action that can be brought against itself under state law, and if there is no federal cause of action, even though the state has waived its jurisdictional immunity, then the case cannot proceed.¹⁹⁷ This is the clearest interpretation of the so-called “middle way” decisions, which distinguish between waiver of immunity from suit and waiver of immunity from liability.¹⁹⁸ Conversely, once a state waives jurisdictional immunity, if there is a substantive cause of action, the claim may proceed. This may be the best interpretation of *Lapides*; Georgia waived its

even by authorizing suits against it in any court of competent jurisdiction” (quoting Fla. Dep’t of Health and Rehab. Servs. v. Fla. Nursing Home Ass’n, 450 U.S. 147, 149–50 (1981) (per curiam); Kennecott Copper Corp. v. State Tax Comm’n, 327 U.S. 573, 577–79 (1946)).

¹⁹⁴ Siegel, *supra* note 76, at 1234.

¹⁹⁵ See, e.g., *Estes v. Wyo. Dep’t of Transp.*, 302 F.3d 1200, 1203–04 (10th Cir. 2002) (deciding that Congress did not have the power to create a private cause of action that could be brought against the state under Title I of the ADA, but holding nevertheless that the state had waived its immunity from the ADA claim by removing the case to federal court).

¹⁹⁶ It is possible that state officials might forget to point out that there is no underlying cause of action, and perhaps one could argue that if this happens, the state waives its ability to raise this defense at a later point. But the Federal Rules of Civil Procedure allow the defense of “[f]ailure to state a claim upon which relief can be granted” to be raised at trial, long after many other affirmative defenses are considered waived. Fed. R. Civ. P. 12(h)(2). Thus, at a minimum, a state’s litigation conduct should not waive substantive immunity protections until trial. Accordingly, substantive immunity should not be waived by removal.

¹⁹⁷ See Siegel, *supra* note 76, at 1234.

¹⁹⁸ See, e.g., *Stroud v. McIntosh*, 722 F.3d 1294, 1302–03 (11th Cir. 2013).

jurisdictional immunity by removing the case, and under the State's substantive law, tort suits could be brought against the State so the claim was allowed to go forward.¹⁹⁹

A. Substantive State Law Bars to Sovereign Immunity

Whether there is a substantive state law bar depends on how a state protects its sovereign immunity. If a state shields itself by refusing to grant state courts jurisdiction over causes of action brought against the state, then a jurisdictional waiver of immunity in federal court would allow substantive causes of action to proceed. Thus, when a state statute authorizes causes of action to be brought against a state, suit in federal court could proceed if a state waives its jurisdictional immunity through removal. The crucial question is whether there is a cause of action that can be brought against the state.

Causes of action against a state can be created in general or specific terms. For an example of language permitting a general cause of action, it is instructive to consider the statute that was at issue in *Florida Department of Health & Rehabilitative Services v. Florida Nursing Home Ass'n*: "Florida law provides that the Department of Health and Rehabilitative Services is a 'body corporate' with the capacity to 'sue and be sued.'"²⁰⁰ While the quoted language does not explicitly create a cause of action, presumably other laws that create causes of action against a "body corporate" also apply to the state absent statutory exceptions. If Florida had waived its jurisdictional immunity by removing a case brought against its Department of Health and Rehabilitative Services, and there was an underlying state law cause of action that could be brought against corporate entities, then under this statute it appears that suit could proceed.²⁰¹

Likewise, states can also create specific causes of action that can be brought against them. If the State had been found to have waived its jurisdictional immunity in *Ford Motor Co. v. Department of Treasury of*

¹⁹⁹ 535 U.S. at 616, 620.

²⁰⁰ 450 U.S. 147, 149 (1981) (per curiam) (quoting Fla. Stat. § 402.34 (1979)).

²⁰¹ Of course this hypothetical is different from the actual situation in *Florida Nursing Home Ass'n*. The Court there explicitly refused to hold that the general statute allowing the state to "sue and be sued" was sufficient to overcome an Eleventh Amendment immunity objection in federal district court. *Id.* at 150. The case had been filed against the state initially in federal district court, however, and thus there was no argument that jurisdictional immunity had been waived by removal. *Id.* at 148.

