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The Better Course in the Post-*Lapides* Circuit Split: Eschewing the Waiver-by-Removal Rule in State Sovereignty Jurisprudence

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By the Rehnquist Court's end, much of lay and learned opinion had ascribed to it a reestablishment of state prerogatives and a revival of federalism. Commentators noted how the Rehnquist Court had overturned "dozens of federal laws that sought to project federal authority into what the Supreme Court majority viewed as the domain of the states." Scholars observed how, in the last fifteen years, the Court had struck down at least ten federal statutes on federalism grounds. In contrast, in the prior fifty years, the Supreme Court had only once found that a statute violated principles of federalism. "Over the past fifteen years, the U.S. Supreme Court has breathed life into what appeared to be a moribund, abstract, technical area of law, and renewed attention has fallen upon the federal-state balance of power."
Despite the Rehnquist Court's use of judicial review to advance federalism, however, many constitutional scholars question its decisions' cumulative coherence and likely future influence. The incoherence appears particularly in what many describe as the cornerstone of the Rehnquist Court's federalism, its defense of state sovereign immunity. Sovereign immunity protects states from the suits of individuals. It also indirectly protects States from the federal government, which often attempts to enforce its laws by enabling individuals to sue States through private causes of action or citizen-


9. For concision's sake, this Note uses the otherwise unmodified phrases "sovereign immunity" or "immunity" to refer to state sovereign immunity and not to federal sovereign immunity. For a discussion of the latter doctrine, see generally Vicki C. Jackson, Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence, 35 Geo. Wash. Int'l L. Rev. 521 (2003).

10. See Note, The Irrational Application of Rational Basis: Kimel, Garrett, and Congressional Power to Abrogate State Sovereign Immunity, 114 Harv. L. Rev. 2146, 2169 (2001) (concluding that sovereign immunity bars suits for money damages against states, "thereby closing off the single most important avenue for those individuals to enforce their rights against states").
Sovereign immunity does not shield States from suits brought by other States and by the federal government.\textsuperscript{12} The impermanence of the Rehnquist Court's sovereign immunity jurisprudence has been demonstrated recently by the Roberts Court's overruling of one of the earlier Court's central provisions—that statutes passed under Article I powers did not abrogate state immunity.\textsuperscript{13} This doctrinal back-and-forth characterizes much of the Supreme Court's sovereign immunity jurisprudence over the past few decades.\textsuperscript{14} This Note focuses on one of the latest swerves,\textsuperscript{15} \textit{Lapides v. Board of Regents}.\textsuperscript{16} \textit{Lapides} ruled that a State

\begin{itemize}
  \item \textsuperscript{11} For examples of the aims of federal private causes of actions, see Pamela H. Bucy, \textit{Private Justice}, 76 S. CAL. L. REV. 1, 2–6, 31–43 (2002) (describing private causes of actions in general and in particular the federal government's use of citizen suits to compel States to comply with environmental regulations); Michelle Reed, Note, "Arising Under" Jurisdiction in the Federalism Renaissance: Verizon Maryland Inc. v. Public Service Commission of Maryland, 2002 BYU L. REV. 717, 733–38 (discussing the intersection of sovereign immunity and private causes of action in the context of federal telecommunications law).
  \item \textsuperscript{12} See, e.g., United States v. Texas, 143 U.S. 621, 644 (1892) (providing that States can still be sued by the federal government); Rhode Island v. Massachusetts, 37 U.S. 657 (1838) (providing that States can be sued by other States).
  \item \textsuperscript{15} See, e.g., Paul Horton, Lapides v. Board of Regents and the Untrustworthiness of Unanimous Supreme Court Decisions, 41 SAN DIEGO L. REV. 1057, 1058 (2004) (asserting that "[a]fter two decades of hard-fought, inch-by-inch progress, mostly in the direction of clarifying the relationship between the Eleventh Amendment and the doctrines associated with State Sovereign Immunity, [with Lapides] the Rehnquist Court has again opted for disarray").
  \item \textsuperscript{16} See Lapides v. Bd. of Regents, 535 U.S. 613, 623 (2002) (ruling that state removal to federal court amounted to a waiver of its sovereign immunity). Lapides, a professor employed by the Georgia state university system, brought suit in state court against the State and the Regents in their personal capacities. \textit{Id.} at 616. Lapides alleged that university officials had placed allegations of sexual harassment in his personnel files in violation of state law. \textit{Id.} Defendants removed to Federal District Court, where they sought dismissal. \textit{Id.} at 617. Those whom Lapides had sued in their personal capacities successfully argued that the doctrine of "qualified immunity" barred Lapides's federal-law claims against them. \textit{Id.} The State, conceding that a state statute had waived sovereign immunity from state-law suits in state court, argued that it enjoyed Eleventh Amendment immunity from suit in federal court. \textit{Id.} The District Court rejected and the Court of Appeals for the Eleventh Circuit upheld the immunity
could not advance in federal court a sovereign immunity defense waived by state statute or through litigation on the merits. The decision appeared to many as a surprising reversal, or at least tempering, of the Rehnquist Court's earlier federalism decisions. It has cast doubt on the current state of state sovereign immunity. It has led to a circuit split on the ruling's scope, the resolution of which is this Note's topic.

Part II of this Note places Lapides in the history of sovereign immunity and its exceptions. Part III analyzes Lapides and the arguments of both sides of the circuit split, while criticizing the doctrine of waiver-by-removal. Part IV appraises the arguments of the courts adopting waiver-by-removal, and instead recommends the adoption of the Fourth Circuit's limited waiver rule. In conclusion this Note urges the Court and other courts to adopt the Fourth Circuit's rule.

II. State Sovereign Immunity and Waiver in Historical Context

Lapides belongs to sovereign immunity's long and confusing history. Subpart A provides the development of the intertwined jurisprudences of sovereign immunity and Eleventh Amendment immunity. Subpart B describes the three exceptions to sovereign immunity, providing their current scope and discussing their constitutional legitimacy. Both subparts demonstrate the defense.  

Id. The Court construed the Eleventh Amendment to provide that States do enjoy Eleventh Amendment immunity from suit in a federal court, but that the immunity may be waived. Id. at 619. Waiver was satisfied when the State voluntarily invoked a federal court's jurisdiction. Id. at 622. For this reason, Georgia had waived its Eleventh Amendment immunity, and Lapides's suit survived the defense. Id. at 623.

17. See id. at 623 (providing the holding).


confusion of immunity jurisprudence and waiver's centrality to it—two issues that Lapides has failed to resolve.

A. Sovereign Immunity and Eleventh Amendment Immunity in Historical Context

Sovereign immunity derives from the axiom that "no suit or action can be brought against the King, even civil matters, because no court can have jurisdiction over him...for all jurisdiction implies superiority of power." The Court asserts that states enjoyed this immunity before and after the Constitution's ratification. As currently understood, state sovereign immunity has two parts: "[F]irst, that each State is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." The Court describes state sovereignty as indispensable to the federal system. Yet the Constitution nowhere mentions state sovereignty. The historical record instead indicates that, while many Constitutional Convention delegates believed the doctrine to inform the Constitution, their attempts to explicate the doctrine

22. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 235 (1769).
23. See Alden v. Maine, 527 U.S. 706, 713 (1999) (stating that the sovereign immunity enjoyed by the states before constitutional ratification exists undiminished except as altered by the Constitutional Convention or by later constitutional amendments); Nevada v. Hall, 440 U.S. 410, 416 (1979) (finding state sovereign immunity "based 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") (citations omitted). The equal footing doctrine holds that new states enter the Union with the same privileges as those currently enrolled. See Alden, 527 U.S. at 713 (discussing the "sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments"). Like state sovereign immunity, however, the equal footing doctrine goes unmentioned by the Constitution. See U.S. CONST. Art. 4, § IV ("New States may be admitted by the Congress into this Union.").
25. See Alden, 527 U.S. at 748 (1999) (asserting that states are "residuary sovereigns and joint participants in the governance of the Nation").
27. See THE FEDERALIST NO. 39, at 245 (James Madison) (claiming states need not fear Article III diversity jurisdiction because they retain a "residuary and inviolable sovereignty"). These arguments countered the criticisms faulting the proposed constitution for not adequately
in an amendment failed.\textsuperscript{28} Ever after, the Court has never succeeded in grounding its immunity decisions in constitutional text.\textsuperscript{29}

Instead, the Court has justified its sovereign immunity rulings from deductions drawn from the "constitutional design,"\textsuperscript{30} the "system of federalism,"\textsuperscript{31} and the "plan of the convention."\textsuperscript{32} Yet as Justice Breyer has observed:

These words . . . suffer several defects. Their language is highly abstract, making them difficult to apply. They invite differing interpretations at least as much as do the Constitution's own broad liberty-protecting phrases, such as "due process of the law" or the word "liberty" itself. And compared to these latter phrases, they suffer the additional disadvantage that they do not actually appear anywhere in the Constitution.\textsuperscript{33}

Perhaps because of the absence of a textual anchor, the Court has variously asserted that state sovereign immunity derives from internationally-accepted axioms of law\textsuperscript{34} or from the English common law.\textsuperscript{35} The Court has found sovereign immunity reserved by the Tenth Amendment,\textsuperscript{36} contained protecting state sovereignty. See, e.g., 2 THE COMPLETE ANTI-FEDERALIST 429 (Brutus) (1981) (claiming Article III is "improper, because it subjects a state to answer in a court of law, to the suit of an individual. This is humiliating and degrading to a government . . . ."); Scott Dodson, Dignity: The New Frontier of State Sovereignty, 56 OKLA. L. REV. 777, 786 (2003) (providing historical context of state sovereign immunity in the Republic's first years).

