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STATE SOVEREIGN IMMUNITY AND THE PLAINTIFF STATE: DOES THE ELEVENTH AMENDMENT BAR REMOVAL OF ACTIONS FILED IN STATE COURT?

VIRGINIA F. MILSTEAD*

California recently filed suit against multiple energy suppliers in California state court, alleging unfair competition arising from California's energy crisis of 2000 and 2001.¹ The defendants promptly removed the action, alleging bases for federal jurisdiction.² The state moved to remand the action, arguing among other things, that the removal was barred by the Eleventh Amendment.³

Whether the Eleventh Amendment would in fact preclude removal may at first blush be clear.⁴ The actual text of the Eleventh Amendment applies to suits "commenced or prosecuted against one of the United States,"⁵ whereas in this context, the state is a plaintiff.⁶ In fact, the two United States Courts of Appeals to consider this question concluded that removal is not barred.⁷ Of the eighteen federal district courts to consider the

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1. *California v. Dynegy, Inc.*, 375 F.3d 831, 834-35 (9th Cir. 2004).

2. *Id.* Whether federal jurisdiction in fact existed was a major point of contention. However, the court concluded that it did. *Id.* at 838-43.

3. *Id.* at 843.

4. See *S. Dakota v. Burlington N. & Santa Fe Ry. Co.*, 280 F. Supp. 2d 919, 935 (D. S.D. 2003) (noting that "[i]t is well settled" that the Eleventh Amendment does not apply when the state is a plaintiff). See also Peter Nicolas, *American-Style Justice in No Man's Land*, 36 GA. L. REV. 895, 1061 (2002) (stating that "it seems fairly clear" that when a state brings suit in state court based on a federal question, removal is not barred).

5. U.S. CONST. amend. XI. The full text of the amendment reads, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." See also *Burlington*, 280 F. Supp. 2d at 935 (citing "commenced or prosecuted" language to show inapplicability of the Eleventh Amendment).

6. See *Burlington*, 280 F. Supp. 2d at 935 (noting that the state is a plaintiff).

7. *Dynegy*, 375 F.3d at 843, 848; *Oklahoma v. Magnolia Marine Transp. Co.*, 359 F.3d 1237, 1238 (10th Cir. 2004).

question, only two concluded that the Eleventh Amendment bars removal.⁸ Meanwhile, many scholars and four Supreme Court justices would argue that there is no basis at all for this application of the Eleventh Amendment.⁹ These scholars generally

8. *Compare* Pub. Employees Ret. Sys. v. Ebbers (*In re* WorldCom, Inc. Sec. Litig.), No. 03 Civ. 167 (DLC), 2003 U.S. Dist. LEXIS 7406, at *9 (S.D.N.Y. May 5, 2003); *Burlington*, 280 F. Supp. 2d at 937; *California v. Pac. Gas & Elec. Co.* (*In re* Pac. Gas & Elec. Co.), 281 B.R. 1, 6 (Bankr. N.D. Cal. 2002); *In re Rezulin Prods. Liab. Litig.*, 133 F. Supp. 2d 272, 297 (S.D.N.Y. 2001); *Cornyn v. Real Parties in Interest*, 110 F. Supp. 2d 514, 531 (E.D. Tex. 2000); *Missouri ex rel. Nixon v. Prudential Health Care Plan, Inc.*, No. 4:00CV8 ERW, 2000 U.S. Dist. LEXIS 22407, at *19 (E.D. Mo. June 28, 2000); *Regents of the Univ. of Minn. v. Glaxo Wellcome, Inc.*, 58 F. Supp. 2d 1036 (D. Minn. 1999); *State Engr's of Nev. v. S. Fork Band of the Te-Moak Tribe of W. Shoshone Indians*, 66 F. Supp. 2d 1163, 1170 (D. Nev. 1999); *Kansas v. Home Cable, Inc.*, 35 F. Supp. 2d 783, 789 (D. Kan. 1998); *Missouri ex rel. Nixon v. Coeur D'Alene Tribe*, No. 97-0914-CV-W-6, 1997 U.S. Dist. LEXIS 14980, at *7 (W.D. Mo. Sept. 29, 1997); *California v. Acme Fill Corp.*, No. C-97-1983-VRW, 1997 U.S. Dist. LEXIS 16847, at *4 (N.D. Cal. Oct. 16, 1997); *Vermont v. Oncor Communications, Inc.*, 166 F.R.D. 313 (D. Vt. 1996); *S.D. State Cement Plant Comm'n v. Wausau Underwriters Ins. Co.*, 778 F. Supp. 1515, 1522 (D. S.D. 1991); *Terrebonne Parish Sch. Bd. v. Mobil Oil Corp.*, No. 89-1983, 1989 U.S. Dist. LEXIS 13703, at *2 (E.D. La. Nov. 9, 1989); *Banco y Agencia v. Urbanizadora Villalba*, 681 F. Supp. 981, 982-83 (D. P.R. 1988); *Oregon v. City of Rajneeshpuram*, No. 84-359 FR, 1984 U.S. Dist. LEXIS 14903, at *2 (D. Ore. July 17, 1984); *and New York v. Citibank, N.A.*, 537 F. Supp. 1192, 1197 (S.D.N.Y. 1982) (all allowing removal), *with Moore v. Abbott Labs., Inc.*, 900 F. Supp. 26, 30 (S.D. Miss. 1995); *California v. Steelcase, Inc.*, 792 F. Supp. 84, 86 (C.D. Cal. 1992) (both barring removal).

9. *See Alden v. Maine*, 527 U.S. 706, 759 (1999) (Souter, J., dissenting, joined by Justices Stevens, Ginsburg, and Breyer) (arguing against a broad interpretation of the Eleventh Amendment, concluding that the Framers did not intend states to have sovereign immunity). *See also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1466 (1987) ("By allowing both federal and state governments to invoke 'sovereign immunity' from liability for constitutional violations, the Court has misinterpreted the Federalist Constitution's text, warped its unifying structure, and betrayed the intellectual history of the American Revolution that gave it birth."); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1045-63 (1983) (arguing that Supreme Court's view of the Eleventh Amendment is historically mistaken); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1890 (1983) ("For almost a century constitutional theory has labored under the burden of repressive and historically inaccurate interpretation of the eleventh amendment."); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 3 (1988) (arguing that the concept of sovereign immunity is "in tension with two other fundamental constitutional principles: that the law will generally provide a remedy for rights violated by the government" and "that the judicial power of the United States over claims arising under federal law is as broad, within its sphere, as is the legislative power of the United States"); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV.

conclude that the current United States Supreme Court's understanding of the Eleventh Amendment is too broad considering the history of its ratification and text.¹⁰ Further expansion certainly would not be warranted.¹¹

Nevertheless, despite widespread criticism, the United States Supreme Court has consistently broadened the reach of the Eleventh Amendment, arguing that text aside, it stands for a broad grant of state sovereign immunity.¹² Inherent in this immunity is concern over the states' dignity and solvency,¹³ governmental effectiveness,¹⁴ and federalism.¹⁵ Accordingly, the

1269, 1352-67 (1998) (arguing that the Supreme Court has misapplied history to arrive at its interpretation of the Eleventh Amendment); Rodolphe J.A. de Seife, *The King is Dead, Long Live the King! The Court-created American Concept of Immunity: The Negation of Equality and Accountability Under Law*, 24 HOFSTRA L. REV. 981 (1996) (arguing that the concept of sovereign immunity is inconsistent with the intention of the framers); Carlos Manuel Vasquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1685 (1997) ("The Eleventh Amendment has long been regarded as an embarrassment to the United State's aspiration to be a government of laws and not of men.").

10. See generally articles cited *supra* note 9.

11. No United States Supreme Court case has extended the Eleventh Amendment to suits in which the state is a plaintiff.

12. See, e.g., *Alden*, 527 U.S. at 728 ("[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."); *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (claiming that for over a century, it has been recognized that "each State is a sovereign entity in our federal system; and . . . 'it is inherent in the nature of sovereignty not to be amenable to suit of an individual without its consent'" (citing *Hans v. Louisiana*, 134 U.S. 1 (1890))); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.").

13. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 53 (1994) ("Requiring the Port Authority to answer in federal court to injured railroad workers who assert a federal statutory right, under the FELA, to recover damages does not touch the concerns—the State's solvency and dignity—that underpin the Eleventh Amendment.").

14. See *Alden*, 527 U.S. at 750. Cf. Seife, *supra* note 9, at 1045.

[T]he court must commit to either of two positions: (1) allow suits against prosecuting officials and risk inundation of meritless, vindictive suits which entangle the legal system and discourage prosecutors from vigorously pursuing their duties; or (2) grant prosecutors absolute immunity and risk abuse of the immunity by careless or intentional misconduct by prosecutorial usurpation of power.

Id. (citing *Gregoire v. Biddle*, 177 F.2d 579, 580-81 (2d Cir. 1949) (Hand, J.)).

15. John Evans Taylor, Note, *Express Waiver of Eleventh Amendment Immunity*, 17 GA. L. REV. 513 (1983) ("[C]ourts treat the eleventh amendment as a tool of federalism." (citing *Monaco v. Mississippi*, 292 U.S. 313 (1934))). In *Monaco*, the Court held that generally, before a state court be sued, it must consent. *Monaco*, 292 U.S. at 322. However, in circumstances where "surrender of this immunity [is] in the plan of the convention," *id.* at 322-23, the state may be sued without consent, such as when the United States brings

general rule is that a state cannot be sued, whether in state¹⁶ or federal¹⁷ court, without its consent.¹⁸ The Court regularly refers, however, to consent to suit in *federal* court.¹⁹ The Court has noted that the test for consent is “stringent,”²⁰ and that a state does not “consent to suit in federal court merely by consenting to suit in the courts of its own creation.”²¹

Against this backdrop, the question of whether a private litigant may remove a suit brought by a state in state court to federal court becomes less obvious.²² The text of the Eleventh Amendment cannot be relied on to answer the question.²³ Neither is it so simple to say that by bringing suit the state has necessarily waived its immunity.²⁴ Rather, the answer appears to rest on the language of the federal removal statute and on the stated policies behind state sovereign immunity.²⁵

suit. *Id.* at 329. See also Taylor, *supra*, at 513.

16. *Alden*, 527 U.S. at 712 (“We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.”).

17. *Hans*, 134 U.S. at 17 (“[N]either a State nor the United States can be sued as defendant in any court in this country without their consent. . . .”).

18. *Id.* (“Undoubtedly a State may be sued by its own consent. . . .”).