Indiana,²⁰² presumably the underlying state statute would have permitted suit against the State. To elaborate, the statute in *Ford* authorized individual taxpayers who thought that their taxes had been wrongfully exacted to bring “action or suit against the department in any court of competent jurisdiction” and provided that “the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected.”²⁰³ Thus, this statute (1) created a cause of action that could be brought against the Indiana Treasury Department and (2) authorized Indiana courts in the taxpayer’s county to have jurisdiction over such suit. The substantive right of action existed independently of any jurisdictional questions. The Court in *Ford* did not allow the underlying cause of action to proceed against Indiana, but presumably this is because it did not think that Indiana had waived its jurisdictional immunity in federal court.²⁰⁴

Similarly, states can protect their substantive immunity by creating a general bar to all causes of action that can be brought against the state or specific bars to particular causes of action. States could enact a general law that provides that “no cause of action created by the laws of this state runs against the state, unless a specific statute otherwise provides.” Such a protection should survive any waiver of jurisdictional immunity in federal court. Alternatively, states could defend their sovereign immunity by explicitly stating that certain causes of action do not apply to the state. Thus, if a state created a cause of action for certain torts but noted that the cause of action could not be brought against the state, then regardless of any jurisdictional waivers, a tort suit against the state could not proceed in federal court.

It is not clear whether states pay close attention to the way that they protect their sovereign immunity in state court. A state that truly wishes to shield itself from suit in federal court must protect itself substantively by enacting laws that prohibit private causes of action from being brought against it, rather than by relying on jurisdictional protections that prohibit state courts from hearing causes of action brought against the state. On the surface, the distinction may appear slight, but it is abso-

²⁰² 323 U.S. 459 (1945).

²⁰³ *Id.* at 465 (quoting Ind. Code Ann. § 64-2614(a) (Burns 1943 Replacement)).

²⁰⁴ *Id.* at 465–70.

lutely critical. Only substantive protections can survive jurisdictional waivers.

B. Substantive Federal Bars to Sovereign Immunity

Federal causes of action must also exist independently of a jurisdictional immunity bar in order for a federal law claim to proceed against a state. While there are no limits on what types of claims a state can authorize against itself, there may be limits on what causes of action Congress can create against a state.²⁰⁵ Just as it is important to distinguish between jurisdictional and substantive limits in state law, it is likewise important to distinguish between jurisdictional and substantive limits in federal law.

Does the doctrine of sovereign immunity simply limit the ability of federal courts to hear suits against a state (jurisdictional immunity), or does it also limit the ability of Congress to create causes of action that can be brought against a state (substantive immunity)? As discussed above, by its terms, the Eleventh Amendment modifies the grant of judicial power in Article III, and thus one might assume that it applies only to federal courts. Therefore, in theory perhaps Congress could create causes of action against a state that the Eleventh Amendment would explicitly bar federal courts from hearing. If a state waived its jurisdictional immunity, however, by removing a case to federal court, then presumably such causes of action would be free to proceed. Nevertheless, *Alden v. Maine* seems to suggest that state sovereign immunity is a limit on Congress's Article I powers, not just a jurisdictional restriction.²⁰⁶

Since Congress also shapes the contours of federal jurisdiction,²⁰⁷ at a minimum, the Eleventh Amendment limits Congress's ability to create jurisdictional rules for federal courts. Indeed, if Congress tried to authorize federal district courts to hear suits against an unconsenting state brought by citizens of another state, such a law would be in obvious conflict with the literal interpretation of the Eleventh Amendment, and the Court would likely find it unconstitutional. If the Eleventh Amendment

²⁰⁵ See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 78–79 (2000).

²⁰⁶ 527 U.S. 706, 730 (1999) (“In this case we must determine whether Congress has the power, under Article I, to subject nonconsenting States to private suits in their own courts.”).

²⁰⁷ See U.S. Const. art. III, § 2, cl. 2 (stating that Congress has the power to make “Exceptions” and “Regulations” to the Supreme Court’s appellate jurisdiction); see also U.S. Const. art. III, § 1 (stating that Congress has the power to “ordain and establish” “inferior Courts” that exercise federal judicial power).

constrains Congress's ability to grant jurisdiction to federal courts, then perhaps it should also limit Congress's ability to create the underlying causes of action that federal courts are barred from hearing.

Likewise, if sovereign immunity is a broader constitutional principle that extends beyond the Eleventh Amendment and Article III, as *Alden* postulated,²⁰⁸ then perhaps it limits Congress's substantive powers to create causes of action against states. Thus, sovereign immunity as a structural principle might restrict Congress's substantive powers, even if the jurisdictional immunity found in the Eleventh Amendment and Article III provides no such restrictions.

