

LAPIDES V. BOARD OF REGENTS OF THE UNIVERSITY OF GEORGIA, STATE SOVEREIGN IMMUNITY, AND THE PROPER SCOPE OF WAIVER-BY-REMOVAL

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In Lapidés v. Board of Regents of the University of Georgia, the Supreme Court held that when a state actor voluntarily removes a case from state to federal court, that action waives the state’s sovereign immunity under the Eleventh Amendment to the United States Constitution. The United States Courts of Appeals have split, however, on the precise contours and reach of that decision—and their split disadvantages the average citizen seeking redress against the state (most often state employees seeking generally-available redress under antidiscrimination or civil rights or labor laws). This Note examines the history of the Eleventh Amendment, the reasoning in Lapidés, and the arguments made by the Courts of Appeals themselves in arguing that only a blanket waiver-by-removal rule effectively furthers the Supreme Court’s voluntary invocation jurisprudence, and protects the average citizen from the asymmetric advantages provided to states who, as employers, should be held to the same standards as the private sector.

INTRODUCTION	764
I. THE HISTORICAL PURPOSE OF STATE SOVEREIGN IMMUNITY	768
A. Pre-Amendment Foundations for State Sovereign Immunity	768
B. <i>Chisolm v. Georgia</i> and the Origin of the Eleventh Amendment	770
C. Supreme Court Interpretations of State Actions Waiving Sovereign Immunity	772
II. <i>LAPIDES</i> AND ITS PROGENY	774

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A.	The <i>Lapides</i> Decision	775
B.	Waiver-by-Removal in the Circuit Courts	777
1.	The Second Circuit	777
2.	The Ninth Circuit	778
3.	The Tenth Circuit	779
4.	The Federal Circuit	780
C.	Circuits Limiting <i>Lapides</i> to Its Facts	781
1.	The First Circuit	781
2.	The Fourth Circuit	782
3.	The D.C. Circuit	783
D.	Hybrid Decisions	784
1.	The Third, Fifth, and Eleventh Circuits	784
2.	Analysis	785
III.	ANALYZING THE COMPETING VISIONS OF <i>LAPIDES</i> IN THE CIRCUIT COURTS	786
A.	Fidelity to History	787
B.	Fidelity to Precedent	790
1.	Continuing the Line of Voluntary Invocation Cases	790
2.	Adhering to the Essential Logic of the <i>Lapides</i> Opinion	791
C.	Other Arguments for Waiver-by-Removal	793
1.	Timing	794
2.	Judicial Economy	795
D.	Arguments for a Limited <i>Lapides</i>	796
1.	“Fairness,” Misinterpreted	796
2.	Federal Judges and Federal Issues	797
	CONCLUSION: CLOSING THE BOOK ON <i>LAPIDES</i>	798

INTRODUCTION

This Note is about a relatively dry question of civil procedure: whether a state waives its constitutionally granted sovereign immunity to suit by voluntarily removing a civil claim from state to federal court. Answering the dry question requires an examination of standard legal sources that are also dry: complicated, conflicting, and *old* historical sources, academic debates about those sources, Supreme Court cases, academic debate about those cases, and the opinions of federal judges who disagree with each other about how all those other debates should be synthesized. The Court’s answer to the question, when it

comes, probably won't make it past the pages of SCOTUSblog¹ and The Volokh Conspiracy.² But the answer matters.

Here's a quick story:³ There once was a man named Michael Lombardo. He worked for the State of Pennsylvania for thirty-eight years at a state-operated home for the disabled.⁴ When Michael was sixty-one, he came up for promotion at the Center and was passed over.⁵ Michael believed that this decision not to promote him was based primarily on his age.⁶

Fortunately for Michael, We the People decided in 1967 that age shouldn't be a valid reason to hire, fire, promote, or demote, and Congress passed the Age Discrimination in Employment Act to make it illegal to so discriminate.⁷ Michael did what an individual in his situation is entitled to do: He sued his employer in state court under the federal cause of action created by the ADEA to protect him from discriminatory practices, and under a mirror state law provision.⁸ If he could prove that age actually played into the decision to pass him over for promotion, he would be able to obtain injunctive relief against his employer, and (perhaps more relevant to Lombardo himself) receive liquidated damages for backpay.⁹ Perhaps more importantly, his em-

1. A website focused on the coverage and analysis of the U.S. Supreme Court's orders and decisions; the best of its kind. <http://www.scotusblog.com/>.

2. A popular legal blog. <http://www.washingtonpost.com/news/volokh-conspiracy/>.

3. I did not make up this story; you can read the facts in *Lombardo v. Pennsylvania*, 540 F.3d 190 (3rd Cir. 2008). I discuss this case in more analytical terms in Part II.C, *infra*.

4. The White Haven State Center still operates in Luzerne County, PA. It is an institutional-living center for the intellectually disabled, and has been in constant operation for over fifty years. It presently provides permanent care for 163 live-in patients, and employs approximately 800 individuals, including round-the-clock medical personnel. *White Haven State Center*, PA. DEP'T OF PUB. WELFARE, <http://www.dpw.state.pa.us/foradults/statecenters/whitehavenstatecenter/index.htm> (last modified Aug. 1, 2013).

5. *Lombardo*, 540 F.3d at 193.

6. *Id.*

7. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-34 (2012)). Pennsylvania has a sordid history with age-related retirement and mandatory retirement generally. It was the focus both of a major pre-ADEA Supreme Court case upholding the constitutionality of mandatory retirement, *McIlvaine v. Pennsylvania*, 415 U.S. 986 (1974) (upholding a mandatory retirement requirement for police officers at age sixty), and a major, continuing political and judicial dispute over the validity of a state constitutional amendment creating mandatory retirement ages for judges, see Julie Deisher, *Pennsylvania Top Court Upholds Mandatory Retirement Age for Judges*, JURIST (June 18, 2013), <http://jurist.org/paperchase/2013/06/pennsylvania-top-court-upholds-mandatory-requirement-age-for-judges.php>.

8. *Lombardo*, 540 F.3d at 192.

9. See *Remedies for Employment Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employees/remedies.cfm> (last visited Aug. 4, 2014).

ployer would have to internalize the costs of allowing an employment decision to be made on the verboten basis of an employee's age,¹⁰ and would be deterred from acting in such a way in the future—the point of regulating the employer in the first place.¹¹

Then his case ended. Abruptly.

The case ended not because Michael had an opportunity to present evidence of his discrimination claim, nor because a federal jury weighed in on his case. It didn't end because there was a settlement, or because Michael had so thoroughly failed to state his claim that a judge ordered the case dismissed. The case ended because the State of Pennsylvania, shortly after removing the entire claim to federal court, filed a motion to dismiss on grounds of state sovereign immunity—the State claimed that even though the State itself had sought the federal court's time and attention through removal, now that it was there, the federal court had no jurisdiction to hear the case at all.¹² The Court of Appeals for the Third Circuit ordered the case dismissed.¹³

That was the end of Michael's claim. A state employee, arguably someone who should be *least* worried about losing his job on illegal grounds, was kicked out of court by the government he worked for. The extraordinary defense of sovereign immunity allowed the State to hold itself to a different standard than that to which it would have held the bodega owner on the corner or Wal-Mart's HR department in the same situation.¹⁴

The Supreme Court of the United States addressed a similar fact pattern in *Lapides v. Bd. of Regents*.¹⁵ There, too, a state employee felt wrongfully discriminated against by his employer.¹⁶ There, too, he sued under state and federal causes of action.¹⁷ And there, too, the State removed the claims to federal court and sought to end the entire suit based on Eleventh Amendment sovereign immunity.¹⁸ Georgia, however, did not fare as well as Pennsylvania: the Supreme Court held that by voluntarily invoking the jurisdiction of the federal court, the

10. 29 U.S.C. § 623(a)(1) (2012).

11. See M. Todd Henderson, *The Nanny Corporation*, 76 U. CHI. L. REV. 1517, 1522 (identifying cost internalization as “the primary basis for public and private regulation.”).

12. *Lombardo*, 540 F.3d at 193.

13. *Id.* at 200.

14. A non-state actor sued for employment discrimination, of course, does not have the extraordinary defense of state sovereign immunity available to it, and would be forced to face the civil suit.

15. 535 U.S. 613 (2002).

16. *Id.* at 616.

17. *Id.*

18. *Id.* For a detailed discussion of the *Lapides* case, see *infra* Part II.A.

State had waived its immunity to suit.¹⁹ Why did Georgia lose, while Pennsylvania avoided accountability?

The wrinkle: In *Lapides*, the State had waived sovereign immunity in state court, and was using removal to federal court to regain that which it had lost.²⁰ In *Lombardo*, the State did not engage in such strategic behavior.²¹ The Third Circuit used that distinction to both agree and disagree with the Supreme Court in the same breath, maintaining Pennsylvania's immunity from liability while paying lip service to the Supreme Court's reasoning in *Lapides*.²² This wrinkle has proven mountainous enough to fracture the circuit courts on the matter of state removal: Should a state, voluntarily removing a case to federal court, be permitted to disclaim that very court's jurisdiction? Or should voluntarily seeking a federal forum be taken to be a waiver of a state's immunity from suit in that forum? And on what basis should a court making that call ground its decision—on fairness towards the *state*, as some circuits have argued?²³ Or on fairness towards the *plaintiff*, as the Supreme Court stated in *Lapides*?²⁴

This Note argues that *Lapides* necessarily created a blanket waiver-by-removal rule—necessarily, because *without* such a waiver, the Supreme Court's reasoning in *Lapides* and the underlying purpose of state sovereign immunity doctrine are both ignored. Even if this outcome is not apparent, the opinion *should* be read to create such a blanket rule, which ensures fair treatment of plaintiffs—mostly state employees seeking generally available civil redress²⁵—and disincentivizes gamesmanship on the part of state actors while in no way unfairly disadvantaging them. And while the circuit courts have fractured on the issue, this Note further argues that a growing consensus of reasoning on the matter can be seen in the lower courts; that the time is right for the Supreme Court to revisit the question it left open in *Lapides*, and confirm the right thinking of the majority of the circuits to directly consider the *Lapides* question.

I proceed in three Parts. In Part I, I consider the sovereign immunity doctrine from a historical and constitutional perspective, paying particular attention to the specific evils the doctrine was designed to

19. 535 U.S. at 623–24.

