Volume 61, Issue 1 Page 1

Stanford Law Review

MANDATORY RULES

Scott Dodson

© 2008 by the Board of Trustees of the Leland Stanford Junior University, from the *Stanford Law Review* at 61 STAN. L. REV. 1 (2008). For information visit http://lawreview.stanford.edu.

ARTICLES

MANDATORY RULES

Scott Dodson*

Whether a limitation is jurisdictional or not is an important but often obscure question. In an article published in Northwestern University Law Review, I proposed a framework for courts to resolve the issue in a principled way, but I left open the next logical question: what does it mean if a rule is characterized as nonjurisdictional? Jurisdictional rules generally have a clearly defined set of traits: they are not subject to equitable exceptions, consent, waiver, or forfeiture; they can be raised at any time; and they can be raised by any party or the court sua sponte. This jurisdictional rigidity has led courts and commentators to overlook the fact that nonjurisdictional rules need not be the mirror inverse but may instead have attributes commonly associated with jurisdictionality. A nonjurisdictional rule might, for example, be "mandatory," meaning that it is subject to waiver or forfeiture, but if properly raised by the party for whose benefit it lies, it has the jurisdictional-like attribute of being immune to equitable exceptions. This Article is the first to take a hard look at nonjurisdictional rules and, particularly, "mandatory" rules. It first argues that they have an important institutional role to play in our procedural system. It then shows that, in practice, mandatory but nonjurisdictional characterizations may help explain a number of perplexing doctrines. As an example, the Article demonstrates how such a characterization can help reconcile the convoluted doctrine of state sovereign immunity. Ultimately, the Article suggests that a greater appreciation for mandatory rules both can benefit the procedural system and can broaden our view of what salutary roles nonjurisdictional rules can play.

INTRODUCTION..2
I. UNDERSTANDING NONJURISDICTIONAL RULES..4
A. *Avoiding the False Dichotomy*..4
B. *The Effects of the False Dichotomy*..6
II. A ROLE FOR MANDATORY RULES..9

* Visiting Associate Professor of Law (Fall 2008), Duke University School of Law; Assistant Professor of Law, University of Arkansas School of Law. This Article benefited from comments received during presentations to the faculties of Duke University School of Law and Seattle University Law School. Also, thanks to Aaron Bruhl for comments on an earlier draft. A generous research grant from the University of Arkansas School of Law supported the completion of this Article.

A. *Mandatory Rules Defined* 9
B. *Institutional Benefits* 10
C. *A Case Study: Section 2107*....................11
1. *Nonjurisdictional* 11
2. *Mandatory* 13
3. *Some conclusions*....................15
III. MANDATORY SOVEREIGN IMMUNITY....................15
A. *A Brief Background on State Sovereign Immunity*....................16
B. *The Case for a Nonjurisdictional State Sovereign Immunity* 18
1. *Presumption of jurisdictionality* 19
2. *Function*....................20
3. *Effects* 23
4. *Doctrinal and cross-doctrinal consistency* 25
C. *The Case for a Mandatory Sovereign Immunity*....................28
1. *No sua sponte requirement* 28
2. *Forfeitability*....................29
3. *No availability of equity*....................32
CONCLUSION....................34

INTRODUCTION

How does one determine whether a particular rule is jurisdictional or not? Over the last few years, the Court has focused on this question. Since 2004, the Court has determined that Bankruptcy Rule 4004, which gives a Chapter 7 creditor sixty days after the first creditors' meeting to object to debtor discharge,[1] is nonjurisdictional;[2] that Federal Rule of Criminal Procedure 33(b)(2), which sets a time limit to file a motion for a new trial,[3] is nonjurisdictional;[4] that Title VII's "employee-numerosity requirement"[5] is a nonjurisdictional element of the claim;[6] and that the time limit to extend the filing of a notice of appeal in a civil lawsuit[7] is jurisdictional.[8] And, just a few months ago, the Court decided that the six-year statute of limitations in the Tucker Act is a quasi-jurisdictional bar to suit.[9]

The Court is right to be attentive. Whether a rule is jurisdictional or not affects both litigants and the courts in important ways. Though I believe that the Court has yet to develop a principled framework for resolving the issue,[10]

1. FED. R. BANKR. P. 4004(a).
2. *See* Kontrick v. Ryan, 540 U.S. 443, 447 (2004).
3. FED. R. CRIM. P. 33(b)(2).
4. *See* Eberhart v. United States, 546 U.S. 12, 15-19 (2005) (per curiam).
5. Arbaugh v. Y & H Corp., 546 U.S. 500, 504 (2006); *see* 42 U.S.C. § 2000e-5 (2000).
6. *See Arbaugh*, 546 U.S. at 514-16.
7. 28 U.S.C. § 2107(c) (2000).
8. *See* Bowles v. Russell, 127 S. Ct. 2360 (2007).
9. *See* John R. Sand & Gravel Co. v. United States, 128 S. Ct. 750 (2008).
10. *See* Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55

the Court is correct to recognize the issue as an important one and to continue to strive for a workable and sensible resolution.

But the jurisdictional inquiry also implicates another question of equal importance, but that has received less attention and thought. What does the determination that a rule is jurisdictional or not mean? For a jurisdictional rule, the answer is (usually) easy.[11] A jurisdictional rule can be raised by any party at any time, including for the first time on appeal; it obligates the court to police compliance sua sponte; and it is not subject to principles of equity, waiver, forfeiture, consent, or estoppel.[12]

By contrast, the effects of a nonjurisdictional characterization are far less studied. Often, courts and commentators simply assume that nonjurisdictional rules have all of the inverse effects of jurisdictional rules: that is, they must be raised by a particular party by a particular time or they are forfeited; they are subject to consent and waiver and estoppel; and they are subject to principles of equity. Thus, some courts and commentators have assumed that if a rule has any attributes of jurisdictionality, it must be jurisdictional, and that if a rule is nonjurisdictional, then it must have no attributes of jurisdictionality.[13] In addition, that assumption is made without any meaningful discussion of what attributes the nonjurisdictional rule in question should have as an institutional, analytical, or normative matter.[14] As I will explain, that assumption is wrong, and reliance on it reflects a deep misunderstanding of, and underappreciation for, nonjurisdictional rules.

This Article is the first to take a hard look at nonjurisdictional rules and the important roles they can play. Part I illustrates how courts and commentators have tended to confine nonjurisdictional rules to the mirror inverse of jurisdictional rules, and it exposes this rigid treatment of jurisdictional and nonjurisdictional rules as a false dichotomy. Nonjurisdictional rules need not have the opposite effects of jurisdictional rules—nor do they invariably in practice. The point is that characterizing a rule as nonjurisdictional does not tell us much about the rule's effects, and identifying a particular jurisdictional attribute of a rule does not tell us whether the rule is jurisdictional or not. As a result, courts and commentators falling victim to this false dichotomy often commit one of two errors. Either they erroneously mischaracterize a nonjurisdictional rule as jurisdictional, or they erroneously mischaracterize a nonjurisdictional rule as having no jurisdictional effects.

Part II argues that this false dichotomy also obscures the opportunity to explore a more nuanced approach, in which a nonjurisdictional rule has some, but not all, of the attributes commonly associated with jurisdictionality. As an

(2008) (developing such a framework).

11. *See infra* note 15.

12. *See infra* note 16.

13. *See infra* text accompanying notes 17-19.

14. *See infra* note 17.

example, this Part focuses on the importance of the oft-overlooked "mandatory" rule, a species of nonjurisdictional rules that has both nonjurisdictional and jurisdictional effects. A mandatory rule is susceptible to waiver, forfeiture, and consent, and it need not be policed by the court sua sponte. But it is, like jurisdictional rules, immune to equitable excuses for noncompliance. The benefits of such a rule are important, though—unfortunately—overlooked.

Part III argues that closer attention to nonjurisdictional rules with jurisdictional attributes can have a positive doctrinal impact. Shedding the blinders of the false dichotomy can help explain and conceptualize some of the more curious doctrinal anomalies. State sovereign immunity is one example. Though often characterized as a jurisdictional doctrine, it can be waived or consented to. The false dichotomy separating nonjurisdictional rules from jurisdictional rules has no place for this strange doctrine, and, as a result, scholars and courts have struggled to explain it. But taking the blinders off reveals that a mandatory characterization goes a long way towards reconciling the anomaly and bringing some consistency to what has been a tortuous doctrine.

I conclude by zooming out to a broader view. A greater appreciation for nonjurisdictional rules with jurisdictional attributes can alleviate blind adherence to the false dichotomy and potentially be a powerful tool for a richer understanding of both complex and everyday doctrines.

I. UNDERSTANDING NONJURISDICTIONAL RULES

Nonjurisdictional rules are routinely misunderstood. If a court decrees a rule to be nonjurisdictional, its next step often is not analytical at all, but instead is formalistic: the court simply gives the nonjurisdictional rule the inverse effects of jurisdictionality, without further analysis. As I explain in more detail below, that dispensation is too facile.

A. *Avoiding the False Dichotomy*

Jurisdictional rules (usually) have clear and well-settled effects.[15] A

15. I say "usually" because there are at least three areas in which a jurisdictional rule's effects might be more complicated. First, the rule might be jurisdictional without implicating subject-matter jurisdiction. Personal jurisdiction, for example, can be waived. Second, a jurisdictional rule might have nonjurisdictional preconditions. Appellate jurisdiction, for example, will not attach without a notice of appeal being filed, but what constitutes a notice may be subject to some equitable flexibility. Third, a rule could be jurisdictional yet also contemplate, either expressly or implicitly, the effects of equity or waiver. The deadline to file a notice of appeal in a civil case, for example, may be jurisdictional, but the statute governing that deadline specifically allows courts to extend it for certain equitable reasons. *See generally* Scott Dodson, *Appreciating Mandatory Rules: A Reply to Critics*, 102 NW. U. L. REV. COLLOQUY 228 (2008), http://colloquy.law.northwestern.edu/main/2008/02/

jurisdictional rule can be raised by any party at any time, including for the first time on appeal; it obligates the court to police compliance sua sponte; and it is not subject to principles of equity, waiver, forfeiture, consent, or estoppel.[16]

By contrast, nonjurisdictional rules do not have the same rigid effects. Nevertheless, courts and commentators have tended to express nonjurisdictional rules as having the inverse effects of jurisdictional rules.[17] Even the Supreme Court has contributed to the trend. In *Day v. McDonough*, the Court stated that nonjurisdictional deadlines are subject to waiver and forfeiture and impose no obligation on courts to raise them sua sponte.[18]

Thus, as Perry Dane has noted in the specific context of time prescriptions, the characterization question "always rests on an explicit contrast. . . . [I]f a time limit is jurisdictional, the court will read it or treat it one way; if it is not jurisdictional, the court will read it or treat it another way."[19] The assumption behind the question is that a jurisdictional characterization has one set of effects and a nonjurisdictional characterization has a wholly different set of effects.

