Lapides v. Board of Regents and the Untrustworthiness of Unanimous Supreme Court Decisions

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A former judge's yearning for consensus on the United States Supreme Court resonates pleasantly with most of us most of the time.

> The United States Supreme Court has seriously misled the public as to the function of a judge. Despite the textbook model of a democracy, democratic institutions strive not for majorities but for consensus and, if possible, for unanimity. . . .
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> . . . The United States Supreme Court, on the other hand, regularly decides cases by votes of five to four and, worse, three to two to four. Instability in the law, and even chaos in the streets, is often the result.[1]

His hyperbole aside, all of us can bring quickly to mind an abundance of fractured Supreme Court decisions that support the judge's accusations. Supreme Court unanimity, however, sometimes comes at a big price. Getting to consensus often requires compromise, and compromise typically entails sacrifices of the kind of rationality and precision we associate with argument from rule or principle. Supposedly the Supreme

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1. Alexander M. Sanders, Jr., *Everything You Always Wanted to Know About Judges but Were Afraid to Ask*, 49 S.C. L. REV. 343, 345–46 (1998). For chaos in the streets, see *Roe v. Wade*, 410 U.S. 113 (1973) (fractured decisions), and progeny. But for maybe more chaos in the streets, see *Brown v. Bd. of Educ*., 347 U.S. 483 (1954) (unanimous decision).

Court deals with weighty issues framed in heated controversy, often with splits between whole circuits over how these issues ought to be resolved; one might guess that if consensus has not already been reached below, then consensus will not be reached above if the High Court is doing its job. And thus, we just might be entitled to suspect that a nice, clean unanimous Supreme Court decision sometimes, at least sometimes, indicates that someone up there was asleep at the switch.

Take the Court's recent Eleventh Amendment decisions for example. Unanimity, while not completely unknown, did not characterize the Court's Eleventh Amendment jurisprudence between 1985 and 2000, and, more often than not, the Court's Eleventh Amendment decisions revealed deep splits.[2] Indeed, the Eleventh Amendment has figured one way or another in a large number of the Supreme Court's decisions during the last century or so, but only a handful of them were unanimous.[3] I have heard that some Constitutional Law teachers avoid the Eleventh Amendment in their courses, waiting patiently for its doctrine to settle down. After two decades of hard-fought, inch-by-inch progress, mostly in the direction of clarifying the relationship between the Eleventh Amendment and the doctrines associated with State Sovereign Immunity, the Rehnquist Court has again opted for disarray. Like other unanimous Eleventh Amendment decisions, the Court's 2002

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2. *See, e.g.*, Miller v. French, 530 U.S. 327 (2000) (7–2 decision); Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765 (2000) (6–1–2 decision); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (5 with respect to Parts I, II, and IV of the Court's opinion, 7 with respect to Part III, 4 dissenting with respect to Parts I, II, and IV, and a different 2 dissenting with respect to Part III); Alden v. Maine, 527 U.S. 706 (1999) (5–4 decision); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (5–4 decision); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (5–4 decision), *aff'd*, 527 U.S. 666 (1999); California v. Deep Sea Research, Inc., 523 U.S. 491 (1998) (unanimous decision); Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997) (5–4 decision); Regents of the Univ. of Cal. v. Doe, 519 U.S. 425 (1997) (unanimous decision); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (5–4 decision); Hess v. Port Auth. Trans–Hudson Corp., 513 U.S. 30 (1994) (5–4); Hafer v. Melo, 502 U.S. 21 (1991) (unanimous decision, except Thomas, J., who took no part); Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991) (6–3 decision); McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990) (unanimous decision); Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96 (1989) (4–1–4 decision); Missouri v. Jenkins, 491 U.S. 274 (1989) (5–3 decision); Dellmuth v. Muth, 491 U.S. 223 (1989) (5–4 decision); Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987) (4–1–4 decision); Papasan v. Allain, 478 U.S. 265 (1986) (2–4–3 decision); Green v. Mansour, 474 U.S. 64 (1985) (5–4 decision); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) (5–4 decision).

3. *See, e.g.*, Frew *ex rel.* Frew v. Hawkins, 124 S. Ct. 899 (2004); Lapides v. Bd. of Regents, 535 U.S. 613 (2002); *Deep Sea Research*, 523 U.S. at 491; *Regents of the Univ. of Cal.*, 519 U.S. at 425; *Hafer*, 502 U.S. at 21; *McKesson Corp.*, 496 U.S. at 18; Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459 (1945); Clark v. Barnard, 108 U.S. 436 (1883); New Hampshire v. Louisiana, 108 U.S. 76 (1883).

Lapides decision[4] resonates more like a fist on the keys than a major ninth.

1. The Eleventh surely must be counted among the most straightforward and elegant of our Constitution's Amendments:

> 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.[5]

Anyone with passing familiarity with the Constitution's text knows where to look for the meaning of "judicial power." Article III makes it pretty clear that the federal courts hold the judicial power of the United States. The most pertinent passages in Article III section 2 provide:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies . . . between a State and Citizens of another State; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[6]

One needs neither more information nor much common sense to conclude that these passages in Article III gave federal courts jurisdiction over lawsuits between a State and folks who were not that State's citizens, that something led people in high places to realize that doing so was wrong, and that the Eleventh Amendment removed from "the Judicial power of the United States" jurisdiction over lawsuits commenced against a State by a noncitizen of that State. Such a little, but likely important, change.

2. The textualism produced by the innocent combination of a little knowledge with common sense sometimes is a dangerous thing. Sometimes the tendency simply to read and react to canonical text leads one to overlook plausible alternative interpretations. But what is there to interpret in the Eleventh Amendment? And when we add the most easily accessible historical context—*Chisholm v. Georgia*[7]—to what we have so far, what we have so far seems comfortably confirmed.