In other words, what is the best interpretation of the Court's holding in cases like *Kimel v. Florida Board of Regents*?²⁰⁹ The Court there explained that in order to abrogate state sovereign immunity, Congress must be exercising its enforcement powers under Section Five of the Fourteenth Amendment since abrogation is inappropriate under Congress's Article I powers.²¹⁰ Does *Kimel* imply that Congress cannot create causes of action against states outside of its Section Five enforcement power under the Fourteenth Amendment, or does it simply mean that Congress cannot grant federal courts the jurisdiction to hear such causes of action? Does Congress abrogate sovereign immunity by granting federal courts the ability to hear prohibited causes of action or by creating the underlying cause of action in the first place?

The way one answers these questions will largely depend on how one conceives of sovereign immunity. If sovereign immunity is simply a jurisdictional bar to federal courts—under either a subject matter or personal jurisdiction understanding—then Congress can create causes of action that could be enforced against states once the jurisdictional bar is removed (through consent). If sovereign immunity also places limits on Congress's ability under the Necessary and Proper Clause to enforce its Article I power by creating causes of actions that can be brought against states, then a waiver of jurisdictional immunity would not affect a state's substantive sovereign immunity.

²⁰⁸ 527 U.S. at 713.

²⁰⁹ 528 U.S. at 92.

²¹⁰ *Id.* at 78–80. See also *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65–66 (1996) (overruling precedent that had held that under Article I, Congress could extend the federal courts' jurisdiction under Article III).

There is significant evidence that the Founders conceived of sovereign immunity in purely jurisdictional terms.²¹¹ Yet if one thinks of “sovereign immunity as a constitutional principle” that upholds the federalist system,²¹² then perhaps there are indeed limits to Congress’s ability to create suits against states. Indeed, if “[t]his separate and distinct structural principle is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution,” then sovereign immunity is a restriction on Congress’s substantive power.²¹³ Allowing Congress to create causes of action that can be brought against an unconsenting state would be a violation of its inherent dignity as a sovereign and a dangerous grant of power to the federal government.

At the outset, it is important to note that these restrictions seem to apply to Congress’s ability to create causes of action against *unconsenting* states. Perhaps Congress has the power under the Necessary and Proper Clause to create suits against *consenting* states. After all, sovereign immunity historically has been focused on protecting states from unwanted suit.²¹⁴ One might object that even giving Congress the power to create causes of action against consenting states is an expansion of federal power that raises federalism concerns, but this objection would be closely connected to an argument against Congress’s ability to create the underlying duty in the first place. Under current doctrine, Congress has the power to regulate states under Article I.²¹⁵ It is hard to object to a congressional power to create suits against consenting states.

Even if sovereign immunity is only a jurisdictional concept, there may be other substantive limits on Congress’s power to create causes of action against a state. Any ability of Congress to create causes of action against unconsenting states presumably rests on the Necessary and Proper Clause.²¹⁶ Such power would be incidental to Congress’s ability

²¹¹ The Founders viewed it either as a personal jurisdiction style immunity under general common law or as a subject matter limitation under the text of the Eleventh Amendment. See Nelson, *supra* note 69, at 1592–608, 1615–17.

²¹² *Alden*, 527 U.S. at 728–29.

²¹³ *Id.* at 730.

²¹⁴ See *id.*

²¹⁵ See, e.g., *Kimel*, 528 U.S. at 78 (citing *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983)) (explaining that the application of the ADEA to the states was a valid exercise of Congress’s Article I Commerce Clause power).

²¹⁶ See U.S. Const. art. I, § 8, cl. 18 (granting Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and

to exercise its other enumerated powers—for example, to enforce its Commerce Clause regulation, Congress might create a cause of action that can be brought against an unconsenting state that refuses to pay its employees the national minimum wage. Yet because the Founders viewed state sovereignty with the utmost respect, one might expect that if they wanted to give Congress this power, they would have done so expressly. Thus, as Nelson observes, perhaps the ability to create causes of action against unconsenting states is “a great substantive and independent power,” not “something that could ‘pass as incidental to those powers which are expressly given.’”²¹⁷