20. *Id.* at 616.

21. One could, of course, argue that the simple act of removing a claim to federal court is *itself* strategic behavior. See Section III.D.2, *infra*.

22. *Lombardo*, 540 F.3d at 196–200.

23. See *infra* Part II.C.1.

24. See *infra* Section II.A.

25. See discussion *infra* Part II, exploring the facts of the major circuit decisions interpreting *Lapides*.

address, and the way those evils have been addressed as the doctrine has developed. In Part II, I present the Supreme Court's decision in *Lapides* and describe the battle lines in the circuit-level campaign to determine *Lapides*' boundaries. Part III argues that the only resolution consistent both with the historical underpinnings of state sovereign immunity and the Supreme Court's reasoning in *Lapides* is that which creates a broad waiver-by-removal rule. The conclusion argues that the time is ripe for the Supreme Court to revisit *Lapides* and confirm this fact, in light of the extensive circuit court exploration of the issue and the cleavages in opinion that have developed below.

I.

THE HISTORICAL PURPOSE OF STATE SOVEREIGN IMMUNITY

State sovereign immunity to suit in federal court is enshrined in the Eleventh Amendment of the United States Constitution, which reads in full: "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."²⁶ This one sentence is the subject of a continuing, vigorous academic and judicial debate as to its meaning, scope, and purpose in a modern republic.²⁷

A. *Pre-Amendment Foundations for State Sovereign Immunity*

In order to understand the ambit of the Eleventh Amendment, and the intent of its framers in creating (or, perhaps, merely confirming the existence of) state sovereign immunity, a historical detour is required. If a broad shield warding states against all liability is to be read into the Amendment, one would expect to see a broad shield existing at the time the Amendment was created—or, at least, a discussion of creating such a shield. What we see, however, is conflict, confusion, and

26. U.S. CONST. amend. XI.

27. In presenting this historical overview, I recognize that I tread along the outskirts of an academic minefield all its own; minds far greater than mine continue to debate why the Amendment was adopted and what the framers of the Amendment thought they were accomplishing by its ratification. I attempt here to recount facts generally agreed upon by all camps; for a more in-depth debate on the Eleventh Amendment's history, see generally, e.g., Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 *YALE L.J.* 1 (1988); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 *COLUM. L. REV.* 1889 (1983). For an exhaustive judicial review of the historical sources surrounding the Eleventh Amendment's passage, see *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 237–40 (1985), *superseded by statute*, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845, *as recognized in Lane v. Pena*, 518 U.S. 187 (1996).

the stumbling corrections of a transitional democracy facing post-revolutionary uncertainty—and that reality should inform our approach to *Lapides*, waiver-by-removal, and the Eleventh Amendment generally.

It is a common assumption that state sovereign immunity is based, somehow, in the sovereign immunity once enjoyed by the King of Great Britain;²⁸ even the Supreme Court has quoted the maxim that “the Crown could not be sued without consent in its own courts.”²⁹ This conception of the sovereign Crown (and by succession, the sovereign State) as having enjoyed immunity from suit in its courts, however, is not an unquestioned fact. Indeed, Professor Louis L. Jaffe’s heavily cited *Suits Against Governments and Officers: Sovereign Immunity* raises the question of whether it existed at all.³⁰ His findings suggest that the King enjoyed a limited personal immunity from common law courts, but that the immunity was just that—*personal*—and not shared by his officers or his government.³¹

More relevant to the American experience was the impact this personal immunity had on the function of the colonies—that is to say, none at all. The colonial charters do not include references to state sovereign immunity (which makes sense, considering the fact that some of these colonies were in fact corporate entities, no less amenable to suit than other corporations).³² State bills of rights often included a provision that every man should have a judicial remedy for *every injury* against him.³³ Neither the colonial charters nor the state constitutions ratified after the Revolutionary War seemed to indicate that the states considered themselves generally immune from suit; if anything, the right of the citizen to see *all* wrongs redressed is more apparent. The immunity encoded in the Eleventh Amendment, then, had to come from elsewhere, in response to something else. I argue

28. See, e.g., KENNETH R. THOMAS, CONG. RESEARCH SERV., RL30315, FEDERALISM, STATE SOVEREIGNTY, AND THE CONSTITUTION: BASIS AND LIMITS OF CONGRESSIONAL POWER 19 (2013), available at <http://www.fas.org/sgp/crs/misc/RL30315.pdf>.

29. Alden v. Maine, 527 U.S. 706, 715 (1999).

30. 77 HARV. L. REV. 1, 2 (1963).

31. *Id.* at 5–19.

32. See Charter of the Colony of New Plymouth Granted to William Bradford and His Associates (Mass. 1629), in 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 1841 (Francis Newton Thorpe ed., 1909) [hereinafter CONSTITUTIONS]; First Charter of Virginia (1606), in 7 CONSTITUTIONS, *supra*, at 3783.

33. See, e.g., Univ. of Chicago, *Bill of Rights: Delaware Declaration of Rights* sec. 12, THE FOUNDERS’ CONST. (1987), http://press-pubs.uchicago.edu/founders/documents/bill_of_rights4.html; MD. CONST. OF 1776, art. XVII, in 3 CONSTITUTIONS, *supra* note 32, at 1688; MASS. CONST. OF 1780, pt 1, art. XI in 3 CONSTITUTIONS, *supra* note 32, at 1891.

that it comes from a Supreme Court case and a misstep in the construction of Article III of the Constitution.

B. Chisolm v. Georgia and the Origin of the Eleventh Amendment

The Eleventh Amendment holds the questionable honor of being the first Amendment specifically ratified by the States to overrule a Supreme Court decision, a distinction shared by only three other Amendments to the federal Constitution.³⁴ The objectionable decision, *Chisolm v. Georgia*,³⁵ was one of three closely related decisions handed down by the Supreme Court in its 1793 term.³⁶ All three, tangentially or directly, concerned the Treaty of 1783 and individual states' post-war decisions to pay or not pay pre-war debts owed to Great Britain;³⁷ necessarily, then, they concerned an individual state's capacity to be sued. The relevant decision of the trifecta, *Chisolm*, held that the State of Georgia was subject to the federal judiciary's original jurisdiction over suits between states and the citizens of another state—that a state could be hailed into court on the basis of diversity alone—and that therefore the federal courts were capable of compelling Georgia to appear.³⁸

Congress responded almost immediately. The day after the *Chisolm* decision, the House of Representatives introduced a resolution declaring:

[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.³⁹

It took the Senate one more day to formulate its response, which was filed on February 20, 1793:

The Judicial power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the

34. The other amendments overturning Supreme Court decisions are the Thirteenth Amendment, overruling *Dred Scott v. Sandford*, 60 U.S. 393 (1857); the Sixteenth Amendment, overruling *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); and the Twenty-Sixth Amendment, overruling *Oregon v. Mitchell*, 400 U.S. 112 (1970).

35. 2 U.S. 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend XI.

36. *Gibbons*, *supra* note 27, at 1920–21.

37. *Id.*

38. 2 U.S. at 480.

39. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 101 (1922) (quoting H.R. Res., 2d Cong. (1793)).

United States by citizens of another State, or by citizens or subjects of any foreign State.⁴⁰

No action was taken on either of these resolutions for the remainder of the Second Congress's first term. During its 1793 recess, private individuals lodged several additional federal suits against states depending solely on diversity of jurisdiction, and several state legislatures passed official resolutions designed to pressure Congress to quickly stem these debt- and property-related suits by way of constitutional amendment.⁴¹ While the Jeffersonian Revolution was still seven years away, the Federalists were already fighting off Republican contention in Congress,⁴² and responded quickly to this pressure from the states in an attempt to staunch one of the grounds of criticism against them. The Second Congress, now in its second term, drafted the text that would become the Eleventh Amendment in early January.⁴³ It was certified by President Adams as having been ratified four years later.⁴⁴

The takeaway here is the reaction to the *Chisolm* decision: Immediate, and designed to correct a perceived flaw in the construction of Article III of the United States Constitution that permitted suits to be lodged against states merely due to diversity of jurisdiction. The Eleventh Amendment closely tracks the language of the Constitution in picking out precisely which claims should no longer be considered to have original jurisdiction in the federal courts; what we see is an Amendment designed to ensure that foreign citizens (citizens of other states and aliens alike) would be unable to bring suit against a state for reasons of *diversity alone*. If the Second Congress had intended to completely insulate the states from all suit, one would reasonably expect such a motive to arise somewhere in the historical record, or for such an intent to be reflected more clearly in the ultimate language of the Amendment itself. Such a broad reading, however, would have to wait for judicial interpretation some hundred years later.

In 1890,⁴⁵ the Supreme Court articulated a broad view of the Eleventh Amendment that has survived mostly intact to this day, de-

40. 3 ANNALS OF CONG. 651–52 (1793).

41. For a discussion of this time period and the actions leading to the penning of the Eleventh Amendment, see *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 284 (1985), *superseded by statute*, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845, *as recognized in* *Lane v. Pena*, 518 U.S. 187 (1996).

42. GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 276 (2011).

43. *See, e.g., Atascadero*, 473 U.S. at 285.

44. *See, e.g., id.* at 286.

45. Between the framing of the Eleventh Amendment and *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court had regular occasion to remark on the scope and power of the Eleventh Amendment. This history, while interesting, is irrelevant to the

clarifying the Amendment to provide a broad constitutional immunity for states from being sued in federal court.⁴⁶ In *Hans v. Louisiana*, the petitioner brought suit against Louisiana to compel the repayment of certain bonds which the state had repudiated through constitutional revision.⁴⁷ This revision, petitioner claimed, violated the Contracts Clause of the federal Constitution, a federal question to be adjudicated in federal court.⁴⁸ The state claimed sovereign immunity defeated jurisdiction, even in federal question cases.⁴⁹ The Supreme Court, relying heavily on the notion that “the suability of a state, without its consent, was a thing unknown to the law” at the time of the Constitution’s framing, held that the Eleventh Amendment granted sovereign immunity not only in diversity actions, but in federal question claims as well.⁵⁰ The Court painted immunity with a broad brush—and the brushstrokes have mostly survived to this day. Even this broad view, however, was subject to limitation;⁵¹ it is one of those limitations, that of consent and waiver, to which this Note now turns.