Chisholm involved a diversity lawsuit commenced in the United States Supreme Court in 1792, a scant handful of years after the Constitution

4. *Lapides*, 535 U.S. at 613.
5. U.S. CONST. amend. XI.
6. *Id.* art. III, § 2, cl. 1.
7. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

became the United States Constitution, by some South Carolina creditors seeking a money judgment against their debtor, the State of Georgia. Georgia refused to appear or otherwise submit to the Court's jurisdiction to entertain the suit. The plaintiffs, through the United States Attorney General, sought a writ to compel the State's appearance and answer under threat of default judgment.[8] Of the Court's five Justices, four—two of whom had been members of the Constitutional Convention of 1787, and another of whom had participated with Hamilton and Madison in authoring the *Federalist Papers*—supported the issuance of the writ in opinions that, however wide-ranging, rested on the text of Article III.[9]

Justice Iredell, the lone *Chisholm* dissenter, avoided the Constitution's text. In his view, Article III articulated the theoretical boundaries of the federal judicial power. But legislation was required to grant the authority and means to enable that power, and Congress had refrained from touching State sovereign immunity—an immunity that, to Justice Iredell, preexisted the Constitution and remained after its ratification—in the pertinent enablement.[10]

The United States' response to *Chisholm* was swift and meaningful. The first bill proposing the Eleventh Amendment was introduced in Congress two days after the decision was filed. Congress enacted its final proposal, looking much like the first, in March 1794. A year later, enough States ratified it. President Adams, however, did not announce its ratification until January 1798.[11] In *Hollingsworth v. Virginia*, another diversity lawsuit filed in the Supreme Court, the Court effectively bowed to the new text and to the popular will behind it in a *per curiam* decision filed February 14, 1798:

> THE COURT, on the day succeeding the argument, delivered a unanimous opinion, that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects of any foreign state.[12]

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8. *Id.*

9. The five opinions in *Chisholm* were authored by Justices Iredell, Blair, Wilson, Cushing, and by Chief Justice Jay.

10. *Chisholm*, 2 U.S. at 449 (Iredell, J., dissenting); *see also* CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 39–42 (1972) (arguing that although the First Congress understood that States would be suable in federal court, it failed to pass the necessary provisions in the Judiciary Act of 1789 to effectuate this understanding).

11. For a good history of the trip the Eleventh Amendment took from its introduction as a bill to ratification by the States, see the briefs in *In re* Ayres, 123 U.S. 443, 462–64 (1887), and Justice Kennedy's more complete historical account in Alden v. Maine, 527 U.S. 706, 715–27 (1999).

12. Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 382 (1798).

The Court then extended its declaration of no federal judicial power over actions brought against a State by a noncitizen of that State *nunc pro tunc* at least as far back as *Chisholm.*[13] Thus, by the end of the eighteenth century, the Eleventh Amendment had been entered into the Constitution and had been put to bed with the Supreme Court's definitive holding that it meant just what it said. *Hollingsworth* has never explicitly been overruled.

3. Maybe a little interpretation is needed after all. We know that U.S. adjudication is divided into federal and state systems. We also know that the Eleventh Amendment blockades the use of federal courts for the commencement and prosecution of suits against a State by noncitizens of that State. The question becomes which suits—all of them or just some of them?

Federal courts do not possess general original jurisdiction. Article III of the Constitution specifies the grounds for original jurisdiction, and divides the world of federal civil trial adjudication into two general parts: diversity/alienage and federal question. We know that the Eleventh Amendment speaks to this Article III original jurisdiction. We also know that the Eleventh Amendment, unlike Article III, says nothing about States as the commencers and prosecutors. We are dealing, then, with suits brought by individuals as plaintiffs against States as defendants.

From here on out, I will use "Citizen" to refer to an individual civil litigant against a State who is a citizen of that State, and I will use "Noncitizen" to refer to an individual civil litigant against a State who is not a citizen of that State. Litigants can commence and prosecute their claims against States in eight basic configurations, six of which implicate the Article III federal judicial power:

> *Citizens* with claims against their own State might commence and prosecute them (1) in federal court (federal claims); (2) in federal court (state claims); (3) in state court (federal claims); (4) in state court (state claims).
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> *Noncitizens* with claims against States might commence and prosecute them (5) in federal court (federal claims); (6) in federal court (state claims; diversity or alienage jurisdiction); (7) in state court (federal claims); (8) in state court (state claims).

13. The Court had held the writ issued in *Chisholm* in abeyance pending the proceedings that led to the Eleventh Amendment. *Chisholm*, 2 U.S. at 480 n.*.

We know that Article III's provisions on original-jurisdiction do not recognize configuration (2), and do not reach configuration (4), even by implication. We know that the text of the Eleventh Amendment specifically excludes configuration (6). We also know that the text of the Eleventh Amendment does not deal with configurations (1), (3), (7), and (8). That leaves us with configuration (5)—Noncitizen brings federal question claim against State in federal court—to worry about so far as the text of the Eleventh Amendment is concerned.

The argument for including configuration (5) within the Eleventh Amendment's exclusion from federal judicial power is that the Amendment's text refers to "*any* suit in law or equity," a phrase that seems to include federal question suits as well as diversity suits. If that is what the Eleventh Amendment says, then Noncitizen must commence his or her federal question suit in state court. The argument for excluding configuration (5) from the Eleventh Amendment's exclusion regards the text of Article III as contributing to the meaning of the Amendment. Aside from the partial phrase "law and equity," which echoes the same partial phrase in Article III's "federal question" provision, the text of the Eleventh Amendment seems to target the two Article III provisions alluding to diversity/alienage civil actions involving States and Noncitizens.

We are faced, then, with a question of interpretation for which assistance outside the Eleventh Amendment's text will prove necessary. *Hollingsworth* may have answered that question, one month after the Eleventh Amendment became official constitutional text. However, *Hollingsworth*, like *Chisholm*, was a diversity case, not a federal question case. The narrowest legitimate interpretation will be that the Eleventh Amendment eliminates *diversity lawsuits commenced by Noncitizens against States* from the original jurisdiction of the federal courts. The broadest legitimate interpretation will be that the Eleventh Amendment eliminates *diversity lawsuits and federal question lawsuits commenced by Noncitizens against States* from the original jurisdiction of the federal courts.

The broadest interpretation seems clearly assumed by Chief Justice Marshall in *Osborn v. President, Directors & Co. of Bank of the United States*,[14] the first Supreme Court decision holding that a plaintiff with a federal claim could avoid the jurisdictional bar of the Eleventh Amendment by suing State officers and not the State itself, over a

14. Osborn v. President, Directors & Co. of the Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

dissent by Justice Johnson that no federal question was actually involved. The Reconstruction Court, while confronting a large number of actions claiming that Southern States were unconstitutionally outmaneuvering their creditors by impairing the obligations of their own contracts, solidified the broad interpretation.[15] And, when asked to revisit the old issue (mostly by its dissenters), the Rehnquist Court seems tentatively to have mustered a bare majority willing to adopt the broad, includes-federal question construction of the Amendment's terms.[16]

I confess here to wishing that Chief Justice Marshall, writing a mere thirty years after *Chisholm*, was wrong. As I read the Eleventh Amendment's text, limitation of the Amendment to diversity cases harmonizes with my intuition, while expanding the limitation to include federal question cases seems grating and dissonant.[17] Others' reactions to the Eleventh Amendment's text in the shadow of Article III may differ from mine. I think the broadest legitimate interpretation creates problems for the resolution of a few federal question claims that are eliminated or made less difficult under the narrowest legitimate interpretation.[18] I am guessing, on the other hand, that the broadest

15. "That a State cannot be sued by a citizen of another State, or of a foreign state, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases." Hans v. Louisiana, 134 U.S. 1, 10 (1890).