It is important to note that the real issue here is the scope of Congress’s substantive powers. While it is possible to interpret a case like *Kimel* as merely placing limits on Congress’s ability to authorize federal courts to hear causes of action brought against unconsenting states, the more natural reading seems to be that there are also limitations on Congress’s ability to create the cause of action against unconsenting states in the first place. *Kimel* focused on whether a cause of action against the state under the ADEA can constitutionally exist, rather than the federal court’s ability to hear the suit.²¹⁸ Indeed, the Eleventh Circuit in *Stroud v. McIntosh* interpreted *Kimel* as placing substantive limits on Congress’s ability to create causes of action, not just its ability to require a federal court to hear such cause of action.²¹⁹ Nevertheless, one might argue that this limitation is in tension with Congress’s ability to enforce its Article I powers under the Necessary and Proper Clause.²²⁰

Regardless, under the Court’s current precedent, it appears that Congress cannot create causes of action against unconsenting states using its Article I powers, which could suddenly be applicable if a state waived

all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).

²¹⁷ Nelson, *supra* note 69, at 1640 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819)).

²¹⁸ 528 U.S. at 79 (“[I]f the ADEA rests solely on Congress’ Article I commerce power, the private petitioners in today’s cases cannot maintain their suits against their state employers.”).

²¹⁹ The Eleventh Circuit held that although the state had waived its jurisdictional immunity through removal, a claim brought under the ADEA was still barred by substantive immunity “because Congress did not enact the law under section 5 of the Fourteenth Amendment.” *Stroud v. McIntosh*, 722 F.3d 1294, 1303 (11th Cir. 2013) (citing *Kimel*, 528 U.S. at 91–92).

²²⁰ Cf. Nelson, *supra* note 69, at 1651 (“This vision of Article I—as authorizing Congress to command the states in various ways but as minutely regulating the remedial mechanisms that Congress can use to enforce those commands—is hard to fathom.”).

its jurisdictional immunity by removing a case to a federal forum.²²¹ The rationale for these limits could come from an expansive understanding of sovereign immunity (like the one in *Alden*) or from the doctrine of enumerated powers.

If Congress can create causes of action against consenting states, could a suit under such a cause of action proceed if a state has waived its jurisdictional immunity by removing a case to a federal forum? Obviously the answer depends on whether removal indicates a state's willingness to consent to the underlying cause of action, not just the federal court's jurisdiction. While it may make sense to find jurisdictional consent through removal, it is harder to argue that removal should alter the presence (or absence) of a cause of action.²²² Yet presumably, if Congress has the power to create a cause of action against consenting states, it also has some power to determine what is required to indicate such consent. Thus, theoretically, Congress may be able to provide that removal indicated consent to a cause of action.²²³

If Congress could create causes of action that apply only to consenting states, and if removal could somehow constitute evidence of consent, then one might wonder whether causes of action that Congress has already created but that the Court has struck down as barred by sovereign immunity—such as the cause of action under the ADEA at issue in *Kimel*—could proceed against states who remove a case to federal court. The question is one of severability—could the unconstitutional application of the cause of action against an unconsenting state be severed from the constitutional application of the cause of action against a consenting state? There is typically a presumption that constitutional applications of a statute can be severed from unconstitutional applications,²²⁴ so such

²²¹ Remember that the Court has held that Congress can abrogate state sovereign immunity under Section Five of the Fourteenth Amendment. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996). In this context, Congress has the power both to abrogate jurisdictional immunity and to create the underlying cause of action against an unconsenting state. A discussion of why Congress might have such power under the Fourteenth Amendment, but not under Article I, is beyond the scope of this Note. For one explanation of this distinction, see Nelson, *supra* note 69, at 1623–26.

²²² See *infra* Section III.C.

²²³ One might nevertheless argue that this is unconstitutionally coercive, see *infra* note 269.

²²⁴ See Gillian E. Metzger, *Facial Challenges and Federalism*, 105 *Colum. L. Rev.* 873, 884 & n.48 (2005) (collecting cases).

severability may indeed be possible in the ADEA context. Exploring this question in greater depth, however, is beyond the scope of this Note.²²⁵

C. Removal Should Not Be Sufficient to Waive Substantive Immunity

While removal could be sufficient to waive a state's jurisdictional immunity, it should not be sufficient to waive a state's substantive immunity.²²⁶ This is the import of the so-called "middle way" taken by the First, Third, Fifth, Tenth, and Eleventh Circuits.²²⁷ It is normal for a party's litigation conduct to affect its ability to contest jurisdictional and procedural elements (such as personal jurisdiction, tolling provisions, and failure to serve adequate process), but it would be quite anomalous for litigation conduct to affect the underlying substantive law that permits or prohibits suit in the first place.²²⁸