C. Supreme Court Interpretations of State Actions Waiving Sovereign Immunity

The preceding Sections presented the wide-ranging and tumultuous history surrounding the creation and interpretation of the Eleventh Amendment. This Note is concerned with one particular thread of this history having to do with state waiver of the Eleventh Amendment’s protection.⁵² The Supreme Court has, as one might imagine, weighed

argument of this Note, and omitted from the discussion. For an excellent summary of the Supreme Court’s jurisprudence in the interim, see Gibbons, *supra* note 27, at 1941–97.

46. See *Hans*, 134 U.S. at 19–21, *superseded by statute*, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845. Just because the interpretation of the Eleventh Amendment in *Hans v. Louisiana* has survived does not mean it is not controversial; for a bitter argument against the reasoning in *Hans*, see *Atascadero*, 473 U.S. at 299–302 (Brennan, J., dissenting) (arguing that the *Hans* decision “rested on misconceived history and misguided logic.”).

47. *Hans*, 134 U.S. at 2–3.

48. *Id.* at 3.

49. *Id.*

50. *Id.* at 16.

51. *Id.* at 17.

52. There are two other exceptions to state sovereign immunity currently recognized by the Supreme Court: the “state actor exception” announced in *Ex parte Young*, 209 U.S. 123 (1908), allowing a citizen to sue a state officer to enjoin violation of a federal law, and congressional abrogation, wherein certain suits brought under the Fourteenth Amendment may be considered outside the Eleventh Amendment’s protection, see *Fitzpatrick v. Blitzer*, 427 U.S. 445 (1976). These more tightly circumscribed exceptions to state sovereign immunity, while valid protections from state overreach, lie outside the scope of this Note.

in on this contour of Eleventh Amendment doctrine. In *Hans v. Louisiana*, the first major case to discuss the waiver issue, the Court laid down a single, critically important foundational fact: sovereign immunity can be waived.⁵³ Immunity from suit is a right to be exercised by a state actor; it follows that if the state actor *declines* to exercise that right, the Amendment's protections never attach.⁵⁴ And more than just distinguishing between active exercise of the right and passive silence, the Court held that sovereign immunity can be actively *disclaimed* by a state—it can consent to suit, and that consent will be considered valid in federal court.⁵⁵

Waiver is not narrowly defined. Surrounding Supreme Court jurisprudence makes clear that the *behavior of the state actor* in preparing for and executing its litigation strategy can serve as waiver as well as can an actual piece of paper declaring the State's intent to waive. The first case on point here is *Clark v. Barnard*, a case contemporary with *Hans* that found that a state's voluntary appearance in federal court waived its sovereign immunity.⁵⁶ It isn't, however, the last word. In *Gunter v. Atlantic Coast Line Railroad Company*, the Supreme Court held that by voluntarily participating in a tax case in federal court, South Carolina had waived its right to claim Eleventh Amendment immunity.⁵⁷ In *Gardner v. New Jersey*, a state's filing of a creditor claim in bankruptcy court waived its Eleventh Amendment immunity to objections and adjudications of the claim.⁵⁸

The broad pattern here is stark: not only has voluntary waiver jurisprudence grown more and more inclusive in an unbroken century of Supreme Court decisions, but the Court has *never* found that the State has preserved Eleventh Amendment immunity in a case where the plaintiff alleged that the State waived immunity by invoking federal jurisdiction. From the Supreme Court's point of view, this line of

53. 134 U.S. at 13.

54. *Id.*

55. *Id.*

56. 108 U.S. 436, 447 (1883). I note that the notion that appearance in the courtroom served as acknowledgment of that court's jurisdiction over the matter at hand was hardly novel, even in *Clark*; government parties refused to cooperate with courts whose jurisdiction they denied as early as *Marbury v. Madison*. See Michael W. McConnell, *The Story of Marbury v. Madison: Making Defeat Look Like Victory*, in CONSTITUTIONAL LAW STORIES 13, 27 (Michael C. Dorf ed., 2004) (noting that Jefferson's State Department refused to submit evidence to the Supreme Court ahead of oral arguments. The Republican-controlled Senate also failed to provide the Court with an official record of Marbury's nomination and confirmation, even though such records existed and were undisputed).

57. 200 U.S. 273, 284–85 (1906).

58. 329 U.S. 565, 574 (1947).

cases represents nothing more than the “unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts.”⁵⁹

This was the legal landscape when Paul Lapidès sued the Board of Regents of the University of Georgia in 1997.

II.

LAPIDÈS AND ITS PROGENY

Lapidès is the Supreme Court’s most recent holding on the matter of a state’s capacity to waive Eleventh Amendment protection through voluntary invocation of a federal court’s jurisdiction. In keeping with the pattern of post-*Lapidès* waiver-by-removal cases, a state employee was wronged by a state employer and sought generally available redress—and the State attempted to avoid the lawsuit by strategic application of its Eleventh Amendment immunity.

Paul Lapidès, a professor at Kennesaw State University, was accused of sexual harassment in August of 1997.⁶⁰ A full university investigation turned up no corroborating evidence, no official disciplinary action was taken against Lapidès, and the student did not follow up on the accusations with any legal action.⁶¹ Lapidès, however, claimed that in the course of the investigation several faculty members had written defamatory letters about him concerning the harassment allegations, and that those letters had been placed in his permanent personnel file.⁶² The inclusion of those letters, he claimed, harmed his employment prospects and advancement opportunities, and constituted violations of 42 U.S.C. § 1983 and the Georgia Tort Claims Act—leading him to file civil suits against the University in state court.⁶³

Georgia’s Attorney General timely filed a notice of removal to federal court based on the federal question contained in the section 1983 claims.⁶⁴ Simultaneously, the Attorney General filed a Rule 12(b)(6) motion to dismiss based on the State’s Eleventh Amendment immunity from suit.⁶⁵ The district court found that invocation of the federal court’s jurisdiction waived Eleventh Amendment immunity.⁶⁶

59. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681 (1999).

60. *Lapidès v. Bd. of Regents*, 251 F.3d 1372, 1373 (2001), *rev’d*, 535 U.S. 613 (2002).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

The Eleventh Circuit Court of Appeals disagreed and reversed, saying that the act of removal was not affirmative litigation conduct sufficient to waive state sovereign immunity.⁶⁷ The Supreme Court granted certiorari⁶⁸ and delivered its decision on May 13, 2002.⁶⁹

A. *The Lapidés Decision*

Justice Breyer wrote the *Lapidés* opinion, speaking for a unanimous Supreme Court.⁷⁰ The Court focused its reasoning on “consistency, fairness, and preventing States from using the [Eleventh] Amendment ‘to achieve unfair tactical advantages.’”⁷¹ The decision itself, in the Court’s view, was a mere extension of its existing jurisprudence holding 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”⁷² by invoking its sovereign immunity under the Eleventh Amendment.⁷³

I could paraphrase the Court, but the directness of its language and the simplicity of its holding speak for themselves. In finding that voluntary removal of the case served as waiver, the Court summarized the situation forcefully, simply, and without caveat:

In this case, the State was brought involuntarily into the case as a defendant in the original state-court proceedings. But the State then voluntarily agreed to remove the case to federal court. In doing so, *it voluntarily invoked the federal court’s jurisdiction*. And unless we are to abandon the general principle . . . or unless there is something special about removal or about this case, the general legal principle requiring waiver ought to apply. *We see no reason to abandon the general principle.*⁷⁴

There were, in fact, plenty of reasons to actively *buttress* the general principle that voluntary invocation of a federal court’s jurisdiction waives immunity to suit. As the Court noted, it would be “anomalous . . . 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 deny-

67. *Id.* at 1376, 78.

68. *Lapidés v. Bd. of Regents*, 534 U.S. 991 (2001).

69. *Lapidés v. Bd. of Regents*, 535 U.S. 613 (2002).

70. *Id.* at 615.

71. *Stewart v. North Carolina*, 393 F.3d 484, 490 (4th Cir. 2005) (quoting *Lapidés*, 535 U.S. at 621).

72. *Lapidés*, 535 U.S. at 619 (citing *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906)).

73. *Id.*

74. *Id.* at 620 (emphasis added) (internal citations omitted).

ing that the ‘Judicial power of the United States’ extends to the case at hand.”⁷⁵ And an unclear, difficult to interpret jurisdictional rule upon which hangs an entire case is bad law—the Supreme Court announced that *Lapides* created “a clear [rule], easily applied Removal is a form of voluntary invocation of a federal court’s jurisdiction sufficient to waive the State’s otherwise valid objection to litigation”⁷⁶

Lapides is necessarily a limited opinion—a fact heavily relied on by circuits choosing to limit the case to its facts.⁷⁷ Because the plaintiff’s federal claims against Georgia were *per se* invalid for unrelated reasons, the Court could only adjudicate the effect of removal on the state claims for which immunity was barred in state court.⁷⁸ The opinion simply could not reach the issues of whether a state’s removal of a federal claim to federal court would constitute a waiver, or whether in removing a state claim to federal court waiver would attach even if that state’s immunity had not been waived or abrogated below.⁷⁹

Just because these issues were not formally captured by the holding of *Lapides* doesn’t mean that the Court’s language in that opinion did not provide guidance as to how such issues would be resolved, had the Court had opportunity to consider them. First and foremost, the limiting language in the opinion’s opening sentences is apologetic—Justice Breyer writes that “It has become clear that *we must limit* our answer [to state claims].”⁸⁰ He immediately goes on to describe the rule announced in *Lapides* as applying to all cases—without ever again mentioning the limitations imposed by standing, or raising distinctions between state claims and federal claims in the reasoning of the opinion.⁸¹

This is not the only indication that the Court’s limiting language is meant to be read as narrow only by necessity, as opposed to read as an essential part of the opinion’s reasoning. Had the Court been so inclined, it could have also disposed of the entire *Lapides* claim as moot, because in the absence of a viable federal claim the district court could have remanded the state law claims at issue and eliminated

75. *Id.* at 619 (quoting U.S. CONST. amend. XI).

76. *Id.* at 623–24.

77. See *infra* Part II.C.

78. *Lapides*, 535 U.S. at 617 (“*Lapides*’ only federal claim against the State arises under 42 U.S.C. § 1983 [W]e have held that a State is not a ‘person’ against whom a § 1983 claim for monetary damages might be asserted.”) (internal citations omitted).