28. See, e.g., 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 409 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES] (recounting New York's proposed amendment that nothing in the Constitution "is to be construed to authorize any suit to be brought against any state, in any manner whatever").

29. For an excellent overview of the problems involved, see generally John F. Manning, The Eleventh Amendment and the Reading of Precise Constitutional Texts, 113 YALE L.J. 1663 (2004).


31. \textit{Id.} at 730.

32. \textit{Id.}


34. See Beers v. Arkansas, 1 U.S. 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.").

35. See Employees of Dep't of Pub. Health and Welfare of Mo. v. Dep't of Pub. Health and Welfare of Mo., 411 U.S. 279, 288 (1973) (Marshall, J., concurring) ("Sovereign immunity is a common-law doctrine that long predates our Constitution and the Eleventh Amendment, although it has, of course, been carried forward in our jurisprudence.").

36. See Alden v. Maine, 527 U.S. 706, 713-14 (1999) ("Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power.").
within the Eleventh Amendment, or located intrinsically within the Constitution. This confusion is compounded by confusion regarding the doctrine's nature. The Court has explained sovereign immunity as an absence of personal jurisdiction and as a limit on subject matter jurisdiction, as a right, as an affirmative defense, and as an immunity from any suit at all.

Sovereign immunity jurisprudence has been confused by the language of the Eleventh Amendment, ratified in 1798 to sustain an aspect of sovereign immunity disregarded by a Court decision. The Eleventh Amendment reads in full: "The Judicial power of the United States shall

37. See Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991) (describing the Court's expansive reading of the Eleventh Amendment). The Court noted:

Despite the narrowness of its terms, since Hans v. Louisiana, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty.

Id. (citations omitted).

38. See Alden, 527 U.S. at 730 ("While the constitutional principle of sovereign immunity does pose a bar to federal jurisdiction over suits against nonconsenting States . . . this is not the only structural basis of sovereign immunity implicit in the Constitution[]. . . .").

39. See Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 394 (Kennedy, J., concurring) ("In certain respects, the immunity bears substantial similarity to personal jurisdiction requirements, since it can be waived and courts need not raise the issue sua sponte.").

40. Id. at 391 (raising the issue and asserting its lack of resolution).


44. See Hans v. Louisiana, 134 U.S. 1, 14 (1890) (providing a history of the Eleventh Amendment). Whether in fact States could be unwillingly subject to suit under the state-citizen clause was a matter of disagreement among the Founders. See, e.g., 3 ELLIOT'S DEBATES, supra note 28, at 533 (recording Madison's belief that the state-citizen clause only authorized States to sue as plaintiffs); id. at 555-56 (recording Marshall's agreement with Madison, although suggesting immunity did not extend to state legislatures); THE FEDERALIST No. 81, at 487 (Alexander Hamilton) (arguing that states are not subject to suit without consent, whether in the future or at a constitutional convention). But see 3 ELLIOT'S DEBATES, supra note 28, at 573-75 (recording Edmund Randolph's beliefs that States should be liable for debts in federal court); id. at 549 (recording Edmund Pendleton's argument for jurisdiction over States).
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." The narrowness of this wording and the Amendment's swift passage testify to the unpopularity of the Court's decision in Chisholm v. Georgia. In essence, Chisholm held that Article III's provision for federal diversity jurisdiction trumped States' common-law sovereign immunity. The Eleventh Amendment overruled the decision.

In succeeding years, however, the Court has confused things further by interpreting the Eleventh Amendment more broadly than the text warrants. The starkest instance of this expansion came in Hans v. Louisiana. Hans's facts reversed Chisholm's, as Hans sued his

45. U.S. CONST. amend. XI.
46. The amendment, proposed on March 4, 1794, was ratified on February 7, 1795, when the twelfth of fifteen states approved it. See Larson v. Domestic & Foreign Comm. Corp., 337 U.S. 682, 708 (1949) (Frankfurter, J., dissenting) (remarking upon the "vehement speed" of the amendment's passage).
47. See Chisholm v. Georgia, 2 U.S. 419, 445 (1793) (ruling that sovereign immunity did not protect a State from suits from another State's citizens). A South Carolinian's executor sued Georgia to recover default payment for medical supplies. Id. at 422. When brought in a Georgia court, the State's attorney general claimed immunity from the federal courts. Id. at 426. Georgia maintained that it was a sovereign state and thus free from suit save by its own consent. Id. The Court found that such immunity did not exist. Id. at 445. Article III of the Constitution provided for jurisdiction by the Court when a State was a party to a controversy between a State and citizens of another state, as in this case. Id. at 447. The interpretation that the State must be the plaintiff was invalid. Id. Therefore, plaintiff had standing to bring a suit in assumpsit against the State. Id. The Court entered an order allowing such with service to be made upon the governor and the attorney general of the State, and making the State's failure to appear or to show cause grounds for a default judgment. Id. at 450.
48. See U.S. CONST. Art. III, § 2 ("The judicial Power shall extend... to Controversies... between a State and Citizens of another State...").
50. See Pennhurst, 465 U.S. at 151 (providing the rationale for the Eleventh Amendment's creation and ratification).
51. See Manning, supra note 29, at 1666 (describing how "strong purposivism" has influenced reading of the Amendment).
52. See Hans v. Louisiana, 134 U.S. 1, 15 (1890) (finding the Eleventh Amendment bars suits from States' own citizens). Plaintiff Hans sued his home state of Louisiana for defaulting on outstanding bonds. Id. at 2. The State argued the defense of sovereign immunity. Id. Hans argued that the Eleventh Amendment did not apply to suits between a State and its citizens. Id. at 3. The issue before the Court, therefore, was whether federal jurisdiction encompassed suits between a State and its citizens on a federal question. Id. at 6. The Court admitted that the Constitution does not specifically provide for federal jurisdiction in suits between a citizen and
Because the Constitution only forbade suits against States by non-citizens, Plaintiff reasonably claimed to be "not embarrassed by the obstacle of the Eleventh Amendment." Rather than rely on extra-constitutional principles of sovereign immunity, the Court justified its decision by the Eleventh Amendment. The Court asked, "Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled?" The Court thought otherwise, and found the Eleventh Amendment, despite its limited wording, to contain a general establishment of state sovereign immunity. The decision blurs the distinction between Eleventh Amendment immunity and sovereign immunity, and for the last century the Court's inflated Eleventh Amendment has served as a textual proxy of common-law blanket immunity.

The consequences of locating traditional sovereign immunity in the Eleventh Amendment are controversial, and are discussed more fully later. Courts remain confused about the distinctions between "Eleventh Amendment immunity" and "state sovereign immunity." While the Supreme Court, but then noted that Article III gives federal jurisdiction over "all cases" arising under a federal question. Id. at 7–9. Further, the Court argued that an inequitable situation would develop if a State's action could give rise to suits from citizens but bar those by non-citizens. Id. at 9. For these reasons the Court interpreted the Eleventh Amendment to bar suits from States' citizens against home States, and upheld Louisiana's sovereign immunity defense. Id. at 15.

53. Id. at 2.
54. See U.S. Const. amend. XI (barring suits "against one of the United States by Citizens of another State").
55. Hans, 134 U.S. at 3.
56. Id. at 15.
57. Id. at 20–21. Hans is still good law. See Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 446 (2003) (citing Hans to support the proposition that "[f]or over a century, however, we have recognized that the States' sovereign immunity is not limited to the literal terms of the Eleventh Amendment").
59. See infra Part IV.B.2 (arguing for a waiver doctrine founded on sovereign immunity and not Eleventh Amendment immunity).
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Court cautions against equating the terms,\(^60\) it is itself hardly innocent of this loose usage.\(^61\) While "Eleventh Amendment immunity" may be only an expression of "state sovereign immunity,\(^62\) in practical effect the two are usually indistinguishable, and "the Eleventh Amendment closes the federal courthouses to suits against member states,\(^63\) wherever the plaintiff lives. It is generally accepted that, whatever Hans's implications, the Eleventh Amendment now forestalls federal jurisdiction over most private suits against unwilling States.\(^64\)

B. Limits on State Sovereign Immunity

The Court currently recognizes three exceptions to sovereign immunity. They are: (1) the Young state-actor fiction; (2) abrogation of immunity by Congress; and (3) state waiver of immunity (consent to suit).\(^65\) The diminished strength of the first two exceptions underscores the importance of waiver, the exception central to Lapides.\(^66\)

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\(^{62}\) See Coeur d'Alene Tribe, 521 U.S. at 267–68 (referring to "the broader concept of immunity, implicit in the Constitution, which [the Court has] regarded the Eleventh Amendment as evidencing and exemplifying"). This understanding is long standing. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98–99 (1984) (explaining relationship between Eleventh Amendment and sovereign immunity); Ex parte New York, 256 U.S. 490, 497 (1921) (same).