Under such a regime, removal would affect state and federal law causes of action differently. Because state law determines what counts as consent to state law causes of action, unless a state explicitly provided by statute that removal to federal court indicated a state's consent to suit, then removal would not change the ability of a party to bring a state law cause of action against a state. If a cause of action can be brought against a state under state law in state court, then it should also proceed in federal court under *Lapides* (which assumes that jurisdictional immunity has been waived). Likewise, if there is no cause of action available against a state under state law, then this should be the same in both state and federal court.²²⁹ To hold otherwise would contravene the *Erie* doctrine—the substance of state law would be different in state and federal courts.²³⁰

Yet if removal could both waive jurisdictional immunity and count as consent to an otherwise prohibited federal law cause of action, then federal law would operate differently in state and federal courts. The federal cause of action would be unavailable against the state in state court (be-

²²⁵ For a greater exploration of this topic, see *id.* at 894–905 (noting that the ordinary presumption of severability should apply to challenges to legislation purported to be authorized by Section Five of the Fourteenth Amendment).

²²⁶ See Siegel, *supra* note 76, at 1234–35.

²²⁷ See *supra* Subsection I.A.3.

²²⁸ See, e.g., *Lombardo v. Pa. Dep't of Pub. Welfare*, 540 F.3d 190, 198 (3d Cir. 2008) (allowing a state to retain immunity from liability even when it had waived its jurisdictional immunity).

²²⁹ See Siegel, *supra* note 76, at 1234–35.

²³⁰ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74–75, 78 (1938).

cause the state would not have yet consented), but consent via removal would make the federal law cause of action available in federal court. This would be an inversion of *Erie*; while the substance of state law must be uniform in both state and federal courts under *Erie*,²³¹ here the substance of federal law would be different in state and federal courts (at least after removal).²³² In contrast, a rule that preserves substantive immunity would uphold the policy of *Erie*, so that the substance of both state and federal law would remain the same in both state and federal courts.²³³ Such a “mirror image rule” would be a logical extension of the holding in *Lapides*.²³⁴

Notably, litigation conduct did not change the underlying substantive law in *Gardner v. New Jersey*, *Gunter v. Atlantic Coast Line Railroad Co.*, and *Clark v. Barnard*—the cases that are repeatedly cited as supporting the proposition that litigation behavior can affect a state’s sovereign immunity.²³⁵ Both *Gardner* and *Clark* involved disputes over funds in bankruptcy; *Gardner* involved a dispute under the Federal Bankruptcy Act,²³⁶ and *Clark* was a federal suit in equity against the state that had been assigned funds in the bankruptcy proceedings.²³⁷ In both cases, the Court discussed how immunity had been waived because the state had intervened in the bankruptcy litigation as a claimant.²³⁸ The immunity that was waived was jurisdictional—the ability of the state to object to being bound by the judgment of the court. There is nothing to indicate that the states’ conduct affected the underlying causes of action in any way.

Likewise, the issue in *Gunter* was whether the state could be bound by the prior judgment of a federal court in a subsequent case when the state had submitted to federal jurisdiction throughout the first case.²³⁹ The underlying dispute from the original case at issue in *Gunter* was brought against county tax officials because of taxes they had levied

²³¹ *Id.*

²³² Note that after removal, if the case was remanded to state court, presumably immunity would still be waived.

²³³ See *Erie*, 304 U.S. at 74–75, 78.

²³⁴ In *Lapides*, the state permitted tort suits to be brought against it in state court, and the Court upheld the same waiver of immunity in federal court. 535 U.S. at 616–17.

²³⁵ *Id.* at 619–20 (citing *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947); *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906); *Clark v. Barnard*, 108 U.S. 436, 447 (1883)).

²³⁶ *Gardner*, 329 U.S. at 568–70.

²³⁷ *Clark*, 108 U.S. at 442–45.

²³⁸ *Gardner*, 329 U.S. at 574; *Clark*, 108 U.S. at 447–48.

²³⁹ *Gunter*, 200 U.S. at 284–85, 292.

against a railroad, and the state had a statute that allowed the attorney general to intervene in such an action and defend the state if the state was interested in the revenue at issue.²⁴⁰ The attorney general had chosen to do so.²⁴¹ Again, the waiver of immunity was jurisdictional, and the actions of the state did nothing to change the underlying cause of action. Thus, there is no precedent that suggests that a state could waive its substantive immunity from a federal law cause of action by litigation conduct (even if it is theoretically possible).