16. This construction of the Eleventh Amendment was presaged by Justice Powell's plurality opinion in *Welch v. Tex. Dep't of Highways and Pub. Transp*., 483 U.S. 468, 476–88 (1987), an opinion that should not have used, and did not need, the Eleventh Amendment to make this point. *See id*. at 488–93; s*ee, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 743 (2002) (5–4 holding that Federal Maritime Commission is barred from adjudicating private complaints against states); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 687–88 n.5 (1999) (the 5–4 majority dismissed Justice Breyer's attempt to revisit the issue of the Eleventh Amendment's coverage of federal question jurisdiction); *cf.* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997) (5–4 decision holding that Indian tribes are generally barred from suing States in federal court); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (5–4 decision holding that Congress could not abrogate States' immunity under the Indian Commerce Clause).

17. Chief Justice Rehnquist apparently shares my intuitive reaction to the text: "[T]he text of the [Eleventh] Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts . . . ." *Seminole Tribe*, 517 U.S. at 54.

18. By "a few federal claims" I mean those federal question claims, these days few in number, that are brought by Noncitizens against States rather than by Citizens against States. Justice Kennedy appears to concur with my cost-benefit analysis of the broad interpretation of the Eleventh Amendment to include federal question claims:

legitimate interpretation requires federal courts to worry less than would be necessary under the narrowest legitimate interpretation about their jurisdiction over lawsuits involving a mix of federal question and diversity claims. Others may not care much about these problems, or may think they have solutions for them that do not offend the text of the Eleventh Amendment.

At present, however, I am not concerned about the resolution of the question of how the Eleventh Amendment is to be interpreted. Of course, whether you fall on the narrow side or on the broad side of the answer to this question of interpretation, I hope you agree with my understanding of the Eleventh Amendment's text. I am only concerned that you recognize my position that the Eleventh Amendment *must* be understood to remove from the original jurisdiction of the federal courts either some or all of the civil lawsuits that Article III authorizes Noncitizens to bring against States.

4. The Eleventh Amendment has provided the ground for many pitched Supreme Court battles, and one easily gets sidetracked while engaged in criticism. Having come this far, let me clarify what I am not criticizing here.

My argument has nothing to do with how to tell whether a Noncitizen is commencing or prosecuting an action against a State. Early in the Nation's history, Chief Justice Marshall tested the Eleventh Amendment simply by looking at the named parties.[19] The Reconstruction Court revisited his test and searched seriously (to the State's benefit) for real

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> Neither in theory nor in practice has it been shown problematic to have federal claims resolved in state courts where Eleventh Amendment immunity would be applicable in federal court but for an exception based on *Young*. For purposes of the Supremacy Clause, it is simply irrelevant whether the claim is brought in state or federal court. Federal courts, after all, did not have general federal-question jurisdiction until 1875. Assuming the availability of a state forum with the authority and procedures adequate for the effective vindication of federal law, due process concerns would not be implicated by having state tribunals resolve federal-question cases.

Coeur d'Alene Tribe, 521 U.S. at 274–75 (Kennedy, J., for a Court plurality).

19. Marshall's most widely quoted statement to this effect comes from *Osborn*:

> [T]he 11th amendment, which restrains the jurisdiction granted by the constitution over suits against states, is, of necessity, limited to those suits in which a state is a party on the record.
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> The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.

Osborn, 22 U.S. at 857–58; s*ee also* United States v. Peters, 9 U.S. (5 Cranch) 115, 139–40 (1809) (treating the named party as the real defendant despite the State's significant interest in the outcome).

parties in interest[20] until its successor Court settled the test in *Ex parte Young*.[21] I like Chief Justice Marshall's test, better than the later ones, but that is not why I am complaining here.

My argument has nothing to do with the old question whether the Eleventh Amendment reaches the appellate jurisdiction as well as the original jurisdiction of the federal courts. In *Cohens v. Virginia*, Chief Justice Marshall answered this question by confining the Amendment's constriction to the federal courts' original jurisdiction.[22] No serious effort to revisit his answer has ever been made, and I make none here.

My argument has nothing to do with the controversy over whether Congress can make State courts of general jurisdiction entertain federal claims commenced or prosecuted by Citizens or Noncitizens against their State targets.[23] It must be true that disabling Congress from exercising this option likely would prevent a few additional good claims from being asserted against States. It also must be true that the overwhelming majority of federal claims by persons against States are commenced by Citizens, not Noncitizens, and thus are claims to which the Eleventh Amendment does not speak.

My argument will not resolve the troublesome questions of just how and when a State can effectively consent to, withdraw consent to, or waive immunity from suit in federal court. The Supreme Court has made a

20. Louisiana was the primary recipient of the Supreme Court's largess. *See, e.g.*, New Hampshire v. Louisiana, 108 U.S. 76, 89, 91 (1883) (New Hampshire was just a front for its citizens who were Louisiana's creditors; original proceeding in Supreme Court dismissed); Louisiana v. Jumel, 107 U.S. 711, 728 (1883) (holding that Louisiana officials were not subject to plaintiff's mandamus action in federal court, because the suit against them for payment of debt from the public treasury was actually against the State); *see also In re* Ayers, 123 U.S. 443, 462 (1887) (concluding that because the State of Virginia, not its Attorney General and Auditor, was the real party in interest in this suit for repayment of a debt, petitioners were discharged of the contempt citations entered against them issued by the federal circuit court).

21. *See Ex parte* Young, 209 U.S. 123 (1908) (holding that state officials may be sued in federal court for injunctive relief to prevent violating federal law); s*ee also Seminole Tribe,* 517 U.S. at 74; *Coeur d'Alene Tribe*, 521 U.S. at 277; Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779–86 (1991) (reaffirming the *Young* doctrine as an important safety valve, on the assumptions that (1) the Eleventh Amendment bars Noncitizens' federal question claims, and that (2) Indian tribes on reservation lands within the State they are suing (or the State that is suing them) are nonetheless Noncitizens of that State).

22. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 415 (1821).

23. Alden v. Maine, 527 U.S. 706, 712 (1999) (holding 5–4 that Congress cannot subject States to private civil actions in their own courts under the Fair Labor Standards Act).

shambles of answering these questions, and has significantly contributed to the shambles in the decision I am about to discuss. My argument goes no further than to make these troublesome questions irrelevant in lawsuits that fall within the terms of the Eleventh Amendment.

My argument will seem to require some defense against three problematic areas, at least two of which have some doctrine attached: (1) suits commenced in federal court by private parties against members to interstate compacts; (2) counterclaims and the like asserted by private parties against States that have initiated litigation against them in federal court; (3) congressional attempts to require States to consent to suit in federal court in return for federal benefits. I will try to mention these areas again later in this article.