This automatic characterization of nonjurisdictional rules as the inverse of jurisdictional rules—that they are subject to waiver, consent, forfeiture, and equitable exceptions and that they need not be raised (or cannot be raised) sua sponte by the court—is erroneous.

---

appreciating-ma.html (exploring these possibilities). Both for simplicity's sake and to focus the discussion on the underexplored nonjurisdictional side of the equation, I will confine "jurisdictional" to matters of subject-matter jurisdiction and avoid ruminating, at least for now, on different species of jurisdictional rules.

16. *See* United States v. Cotton, 535 U.S. 625, 630 (2002) ("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived."); Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999) (stating that courts have an independent obligation to determine whether subject-matter jurisdiction exists, even if not challenged by any party); Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinée, 456 U.S. 694, 702 (1982) (setting out characteristics of subject-matter jurisdiction).

17. *See, e.g.*, United States v. Lee, No. 06-51399, 2007 WL 2693073, at *1 (5th Cir. Sept. 10, 2007) (per curiam) ("[T]ime limits not imposed by statute are not jurisdictional. The specific implication is that these time limits may be waived." (internal citations omitted)); Cook v. United States, No. 06-5276, 2007 WL 2566014, at *3 (6th Cir. Sept. 5, 2007) ("[J]urisdictional rules are mandatory; therefore, their time limits cannot be waived. On the other hand, claim-processing rules are not jurisdictional—thus, their time limits *can* be waived." (emphasis in original) (citation omitted)); E. King Poor, *Jurisdictional Deadlines in the Wake of* Kontrick *and* Eberhart*: Harmonizing 160 Years of Precedent*, 40 CREIGHTON L. REV. 181, 208 n.172 (2007) ("The importance of the distinction [between jurisdictional and nonjurisdictional characterizations] was that non-jurisdictional deadlines are subject to equitable exceptions, described as 'waiver, estoppel, and equitable tolling.'" (quoting Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982))).

18. 547 U.S. 198, 205 (2006) ("A statute of limitations defense . . . is not 'jurisdictional,' hence courts are under no *obligation* to raise the time bar sua sponte." (emphasis in original)); *id.* at 213 (Scalia, J., dissenting) ("We have repeatedly stated that the enactment of time-limitation periods such as that in § 2244(d), without further elaboration, produces defenses that are nonjurisdictional and thus subject to waiver and forfeiture.").

19. Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 12 (1994).

In truth, nonjurisdictional rules do not have so rigid a set of effects as jurisdictional rules. Indeed, many nonjurisdictional rules exhibit some attributes of jurisdictionality. For example, certain nonjurisdictional bankruptcy rules may not be susceptible to consent or equitable exception.[20] Certain nonjurisdictional criminal procedure rules have been characterized as "inflexible," suggesting that they are immune from equitable exceptions.[21] The nonjurisdictional exhaustion requirement imposed on a state prisoner seeking a federal writ of habeas corpus cannot be forfeited by the State or subject to estoppel.[22] And federal courts may, in appropriate circumstances, raise a petitioner's procedural default sua sponte to bar habeas corpus review under the nonjurisdictional independent and adequate state grounds doctrine, even if the state forfeited the argument.[23] Courts may raise and decide many other nonjurisdictional limits sua sponte.[24] And several commentators have picked up on the idea that nonjurisdictional rules can be mandatory or nonwaivable.[25]

As these examples show, nonjurisdictional rules are not inherently prohibited from having jurisdictional effects. As a result, it is wrong to assume that jurisdictional rules have one set of fixed effects and nonjurisdictional rules have another. The dichotomy is simply false.

B. *The Effects of the False Dichotomy*

Adherence to the dichotomy has at least two consequences, both of which lead to analytically inconsistent results. First, it obscures a middle path that may be more accurate. For example, a rule might be nonjurisdictional yet exhibit jurisdictional traits. The false dichotomy does not allow for such a rule and therefore may lead to an incorrect result or doctrinal confusion.

Second, judicial adherence to the false dichotomy risks either over- or underdeciding the case. Imagine, for example, a case that presents the question

---

20. *Cf.* Kontrick v. Ryan, 540 U.S. 443, 457 n.12 (2004) (noting the possibility that a debtor and creditor may not be able to stipulate to the assertion of time-barred claims when their assertion would prejudice other creditors); *id.* at 457 n.11 (noting a split in the lower courts as to whether equitable exceptions can excuse noncompliance with the deadline to object to a debtor's discharge).

21. Eberhart v. United States, 546 U.S. 12, 19 (2005) (characterizing Federal Rule of Criminal Procedure 45(b) as "inflexible").

22. 28 U.S.C. § 2254(b)(3) (2000).

23. *Day*, 547 U.S. at 206-07 (citing the unanimity of the circuits on this issue).

24. *See, e.g.*, Arizona v. California, 530 U.S. 392, 412 (2000) (res judicata defense); Schiro v. Farley, 510 U.S. 222, 229 (1994) (retroactivity); Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962) (failure to prosecute); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (forum non conveniens).

25. *See, e.g.*, Dane, *supra* note 19, at 39 ("First, legal rules can be mandatory without being jurisdictional."); Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457, 1497 (2006) ("Courts can still apply nonjurisdictional rules with rigidity and decide, for example, that even if a particular rule is nonjurisdictional, it still cannot be waived.").

of whether a rule is susceptible to equitable exceptions. A court that construes the rule as jurisdictional might resolve the question but only by overdeciding it: by characterizing the rule as jurisdictional, the court has silently resolved other questions not presented (and likely never briefed), such as whether the rule must be policed sua sponte by the court or whether the rule is subject to equitable exceptions. On the other hand, a court that construes the rule as nonjurisdictional but decides nothing further has underdecided the issue by merely begging the question of what jurisdictional attributes (such as being unsusceptible to equitable exceptions) the rule nonetheless might have.

Take, as an example of these problems, the Supreme Court's recent decision in *Bowles v. Russell*, about which I will have more to say later. There, Keith Bowles petitioned for a federal writ of habeas corpus, which the district court denied.[26] Under 28 U.S.C. § 2107, Bowles had thirty days to appeal.[27] He did not do so within that deadline. Instead, after the deadline had passed, Bowles moved to reopen the time to file an appeal,[28] a motion authorized by § 2107.[29] The district court granted Bowles's motion to reopen the time for appeal on February 10, 2004.[30]

In the district court's order, the district court gave Bowles seventeen days, until February 27, to file his notice of appeal. Accordingly, Bowles filed his notice of appeal on February 26.[31] However, § 2107(c) limits a reopened time period to fourteen days.[32] Thus, Bowles's notice of appeal was timely under the district court's order but untimely under § 2107(c).

The State successfully moved to dismiss Bowles's appeal, arguing that the notice of appeal was untimely under § 2107(c) and that the Court of Appeals therefore lacked jurisdiction to hear the appeal. Bowles sought certiorari review in the Supreme Court, arguing that the deadline was not jurisdictional and that the Court should excuse his noncompliance with the statutory deadline because he relied on the district court's order.[33]

The Supreme Court agreed with the State and affirmed the decision of the lower court in a 5-4 decision authored by Justice Thomas. Relying primarily on the statements of past cases, the Court held the rule to be jurisdictional.[34] And, because the deadline was jurisdictional, it was not susceptible to the equitable excuse proffered by Bowles.[35]

---

26. Bowles v. Russell, 127 S. Ct. 2360, 2362 (2007).

27. 28 U.S.C. § 2107(a) (2000); *see also* FED. R. APP. P. 4(a)(1)(A).

28. *Bowles*, 127 S. Ct. at 2362.

29. 28 U.S.C. § 2107(c); *see also* FED. R. APP. P. 4(a)(6).

30. *Bowles*, 127 S. Ct. at 2362.

31. *Id.*

32. 28 U.S.C. § 2107(c); *see also* FED. R. CIV. P. 4(a)(6).

33. *Bowles*, 127 S. Ct. at 2362-63.

34. *Id.* at 2363 ("This Court has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'").

35. *Id.* at 2366.

As I have argued elsewhere, there are a number of good reasons to criticize *Bowles*.[36] One reason, however, is particularly relevant here. The issue in *Bowles*, in its narrowest sense, was whether the district court had the power to extend the time to file the notice of appeal beyond the time set by § 2107(c) for equitable reasons not recognized in the statute. But the issue the Court actually considered was whether the statutory time limit was jurisdictional. True, in answering "yes," *Bowles* did resolve the narrower issue. But at the same time, the Court also resolved other issues *sub silentio* that, though neither presented by the facts nor addressed by the Court, necessarily follow from a jurisdictional characterization. Thus, by declaring the deadline jurisdictional, *Bowles* requires courts to police the deadline sua sponte, makes the deadline unsusceptible to waiver, forfeiture, or consent, and allows noncompliance to be raised at any time by any party—including the party who missed the deadline in the first place. Although none of these issues was presented by the parties in *Bowles* or, as far as I can tell, considered by the Court, the Court's jurisdictional ruling decided them anyway. And, as I will explain below, a more principled consideration of them might have led to a different characterization.

For what it is worth, the dissent in *Bowles* fell victim to the same trap. The dissent would have held the deadline nonjurisdictional and therefore amenable to the equitable excuse presented in the case.[37] But a nonjurisdictional characterization, rather than leading to that result, merely begs it. Not all nonjurisdictional rules are amenable to equitable excuses, and there are good reasons why the deadline to file a notice of appeal is one of those that is not.[38]

Thus, neither the majority nor the dissent confronted directly the narrow question presented, which was whether the deadline is mandatory (and therefore not subject to equitable exceptions). Worse, neither the majority nor the dissent even acknowledged the possibility of a middle path—that the rule might be nonjurisdictional yet unsusceptible to equitable exceptions. The Justices' focus on the false dichotomy described above obscured that possibility. That is a shame, for, as I will argue below, a mandatory but nonjurisdictional characterization of § 2107 has much to commend it.[39]

Bowles therefore illustrates the two perverse effects that the false dichotomy engenders. First, the dichotomy focused the Court's inquiry on a question whose answer was either broader than necessary (the majority's jurisdictional characterization) or narrower than needed (the dissent's nonjurisdictional characterization) to resolve the case. And, second, it hid from the Court a critical piece of the puzzle: the possibility that a rule might be mandatory without being jurisdictional.

---

36. *See, e.g.*, Scott Dodson, *Jurisdictionality and* Bowles v. Russell, 102 NW. U. L. REV. COLLOQUY 42, 46 (2007), http://www.law.northwestern.edu/lawreview/colloquy/2007/21/; Dodson, *supra* note 10, at 78 & n.126.

37. *Bowles*, 127 S. Ct. at 2367 (Souter, J., dissenting).

38. *See* Dodson, *supra* note 36, at 46.

39. *See* discussion *infra* Parts II.C.1, II.C.2.

II. A ROLE FOR MANDATORY RULES

Had the Court in *Bowles* appreciated the nuances of jurisdictional and nonjurisdictional characterizations rather than focusing on the false dichotomy, it might have avoided the problems identified above.[40] Convincing courts and commentators to look outside the dichotomy is thus a laudable goal. As a step toward that goal, I will show that the jurisdictional traits of nonjurisdictional rules can have valuable and important roles to play. Take, as just one example, the "mandatory rule."