19. See, e.g., *Lapides v. Bd. of Regents*, 535 U.S. 613 (2002) (finding waiver of immunity when a state removed a case from state to federal court); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-76 (1999) (noting that “our test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one,” and that the State must make a “clear declaration’ that it intends to submit itself to our jurisdiction”); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985) (“[I]f a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action.”); *Gunter v. Atl. Coast Line R.R.*, 200 U.S. 273, 292 (1906) (noting that the Eleventh Amendment “relate[s] to the power of courts of the United States to deal, against the will and consent of a State, with controversies between it and individuals”).

20. *Coll. Sav. Bank*, 527 U.S. at 675.

21. *Id.* at 676 (citing *Smith v. Reeves*, 178 U.S. 436, 441-45 (1900)).

22. I am assuming the correctness of the Supreme Court jurisprudence. This issue does not arise otherwise—if the Supreme Court’s jurisprudence were questioned, there would be no need to consider whether the defendant could remove because the state would not have immunity at all. For another article that took this approach, see Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167, 1178 (2003).

23. See *Alden*, 527 U.S. at 712-13 (noting that “Eleventh Amendment immunity” is a misnomer because immunity does not derive from the text of the Eleventh Amendment but from the Constitution’s history, its structure, and authoritative interpretations of the Court); *Seminole Tribe*, 517 U.S. at 54 (noting that the text of the Eleventh Amendment is limited to suits brought based on diversity jurisdiction, but that the Eleventh Amendment nevertheless applies to suits based on federal question jurisdiction).

24. See cases cited *supra* note 19 (discussing consent to suit in *federal* court, not state).

25. See text accompanying notes 12-15 (discussing policies behind the

I will explore the question of whether suits brought by states in state courts should be removable. First, I will discuss the background of the Eleventh Amendment. Second, I will examine the cases that have addressed this issue.²⁶ Most courts have failed to fully examine this issue, typically relying on the text of the Eleventh Amendment, and on each other, for the conclusion that removal is not barred.²⁷ Several cases look to the waiver doctrine, which ultimately is not adequate to answer the question.²⁸ Finally, I will consider whether suits brought by states should be removable by looking at the federal removal statute and by examining how the policies of the Eleventh Amendment are served (or not served) by barring removal.²⁹

I. BACKGROUND: STATE SOVEREIGN IMMUNITY AND ITS EXCEPTIONS

A. *The Supreme Court Has Established a Broad Grant of Sovereign Immunity*

The scope and meaning of the Eleventh Amendment were truly tested almost one hundred years after its passage.³⁰ In *Hans*

Eleventh Amendment); *infra* Part III.

26. See cases cited *supra* note 8 (addressing the removability of suits brought by states).

27. See *infra* Part II.

28. See *infra* Part II.

29. See *infra* Part III.

30. The Eleventh Amendment was ratified in response to the 1793 case, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). See, e.g., Jackson, *supra* note 9, at 8 (“The Eleventh Amendment was the first amendment added to the Constitution for the purpose of overturning a Supreme Court decision.”) (discussing *Chisholm*). In *Chisholm*, the plaintiff, a citizen of South Carolina, brought suit against the state of Georgia for damages. *Chisholm*, 2 U.S. at 2. The asserted basis of jurisdiction was found in Article III of the U.S. Constitution, which conferred judicial power over “controversies . . . between a State and Citizens of another state.” U.S. CONST. art. III; *Chisholm*, 2 U.S. at 3. The Court held that the Constitution granted jurisdiction to hear the plaintiff’s case, and any sovereignty the state might have enjoyed was abrogated by its ratification of the Constitution. The Eleventh Amendment was passed immediately thereafter to overrule this case. *Hans*, 134 U.S. at 11. In *Hans* the Court noted that *Chisholm* created a “shock of surprise throughout the country.” *Id.* See also Fletcher, *supra* note 9, at 1035. Since then, there has been controversy over the scope and meaning of the Eleventh Amendment. One scholar contends that the Eleventh Amendment was meant only as a “limiting construction on the jurisdiction granted by the state-citizen diversity clause.” *Id.* at 1035. Accordingly, it said nothing about a private citizen’s ability to sue a state based on federal question jurisdiction. *Id.* at 1036. At the time the Eleventh Amendment was adopted, there were not many bases for federal question jurisdiction. *Id.* at 1038. Until *Hans*, the “Supreme Court did not directly address the issues of whether the eleventh amendment forbade private suits against states by all private citizens, out-of-state or in-state, and whether private suits could be brought under another

v. Louisiana,³¹ the Court held that the Eleventh Amendment barred suits against states by private individuals based on federal question jurisdiction, despite the seemingly unresponsive text of the amendment.³² The Court reasoned that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”³³ Accordingly, states could “pay their own debts in their own way,”³⁴ and would only be bound to contracts based on conscience.³⁵ To enforce a recovery against a state would be to “[wage] war” against the state, and to use the federal courts to accomplish that end.³⁶ The Court saw no problem with allowing states access to the courts where individuals would not have it: “[b]ut say they, there will be partiality in it if a State cannot be defendant—if an individual cannot proceed to obtain judgment against a State, though he may be sued by a State. It is necessary to be so, and cannot be avoided.”³⁷ Therefore, the Court in *Hans* did not rely on the text of the Eleventh Amendment, but on the history and structure of the Constitution as the Court understood it.³⁸

The Rehnquist Court vigorously reaffirmed *Hans* in *Seminole Tribe v. Florida*.³⁹ In *Seminole Tribe*, the Court held that Congress could not use its Article I power to abrogate state sovereign immunity.⁴⁰ The Court concluded that to allow Congress to abrogate state sovereign immunity through Article I would be to

head of jurisdiction, until after the first general original federal question jurisdictional statute was passed in 1875.” *Id.* at 1039.

31. 134 U.S. 1 (1890).

32. *Id.* at 9.

33. *Id.* at 13.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 14.

38. See Fletcher, *supra* note 9, at 1040. For example, the Court concluded it would be anomalous to disallow a suit in federal court by a citizen of another state, but to allow a suit by a citizen of the same state. *Hans*, 134 U.S. at 15. See also Siegel, *supra* note 22, at 1174. The Court also relied on statements made by Madison, Marshall, and Hamilton during the ratification debates. *Hans*, 134 U.S. at 13-15. The Court’s use of these statements has, however, not been without criticism. See Gibbons, *supra* note 9, at 1899 (stating that the Court in *Hans* relied upon “three isolated statements,” and that “[p]laced in the context of the entire debate over ratification, that evidence of a contemporaneous belief in state sovereign immunity from suit in federal courts is extraordinarily weak”). Without being tied to the text, the court has applied the Eleventh Amendment in a variety of circumstances. See *Smith*, 178 U.S. at 445-49 (federally chartered corporations); *Blatchford*, 501 U.S. at 787-92 (Native American tribes); *Monaco*, 292 U.S. at 329-32 (foreign nations); *Ex Parte New York*, 256 U.S. 490, 497-500 (1921) (admiralty); *Alden*, 527 U.S. at 741-54 (suits in state courts). See also Siegel, *supra* note 22, at 1177-78.

39. 517 U.S. 44 (1995) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

40. *Id.* at 47.

impermissibly expand the bases of jurisdiction enumerated in Article III.⁴¹ State sovereign immunity, the Court argued, had been an “essential part of the Eleventh Amendment” for over a century.⁴² Grounded in the “fundamental jurisprudence in all civilized nations,”⁴³ state sovereign immunity “prompted” a specific constitutional amendment, but is not limited by that amendment.⁴⁴ The Court was not concerned that its decision would compromise the enforcement of federal law: other methods of ensuring compliance with federal law are available, including enforcement by the United States, suits for injunctions against state officials, and appeals to federal court arising from state court decisions.⁴⁵

The Court extended broad sovereign immunity in *Alden v. Maine*,⁴⁶ which held that Congress could also not use its Article I power to subject states to suit in state court.⁴⁷ It stated that state sovereign immunity derives from the Constitution’s structure, history, and the “authoritative interpretations” by the Supreme Court.⁴⁸ Sovereign immunity is “inviolable” and ensures that states retain the “dignity” of sovereignty.⁴⁹ Dignity is implicated because “jurisdiction implies superiority of power.”⁵⁰

While the Eleventh Amendment is a limit on federal jurisdiction, “this is not the only structural basis of sovereign immunity implicit in the constitutional design.”⁵¹ The Court explained that the “separate and distinct” principle, that states should not be subject to suit without their consent, “inhere[s] in the system of federalism established by the Constitution.”⁵² Accordingly, the Eleventh Amendment would apply with equal force to state court suits.⁵³ The concerns over state dignity are still

41. *Id.* at 65.

42. *Id.* at 67.

43. *Id.* at 69 (quoting *Hans*, 134 U.S. at 17).

44. *Id.*

45. *Id.* at 71 n.14.

46. 527 U.S. 706 (1999).

47. *Id.* at 712.

48. *Id.* at 713.

49. *Id.* at 715.

50. *Id.* The Court explained that this concept of sovereign dignity has roots in English law. *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 234-35 (1765)). While the “American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified.” *Id.* at 715-16.

51. *Id.* at 730. See generally Vasquez, *supra* note 9 (discussing immunity-from-liability theory of the Eleventh Amendment, and the theory that the Eleventh Amendment is a limit on jurisdiction).

52. *Alden*, 527 U.S. at 730.

53. See *id.* (discussing the notion that states may possess “attributes of sovereignty” to be immune from suits in their own courts).

present: “the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties” is the concern “regardless of the forum.”⁵⁴ Private suits for money damages, which may “threaten the financial integrity of the States,”⁵⁵ are a consideration whether in state or federal court. “Unanticipated intervention in the processes of government”⁵⁶ is avoided through sovereign immunity; public policy and “administration of public affairs” are controlled by elected officials instead of courts.⁵⁷ In sum, *Alden* established that state sovereign immunity involved not only a limitation on federal jurisdiction, but also an affirmative grant to the states—a grant of immunity to promote dignity, federalism, fiscal independence, and the proper functioning of government.

B. *Exceptions to State Sovereign Immunity: Consent and Waiver*

“The expansive, official doctrine of state sovereign immunity creates serious problems for governance.”⁵⁸ Because federal law is supreme, it may regulate the behavior of states.⁵⁹ However, broad sovereign immunity works to make that regulation of states unenforceable.⁶⁰ In order to counter that effect, there are certain exceptions to sovereign immunity:⁶¹ (1) state officials may be sued

54. *Id.* at 749.

55. *Id.* at 750.

56. *Id.*

57. *Id.* The Court explained this policy rationale:

A general federal power to authorize private suits for money damages would place unwarranted strain on the States’ ability to govern in accordance with the will of their citizens. Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of the State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen. “It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place.”

Id. at 750-51 (quoting *Louisiana v. Jumel*, 107 U.S. 711, 727-28 (1883)).

58. Siegel, *supra* note 22, at 1178.

59. *See id.* at 1178 nn.42-43 (citing U.S. CONST. art. VI, § 1, cl. 2, and *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554-57 (1985)).