79. *Id.* at 617–18.

80. *Id.* at 617 (emphasis added).

81. *Id.* at 618–19.

the need for federal review entirely.⁸² Justice Breyer goes out of his way to dispose of the mootness question, however,⁸³ to get to the meat he is able to reach: whether removing a claim to federal court waives sovereign immunity.⁸⁴ Consider the broad language with which the Court framed the issue: “whether a state waive[s] its Eleventh Amendment immunity by its affirmative litigation conduct when it removes *a case* to federal court.”⁸⁵ No distinction between state claims or federal claims, no distinction between monetary damages or injunctive relief. The word *claim* isn’t even used. The Court passed judgment on the removal of *cases*.

Lapides, while procedurally limited, reads like an opinion announcing a broad, blanket rule regarding waiver-by-removal to federal court. This logical reading of the Court’s own words has been accepted, rejected, and remarkably twisted by circuit courts seeking to answer the question on their own terms.

B. Waiver-by-Removal in the Circuit Courts

A majority of circuit courts that have considered the *Lapides* question have chosen to adopt a waiver-by-removal rule, or a broad enough waiver rule as to essentially approach a blanket waiver-by-removal rule.

1. The Second Circuit

The Second Circuit has not had opportunity to rule squarely on the *Lapides* question, but that has not stopped it from making its opinion on the matter clear in dicta. In a 2007 case, *In re Deposit Insurance Agency*, the State of New York filed claims in a bankruptcy dispute with two failed banks.⁸⁶ While the court eventually found the State amenable to suit through a separate means of avoiding Eleventh Amendment immunity,⁸⁷ in dicta setting up its discussion of the Eleventh Amendment, the court enumerated “easy cases” where a state’s

82. *Id.* at 618.

83. *Id.* (“*Lapides*’ state-law tort claims . . . remain pending in Federal District Court, and the law commits the remand question, ordinarily a matter of discretion, to the Federal District Court for decision in the first instance. Hence, the question presented is not moot.”) (internal citations omitted).

84. *Id.* at 618–19.

85. *Id.* at 617 (quoting Petition for Writ of Certiorari) (alteration in original) (emphasis added).

86. 482 F.3d 612, 615.

87. *Id.* at 618 (holding that the *Ex parte Young* doctrine applied to the case at bar, as an ongoing violation of federal law was alleged and prospective relief was sought).

sovereign immunity was clearly considered abrogated or waived.⁸⁸ Included in that list: “When the state itself . . . removes a case from state to federal court.”⁸⁹

The Second Circuit has reiterated that position as recently as 2012. In *Kozaczek v. New York Higher Education Services Corporation*, a government employee appealed a district court’s order to dismiss his complaint based on the Fair Debt Collection Practices Act.⁹⁰ The case is tantalizingly close to being a waiver-by-removal holding for the Second Circuit; however, a service error at the time the state actor removed to federal court caused Kozaczek’s claim to fail.⁹¹ The Second Circuit took the time to note, however, that the process service alone was the cause for the dismissal, “[a]lthough a state or state agency waives immunity from suit by removing to federal court.”⁹² In both cases, the Second Circuit cited to *Lapides* as its basis for finding waiver-by-removal.

2. *The Ninth Circuit*

The Ninth Circuit’s position on the *Lapides* question is much cleaner than the Second Circuit’s: There is a binding holding on the matter to which later cases have deferred,⁹³ and that holding creates a circuit-wide blanket waiver-by-removal rule. The case creating that blanket rule, *Embury v. King*,⁹⁴ follows a fact pattern that should at this point begin to sound familiar: A former associate professor at a state university brought a wrongful discharge from employment action against the University of California, citing both state and federal law causes of action. The litigation dragged on for years; while the case still wound its way through the court system, the Supreme Court decided *Lapides*.⁹⁵ By the time the Ninth Circuit had opportunity to issue an opinion on the case, the State had conceded that, by *Lapides*’s own terms, the state law claims had a jurisdictional basis to be heard in federal court notwithstanding Eleventh Amendment immunity.⁹⁶ The State challenged the power of the court to adjudicate the federal claims—arguing for a limited reading of *Lapides*.⁹⁷

88. *Id.* at 617.

89. *Id.*

90. 503 F. App’x. 60, 61 (2012).

91. *Id.* at 62.

92. *Id.* (internal citations omitted).

93. *See, e.g., Valadez v. Regents*, 2005 WL 1541086 (E.D. Cal. June 25, 2005).

94. 361 F.3d 562, 562–63 (2004).

95. *Id.* at 564.

96. *Id.*

97. *Id.*

The court rejected the State's argument, and decided in favor of a broad, generally applicable waiver-by-removal rule. It announced that "[b]y removing the case to federal court, the State waived its Eleventh Amendment immunity from suit in federal court."⁹⁸ There was no reason to limit *Lapides* to state law claims—the court focused especially on the Supreme Court's use of the word "case" in its holding, as opposed to "claim," in arguing that *Lapides* on its face was creating a broad waiver rule.⁹⁹ The evidence for a broad rule capturing all claims was only strengthened, in the Ninth Circuit's view, by the opinion's tracking of the language of Article III and the Eleventh Amendment themselves, which extend to "cases"¹⁰⁰ and entire "suits,"¹⁰¹ respectively.¹⁰²

Embury v. King has become a regularly-cited case in the Ninth Circuit, standing unquestionably for the proposition that a blanket waiver-by-removal rule exists in the Ninth Circuit.¹⁰³ The only carve-out, based on unrelated legal doctrine, is for tribal sovereign immunity.¹⁰⁴

3. The Tenth Circuit

The Tenth Circuit, like the Ninth, has squarely considered the *Lapides* question and reasoned its way to a blanket waiver-by-removal rule. In *Estes v. Wyoming Department of Transportation*, a state employee sued her former employer after losing her job in the wake of a

98. *Id.*

99. *Id.* at 565. "Lapides explains that the State, by removing the case, 'voluntarily agreed to remove the case to federal court. In doing so, it voluntarily invoked the federal court's jurisdiction.'" *Id.* (quoting *Lapides v. Bd. of Regents*, 535 U.S. 613, 620 (2002) (emphasis added). The Supreme Court characterized the *Lapides* rule this way: "[R]emoval is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter" *Id.* (quoting *Lapides*, 535 U.S. at 624) (emphasis added).

100. U.S. CONST. art. III (granting power to decide cases, as opposed to specific claims).

101. U.S. CONST. amend. XI ("any suit in law or equity") (emphasis added).

102. *Embury*, 361 F.3d at 565 ("The use of the terms 'case' and 'matter' in *Lapides* suggests that the federal court's power extends, once immunity is waived, to the entire case, consistent with Article III's grant of power to decide 'cases.'").

103. *See, e.g.*, *Crayton v. Hedgpeth*, No. CV.S-03-0433 WBS GGH, 2011 WL 1988450, at *15 (E.D. Cal. May 20, 2011); *Lopez v. Wasco State Prison*, No. 1:08-CV-889 AWI TAG, 2008 WL 5381696, at *5 (E.D. Cal. Dec. 22, 2008); *Valadez v. Regents of Univ. of Cal.*, No. CV.S-03-0433 WBS GGH, 2005 WL 1541086, at *3 (E.D. Cal. June 29, 2005). Note that all of these cases, true to form, involve a state employee or state ward suing the State under civil rights or discrimination causes of action.

104. *See Ingrassia v. Chicken Ranch Bingo and Casino*, 676 F. Supp. 2d 953 (E.D. Cal. 2009).

workplace injury.¹⁰⁵ The claims were grounded in the Americans with Disabilities Act and a complementary state antidiscrimination statute.¹⁰⁶ Wyoming removed to federal court and filed a motion to dismiss, citing its Eleventh Amendment immunity.¹⁰⁷

The Tenth Circuit's analysis took *Lapides* to stand for a general waiver-by-removal rule. As with the Ninth Circuit, the court in *Estes* relied largely on the plain language and context of the *Lapides* opinion notwithstanding the formalistic standing limitations of its holding; in its first sentence of analysis on the waiver issue, the court declared that "*Lapides* clearly holds that a State waives its sovereign immunity to suit in a federal court when it removes a case from state court."¹⁰⁸ The Tenth Circuit then explored its own history of dealing with waiver of Eleventh Amendment immunity before the Supreme Court provided guidance in *Lapides*, and confirmed that its own case law supported the broad rule—even before Justice Breyer weighed in, the Tenth Circuit viewed voluntary invocation of a federal court's jurisdiction as a waiver of sovereign immunity. For the Tenth Circuit, removal was an unambiguous expression of intent to waive sovereign immunity: "A State must express an unequivocal intent to waive sovereign immunity, and such intent seems clear when a State, facing suit in its own courts, purposefully seeks a federal forum."¹⁰⁹

4. *The Federal Circuit*

The Federal Circuit knew its answer to the waiver-by-removal question before the Supreme Court even took up *Lapides*. In *In re Regents of the University of California*, the University of California waived its Eleventh Amendment immunity to suit in a California district court, then claimed that it had waived its Eleventh Amendment immunity only vis-à-vis that specific venue when its claim was consolidated in the Federal Circuit as part of a multidistrict litigation.¹¹⁰ The Federal Circuit held that voluntary invocation of the federal court's jurisdiction—accomplished here by waiver—was enough to irreversibly waive a state actor's sovereign immunity: "Upon entering the litigation arena the Regents, like all litigants, became subject to

105. 302 F.3d 1200, 1202 (10th Cir. 2002).

106. *Id.*

107. *Id.*

108. *Id.* at 1204.

109. *Id.* at 1205 (internal quotations and citations omitted).

110. 964 F.2d 1128, 1134 (Fed. Cir. 1992).

the Federal Rules . . . having invoked the jurisdiction of the federal court, the State accepted the authority of the court.”¹¹¹

This focus on equal treatment—ensuring that the State, *like all litigants*, is held responsible for its own decisions in the courtroom—is echoed in *Lapides*.¹¹² The concern makes sense: it is unclear why, if at all, a state deserves special treatment when it voluntarily invokes the jurisdiction of the federal court in resolving its claim, why any protection it may be able to exercise in an involuntary case should survive knocking on the courthouse door itself. Combined with the Ninth and Tenth Circuit’s close attention to the actual textual language in both Article III of the Constitution and the Eleventh Amendment, and the Second Circuit’s reference to the clear language of the *Lapides* decision itself, the other side of this split seems difficult to envision. That, however, has not stopped other circuits from finding it all the same.