Even if a state could indicate consent to a substantive cause of action through litigation conduct, there are powerful arguments why removal should not be sufficient to do so. Outside of the personal jurisdictional immunity context, the Court has required “express language” indicating that the state is waiving its immunity.²⁴² In other words, consent to a substantive cause of action—and the corresponding removal of sovereign immunity—also falls under the “clear declaration” line of cases.²⁴³ Because state causes of action are typically created by statute, it is no surprise that the Court has typically required written evidence of consent to suit.²⁴⁴ Indeed, sovereign immunity is so important that when Congress uses its Section Five enforcement powers of the Fourteenth Amendment to abrogate state sovereign immunity, the Court has “required an unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the several States.”²⁴⁵ Likewise,

²⁴⁰ *Id.* at 286.

²⁴¹ *Id.* at 287–88.

²⁴² *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239–40 (1985) (citations omitted), superseded by statute on other grounds, 42 U.S.C. § 2000d-7 (2006); see also *supra* Section II.A (discussing the consent line of cases).

²⁴³ See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–76 (1999). The “clear declaration” line of cases has looked to state law to find evidence of consent both in relation to subject matter jurisdictional immunity and substantive immunity. See, e.g., *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 170–71 (1909) (construing cause of action against the state under standard requiring the “most express language” to indicate consent or “such overwhelming implication from the text as would leave no room for any other reasonable construction”); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529–30 (1857) (upholding statute that placed jurisdictional limitations on action that could be brought against the state); see also discussion *supra* Section II.A (discussing the “clear declaration” line of cases).

²⁴⁴ See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (“[W]e will find waiver only where stated ‘by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.’” (quoting *Murray*, 213 U.S. at 171)).

²⁴⁵ *Atascadero*, 473 U.S. at 240 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984))

when Congress does not have power under Section Five to abrogate state sovereign immunity, and is instead creating a cause of action that requires consent, such consent should also be unequivocally expressed—ideally written. Generally, enjoying federal privileges does not indicate that a state has waived its sovereign immunity. Just as the Court recognized in *Atascadero State Hospital v. Scanlon* that receiving federal funds was insufficient to indicate a waiver of immunity,²⁴⁶ so too should the Court find that taking advantage of a federal forum by itself does not demonstrate a waiver of immunity. As already discussed, in the context of multiple claims and multiple parties, removal is ambiguous evidence of consent.

The federalism arguments, discussed earlier in the context of jurisdictional immunity, apply even more forcefully in the context of substantive immunity. Indeed, federalism appears to be the reason why the Court has so strongly enforced the “clear declaration” rule: “[I]t is not consonant with our dual system” for federal courts to find consent absent a “clear declaration.”²⁴⁷ Even if there is a waiver of jurisdictional immunity, if there is no cause of action that can be brought against the state, then the suit should not proceed. To hold otherwise would denigrate state sovereignty, and open up state treasuries.

While it may be possible to find a jurisdictional waiver by removal, courts should not hold that removal waives substantive immunity protections. A rule that allowed waiver of substantive immunity by removal would affect state and federal law causes of action differently, and the substance of federal law would differ between state and federal courts. There is no precedential support for the proposition that litigation conduct can change substantive immunity, and removal itself is not an inherently unambiguous declaration that a state wishes to consent to a federal cause of action. Courts like the Ninth Circuit in *Embury v. King*²⁴⁸ are wrong—a complete waiver by removal rule should not apply, and the First, Third, Fifth, Tenth, and Eleventh Circuits have the better position with their “middle way” approach.²⁴⁹

²⁴⁶ *Id.* at 246–47.

²⁴⁷ *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944).

²⁴⁸ 361 F.3d 562, 564 (9th Cir. 2004).

²⁴⁹ See *supra* Subsection I.A.3.