60. *Id.* Professor Siegel points out that states may choose to comply with federal law, but that is probably not enough. *Id.* It isn’t that state officials are necessarily malicious, but that legal liability is a profound disincentive for behavior that is against “legal norms,” and state officials are, after all, only human. *Id.* at 1178-79.

61. *Id.* at 1179.

for an injunction;⁶² (2) a state may be sued by other states or the United States;⁶³ (3) sovereign immunity may be abrogated by Congress pursuant to section five of the Fourteenth Amendment;⁶⁴ and (4) consent and waiver.⁶⁵ Consent and waiver are the exceptions relevant to the current inquiry.

From the earliest of Eleventh Amendment cases, it has been clear that the state could waive its sovereign immunity.⁶⁶ In *Clark v. Barnard*, an 1883 case,⁶⁷ the Court held that Rhode Island waived its immunity by voluntarily appearing in federal court and making a claim on a bankruptcy estate.⁶⁸ The Court stated that Rhode Island “made itself a party to the litigation to the full extent required for its complete determination.”⁶⁹ *Clark* illustrates that states may waive their immunity through their action in litigation.⁷⁰ Likewise, consent is “altogether voluntary,”⁷¹ and a state is “free to set conditions on any consent that it [chooses] to give.”⁷² A state may consent to suit in its own courts, but not federal courts.⁷³ Further, consent can be withdrawn after given.⁷⁴

Both the waiver and consent cases, therefore, have focused on waiver and consent to suit in a particular court, not waiver or consent to suit in general. No case has concluded that consent or

62. *Ex parte Young*, 209 U.S. 123 (1908); Virginia Coupon Cases, 114 U.S. 269, 293 (1885) (listing the cases that permitted suits against state officials for failure to honor the state’s promise to allow past-due bond coupons as payment for taxes). See also Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1622-44 (1997) (discussing the history of suits against state officials and *Ex parte Young*); Siegel, *supra* note 22, at 1179 (discussing exceptions to the Eleventh Amendment).

63. *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904); *United States v. Texas*, 143 U.S. 621, 642-46 (1892); Siegel, *supra* note 22, at 1181.

64. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). This exception, of course, is limited to laws passed under the Fourteenth Amendment. See *Seminole Tribe*, 517 U.S. at 66 (overruling *Union Gas*, 491 U.S. 1 (plurality)); *Alden*, 527 U.S. at 756. Professor Siegel points out that *Seminole Tribe* marked a point in which the Supreme Court began to methodically restrict the exceptions to the Eleventh Amendment, and that this policy of strict enforcement is continuing. Siegel, *supra* note 22, at 1183.

65. Siegel, *supra* note 22, at 1184-85.

66. See *Clark v. Barnard*, 108 U.S. 436 (1883).

67. *Id.* at 436.

68. *Id.* at 447-48.

69. *Id.* at 448.

70. See Gil Seinfeld, *Waiver-in-Litigation: Eleventh Amendment Immunity and the Voluntariness Question*, 63 OHIO ST. L.J. 871, 885-86 (2002).

71. *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858).

72. Siegel, *supra* note 22, at 1189.

73. *Smith*, 178 U.S. at 441. In fact, Courts have read statutory consent narrowly as permitting suit in state but not federal court when not otherwise specified. *Id.* See also *Coll. Sav. Bank*, 527 U.S. at 676; *Atascadero State Hosp.*, 573 U.S. at 241; Siegel, *supra* note 22, at 1189.

74. Siegel, *supra* note 22, at 1189.

waiver to one court is necessarily consent or waiver to another.⁷⁵

This principle has been seen most recently in *Lapides v. Board of Regents*.⁷⁶ In *Lapides*, the Court held that when a state, as a defendant, removes a case to federal court, it waives its sovereign immunity.⁷⁷ The Court concluded that waiver was appropriate because the state “invoke[d]” federal jurisdiction; it could not assert immunity at the same time.⁷⁸ The Court’s opinion was peppered with references to submission to suit in federal court specifically.⁷⁹ A state could waive its immunity from suit in state court without having waived that immunity from suit in federal court.⁸⁰ The Court explained that its decision was driven by the “need to avoid inconsistency, anomaly, and unfairness, and not upon a State’s actual preference or desire, which might, after all, favor selective use of ‘immunity’ to achieve litigation advantages.”⁸¹ A state could not simultaneously invoke federal jurisdiction and claim that such jurisdiction did not exist.⁸²

The Supreme Court’s Eleventh Amendment opinions throughout history reveal four major underlying policies: (1) protection of dignity; (2) protection of state budgets; (3) protection from interference in governance; and (4) federalism.⁸³ The Court’s exceptions reveal one final policy: (5) balancing of state interests with the interests of individuals.⁸⁴ These policies may be applied to the question of whether removal should be barred when a state

75. See *id.* at 1189-96 (collecting little known consent and waiver cases).

76. 535 U.S. 613, 622 (2002).

77. *Id.* at 616.

78. *Id.* at 619.

79. See *id.* at 618 (“A State remains free to waive its Eleventh Amendment immunity from suit in a federal court.”); *id.* at 619 (“[A] State’s voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity.”) (citing *Clark*, 108 U.S. at 447); *id.* (“[A] State ‘waives any immunity . . . respecting the adjudication of a ‘claim’ that it voluntarily files in federal court.”) (quoting *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947)); *id.* at 620 (“In this case, the State was brought involuntarily into the case as a defendant in the original state-court proceedings. But the State then voluntarily agreed to remove the case to federal court.”).

80. *Lapides*, 535 U.S. 617-18. The Court stated that it did not need 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.” *Id.* In *Lapides*, the State explicitly waived immunity from state-court proceedings already. *Id.* If it had not, removal to federal court would not necessarily constitute waiver. See *id.* If waiver in state court necessarily constituted waiver in federal court, the issue in *Lapides* never would have arisen.

81. *Id.* at 620.

82. See *id.*

83. See *supra* Part I.A.

84. See Shannon Sheppard, Note, *Lapides: Striking a Balance Between State Sovereignty and Fairness to Individual Litigants?*, 54 MERCER L. REV. 1741, 1757 (2003).

is a plaintiff.⁸⁵ But first, this Article will examine what the courts considering this issue have done.

II. COURTS ON WHETHER REMOVAL IS BARRED

The majority of courts to consider the question of whether the Eleventh Amendment bars removal when the state is a plaintiff has concluded that it does not.⁸⁶ These courts generally advance four main arguments for why removal is not barred. First, they conclude that the literal language of the Eleventh Amendment does not apply when the state is a plaintiff.⁸⁷ Second, courts cite two Supreme Court cases, *Ames v. Kansas*,⁸⁸ and *Illinois v. City of Milwaukee*,⁸⁹ and argue that these cases address the issue.⁹⁰ Third, courts conclude the Eleventh Amendment is waived or otherwise inapplicable when the state is a plaintiff.⁹¹ Finally, they rely on district courts that have decided this question, and conclude that the issue is well settled.⁹² The Courts of Appeals to consider this issue have advanced only these four arguments.⁹³ Several district courts have looked at the policies behind the Eleventh Amendment and concluded that it does not bar removal.⁹⁴

Overall, the analysis in these cases is unsatisfying.⁹⁵ With the

85. See *infra* Part III.

86. See cases cited *supra* note 8.

87. *Dynegy*, 375 F.3d at 844-45; *Magnolia*, 359 F.3d at 1239; *Burlington*, 280 F. Supp. 2d at 935; *Rezulin*, 133 F. Supp. 2d at 297; *Glaxo Wellcome*, 58 F. Supp. 2d at 1039; *Oncor Communications*, 166 F.R.D. at 321.

88. 111 U.S. 449 (1884).

89. 406 U.S. 91 (1972).

90. *Dynegy*, 375 F.3d at 846; *Magnolia*, 359 F.3d at 1239; *Glaxo Wellcome*, 58 F. Supp. 2d at 1039; *Coeur D'Alene Tribe*, 1997 U.S. Dist. LEXIS 14980, at *7-8; *Acme Fill Corp.*, 1997 U.S. Dist. LEXIS 16847, at *3; *Oncor Communications*, 166 F.R.D. at 321; *Home Cable, Inc.*, 35 F. Supp. 2d at 788; *Missouri ex rel. Nixon v. Prudential Health Care Plan, Inc.*, No. 4:00CV8 ERW, 2000 U.S. Dist. LEXIS 22406, at *9 (E.D. Mo. Apr. 13, 2000).

91. *Magnolia*, 359 F.3d at 1239; *Acme Fill Corp.*, 1997 U.S. Dist. LEXIS 16847, at *3; *Wausau Underwriters*, 778 F. Supp. at 1522; *Citibank, N.A.*, 537 F. Supp. at 1197.

92. *Magnolia*, 359 F.3d at 1240; *Burlington*, 280 F. Supp. 2d at 935; *In re Pac. Gas & Elec. Co.*, 281 B.R. at 1; *Rezulin*, 133 F. Supp. 2d at 297; *Prudential Health Care Plan*, 2000 U.S. Dist. LEXIS 22406, at *8-9; *Glaxo Wellcome*, 58 F. Supp. 2d at 1039-40; *Home Cable, Inc.*, 35 F. Supp. 2d at 788.

93. See *Dynegy*, 375 F.3d at 845-49; *Magnolia*, 359 F.3d at 1238-40.

94. *Cornyn*, 110 F. Supp. 2d at 531; *Terrebonne Parish Sch. Bd.*, 1989 U.S. Dist. LEXIS 13703, at *1-2.

95. I acknowledge that many district courts, having heavy workloads, do not have the time or resources to thoroughly analyze every issue that comes before them. My purpose is not to fault these courts, but to point out that the issue of removal and the Eleventh Amendment has not been thoroughly addressed.

exception of *Cornyn v. Real Parties in Interest*,⁹⁶ which is ultimately distinguishable from the other cases and will be discussed in greater detail, the courts give short shrift to the issue. Two cases, meanwhile, find that the Eleventh Amendment does bar removal.⁹⁷ These cases, likewise, fail to grapple with the issue, and have been rejected by other courts on that basis.⁹⁸

A. The "Literal Language" of the Amendment

In *Vermont v. Oncor Communications, Inc.*, the court considered the state's argument that it "lack[ed] jurisdiction over [the] action under the Eleventh Amendment."⁹⁹ After quoting the text of the amendment in full,¹⁰⁰ the court quoted a sentence from *Pennhurst State School & Hospital v. Halderman*¹⁰¹ describing the general rule behind the Eleventh Amendment, that states are immune from suits brought by their own citizens and other citizens without consent.¹⁰² It then concluded, "suits brought by a state are not barred by the literal language of the amendment."¹⁰³ Several courts since then have relied on similar reasoning.¹⁰⁴ One court acknowledged that "in some areas" the Eleventh Amendment "has been extended beyond its textual limits," but concluded that "this is not the case with respect to state plaintiffs."¹⁰⁵ The court did not explain why the textual limits should apply in this context but not others.¹⁰⁶

The courts' reliance on the text of the amendment is unsatisfying for a reason that one court acknowledged—the text of the amendment does not direct its meaning.¹⁰⁷ In fact, the Supreme Court has stated that state sovereign immunity does not derive from the Eleventh Amendment—that referring to the Eleventh Amendment is "convenient shorthand but something of a misnomer"¹⁰⁸—and that immunity derives from the Constitution's

96. 110 F. Supp. 2d 514.