I will be tempted to pay considerable and detailed attention to statements made in recent Supreme Court majority and plurality opinions that seem to contradict my argument. I will resist that temptation by conceding that bad Supreme Court language contradicts me. The results in these opinions do not. Part of my project here will be to test how seriously the High Court intends this bad language.

5. What does *Lapides v. Board of Regents*[24] have to do with the Eleventh Amendment? The answer, so far, is nothing. Paul Lapides—a Kennesaw State University instructor, doubtless a Georgia citizen, employed by Georgia's state university system—brought a civil action in a proper Georgia Superior Court against a Georgia state agency and various Georgia state employees in their official and personal capacities, claiming violations of both Georgia state law and federal law. The federal claims in the complaint privileged the defendants to remove Lapides' action to federal court, and they did so. Once there, the state agency moved to dismiss Lapides' complaint against it. The district court refused to dismiss the State from the suit, holding that its participation in the act of removal amounted to a waiver of its "Eleventh Amendment immunity" from suit in federal court. The Court of Appeals reversed. The Supreme Court reversed the Court of Appeals.[25] After noting that the District Court had dismissed the federal claims against the individual defendants, and that Lapides' federal claim against the State was not a cognizable one,[26] the Court held:

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24. Lapides v. Bd. of Regents, 535 U.S. 613 (2002).

25. *Id.* at 624.

26. *See id*. at 616 (addressing claims against individual defendants); *id.* at 617 (discussing a claim against State: "Lapides' only federal claim against the State arises under 42 U.S.C. § 1983, that claim seeks only monetary damages, and we have held that a State is not a 'person' against whom a § 1983 claim for money damages might be asserted." (citing Will v. Mich. Dep't of State Police, 491 U.S. 58, 66 (1989))).

> We conclude that the State's action joining the removing of this case to federal court waived its Eleventh Amendment immunity—though, as we have said, the District Court may well find that this case, now raising only state-law issues, should nonetheless be remanded to the state courts for determination.[27]

Regardless of one's reaction to this result, the wrong vehicle must have been carelessly chosen to reach it. A unanimous *Lapides* Court held that a State waives its Eleventh Amendment immunity when it removes to federal court a case brought by a Citizen (that is, one of the State's own citizens) against it in state court (in this case, one of the State's own courts). If the Court actually means what it unanimously said, its opinion is wrong in nearly every traditional way known to constitutional jurisprudence: disregard of constitutional text; misuse (at least misreading) of precedents; avoidance of the narrow in favor of the sweeping; and indifference to likely consequences.

6. The doctrines associated with Sovereign Immunity—that a Sovereign is not amenable to suit without its consent—cover a much broader, yet also narrower, range than the text of the Eleventh Amendment. I am not about to revive the argument Justice Wilson so eloquently expressed in *Chisholm* that States of the United States are not the "sovereigns" entitled to this sovereign immunity.[28] I recognize, and forgive, the Court's often mistaken use of "Eleventh Amendment" as a stand-in for the *breadth* of State Sovereign Immunity; that is to say, for the proposition that a sovereign is not amenable to suit. A State "not amenable to suit" with respect to claims falling within the Eleventh Amendment's text is a State not amenable to suit.

The *Lapides* Court, like some Courts before it, carelessly cites *Hans v. Louisiana*[29] for the proposition that Eleventh Amendment equals Sovereign Immunity.[30] *Hans* held no such thing. In *Hans*, Louisiana creditors, claiming unconstitutional impairment of contract, sued their debtor, the State of Louisiana, in a federal trial court over actions the State had taken to avoid these debts. Louisiana moved to dismiss, asserting that "[p]laintiff cannot sue the state without its permission; the

27. *Lapides*, 535 U.S. at 624.

28. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 454–58 (1793) (Wilson, J., concurring).

29. Hans v. Louisiana, 134 U.S. 1 (1890).

30. Indeed, *Lapides* begins dramatically with this erroneous assertion: "The Eleventh Amendment grants a State immunity from suit in federal court by citizens of other States . . . and by its own citizens as well, *Hans v. Louisiana* . . . ." *Lapides*, 535 U.S. at 616.

constitution and laws do not give this honorable court jurisdiction of a suit against the state, and its jurisdiction is respectfully declined."[31] The trial court dismissed, and the Supreme Court affirmed.[32]

The *Hans* creditors argued that the Eleventh Amendment did not bar their federal suit. Of course they were correct on this point, and the Court confessed as much.[33] But then the *Hans* Court turned away from the Eleventh Amendment toward what lay behind it—*Chisholm v. Georgia*, Hamilton's *Federalist 81*, and Madison's explanation of Article III during Virginia's ratification convention—and held that the *Chisholm* dissenter was right that the Constitution, and specifically the terms of Article III, had been articulated against a law background that included State sovereign immunity:

> The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. . . .
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> The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in *Chisholm v. Georgia;* and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone farthest in sustaining suits against the officers or agents of States.[34]

In other words, *Sovereign Immunity*—that a State is not amenable to suit (including suit commenced in federal court) without its consent—*and not the Eleventh Amendment* was the Court's basis for dismissing the Louisiana creditors' suit in *Hans. Hans* never said "Eleventh Amendment equals Sovereign Immunity." *Hans* said that State sovereign immunity was accommodated by implication in the original Constitution, *independently of the Eleventh Amendment*, and that the *Chisholm* majority was wrong to imagine otherwise.

7. Indeed, *Chisholm*'s rejection of State Sovereign Immunity furnishes the only reason—a false positive produced by coincidence—for conjoining Eleventh Amendment with that more general doctrine. I would not bet against the notion that if the majority in *Chisholm v. Georgia* had joined instead of overridden Justice Iredell, then (1) the

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31. *Hans,* 134 U.S. at 3.
32. *Id.* at 4, 21.
33. [T]he plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by . . . subjects of a foreign State. It is true, the amendment does so read: and if there were no other reason or ground for abating his suit, it might be maintainable . . . .

Id. at 10.
34. *Id*. at 15–16.

Eleventh Amendment would never have come into being, and (2) to this day our federal Constitution, with its Article III intact, would be interpreted to assume State Sovereign Immunity with respect to suits between a State and its own citizens, citizens of other States, or citizens of foreign nations. Claimant would bring suit against State in federal court. The suit, if maintainable against another individual regardless of the latter's consent, would also be maintainable against State if State consented to suit.