A. *Mandatory Rules Defined*

A mandatory rule is nonjurisdictional but nevertheless has the jurisdictional attribute of being unsusceptible to equitable excuses for noncompliance.[41] Thus, a mandatory rule has the nonjurisdictional attributes of being waivable, forfeitable, and consentable, and a court has no obligation to monitor it sua sponte. However, if the rule is properly invoked by the party for whose benefit it lies, a court has no discretion to excuse noncompliance.[42]

---

40. The Court has previously dispensed with a jurisdictional question in favor of a narrower ruling. *See* Hallstrom v. Tillamook County, 493 U.S. 20, 31 (1989) (declining to answer the question presented—whether the Resource Conservation and Recovery Act's sixty-day notice provision was jurisdictional—and instead resolving the narrower question presented by the facts, namely whether the provision was amenable to equitable exceptions).

41. *See* Dodson, *supra* note 36, at 46-47. Note that my definition is critically different than Justice Souter's, who describes a mandatory rule as one that, while "enforceable at the insistence of a party claiming its benefit or by a judge concerned with moving the docket, it may be waived or mitigated in exercising reasonable equitable discretion." *Bowles*, 127 S. Ct. at 2368 (Souter, J., dissenting). I take this to mean that Justice Souter believes a mandatory rule may be mitigated through the exercise of reasonable equitable discretion. I disagree with that definition. Allowing a "mandatory" rule to be subject to equitable discretion would render the "mandatory" moniker meaningless, for there would be nothing "mandatory" about it.

42. I am of two minds as to whether a mandatory rule should generally allow or bar equitable estoppel. The principle of equitable estoppel is that where one party has, by his representations or conduct, induced the other party to give him an advantage that would be against equity and good conscience for him to assert, he should not be permitted to avail himself of that advantage in a court of justice. Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 234 (1959). On the one hand, equitable estoppel could be viewed as a form of waiver—one that is implied or forced based on the equitable doctrine that a party's own behavior has deprived him of the right to benefit from the legal rule. *See* Dane, *supra* note 19, at 66-67. On the other hand, equitable estoppel is actually the opposite of waiver because it arises only when a party timely invokes the rule—it is only that equity deems the invocation ineffective. While generally I can see both arguments, specifically I believe, as I discuss in more depth below, that equitable estoppel should not be available in the context of state sovereign immunity. *See infra* text accompanying notes 182-190.

B. *Institutional Benefits*

The benefits of such a rule in theory should be obvious. Waiver, consent, and forfeiture allow the parties to designate which issues require court decision and which are of such relative unimportance to the parties that they would rather forgo the costs of litigating them. They allow the parties to engage in minisettlements during the litigation, trading the invocation of a mandatory rule for a concession by the other side. They promote finality by ensuring that a relatively unimportant rule that is waived and quickly forgotten will not rise later on its own to unravel months' or years' worth of litigation and the settled expectations and choices of the parties. And, they reduce the unfairness of allowing the noncomplying party to raise her own default as a basis for overturning an adverse result. In sum, mandatory rules further efficiency and economy, encourage settlement, maintain finality, and promote fairness, all while preserving litigant autonomy and the adversarial process.[43]

In addition, a mandatory but nonjurisdictional characterization relieves the court of the burden to police the rule sua sponte, an obligation that can impose significant costs on a court. Free of that duty, a court need not monitor when the rule's requirement approaches and need not fret over whether the parties have complied when it arises. Instead, the court need only address the rule if the party for whose benefit it lies properly raises it, and the court can rely on the parties to brief the issue. Thus, mandatory rules further accuracy and conserve judicial resources by ensuring that the courts need only resolve the issue when the parties have raised and briefed it.

Inflexibility—even in the face of equity—also has its virtues. Precluding equitable excuses incentivizes compliance, maintains finality and reliance interests, constrains judicial discretion and thus promotes fairness and equity across cases, furthers the rule of law, and conserves judicial resources by avoiding the need to litigate a host of potential equitable issues.[44] The primary detraction is that the preclusion of equitable excuses might be harsh and unfair in specific cases. But, at least in theory, some situations call for a rule that elects inflexibility over equity.

Neither a jurisdictional rule nor a nonjurisdictional, nonmandatory rule can boast of all of these benefits. That is not to say that a mandatory characterization is warranted in every situation. To the contrary, other situations may call for a jurisdictional rule, or perhaps for a nonjurisdictional rule that must be policed by the courts on their own. But my point is that we ought to break from the dichotomy to explore the various combinations available in the middle of the road that occupy beneficial niches. Mandatory

---

43. *Cf.* Mark A. Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 GA. L. REV. 399, 419 (1986) (discussing similar benefits).

44. *Cf.* Dane, *supra* note 19, at 20-21 ("Strictly construed time limits create incentives for compliance. They encourage repose and advance finality. They reduce the burden on courts of deciding when leniency is in order." (citation omitted)).

rules are just the particular species I have chosen to illustrate this idea.

C. *A Case Study: Section 2107*

Practicality, however, is necessary to validate theory. I therefore propose that a nonjurisdictional but mandatory characterization would have fit quite well with the statutory deadline for filing a notice of appeal that was at issue in *Bowles*. I will make both the nonjurisdictional case and the mandatory case for characterizing the deadline to file a notice of appeal in a civil case.[45]

1. *Nonjurisdictional*

Elsewhere I have developed a framework for determining whether a rule is jurisdictional or not in the removal context,[46] and I think the analysis is generally importable to the context here.

For such a statutory rule, a court first should consider whether Congress expressly designed the rule as jurisdictional. If so, then courts should presume the rule to be jurisdictional. After all, Congress is the branch with the constitutional authority to regulate the jurisdiction of the courts, and a clear statement of jurisdictionality should presumptively control.[47] For § 2107, there is no clear statement of jurisdictionality. Congress directed that no notice of appeal "shall" be brought unless filed within thirty days,[48] but nothing suggests that this word means "jurisdictional" as opposed to "mandatory."[49] Congress could have instead directed that "the appellate court shall have no jurisdiction unless a notice of appeal is filed within thirty days," but it did not in fact speak in such jurisdictional terms. Thus, the presumption is inapplicable.

Absent a presumption, a rule could still be jurisdictional, but the character will depend upon three other factors. First, what is the function or purpose of the rule? Is the rule directed primarily at the power of the court and underlying societal values such as federalism, or is it directed at the rights, obligations, or conveniences of the parties? Is it to separate classes of cases, or is it to provide a mode of procedure? Jurisdictional rules generally speak to the power of the court or underlying societal values and separate classes of cases. Nonjurisdictional rules, on the other hand, generally speak to the rights and

---

45. Unlike a court, which should worry about the dangers of overdeciding or underdeciding the specific case before it, *see supra* text accompanying notes 36-38, I mean to characterize the statute fully and for a broader purpose. I do not mean to suggest that the Court should have followed my methodological approach wholesale in *Bowles*.

46. Dodson, *supra* note 10, at 66-78.

47. *Id.* at 66.

48. 28 U.S.C. § 2107(a) (2000).

49. *Cf.* Kontrick v. Ryan, 540 U.S. 443 (2004) (holding nonjurisdictional Bankruptcy Rule 4004(a), which prescribes that an objecting creditor "shall" file within sixty days).

obligations of the parties and regulate the process or mode of the case.[50]

This factor supports a nonjurisdictional characterization of § 2107. The purpose of the time limit is to provide notice of the appeal and discourage litigation of stale issues. These primarily benefit the litigants rather than broader societal interests.[51] This purpose is reinforced by the use of the phrase "is filed" in the rule: "no appeal shall bring any judgment, order or decree . . . unless notice of appeal is filed, within thirty days."[52] Though in the passive voice, the phrase "is filed" most sensibly speaks to the parties rather than to the appellate court. It is true that a notice of appeal shifts power from a district court to an appellate court,[53] but that shift is caused by the very existence of a notice of appeal, not its timing. Also, while the deadline does separate appeals filed in less than thirty days from appeals filed in more than thirty days, those are not the kind of "classes of cases" that jurisdictional lines typically draw. Rather, the deadline appears more directed towards requiring litigant action than distinguishing between inherently different cases. In short, there is no reason to think that the timing of the notice of appeal (at least as opposed to its mere existence) has any jurisdictional function.

Second, courts should consider the effects of a jurisdictional or nonjurisdictional characterization, including (1) the burdens on courts to monitor compliance sua sponte, (2) the benefits of allowing parties to consent to noncompliance, (3) the burden on the appellee to discover and prove noncompliance, and (4) the resulting inefficiencies and equities of a particular characterization.[54]

This factor supports a nonjurisdictional characterization of § 2107 as well. The first and third effects basically cancel each other out. Dates are counted fairly easily, and any extension must be applied for by motion.[55] Thus, the burden on the court to monitor compliance on its own is relatively light and is effectively the same as the burden on the appellee to discover and prove noncompliance.

But the other effects more strongly point to a nonjurisdictional characterization. Allowing the appellee to be able to consent to an extension of the time to appeal permits the parties to choose to avoid litigating what constitutes "excusable neglect or good cause,"[56] a determination that might otherwise be fact-intensive, time-consuming, and difficult for the court.

50. Dodson, *supra* note 10, at 71-72.

51. Hall, *supra* note 43, at 399-400 ("[A]ppeal periods are like original jurisdiction limitation periods: they involve primarily the interests of the immediate parties, not fundamental societal interests."); Lees, *supra* note 25, at 1496.

52. 28 U.S.C. § 2107(a).

53. *See* Lees, *supra* note 25, at 1496 (arguing that power shifts support a jurisdictional characterization).

54. Dodson, *supra* note 10, at 77.

55. 28 U.S.C. § 2107(c) (conditioning extensions on the filing of a motion).

56. *Id.* (allowing an extension "upon a showing of excusable neglect or good cause").

Similarly, a jurisdictional characterization for a timing defect that happens to go unnoticed may ultimately unravel a fully argued appeal, including even a rehearing and rehearing en banc, wasting litigant and judicial time and resources. On balance, the effects of the potential characterizations favor applying a nonjurisdictional characterization.

Third, courts should consider doctrinal and cross-doctrinal consistency.[57] What characterization is most consistent with any historical treatment of the doctrine at issue or its equivalents? For § 2107, this factor either is neutral or supports a nonjurisdictional characterization. Although there is some language in prior precedent that terms the deadline as "mandatory and jurisdictional,"[58] that precedent is far from clear or consistent.[59] In addition, the treatment of a time limit to appeal as jurisdictional is in tension with the long tradition of characterizing statutes of limitations as nonjurisdictional.[60]

Taking all of these factors into consideration suggests that the time to file a notice of appeal in a civil case under § 2107 is nonjurisdictional. But, as I have argued, that a rule is nonjurisdictional does not make it nonmandatory.