IV. ADDITIONAL REASONS WHY REMOVAL MAY BE INSUFFICIENT
EVIDENCE OF WAIVER

Regardless of the type of immunity—jurisdictional or substantive—there are other reasons why a Court might reject a blanket waiver by removal rule. One of the major themes of the *Lapides* opinion was unfairness.²⁵⁰ Indeed, the Court explained that fairness was also the driving force behind its decisions in *Clark v. Barnard*, *Gardner v. New Jersey*, and *Gunter v. Atlantic Coast Line Railroad Co.*: “[T]he rule governing voluntary invocations of federal jurisdiction has rested upon the problems of inconsistency and unfairness that a contrary rule of law would create.”²⁵¹ The Court repeatedly mentioned how a waiver by removal rule would avoid unfairness by preventing states from being able to exploit the federal litigation system.²⁵²

According to the Court, the first way a state might engage in unfair litigation tactics was by waiving substantive and jurisdictional immunity in state court and then attempting to reclaim this immunity in federal court; this is exactly what Georgia was attempting to do in *Lapides*.²⁵³ For cases in which a state retains immunity in state court to either state or federal law claims, this concern does not apply; even if the Court finds a jurisdictional waiver via removal, substantive immunity protections—the absence of a cause of action—should still control.

The second way a state could unfairly manipulate the system was by litigating a case through the federal system and then claiming sovereign immunity after an adverse ruling.²⁵⁴ Indeed, “a Constitution that permitted States to follow their litigation interest by freely asserting both claims [waiver of immunity and retention of immunity] in the same case could generate seriously unfair results.”²⁵⁵ This was the situation in *Ford Motor Co. v. Department of Treasury of Indiana*, where the defending State had claimed sovereign immunity for the first time on appeal to the Supreme Court.²⁵⁶ Although it had not been raised earlier, the Court in

²⁵⁰ 535 U.S. at 622–23.

²⁵¹ *Id.* at 622.

²⁵² *Id.* at 620, 622–23.

²⁵³ *Id.* at 616–18. See also *Stewart v. North Carolina*, 393 F.3d 484, 488 (4th Cir. 2005) (explaining that in *Lapides*, “[b]ecause Georgia had already consented to suit in its own courts, the only issue was whether the state could regain immunity by removing the case to federal court and invoking the Eleventh Amendment”).

²⁵⁴ *Lapides*, 535 U.S. at 619, 622.

²⁵⁵ *Id.* at 619.

²⁵⁶ 323 U.S. 459, 467 (1945).

Ford determined that the Eleventh Amendment issue was sufficient to dismiss the case.²⁵⁷

In his concurrence in *Wisconsin Department of Corrections v. Schacht*, Justice Kennedy commented on this potential for unfairness under *Ford*.²⁵⁸ Justice Kennedy explained,

I have my doubts about the propriety of this rule. In permitting the belated assertion of the Eleventh Amendment bar, we allow States to proceed to judgment without facing any real risk of adverse consequences. Should the State prevail, the plaintiff would be bound by principles of res judicata. If the State were to lose, however, it could void the entire judgment simply by asserting its immunity on appeal.²⁵⁹

To avoid these problems, Justice Kennedy suggested that a better rule might be that “[c]onsent to removal . . . is a waiver of the Eleventh Amendment immunity.”²⁶⁰ The Court in *Lapides* took Justice Kennedy’s suggestion, citing his concurrence and specifically overruling *Ford*.²⁶¹

Yet Justice Kennedy also suggested that the Court could eliminate this unfairness by treating sovereign immunity like personal jurisdiction.²⁶² Indeed, “[u]nder a rule inferring waiver from the failure to raise the objection at the outset of the proceedings, States would be prevented from gaining an unfair advantage.”²⁶³ When a state maintains sovereign immunity in state court after removal, a “raise it or waive it” approach to sovereign immunity would eliminate the potential for unfairness.

In contrast, requiring a state to waive either its jurisdictional or substantive immunity when it removes a proceeding to federal court could create unfair results—undermining the very rationale of *Lapides*. As the First Circuit explained, under a general waiver by removal rule, “a state with a colorable immunity defense to a federal claim brought against it in its own courts would face a Morton’s Fork: remove the federal claim to federal court and waive immunity or litigate the federal claim in state

²⁵⁷ *Id.* at 469–70.

²⁵⁸ *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 393–94 (1998) (Kennedy, J., concurring).

²⁵⁹ *Id.* at 394.

²⁶⁰ *Id.* at 393.

²⁶¹ *Lapides*, 535 U.S. at 623 (citing *Schacht*, 524 U.S. at 395, 397 (Kennedy, J., concurring)).

²⁶² *Schacht*, 524 U.S. at 395 (Kennedy, J., concurring).