I submit here to the general rule of *Hans v. Louisiana* as *Hans* expressed that rule. Suppose you were on the *Chisholm* Court. Or suppose you were the *Hans* Court asked to step into the shoes of the *Chisholm* Court. You had interpreted a phrase in Article III to mean exactly what it said, over a vigorous dissent arguing for a pervasive constitutional background of State Sovereign Immunity. Congress, followed by the States, had responded by passing a constitutional amendment that (among other things) had obliterated *Chisholm*'s precise holding as clearly as words could manage without mentioning names. *How would you treat the resulting void?* I think that you have four options.

(1) You could admit your error in interpreting Article III the way you did in *Chisholm.* Then you could ignore the new amendment's text and say the amendment obliterated *Chisholm* in toto, restoring the field of State Sovereign Immunity to its preexisting condition, *and nothing more.*

(2) You could refuse to admit your error in interpreting Article III the way you did in *Chisholm.* Then you could settle exclusively on the new amendment's text and say it did nothing more than overrule the explicit *holding* in *Chisholm*—addressing only Noncitizens' lawsuits against States brought in federal court—without touching the rest of your understanding of the U.S. Constitution's effect on preexisting State Sovereign Immunity.

(3) You could refuse to admit your error in interpreting Article III the way you did in *Chisholm.* Then you could ignore the amendment's text and say the new amendment restored the field of State Sovereign Immunity to the condition it was in before Article III became effective.

(4) You could admit your error in interpreting Article III the way you did in *Chisholm.* Then you could respect both the amendment's text and the amendment's immediate effect. You could say the new amendment obliterated *Chisholm* in toto, restoring the field of State

> Sovereign Immunity to its preexisting condition, *except to the extent the terms of the amendment altered the preexisting condition.*

And, if you were just a little bit humble, and just a little bit respectful of the ability of other intelligent people to write things down on pieces of paper, you would choose the fourth of these options. As I have noted previously, the *Hans* Court circumvented option (1). The *Hans* Court clearly rejected option (2).[35] Thanks to a perfunctory concurrence in which Justice Harlan must have chosen either option (2) or option (3),[36] we can say with comfort that the *Hans* Court selected option (4). We might, in short, join the Supreme Court in its common post-*Hans* observation, so far as that observation concerns the *general rule of State Sovereign Immunity:*

> Although the text of the [Eleventh] Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." That presupposition, first observed over a century ago in *Hans v. Louisiana* . . . has two parts: first, that each State is a sovereign entity in our federal system; and second, that "'[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'"[37]

8. Submission to the *general* rule expressed in *Hans* fairly implies my willingness to admit a qualification or two not expressed in *Hans.* For example, I am willing to admit that Congress, acting in pursuance of its constitutional authority, might be able to modify the *breadth* of State Sovereign Immunity. I would be willing to admit, for example, that

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35. It was argued by the opponents of the Constitution that this clause would authorize jurisdiction to be given to the federal courts to entertain suits against a State brought by the citizens of another State, or of a foreign state. Adhering to the mere letter, it might be so; and so, in fact, the Supreme Court held in *Chisholm v. Georgia;* but looking at the subject as Hamilton did, and as Mr. Justice Iredell did, in the light of history and experience and the established order of things, the views of the latter were clearly right . . . .

Id. at 13–14.

36. I cannot give my assent to many things said in the opinion. The comments made upon the decision in *Chisholm v. Georgia* do not meet my approval. They are not necessary to the determination of the present case. Besides, I am of opinion that the decision in that case was based upon a sound interpretation of the Constitution as that instrument then was.

Id. at 21 (Harlan, J., concurring).

37. Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996) (internal citations omitted). To like effect, inviting our like acquiescence: "The Court's unanimous [sic] decision in *Hans* . . . firmly established that the Eleventh Amendment embodies a broad constitutional principle of sovereign immunity." Welch v. Tex. Dep't of Highways and Pub. Transp., 483 U.S. 468, 486 (1987) (Powell, J., plurality opinion). We may say "true" to this statement, if we wish, without conceding that the Eleventh Amendment also "embodies" the "without its consent" qualification of the sovereign-immunity principle. *Seminole Tribe*, 517 U.S. at 54.

Congress can modify, even abrogate, this State Sovereign Immunity in the exercise of its Commerce power—a position rejected by a deeply divided Court in *Seminole Tribe*[38] and again in *College Savings Bank.*[39] I would be willing to admit that Congress can modify or abrogate State Sovereign Immunity in the exercise of its power under the Fourteenth Amendment—a position assumed in many cases and explicitly taken by the Court (not without dissent) in *Fitzpatrick v. Bitzer.*[40] I would be willing to admit that Congress could successfully insist that States must "consent" to waive their sovereign immunity in return for federal benefits—a position maintained articulately by the Court at least since *South Dakota v. Dole.*[41] I would even be willing to admit that Congress can circumvent State Sovereign Immunity by authorizing suit on federal claims against States in their own courts—a position narrowly rejected by the Supreme Court in *Alden v. Maine.*[42]

None of these qualifications on the *Hans* doctrine require further discussion here. The *Lapides* decision neither takes up nor deals with any of them. Instead, it deals with the "consent" element of the general doctrine, and it holds that a State waives its immunity from the maintenance of a suit against it in federal court by removing to that court a suit initiated against it (by one of its own Citizens) in its own State courts.[43] Although quite a bit of vitriol has been spilled in recent years

38. *Seminole Tribe*, 517 U.S. at 47.

39. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682–83 (1999).

40. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

41. South Dakota v. Dole, 483 U.S. 203, 206 (1987). *Dole* holds that the federal Spending Power permits Congress to impose conditions on State receipt of federal benefits and funds as long as those conditions do not induce the States to engage in activities that would be unconstitutional. *Id*. at 210–12. The proposition apparently stems from Steward Machine Co. v. Davis, 301 U.S. 548, 591–98 (1937) (upholding the Social Security Act's provisions that condition tax credits upon States' adoption of employment laws as required by the Act). If it wishes to require State waiver of sovereign immunity as a condition to participation in federal benefits programs, Congress must likely indicate this intent expressly and in some detail. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

42. Alden v. Maine, 527 U.S. 706, 712 (1999). Several if not all of these doctrinal subtopics ultimately require resolution of the question whether Sovereign Immunity is a constitutional or merely a common law principle. If the former, Congress would be limited in attempting to alter State Sovereign Immunity in ways that otherwise would be available to Congress if the doctrine were only a common law principle. Note, however, that the Eleventh Amendment is not a required component in the resolution of any of these subtopics.

43. *See generally* Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167 (2003) (arguing that the

over the "consent" element of the Sovereign Immunity doctrine—we would expect federal courts to fumble with a "consent" condition from time to time—none was reserved for this issue by our Supreme Court's members in *Lapides*, and I have no problems with this version of its holding.