2. *Mandatory*

There are good reasons for characterizing the deadline to file a civil notice of appeal as mandatory (and therefore not amenable to equitable exceptions) even if it is nonjurisdictional. First, Congress wrote that "no appeal shall [be brought] . . . unless notice of appeal is [timely] filed."[61] The word "shall," though not dispositive as to a jurisdictional characterization, normally does create a mandatory obligation.[62]

Second, Congress expressly provided specific and detailed exceptions—excusable neglect or good cause—and strict time limits both for raising them and for extending the time to appeal once an exception is met.[63] Its deliberate choices suggest that lawmakers meant to restrain judicial discretion from going

---

57. Dodson, *supra* note 10, at 78.

58. *See* Bowles v. Russell, 127 S. Ct. 2360, 2363 (2007).

59. *See* Scott Dodson, *The Failure of* Bowles v. Russell, 43 TULSA L. REV. 631, 635-43 (2008).

60. *See, e.g.*, FED. R. CIV. P. 8(c) (characterizing statutes of limitations as waivable affirmative defenses); Day v. McDonough, 547 U.S. 198, 205 (2006); Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 93-96 (1990); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982); Lees, *supra* note 25, at 1491-98 (linking statutes of limitations to appeal deadlines as support for a nonjurisdictional characterization of each).

61. 28 U.S.C. § 2107(a).

62. *See, e.g.*, Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (stating that "the mandatory 'shall[]' . . . normally creates an obligation impervious to judicial discretion"). *But cf.* Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 433 n.9 (1995) ("Though 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may.'").

63. 28 U.S.C. § 2107(c).

beyond the parameters that Congress set forth.[64]

Third, cases interpreting time limits for filing notices of appeal almost uniformly have held them to be mandatory.[65] As I noted above, one should question whether certain cases properly characterized the time limit to be jurisdictional,[66] but they are on far firmer ground characterizing it as mandatory.[67] And, the Court also has characterized as mandatory the time limit for filing a notice of appeal in a *criminal* case.[68] Thus, a mandatory characterization would be fully consistent with prior decisions.[69]

The balance of equities is a tougher call, for unique circumstances may raise compelling arguments for the application of equity.[70] But, in my view, those rare inequities are outweighed by the other justifications for a mandatory characterization. The deadline serves the important purposes of discouraging old and stale appeals and of promoting finality and reliance interests by setting a definite point of time when litigation shall be at an end.[71] The resulting salutary effects of characterizing the rule as mandatory—finality, predictability, efficiency, and the rule of law—at least mitigate the harsh effects of particular sympathetic situations. And they make it particularly unlikely that a mitigated need for equity can outweigh the textual and precedential support for a mandatory characterization noted above.

One practical difficulty of making the time to appeal forfeitable is that no

---

64. *See, e.g.*, United States v. Beggerly, 524 U.S. 38, 48-49 (1998) ("Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute. Here, the QTA, by providing that the statute of limitations will not begin to run until the plaintiff 'knew or should have known of the claim of the United States,' has already effectively allowed for equitable tolling. Given this fact, and the unusually generous nature of the QTA's limitations time period, extension of the statutory period by additional equitable tolling would be unwarranted.") (citations omitted); United States v. Brockamp, 519 U.S. 347, 352 (1997) ("Section 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to us that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote."); Bank of Ala. v. Dalton, 50 U.S. 522 (1850) (interpreting a statute of limitations that includes specified exceptions to exclude others).

65. *See* Bowles v. Russell, 127 S. Ct. 2360, 2364-65 (2007) (citing precedent).

66. *See supra* text accompanying note 59.

67. *See supra* text accompanying note 59.

68. *See* United States v. Robinson, 361 U.S. 220, 224-26 (1960) (characterizing a time limit in the Federal Rules of Appellate Procedure for filing a notice of appeal as "mandatory and jurisdictional," and holding the limit not subject to extension for reasons of excusable neglect).

69. Considerations of stare decisis have special force in statutory interpretation cases because Congress can alter the Court's interpretations. *See* Ankenbrandt v. Richards, 504 U.S. 689, 700 (1992); Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989).

70. Keith Bowles's own reliance on an erroneous district court order is particularly sympathetic. *See* Elizabeth Chamblee Burch, *Nonjurisdictionality or Inequity*, 102 NW. U. L. REV. COLLOQUY 64 (2007), http://www.law.northwestern.edu/lawreview/colloquy/2007/24/.

71. *See* Browder v. Dir., Dep't of Corr., 434 U.S. 257, 264 (1978).

specific pleading mechanism sets a clear line for when a challenge to a tardy appeal has been forfeited.[72] An easy solution, however, is to recognize a forfeit from the failure to raise the defect in the initial opposition brief.

On balance, then, the deadline to file a notice of appeal is mandatory but nonjurisdictional.[73]

3. *Some conclusions*

As I mentioned above, *Bowles* should not have undertaken so elaborate an inquiry. If the deadline to file a notice of appeal is in fact mandatory, then the Court could have resolved the case by saying just that without ever tackling the broader question of whether the rule is also jurisdictional. My purposes here are quite different; I mean to show that there are good reasons to characterize § 2107 as a mandatory but nonjurisdictional rule and that such a characterization has the potential for positive practical value.

III. MANDATORY SOVEREIGN IMMUNITY

The previous Parts demonstrated that mandatory but nonjurisdictional rules have a valuable role to play and that courts should apply them with greater appreciation. But they did so in the context of cases already decided. To truly demonstrate the value of a wide appreciation, I want to show how they might resolve an undecided and very different question: how to characterize state sovereign immunity.

That is a daunting task, for while the characterization approach of § 2107 was a somewhat ordinary case of statutory interpretation, state sovereign immunity is not statutory and thus lacks the familiar grounding that statutes can provide. But, though daunting, the task is necessary. Not all rules are statutory. Some are court rules promulgated under the Rules Enabling Act, some are prudential rules prescribed by the courts themselves, some are common law rules, and some are constitutional or quasi-constitutional rules. A broader case for a greater appreciation for the mandatory rule would be one in which a governing text cannot be relied upon.

Enter the Eleventh Amendment, or, rather, to be more accurate under the prevailing case law, state sovereign immunity. Simply stated, sovereign immunity is the prerogative of a nonconsenting sovereign not to be sued.[74] Is

---

72. Hall, *supra* note 43, at 425.

73. Other commentators have agreed, though under a more cursory analysis. *See, e.g.*, *id.* at 424.

74. I have oversimplified here for convenience. In reality, state sovereign immunity is more convoluted; for example, it encompasses immunity from suits brought by private individuals and foreign nations but not suits brought by other states or the federal government. *Compare* Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) (applying immunity to suits by foreign nations), *and* Hans v. Louisiana, 134 U.S. 1 (1890) (applying

this rule jurisdictional? If not, is it nevertheless mandatory?

A. *A Brief Background on State Sovereign Immunity*

The historical acceptance of some form of sovereign immunity is ancient and widespread.[75] Its rationale is logical from a monarchical view. The King could not be compelled by his own laws against his will, for, as the absolute font of the law, his refusal to submit would create a legal exception for himself.[76] Likewise, the King could not be compelled by his own courts regardless of the source of the law, for the King, as the highest figure of justice, would then be inferior to his own tribunals.[77]

At Independence, the new American states inherited the doctrine from England,[78] but, as with other traditions, the colonists' new notions of sovereignty did not fit well with the traditional model,[79] for two reasons. First, the revolutionaries rejected the absolute sovereignty of the King[80] and placed

---

immunity to suits brought by private individuals), *with* United States v. Mississippi, 380 U.S. 128, 140-41 (1965) (refusing to apply immunity to suits brought by the United States), *and* South Dakota v. North Carolina, 192 U.S. 286, 315 (1904) (refusing to apply immunity to suits brought by a state), *and* United States v. Texas, 143 U.S. 621, 646 (1892) (same as *United States v. Mississippi*).

75. *See* CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 5 (1972) ("At least as early as the thirteenth century, during the reign of Henry III (1216-1272), it was recognized that the king could not be sued in his own courts . . . ."); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2 (1963) ("By the time of Bracton (1268) it was settled doctrine that the King could not be sued *eo nominee* in his own courts."); *see also* Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1857) ("It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission . . . .").

76. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *243-51; *see also* Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) (Holmes, J.) ("A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."). *But see* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 97-98 (1996) (Stevens, J., dissenting) (criticizing this logic).

77. *See* 1 BLACKSTONE, *supra* note 76, at *242 ("[N]o suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power . . . ."); *see also Seminole Tribe*, 517 U.S. at 103 (Souter, J., dissenting) ("[T]he King or Crown, as the font of justice, is not subject to suit in its own courts."); Nevada v. Hall, 440 U.S. 410, 414-15 (1979) (explaining sovereign immunity on the basis that no tribunal could be higher than the King).

78. United States v. Lee, 106 U.S. 196, 205 (1882) (surmising that the doctrine "is derived from the laws and practice of our English ancestors").

79. *Cf.* Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 115 (2000) (explaining that the Framers broke with English tradition in a variety of ways, including English understanding of sovereignty).

80. *See* Clinton v. Jones, 520 U.S. 681, 697 n.24 (1997) ("Although we have adopted the related doctrine of sovereign immunity, the common law fiction that [the King can do no wrong] was rejected at the birth of the Republic.").

that sovereign authority in the people themselves.[81] And, second, the new government was federal, with both state and national governments, and with the national government supreme over the states in certain matters.[82]

Nevertheless, both the ratification debates and the adoption of the Eleventh Amendment confirm that the tradition was accepted in some form. The ratification debates were particularly incendiary. The original Constitution contained no mention of sovereign immunity, and leading opponents of ratification argued that the Constitution would abrogate that sovereign prerogative.[83]

But prominent supporters of ratification assured the people that the states would retain their prerogative not to be sued without their consent. Alexander Hamilton wrote: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*."[84] And James Madison asserted, "It is not in the power of individuals to call any state into court."[85] Even John Marshall, before becoming Chief Justice, stated, "I hope that no gentleman will think that a state will be called at the bar of the federal court . . . . It is not rational to suppose that the sovereign power shall be dragged before a court."[86]

And, when the Supreme Court held in *Chisholm v. Georgia*,[87] shortly after ratification, that the Constitution abrogated that prerogative,[88] the states reacted

---

81. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); THE FEDERALIST NO. 22, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that the people are "that pure, original fountain of all legitimate authority"); *id.* NO. 46, at 294 (James Madison) ("The federal and State governments are in fact but different agents and trustees of the people . . . . [T]he ultimate authority, wherever the derivative may be found, resides in the people alone . . . ."); *id.* NO. 49, at 313 (James Madison) ("[T]he people are the only legitimate fountain of power . . . ."); *see also* Alden v. Maine, 527 U.S. 706, 802 (1999) (Souter, J., dissenting) (stating that royal dignity is "inimical to the republican conception, which rests on the understanding of its citizens precisely that the government is not above the them, but of them, its actions being governed by law just like their own"); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 344-62, 404-10, 447-54, 463-65 (1969) (explaining that the revolutionaries and, later, the Federalists, located sovereignty in the people rather than in the government).