\(^{64}\) See Nguyen, supra note 58, at 598 (summarizing Hans's general effect).

\(^{65}\) Id. at 598–600. Strictly speaking, the Young state actor fiction is not an exception to state sovereign immunity as it purports to affect only the state actor. In practice, of course, the fiction acts like other restraints on state action. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank II, 527 U.S. 666, 670 (1999) (giving the Court's view of two main exceptions to state sovereign immunity, congressional abrogation and waiver).

\(^{66}\) See Jonathan R. Siegel, Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment, 52 DUKE L.J. 1167, 1170 (2003) ("Since its landmark decision in Seminole Tribe of Florida v. Florida, the Supreme Court has steadily constricted the set of circumstances in which private parties may sue states. [As] this set diminishes, each remaining element in the set takes on increased importance.").
I. The State-Actor Exception

The first exception, the *Ex Parte Young* state actor fiction, sprang from a Minnesota official's attempted use of the Eleventh Amendment to overturn a federal injunction entered against him. The Court rejected his plea, holding that citizens may sue state officers to enjoin violation of federal law. The Court reasoned that by acting outside federal law, state actors (even in obeying state law) have exceeded a state's authority and are therefore unprotected by the Eleventh Amendment. The *Young* decision thus creates a legal fiction that it is not the states but their actors who lie subject to suit. One scholar describes state-officer suits as "a way of dodging the protections that the doctrine of state sovereign immunity would otherwise confer on the states in federal court." The Court's disingenuousness has led to criticism, even after the exception was

67. See *Ex Parte Young*, 209 U.S. 123, 130 (1908) (finding that a state official cannot use sovereign immunity to protect unconstitutional acts). Minnesota limited railroad rates and heavily penalized their violation, which drew a lawsuit in federal court from railroad shareholding, who asserted violations of the Fourteenth Amendment and the Commerce Clause. *Id.* at 124. *Young*, the State’s Attorney General, argued that the Eleventh Amendment protected States from suits by their citizens. *Id.* The federal court, unconvinced, restrained Young from enforcing the rates. *Id.* Young subsequently sued in state court to enjoin the railroads to adopt the new rates. *Id.* The federal court thereupon held Young in contempt, but permitted him to file a writ of habeas corpus to the Supreme Court. *Id.* The Court found the Minnesota rates unconstitutional, then addressed the more vexing issue of whether the Eleventh Amendment permitted a state official to be restrained from prosecuting violations of such laws. *Id.* at 126. Young argued that he was merely acting for the State when he sought to enforce its laws. *Id.* at 124. The Court held, however, that a state official's unconstitutional act cannot be done on behalf of the State because the Constitution's Supremacy Clause voids all contrary laws. *Id.* at 130. Whenever a state official enforces an unconstitutional law, that individual therefore is stripped of "his official or representative character." *Id.* He is merely a private citizen who can be sued for injunctive relief without implicating the Eleventh Amendment. *Id.*

68. *Id.* at 124.

69. *Id.* at 130.

70. *Id.* This fiction, though transparent, can claim common law antecedents. See 1 BLACKSTONE, *supra* note 22, at 244 ("In the exertion therefore of those prerogatives, which the law has given him, the king is irrefutable and absolute . . . . And yet, if the consequence of that exertion be manifestly to the grievance or dishonour of the kingdom, the parliament will call his advisers to a just and severe account.").

71. See *Ex Parte Young*, 209 U.S. at 130 (finding state actors liable to suit).


73. See *id.* at 218 (finding that, its beneficial effects aside, the doctrine of *Ex Parte Young* is "not constitutionally viable"); Julie Jensen Nelson, *Ex Parte Young and Congressional Abrogation: Can the Two Peacefully Coexist?*, 2003 UTAH L. REV. 949, 970 (2003) (discussing the artificiality of the *Ex Parte Young* decision).
limited to injunctive relief in *Edelman v. Jordan*. Currently States must waive immunity in order for defendants to recover damages.

2. **Congressional Abrogation**

The second exception to sovereign immunity is congressional abrogation, which *Fitzpatrick v. Bitzer* limited to certain suits brought under Section Five of the Fourteenth Amendment. Through this section, the Court found that "Congress is expressly granted authority to enforce...the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority." In effect, by its later ratification the

74. See *Edelman v. Jordan*, 415 U.S. 651, 660 (1974) (finding that participation in a federal regulatory program did not automatically constitute a waiver of immunity). Jordan sued Illinois for violating federal time limits in the administration of a federal-state aid program. *Id.* at 652. He sought an injunction to force the State to award him retroactively the aid lost through the State's delay. *Id.* The issue before the Court was whether a federal court could require States to restore money wrongfully withheld from their citizens. *Id.* at 654. The Court noted that few, if any, Eleventh Amendment cases had ever held that States could be required to retroactively repay withheld funds. *Id.* at 656–57. The Court then distinguished these payments from payments that are ordered after an injunction is issued. *Id.* at 658. Finally, the Court refused to view participation in the federal aid program as constructive consent to suit. *Id.* at 660. The Court concluded that the Eleventh Amendment required that the state could not be made to restore the funds it should have been paying out to aid applicants. *Id.* at 662.

75. See, e.g., Pfander, supra note 63, at 248 (advising that only through waiver will States have to pay damages for violations of commercial regulations). *Lapides* notes that "suits for money damages against the State [are] the heart of the Eleventh Amendment's concern." *Lapides v. Bd. of Regents*, 535 U.S. 613, 620 (2002).

76. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451 (1976) (finding that laws passed under the Fourteenth Amendment may abrogate sovereign immunity). The Congressional statute Title VII allowed individuals to sue state governments to recover money damages for discrimination based on race, sex, or national origin. *Id.* at 446. Male retirees sued Connecticut under this provision. *Id.* at 445. Connecticut invoked its Eleventh Amendment sovereign immunity, and the District Court and Court of Appeals both permitted only injunctive relief. *Id.* The issue before the Court was whether the Fourteenth Amendment could fully override the States' protection under the Eleventh Amendment. *Id.* at 450. The Court distinguished *Edelman v. Jordan* because the instant case was begun under an express provision by Congress permitting such a suit. *Id.* The Court ruled that Congress has the power under the Fourteenth Amendment to abrogate the sovereign immunity of States, because the Fourteenth Amendment was enacted specifically to enforce civil rights guarantees against them. *Id.* at 451. The Court therefore invalidated Connecticut's sovereign immunity defense and permitted suits against a State for damages, if such damages are explicitly authorized by Congressional statute. *Id.*

77. See U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *Fitzpatrick*, 427 U.S. at 451 (limiting the scope of congressional abrogation of state sovereign immunity to Section Five of the Fourteenth Amendment).

78. *Fitzpatrick*, 427 U.S. at 449.
Fourteenth Amendment trumps the Eleventh. For similar reasons, the Court has held that States enjoy immunity from suits arising under Congress's much broader Article I powers. With this understanding, the Court rejected the doctrine of "implied waiver," in which a state waived immunity by acting within the purview of a federal regulatory scheme. Currently the Court requires that a citizen suing a State in federal court find: (1) a clear violation under the Fourteenth Amendment; (2) that the implicated statute provides a private right to sue; (3) a pattern of repeated violations affecting a large group of people; (4) that the statutory remedy fits the violation; and (5) that insufficient remedies are available at the state court level. The Court has not hesitated to strike down statutes that do not meet these requirements. Abrogation's stiff requirements has likely contributed to the increasing interest in waiver.

3. Waiver

The third exception to immunity is the longest recognized—that "a State may at its pleasure waive its sovereign immunity by consenting to suit."

79. See id. (giving rationales for this decision).
80. See Alden v. Maine, 527 U.S. 706, 748 (1999) (noting that it is "settled doctrine" that Article I does not provide grounds for abrogation of States' rights); Fed Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760–61 (2002) (holding that sovereign immunity bars a federal agency from adjudicating a private party's complaint against a nonconsenting state); Pfander, supra note 63, at 247 (describing doubts that Congress could abrogate sovereign immunity as regards, among other things, patents and other intellectual property). But see Central Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1005 (2006) (claiming that Article I, Section 8, Clause 4 grants Congress the right to abrogate State's sovereign immunity from private suits arising from the Bankruptcy code). Although the opinion did not explicitly overturn the Hans line of sovereign immunity cases, the Court appears to have overruled them sub silencio. See id. at 1007 (Thomas, J., dissenting) ("Today's decision thus cannot be reconciled with our established sovereign immunity jurisprudence, which the majority does not purport to overturn.").
84. Fla. Prepaid, 527 U.S. at 670. This principle is long-established. See, e.g.,
Waivers of immunity appear either by state statute or through willing participation in a suit.\textsuperscript{85} To demonstrate participation, the Court currently requires either: (1) the State's voluntary invocation of federal court jurisdiction, or (2) the State's "clear declaration" that it submits to federal court jurisdiction.\textsuperscript{86} This two-part test is effectively unitary, as over a century of Court precedents have established that a State's voluntary invocation of federal jurisdiction amounts to a clear declaration of submission to it.\textsuperscript{87} The question then turns to what constitutes "voluntary invocation."\textsuperscript{88} As the Lapides line of cases demonstrates, this concept can be so broadly construed that it finds voluntary waiver in State action where no waiver was intended.