Nor am I particularly roused by the Court-sanctioned observation that "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms . . . ."[44] "Standing for the presupposition" seems to me a rather different idea than "Eleventh Amendment equals the presupposition, nothing more and nothing less." And the Eleventh Amendment, I maintain, does not simply reinstate the general doctrine of State Sovereign Immunity. The Eleventh Amendment also amends that doctrine with respect to the claims it covers.

9. As the complete statement of the doctrine suggests, Sovereign Immunity has nothing to do with a court's "jurisdiction" in the usual sense.[45] Thus, a claimant brings suit against State, alleging a claim that would be cognizable if brought against another citizen, in a federal court (or state court) having original jurisdiction to entertain the suit; State decides, by word or action, whether to consent to the suit; if State consents, then the suit proceeds; if State does not consent, then the State (successfully) moves for dismissal (although moving for summary judgment would be better) on grounds of Sovereign Immunity.[46]

Supreme Court conflated two distinct notions of waiver—a state's consent to suit, and the effect of state officers' actions—in mid-twentieth century in cases dealing with Sovereign Immunity and the Eleventh Amendment).

44. Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991). This language was quoted verbatim in *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996), *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 634 (1999), *aff'd*, 527 U.S. 666 (1999), *Alden v. Maine*, 527 U.S. 706, 729 (1999), and *Fed. Mar. Comm'n v. S.C. State Ports Auth*., 535 U.S. 743, 753 (2002).

45. *Cf.* CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 7 (1972) ("For Blackstone . . . the doctrine of sovereign immunity was simply a way of stating that the king was not amenable to the jurisdiction of his own courts unless he assented to such jurisdiction. However, the doctrine was not then understood as relieving the sovereign of his legal obligations . . . ."); Eric S. Johnson, Note, *Unsheathing Alexander's Sword:* Lapides v. Board of Regents of the University System of Georgia, 51 AM. U. L. REV. 1051, 1061–62 (2002) (arguing that confusion surrounding Sovereign Immunity—which the author equates with the Eleventh Amendment—results from its treatment as a subject matter jurisdiction concept rather than as a personal jurisdiction concept).

46. *See generally* 1 CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENT: ITS DIVISIONS, AGENCIES, AND OFFICERS, §§ 1:1–1:4 (2d ed. 2002) (discussing the traditional doctrine, its procedural nature, and nuances of each jurisdiction).

And here is where we find obvious divergence between the Eleventh Amendment and the Sovereign Immunity it presupposes. *The Eleventh Amendment's text leaves no room for State consent to the suits falling within its express scope.* Indeed, the Eleventh Amendment is crafted, not as an "immunity," but rather as a limitation on the scope of the federal judicial power. According to the Eleventh Amendment's text, the lawsuits falling within its scope *belong, under no circumstances, in federal court*; attempts to adjudicate them, *with or without a State-defendant's consent*, would be *ultra vires.* Put differently, according to text, Eleventh Amendment does not equal Sovereign Immunity, and construing the Eleventh Amendment to equal Sovereign Immunity would extend the federal judicial power to the lawsuits the Amendment eliminates from the original jurisdiction of the federal courts.

That the Eleventh Amendment does not equal Sovereign Immunity seems easy enough to prove. Start simply by comparing the official version of the Eleventh Amendment with one version of what it would say if it were expressed in terms of Sovereign Immunity:

> *Official version*: "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."
>
> *"Sovereign Immunity" version*: "The Judicial power of the United States shall extend to suits commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State, subject, however, to the State's consent to suit in the courts of the United States."[47]

Then give a little credit to the intelligence of eighteenth century legislators. That is, realize the likelihood that they would have used something like the latter phraseology, rather than the phraseology actually employed, if they had wanted the Eleventh Amendment to reinstate State Sovereign Immunity exactly the way it was before

47. Compare yet another hypothetical version of a "Sovereign Immunity Eleventh Amendment": "The Judicial power of the United States shall not extend to suits commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State, unless the State against which suit is commenced or prosecuted consents to suit in the courts of the United States." (Perhaps you can begin to see why I like the hypothetical version in text better than other hypothetical versions).

Chisholm.[48] Especially so, in the face of a *S*upreme Court that had just finished demonstrating the tendency to interpret the Constitution literally and in a way that aggrandized the federal government's power.

Now consider the following scenarios, each of which is staged in a vigilant federal district court acting with due regard to the constitutional boundaries of its jurisdiction.

> [1] Noncitizen of State brings a diversity lawsuit against State in federal district court. *Without waiting for further action by the parties*, the district court immediately dismisses the lawsuit as lying outside the jurisdiction of the federal courts, citing the Eleventh Amendment as authority for mandatory, *sua sponte* dismissal.[49]
>
> [2] Citizen of State brings a federal question lawsuit in federal district court against State. This lawsuit proceeds until State takes action (motion to dismiss, for example, or motion for summary judgment) that the court recognizes as an effective assertion of State's Sovereign Immunity.[50]

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48. The starting points for analysis of Sovereign Immunity and the Eleventh Amendment's bar are actually opposite to each other. *Immunity* presupposes that judicial power is vested but then exempts the immune subject from the exercise of that power; hence, "[a]ny *exemption* from a duty, liability, or service of process; esp., such an exemption granted to a public official." BLACK'S LAW DICTIONARY 752 (7th ed. 1999) (emphasis added). The Eleventh Amendment insists that the judicial power is not vested (or no longer will be vested) with respect to the litigation types it covers, and then limits the authority of the federal government to extend the judicial power to reach those litigation types.

49. States of the United States are never mentioned as potential parties for purposes of federal diversity jurisdiction. Diversity jurisdiction extends to civil actions "between (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state . . . as plaintiff and citizens of a State or of different States." 28 U.S.C. § 1332(a) (2000). Although Congress thought to define "corporation" as a citizen or party for diversity jurisdiction, *Id.* § 1332(c)(1), it defined "States" with no mention of them as parties, *Id.* § 1332(d). Thus, without mention of the Eleventh Amendment, Congress has not enabled the original jurisdiction granted to district courts to authorize diversity suits involving the State as a party. *See also* Postal Tel. Cable Co. v. Alabama, 155 U.S. 482, 487 (1894):

> A State is not a citizen. And, under the Judiciary Acts of the United States, it is well settled that a suit between a State and a citizen . . . of another State is not between citizens of different States; and that the Circuit Court of the United States has no jurisdiction of it, unless it arises under the Constitution, laws, or treaties of the United States.

50. Or, in the alternative, the federal district court waits until return of service is filed, then enters some sort of order proposing to dismiss the lawsuit in thirty days on grounds of State sovereign immunity, unless within that time the State appears in the action or otherwise manifests its consent to suit. "The district courts shall have original jurisdiction of *all* civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2004) (emphasis added). Although original jurisdiction of federal questions has been vested in the federal district courts by act of Congress, the States may continue to exercise any available exemption—such as Sovereign Immunity—from federal suit.