C. Circuits Limiting *Lapides* to Its Facts

1. The First Circuit

In *Bergemann v. Rhode Island Department of Environmental Management*, the First Circuit faced the *Lapides* question for the first time.¹¹³ A Rhode Island police officer union sought redress for wage and benefit matters they felt violated the Fair Labor Standards Act¹¹⁴ in part of an ongoing litigation with the State.¹¹⁵ Rhode Island removed the case to federal court, and then sought dismissal on immunity grounds.¹¹⁶ Instead of finding that by removing its claim to federal court the State had waived its sovereign immunity, however, the First Circuit instead elected to introduce a new component into its analysis: a so-called fairness analysis.¹¹⁷ In the First Circuit’s mind, a fact critical to *Lapides* was Georgia’s use of removal to attempt to regain immunity that it had previously waived in state court—removal “operated in effect as an end-run around Georgia’s state-court waiver

111. *Id.* at 1135.

112. *See Lapides v. Bd. of Regents*, 535 U.S. 613, 623 (2002) (“A rule of federal law that finds waiver through a State attorney general’s invocation of federal-court jurisdiction avoids inconsistency and unfairness. A rule of federal law that . . . denies waiver despite the state attorney general’s state-authorized litigating decision does the opposite.”).

113. 665 F.3d 336, 338 (1st Cir. 2011) (“The question, which is a matter of first impression for this court, is whether a state waives its sovereign immunity to a pleaded claim by removing that claim to federal court.”).

114. 29 U.S.C. §§ 201–19 (2012).

115. *Bergemann*, 665 F.3d at 338.

116. *Id.* at 339.

117. *See id.* at 341.

of immunity.”¹¹⁸ Because in this case there was no such regaining of immunity to be had through removal, the First Circuit believed a finding of waiver would penalize the State needlessly—inappropriate, in the court’s mind, because “[the] desire to avoid unfairness has animated every invocation by the Supreme Court of the waiver by conduct doctrine.”¹¹⁹

The First Circuit’s response to this perceived unfairness was to throw itself on the limitations of *Lapides*: “We take the Supreme Court at its word and regard the holding of *Lapides* as limited to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings.”¹²⁰ With this limitation in mind, the First Circuit used precedent related to waiver by litigation conduct to determine that the State had not waived its immunity, and that *Lapides* should be read as limited to its facts.¹²¹ *Lapides*, however, was not a waiver by litigation conduct case. The conduct in *Lapides* was *voluntary invocation*, the act of knocking on the courthouse door. This is an analogy that the First Circuit’s opinion studiously avoids, and with reason: as described in Section I, the Supreme Court’s voluntary invocation jurisprudence has, for hundreds of years in an unbroken line, confirmed that voluntary invocation of federal-court jurisdiction equals waiver.¹²² *Lapides* said the same thing.¹²³

2. *The Fourth Circuit*

The Fourth Circuit took the First Circuit’s fairness concerns even further, specifically requiring the fact pattern present in *Lapides* before finding waiver-by-removal: The State needed to have previously waived its immunity to a claim in state court proceedings.¹²⁴ In *Stewart v. North Carolina*, an employee of the North Carolina Department of Corrections was demoted after being accused of double-billing his time (for which he was exonerated well before the demotion).¹²⁵ In a pattern that should now be quite familiar to the reader, the state employee sued, the state actor removed, and the state actor moved for dismissal based on sovereign immunity.¹²⁶

118. *Id.*

119. *Id.*

120. *Id.* (internal quotations omitted).

121. *Id.* at 342.

122. *See supra* Part I.C.

123. *See Lapides v. Bd. of Regents*, 535 U.S. 613, 623 (2002).

124. *Stewart v. North Carolina*, 393 F.3d 484, 490 (4th Cir. 2005).

125. *Id.* at 487.

126. *Id.*

Interestingly, the Fourth Circuit's opening move is to examine history—drawing a distinction between sovereign immunity as defined by the Eleventh Amendment, and sovereign immunity which can arguably be said to predate the Eleventh Amendment—at common law.¹²⁷ The Fourth Circuit takes the (reasonable) view that the Eleventh Amendment did not *create* sovereign immunity, merely confirmed its existence.¹²⁸ In so delineating between the two, however, the Fourth Circuit does not attempt to create a distinct doctrinal treatment for each—it merely points out the existence of the two possible fonts of immunity as a segue into a much more familiar analysis of *Lapides*, and examination of the “fairness” concerns at play in *Lapides* versus in *Stewart*.¹²⁹

The reason for this detour into history is unclear—the actual basis for the Fourth Circuit's decision is not the difference, whatever it may be, between the scope of Eleventh Amendment immunity and the common law of state sovereign immunity. It is that the court “[saw] nothing inconsistent, anomalous, or unfair about permitting North Carolina to employ removal in the same manner as any other defendant facing federal claims.”¹³⁰ The historical distinction has not been echoed in the other circuits seeking to either limit *Lapides* or arrive at a middle ground between blanket waiver-by-removal and a toothless Supreme Court precedent. The historical analysis does not attack the validity of the abrogation, waiver, and state actor framework set out in the case law as the contour of state susceptibility to suit. It appears merely to be a lens through which the same misguided fairness and litigation conduct analysis in the First Circuit is carried out in the Fourth—and it leads the court to the same suboptimal result.

3. *The D.C. Circuit*

While not joining the Fourth Circuit in distinguishing between common law sovereign immunity and Eleventh Amendment sovereign immunity, the D.C. Circuit has taken a similar view as to the reach of *Lapides*—holding that it should only apply in situations where the state actor has waived immunity in state court.¹³¹ The D.C. Circuit applies a particularly stringent gloss to waiver of sovereign immunity, finding waiver “only where stated by the most express language or by

127. *Id.* at 487–88.

128. *Id.*

129. *See id.* at 488–91.

130. *Id.* at 490.

131. *Watters v. Wash. Metro. Area Trans. Auth.*, 295 F.3d 36, 42 n.13 (D.C. Cir. 2002).

such overwhelming implications from the text as will leave no room for any other reasonable construction.”¹³²

D. Hybrid Decisions

Lying somewhere between the waiver-by-removal circuits and the limited-*Lapides* circuits, some courts have attempted to build for themselves a halfway house where specific, novel doctrinal distinctions shield them from having to take sides in the split.

1. The Third, Fifth, and Eleventh Circuits

Here we return to the case of Michael Lombardo, discussed in the introduction of this Note. The Third Circuit’s approach to Lombardo’s claim was to embrace a wide view of *Lapides*, discussing its broad language and the consistency and fairness produced by a waiver-by-removal rule,¹³³ but to then pull a bait-and-switch on the jurisprudence. Instead of stopping at waiver-by-removal and holding that the State had rendered itself susceptible to suit by voluntarily invoking a federal court’s jurisdiction, the Third Circuit turned to examine whether immunity from *liability* may somehow have survived a waiver of immunity from *suit*.¹³⁴

It is telling that the first case the Third Circuit cites in this examination is *College Savings Bank*, a Supreme Court case which deals most centrally with questions of congressional abrogation of sovereign immunity (and sets a high standard for the same).¹³⁵ In the *College Savings Bank* opinion’s discussion of waiver, the Court announced that waiver of sovereign immunity must be express and unequivocal.¹³⁶ For the Supreme Court, the voluntary invocation of a federal court’s jurisdiction through removal satisfied that requirement.¹³⁷ For the Third Circuit, however, the language in *College Savings Bank*, combined with the Court’s admonition to “indulge every reasonable presumption against waiver,”¹³⁸ justified finding that “while voluntary

132. *Morris v. Wash. Metro. Area Trans. Auth.*, 781 F.2d 218, 221 (D.C. Cir. 1986) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)).

133. *Lombardo v. Pennsylvania*, 540 F.3d 190, 196–97 (2008).

134. *Id.* at 198.

135. 527 U.S. 666, 680–81 (1999). Congressional abrogation of state sovereign immunity is a separate and distinct method of overcoming sovereign immunity from that of state waiver, with which *Lapides* is concerned.

136. *Id.*

137. This is Breyer’s message in *Lapides*, see *supra* Part II.A.

138. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937). Note how chronologically distant from *Lapides* this admonition is, and how *Lapides* itself announced plainly that removal was waiver, full stop.

removal waives a State's immunity from suit in a federal forum, the removing State retains all defenses it would have enjoyed had the matter been litigated in state court, including immunity from liability."¹³⁹

The Fifth Circuit, in *Meyers ex rel. Benzing v. Texas*, held the same, finding that state sovereign immunity is comprised of two separate and distinct kinds of immunity, and that the waiver of one (immunity from suit) did not "affect its enjoyment of the other."¹⁴⁰ The Eleventh Circuit, too, takes this position in its *Lapides* analogue, *Stroud v. McIntosh*.¹⁴¹ By dividing immunity from suit and immunity from liability, and allowing the State to retain one while waiving the other, these circuits attempt to obviate the need to answer the challenge posed by *Lapides* head-on.

2. Analysis

While this is an admirable attempt at striking a middle ground between a broadly construed *Lapides* and a narrowly construed *Lapides*, these circuits base their decisions on a logical flaw incompatible with Article III's Controversy Clause.¹⁴² The Supreme Court has not weighed in on the quality or merit of the immunity from suit/immunity from liability distinction, and while it may indeed consider this possible middle ground if and when it is called to close the book on *Lapides*, I believe this particular proposed solution stands on weak foundations. One simply cannot sever immunity from suit from immunity from liability.

Certain parts of sovereign immunity are undoubtedly severable. States can, for instance, waive immunity from suits for equitable relief while retaining immunity from monetary damages.¹⁴³ They can also waive certain forms of immunity in their own courts while retaining immunity in federal court (so long, of course, as they don't remove to federal court voluntarily).¹⁴⁴ Perhaps more pertinent to this specific thread of jurisprudence, the Supreme Court has held that a state may

139. *Lombardo v. Pennsylvania*, 540 F.3d 190, 198 (2008).

140. 410 F.3d 236, 252–53 (5th Cir. 2005).

141. *See* 722 F.3d 1294, 1302 (11th Cir. 2013).