III. Lapides and Aftermath

What constitutes waiver by voluntary invocation was not fully answered in Lapides. Subpart A describes Lapides and the issues it declined to answer fully. Subpart B describes the circuit split that arose in answering these issues.

A. Lapides: Unanswered Questions

In Lapides, a state employee sued Georgia in state court on state and federal claims.\textsuperscript{89} The State removed the case to federal court to assert the sovereign immunity

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\textsuperscript{85} See Gardner v. New Jersey, 329 U.S. 565, 574 (1947) ("When the State becomes an actor and files a claim against [the fund], it waives any immunity which it otherwise might have had respecting the adjudication of the claim in federal court.").

\textsuperscript{86} College Savings, 527 U.S. at 675-76 (citing Great N. Life Ins. v. Read, 322 U.S. 47, 54 (1944); Gunter v. Atl. Coast Line Ry. Co., 200 U.S. 273, 284 (1906)).

\textsuperscript{87} See, e.g., Gardner, 329 U.S. at 573-74 (holding that when a state files a claim in bankruptcy court "it waives any immunity which it otherwise might have had respecting the adjudication of the claim"); Gunter, 200 U.S. at 284–85, 289 (holding that state participation in tax collection litigation waived Eleventh Amendment immunity); Clark v. Barnard, 108 U.S. 436, 447 (1883) (holding Eleventh Amendment immunity waived "by the voluntary appearance of the State in intervening as a claimant of the fund in court"). The Court found these cases support the rule that "where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." Lapides v. Bd. of Regents, 535 U.S. 613, 619 (2002) (emphasis in original) (citations omitted).

\textsuperscript{88} See Edelman v. Jordan, 415 U.S. 651, 673 (1974) (requiring proof of waiver by "express language" or "overwhelming implication").

\textsuperscript{89} See Lapides, 535 U.S. at 617 (providing case's facts).
that was barred by Georgia statute in state court.\(^9\) The plaintiff appealed, and the Court ruled for him, holding that a defendant-State waived sovereign immunity by removing to federal court a state claim to which it had waived immunity.\(^9\) This waiver could exist by virtue of state law or by "the litigation act the State takes that creates the waiver."\(^9\)

More interesting than the Court's decision, however, are the issues that the Court declined to reach. Because plaintiff's federal claim against Georgia was \textit{prima facie} invalid, the Court limited its opinion to state-law claims.\(^9\) It explicitly reserved for itself the issues of: (1) whether State removal of a federal claim to federal court constituted a waiver, and (2) whether waiver would attach to a state-law claim over which sovereign immunity from suit has not been previously waived or abrogated.\(^9\) As subpart B shows, lower courts have split on how to answer these questions.\(^9\)

\textbf{B. Aftermath}

Four appellate courts have squarely answered \textit{Lapides}'s open questions. Section 1 discusses and praises the Fourth Circuit's restrictive view of waiver. Section 2 discusses and criticizes the waiver-by-removal rule established by the Tenth, Ninth, and Fifth Circuits. In assessing each case, this Note provides: (1) the procedural history and holding, including the timing of removal; (2) the appellate court's reasoning; and (3) how it distinguished state sovereign immunity from Eleventh Amendment immunity.

\textit{1. Restricting Waiver: Fourth Circuit}

Of the appellate courts reaching the unresolved issues of \textit{Lapides}, only the Fourth Circuit, in its opinion in \textit{Stewart v. North Carolina},\(^9\) refrained from

\begin{itemize}
\item \textit{Id.} at 617 (providing the facts of the case).
\item \textit{Id.} at 623–24.
\item \textit{Id.} at 620.
\item \textit{See} \textit{Stewart}, 393 F.3d at 486 (ruling that a State's voluntary removal to federal court does not waive sovereign immunity). \textit{Stewart} sued the North Carolina Department of Corrections and its employees in state court for violations of state and federal law. \textit{Id.}
\end{itemize}
expanding waiver's scope. Stewart's plaintiff sued North Carolina in state court on federal and state grounds; the State removed the case. The record does not reveal when precisely the state sovereign immunity defense was made, although it occurred before the merits were reached. The State appealed, arguing that the lower court had relied erroneously on Lapides to find waiver by removal over state claims to which immunity had not been earlier waived. The Fourth Circuit agreed, observing that there was nothing "inconsistent, anomalous, or unfair about permitting North Carolina to employ removal in the same manner as any other defendant facing federal claims." The issue of removing an unwaived federal claim was not decided, but would appear to fall within the court's reasoning for removing state claims.

In reaching its opinion, the Fourth Circuit distinguished Lapides by observing that North Carolina, unlike Georgia, had not consented to suit in its own courts for the claims asserted by the plaintiff. Because the State did not seek to regain its previously-waived immunity, it "merely sought to have the sovereign immunity issue resolved by a federal court rather than a state court." The Fourth Circuit concluded that the State was employing the rules of civil procedure much like any other defendant would.

When discussing immunity, the Fourth Circuit recited the Court's distinction in Alden that "sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." Remarkably, the Fourth Circuit recognized the separate existence of a "broader concept of immunity, implicit in the Constitution." In a footnote,

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Defendants removed the case to federal court and moved to dismiss. Id. The district court dismissed the federal and some but not all state claims. Id. The district court refused to dismiss the intentional tort and the gross negligence claims, relying on Lapides to rule that by waiver the defendants had waived sovereign immunity. Id. The defendants appealed, and the Fourth Circuit considered whether a state waived sovereign immunity by voluntarily removing an action to federal court when it would have been immune from the same action in state court. Id. The appellate court found that the district court had read the rule of Lapides too broadly, and reversed the court below. Id.

97. Id. at 491.
98. Id. at 487.
99. Id.
100. Id.
102. Id.
103. Id.
104. Id.
105. Id. at 487 (quoting Alden v. Maine, 527 U.S. 706, 713 (1999)).
106. Stewart, 393 F.3d at 489 (quoting Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267–68 (1997)).
the appellate court limited its opinion to removal on sovereign immunity, "the longstanding principle of state sovereign immunity implicit in constitutional order," and not to Eleventh Amendment immunity. The Fourth Circuit's holding therefore does not necessarily reach the similar case in which the plaintiff is a non-citizen.

2. Circuits Expanding Waiver

a. Tenth Circuit

The Tenth Circuit, in *Estes v. Wyoming Department of Transportation*, was the first appellate court to reach the issue reserved by the Court. Plaintiff brought suit under federal and state causes of action against the State in state court; the State removed the case. In its notice of removal, the State reserved the right to pursue constitutional challenges to the district court's jurisdiction, which it did by claiming sovereign immunity before litigation on the merits. Because a Wyoming statute had waived immunity for the state

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107. *Id.* at 490 n.5.

108. *Id.*

109. Given that such a scenario would fit within the explicit language of the Eleventh Amendment, it would likely come out the same way.

110. See *Estes v. Wyo. Dep't of Transp.*, 302 F.3d 1200, 1204 (10th Cir. 2002) (finding that removal to federal court waives sovereign immunity). After injuring her back at work, Estes, an employee of the Wyoming Department of Transportation (WDOT), could not complete several requirements of her job, e.g., lifting fifty pounds. *Id.* at 1202. She was fired. *Id.* Estes sued in state court, alleging a violation of Title I of the Americans with Disabilities Act (ADA) and breaches of state contract and workers' compensation laws; the State removed the case. *Id.* The district court found that the ADA abrogated sovereign immunity and that the WDOT had waived sovereign immunity on the state claims, no matter the forum. *Id.* at 1204. Noting the strictness of requirements for abrogation of immunity, however, the Tenth Circuit reversed the lower court's finding that the ADA so abrogated. *Id.* at 1203. Nevertheless, the Tenth Circuit found that *Lapides* holds that "a State waives its sovereign immunity to suit in a federal court when it removes a case from state court." *Id.* at 1204. Though noting that *Lapides* did not "squarely address" the issue of federal suits brought to federal court, the Tenth Circuit found that Supreme Court and circuit precedent supported such a conclusion—even if the State only removes to federal court to challenge the jurisdiction of the federal forum. *Id.* at 1204–05. The Tenth Circuit concluded that WDOT waived its sovereign immunity relative to the ADA claim and permitted Estes's suits on all counts. *Id.* at 1207.

111. Both cases were filed in the same year. The Tenth Circuit abated its decision until *Lapides* was filed. See *id.* at 1202 (furnishing procedural history).

112. *Id.*

113. *Id.*
claim, the Tenth Circuit applied Lapides to find immunity waived for it. In addition, the Tenth Circuit expanded the doctrine to find waiver in the State’s removal of any claim, whether state or federal and whether waived or not.