[3] Noncitizen of State brings a federal question lawsuit in federal district court against State. If the Eleventh Amendment abrogates federal original jurisdiction with respect to federal question claims, then the court follows the process indicated in [1] above. If the Eleventh Amendment does not implicate federal original jurisdiction over federal question claims, then the court follows the process indicated in [2] above.

[4] Noncitizen of State brings a lawsuit against State in that State's courts (or, for that matter, in some other state's courts), alleging nonfederal claims. State removes the lawsuit to the federal district court that would have original diversity jurisdiction of a similar lawsuit if brought against a defendant who was not a State. *Without waiting for further action by the parties,* the district court immediately remands the lawsuit to the state court in which it originated and erases all record of the lawsuit from its calendar, because the lawsuit lies outside the original jurisdiction of the federal district courts—and hence, outside their removal jurisdiction—citing the Eleventh Amendment as authority for mandatory, *sua sponte* remand.[51]

[5] Citizen of State brings a federal question lawsuit against State in that State's courts. State removes the lawsuit to the federal district court of the district in which the state lawsuit was commenced. This lawsuit proceeds on the court's removal calendar until State takes action (motion to dismiss, for example, or motion

51. To remove on grounds of diversity of citizenship, the federal district court to which removal is made must have the original jurisdiction of the civil action that it would have had if plaintiff had commenced the action in federal court rather than in state court. 28 U.S.C. 1441(a) (2000). Federal district courts, however, do not have original jurisdiction over States in diversity actions, although they might in federal question actions. *Compare Postal Tel. Cable Co.*, 155 U.S. at 487 (stating that no district court has original jurisdiction over States in diversity cases), *with* Ames v. Kansas, 111 U.S. 449, 462–63 (1884) (allowing removal of a federal question claim brought by the State against its own citizen in state court). *See also* Wisconsin Department of Corrections v. Schacht, 524 U.S. 389–90 (1998) (citations omitted):

> Where original jurisdiction rests upon Congress' statutory grant of "diversity jurisdiction," this Court has held that one claim against one nondiverse defendant destroys that original jurisdiction. . . . But, where original jurisdiction rests upon the Statute's grant of "arising under" jurisdiction, the Court has assumed that the presence of a potential Eleventh Amendment bar with respect to one claim, has not destroyed original jurisdiction over the case. . . . Since a federal court would have original jurisdiction to hear this case had Schacht originally filed it there, the defendants may remove the case from state to federal courts. See [28 U.S.C.] § 1441(a).

for summary judgment) that the court recognizes as an effective assertion of State's Sovereign Immunity.[52]

[6] Noncitizen of State brings a federal question lawsuit against State in that State's courts (or, for that matter, in some other state's courts). State removes the lawsuit to the federal district court in the district in which the state lawsuit was commenced. If the Eleventh Amendment abrogates federal original jurisdiction with respect to federal question claims, then the court follows the process indicated in [4] above. If the Eleventh Amendment does not implicate federal original jurisdiction over federal question claims, then the court follows the process indicated in [5] above.

So far, so good—in *Lapides*, Georgia removed an action commenced in its own courts by one of its Citizens on federal question grounds. Thus, *Lapides* presents a scenario [5] case, which implicates Sovereign Immunity *and not* the Eleventh Amendment. The District Court was entirely correct to welcome the case on its removal calendar. If we admit the view that, by removing, the State consented to suit in federal court, then the Supreme Court was uncontroversially correct in affirming the District Court's refusal to dismiss and in reversing the Court of Appeals' contrary view. Share my short-lived comfort with this nice, clean, unanimous Supreme Court decision.

10. Eleventh Amendment, Sovereign Immunity: What difference does it make, as long as the State always succeeds in getting a dismissal of the lawsuit commenced or prosecuted against it in federal court? The question is an entirely legitimate one to ask, especially since States have almost never lost when either theory has been put in play,[53] and in recent years the Court has overruled or severely limited several of the precedents in which States lost.[54]

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52. Or, in the alternative, the federal district court posits that the act of removal constitutes an effective (perhaps irrevocable) consent by the State to suit in federal court (or, in the alternative, an effective waiver of its sovereign immunity from suit in federal court).

53. *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760, 769 (2002) (holding that sovereign immunity precluded the Federal Maritime Commission from adjudicating a claim against a state-run port); Bd. of Trs. v. Garrett, 531 U.S. 356, 374 (2001) (holding that the Americans with Disabilities Act does not subject States to suit in federal court). The Eleventh Circuit correctly decided *Garrett* on sovereign immunity grounds, but the Supreme Court incorrectly decided it on Eleventh Amendment grounds. *But see* Frew *ex rel.* Frew v. Hawkins, 124 S. Ct. 899, 906 (2004) (rejecting State's argument that the Eleventh Amendment bars enforcement of federal consent decrees entered into by state officials); Lapides v. Bd. of Regents, 535 U.S. 613, 624 (2002) (holding that State waived its Eleventh Amendment immunity by voluntarily removing case to federal court).

54. *See, e.g.*, Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 680 (1999) (overruling Parden v. Terminal Ry., 377 U.S. 184 (1964)).

I have just suggested that one difference lies in the amount of judicial resources that must be spent in achieving that dismissal. A true Eleventh Amendment case requires only that the federal court examine a Noncitizen's lawsuit to determine (1) if a State is being sued and (2) if the Eleventh Amendment applies to the suit—and, if so, then immediately to dismiss it. A true Sovereign Immunity case requires that the federal court determine (1) whether a sovereign is being sued, and (2) whether the sovereign manifests consent to suit—that is, to wait for a valid manifestation of State consent or waiver (or its opposite)—and then exercise its jurisdiction in continuing with or dismissing the suit according to the manifestation. The reason for this difference is that, among all the types of lawsuits against States that fall within the Article III original jurisdiction of the federal courts, true Eleventh Amendment lawsuits fall outside the original jurisdiction of the federal courts, while true Sovereign Immunity lawsuits fall within the federal original jurisdiction.

11. The reason for all the confusion is that the United States Supreme Court often has garbled "Eleventh Amendment" and "Sovereign Immunity." Indeed, one who reads the Court's recent decisions can easily begin to suspect that the Court waves perfunctorily at the Eleventh Amendment to provide a kind of cover for the State Sovereign Immunity that lurks off to its side. All this obfuscation in a decision the State is about to win anyway.[55]

Take the question whether non-State "sovereigns"—like foreign nations and Indian Tribes—are to be treated as Noncitizens for purposes of the Eleventh Amendment. If they are Noncitizens, then their lawsuits against States lie outside the federal judicial power. If they are sovereigns rather than Noncitizens, then the State they are suing has Sovereign Immunity to invoke. At least in the Supreme Court, these lawsuits have all resulted in dismissal of proceedings against the State.