142. U.S. CONST. art. III, § 2, cl. 1.

143. *See* *Sossamon v. Texas*, 131 S. Ct. 1651, 1658 (2011).

144. *See* *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) ("A state does not consent to suit in federal court merely by consenting to suit in the courts of its own creation.").

waive immunity from liability without waiving its immunity from suit in federal court.¹⁴⁵

The three circuits that have struck out on this middle road have incorrectly inferred that the *inverse* must also be permissible—that a state can waive immunity from suit in federal court without waiving immunity from actual liability for the substantive claim.¹⁴⁶ Or stated another way, that a state can consent to a suit being heard in federal court but maintain immunity from liability in that suit. This inference must be incorrect, as that outcome is facially incompatible with the black-letter principle that parties cannot create federal subject matter jurisdiction by consent.¹⁴⁷ A party that consents to suit in federal court by means of affirmative litigation conduct must consent in such a way that creates a personal stake in the litigation, or opportunity to secure additional relief—without that personal stake, there is no Article III standing.¹⁴⁸ Since the state actor is essentially claiming that the federal court has jurisdiction to dispose of a claim without having the power to hold the state liable, stakeless standing is precisely what is created by a waiver regime where a state can sever waiveable immunity from suit while retaining immunity from liability.

Once a state is found to have voluntarily invoked federal court jurisdiction, that state's waiver of sovereign immunity must be taken to include both immunity from suit and immunity from liability in order to avoid transforming that invocation into jurisdiction-by-consent, which is patently unconstitutional. Because of this necessity, the Third, Fifth, and Eleventh Circuit's response to the *Lapides* question is invalid—and the circuit split again is reduced to a competition between the broad and narrow visions of *Lapides*'s central holding.

III.

ANALYZING THE COMPETING VISIONS OF *LAPIDES* IN THE CIRCUIT COURTS

Clearly, there is a lively debate as to the correct reading of *Lapides v. Board of Regents*—one that has more than split the circuits, but

145. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985), *superseded by statute*, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845, *as recognized in* *Lane v. Pena*, 518 U.S. 187 (1996).

146. See *Lombardo v. Pennsylvania*, 540 F.3d 190, 199 (2008); *Meyers ex rel. Benzinger v. Texas*, 410 F.3d 236, 254 (5th Cir. 2005).

147. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986).

148. See *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523, 1528–32 (2013) (dismissing a lawsuit in which the plaintiff lacked a personal stake for lack of subject matter jurisdiction).

fractured them. There is, however, a correct answer to this question. In this section, I argue that the only reasonable reading of *Lapides* is a reading that considers the historical purpose of the Eleventh Amendment, the text and spirit of *Lapides* itself, and the mechanical considerations of a judicial system with limited time and limited resources in gestalt to arrive at a broad waiver-by-removal rule that should apply to all claims in all situations where a state actor voluntarily removes his claim from state to federal court.

A. *Fidelity to History*

The Eleventh Amendment was not intended to grant the states a tool to avoid having to face plaintiffs in federal court in all circumstances.¹⁴⁹ It was intended to correct a minor misstep in the construction of Article III of the United States Constitution and ensure that a state could not be sued by a foreign citizen based only on diversity jurisdiction.¹⁵⁰ As the historical background provided in Section I elucidates, the Eleventh Amendment *did* create sovereign immunity from suit—in specific circumstances, for specific reasons. A waiver-by-removal rule applied uniformly through the federal court system is the rule best reflecting the original intent of those who crafted the Eleventh Amendment, and the rule most in line with the historic concerns leading to its ratification.

It is a commonplace tool of constitutional interpretation to inquire after the original intention of the framers of the document in authoring a specific provision.¹⁵¹ The same analytical strategy applies to later portions of the Constitution, from the Bill of Rights to the Reconstruction Amendments, and so on. If one wishes to ascribe to the framers of the Eleventh Amendment an intent to create for the states a complete immunity from suit in federal courts, it makes sense that one should be able to point to circumstances in the 1780s and 90s indicating that complete state immunity already existed, or at least was contemplated by the Second Congress.¹⁵² One can do neither.

Just because there is no clear indication that the framers of the Eleventh Amendment existed in a world conducive to the creation of

149. See discussion *supra* Part I; see also Gibbons, *supra* note 27, at 2003–05.

150. See Gibbons, *supra* note 27, at 1926–27.

151. See, e.g., R. E. H., Annotation, *Resort to Constitutional or Legislative Debates, Committee Reports, Journals, etc., As Aid in Construction of Constitution or Statute*, 70 A.L.R. 5 (1931) (“[I]t is well settled that such history, generally speaking, may be resorted to as an aid in determining the proper construction of a statute . . .”).

152. See Gibbons, *supra* note 27 at 1899 (“[T]he weight of the evidence is against those scholars who assert that the bar in the 1790’s generally assumed the existence of state sovereign immunity.”).

total state sovereign immunity¹⁵³ does not, of course, end the debate. On top of this, we have the text of the Amendment itself: “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.”¹⁵⁴ On a simple reading of the Amendment, we have a strong argument for the proposition that the Amendment was meant to provide a limited remedy. If the framing Congress had wanted to shield states from suit entirely, it could have—by ending the text of the Amendment after the words “against one of the United States.” The fact that it added qualifying language in two following clauses (both of which dealt with diversity of citizenship) challenges the notion that the Eleventh Amendment was envisioned as an extraordinary weapon.

The surrounding history and actual text of the Eleventh Amendment indicate it was not intended as a weapon for states, or as a broad shield against suits in all (or even most) cases. However, one could argue that notwithstanding the text, Supreme Court gloss on the Amendment and the actual evil the Amendment was intended to cure require the preservation of states’ sovereign immunity, even in cases of removal. Regardless of how one interprets the Amendment’s purpose, however, a blanket waiver-by-removal rule is appropriate.

If the motivating principle of the Eleventh Amendment flows from English law—from the ancient conception that “the Crown could not be sued without consent in its own courts”¹⁵⁵—and if the evil the Amendment was therefore supposed to guard against was a state being haled into court without consent, then the framers of the Amendment would agree that *Lapides* creates a blanket waiver-by-removal rule. Under this conception of the Amendment, state sovereign immunity is reduced to a jurisdictional proposition that “no Court can have jurisdiction over [the King]: for all jurisdiction implies superiority of power.”¹⁵⁶ A sovereign, however, can *consent* to suit. And in the removal context, there emphatically has been waiver. The *Lapides* court focused on the voluntary invocation of a federal court’s jurisdiction as the basis for finding waiver of Eleventh Amendment immunity.¹⁵⁷ This voluntary invocation, this signal to a federal court that the State wishes the court to adjudicate its claim, must be and is a form of

153. See discussion *supra* Part I.

154. U.S. CONST. amend. XI.

155. *Alden v. Maine*, 527 U.S. 706, 715 (1999).

156. *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *230, *234–35).

157. 535 U.S. 613, 623–24 (2002).

consent to be seen, heard, and called into that courtroom. The King himself has granted the court a superiority of power through consent, and may be bound by that court's jurisdiction.

If the motivating principle of the Eleventh Amendment is solely to correct *Chisolm v. Georgia*'s¹⁵⁸ determination that federal jurisdiction could extend to states under the state-citizen clause of Article III,¹⁵⁹ *Lapides* can be and should be read broadly. On this view, as discussed in detail in Section I of this Note, the purpose of the Eleventh Amendment was to ensure that a state could not be sued in federal court by citizens of another state on the basis of *diversity alone*.¹⁶⁰ For this reason, the Eleventh Amendment mirrors the language of the troublesome portion of Article III and makes clear, on its face, that it is only changing this one thing.¹⁶¹ The need for this change makes sense: as described in Section I, while there was no blanket immunity for all states at the time of the Framing, statutory immunity in specific instances did exist. And without this Amendment, a state could find itself susceptible to suit in federal court, purely on diversity grounds, for a claim its own citizens could not bring against it in state court. Sovereign immunity, under this conception, should never attach to federal claims—Eleventh Amendment immunity arguably was never anticipated to apply to federal causes of action.¹⁶² Bringing the federal claims in with the state claims when a state removes to federal court is perfectly in line with this conception of the evils the Amendment was conceived of to address.

Certainly, this analysis does not resolve—or attempt to resolve—the continuing academic debate on the history and essential purpose of the Eleventh Amendment.¹⁶³ It does not need to. What is important here is simply to demonstrate that the framers of the Eleventh Amendment did not intend to create a weapon for the states, but instead envi-

158. 2 U.S. 419, 452 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

159. See discussion *supra* Part I.

160. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 287 (1985) (Brennan, J., dissenting), *superseded by statute*, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845, *as recognized in* *Lane v. Pena*, 518 U.S. 187 (1996).

161. Compare U.S. CONST. art. III, § 2 (“The judicial power shall extend to all cases . . . between a state and citizens of another state . . .”) (emphasis added), with U.S. CONST. amend. XI (“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.”) (emphasis added).

162. *Atascadero*, 473 U.S. at 301 (Brennan, J., dissenting) (“If federal jurisdiction is based on the existence of a federal question, . . . the Eleventh Amendment has no relevance.”).

163. See discussion *supra* Part I.

sioned a shield against specific sorts of claims—and that even that shield could be taken from the states for a variety of reasons. Holding states accountable for their decisions to remove to federal court most effectively mirrors the historical underpinnings of the Eleventh Amendment.

B. *Fidelity to Precedent*

Ancient history aside, much more recent history—that of the Supreme Court’s own voluntary invocation jurisprudence, and its actual words in *Lapides v. the Board of Regents*—strongly supports the uniform application of a blanket waiver-by-removal rule.

1. *Continuing the Line of Voluntary Invocation Cases*

In each of the Supreme Court’s voluntary invocation cases, the Court has rightly arrived at the same conclusion: that voluntary invocation of a federal court’s jurisdiction waived a state actor’s right to sovereign immunity.¹⁶⁴ The pattern is unbroken. From *Clark v. Barnard*’s common-sense proposition that voluntary appearance in federal court indicated a waiver of sovereign immunity¹⁶⁵ to *Gardner v. New Jersey*’s more subtle holding that something as attenuated as filing a creditor claim against an estate in bankruptcy gave rise to waiver,¹⁶⁶ the Court’s message has been that voluntary and purposeful conduct bringing a state into contact and interaction with a federal courthouse, with the aim of having a claim or right adjudicated by that court, should be and is an invocation of that court’s jurisdiction and a waiver of whatever immunity that state might otherwise be able to claim.