97. *Abbott Labs, Inc.*, 900 F. Supp. at 30-31; *Steelcase*, 792 F. Supp. at 86.

98. *See, e.g., Glaxo Wellcome*, 58 F. Supp. 2d at 1039.

99. *Oncor Communications*, 166 F.R.D. at 320.

100. *See id.*

101. 465 U.S. 89, 100 (1984).

102. *Oncor Communications*, 166 F.R.D. at 320.

103. *Id.* at 321.

104. *Dynergy*, 375 F.3d at 845; *Magnolia*, 359 F.3d at 1240; *Burlington*, 280 F. Supp. 2d at 935; *Glaxo Wellcome*, 58 F. Supp. 2d at 1039; *Rezulin*, 133 F. Supp. 2d at 297. *See also Banco y Agencia*, 681 F. Supp. at 983 (construing "commenced or prosecuted against.").

105. *Rezulin*, 133 F. Supp. 2d at 297. *See also Dynergy*, 375 F.3d at 844-45 (explaining that the language of the amendment is not binding, but noting that it is still "helpful in answering the question before us").

106. *See Dynergy*, 375 F.3d at 844-45.

107. *See Alden*, 527 U.S. at 713.

108. *Id.*

structure, history, and the Supreme Court's decisions.¹⁰⁹ In accordance with Supreme Court jurisprudence, the passage of the Eleventh Amendment simply confirmed a principle the framers already believed in, and so did not create or limit that principle.¹¹⁰ The district courts relying on the text of the amendment assume that in "some areas," the text of the Eleventh Amendment "has been extended,"¹¹¹ but this is not a correct statement of the law, and the courts have not relied on authority to show that it is.¹¹² In truth, the text of the amendment has been wholly irrelevant for over one hundred years, and no Supreme Court case has been bound by it since *Hans v. Louisiana*.¹¹³ Therefore, when the Ninth Circuit concluded that the language of the amendment is "helpful" to its inquiry, it is not clear why this is so.¹¹⁴ The courts relying on the text of the Eleventh Amendment treat it as though it defines the boundaries of state sovereign immunity, an idea that has been repeatedly rejected by the Supreme Court.¹¹⁵

B. *Ames v. Kansas* and *Illinois v. City of Milwaukee*

One of the first cases to consider whether removal should be permitted cited *Ames v. Kansas* in concluding that it should.¹¹⁶ In *Ames*, there is language that appears to be directly on point: the Court states "suits cognizable in the courts of the United States on account of the nature of the controversy,¹¹⁷ and which need not be brought originally in the Supreme Court, may now be brought in or removed in the Circuit Courts without regard to the character of the parties."¹¹⁸ Cases since *Ames* have turned to *Illinois v. City of Milwaukee*¹¹⁹ for guidance.¹²⁰

There are two problems with relying on these cases: first, they were not primarily concerned with the Eleventh Amendment

109. *Id.*

110. *See id.*

111. *Rezulin*, 133 F. Supp. 2d at 297.

112. *See id.* at 272. *Rezulin* was decided after *Alden*, 2001 and 1999 respectively.

113. 134 U.S. at 10-11 (discussing the language of the Eleventh Amendment and stating that Eleventh Amendment aside, there are other grounds for barring the suit in question).

114. *Dynegy*, 375 F.3d at 844.

115. *See, e.g., Alden*, 527 U.S. at 713.

116. *Citibank, N.A.*, 537 F. Supp. at 1197 (citing *Ames*, 111 U.S. at 463).

117. *See* U.S. CONSTITUTION, Art. III, § 2, cl. 1 (federal questions).

118. *Ames*, 111 U.S. at 470 (footnote not in original).

119. 406 U.S. 91, 100-01 (1972) (quoting the same sentence, *supra* text accompanying note 118, from *Ames*, 111 U.S. at 470-72).

120. *See Dynegy*, 375 F.3d at 846; *Magnolia*, 359 F.3d at 1239; *Prudential Health Care Plan*, 2000 U.S. Dist. LEXIS 22406, at *9; *Glaxo Wellcome*, 58 F. Supp. 2d at 1039; *Home Cable, Inc.*, 35 F. Supp. 2d at 789; *Couer D'Alene Tribe*, 1997 U.S. Dist. LEXIS 14980, at *8; *Acme Fill Corp.*, 1997 U.S. Dist. LEXIS 16847, at *4; *Oncor Communications*, 166 F.R.D. at 321.

question, and second, *Ames*, upon which *Illinois* relies, was decided before *Hans*. In *Ames*, the plaintiff state brought a quo warranto action against the defendant in state court, and the defendant sought to remove the action.¹²¹ The main question the Court was concerned with answering, however, was whether the lower federal courts had original jurisdiction.¹²² Because the Constitution provides that the Supreme Court has original jurisdiction in cases in which the state is a party,¹²³ the Court had to decide whether this jurisdiction was exclusive or concurrent.¹²⁴ The Court decided that jurisdiction was concurrent, and this birthed the statement quoted by lower courts on the removal question.¹²⁵ The Court was evidently saying that, after the 1875 general federal question jurisdiction statute, federal district courts have jurisdiction (either originally or on removal) concurrently with the Supreme Court, regardless of the party structure. This is in tension with the later-decided *Hans*, which declined jurisdiction over a federal question solely because of party structure.¹²⁶

These lower courts have allowed *Ames* to stand for a proposition it did not directly address. To the extent *Ames* addressed Eleventh Amendment immunity,¹²⁷ it did so in a legal landscape entirely different from today's.¹²⁸ *Ames* was decided before *Hans*, the first case to recognize a broad sovereign immunity irrespective of the text of the Eleventh Amendment.¹²⁹ Accordingly, *Ames* discussed *Cohens v. Virginia*,¹³⁰ a case that established federal appellate review of state court decisions based on federal law.¹³¹ Looking at *Cohens*, the Court in *Ames* therefore reasoned:

121. *Ames*, 111 U.S. at 462. The asserted basis for jurisdiction was federal question. *Id.* at 459.

122. *Id.*

123. U.S. CONST. art. III.

124. *Ames*, 111 U.S. at 463-64.

125. *Id.* at 470.

126. *Hans*, 134 U.S. at 9-10.

127. The State argued that even if federal question suits could be brought originally in the lower courts, it was exempt from the operation of this statute. *Ames*, 111 U.S. at 470. The opinion doesn't say "Eleventh Amendment," but this appears to be the basis of the argument. *Id.*

128. *Ames* was decided in 1884.

129. *See supra* Part I.A.

130. 19 U.S. (6 Wheat) 264 (1821).

131. *Id.* at 415 (reasoning that a federal tribunal must be able to review questions of federal law in order to properly enforce federal law). *Dynegy*, 375 F.3d at 845-46 (relying on *Cohens* to show that the language of the Eleventh Amendment does not apply when the suit is removed because removal is not commencing or prosecuting a suit). *Id.* at 845-46 (using the holding in *Ames* to show that the Eleventh Amendment did not disturb the holding in *Cohens*). The court does not address the arguments that *Cohens* dealt with appellate, not original, jurisdiction and that it pre-dated *Hans*. *Id.* The significance of this distinction is discussed *infra* notes 133-136 and accompanying text.

If the Constitution of laws may be violated by proceedings instituted by a State against its own citizens, and if that violation may be such as essentially to affect the Constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision which expressly extends the judicial power of the Union to all cases arising under the Constitution and laws?¹³²

In other words, the Court in *Ames* concluded that states must be susceptible to federal court jurisdiction on federal questions because otherwise, provisions of the Constitution may go unenforced.¹³³ While the reasoning of *Cohens* is still sound in the appellate context,¹³⁴ the principle has been rejected in original suits because of the operation of the Eleventh Amendment.¹³⁵ In *Seminole Tribe v. Florida*, the Court specifically held that failure to bring states into federal court on federal questions did not raise enforcement problems.¹³⁶ To the extent the Court rejected the reasoning of *Ames*, it impliedly abrogated *Ames*.

Illinois v. City of Milwaukee is another original jurisdiction case. In *Illinois*, the plaintiff state sought to have the action tried originally in the Supreme Court.¹³⁷ The Supreme Court reasoned that if concurrent jurisdiction existed with the lower federal courts, original jurisdiction was not mandatory.¹³⁸ Looking to *Ames*, it concluded that original jurisdiction over federal questions was not mandatory.¹³⁹ *Illinois* cited *Ames* for the proposition that

132. *Ames*, 111 U.S. at 471.

133. *See id.* The Court continued:

After bestowing on this subject the most attentive consideration, the court can perceive no reason, founded on the character of the parties, for introducing an exception which the Constitution has not made; and we think the judicial power, as originally given, extends to all cases arising under the Constitution or a law of the United States, whoever may be parties.

Id.

134. *See, e.g., Seminole Tribe*, 517 U.S. at 71 n.14 (stating that appellate review of state court judgments is a method of enforcing federal law); *Arizona v. Evans*, 514 U.S. 1, 8-9 (1995) (citing *Cohens* and stating that states are answerable to the final authority of the Supreme Court).

135. *See, e.g., Coll. Sav. Bank*, 527 U.S. at 701 (Breyer, J., dissenting) (stating that the Court's jurisprudence ignores the principle announced in *Cohens*); *Seminole Tribe*, 517 U.S. at 71-74 (stating that state sovereign immunity does not depend on the subject matter of the suit, and that historically concerns over enforcement of federal law in federal court could not have been particularly great because federal question jurisdiction was not conferred for two centuries).

136. *Seminole Tribe*, 517 U.S. at 71-74.

137. *Id.* at 93.

138. *Id.* at 98.