The Tenth Circuit’s ruling, though admitting that Lapides does not "squarely answer whether the mere act of removing federal-law claims waives a State’s sovereign immunity in federal court," found support in national and state precedents. The national precedents, beyond providing the general rule on waiver through affirmative litigation conduct, gave only negative support: "Never has the Court enunciated a requirement of litigation on the merits as a condition of waiver." The state precedents established that a State’s participation in a lawsuit approximated consent to suit, that any defendant State’s removal to federal court constituted waiver, and that any invocation of federal jurisdiction proceeding from defendant-States creates jurisdiction. The Tenth Circuit admitted that in each precedential case the defendant-State, unlike the State in Estes, had chosen to litigate on the merits after removal. The Tenth Circuit, however, claimed that "nothing in these three cited cases limits their holdings to cases litigated on the merits following removal" and that, even if they did, "Lapides now undermines the argument because it contains no such requirement."

In two sentences, the Tenth Circuit quoted the Eleventh Amendment and noted that, "[a]s interpreted, ‘an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State.’ It will be worthwhile later to compare this court’s casual acceptance

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114. Id. at 1204.
115. Estes, 302 F.3d at 1204.
116. Id.
117. Id. at 1205–06 (discussing Supreme Court and circuit precedents).
118. Id. at 1206.
119. Id. at 1204 (citing Gallagher v. Continental Ins. Co., 502 F.2d 827, 830 (10th Cir. 1974).) Gallagher discussed, but did not apply, the doctrine of waiver. Gallagher, 502 F.2d at 830.
120. Estes v. Wyo. Dep’t of Transp., 302 F.3d 1200, 1204 (10th Cir. 2002) (citing Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226 (10th Cir. 1999)). Interestingly, in Sutton, the circuit justifies its expansion by concluding that no Supreme Court decision prohibited such an expansion. Sutton, 173 F.3d at 1234.
121. Estes, 302 F.3d at 1204 (citing McLaughlin v. Bd. of Trustees, 215 F.3d 1168, 1170 (10th Cir. 2000)).
122. Id. at 1205.
123. Id.
124. Id.
125. Id. at 1202 (quoting Edelman v. Jordan, 415 U.S. 651, 662–63 (1974)).
of the conflated sovereign and Eleventh Amendment immunities to the Fourth Circuit’s more careful distinction of them.\(^{126}\)

\(b\). Ninth Circuit

In *Embry v. King*,\(^{127}\) the Ninth Circuit became the second appellate court to address the issues left open by *Lapides*.\(^{128}\) Plaintiff sued in state court on state and federal claims.\(^{129}\) The State removed the case to federal court.\(^{130}\) Defendants successfully moved for summary judgment; an amended complaint was filed, and the State then sought Eleventh Amendment immunity against both the federal and state claims.\(^{131}\) Though mentioning that "the Court in *Lapides* was careful to note that it spoke only to the state law claims in that case," the appellate court found that "the rule in *Lapides* applies to federal claims as well as to state law claims and to claims asserted after removal as well as to those asserted before removal."\(^{132}\) Like the earlier decision in *Estes*, the Court found immaterial whether the State had waived immunity to the case through statute or affirmative acts of litigation.\(^{133}\) Declining to permit the "chutzpah"\(^{134}\) of allowing a State to waive immunity to federal court and then to

\(^{126}\) Compare *Estes v. Wyo. Dep’t of Transp.*, 302 F.3d 1200, 1202 (10th Cir. 2002) (blurring the distinction between sovereign and Eleventh Amendment immunities), with *Stewart v. North Carolina*, 393 F.3d 484, 490 n.5 (4th Cir. 2004) (maintaining a distinction between sovereign and Eleventh Amendment immunities).

\(^{127}\) See *Embry v. King*, 361 F.3d 562, 566 (9th Cir. 2004) (finding waiver in a State’s removal to federal court). *Embry*, a physician, sued the University of California system and others in both state and federal courts for violations of state labor law and for violating due process under federal and state laws. *Id* at 562–64. *Embry* did not serve complaints on defendants, but later filed an amended complaint in state court, demanding declaratory and injunctive relief for the State’s violation of his federal and state due process rights, in addition to damages for his state law claims of violation of public policy and breach of contract. *Id* at 563. All defendants later joined in removing the state superior court case to federal court. *Id*. The defendants moved for summary judgment but did not assert sovereign immunity. *Id*. The motion was granted, with leave to amend. *Id*. *Embry* filed an amended complaint, asserting federal and state law claims for damages, declaratory relief, and injunctive relief. *Id*. The defendants again moved to dismiss, this time arguing Eleventh Amendment immunity, eventually on all counts. *Id*. The trial judge refused; the State appealed, conceding no immunity for the state charges but arguing that immunity blocked the federal charges. *Id* at 564. The Ninth Circuit held that any removal waived sovereign immunity. *Id* at 566.

\(^{128}\) See *id.* (finding that a State’s removal to federal court waived its immunity).

\(^{129}\) *Id*. at 562–63.

\(^{130}\) *Id*. at 563.

\(^{131}\) *Id*. at 564.

\(^{132}\) *Embry*, 361 F.3d at 564.

\(^{133}\) See *id.* at 565 (finding the nature of waiver immaterial).

\(^{134}\) *Id*. at 566.
"unwaive" it by asserting sovereign immunity, the Court pronounced a firm rule: "Removal waives Eleventh Amendment immunity."\(^{135}\)

In reaching this decision, the Ninth Circuit lingered on the lower court’s record, which, though mostly immaterial, reflected poorly on the State.\(^{136}\) The Ninth Circuit then reasoned that nothing in *Lapides* limited waiver to state claims or to claims asserted in the original complaint.\(^{137}\) The circuit court also questioned the consistency of a State acquiescing in the resolution of state law by a federal court but objecting to federal jurisdiction over the federal claims (even though the federal claims permit supplemental jurisdiction over the state claims).\(^{138}\) The Ninth Circuit supported this position with a close reading of the Eleventh Amendment, which extends immunity "to any *suit* in law or equity, commenced or prosecuted against one of the United States."\(^{139}\) The Ninth Circuit concluded that "suit" is a synonym for "case," and that therefore the case’s immunity was waived, not individual complaints.\(^{140}\) Once the State removed the case, in the federal court system it became "subject to liberal amendment of the complaint."\(^{141}\) The court also relied on the persuasive authority of *Estes*.\(^{142}\)

The decision nowhere mentioned the phrase "sovereign immunity." It therefore implicitly considers the concept and the Eleventh Amendment as coterminous.\(^{143}\) The conflation of the two doctrines again contrasts with the Fourth Circuit’s distinction of them.\(^{144}\)

\(^{135}\) *Id.*

\(^{136}\) See *id.* at 563 (recounting how the trial judge needed to ask the State whether it claimed sovereign immunity on state or federal claims pleadings, and how the State could not immediately answer a question regarding to which claims sovereign immunity was being offered as a defense). The trial court also noted that the defendant-State had only advanced the immunity defense after the trial court had noted that it was not favorably disposed to their state law claims. *Id.* at 563–64.

\(^{137}\) *Embury*, 361 F.3d at 563–64.

\(^{138}\) *Id.*

\(^{139}\) *Id.* at 565 (quoting U.S. CONST. amend. XI) (emphasis added).

\(^{140}\) *Id.*

\(^{141}\) *Id.*

\(^{142}\) *Embury*, 361 F.3d at 565 ("In *Estes v. Wyoming Department of Transportation*, the Tenth Circuit held that when a state removes a case that includes both state law and federal law claims to federal court, it waives Eleventh Amendment immunity for both classes of claims, not just the state law claims."). The facts differed from those in *Estes*, as in the instant case California did not immediately raise the sovereign immunity defense. *Id.* at 563.

\(^{143}\) *Id.* at 562.

\(^{144}\) Compare *id.* (equating these doctrines), with *Stewart v. North Carolina*, 393 F.3d 484, 490 n.5 (4th Cir. 2004) (distinguishing these doctrines).
c. Fifth Circuit

The Fifth Circuit in *Myers v. Texas*\(^ {145} \) is both the latest appellate court to adopt waiver-by-removal and the first to do so after the Fourth Circuit split.\(^ {146} \) Plaintiff sued Texas in state court on state and federal claims.\(^ {147} \) The State removed to federal court, and, before the case was argued on the merits, claimed Eleventh Amendment immunity.\(^ {148} \) The Fifth Circuit found "that *Lapides* [...] applies generally to any private suit which a state removes to federal court."\(^ {149} \) This holding included cases in which the state had not removed a claim to which it had previously waived immunity.

The appellate court cited several supports for its reasoning. First, it found no basis for limiting *Lapides* to the relatively small subset of federal cases in which the State removes after having waived immunity in state court.\(^ {150} \) The Fifth Circuit also supported waiver-by-removal by grounding it in a discussion of the "voluntary invocation principle,"\(^ {151} \) which it placed not in the context of litigation (i.e., contesting on the merits) but in the procedural act of removal.\(^ {152} \) The voluntary invocation principle had not been applied to state-law claims before *Lapides*, but, the Fifth Circuit observed, "the Supreme Court gave no indication that the principle applied only to state-law claims or that it mattered whether the state had waived its immunity from suit in its own courts."\(^ {153} \) The Fifth Circuit also relied on generally applicable principles of consistency and fairness.\(^ {154} \)

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145. See *Myers v. Texas*, 410 F.3d 236, 256 (5th Cir. 2005) (finding State’s waiver of immunity in its removal to federal court). Plaintiffs brought a civil rights class action in Texas state court under the ADA against the state of Texas, the Texas Department of Transportation, and an individual. *Id.* at 239. Texas removed the case to federal district court, which remanded the case to the state court. *Id.* Texas filed a motion in the state court to dismiss on grounds of state sovereign immunity. *Id.* That motion was denied and Texas appealed to the state court of appeals. *Id.* While the appeal was pending, Texas again removed the case to the federal district court and again moved to dismiss on grounds of state sovereign immunity from suit. *Id.* The district court agreed and dismissed the plaintiffs’ claims for damages and injunctive relief for lack of subject matter jurisdiction on Eleventh Amendment grounds. *Id.* The Fifth Circuit overruled, holding that Texas waived its state sovereign immunity from suit by individuals when it removed this case from state court to federal district court. *Id.* at 256.