82. U.S. CONST. art. VI.

83. *See, e.g.*, 2 THE COMPLETE ANTI-FEDERALIST 429-31 (Herbert J. Storing ed., 1981) (Brutus) (interpreting Article III to "subject[] a state to answer in a court of law, to the suit of an individual"); 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 526-27 (Jonathan Elliot ed., 2d ed. 1876) [hereinafter ELLIOT'S DEBATES] (George Mason) (arguing that Article III enables "claim[s] against this state [to] be tried before the federal court"); 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 41-42 (John P. Kaminski & Gaspare J. Saladino eds., 1983) (Federal Farmer) ("[T]his new jurisdiction will subject the states . . . to actions, and processes . . . ."). For a list of similar ratification sentiments, see Scott Dodson, *The Metes and Bounds of State Sovereign Immunity*, 29 HASTINGS CONST. L.Q. 721, 728 n.33 (2002).

84. THE FEDERALIST NO. 81, *supra* note 81, at 487 (Alexander Hamilton).

85. 3 ELLIOT'S DEBATES, *supra* note 83, at 533 (James Madison).

86. *Id.* at 555 (John Marshall).

87. 2 U.S. (2 Dall.) 419 (1793).

88. *Id.*

quickly to overturn the decision by constitutional amendment. An amendment was proposed the day after *Chisholm* was issued.[89] During the ensuing congressional recess, Massachusetts and Virginia called for a constitutional convention to consider the suability of states in federal court.[90] Within a few months, New Hampshire, Connecticut, and North Carolina all had joined in the push for a convention.[91] Almost immediately after Congress reconvened, the Senate introduced what was to become the Eleventh Amendment.[92] It passed 23-2 in the Senate[93] and 81-9 in the House.[94]

The ratification debates and the swift and decisive overturning of *Chisholm* provide powerful historical justifications for the recognition of state sovereign immunity as an accepted part of American federalism. And, despite the tensions between the doctrine's foundations and a federal democratic republic,[95] that acceptance has happened.[96] The open question is whether the doctrine is jurisdictional or not, and, if not, whether the doctrine is mandatory.

B. *The Case for a Nonjurisdictional State Sovereign Immunity*

To make the case for a nonjurisdictional sovereign immunity, I rely on the two-step framework used to characterize § 2107 above that begins with consideration of a presumption of jurisdictionality and continues with three additional factors.[97] Application of the framework provides much support for a nonjurisdictional characterization of state sovereign immunity.[98]

---

89. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 101 (rev. ed. 1937) ("[N]o State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States, at the suit of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States.").

90. *See* 1793 Va. Acts 52; John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1931 (1983).

91. *See* JACOBS, *supra* note 75, at 65-66.

92. 3 ANNALS OF CONG. 25 (1794).

93. *Id.* at 30-31.

94. 4 *id.* at 476-78.

95. *See supra* text accompanying notes 80-82.

96. *See* United States v. Lee, 106 U.S. 196, 207 (1882) ("And while the exemption of the United States and of the several states from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.").

97. *See supra* Part II.C.1.

98. I sympathize with the view that sovereign immunity has aspects of *personal* jurisdiction, *see* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002), and many of the arguments I make here might also support such a characterization. I have not yet resolved how personal jurisdiction fits into the jurisdictional characterization inquiry, and so, as I mentioned at the outset, *see supra* note 15, I have proceeded on the definition of "jurisdiction" as *subject-matter* jurisdiction. Thus, that personal jurisdiction may appropriately characterize the doctrine of state sovereign

1. *Presumption of jurisdictionality*

The first step is whether a clear statement of jurisdictionality from a lawmaking authority raises a presumption of jurisdictionality.[99] Sovereign immunity inheres in the very status of sovereignty,[100] and thus textual manifestations, except in the cases of abrogation or waiver,[101] are rare. As a result, there are few instances to apply the presumption.

The glaring exception is the Eleventh Amendment to the U.S. Constitution, which states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[102]

Were I analyzing only the Eleventh Amendment, I might conclude that the presumption of jurisdictionality applies here. After all, its language, which speaks directly to the court and restricts its "power," strongly implies a limitation of the jurisdiction of the federal courts.

But there are two reasons why that implication should be set aside here. First, the Supreme Court has distanced itself from the text of the Eleventh Amendment. In the Court's view, the Eleventh Amendment is merely a confirmation of the older principle of state sovereign immunity.[103] The words of the Eleventh Amendment were meant only to overturn *Chisholm*.[104] In effect, *Chisholm* and the Eleventh Amendment cancel each other out, restoring a textless doctrine of sovereign immunity.[105] The Court has not been shy about adopting this view with respect to other terms of the Eleventh Amendment,[106] and so there is good reason to question rote adherence to the textual limitation on "Judicial power."[107] As the Court has said, "[t]his separate and distinct

immunity does not mean that "mandatory but nonjurisdictional," as I have explained it, does not as well.

99. Dodson, *supra* note 10, at 66-67.

100. *See* THE FEDERALIST NO. 81, *supra* note 81, at 487 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.").

101. Congress may abrogate the sovereign immunity of the states by statute in certain cases, *see, e.g.*, Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006) (allowing abrogation under the Bankruptcy Clause); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (allowing abrogation under the Fourteenth Amendment), and states themselves may waive their immunity by state statute, *see, e.g.*, Alden v. Maine, 527 U.S. 706, 756 (1999) (stating that many state statutes waive sovereign immunity for certain cases).

102. U.S. CONST. amend. XI.

103. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996).

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

105. *See Alden*, 527 U.S. at 722-23.

106. *See* Scott Dodson, *Vectoral Federalism*, 20 GA. ST. U. L. REV. 393, 394 n.6 (2003) (citing cases).

107. I alluded to this in an earlier article. *See* Scott Dodson, *Dignity: The New Frontier of State Sovereignty*, 56 OKLA. L. REV. 777, 821 (2003) ("Perhaps the best resolution lies in

structural principle [of state sovereign immunity] is not directly related to the scope of the judicial power established by Article III."[108]

And, second, even if the Eleventh Amendment does erect a jurisdictional bar for the immunity encompassed within its text, not all sovereign immunity is captured by the Eleventh Amendment. There is broad agreement that states have some kind of sovereign immunity from suits that do not fall within the literal terms of the Eleventh Amendment.[109] Thus, most instances of sovereign immunity are not based on the Eleventh Amendment at all and therefore have little connection to its text.

These reasons counsel in favor of declining to apply the presumption and instead considering the characterization of the doctrine through the other factors.

2. *Function*

The first of those factors is the function of the doctrine. On the whole, this factor supports a nonjurisdictional characterization.

The primary function of state sovereign immunity—granting a state the right not to be subject to a lawsuit at the insistence of an individual—speaks to a right of a particular party, not to a limitation on the court's power to hear the case. And, a state can waive sovereign immunity or consent to suit,[110] features that also support a nonjurisdictional function.

Confessedly, immunity is not clearly either a "mode of relief" or a "claim-processing rule," as many nonjurisdictional rules of procedure are, but neither does sovereign immunity really "separate classes of cases" as rules of subject-matter jurisdiction generally do.[111] The inability of sovereign immunity to fit perfectly into one of those categories just means that that dichotomy is less helpful to the characterization; it does not mean that the characterization cannot

---

rethinking the characterization of state sovereign immunity as a limitation on judicial power. If it is indeed so completely divorced from the text of the Constitution as the Court has intimated, it need not be bound by the Eleventh Amendment's reference to a limit on 'the judicial Power,' . . . .").

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

109. *See* Nelson, *supra* note 98 (distinguishing between Eleventh Amendment immunity as subject-matter jurisdiction and non-Eleventh Amendment immunity as personal jurisdiction); *see also Alden*, 527 U.S. at 736 ("[T]he . . . text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit."); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 116-17 (1996) (Souter, J., dissenting) (recognizing a nonconstitutional immunity outside of the Eleventh Amendment).

110. *See* Clark v. Barnard, 108 U.S. 436 (1887); *see also* Lapides v. Bd. of Regents of the Univ. of Ga., 535 U.S. 613, 620 (2002) (holding that a state's voluntary removal to federal court waives Eleventh Amendment immunity); Idaho v. Couer d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997) ("[A] State can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it.").

111. *See* Scarborough v. Principi, 541 U.S. 401, 413-14 (2004) (setting out these categories); Kontrick v. Ryan, 540 U.S. 443, 454-55 (2004) (same).

be made on the basis of other considerations.[112] Sovereign immunity is directed at the right of a particular party, rather than the power of the court, and on that basis, I am comfortable concluding that its function supports a nonjurisdictional characterization.

There are contraindications, though they are weak. First, the logical justification for sovereign immunity as applied in eighteenth-century England, particularly the idea that the courts could not have jurisdiction over the King because jurisdiction implies superiority in power,[113] does support a jurisdictional characterization. But the logical justification was rejected by the new American republic and has never been a justification for the doctrine in the United States.[114] In addition, the Constitution expressly contemplates federal jurisdiction over state defendants in certain cases,[115] and the Supreme Court uniformly has upheld such exercise of jurisdiction.[116]

Second, the text of the Eleventh Amendment—"The Judicial power shall not extend"[117]—seems to speak to the power of the court rather than the rights or obligations of the sovereign party. That also supports a jurisdictional characterization. But, as I mentioned above, there are good reasons to set the text of the Eleventh Amendment aside when discussing state sovereign immunity.[118] And even were the Eleventh Amendment's text to apply, it would leave untouched a broad swath of cases in which non-Eleventh Amendment state sovereign immunity could apply and in which the characterization of that non-Eleventh Amendment state sovereign immunity must still be determined.

Third, immunity in federal court functions as a defense to the entire suit rather than merely a defense to liability or certain relief.[119] In that respect, state sovereign immunity is unlike *Scarborough v. Principi*,[120] which characterized as nonjurisdictional a rule pertaining to a particular "mode of relief" in a case over which the court already had jurisdiction.[121] But not all exemptions from

112. *See* Dodson, *supra* note 10, at 71-77. ("To the extent that a particular issue that arises is just too difficult to characterize as a claim-processing rule or one that separates classes of cases, then this factor in the framework may be less helpful than the other factors, but that does not mean that the framework as a whole cannot be effective.").

113. *See supra* note 77.

114. *See supra* text accompanying notes 80-82. Of course, the dignity rationale also is of questionable pedigree, *see* Dodson, *supra* note 107, at 780-808, but it does have the additional force of express Supreme Court endorsement.

115. U.S. CONST. art. III, § 2 (extending jurisdiction to suits between states).

116. *See, e.g.*, South Dakota v. North Carolina, 192 U.S. 286, 315 (1904) (refusing to allow immunity from suit brought against a state by a state).

117. U.S. CONST. amend. XI.

118. *See supra* text accompanying notes 103-09.

119. *See* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997) (calling the doctrine "a sovereign immunity from suit"); P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (stating that immunity is justified "in part by a concern that States not be unduly burdened by litigation").