On this view, there can be little doubt that *Lapides* intended to signal to the lower courts that while the Supreme Court was not in a position to close the waiver-by-removal loop entirely, its pattern of finding waiver in a state actor’s voluntary invocation was not about to be broken. This is self-evident in the words of the opinion itself: “We see no reason to abandon the general principle [of voluntary invocation as establishing waiver].”¹⁶⁷ Confidence in this interpretation is reflected in the academy as well: Wright & Miller’s famed civil procedure treatise, cited regularly by the Supreme Court as persuasive authority,¹⁶⁸ does not deign to mention the split in circuit opinion above the line, noting only that “in *Lapides v. Board of Regents*, the Su-

164. See discussion *supra* Part I.C.

165. 108 U.S. 436, 447 (1883).

166. 329 U.S. 565, 574 (1947).

167. 535 U.S. 613, 620 (2002).

168. See, e.g., *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011).

preme Court *held* that a state’s removal of a suit to federal court constitutes a waiver of its Eleventh Amendment immunity.”¹⁶⁹ Faithfulness to the Court’s precedential line required a blanket waiver-by-removal rule.

2. *Adhering to the Essential Logic of the Lapidés Opinion*

Even if one divorces *Lapidés* from the voluntary invocation cases and instead treats it as a stand-alone case concerned primarily with litigation conduct and fairness,¹⁷⁰ the language and reasoning of the case itself both weigh heavily in favor of a broad reading.

I have already discussed the textual support for a blanket waiver-by-removal rule in the *Lapidés* opinion elsewhere in this Note.¹⁷¹ To recap briefly: Only in the opening sentences of the opinion, in setting the mandated bounds of the Court’s jurisdiction over the case, does the Supreme Court ever use limiting language—and even then, the limits are painted as due solely to the contours of the question presented, not due to doctrinal concerns. The remainder of the opinion uses broad, general language, from the actual formulation of the question presented (“whether a state waive[s] its Eleventh Amendment immunity by its affirmative litigation conduct when it removes a case to federal court”)¹⁷² to the simplicity of the Court’s holding (“removal is a form of voluntary invocation of a federal court’s jurisdiction sufficient to waive the State’s otherwise valid objection to the litigation of a matter . . . in a federal forum”).¹⁷³ Textually, there is ample evidence for a broad rule, and only the apologetic standing language of the Court’s opening sentences is in support of a narrow ruling.

Although *Lapidés* only involved itself with state claims, its reasoning easily extends to federal claims as well.¹⁷⁴ It would be inconsistent, bordering on absurd, to allow a state to affirmatively invoke federal jurisdiction over only the state claims against it while pro-

169. 14B CHARLES ALAN WRIGHT, ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE JURIS. 3721 (4th ed. 2009) (emphasis added).

170. As the First Circuit does in *Bergemann v. R.I. Dep’t of Env’tl. Mgmt.*, 665 F.3d 336, 341 (1st Cir. 2011).

171. *See supra* Part II.A.

172. *Lapidés*, 535 U.S. at 617.

173. *Id.* at 624.

174. *See, e.g.*, *Stroud v. McIntosh*, 722 F.3d 1294, 1300 (11th Cir. 2013) (“Most circuit courts seem to agree that the *Lapidés* Court’s reasoning should apply in cases involving federal law claims”); *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 244 (5th Cir. 2005) (noting that *Lapidés*’s holding is “derived from generally applicable principles,” notwithstanding the nature of the underlying claim).

claiming immunity from the federal law claims that serve as grounds for removal.¹⁷⁵

The spirit and reasoning of *Lapides* are equally powerful supports for a blanket waiver-by-removal rule. The *Lapides* opinion goes out of its way to “avoi[d] inconsistency and unfairness.”¹⁷⁶ Critically, the inconsistency and unfairness at issue in *Lapides* are the inconsistency and unfairness faced by the *non-state actor* in having to face down a state with the asymmetric constitutional gift of sovereign immunity.¹⁷⁷ In fact, the Court makes clear that it is *not* concerned with disadvantages generated by the decision towards the State.¹⁷⁸ This makes sense; while one might argue that a non-state actor in a *Lapides*-esque case should care little whether he loses on immunity grounds in state court or federal court, the act of removal itself carries costs. The plaintiff is the master of his claim.¹⁷⁹ While a state actor shares the right to remove with any other party qualifying for removal under law,¹⁸⁰ its decision to drag the plaintiff out of the forum of his choosing into federal court, simply to be subjected to the same motion to dismiss as he would have faced below, is a suboptimal treatment of the civil action.

More than being a dignitary blow and an administrative annoyance to the non-state actor, it may have very real costs to an individual seeking to sue a state. In presenting this circuit split to the reader, a pattern should have become apparent: this body of case law is built on state employees being prevented from suing their employer for redress under otherwise generally applicable anti-discrimination or labor laws. Relatively unsophisticated civil servants, most likely with limited assets to spend on legal proceedings and paying a steep opportunity cost for engaging in a lawsuit as opposed to seeking employment, suddenly find themselves charged with having to pay for the associated costs of removal—deciding whether to challenge the notice of removal, preparing new briefs and filings for the federal court, perhaps even secur-

175. See *Embury v. King*, 361 F.3d 562, 565 (9th Cir. 2004).

176. *Id.* at 623.

177. See *id.* at 621 (“To adopt the State’s Eleventh Amendment position would permit States to achieve unfair tactical advantages, if not in this case, in others.”).

178. See *id.* at 623 (discussing case law where the United States has been permitted to voluntarily enter a case without waiving its immunity and recognizing the validity of this case law, but declining to extend the privilege to individual states due to over-riding fairness and consistency concerns).

179. Civil procedure jurisprudence creates presumptions in favor of the plaintiff’s choice of forum for a variety of proceedings. See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (plaintiff’s choice should “rarely be disturbed”).

180. 28 U.S.C. § 1441 (2012).

ing new counsel with federal litigation experience. All of this costs a great deal of money.

Put this plaintiff up against a state, the paradigmatic repeat player in its own courts and the federal circuit in which it sits, with its vastly superior resources and deep bench of attorneys with experience litigating in state and federal court—and with its trump card of sovereign immunity. A reasonable plaintiff, facing these odds, would understandably be tempted to settle for a suboptimal price,¹⁸¹ or to escape court entirely and stop hemorrhaging money. Rights would not be vindicated. The deterrent signal built into this nation’s anti-discrimination laws would not be sent. The public would be harmed. The decision to allow a state to game the judicial system and remove, then immediately disclaim federal jurisdiction, is a decision against the public good of the United States.

As a final note: Georgia in *Lapides* argued that its motive was entirely benign, and I do not argue that the state actor in all cases is acting in a Machiavellian manner to stiff the non-state actor out of deserved relief.¹⁸² To the extent that a state’s good or bad motive should matter in a *Lapides* determination, however, the First and Fourth Circuits’ insistence that unfair tactical advantage must be shown before waiver is found is misguided. *Lapides* demonstrates a concern for “preventing the *potential* for unfair tactics,” not a concern for “sanction[ing] the *actual achievement* of an unfair tactical advantage.”¹⁸³ A bright line rule equating removal with waiver of sovereign immunity in all cases for all claims is the only way to ensure that states do not structure their behavior in an attempt to take advantage of federal courts.

C. Other Arguments for Waiver-by-Removal

Beyond the major concerns of historical fidelity and attention to Supreme Court precedent, there are other powerful reasons to read *Lapides* as creating a broad waiver-by-removal rule. These reasons—

181. Consider also that employment discrimination cases are already one of the most regularly settled classes of cases, and that the nature of parties in a civil suit (sophisticated v. non-sophisticated, state v. non-state, etc.) has an impact on those settlement rates. See generally Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, available at <http://scholarship.law.cornell.edu/facpub/203/>. If settlement in this area of law is *already* so common, and if the nature of the parties further impacts that settlement rate, it is plausible that few states would ever be held to account for discriminatory employment decisions.

182. 535 U.S. 613, 621 (2002).

183. Meyers *ex rel.* Benzing v. Texas, 410 F.3d 236, 249 (5th Cir. 2005).

providing guidance to states on the timing of their actions and preserving the judicial system's resources through maintaining bright-line jurisdictional rules—are based both in the language of *Lapides* and general mechanical considerations as to how a judicial system should be run.

1. *Timing*

Lapides is centrally concerned with the unique power of states to declare themselves immune to suit, and with the unique asymmetric advantage this grants them vis-à-vis an average citizen.¹⁸⁴ A blanket waiver-by-removal rule minimizes a state's capacity to use this asymmetric advantage in a way that games the system in favor of the state actor at the expense of the citizen, as described above. It also benefits the state by providing straightforward guidance on the ideal timing of various litigation actions—most obviously, its raising of the sovereign immunity claim.

Even courts limiting *Lapides* are willing to say that actual litigation conduct preceding a state's removal may rise to the level of litigation conduct the *Lapides* court referenced when determining that Georgia had waived its sovereign immunity by removing to federal court.¹⁸⁵ Those circuits, however, do not provide clear guidance on how much litigation conduct is too much, or how much is acceptable. Does filing a motion to dismiss before removing count? Do settlement negotiations count? Seeking extensions to filing deadlines? All of these perfectly acceptable litigation activities could be cast as dragging litigation out in hopes of pricing the plaintiff out of the marketplace for civil justice, followed up by removal to federal court and the claiming of sovereign immunity. They can also be cast as the standard, expected behavior of a party that has been hailed into court. And the outcome in any given case will depend on the court's definition of unacceptable litigation activity generating an unfair advantage.

Compare this with the simple, bright-line rule created by the *Lapides* court—if you remove, you have waived sovereign immunity. No inquiry. No uncertainty. There is a line in the sand, and if you cross it, you will be held to have voluntarily invoked the court's jurisdiction. Giving an assistant attorney general specific guidance as to the ramifications of her state-authorized litigation decisions benefits the state,

184. 535 U.S. at 614.

185. See, e.g., *Bergemann v. R.I. Dep't of Env'tl. Mgmt.*, 665 F.3d 336, 341–42 (1st Cir. 2011).

and the judicial system, providing a desirable measure of certainty without departing from the language or spirit of *Lapides*.