139. *Id.* at 101. The question was whether a suit based on federal common law was a suit arising under the laws of the United States. *Id.* at 100. The Court concluded it was. *Id.*

original jurisdiction was concurrent, not that removal should be permitted.¹⁴⁰ *Illinois* did not address the Eleventh Amendment at all.¹⁴¹

Nevertheless, courts addressing the removal issue conclude that barring removal “is against the weight of established Supreme Court precedent.”¹⁴² Each of the courts addressing these cases has asserted rather than explained their applicability.¹⁴³ In *Oklahoma v. Magnolia Marine Transport*, the court granted that these cases were about original jurisdiction, but nevertheless concluded that the “unconditional holding” of the *Ames* and *Illinois* Courts was in favor of removal.¹⁴⁴ In *California v. Dynegy, Inc.*, the court acknowledged that *Ames* pre-dates *Hans* but concluded that because the Supreme Court did not state in *Illinois* that *Ames* had fallen into disfavor; it must still be relevant.¹⁴⁵ It does appear, however, that these cases are quoting a sentence out of context. In truth, the “weight of established Supreme Court precedent” is that state sovereign immunity is broad,¹⁴⁶ and that even in situations where the federal courts have original jurisdiction, the Eleventh Amendment may preclude its exercise.¹⁴⁷ This Supreme Court precedent is more recent and more on point, and yet remains unaddressed by the courts on the removal issue.¹⁴⁸

C. *The Eleventh Amendment Is Inapplicable when the State Is a Plaintiff*

Another argument advanced by courts to show that removal is not barred is that the Eleventh Amendment does not apply when the state is a plaintiff.¹⁴⁹ For many cases, this is not a separate argument, but a conclusion based on the arguments

140. *Id.*

141. *See id.*

142. *Glaxo Wellcome*, 58 F. Supp. 2d at 1039; *Coeur D'Alene Tribe*, 1997 U.S. Dist. LEXIS 14980, at *3. *Accord Oncor Communications*, 166 F.R.D. at 321.

143. *See cases cited supra* notes 116, 119 (all cases citing *Ames* and/or *Illinois*).

144. *Magnolia*, 359 F.3d at 1237.

145. *Dynegy*, 375 F.3d at 846.

146. *Alden*, 527 U.S. at 713.

147. *Seminole Tribe*, 517 U.S. at 44.

148. *See cases cited supra* note 119 (cases citing *Ames* or *Illinois* without addressing *Alden* or *Seminole Tribe*).

149. *Dynegy*, 375 F.3d at 847; *Burlington*, 280 F. Supp. 2d at 919; *Rezulin*, 133 F. Supp. 2d at 297; *Cornyn*, 110 F. Supp. 2d at 531; *Prudential Health Care Plan*, 2000 U.S. Dist. LEXIS 22406, at *7; *Glaxo Wellcome*, 58 F. Supp. 2d at 1039; *Coeur D'Alene Tribe*, 1997 U.S. Dist. LEXIS 14980, at *7-8; *Acme Fill Corp.*, 1997 U.S. Dist. LEXIS 16847, at *4; *Oncor Communications*, 166 F.R.D. at 320-21; *Wausau Underwriters*, 778 F. Supp. at 1521; *Terrebonne Parish Sch. Bd.*, 1989 U.S. Dist. LEXIS 13703, at *1-2; *Banco y Agencia*, 681 F. Supp. at 981; *Citibank, N.A.*, 537 F. Supp. at 1197.

discussed above—the text of the amendment,¹⁵⁰ *Ames* and *Illinois*,¹⁵¹ or both.¹⁵² In *Dynegy*, however, the court reached this conclusion by reference to the ratification debates and Supreme Court decisions, stating that “this history gives little indication that sovereign immunity was ever intended to protect *plaintiff* states.”¹⁵³ It states that the history “plainly understands sovereign immunity as protection from *being sued*.”¹⁵⁴ To support these statements, the court cites concerns over “out-of-state creditors” and “suits for money damages against the State[s].”¹⁵⁵ The *Dynegy* court in short, cites the traditional policy arguments in favor of state sovereign immunity to show that the Eleventh Amendment does not apply to plaintiff states.

The first difficulty with this approach is that the court cites no evidence that the framers and courts even considered the question. Second, as will be discussed below,¹⁵⁶ the policies identified by the framers and courts that the *Dynegy* court did not address may apply with equal force when the state is a plaintiff. To the extent they do, this history supports applying the Eleventh Amendment to plaintiff states, even if the discussion at the time was specific to suits brought *against* states.

Other courts, however, have construed a state bringing an action in state court as a waiver.¹⁵⁷ In *Cornyn v. Real Parties in Interest*, the court acknowledged the broad scope of state sovereign immunity and its separation from the text of the Eleventh Amendment.¹⁵⁸ Ultimately, however, the court concluded that a “state may waive its Eleventh Amendment immunity by voluntarily invoking the jurisdiction of the federal court, either by defending an action in federal court on its merits or by ‘voluntarily submitting its rights to judicial determination.’”¹⁵⁹ Similarly, in *Nixon v. Prudential Health Care Plan, Inc.*, the court stated that

150. *Banco y Agencia*, 681 F. Supp. at 982-83.

151. *Citibank, N.A.*, 537 F. Supp. at 1197.

152. *Burlington*, 280 F. Supp. 2d at 935; *Glaxo Welcome*, 58 F. Supp. 2d at 1039; *Couer D’Alene Tribe*, 1997 U.S. Dist. LEXIS 14980, at *3; *Oncor Communications*, 166 F.R.D. at 320-21; *Rezulin*, 133 F. Supp. 2d at 297.

153. *Dynegy*, 375 F.3d at 847.

154. *Id.*

155. *Id.*

156. *See infra* Part III.

157. *Dynegy*, 375 F.3d at 848; *Acme Fill Corp.*, 1997 U.S. Dist. LEXIS 16847, at *3 (stating that the suit comes within the purview of the Eleventh Amendment, but that California “brought suit . . . of its own accord” and therefore the suit is not barred); *Cornyn*, 110 F. Supp. 2d at 531; *Prudential Health Care Plan*, 2000 U.S. Dist. LEXIS 22406, at *7.

158. *Cornyn*, 110 F. Supp. 2d, at 530-31 (“The Supreme Court’s reading of the Eleventh Amendment, however, has consistently exceeded the scope of the amendment’s text. . . . And importantly, the Court’s recent jurisprudence has reflected an enhanced respect for state sovereignty.”) (citations omitted).

159. *Id.* (quoting *Coll. Sav. Bank*, 527 U.S. 666).

“when a state voluntarily appears as a plaintiff, it may be considered by the court as waiving its immunity offered under the Eleventh Amendment.”¹⁶⁰

In some ways, the reasoning in *Cornyn* is inapplicable to the issue at hand. In *Cornyn*, the plaintiff state had originally filed a suit in federal court against the tobacco industry.¹⁶¹ Following a settlement, the plaintiff state brought a suit in state court to investigate the actions of outside counsel arising from the tobacco litigation.¹⁶² The settlement contained a clause that specified federal court as the exclusive court for all matters arising from the tobacco litigation.¹⁶³ When the court concluded that the state had waived its immunity as a plaintiff, it did so because the state had filed the original tobacco litigation in federal court, not because the investigation of the attorneys was filed.¹⁶⁴ The court’s key holding was that the plaintiff state had turned specifically to federal court.¹⁶⁵ In this way, the court’s holding was probably correct in light of Supreme Court doctrine, and actually supports the conclusion that removal is otherwise barred.

This becomes clear when contrasted with *Nixon*, which concluded that when a state files suit in state court it waives its immunity.¹⁶⁶ Several courts have concluded that filing suit constitutes a waiver, but each case has done so because the state turned to federal court.¹⁶⁷ Except for *Dynegy*, no court of appeals has held that filing suit in state court constitutes a waiver in federal court,¹⁶⁸ and the Supreme Court has consistently referred to waiver as a voluntary submission to *federal court* specifically.¹⁶⁹ Moreover, filing suit does not necessarily constitute a waiver

160. *Prudential Health Care Plan*, 2000 U.S. Dist. LEXIS 22406, at *7.

161. *Cornyn*, 110 F. Supp. 2d at 515.

162. *Id.*

163. *Id.* It read:

It is ordered that this Court shall have exclusive jurisdiction over the provisions of the Comprehensive Settlement Agreement and Release, this Order, and the Final Judgment. All persons in privity with the parties, including all persons represented by the parties, who seek to raise any objections or challenges in any forum to any provision of this Judgment are hereby enjoined from proceeding in any other state or federal court.

Id.

164. *Id.* at 531.

165. *See id.*

166. *Prudential Health Care Plan*, 2000 U.S. Dist. LEXIS 22406, at *7.

167. *Rose v. United States Dep’t of Educ.*, 187 F.3d 926, 929 (8th Cir. 1999); *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1234 (10th Cir. 1999); *DeKalb County Div. of Family & Children Servs. v. Platter*, 140 F.3d 676, 679-80 (7th Cir. 1998); *Ga. Dep’t of Rev. v. Burke*, 146 F.3d 1313, 1318-19 (11th Cir. 1998). Each of these cases involved filing in bankruptcy court, and so necessarily federal court.

168. *See, e.g.*, cases cited *supra* note 167.

169. *See supra* Part I.B. (discussing the Supreme Court on waiver).

because even when a state files suit in federal court, the private litigant is still limited in the counterclaims that may be brought, which indicates that sovereign immunity still exists.¹⁷⁰

Furthermore, in *Porto Rico v. Ramos*,¹⁷¹ the Court explained that a state should not be able to come in and out of litigation it chose to commence by claiming immunity.¹⁷² This policy is not implicated when the state files suit in state court. By asking for Eleventh Amendment immunity, the state is not asking that the litigation cease, only that it take place in the court the state has chosen to submit to.¹⁷³ If a state filed suit as a plaintiff in state court, and then, pursuant to *Alden v. Maine*, asked for Eleventh Amendment immunity, the case would be analogous to those cases in which the state has filed in federal court.¹⁷⁴ However, in *Nixon*, the court's conclusion, that if the state was a plaintiff in state court it necessarily waived all Eleventh Amendment immunity, cannot be justified.¹⁷⁵

D. District Courts Relying on One Another: What About the Policy Behind Eleventh Amendment Immunity?

Many courts conclude that removal is not barred primarily by relying on decisions by other district courts that have decided this issue.¹⁷⁶ This is both predictable and reasonable—courts naturally rely on cases that are most on point to the issue they are addressing. The difficulty in this approach is that, as discussed

170. See *Magnolia*, 359 F.3d at 1237.

171. 232 U.S. 627 (1914).

172. *Id.* at 632. This argument was also made in *Dynegy*, 375 F.3d at 848.