120. 541 U.S. 401 (2004).

121. *Id.* at 413.

suit are limitations on a court's subject-matter jurisdiction.[122] Other doctrines, such as official immunity, are nonjurisdictional immunities from suit.[123] The mere fact that the immunity is a bar to suit rather than to a remedy says little about whether it is jurisdictional.

Fourth, state sovereign immunity does function to protect federalism divisions, an institutional value that often calls for a jurisdictional characterization in litigation between private parties. The reason institutional protections such as federalism values often warrant a jurisdictional characterization is that the private parties may not have adequate incentives to protect them.[124]

In the case of state sovereign immunity, however, the federalism angle cuts the other way. The primary purpose of immunity is "to accord States the dignity that is consistent with their status as sovereign entities."[125] In contrast to a private individual, a party-state has a vested interest in protecting its own dignity, and therefore the state's ability to make choices that implicate immunity stands on a very different footing than a private party's ability to make the same choices. In addition, the ability of the state to make such choices is a vindication of, rather than an impingement on, the dignity of the state.[126] The same cannot be said when the choice is made by a private party.

It is possible that state sovereign immunity implicates other institutional values besides respect for state dignity, but it is difficult to discern exactly what

---

122. *See Coeur d'Alene*, 521 U.S. at 267 (calling the doctrine "a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction").

123. *Cf.* Arbaugh v. Y & H Corp., 546 U.S. 500, 514-15 (2006) (holding the employer-numerosity requirement of Title VII to be nonjurisdictional, even though an employer not meeting the requirement would not be covered by the statute at all). *Compare* Saucier v. Katz, 533 U.S. 194, 200 (2001) (stating that official immunity "is an immunity from suit rather than a mere defense to liability") (internal quotation marks and emphasis omitted), *with* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (stating that official immunity is an affirmative defense that must be pleaded).

124. *See* Dane, *supra* note 19, at 36-37 ("Commentators sometimes say that parties cannot control jurisdictional issues because jurisdictional rules embody societal interests that go beyond the interests of the parties and that none of the parties might have an adequate incentive to advance. For example, both parties to a lawsuit might prefer their case to be heard in a fast, efficient, clean federal court than in a slow, clumsy, dingy state court. But the larger social interest in federalism might dictate otherwise."); Hall, *supra* note 43, at 423 (referencing "important political principles that underlie the jurisdictional limits in a federal system").

125. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002). A secondary purpose is to protect the state fisc. *See id.* at 765 ("While state sovereign immunity serves the important function of shielding state treasuries and thus preserving the States' ability to govern in accordance with the will of their citizens, the doctrine's central purpose is to accord the States the respect owed them as joint sovereigns." (citation and internal quotation marks omitted)); *id.* at 769 ("As we have previously noted, however, the primary function of sovereign immunity is not to protect State treasuries, but to afford the States the dignity and respect due sovereign entities." (citation omitted)).

126. *See* Dodson, *supra* note 107, at 820-23.

they would be[127] and to understand why the states would not adequately protect them as parties anyway. In any case, the primary purpose of protecting state dignity should take precedence over whatever secondary federalism effects happen to be implicated.[128]

Thus, the primary function of state sovereign immunity—to provide a particular state party a right to refuse to be a defendant—bespeaks a nonjurisdictional rule rather than a jurisdictional rule. There are some counterindications, but they are outweighed by (or, as to the purpose of protecting state dignity, actually support) the stronger nonjurisdictional functions. On balance, this factor supports a nonjurisdictional characterization.

3. *Effects*

The effects factor also supports a nonjurisdictional characterization. A nonjurisdictional characterization would entail significant benefits of consent and waiver with a relatively low impact on institutional federalism values. On the flip side, a jurisdictional characterization has only marginal benefits and burdens.

The ability of a state to waive immunity or consent to suit is an important nonjurisdictional feature. The state legislature may wish to waive immunity in an entire class of cases, such as discrimination cases. Or, the state may wish to consent to a particular lawsuit from which it would otherwise be immune. Public pressure or individualized considerations of fairness and justice may motivate a state's decision to waive or consent. On the other hand, equally important concerns for the state fisc might justify a decision not to waive immunity or consent to suit.[129] In short, the nonjurisdictional characteristics of waiver and consent provide an opportunity for the states to strike a balance between the legitimate concerns of suing a state and the need for redress of injuries caused by the state. The importance of the ability to waive immunity or consent to suit supports a nonjurisdictional characterization.

The downside is comparatively insubstantial. A federal court's issuance of

---

127. *See id.* at 807 (questioning the federalism benefits of the dignity rationale); Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 61 (1998) ("[T]he Court appears to be much more concerned about preserving the dignity of the states—as if they were natural persons that could experience hurt feelings beyond those of their residents—than in pursuing decentralization and the other policy goals that federalism serves." (citations omitted)); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 910-26 (1994). *See generally* Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1 (2002) (analyzing the impact of state sovereignty on federalism values).

128. Dodson, *supra* note 10, at 59-61.

129. *See* Ann Althouse, *On Dignity and Deference: The Supreme Court's New Federalism*, 68 U. CIN. L. REV. 245, 266 (2000) (noting that a state cannot simply declare bankruptcy or limit spending only to profitable matters).

a binding order on a sovereign state does implicate federalism concerns. But, under the immunity doctrine, the federal court's ability to do so is blessed by the state itself through waiver or consent. It is therefore difficult to understand why the effects on federalism are unduly severe. Self-interest would suggest that a state would only subject itself to suit when federalism implications are minor or significantly outweighed by other needs. In addition, to the extent federalism values are supported by maintaining the dignity of the state,[130] it is surely more consonant with state dignity to allow a state to waive immunity or consent to suit than to disallow the state to do so when it so wishes.[131] Finally, by creating a market for its consent or waiver, the state can maximize its economic rewards, and the Supreme Court has upheld the propriety of a state "selling" its waiver to the federal government for federal funds.[132] The upshot to all this is that a nonjurisdictional characterization has significant benefits because it allows the possibility of waiver and consent.

A jurisdictional characterization, on the other hand, might cause some marginal costs and unfairness. For example, an entity whose state status is unclear might wait until losing on the merits before asserting its sovereign immunity.[133] At that point, the district court or appellate court would have to determine whether the entity is an arm of the state entitled to immunity after a judgment on the merits. Raising a jurisdictional issue late in the case, after a merits determination, flips the natural order of the proceedings and may cause an unraveling of the entire case, resulting in wasted judicial and litigant resources and uncertainty at the outset.

It seems unlikely, however, that a state entity would hide the ball in that way very often. Immunity would preclude the suit altogether, and any denial of immunity would be immediately appealable.[134] Therefore, if the entity has any basis to claim state status, it has little to gain by asserting immunity only late in the proceedings.[135] It is, therefore, unlikely that a jurisdictional

---

130. *See supra* text accompanying notes 125-28.

131. *See* Dodson, *supra* note 107, at 820-23.

132. *See* Alden v. Maine, 527 U.S. 706, 755 (1999) (stating that Congress may induce immunity waivers through Spending Clause legislation).

133. *See* Christina Bohannan, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 N.Y.U. L. REV. 273, 290-91 (2002) (arguing that, as a limit on subject-matter jurisdiction, states may assert sovereign immunity for the first time even on a collateral attack to the judgment).

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

135. Two cases illustrate the likely rarity of such delay. In *Northern Insurance Co. of New York v. Chatham County*, 547 U.S. 189 (2006), the plaintiff insurance company sued a Georgia county for negligent operation of a drawbridge. The county immediately moved for summary judgment on sovereign immunity grounds, even though it was not an arm of the state. *Id.* at 192. The county's conduct demonstrates the willingness of quasi-state entities to claim immunity even if their justifications for the claim are doubtful. The other case, *Edelman v. Jordan*, 415 U.S. 651 (1974), may be the exception that proves the rule. There, the plaintiff sued a state officer for declaratory and injunctive relief. It was not until the plaintiff prevailed and the court issued an order against the state officer that the state officer

characterization would waste many resources.

However, the benefits of a jurisdictional characterization are not appreciable, either. It is true that a jurisdictional characterization would save courts from delving into questions of equity or waiver, but it does not appear that those issues are often contested or difficult to resolve.[136] On balance, the jurisdictional costs probably negate the jurisdictional benefits. In light of the neutral effect of a jurisdictional characterization, the significant benefits of the availability of waiver and consent tip this factor in favor of a nonjurisdictional characterization.

4. *Doctrinal and cross-doctrinal consistency*

The last factor, doctrinal and cross-doctrinal consistency, also supports a nonjurisdictional characterization. Although the Supreme Court has never categorically characterized state sovereign immunity as jurisdictional or not[137]—though it has come close in conflicting pronouncements[138]—a jurisdictional characterization would undermine the longstanding tradition of allowing the state to consent to suit[139] or otherwise waive its immunity.[140] Even in its English roots, the sovereign could waive sovereign immunity,[141]

---

appealed and asserted sovereign immunity from part of the judgment. *Id.* at 677-78. The Court allowed the assertion of immunity for the first time on appeal. *Id.* However, there was good reason to do so. The suit ostensibly was permitted by *Ex parte Young*, 209 U.S. 123 (1908), at the outset; it was not until the district court ordered retroactive monetary payments that the state officer asserted immunity from such payments as not covered by the *Young* exception. Indeed, the Supreme Court reversed only that part of the order. *Edelman*, 415 U.S. at 678. Had the state officer understood that retroactive payments were sought, it is likely he would have asserted the immunity defense at the outset as well.

136. *See* Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613, 620 (2002) (adopting general waiver principles as a basis for a federal common law of sovereign immunity waiver); *id.* at 623-24 (disagreeing that the waiver rule adopted is confusing or unclear).

137. *See* Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 391-92 (1998) ("Even making the assumption that Eleventh Amendment immunity is a matter of subject-matter jurisdiction—a question we have not decided . . . .").

138. *Compare* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997) (calling it "a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction"), *with Edelman*, 415 U.S. at 677-78 (stating that state sovereign immunity "sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court").

139. *See* Alden v. Maine, 527 U.S. 706, 755 (1999) ("Many States, on their own initiative, have enacted statutes consenting to a wide variety of suits."); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 53 (1944) (proclaiming that immunity is "mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign").

140. *See Lapides*, 535 U.S. at 616 (holding that a state's removal to federal court constituted waiver); Clark v. Barnard, 108 U.S. 436, 447 (1883) ("The immunity from suit belonging to a state . . . is a personal privilege which it may waive at pleasure . . . .").