146. *Id.*

147. *Id.* at 239.

148. *Id.*

149. *Id.* at 242.

150. See *Myers*, 410 F.3d at 256 (finding no language in *Lapides* limiting its holding).

151. *Id.* at 243.

152. *Id.*

153. *Id.* at 246.

154. *Id.* at 244.
The Fifth Circuit recited Alden's distinction between state sovereign immunity and Eleventh Amendment immunity, but noted that the term "Eleventh Amendment immunity" has been used loosely and interchangeably with "state sovereign immunity." Any distinction between them was not drawn until the end of the opinion, in which the court discussed Texas's proposal that although it had waived its Eleventh Amendment forum immunity, it retained its basic or inherent immunity from suit. This poorly-supported argument did not convince the court. Instead, the court termed "Eleventh Amendment immunity" a misnomer, recalling Alden's ruling that no separate immunity was created by the Eleventh Amendment.

IV. Analysis

Because the Court has not answered the questions left by Lapides, the divided appellate courts remain the highest authorities on their resolution. Three appellate courts adopted waiver-by-removal; the Fourth Circuit did not. Three appellate courts did not meaningfully distinguish between Eleventh Amendment and sovereign immunity; the Fourth Circuit did. This

156. Id. at 256.
157. Texas cited Alden v. Maine, 527 U.S. 706 (1999), and Pennhurst State School v. Halderman, 465 U.S. 89 (1984), without explaining their application to the instant case. Myers, 410 F.3d. at 251. The Fifth Circuit criticized the States' reasoning, stating that "Texas merely states its conclusions about the structure of sovereign immunity and points to the pages in the two opinions that it claims as authority and gives no further explanation." Id.
158. Myers, 410 F.3d at 251. The circuit court was persuaded, however, by the theory that a State must separately waive suit and waive liability to damages. Id. at 252. It found a State could constitutionally waive a right to suit without necessarily waiving its defense from liability. Id. Its support for this proposition was New Hampshire v. Ramsey, 366 F.3d 1, 15 (1st Cir. 2004), which stated in dicta that "a state may waive its immunity from substantive liability without waiving its immunity from suit in a federal forum." See also Alaska v. United States, 64 F.3d 1352, 1355–56 (9th Cir. 1995) (asserting that while state sovereign immunity entitles the state to avoid suit in a federal court, federal sovereign immunity is only a defense to liability); Pullman Constr. Indust. v. United States, 23 F.3d 1166, 1169 (7th Cir. 1994) (same).
161. Compare Myers, 410 F.3d at 241, 250 (acknowledging but not applying Alden's distinction between sovereign and Eleventh Amendment immunity), Embury, 361 F.3d at 562–66 (discussing "Eleventh Amendment immunity" without mention of sovereign immunity), and
Part asserts that in both cases the Fourth Circuit provided the better answer. Subpart A rejects the rationales of courts adopting waiver-by-removal. Subpart B advocates the Fourth Circuit's decision to treat immunity as a defense and to ground it in common-law sovereign immunity.

A. Arguments for Waiver-by-Removal

As Part III demonstrates, Lapides forbids a State to regain in federal court the immunity it had lost by statute or through "litigation conduct" in state court. The Tenth, Ninth, and Fifth Circuits understand waiver-by-litigation very broadly, including the act of removal. The Ninth Circuit applied waiver-by-removal to claims introduced after the removal; the Tenth Circuit applied waiver-by-removal even when the motion to remove reserved the right to bring a constitutional defense in moving for summary judgment. In justifying such expansions of waiver, the appellate courts noted that no language in Lapides bars them. The courts also cited firmer reasons than the merely negative: fairness, comprehensiveness, and judicial economy.

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Estes, 302 F.3d at 1202 (conflating the doctrines), with Stewart, 393 F.3d at 490 n.5 (distinguishing sovereign and Eleventh Amendment immunity).


163. See Myers, 410 F.3d at 250 (observing that "we are not persuaded by Texas's argument that Lapides must be read as limiting the ambit of the voluntary invocation principle to cases involving state-law claims with respect to which the state has waived immunity in its own courts"); Embury, 361 F.3d at 564 ("We conclude that the rule in Lapides applies to federal claims as well as to state law claims and to claims asserted after removal as well as to those asserted before removal."); Estes, 302 F.3d at 1207 (noting that "when a State removes federal-law claims from state court to federal court ... [it] unequivocally invokes the jurisdiction of the federal courts").

164. See Embury, 361 F.3d at 564 (finding waiver-by-removal applies to claims asserted after removal).

165. See Estes, 302 F.3d at 1202, 1206 (finding waiver-by-removal applies even before the motion for summary judgment is filed).

166. See Myers v. Texas, 410 F.3d 236, 242 (5th Cir. 2005) ("There is no evident basis in law or judicial administration for severely limiting those general principles [of waiver by removal], or Lapides's substantial overruling of Ford Motor Co., to a small sub-set of federal cases . . . .") (citations omitted); Embury v. King, 361 F.3d 562, 564 (9th Cir. 2004) ("Nothing in the reasoning of Lapides supports limiting the waiver to the claims asserted in the original complaint . . . ."); Estes v. Wyo. Dep't of Transp., 302 F.3d 1200, 1206 (10th Cir. 2002) (noting that while the State argued that waiver-by-removal only applied after litigation on the merits, "Lapides now undermines the argument because it contains no such requirement").
1. Fairness, Gamesmanship, and Timing

The Court justified *Lapides*'s holding as a way to prevent States from using sovereign immunity to "generate seriously unfair results."\(^{167}\) In expanding waiver beyond *Lapides*'s scope, the appellate courts echo this distaste of the "improper manipulation of the judicial process."\(^{168}\) A material difference, however, distinguishes the circuit courts' conceptions of unfairness from the Supreme Court's. The Court is concerned about *when* the State advances a sovereign-immunity defense after removal;\(^{169}\) the appellate courts are concerned about *whether* the State advances a sovereign immunity defense after removal.\(^{170}\)

*Lapides* only forbids the use of an immunity defense previously waived, whether (1) by statute\(^ {171}\) or (2) through acts of litigation.\(^ {172}\) Waiver-by-statute appears in *Lapides*, when the Court forbade Georgia from maintaining in federal court the sovereign immunity a state statute waived.\(^ {173}\) *Lapides* addresses waiver-by-litigation by substantially overruling\(^ {174}\) its much-criticized decision in *Ford Motor Co. v. Dept. of Treasury of Indiana*.\(^ {175}\) In *Ford Motor*, the Court spectacularly asserted sovereign immunity *sua sponte* after the State

\(^{167}\) *Lapides*, 535 U.S. at 619.

\(^{168}\) *Embury*, 361 F.3d at 564. Interestingly, courts often maintain that a State's motive for removal is irrelevant. See, e.g., *Lapides v. Bd. of Regents*, 535 U.S. 613, 621 (2002) ("Motives are difficult to evaluate, while jurisdictional rules should be clear.").

\(^{169}\) See *Lapides*, 535 U.S. at 619 (asserting the unfairness of a State proceeding on the merits then arguing that sovereign immunity barred the suit).

\(^{170}\) See, e.g., *Embury*, 361 F.3d at 566 (giving the absolute rule that "[r]emoval waives Eleventh Amendment immunity").

\(^{171}\) See *Lapides*, 535 U.S. at 623–24 (forbidding an immunity defense after its waiver by statute).

\(^{172}\) See *id.* at 620 (mentioning waiver by "litigation conduct").

\(^{173}\) *Id.* at 624.

\(^{174}\) See *id.* at 622–23 (repudiating the *Ford Motor* holding).