173. See cases cited *supra* note 8 (states asking for remand, not dismissal).

174. See cases cited *supra* note 167.

175. See *Prudential Health Care Plan*, 2000 U.S. Dist. LEXIS 22406, at *7.

176. See *Magnolia*, 359 F.3d at 1237; *Glaxo Wellcome*, 58 F. Supp. 2d at 1039 (citing *Coeur D'Alene Tribe*, 1997 U.S. Dist. LEXIS 14980; *Acme Fill Corp.*, 1997 U.S. Dist. LEXIS 16847; *Oncor Communications*, 166 F.R.D. at 313; *Home Cable, Inc.*, 35 F. Supp. 2d at 783; *Wausau Underwriters*, 778 F. Supp. at 1515; *Terrebonne Parish Sch. Bd.*, 1989 U.S. Dist. LEXIS 13703; *Oregon v. City of Rajneeshpuram*, 1984 U.S. Dist. LEXIS 14903; *Citibank, N.A.*, 537 F. Supp. at 1192); *Oncor Communications*, 166 F.R.D. at 317 (citing *Citibank, N.A.*); *Home Cable, Inc.*, 35 F. Supp. 2d at 783 (citing *Oncor Communications*); *In re Pac. Gas & Elec. Co.*, 281 B.R. at 6 (citing *Rezulin*, 133 F. Supp. 2d at 272; *Glaxo Wellcome*; and *Acme Fill Corp.*); *Cornyn*, 110 F. Supp. 2d at 514 (citing *Glaxo Wellcome*; *Home Cable, Inc.*; and *Wausau Underwriters*); *Prudential Health Care Plan*, 2000 U.S. Dist. LEXIS 22406 (citing *Glaxo Wellcome* and *Coeur D'Alene Tribe*); *Rezulin*, 133 F. Supp. 2d at 297 (citing *Glaxo Wellcome* and *Citibank, N.A.*); *Burlington*, 280 F. Supp. 2d at 935 (citing *California ex rel. Lockyer v. Mirant Corp.*, No. C-02-1787-VRW, 2002 WL 1897669 (N.D. Cal. Aug. 6, 2002) (unpublished opinion); *Rezulin*; *Glaxo Wellcome*; *Oncor Communications*; *Banco y Agencia*, 681 F. Supp. at 981; and *Wausau Underwriters*). *Dynegy*, 375 F.3d at 848-49, also cites several of these cases, but only to show that its decision is consistent with the weight of authority.

above,¹⁷⁷ the cases considering these issues are not thoroughly reasoned. The result is that no court has adequately justified allowing removal based upon the text of the Eleventh Amendment,¹⁷⁸ *Ames* or *Illinois*,¹⁷⁹ or a finding of waiver in federal court.¹⁸⁰ The issue of whether removal should be barred remains largely unexplored.

It is indeed ironic that, given the dearth of reasoning in these cases,¹⁸¹ the courts considering the two cases that barred removal¹⁸² quickly dismissed them as unpersuasive.¹⁸³ In *California v. Steelcase*, the plaintiff state argued that removal was barred by the Eleventh Amendment.¹⁸⁴ The court agreed and reasoned:

[S]ince immunity granted by the Eleventh Amendment is an immunity from being made an involuntary party to an action in federal court, it should apply equally to the case where the state is a plaintiff in an action commenced in state court and the action is removed to federal court by the defendant.¹⁸⁵

This reasoning in some ways is consistent with the Supreme Court's holdings on the Eleventh Amendment. It recognizes the breadth of state sovereign immunity¹⁸⁶ and that immunity is largely tied not just to whether a party is in court, but where.¹⁸⁷ However, *Regents of the University of Minnesota v. Glaxo Wellcome, Inc.*, for example, points out that *Steelcase* fails to cite

177. See *supra* Parts II.A. to II.C.

178. See *supra* Part II.A..

179. See *supra* Part II.B.

180. See *supra* Part II.C.

181. See *supra* Parts II.A. to II.C.

182. *Abbott Labs., Inc.*, 900 F. Supp. at 29; *Steelcase*, 792 F. Supp. at 86-87.

183. See *Dynergy*, 375 F.3d at 849 n.15; *Glaxo Wellcome*, 58 F. Supp. 2d at 1039 ("It is noteworthy that the court in *Steelcase* did not cite any authority for this proposition, nor did it attempt to distinguish the other cases . . . which found the Eleventh Amendment was not a bar to removal of a state court action in which the state was a plaintiff."); *Oncor Communications*, 166 F.R.D. at 321 (citing *Steelcase* for the proposition that removal was barred, but not discussing its reasoning); *In re Pac. Gas & Elec. Co.*, 281 B.R. at 13 (stating that *Steelcase* is less persuasive, but not explaining why); *Rezulin*, 133 F. Supp. 2d at 297 (citing *Steelcase* as contrary authority but not discussing). *But see State Eng'rs of Nev.*, 66 F. Supp. 2d at 1170 (distinguishing *Steelcase* because it was decided on a case removed on diversity not federal question grounds).

184. *Steelcase*, 792 F. Supp. at 85-86.

185. *Id.* at 86. The court went on to hold that because of the Eleventh Amendment bar, removal was barred for lack of original jurisdiction. See also 28 U.S.C. § 1441(a) (2000). Removal is proper only if to a court with original jurisdiction, while the Eleventh Amendment "is in 'the nature of a jurisdictional bar.'" *Steelcase*, 792 F. Supp. at 85 (quoting *Alabama v. Pugh*, 438 U.S. 781, 782 (1978)). The Eleventh Amendment therefore precluded the court from having original jurisdiction.

186. See *supra* Part I.A.

187. See *supra* Part I.B., Part II.C.

any authority.¹⁸⁸ This statement is not entirely true. While *Steelcase* could have cited *Hans*, it cited *Alabama v. Pugh* and *Edelman v. Jordan*, which generally support its conclusion.¹⁸⁹ *Moore*, which agreed with the reasoning of *Steelcase*,¹⁹⁰ only states that it finds the reasoning in *Steelcase* to be sound;¹⁹¹ it does not state why it agrees with that reasoning.¹⁹²

Ultimately, therefore, whether courts find in favor of or against the states, they are doing so without any real explanation or examination of Supreme Court precedent. Even those courts that examine the policy behind the Eleventh Amendment do so half-heartedly.

There are four cases that directly address the policy of the Eleventh Amendment as it applies to this issue.¹⁹³ *Banco y Agencia* stated that a suit is against a state only if the judgment would (1) come from the public treasury, or (2) restrain government from acting or compel it to act.¹⁹⁴ The court quickly decided that because there was no counterclaim for money against the state, the Eleventh Amendment was not implicated.¹⁹⁵ It did not address other policies behind the Eleventh Amendment, such as protection of state dignity,¹⁹⁶ federalism,¹⁹⁷ or government processes.¹⁹⁸

The court advanced similar reasoning in *Terrebonne Parish School Board v. Mobil Oil Corp.*¹⁹⁹ There, the court identified protection against money judgments and political autonomy as policies behind the Eleventh Amendment.²⁰⁰ The court stated, "[w]e are aware of no case holding the Eleventh Amendment prevents removal of a suit filed by a state as a plaintiff. We conclude that the Eleventh Amendment is inapplicable."²⁰¹ The court did not attempt to address whether the identified policies would be served by disallowing removal;²⁰² nor did it examine Supreme Court precedent that was potentially analogous if not

188. *Glaxo Wellcome*, 58 F. Supp. 2d at 1039.

189. *Steelcase*, 792 F. Supp. at 86. *Seminole Tribe* and *Alden* were decided after *Steelcase*.

190. *Abbott Labs., Inc.*, 900 F. Supp. at 30-31.

191. *Id.*

192. *See id.*

193. *Cornyn*, 110 F. Supp. 2d at 514; *Acme Fill Corp.*, 1997 U.S. Dist. LEXIS 16847, at *3; *Terrebonne Parish Sch. Bd.*, 1989 U.S. Dist. LEXIS 13703; *Banco y Agencia*, 681 F. Supp. at 981.

194. *Banco y Agencia*, 681 F. Supp. at 982.

195. *See id.* at 983.

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

197. *See id.* at 750.

198. *See id.*

199. No. 89-1983, 1989 U.S. Dist. LEXIS 13703 (E.D. La. Nov. 9, 1989).

200. *Id.* at *1.

201. *Id.* at *1-2. This case was decided before *Steelcase* and *Moore*.

202. *See id.*

directly on point.²⁰³

Further, in *California v. Acme Fill Corp.*, the court concluded that the Eleventh Amendment was meant to “avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties’.”²⁰⁴ The court then concluded that the Eleventh Amendment did not apply when the state is a plaintiff.²⁰⁵ However, the statement of law the court quoted seems to support barring removal—a state, upon removal, is subjected to the coercive process of a federal court at the instance of a private party irrespective of its consent to appear in that forum. The court in *Acme* did not explain how preservation of dignity was or was not served by barring removal.²⁰⁶

In *Cornyn v. Real Parties in Interest*, the court noted that “courts have consistently held that when a state brings suit as plaintiff the Eleventh Amendment is not implicated.”²⁰⁷ It then concluded that:

Implicit in these holdings is the conclusion that where a state

203. *Id.*

204. *Id.* (quoting *P.R. Aqueduct & Sewer v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993)).

205. *Id.*

206. *See id.*

207. 110 F. Supp. at 531 (citing *Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1564 (Fed. Cir. 1997)). In *Eli Lilly*, the plaintiff state brought suit based on patent infringement in federal court. *Id.* at 1562. After the suit was transferred, the plaintiff argued that the transferee court lacked jurisdiction because as a state, it only consented to suit in the federal court in which it chose to file. *Id.* at 1564. The court concluded that the Eleventh Amendment did not apply because the state was a plaintiff. *Id.* It did not address whether the state had waived its immunity only in California, the state it filed in, because it claimed the Eleventh Amendment did not apply at all. *Id.* In deciding this, the court relied on *United States v. Peters*, 9 U.S. (5 Cranch) 115, 139 (1809), which states:

The right of a state to assert, as plaintiff, any interest it may have in a subject, which forms the matter in controversy between individuals, in one of the courts of the United States, is not affected by [the Eleventh] amendment; nor can [the amendment] be so construed as to oust the court of its jurisdiction, should such claim be suggested. The amendment simply provides, that no suit shall be commenced or prosecuted against a state. The state cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant.

Id. at 139. The reasoning in *Peters* is therefore the same as that in *Ames*, the courts of the United States have a duty to exercise jurisdiction when given to them. As discussed above, this reasoning has been discredited by the current Supreme Court in *Seminole Tribe v. Florida*. *See supra* Part II.B. Further, the reasoning of *Peters* is assuming a plaintiff voluntarily submitted to federal court jurisdiction. It does not assume a case where the state has not consented to suit in federal court at all.

initiates suit the policies behind sovereign immunity—namely, that states not suffer the indignity of being subjected to the “coercive process of judicial tribunals at the instance of private parties,” and that a state not be “thrust, by federal fiat and against its will, into the disfavored status of a debtor,” are not implicated.²⁰⁸

The approach the *Cornyn* court takes is consistent with the approach that this Article will employ in discussing the removal question. Are the policies of the Eleventh Amendment really served by allowing removal or disallowing it? The *Cornyn* court assumed that the policies are not served when the state is a plaintiff.²⁰⁹ The remainder of this Article will examine those policies.