2. *Judicial Economy*

Finally, a blanket waiver-by-removal rule is the only reasonable procedural rule to ask the circuits to apply when determining whether a state actor's immunity has survived removal. "[J]urisdictional rules should be clear."¹⁸⁶ A uniform waiver-by-removal rule is a "clear one, easily applied by both federal courts *and the States themselves*."¹⁸⁷ All actors involved in litigating an issue where sovereign immunity lurks in the background would be able to judge waiver easily: If a state removes its case to federal court, the inquiry ends, and neither the parties nor the court need spend time or energy litigating the status of the state actor's immunity. If a state wishes to exercise its sovereign immunity, it still can—indeed, should—in state court. The state loses nothing by being asked to file a motion to dismiss based on the Eleventh Amendment in state court, and the federal judiciary gains an *ex ante* procedural rule that is easy to understand, and easier to apply.

If, however, the First or Fourth Circuits have their way, and a court's waiver determination is based on whether a state actor gained an unfair tactical advantage by removing claims to federal court, we create not only a squishy, opaque rule, but an *ex-post* procedural rule. Under this standard, states would not know whether their actions amounted to waiver until it was too late to undo the damage. Courts would be unsure whether or not they had the capacity to even hear the claims before them. Litigation would be extended, costs would increase, and the plaintiffs—often individual state employees—would suffer.

A limited reading of *Lapides* could lead to a proliferation of *Erie* guesses concerning the content of state law and whether a state actor, in a specific case, had retained its immunity from specific classes of cases in state courts before removing to federal court¹⁸⁸—and to even *further* litigation as those decisions are inevitably challenged, amended, reversed, or otherwise fought over, further diverting the resources of the federal judiciary into a silly, patently unnecessary pro-

186. *Lapides*, 535 U.S. at 614.

187. *Id.* at 623 (emphasis added).

188. Consider, for example, *Proctor v. Wash. Metro. Area Trans. Auth.*, 990 A.2d 1048, 1048–69 (Md. 2010) (discussing, for twenty pages, whether or not a state had abrogated, or had intended to abrogate, sovereign immunity in a state statute in a case where the State had removed its case to federal court). Such examinations would be obviated by a blanket waiver-by-removal rule.

cedural detour.¹⁸⁹ And since “months and years of litigation may be in vain as a result of a jurisdictional error,”¹⁹⁰ bright-line procedural rules are imperative to preserve the resources of both the litigant parties (especially the petitioner, as noted above) and the judicial system itself.

D. Arguments for a Limited *Lapides*

1. “Fairness,” Misinterpreted

The *Lapides* decision concerns itself, centrally, with issues of essential fairness¹⁹¹—appropriate for a Court overseeing an adversarial system where balancing the tactical power of plaintiff and defendant is an end in itself. It has been argued that such considerations of fairness must necessarily cut against a simple waiver-by-removal rule.¹⁹² The argument goes that a broad waiver-by-removal rule is unfair to the state, which is placed in the position of having to have its federal sovereign immunity claim decided by a state judge, or waive sovereign immunity and remove to federal court.¹⁹³ While I note that the thought of a state judge ruling on a federal question shouldn’t cause apoplexy in a nation where state courts are presumed to have concurrent jurisdiction over federal causes of action,¹⁹⁴ the notion that a state might face a Morton’s Fork¹⁹⁵ and lose a right no matter what it decides could be seen as conflicting with the fairness interest protected by the Court in *Lapides*.

The Supreme Court’s own words in *Lapides*, however, provide a counterpoint. The language of the *unanimous* opinion not once concerned itself with fairness towards the state actor. In *Lapides* itself, one of the theorized iniquities noted above was present: The govern-

189. Cf. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (requiring federal courts to apply state law to state claims in federal court, necessitating an inquiry into the content of applicable state law).

190. *Sabo v. Dennis Techs., LLC*, No. 07-cv-283-DRH, 2007 WL 1958591, at *8 (S.D. Ill. July 2, 2007).

191. See *supra* Part III.B.

192. See, e.g., Matthew McDermott, Note, *The Better Course in the Post-Lapides Circuit Split: Eschewing the Waiver-by-Removal Rule in State Sovereignty Jurisprudence*, 64 WASH. & LEE L. REV. 753, 777–79 (2007).

193. See *Bergemann v. R.I. Dep’t of Envtl. Mgmt.*, 665 F.3d 336, 342 (1st Cir. 2011) (“[A] state with a colorable immunity defense to a federal claim brought against it in its own courts would face a Morton’s Fork: remove the federal claim to federal court and waive immunity or litigate the federal claim in state court regardless of its federal nature. Either way, the state would be compelled to relinquish a right: either its right to assert immunity from suit or its ‘right to a federal forum.’”) (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005)).

194. See, e.g., *Robb v. Connolly*, 111 U.S. 624, 635–37 (1884).

195. *Bergemann*, 665 F.3d at 342.

ment stated it had removed, in part, to gain access to generous interlocutory appeal procedures in federal court unavailable in Georgia state court.¹⁹⁶ The Supreme Court of the United States did not care. *Lapides* was about—like all voluntary invocation cases are about—holding the State accountable for its actions in seeking an audience in federal court.¹⁹⁷

The opinion had much to say about the unfairness generated towards the *non-state plaintiff*, however.¹⁹⁸ And the litigation implicating the questions *Lapides* left open reveals precisely the type of challenges generated by a narrowed voluntary invocation jurisprudence.¹⁹⁹ There is no textual basis in the opinion to support a “fairness to the state” justification for limiting *Lapides*’ waiver-by-removal framework to its facts and circumstances. As the previous analysis has shown, there is no case law succeeding *Lapides* to suggest that states are in any way unfairly disadvantaged by being held accountable for their actions in the course of litigation. And there is a very real, very powerful threat of unfairness to the non-state actor implicit in providing the state the power to maneuver itself into a favorable forum while retaining the capacity to claim sovereign immunity. A decision to limit *Lapides*’ reach justified on concerns of fairness towards the state would be anchorless, and incorrect.

2. Federal Judges and Federal Issues

The Fourth Circuit’s commitment to “hav[ing] the sovereign immunity issue resolved by a federal court rather than a state court,”²⁰⁰ while seemingly logical on a gut level (why *shouldn’t* a federal issue be decided in a federal forum?), does not stand up to further scrutiny. First, and perhaps most obviously, state courts decide federal issues regularly.²⁰¹ And while certain federal circuits are noted for their expertise in specific areas of federal law, our court system does not provide a general preference to federal fora in cases impinging on federal matters generally.

196. 535 U.S. 613, 621 (2002).

197. Indeed, the Supreme Court went out of its way to note that a specific fairness argument made by the State—that it had removed with a benign motive, as opposed to a strategic motive, and therefore that its removal shouldn’t be taken as a litigation act creating waiver—was irrelevant, and a poor basis for creating a jurisdictional doctrine. *See id.* (“A benign motive . . . cannot make the critical difference for which Georgia hopes. Motives are difficult to evaluate, while jurisdictional rules should be clear.”) (citations omitted).

198. *See supra* Part III.B.

199. *Id.*

200. *Stewart v. North Carolina*, 393 F.3d 484, 490 (4th Cir. 2005).

201. *See, e.g.*, 42 U.S.C. § 1983.

Second, claiming a state forum is somehow less well positioned to decide the sovereign immunity question seems to be a foolhardy litigation strategy. I would not like to be the lawyer tasked with informing a state judge that he or she is incapable of properly adjudicating the subtleties of basic constitutional law, requiring me to remove my claim to a more competent federal court. The response from the judge, I imagine, would not be positive. And if the lawyer recasts the removal *not* as a matter of competency, but as a simple matter of preferring a federal judge to decide this federal question, he or she may open the door to accusation of the very “litigation acts” Justice Breyer described in *Lapides* as rightly triggering waiver-by-removal,²⁰² even under the Fourth Circuit’s limited conception of the word—for why would one want a federal judge, rather than a state judge, to decide the sovereign immunity question unless one thought there was a competitive advantage sufficient to overcome the transaction costs associated with removal?

The State in *Stewart* could have replied to that question by noting the fact that there was, in fact, a split in the circuits, and that it sought federal weigh-in in light of that lower court conflict. That is not a “litigation act” creating some form of unfairness; that’s electing to have your case added to the lexicon of the circuit split already in progress. And while a state court is certainly also capable of utilizing Westlaw and discovering the split in authority, this argument is perhaps strongest. It is a strong argument, however, only so long as the split in authority actually exists, and the Supreme Court can and should resolve that split.

CONCLUSION: CLOSING THE BOOK ON *LAPIDES*

The waiver-by-removal question has been well-treated in the lower courts; as discussed above, a majority of circuits have now had the opportunity to consider the question, and many have decided on the waiver-by-removal question directly. The Supreme Court, however, has not yet granted certiorari to address the issues it reserved for itself—issues which have now created clear dividing lines between circuits. Not only is the issue ripe for review, but further delay could invite other circuits that have yet to decide to follow the Fourth Circuit’s erroneous construction of *Lapides* to join suit, sowing further discord in the lower courts.

There is little to be gained by continuing to allow this issue to be litigated without guidance from the high court.

202. See 535 U.S. 613, 619 (2002).

The stakes at issue in mending this circuit split are clear: In a grand majority of the cases interpreting *Lapides*, the plaintiff is a state employee merely seeking the same process he or she would receive from the courts if he or she worked for a private entity. The defendant is a state organ accused of unlawful discriminatory practices. A narrow interpretation of *Lapides* is not only inconsistent with the historical underpinnings of sovereign immunity and the Supreme Court's own opinion, but it is also contrary to what should be a relatively uncontroversial statement of good public policy: That states should be held to the same standards as corporations in justifying their hiring and firing decisions. That states should not receive a "free pass" on the protections we, the people, have created for minority groups. That states shouldn't be permitted to discriminate.

A majority of the circuit courts to consider this issue have sided with the judicially efficient, easily applied, and essentially fair waiver-by-removal rule announced in *Lapides*. Those that have not misinterpret both the letter and the spirit of the opinion. The time has come for the Supreme Court to revisit the issues it left open in *Lapides*, affirm the reasoning of its own voluntary invocation jurisprudence and the work of its subsidiary courts around the nation, and render waiver-by-removal the law of the land.