\(^{175}\) See *Ford Motor Co. v. Dep't of Treas. of Ind.*., 323 U.S. 459, 467 (1945) (finding that a State's affirmative litigation conduct did not create waiver). A non-resident automobile company brought suit against a State for a refund of income taxes. *Id.* at 460. The district court denied recovery; the circuit court affirmed. The Supreme Court did not reach the issue, finding *sua sponte* that "[w]hile the state's immunity from suit may be waived, there is nothing to indicate authorization of such waiver by Indiana in the present proceeding." *Id.* at 465 (citations omitted). The Court found that the State had only waived suit in state courts. *Id.* at 466. Further, the Court found that the attorney general for the State of Indiana was not authorized by statute to waive immunity from suit, and so could not waive suit by affirmative litigation conduct—even when he argued the case on the merits in federal district and appellate courts. *Id.* at 466–67. The Court could also raise the issue *sua sponte*, as it did in this case. *Id.* at 467. The case was remanded with orders to dismiss. *Id.* at 470.
had argued the merits in two lower courts.\textsuperscript{176} \textit{Lapides} disavowed \textit{Ford}'s willingness to ignore waiver-by-litigation, finding that it leads to "inconsistency and unfairness."\textsuperscript{177} The Court explains its position that:

It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the "Judicial power of the United States" extends to the case at hand.\textsuperscript{178}

Appellate courts cite this passage to support a position broader than the Court articulated.\textsuperscript{179} The Court earlier makes clear that its reasoning is not directed to a "situation where the State’s underlying sovereign immunity from suit has not been waived or abrogated in state court."\textsuperscript{180} Removing constitutes a sufficient voluntary invocation when the immunity has previously been waived;\textsuperscript{181} this differs from removing to have a federal tribunal adjudicate the merits of an immunity defense. \textit{Lapides}, then, stands for the rule that no immunity exists in federal court that has been waived in state court.\textsuperscript{182}

After \textit{Lapides}, waiver-by-statute only appeared in the state-law claims of the underlying Tenth Circuit case.\textsuperscript{183} There the State (before \textit{Lapides} was decided) had advanced in federal court a sovereign immunity defense that state statute barred.\textsuperscript{184} This circumvention clearly ran against \textit{Lapides}'s holding.\textsuperscript{185} In every other case, the defendant-State had not waived its sovereign immunity through statute.

Determining waiver-by-litigation is more contentious than establishing waiver-by-statute. The three courts expanding waiver did not find in \textit{Lapides}'s

\begin{itemize}
\item[176.] \textit{Id.} at 467, 470.
\item[177.] \textit{Lapides} v. Bd. of Regents, 535 U.S. 613, 623 (2002). More technically, the Court ruled that waiver-by-litigation required earlier waiver-by-statute. Because the State’s legislature had not authorized the attorney general to waive immunity by litigation, the Court found that litigation had not been waived. \textit{Ford}, 323 U.S. at 467.
\item[178.] \textit{Lapides}, 535 U.S. at 619.
\item[179.] \textit{See}, e.g., \textit{Myers} v. Texas, 410 F.3d 236, 249 n.17 (5th Cir. 2005) (citing this passage); \textit{Estes} v. Wyo. Dep’t of Transp., 302 F.3d 1200, 1206 (10th Cir. 2002) (same).
\item[180.] \textit{Lapides}, 535 U.S. at 618.
\item[181.] \textit{Id.}
\item[182.] \textit{Id.} at 618, 622–23.
\item[183.] \textit{Estes}, 302 F.3d at 1200.
\item[184.] \textit{Id.}
\item[185.] \textit{See} \textit{id.} at 1204 ("Because WDOT is a division of the State of Wyoming, and Wyoming Statutes Annotated § 1-39-104 waives Wyoming’s sovereign immunity for contract-claim suits in its own courts, \textit{Lapides} is dispositive.").
\end{itemize}
language a requirement of litigation by the merits.\textsuperscript{186} The Tenth and Fifth Circuits found waiver-by-removal for an assertion of immunity immediately after removal and before the merits.\textsuperscript{187} The Ninth Circuit found waiver-by-litigation even after the State's assertion to an amended complaint filed for the first time in federal court.\textsuperscript{188} In effect, the waiver-by-litigation rule becomes waiver-by-removal.

The waiver-by-removal rule prejudices the states, because it denies them a federal forum to decide the validity of their sovereign immunity.\textsuperscript{189} Under a waiver-by-removal rule, a State would waive its immunity by removing so that a federal court could determine it. States lose legal protections should they choose to remove.\textsuperscript{190} As a practical consequence, States may have to curtail litigation activity, such as intervening in bankruptcies for public health reasons.\textsuperscript{191} Waiver-by-litigation also affects other defendants in suits against States. In Lapides, for instance, one reason the State removed was to provide its co-defendants, state officials sued in their personal capacities, "with the generous interlocutory appeal provisions available in federal, but not in state, court."\textsuperscript{192} Because all defendants must agree to remove,\textsuperscript{193} those named with States will likely be forced to remain in State court. This restriction might itself encourage plaintiffs' gamesmanship.

2. Comprehensiveness and Judicial Economy

While the circuit courts gave the elimination of gamesmanship as a motive for expanding waiver, they were also swayed by the attractions of

\begin{itemize}
\item \textsuperscript{186} See, e.g., Estes v. Wyo. Dep't of Transp., 302 F.3d 1200, 1206 (10th Cir. 2002) (noting that Lapides does not require reaching the merits before applying waiver-by-litigation).
\item \textsuperscript{187} See Myers v. Texas, 410 F.3d 236, 242 (5th Cir. 2005) (providing procedural history); Estes, 302 F.3d at 1200 (same).
\item \textsuperscript{188} See Embury v. King, 361 F.3d 562, 564 (9th Cir. 2003) (providing procedural history).
\item \textsuperscript{189} See ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.5 (4th ed. 2003) ("The existence of removal jurisdiction reflects the belief that both the plaintiff and the defendant should have the opportunity to benefit from the availability of a federal forum.").
\item \textsuperscript{190} For one state's assistant attorney general criticism of the dangers of involuntarily waiving sovereign immunity, see Jack Druff, \textit{State Court Sovereign Immunity: Just When Is the Emperor Armor-Clad?}, 24 U. ARK. LITTLE ROCK L. REV. 255 (2002).
\item \textsuperscript{191} See James W. Herr & Tracy M. Sullivan, \textit{Be Careful What You Ask for: You Might Get It: Removal, Waiver, and Eleventh Amendment Immunity}, 21-7 ABIJ 22, 22, 37 (2002) (arguing that after Lapides, a State would waive immunity by intervening in a bankruptcy case with environmental issues, or perhaps any bankruptcy case at all).
\item \textsuperscript{192} Lapides v. Bd. of Regents, 535 U.S. 613, 621 (2002).
\end{itemize}
comprehensiveness and judicial economy. When read narrowly, as a circuit court has noted, *Lapides* affects only a "small subset" of cases. The larger share of the federal docket is filled by federal question jurisprudence, which the Court did not reach. And it is unlikely that States have waived immunity for most of the state-law claims that make it to federal court through diversity or supplemental jurisdiction. To resolve these cases, the appellate courts unsurprisingly attempt to bring them under a single rule. The expansive view of waiver can be seen as an attempt to create "a straightforward, easy-to-administer rule in accord with *Lapides*: Removal waives Eleventh Amendment immunity." The desire for such a "straightforward, easy to administer" rule even affects descriptions of the *Lapides* holding, which one commentator explained as the rule "that a state's decision to remove a case to federal court extinguishes its ability to subsequently invoke Eleventh Amendment protections."

One argument for a comprehensive rule is that its absence injures judicial economy. The worst example of judicial inefficiency appears in the case underlying the Ninth Circuit's opinion. There the federal district court complained of having "digested considerable briefing on both the State and federal claims in the complaint, twice heard oral argument and adjudicated two motions to dismiss," and that the process would be duplicated in state court if the state claims were remanded. These delays were not due to a delayed sovereign immunity defense, however, but to the court permitting a second complaint to be filed. Sovereign immunity was only offered in response to it. A more complex case arose in the Fifth Circuit, where the State removed

194. Myers v. Texas, 410 F.3d 236, 242 (5th Cir. 2005).
195. See Chemerinsky, supra note 189, at § 5.2.1 (describing "the core of modern federal court jurisdiction[,] cases arising under the Constitution and laws of the United States[,] comprising the largest component of the federal courts' docket and [as being] widely viewed as the most important component of the federal courts' workload").
196. See Lapides, 535 U.S. at 617 (limiting answer to state-law claims for which the state has waived immunity).
198. Embury v. King, 361 F.3d 562, 566 (9th Cir. 2003).
199. Florey, supra note 8, at 1378.
200. A discussion of the proper balance between federalism and judicial economy exceeds this Note's scope.
201. Embury, 361 F.3d at 563.
202. See id. (describing the case's facts).
203. Id.
204. Id.
to federal court during the pendency of an interlocutory appeal of the denial of its state sovereign immunity defense.\textsuperscript{205} The Fifth Circuit admitted, however, that the State's reason for removal was not to relitigate sovereign immunity, but to take advantage of a recent federal court decision favorable to its case.\textsuperscript{206} So long as only one court decides the issue of sovereign immunity, judicial economy does not appear impaired. The First Circuit endorsed this view when it ruled that Rhode Island had not waived sovereign immunity by removing to a federal court solely to have the question of its sovereign immunity adjudicated.\textsuperscript{207}

The judicial goals of comprehensiveness and judicial economy are worthwhile. These goals are worthy, however, only insofar as they do not prejudice the interests of a party to the case. In balance, the interests of the courts, as described in this subsection, do not outweigh the disadvantages to the defendant-States (and to joined defendants) described in the previous section.

\textit{B. The Better Choices of the Fourth Circuit}

The previous subsection criticized the motivations of the three appellate courts adopting waiver-by-removal. This section recommends that other courts adopt a fairer, more constitutionally legitimate method by following the Fourth Circuit in (1) limiting waiver to a defense, but not adopting waiver-by-removal, while (2) relying on theories of state sovereign immunity rather than on the Eleventh Amendment.