III. SHOULD REMOVAL BE BARRED BY THE ELEVENTH AMENDMENT?

The Supreme Court usually decides if a certain action is barred by the Eleventh Amendment by examining the policies behind state sovereign immunity.²¹⁰ Here, the question is whether protection of state dignity, coffers, functioning, and federalism are served by applying state sovereign immunity in this context.²¹¹ Additionally, some consideration must be given to the interest of private parties.²¹²

A. *The Removal Statute*

First, however, an examination of the removal statute yields some interesting observations. Properly interpreted, the statute may be dispositive of the issue. Removal is permitted when the district courts of the United States have original jurisdiction over a suit filed in state court.²¹³ In the typical case where a private litigant seeks removal of a case in which the state is a plaintiff, the district court would have original jurisdiction based on a federal question.²¹⁴ Arguably, however, the district court would not have original jurisdiction over a state that did not consent to be there.²¹⁵

208. *Cornyn*, 110 F. Supp. 2d at 531 (quoting *Alden*, 527 U.S. 706) (internal citations omitted).

209. *Id.*

210. See, e.g., *Frew v. Hawkins*, 540 U.S. 431, 440–41 (2004); *Alden*, 527 U.S. at 750-52; *Atascadero State Hosp.*, 473 U.S. at 240 n.2.

211. See *supra* text accompanying notes 51-57 (discussing policies behind Eleventh Amendment as identified by *Alden*).

212. See, e.g., *Sheppard*, *supra* note 84 (arguing that *Lapides* placed fairness to individual litigants over state sovereignty).

213. 28 U.S.C. § 1441(a).

214. *Home Cable, Inc.*, 35 F. Supp. 2d at 788. See generally cases cited *supra* note 8. The basis of original jurisdiction cannot be diversity jurisdiction because the state is not a citizen of a state for diversity purposes. *Postal Tel. Co. v. Alabama*, 155 U.S. 482, 487 (1894); *Moor v. County of Alameda*, 411 U.S. 693, 717 (1973).

215. See *Pugh*, 438 U.S. at 782 (stating that the Eleventh Amendment is a

Furthermore, under 28 U.S.C. § 1441, the case must be removed to the “district court of the United States for the district and division embracing the place where such action is pending.”²¹⁶ In other words, the removal statute guarantees that removal will not result in a change of venue, choice of law, or district which does not have personal jurisdiction over the plaintiff.²¹⁷ For example, if Plaintiff A files suit against Defendant B in Los Angeles County, B may only remove to the district in which the state court sits—to the Central District of California. B could not remove, for example, to Alaska, a state that did not have personal jurisdiction over A. In other words, removal does not typically affect personal jurisdiction over the defendant or the plaintiff. Meanwhile, state sovereign immunity is more like a limit on personal jurisdiction than on subject matter jurisdiction.²¹⁸ Therefore, the effect of applying the removal statute to actions in which the state is a plaintiff is to grant the federal courts personal jurisdiction over the plaintiff state when it would not otherwise have it. Because the removal statute is not like a federal long-arm statute, perhaps it should not be applied in this context to create personal jurisdiction over the plaintiff state.

The argument that § 1441 should not allow removal is bolstered by the Courts’ holdings in both *Seminole Tribe* and *Alden*. In both of those cases, the Court held that a state’s sovereign immunity could not be abrogated by Congress’ exercise of Article I power.²¹⁹ Simply put, Congress cannot pass a law pursuant to its Article I power that alters state sovereign immunity. The removal statute—a jurisdictional statute passed pursuant to Congress’ Article I powers²²⁰—does exactly that if interpreted to allow removal of cases in which the state is a plaintiff. While § 1441 does not purport to abrogate state sovereign immunity, the effect of its application to suits in which the state is a plaintiff is state subjection to federal court without the state’s consent. This calls into question whether the removal

jurisdictional bar).

216. 28 U.S.C. § 1441(a).

217. See *Peterson v. BMI Refractories*, 124 F.3d 1386 (11th Cir. 1997) (stating that § 1441 provides for venue); *Orn v. Universal Auto Ass’n*, 198 F. Supp. 377 (D. Wis. 1961) (stating that § 1441 provides for venue). Cf. *Schwegmann Bros. Giant Super Markets, Inc. v. Pharmacy Reports, Inc.*, 486 F. Supp. 606 (E.D. La. 1980) (removal does not establish personal jurisdiction over defendant).

218. *Wisc. Dep’t of Corrections v. Schact*, 524 U.S. 381 (1998); *Ku v. Tennessee*, 322 F.3d 431 (6th Cir. 2003); *Siegel*, *supra* note 22, at 1213.

219. *Seminole Tribe*, 517 U.S. at 47; *Alden*, 527 U.S. at 712.

220. See Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 797-98 (2001) (not addressing removal statute specifically, but stating that Congress regulates federal jurisdiction within Article III limits, pursuant to the Necessary and Proper Clause).

statute can properly be interpreted as allowing removal in the first instance, especially presuming Congress enacted § 1441 in conformity with the Eleventh Amendment. Courts should interpret § 1441 as not abrogating state sovereign immunity, both because the Court has insisted such abrogations be clear²²¹ and because of the rule requiring avoidance of constitutional questions through fair statutory interpretation. If the court does allow removal, the next question is whether the policies underlying the Eleventh Amendment should support it.

B. State Dignity

Arguably, the impact on the dignity of the state is the same whether the state is brought into federal court as a plaintiff or defendant. The Supreme Court has described the dignity of the state as compromised when it is “called at the bar of the federal court” or “dragged before a court.”²²² A state is forced to litigate its interests in federal court whether it arrives at federal court as a plaintiff or defendant. The decision of the federal court is binding on the state whether the state is a plaintiff or defendant.²²³

The state’s dignity may further be compromised because of the interference with its choice of forum. Normally, a plaintiff’s choice of forum is given great weight; its convenience is a high priority for the courts.²²⁴ Courts conclude that plaintiffs should have access to courts located where they reside, with few exceptions.²²⁵ While normally these considerations only apply to transferring from one location to the next,²²⁶ the Supreme Court has held that “immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself.”²²⁷ In other words, states have a particular interest in choosing when and whether to appear in their own courts because of a special relationship states have with their own courts, free from federal interference.²²⁸ Allowing removal divests state courts of jurisdiction over suits involving states, even if those suits involve state claims.²²⁹ In the context of removal of a plaintiff

221. *Seminole Tribe*, 517 U.S. at 55.

222. *Alden*, 527 U.S. at 718 (quoting James Madison, in 3 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 533 (2d ed. 1854)).

223. *Steelcase*, 792 F. Supp. at 86.

224. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981). *See also* *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947).

225. *Koster*, 330 U.S. at 524. *See also* *Swift & Co. Packers v. Compania Colombiana del Caribe, S.A.*, 339 U.S. 684 (1950).

226. *See supra* cases cited notes 224-225.

227. *Alden*, 527 U.S. at 748.

228. *See id.*

229. *See* 28 U.S.C. § 1441(c) (stating that an entire case, even one involving state claims, may be removed if there is a federal basis for jurisdiction). *See also* *Magnolia*, 359 F.3d at 1237 (allowing removal of case that involved only

state action, choice of forum concerns implicate dignity because they implicate a state's ability to litigate in its own courts.²³⁰

C. State Cooffers

One of the most important reasons for state sovereign immunity is the protection of state coffers.²³¹ "Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States."²³² This concern is not evidently implicated by allowing removal. Where a state sues a private party for money damages, any judgment will come from the private party, not the state treasury. Moreover, whatever costs the state will incur in litigation, it will incur whether in state or federal court. While studies have shown that the cost of litigating in federal court is higher than in state court,²³³ this does not necessarily mean that litigating in federal court is more expensive to the litigants. Any additional costs are of secondary concern, considering the main purpose of the Eleventh Amendment is to protect states from suits seeking (often huge) money awards.²³⁴ This interest is regularly cited as one of the most important.²³⁵ However, it is not dispositive.²³⁶ Therefore, while the lack of impact on state budgets tends to show that removal should not be barred,²³⁷ it does not necessarily end our inquiry.

state law claims).

230. For further discussion of how sovereignty is impacted when the state is a plaintiff, see Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 412 (1995) (stating that there are instances in which a state may sue to assert its own sovereignty interests, and may wish to do so in its own courts).

231. *Alden*, 527 U.S. at 750.

232. *Id.* The Court argues that at the time of the founding, the states may have been forced into insolvency if made answerable for money damages. *Id.*

233. Richard C. Ausness, *The Case for a "Strong" Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1222 n.86 (1996) (stating that the cost to the court system for an average tort case is \$407 in state court and \$1740 in federal court).

234. In fact, because a case can get to trial faster in the federal system, the cost of litigating may be less. Tod Zuckerman & Mark Raskoff, 2 ENVIRONMENTAL INSURANCE LITIGATION: LAW AND PRACTICE § 12:2 (2003) (discussing advantages to federal court, and identifying speed in reaching trial as an advantage).

235. See, e.g., *Alden*, 527 U.S. at 750 (identifying this concern as one of "great substance"); *Edelman v. Jordan*, 415 U.S. 651, 662 (1974). See also Pfander, *supra* note 9.

236. See *Ex parte Young*, 209 U.S. 123 (allowing suit for injunction against state officials, but not state itself).

237. See *Banco y Agencia*, 681 F. Supp. at 982; *Terrebonne Parish Sch. Bd.*, 1989 U.S. Dist. LEXIS 13703, at *1.

D. State Functioning

Another purpose of the Eleventh Amendment is to protect the functioning of the government.²³⁸ Judgments issued by courts could affect the administration of government—policies set, resources used to implement them, and autonomy.²³⁹ At the heart of this concern is the preservation of representative government.²⁴⁰ The Court has reasoned that the decision by a state whether to enter into litigation or not is affected by popular support and competing concerns over the distribution of resources.²⁴¹ At first blush, this interest is not implicated by allowing removal when the state is a plaintiff because the state has brought suit; it has already weighed the costs of court involvement in its policy. These costs are the same whether in state or federal court, except that the state may have concluded it has a better chance of winning in state court.

However, a state may very well decide to sacrifice some of its autonomy²⁴² in state court, but not federal. Courts regularly assume that a state may choose to waive suit in state but not federal court.²⁴³ Additionally, there is less sacrifice of autonomy when the state submits to suit in its own courts than when it grants federal courts the power.

When state officials—that is, the attorneys and representatives of a state—make a decision to bring suit in state as opposed to federal court, they are making a decision as to the governance of the state, a decision that is interrupted by allowing removal. Therefore, interruption of independent state governance is implicated by allowing removal, and is accordingly an argument against allowing removal.