141. *See* 1 BLACKSTONE, *supra* note 76, at *243 ("If any person has, in point of property, a just demand upon the King, he must petition him in his court of chancery, where

and the several states' ability to waive sovereign immunity has always been recognized in America.[142] The availability of waiver, which ordinarily is not allowed for rules that limit subject-matter jurisdiction,[143] is more consistent with a nonjurisdictional characterization of state sovereign immunity than a jurisdictional characterization.[144]

In addition, the Court's development of the sovereign immunity doctrine has three other features that are in tension with a jurisdictional characterization of the doctrine. First, courts need not police and raise state sovereign immunity sua sponte,[145] unlike most jurisdictional defects.[146] Second, immunity does not apply when the suit is against a state officer alleged to have violated federal law, so long as the suit is for prospective, injunctive relief only.[147] This exception is in tension with a strict jurisdictional bar. Third, the availability of immunity depends upon the status of the plaintiff. For example, if the plaintiff is a sister state or the United States, there is no state sovereign immunity from suit.[148] For these reasons, doctrinal consistency supports a nonjurisdictional characterization.

As for cross-doctrinal consistency, there are several potential analogues to other doctrines,[149] but the closest is federal sovereign immunity. Federal sovereign immunity is, at least according to the Court, jurisdictional. In *United States v. U.S. Fidelity & Guaranty Co.*,[150] the United States filed a claim on

---

his chancellor will administer right, as a matter of grace, though not upon compulsion."); *see also* Banker's Case, 14 Howell's State Trials 1 (1700); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 460 (1793) (Wilson, J.) (restating the English practice).

142. *See supra* note 140.

143. *See, e.g.*, Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 377 n.21 (1978); Sosna v. Iowa, 419 U.S. 393, 398 (1975); Jackson v. Ashton, 33 U.S. (8 Pet.) 148, 149 (1834).

144. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 127-28 (1996) (Souter, J., dissenting); Pennsylvania v. Union Gas Co., 491 U.S. 1, 25-29 (1989) (Stevens, J., concurring).

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

146. *See, e.g.*, Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999) (stating that courts have an independent obligation to determine whether subject-matter jurisdiction exists, even if not challenged by any party).

147. *See Ex parte* Young, 209 U.S. 123, 159-60 (1908) (establishing the exception); *see also* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) (limiting *Young* to violations of federal law); Edelman v. Jordan, 415 U.S. 651, 665 (1974) (limiting *Young* to prospective, nonmonetary relief).

148. *See* South Dakota v. North Carolina, 192 U.S. 286, 315 (1904) (refusing to allow immunity from suit brought against a state by a state); *see also* United States v. Mississippi, 380 U.S. 128 (1965) (refusing to allow immunity from suit brought against a state by the United States); United States v. Texas, 143 U.S. 621 (1892) (same).

149. Official immunity for police officers and other state officials acting in the scope and discretion of official duties, a possible analogue, is nonjurisdictional. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

150. 309 U.S. 506 (1940).

behalf of Indian tribes for unpaid royalties due on mining leases against a coal mining company, a debtor in a bankruptcy reorganization. The coal mining company counterclaimed, seeking an amount that exceeded the United States' claim.[151] Federal sovereign immunity law allows counterclaims as "set-offs" against an original claim by the United States but bars any excess that would amount to a monetary award against the United States.[152] The United States failed to assert immunity against the counterclaim, however, and the bankruptcy court approved both claims, leaving the United States with a negative recovery against the coal mining company.[153] Subsequently, the United States brought the same suit against the mining company's surety, and the surety moved to dismiss based on res judicata.[154] The Supreme Court disagreed, holding the bankruptcy judgment void for lack of jurisdiction.[155] Thus, a court lacks jurisdiction over a claim against the United States even if the United States never asserts immunity in that case. The jurisdictional status of federal sovereign immunity was recently confirmed in *United States v. Mitchell*.[156]

The jurisdictional character of federal sovereign immunity provides some support for a jurisdictional characterization of the analogous state sovereign immunity. Were the other factors less indicative of a contrary characterization, the cross-doctrinal support of federal sovereign immunity might tip the scales. But, here, the character of federal sovereign immunity must be weighed against the function and characterization effects of state sovereign immunity, which point towards a nonjurisdictional characterization.

In addition, important differences between federal sovereign immunity and state sovereign immunity weaken the analogical support. Unlike the states, the federal government did not surrender any immunity at ratification. Also unlike the states, the federal government occupies a role in our federal system more amenable to traditional sovereign immunity. It is more consonant with the role of the federal government to assert traditionally jurisdictional immunity than for the states.[157]

---

151. *Id.* at 512-15.

152. *See* GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT §§ 8.12-.13 (4th ed. 2006).

153. *U.S. Fid. & Guar.*, 309 U.S. at 513-15.

154. *Id.*

155. *Id.*

156. 463 U.S. 206, 212 (1983) ("[T]he existence of consent [or waiver] is a prerequisite for jurisdiction.").

157. The Court has recognized that differences between federal sovereign immunity and state sovereign immunity may justify their differential doctrinal development. *See, e.g.*, Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 542-43 (2002) (declining to construe state sovereign immunity doctrine consistently with federal sovereign immunity doctrine on an issue of limitations). *But see* Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999) (calling federal sovereign immunity "obviously the closest analogy" to state sovereign immunity in the waiver context).

On balance, then, while there are good reasons to seek consistency between federal sovereign immunity law and state sovereign immunity law,[158] the other factors supporting a nonjurisdictional characterization of state sovereign immunity likely outweigh the importance of cross-doctrinal consistency.

C. *The Case for a Mandatory Sovereign Immunity*

The case for characterizing state sovereign immunity as nonjurisdictional is only part of the inquiry. A nonjurisdictional characterization does not inform what jurisdictional characteristics the doctrine does or does not have. Determining that is the next task, and, as I will show, I believe a case can be made for a mandatory characterization.

The jurisdictional characterization inquiry already established that the doctrine should be susceptible to waiver and consent. Waiver and consent coincide with the function of the doctrine and its dignity rationale.[159] They allow for the salutary effects of striking a balance between the importance of redressability for wrongs and important policy considerations involving the state and its fisc.[160] And, they have been part and parcel of state sovereign immunity since the beginning of its long historical acceptance.[161] These are powerful reasons why waiver and consent should be features of a nonjurisdictional state sovereign immunity doctrine.

But the aptness of other features is less clear. There are at least three other features to consider: (1) whether the presence of immunity must be policed and raised by the court sua sponte; (2) whether immunity cannot be forfeited by the state; and (3) whether equitable considerations can prevent the invocation of, or circumvent the application of, state sovereign immunity. I think there are good reasons to answer all of these in the negative.

1. *No sua sponte requirement*

Must the existence of sovereign immunity as a bar to suit be raised by the court sua sponte if no party raises it? The answer is no, for three reasons. First, if the doctrine is nonjurisdictional, then there are few institutional reasons for the court to take an independent interest in immunity, and, generally, the parties should consider the underlying values adequately. Second, any noninstitutional reasons for the court to raise the issue on its own (such as the need to ensure that any consent, waiver, or forfeiture is voluntary and otherwise valid) are unlikely to be so important as to require sua sponte invocation by the court,

158. Of course, cross-doctrinal consistency also could be achieved by rethinking the jurisdictional status of federal sovereign immunity.

159. *See supra* text accompanying notes 111, 125-28.

160. *See supra* text accompanying note 129.

161. *See supra* note 139.

particularly when balanced against the burden on the court to be forced to address the issue in each case. And, third, the Court itself has suggested that there is no sua sponte requirement.[162]

That is not to say that a court may *never* raise the issue on its own.[163] There may be compelling reasons to do so in individual cases. For example, if it is unclear whether an entity is an arm of the state entitled to assert immunity or not, and the court cannot determine if the entity is consenting to suit or merely does not realize that it may be able to assert immunity, then a court may wish to raise the issue to determine whether or not the entity is truly consenting to suit. But these situations are more likely to come up on a case-by-case basis and should not entail a blanket requirement. It is far better, and more consonant with the underlying policies, to allow courts discretion to raise the issue when the need arises. In sum, courts should not be required to raise the immunity issue sua sponte.

2. *Forfeitability*

Forfeiture and waiver are slightly different. Waiver is the intentional relinquishment of a right; forfeiture is the failure to make a timely assertion of the right.[164] May immunity be forfeited by a state entitled to assert it? The best answer is yes, in my view, though arguments to the contrary are not without some merit.

There are good reasons why immunity should be forfeitable like any other affirmative defense. Requiring the defense to be asserted in a timely fashion, such as in the answer, allows the issue to be litigated at the outset, potentially avoiding the waste of judicial and litigant resources if it is asserted late in litigation or for the first time on appeal. Also, requiring a timely assertion prevents the state from intentionally delaying the assertion for some tactical advantage. In addition, it promotes clarity, consistency, and fairness in the litigation.[165] And, finally, if immunity exists in substantial part to protect states from the burdens of suit, it makes logical sense to require the defense to be raised as early in the litigation as possible.

If immunity were difficult to determine, I might rethink forfeiture. After all, state sovereign immunity is designed to ensure respect for the states, and a rule that requires a decision whether or not to assert immunity at an early stage

---

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

163. *Cf.* Day v. McDonough, 547 U.S. 198, 205-10 (2006) (allowing courts to raise the untimeliness of habeas petitions on their own even though the time bar is nonjurisdictional and does not require them to do so).

164. *See* United States v. Olano, 507 U.S. 725, 733 (1993); *cf.* Kontrick v. Ryan, 540 U.S. 443, 458 n.13 (2004) (acknowledging the distinction).

165. *Cf.* Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613, 620 (2002) (suggesting that these are values that ought to be considered in immunity jurisprudence).

in the litigation when that decision cannot yet be made does not show much respect for the states and the doctrine of immunity. But the availability of immunity should be, in the vast majority of instances, readily apparent at the outset. Even if the availability of immunity is unclear, an entity usually can—and will have ample incentive to—assert the defense early anyway.[166]

There are two practical arguments against forfeiture, but they strike me as fairly weak. The first is that a no-forfeiture rule would protect those state entities that erroneously believed that they were not entitled to assert immunity but suddenly realized their mistake before the litigation ended but after the forfeiture deadline had expired. A no-forfeiture rule for those cases might enable a court to resolve whether the state entities had consented to suit voluntarily.[167]

But, as I mentioned above in the context of the sua sponte discussion, these cases strike me as very rare indeed,[168] and, to the extent they arise, defendants already have the opportunity to amend their answers to assert affirmative defenses previously omitted if justice so requires.[169] The risk that a nonconsenting state entity will unknowingly forfeit an available immunity defense and be unable to assert it, particularly with the opportunity of a court to raise the issue sua sponte,[170] seems extremely low and provides very little support for a no-forfeiture rule of state sovereign immunity.

The second practical argument is that states may need time to consider carefully whether to waive immunity or not in specific cases, a decision that may not be able to be made without information from the discovery process. Respect for the states and their prerogative to invoke or waive immunity counsels against a strict and early forfeiture rule.

This argument has some merit, but it is not clear to me, as an empirical matter, whether such situations come up often enough to justify it. Even if so, there is an easy solution: a state should assert the immunity defense in its answer but decline to move to dismiss the case before discovery[171] and, instead, after discovery has closed, either waive immunity or move for summary judgment.[172] The point is that the state can preserve its immunity against forfeiture by asserting it in a timely fashion but need not seek dismissal

---

166. *See, e.g.*, N. Ins. Co. of N.Y. v. Chatham County, 547 U.S. 189 (2006) (entertaining the assertion of sovereign immunity by a county whose ability to invoke immunity was unclear).