\textit{1. State Sovereign Immunity as a Waivable Defense}

As the previous cases have shown, few rules recommend applying state sovereign immunity. Sovereign immunity does not appear in the federal rules of civil procedure,\textsuperscript{208} and its judicial application has been fraught with inconsistencies.\textsuperscript{209} The Court has referred to sovereign immunity as a

\textsuperscript{205} See Meyers v. Texas, 410 F.3d 236, 239–40 (5th Cir. 2005) (providing procedural history).
\textsuperscript{206} Id. at 240.
\textsuperscript{207} See R.I. Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31, 49–50 (1st Cir. 2002) (permitting the State to remove for adjudication of its sovereign immunity defense).
\textsuperscript{208} See \textit{generally} FED. R. CIV. P. art. I–art. XIII.
\textsuperscript{209} See, \textit{e.g.}, Florey, \textit{supra} note 8, at 1377–78 (remarking that courts "have frequently noted the ways in which [sovereign immunity doctrine] is both like and unlike such fundamental Article III requirements as justiciability").
"jurisdictional bar" that limits Article III powers. At the same time, however, the Court permits Congress to abrogate immunity through the Fourteenth Amendment—but does not permit any other Article III doctrine to be so limited. A court may possibly still be able to raise immunity sua sponte, while Article III issues like standing must be addressed as soon as they come to the Court's attention.

Most appellate courts simplified the problem by adopting waiver-by-removal. In its own way, this rule seems as absolute as Ford's rule that only a state statute would permit waiver-by-litigation. The Fourth Circuit, in contrast, avoided both extremes. It permitted a State "to have the sovereign immunity issue resolved by a federal court rather than a state court," so long as the immunity had not previously been waived. The Fourth Circuit did not rule on when the defense should be raised. Some authority suggests that immunity could be raised for the first time on appeal. This appears in tension, however, with Lapides's acknowledgment of waiver-by-litigation. A worthwhile suggestion, cited by Lapides, appears in a concurrence by Justice Kennedy, who suggests treating sovereign immunity as a personal jurisdiction defense waivable by litigation acts. Should the Court after Lapides move in this direction, the Fourth Circuit's opinion could accommodate it while preserving its affirmation of a State's right to all of its defenses at a federal forum.

211. See Florey, supra note 8, at 1380 (discussing problems with applying sovereign immunity).
212. Id.
214. See supra Part IV.A.2 and accompanying text (discussing courts' desire for judicial economy).
215. See Ford Motor Co. v. Dep't of Treas. of Ind., 323 U.S. 459, 466–67 (1945) (finding an attorney general unqualified to waive sovereign immunity without legislative authorization).
217. Id.
220. See id. (citing Schacht).
221. See Schacht, 524 U.S. at 394 (Kennedy, J., concurring) (suggesting a treatment of sovereign immunity akin to an individual's personal jurisdiction defense).
History justifies this downgrade of sovereign immunity from true immunity to a jumped-up version of a personal jurisdiction defense.\textsuperscript{222} Recent decades have made a mockery of any state's claim to be, in the Court's words, one of the "residuary sovereigns and joint participants in the governance of the Nation."\textsuperscript{223} Certainly some scholars believe in the federal system's health,\textsuperscript{224} and it is not this Note's purpose to disabuse them. Broadly-based research attests to the fact, however, that states have witnessed the attrition of their powers during the postbellum shift in federal-state power.\textsuperscript{225} That state legislators do not directly select presidential electors but instead require them to reflect the popular vote\textsuperscript{226} and U.S. senators' direct election\textsuperscript{227} both symptomize the States' political decline. This shift has proven to have been beyond the Founders' ken.\textsuperscript{228} Many of the foreseen state checks on the federal government now appear absurd,\textsuperscript{229} and only with difficulty can we envision a time when it appeared "always [to] be far more easy for the state government to encroach upon the national authorities, than for the national government to encroach upon the state authorities."\textsuperscript{230} States have been complicit in the loss of their powers,\textsuperscript{231} and commentators have noticed the current lack of scholarly interest in state sovereign immunity.\textsuperscript{232} As one notes, "[t]hroughout this [past] century,

\textsuperscript{222} For more information on this topic, see ROBERT F. NAGEL, THE IMPLSION OF AMERICAN FEDERALISM (2001).

\textsuperscript{223} Alden v. Maine, 527 U.S. 706, 748 (1999).

\textsuperscript{224} See, e.g., Pfander, supra note 63, at 237 ("For all of its rhetorical commitment to the rule of law and the sovereignty of the people, the Supreme Court of the United States has recently forged quite a robust, constitutional doctrine of state sovereign immunity.") (citations omitted).

\textsuperscript{225} See Dodson, Vectoral Federalism, supra note 26, at 413 (summarizing the aggrandizement of federal power after the Civil War).

\textsuperscript{226} See Bush v. Gore, 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College.").

\textsuperscript{227} See U.S. CONST. amend. XVII (establishing senators' direct election).

\textsuperscript{228} See, e.g., THE FEDERALIST NO. 14 (James Madison) ("[I]t is to be remembered, that the [federal] government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects."); THE FEDERALIST NO. 51 (James Madison) ("Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.").

\textsuperscript{229} See, e.g., THE FEDERALIST NO. 46 (James Madison) (suggesting that states' combined militias could resist an oppressive federal government).

\textsuperscript{230} THE FEDERALIST NO. 17 (Alexander Hamilton).

\textsuperscript{231} See Pfander, supra note 63, at 258 (describing State complicity).

\textsuperscript{232} See Karen Cordry, Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory Ex Parte Young Relief: A Response, 77 AM. BANKR. L.J.
the trend at the state level in America has been to abandon the doctrine of
sovereign immunity in favor of the judicial determination of claims against the
state. Given this history, the Fourth Circuit's reduced immunity seems to fit
the times without destroying an aspect of sovereign immunity completely.

2. Sovereign Immunity, Not Eleventh Amendment Immunity

The Fourth Circuit was also correct in grounding its opinion solely in
sovereign immunity—and it was the only appellate court to do so. Few deny
that centuries of Court precedent recognize the extra-constitutional principle of
sovereign immunity, which is now usually conflated with the Eleventh
Amendment. The latter practice is not as time-honored, however, as the
earlier principle. The Court may eventually reject the Amendment's
constructed meaning and read the language plainly. This shift would carry
great implications, throwing in doubt cases in which a citizen sued his own
state. A citizen-plaintiff sued his own State in Lapides and in each of the four
cases heard by the appellate courts. In four of the five cases, the plaintiff was
an employee or past-employee of the state. A more literal reading of the
Amendment would clearly have a great impact on a state's employment
practices and from there its policies generally. Should this happen, the Fourth
Circuit's opinion would escape serious consequences. The appellate court
intelligently kept to the explicit purpose and the scope of the Amendment:

The purpose of the Eleventh Amendment was to overrule Chisholm v.
Georgia, not to define the contours of state sovereign immunity generally.

23, 23 (2003) (noting the lack of articles willing to support sovereign immunity as a means of
"preserving states as the strong counterbalance to the federal government that the Founders
intended").
233. Id.
234. See supra Part II.A.4 (providing a history of sovereign immunity and the Eleventh
Amendment).
235. See supra Part II.A.4 (discussing this conflation).
236. See supra Part II.A.4 (contrasting sovereign and Eleventh Amendment immunities).
suing the state university system); Myers v. Texas, 410 F.3d 236, 239 (5th Cir. 2005)
describing a citizen suing the state transportation department); Stewart v. North Carolina, 393
F.3d 484, 486 (4th Cir. 2004) (describing an employee suing the state correctional system);
Embury v. King, 361 F.3d 562–63 (9th Cir. 2004) (describing an employee suing the state
university system); Estes v. Wyo. Dep't of Transp., 302 F.3d 1200, 1202 (10th Cir. 2002)
describing an employee suing the state transportation department).
238. See supra note 237 (providing facts about the plaintiffs).
Thus, Eleventh Amendment immunity is but an example of state sovereign immunity as it applies to suits filed in federal court against unconsenting states by citizens of other states.\textsuperscript{239}

By choosing sovereign immunity instead of a constructed inflation of the Eleventh Amendment, the Fourth Circuit founded its opinion on stronger ground.

\textit{V. Conclusion}

\textit{Lapides} was rightfully decided, but the Court erred by omission. By not explicitly rejecting the waiver-by-removal doctrine, it allowed lower courts to apply it. Because several circuits did, and one did not, authority is divided. The Court should resolve the issue by following the Fourth Circuit in conceptualizing waiver as a defense but not immunity, in rejecting waiver-by-litigation, and in grounding its decision in terms of sovereign immunity, not Eleventh Amendment immunity. This course would mediate the extremes of reinstating and of stripping away states' historical protections against suit. It would also ensure that the decision rests on the most legitimate constitutional ground. Because waiver is central to state sovereign immunity, and state sovereign immunity is central to federalism, any Court interested in lasting contributions to federalism should answer \textit{Lapides}'s open issues.

\textsuperscript{239} Stewart v. North Carolina, 393 F.3d 484, 488 (4th Cir. 2004) (citations omitted).