E. Federalism

The Eleventh Amendment is tied very closely to the question of when the federal government can exercise control over a state.²⁴⁴ What is the proper division between federal and state power, and

238. See, e.g., *Alden*, 527 U.S. at 750.

239. *Id.*

240. *Id.* at 751.

241. *Id.*

242. *Id.* at 752.

243. *Smith*, 178 U.S. at 441.

244. See *Alden*, 527 U.S. at 730 (stating that state sovereign immunity involved more than just a limit on federal jurisdiction, but also a “separate and distinct structural principle . . . not directly related to the scope of the judicial power established by Article III,” and that this power “inheres in the system of federalism established by the Constitution.”). In *Alden*, the Court held that the federal government, through its Article I power, could not compel states to appear in their own courts. *Id.* Accordingly, *Alden* was not about state court power over states as much as the power of the federal government to compel that power. *Id.* at 739.

can the federal government exercise power over state governments?

State interests may be implicated by suits in federal court specifically. First, *Hans*, *Seminole Tribe*, and *Alden* rest on the notion that haling a state involuntarily into federal court disrupts the proper relationship between the federal and state governments.²⁴⁵ Second, in *Louisiana Power & Light Co. v. Thibodaux*,²⁴⁶ the Court held that abstention by a federal court was proper in an eminent domain proceeding, where removal was based on diversity.²⁴⁷ The Court reasoned that abstention may “reflect a deeper policy derived from our federalism.”²⁴⁸ Particularly, an eminent domain proceeding is “intimately involved with sovereign prerogative.”²⁴⁹ The Court thought it important to avoid “serious disruption by federal courts of state government or needless friction between state and federal authorities.”²⁵⁰ Therefore, the Court found the state courts were better equipped to consider the issues raised by the proceedings.²⁵¹

Thibodaux illustrates that state sovereign interests can be implicated when a federal rather than a state court makes the decision.²⁵² Likewise, when a state files suit in state court, its decision to do so may be tied up with its sovereign interest.²⁵³ A federal usurpation of this decision may constitute “needless friction between state and federal authorities.”²⁵⁴

F. Fairness to Individual Litigants

James Madison is often quoted as saying:

[The federal jurisdiction] in controversies between a State and citizens of another State is much objected to, and perhaps without

245. *Hans*, 134 U.S. 1; *Seminole Tribe*, 517 U.S. at 44; *Alden*, 527 U.S. at 706. See *supra* Part I.

246. 360 U.S. 25 (1959).

247. *Id.* at 26.

248. *Id.* at 28.

249. *Id.*

250. *Id.*

251. *Id.* at 31.

252. See also *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (enumerating different types of abstention, and noting that in these situations, countervailing considerations guard against exercise of federal jurisdiction where otherwise given).

253. See cases cited *supra* note 8 (listing cases in which the state argued its sovereign interests were implicated by removal to federal court); Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 759 n.196 (1986) (discussing federalism concerns in enforcement of state interests).

254. *Thibodaux*, 360 U.S. at 28. See also Evan Lee, *On the Received Wisdom in Federal Courts*, 147 U. PA. L. REV. 1111 (1999) (claiming that one purpose of the federal system is to maintain state courts for effective constitutional adjudication, but advocating against this purpose).

reason. It is not in the power of individuals to call any State into court. The only operation it can have is that, if a State should wish to bring a suit against a citizen, it must be brought before federal court. This will give satisfaction to individuals, as it will prevent citizens on whom a State may have a claim being dissatisfied with the state courts. . . . It appears to me that this [clause] can have no operation but this—to give a citizen a right to be heard in federal courts; and if a State should condescend to be a party, this court may take cognizance of it.²⁵⁵

This statement directly questions the fairness of allowing states to sue in state court, presumably because of the potential for bias.

Arguably, an interpretation of the Eleventh Amendment that bars removal would be in direct contradiction with the fundamental assumptions behind the creation of federal courts—that federal courts are needed to avoid bias.²⁵⁶ The difficulty with this argument is that the Court has regularly denied access to federal courts by private litigants.²⁵⁷ The Court's original Supreme Court jurisprudence, for example, has assumed that there is no difficulty in a state litigating in its own court.²⁵⁸ Furthermore, the Court has rejected the argument that access to federal courts is necessary for the enforcement of federal law.²⁵⁹ In fact, some have argued in favor of channeling cases to state courts in order to improve the quality of state court adjudication of federal and constitutional issues.²⁶⁰ What remains, however, is a concern over

255. *Alden*, 527 U.S. at 775 (Souter, J., dissenting); *Seminole Tribe*, 517 U.S. at 70 n.12; *Atascadero State Hosp.*, 473 U.S. at 265 (Brennan, J., dissenting); *Nevada v. Hall*, 440 U.S. 410, 436 n.3 (1979) (Rehnquist, J., dissenting); *Hans*, 134 U.S. at 14; *Parden v. Terminal Ry.*, 311 F.2d 727, 730 (5th Cir. 1963).

256. See *Amar*, *supra* note 9, at 1440 (arguing that one of the purposes behind the creation of a federal government was to limit state governments, and that the purpose of these limits was to protect the sovereignty of the people).

257. See, e.g., *Hans*, 134 U.S. at 14-15.

258. See *Ohio v. Wyandotte*, 401 U.S. 493, 499 (1971) (denying the Supreme Court original jurisdiction in favor of litigation in state court, when a state was the plaintiff). In fact, state court was the only court available to the state plaintiff in *Wyandotte*. See *id.*

259. See, e.g., *Coll. Sav. Bank*, 527 U.S. at 701 (Breyer, J., dissenting) (stating that the Court's jurisprudence ignores the principle announced in *Cohens*); *Seminole Tribe*, 517 U.S. at 71-73 (stating that state sovereign immunity does not depend on the subject matter of the suit, and that historically concerns over enforcement of federal law in federal court could not have been particularly great because federal question jurisdiction was not conferred for a century).

260. See *Lee*, *supra* note 254, at 1121.

'We should strive to make both the federal and the state systems strong, independent, and viable. . . . If we are serious about strengthening our state courts and improving their capacity to deal with federal constitutional issues, then we will not allow a race to the courthouse to determine whether an action will be heard first in the federal or state

the appearance of bias—a concern of great validity in the eyes of some.²⁶¹

Additionally, a rule against removal would allow states an advantage that other litigants do not have—the right to prevent another's access to federal courts.²⁶² Even though state sovereign immunity itself sets the state above the private litigant,²⁶³ one could argue that after the litigation has begun, the state should be on equal footing with private litigants. To some extent, this argument has been impliedly rejected in other contexts. For example, a state may have access to privileges that cannot be asserted by private citizens.²⁶⁴ Furthermore, government actors may assert immunities not available to private citizens.²⁶⁵ These instances appear to illustrate that when there are countervailing interests,²⁶⁶ some subjugation of private interests is appropriate. Because of the policies behind the Eleventh Amendment, therefore, some disadvantage to private litigants may be warranted.

The effect of barring removal is to limit an individual's access to federal courts in favor of a state's assertion of autonomy and sovereignty. While many may argue against this result,²⁶⁷ these arguments are more of an indictment against the Eleventh Amendment in general. There do not appear to be disadvantages to litigants caused by barring removal that are not already caused by state sovereign immunity.

In fact, in those instances where the Court has shown most concern for fairness to private litigants, the state has engaged in some form of game-playing. For example, in *Reich v. Collins*,²⁶⁸ the

court. We should allow the state courts to rule first on the constitutionality of state statutes.'

Id. (quoting Justice O'Connor).

261. *See id.* at 1124-27 (arguing that state courts are inferior for the adjudication of constitutional claims because of state judge provincialism).

262. *See Seife, supra* note 9, at 1040 (arguing that the government should not be held above the people).

263. *See id.*

264. *See, e.g., CAL. EVID. CODE* § 1040 (West 2004) (creating a privilege for documents that constitute official information).

265. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982) ("[W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

266. *Shepherd v. Superior Court*, 550 P.2d 161, 170-73 (Cal. 1976) (discussing policies behind section 1040 of the California Evidence Code that outweigh a private litigant's need for information, including the proper functioning of law enforcement).

267. *See* articles cited *supra* note 9.

268. 513 U.S. 106 (1994).

state held out a “clear and certain post-deprivation remedy for taxes collected in violation of federal law.”²⁶⁹ Once a litigant sought to invoke that remedy, the state argued it had sovereign immunity.²⁷⁰ The Court held that “due process requires the State to provide the remedy it has promised.”²⁷¹ Likewise, in *Lapides* the state waived its sovereign immunity in state court, removed to federal court, and then sought to invoke its immunity again.²⁷² The Court held, in part, that fairness dictated its decision that the state waived its immunity when it removed.²⁷³ The Court would not allow the state to simultaneously invoke and reject federal court jurisdiction.²⁷⁴ In both of these cases, there was harm done to the individual distinct from that caused by the existence of sovereign immunity, and the Court responded by limiting the abuse. However, similar considerations do not appear to exist when the state seeks to limit its waiver to state court.²⁷⁵

IV. CONCLUSION

Because good arguments can be made on both sides, it is unfortunate that courts have kept their analysis of this issue to a fairly limited scope. The Supreme Court seems concerned with advancing the policies of the Eleventh Amendment, not with text, form, or strict adherence to precedent.²⁷⁶ Given this trend, the cases analyzing the removal issue seem oddly out of step. The best way to test the scope of the Eleventh Amendment in this context is to examine the question in a manner consistent with current Supreme Court concerns.

The federal removal statute itself should not be interpreted in a manner inconsistent with the dictates of the Eleventh Amendment. After examining the policies behind the Eleventh Amendment, it appears that removal violates its goals. Dignity, functioning of the states, and federalism are all served by barring removal. Additionally, concerns over fairness to individual litigants do not appear to override the advancement of those policies. The only policy that evidently is not implicated is the

269. *Alden*, 527 U.S. at 739 (discussing *Reich*).

270. *Reich*, 513 U.S. at 108.

271. *Alden*, 527 U.S. at 739.

272. 535 U.S. 613 (2002).

273. *Id.* at 622.

274. *Id.* at 619 (stating that it would be “anomalous or inconsistent” to allow the state to invoke federal jurisdiction only to argue it had immunity).

275. *Contra Dynegy*, 375 F.3d at 848 (characterizing the State’s challenge to removal as “selective use of ‘immunity’ to achieve litigation advantages”) (citing *Lapides*, 535 U.S. at 620).

276. *See, e.g., Alden*, 527 U.S. at 717 (discussing policies behind the Eleventh Amendment and rejecting any need to adhere to the text of the amendment, while facing withering criticism from the dissenting justices for failure to properly analyze history).

desire to protect states from money judgments. While this policy is important, it is not necessarily conclusive in answering whether removal should be barred. This analysis leads to the conclusion that the Court would most likely reject removal in this situation.