167. *Cf.* 28 U.S.C. § 2254(b)(3) (2000) (eliminating the forfeitability of the habeas exhaustion requirement to ensure that waiver was proper).

168. One possible exception is *Edelman v. Jordan*, 415 U.S. 651 (1974). *See supra* note 135.

169. *See* FED. R. CIV. P. 15(a); *cf.* Day v. McDonough, 547 U.S. 198, 205-10 (2006) (recognizing the utility of Rule 15 to assert defenses otherwise forfeited).

170. *See supra* text accompanying note 162.

171. *See* FED. R. CIV. P. 12(b).

172. *See* FED. R. CIV. P. 56.

on the basis of immunity until it is ready to do so.

The strongest argument in favor of a no-forfeiture rule is precedent. Although the Court has never said whether state sovereign immunity may be forfeited, two decisions hint otherwise. In *Ford Motor Co. v. Department of Treasury*,[173] the Court allowed a state to assert sovereign immunity in a federal case for the first time on appeal to the U.S. Supreme Court.[174] *Ford* implicated both waiver and forfeiture. The waiver issue was whether the attorney general had authority to waive the state's immunity through his litigation conduct in the lower federal courts. The forfeiture issue was whether, independent of waiver, the state could be barred from asserting immunity because it did not do so in a timely fashion.

Ford decided both issues in favor of the state's retention of immunity. *Ford* held that the attorney general lacked authority to waive state immunity though litigation conduct.[175] The Court overruled that holding in *Lapides v. Board of Regents*, holding instead that an attorney general can waive the state's immunity through his litigation conduct.[176]

But *Ford* also decided the forfeiture issue:

> The objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued by Indiana in this Court. This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court.[177]

Lapides did not overrule this forfeiture aspect of *Ford*.

Similarly, in *Edelman v. Jordan*,[178] the Court allowed the State to assert immunity successfully even though the State invoked immunity for the first time on appeal.[179] The Court stated: "[I]t has been well settled since [*Ford*] that the Eleventh Amendment sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."[180]

Ford and *Edelman* provide some support for a no-forfeiture rule of state sovereign immunity, but they are not unequivocal. A plausible reading of those cases is that, assuming immunity may be forfeited, forfeiture will be narrowly construed and the time limit to forfeiture may be quite long depending upon the

---

173. 323 U.S. 459 (1945), *overruled by* Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613 (2002).

174. *Id.*

175. *Id.* at 469.

176. *Lapides*, 535 U.S. at 623 (overruling *Ford*).

177. *Ford*, 323 U.S. at 467.

178. 415 U.S. 651 (1974).

179. *See id.* at 677-78 (considering the defense, though it was raised for the first time on appeal).

180. *Id.*

circumstances.[181] In addition, it is clear that both *Ford* and *Edelman* premised their holdings on the jurisdictional nature of state sovereign immunity. Reconsidering that jurisdictional premise in the careful and nuanced way that I propose here may undermine the skepticism of forfeiture evinced in *Ford* and *Edelman*.

Ultimately, equivocal precedent should not stand in the way of the strong formalist and functional reasons for allowing state sovereign immunity to be forfeited. But it is a close call. And, if I am wrong, then I happily revert to my broader point: regardless of the specific balance struck here, we need a more nuanced lexicon to deal with doctrines like state sovereign immunity. Regardless of whether a mandatory characterization or some other characterization ultimately carries the day, the point is that some middle path provides a different, and perhaps better, way to conceptualize the doctrine.

3. *No availability of equity*

The final jurisdictional-like attribute to consider is the availability of equity to prevent an assertion of the immunity bar. Although a closer call, I think a persuasive argument can be made that state sovereign immunity resists application of equity.

The availability of equity does not implicate the *Ex parte Young* doctrine. The *Young* doctrine allows a person otherwise barred by immunity to sue a state official for violations of federal law for prospective injunctive or declaratory relief.[182] The *Young* doctrine does not hinge on the need for equity, however. The *Young* doctrine relies on the fiction that a state official is stripped of his state immunity when he violates federal law.[183] An award of money damages would be, in effect, an award against the state when the fiction dictates that the state is not the real party in interest in the suit against the stripped officer.[184] Thus, the distinction between injunctive relief and money damages protects the unconsenting state, which, under *Young*, is still cloaked with immunity, from being effectively the real party in interest to an officer suit.

Later decisions have reinforced the fact that *Young* is not a decision based in equity. In *Edelman*, the Court struck down retrospective injunctive monetary relief, despite its characterization as "equitable restitution," because the award would have come from the state fisc.[185] The Court stated:

We do not read Ex parte Young or subsequent holdings of this Court to

---

181. *Edelman*, in particular, may have had good reason to allow the tardy assertion. *See supra* note 135.

182. *See supra* note 147.

183. *Ex parte* Young, 209 U.S. 123, 159-60 (1908).

184. *See* Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459 (1945).

185. *Edelman*, 415 U.S. at 664-68.

> indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled "equitable" in nature.[186]

In other words, the *Young* doctrine does not subject immunity to the whims of equity. Rather, it arises from the need to end ongoing violations of federal law. The *Young* doctrine does not address the applicability of equity to state sovereign immunity.

Equity may, however, come into play in the state's otherwise proper assertion of immunity. In other words, might there be equitable reasons why a court could hear a claim against a nonconsenting state despite its otherwise proper invocation of immunity?[187]

Two reasons suggest that the answer is no. First, the Court's stringent waiver rules indicate that anything outside of a clear and voluntary waiver or declaration of consent will not deprive a state of its immunity right. For example, a state's consent to suit is valid only if the consent was clear and unambiguous.[188] In addition, waiver based on a state's conduct will be applied only if the state voluntarily invokes the court's jurisdiction.[189] Finally, waivers that are coercive—that are obtained via a stick rather than a carrot—are not binding on the state.[190] These cases suggest that equitable estoppel, to the extent that it is a kind of implied waiver or consent, should not be available to prevent a state from asserting immunity.

Second, immunity is inherent in sovereignty, and, as a result, is of a mandatory and inflexible nature. The sovereign interests served by state sovereign immunity—deference to state dignity and protection of the state fisc—transcend notions of fairness that arise in the context of a specific litigation. (Indeed, they transcend notions of fairness in general by preventing

---

186. *Id.* at 666; *see also* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 282-88 (1997) (refusing to apply the *Young* doctrine to a suit seeking prospective equitable relief that was the functional equivalent to a quiet title action against the state).

187. *See* Pemrick v. Stracher, No. 92 CV 959(CLP), 2007 WL 1876504, at *8 n.16 (E.D.N.Y. June 28, 2007) (assuming that equitable estoppel could prevent a state from asserting immunity but finding that its application was unwarranted by the facts of the case); Hoskins v. Kaufman Indep. Sch. Dist., No. Civ. A. 303CV0130D, 2003 WL 22364356, at *1 n.2 (N.D. Tex. Aug. 25, 2003) (avoiding the issue).

188. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 n.9 (1984); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944).

189. *Compare* Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613, 620 (2002) (finding waiver where the state removed the case to federal court), *and* Porto Rico v. Ramos, 232 U.S. 627, 631 (1914) (finding waiver where Puerto Rico petitioned to become a party), *with* Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675-76 (1999) (abolishing the doctrine of constructive waiver of immunity based on a state's participation in a federal regulatory scheme), *and* Smith v. Reeves, 178 U.S. 436, 441 (1900) (refusing to find consent to suit in federal court based on a state's consent to suit in state court).

190. *Fla. Prepaid*, 527 U.S. at 687.

an injured citizen from recovering against the state that wrongfully caused the injury.) They ought not be subject to the whim of circumstances or the parties' actions, save where those actions manifest a valid waiver or consent by the state.

In sum, a good argument can be made that state sovereign immunity might best be characterized as nonjurisdictional. Its principal function is to bestow a right upon a party rather than to limit the power of the courts. The availability of waiver and consent is an important and consistent corollary to sovereign immunity. And precedent is in tension with a jurisdictional characterization. These features all support a nonjurisdictional characterization of state sovereign immunity. In addition, good arguments support a mandatory characterization. The availability of waiver and consent, as just stated, are important and consistent components of sovereign immunity. Sovereign immunity need not be policed by the courts sua sponte, but it ought to be subject to forfeiture. Finally, the invocation of immunity should resist equitable constraints. For these reasons, we should consider characterizing state sovereign immunity as a mandatory but nonjurisdictional rule.

CONCLUSION

At one level, the goal of this Article is modest: to show why we need a deeper consideration of nonjurisdictional rules and a greater appreciation for their various manifestations, particularly mandatory rules. For statutes like § 2107, the case is somewhat straightforward. A mandatory but nonjurisdictional characterization fits well with its statutory paradigm, purpose, effects, and precedent—far better even than the other characterizations offered by the *Bowles* majority and dissent.

Going beyond statutes, however, taps into something much broader and more complex. As I have tried to show with state sovereign immunity, a willingness to embrace a middle path—such as mandatory rules—may provide additional avenues for conceptualizing and characterizing nonstatutory doctrines, which often are more amorphous and uncertain than their statutory counterparts. There are a host of them to consider. Prudential standing,[191] appellate certification,[192] and exhaustion[193] are just a few. These doctrines

191. *See, e.g.*, Bd. of Educ. v. Nancy E. *ex rel.* Kelly E., 207 F.3d 931, 934 (7th Cir. 2000) (holding prudential standing requirements to be nonjurisdictional).

192. *See* Burton v. Stewart, 549 U.S. 147 (2007) (per curiam) ("[U]nder AEDPA, he was required to receive authorization from the Court of Appeals before filing his second challenge. Because he did not do so, the District Court was without jurisdiction to entertain it.").

193. The Court has avoided resolving whether appellate exhaustion is jurisdictional. *See* Adams v. Robertson, 520 U.S. 83, 90 (1997); Yee v. City of Escondido, 503 U.S. 519, 533 (1992); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 79 (1988). *But see* Carlson v. Green, 446 U.S. 14, 17 n.2 (1980) (stating that the Court can decide issues that were not presented below when the respondent does not object, the issue was squarely presented and

ought not get stuck in the jurisdictional/nonjurisdictional false dichotomy that has trapped others. A greater appreciation for nonjurisdictional rules in general (and mandatory rules specifically) may provide a way out, as well as an opportunity to think more broadly about these doctrines and to give them a richer, more nuanced, character.

At bottom, this Article is not so much about arguing for a specific characterization of state sovereign immunity or § 2107. After all, though I think the arguments for the mandatory but nonjurisdictional characterizations are strong, I am not so utterly convinced of them that I can rule out being persuaded otherwise. Rather, the broader goal is to develop more creative thinking about these difficult characterization issues, to open our minds to the myriad of possibilities that exist for them, and to resolve them with both honesty and principle.

---

fully briefed, and it was an important, recurring issue).