²⁶³ *Id.*

court regardless of its federal nature.”²⁶⁴ In cases involving multiple claims of federal and state law, if a state could claim immunity from some but not others, it would be forced to make the difficult decision of whether to have federal claims adjudicated by a federal court and lose sovereign immunity, or remain in state court and lose federal expertise.

The right of a defendant to a federal forum is statutorily protected.²⁶⁵ Having a federal court decide federal law claims is not an insignificant consideration.²⁶⁶ If the Court enacts a general waiver of immunity by removal rule that applies to all types of claims, then “the state would be compelled to relinquish a right: either its right to assert immunity from suit or its right to a federal forum.”²⁶⁷

Indeed, if a state waives its substantive immunity by removing a case to federal court, an ironic result would occur—a state that wished to seek federal expertise to challenge the constitutionality of a federal cause of action abrogating state sovereign immunity would be unable to do so. By removing the case, the state would have consented to the federal law cause of action, and it could no longer claim immunity. While states could still challenge the federal law cause of action in state court and then appeal the decision of the state’s highest court to the U.S. Supreme Court,²⁶⁸ the avenue of review provided by the federal court system would be largely closed off.²⁶⁹

²⁶⁴ *Bergemann v. R.I. Dep’t of Env’tl. Mgmt.*, 665 F.3d 336, 342 (1st Cir. 2011).

²⁶⁵ 28 U.S.C. § 1441 (2012). See also *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005) (explaining that “[b]y enacting the removal statute, Congress granted a right to a federal forum”).

²⁶⁶ See John F. Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 *Wake Forest L. Rev.* 247, 279 (2007) (finding that the “average federal appellate judge has seven times more experience with federal questions than the average state appellate judge”).

²⁶⁷ *Bergemann*, 665 F.3d at 342 (internal quotation marks and citations omitted).

²⁶⁸ See 28 U.S.C. § 1257 (2012).

²⁶⁹ One might contend that guaranteeing states a right to a federal forum but then requiring states to waive their jurisdictional and substantive immunity in order to exercise that right is inherently coercive. If there are limits on Congress’s ability to encourage states to participate in federal programs by offering them significant amounts of money, see *NFIB v. Sebelius*, 132 S. Ct. 2566, 2606–07 (2012) (Roberts, C.J., plurality opinion); *South Dakota v. Dole*, 483 U.S. 203, 211 (1987), why should Congress be able to require states to open their treasuries to damages in order to participate in a federal forum? While requiring a state to waive its jurisdictional immunity likely will not affect a state’s underlying liability (unless the state has only protected its immunity via a jurisdictional bar), requiring a state to consent to a federal cause of action by taking advantage of a federal forum certainly would change the state’s liability, exposing it to damage actions that could never occur in state court. This issue is ripe for further discussion.

In actuality, a rule consistent with the continuity and fairness motivating the decision in *Lapides* would decline to extend a blanket waiver of sovereign immunity upon voluntary removal to federal court for claims from which a state retained immunity in state court. It is not inconsistent for a state to seek federal adjudication of a valid federal claim, while at the same time maintaining its protected sovereign immunity over other claims.

CONCLUSION

There are many different aspects and approaches to sovereign immunity. Courts must be careful how they evaluate sovereign immunity in the removal context. Substantive immunity is very different from jurisdictional immunity, and it is imperative that courts make this distinction. There are significant reasons why a court might decline to find that removal to a federal forum waives jurisdictional immunity. Even if removal is sufficient to remove jurisdictional immunity, however, it should not affect the underlying presence (or absence) of a cause of action. If state law does not provide a cause of action that can be brought against the state, then a state law claim still should be barred by immunity. Similarly, if federal law does not authorize a cause of action against a state, the federal claim also should not proceed. Even if there are federal causes of action that can be brought against consenting states, there are significant reasons why removal to federal court should not be sufficient evidence of such consent. There are also additional unfairness concerns that might counsel courts to avoid a blanket waiver by removal rule when a state retains sovereign immunity in state court.

Instead, substantive immunity in federal court should mirror substantive immunity in state court. The corollary is that states must be careful how they protect their sovereign immunity. If the only bar to suit against a state in state court is jurisdictional rather than substantive, and if the Court adopts an approach that finds waiver of jurisdictional immunity upon removal, then the state would be unprotected after removal. States that wish to ensure that their immunity from suit continues after removal should employ both jurisdictional and substantive immunity protections.