The leading case, *Principality of Monaco v. Mississippi*, ambiguously holds: (1) "foreign states" are not Noncitizens within the terms of the Eleventh Amendment; (2) the Eleventh Amendment erects an "absolute bar" to "suits against a State, without her consent, brought by citizens of

55. *See generally* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 12–13 (2002) (arguing that when the obfuscation of Sovereign Immunity is stripped away, most of the Supreme Court's decisions—which almost always favor States over individuals—lack any constitutional basis).

another State or by citizens or subjects of a foreign State"; (3) the Eleventh Amendment also "[s]upersed[es] the decision in *Chisholm v. Georgia*," with result that the "'entire judicial power granted by the Constitution' does not embrace authority to entertain such suits in the absence of the State's consent"; (4) the Article III exceptions to (3), that is, federal jurisdiction over suits between States of the United States and suits between the United States and one of its States, are "inherent in the constitutional plan" as a "necessary feature of the formation of a more perfect Union"; and (5) thus, State Sovereign Immunity (nonamenability to suit unless consented to) applies to a foreign state's suit against a State.[56] The meaning of the "absolute bar" passage in (2) is ambiguous—what sort of "absolute bar" would have a "consent" qualification? It is also unnecessary to the unanimous Court's decision denying Monaco leave to file its suit.[57]

When the Court returns to the *Monaco* doctrine in a series of suits brought by Indian Tribes against States in federal court, it begins by quoting the Eleventh Amendment, then moves directly to Sovereign Immunity,[58] and ends by authoring an incomprehensible mish-mash of the two otherwise distinct concepts.[59] The States always win in these decisions. If Indian Tribes are Noncitizens for purposes of the Eleventh Amendment, then the States would always win and the Indian Tribes would know to bring their suits against States in state court. If Indian Tribes are not Noncitizens for purposes of the Eleventh Amendment (because they are sovereigns or, perhaps, because they are Citizens of the State they are suing), then their suits are covered by State Sovereign Immunity, an immunity the State can waive, and Indian Tribes can continue to take a chance on suing States in federal court.[60] What stands

56. Principality of Monaco v. Mississippi, 292 U.S. 313, 328–32 (1934) (citations omitted).

57. Because the *Monaco* Court jumps tracks from Eleventh Amendment analysis to Sovereign Immunity analysis, its conclusion does not quite follow from its premises. The Court could have reached the same conclusion more quickly and clearly—without any dishonesty—if it had ignored the Eleventh Amendment and instead stated that the State retains its Sovereign Immunity and is thus exempt from suit by a foreign state (in the absence of certain exceptions to the exemption, such as the State's knowing consent).

58. Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779–82 (1991); Seminole Tribe v. Florida, 517 U.S. 44, 54–55 (1996).

59. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 267–69, 287–88 (1997).

60. Until the early twentieth century, it was clear that Indian Tribes were neither citizens of the State in which they were located, nor citizens of a foreign state. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 17–18 (1987). In 1924, Congress made all Indians born in the United States citizens of the United States, as well as of their respective states, for Fourteenth Amendment purposes. *Id.* at 18 n.10 (citing 8 U.S.C. § 1401). Nonetheless, when a Tribe sues a State, it sues as a sovereign. Tribes also are not citizens of a State for diversity jurisdiction purposes. *Id.* Several circuits have wrestled with the question of whether a Tribe even falls within the scope of the Eleventh

in the way of this rather straightforward distinction between the Eleventh Amendment's jurisdictional bar and the vagaries of State Sovereign Immunity? Nothing, except the Supreme Court's confusion of the two concepts.

Or take the question of whether Congress can abrogate the Eleventh Amendment in the exercise of its Fourteenth Amendment power. Some may consider bizarre the Rehnquist Court's idea that the Eleventh Amendment blocks Congress from abrogating State Sovereign Immunity by resort to its Article I powers but not from doing so by resort to its Fourteenth Amendment power.[61] My point is that the Court's distinction does not actually rest on the Eleventh Amendment; instead, it rests on whether the Fourteenth Amendment authorizes Congress to abrogate State Sovereign Immunity, and if so, then within what limits. *Fitzpatrick* and *Atascadero*, the leading cases on Congress's authority to provide private causes of action against States in the exercise of its Fourteenth Amendment power, involved Citizens as plaintiffs and were not Eleventh Amendment cases.[62] *Seminole Tribe*, the first decision to broach the distinction between "Article I powers" and "Fourteenth Amendment powers," quotes the Eleventh Amendment and then clearly spends the rest of its time on State Sovereign Immunity.[63] (And, if what I have just said about the nonapplication of Eleventh Amendment to sovereigns makes sense, then *Seminole Tribe* involves not even a whisper of an Eleventh Amendment problem). The State defendants win in all these cases.

Florida Prepaid does involve an Eleventh Amendment problem, and the Court does seem to hold that Congress is not limited by the Eleventh Amendment in the exercise of its Fourteenth Amendment authority.[64] Although I wish the Court had simply ordered dismissal instead of using *Florida Prepaid* as its vehicle for declaring that State Sovereign Immunity was stronger than the Patent Remedy Clarification Act, my argument here does not depend on confession of error on this point by

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Amendment. *See, e.g.*, Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135, 1140–41 (8th Cir. 1974) (holding that Tribes were "stateless persons" but nonetheless within the Eleventh Amendment's bar). S*ee generally* Peter B. Oh, *A Jurisdictional Approach to Collapsing Corporate Distinctions*, 55 RUTGERS L. REV. 389, 434–35 n.201 (2003) (discussing the complexities of tribal citizenship).

61. *See Seminole Tribe*, 517 U.S. at 59, 72–73.

62. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 236–38 (1985); Fitzpatrick v. Bitzer, 427 U.S. 445, 448, 455–56 (1976).

63. *Seminole Tribe*, 517 U.S. at 54–73.

64. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 637, 646–48 (1999), *aff'd*, 527 U.S. 666 (1999).

the Court. So be it if the Fourteenth Amendment amends the terms of the Eleventh Amendment. (And again, the State won in *Florida Prepaid*).

12. Did the *Lapides* Court have to refer to the Eleventh Amendment in concluding that Georgia had consented to federal jurisdiction by removing Lapides' lawsuit to federal court? Probably, out of deference to the parties and lower courts. The parties had framed Georgia's postremoval motion to dismiss by resort to the Eleventh Amendment. The parties had framed the issues on appeal with reference to the Eleventh Amendment. The lower federal courts had resolved the issues with reference to the Eleventh Amendment. Circuits had split in their attempts to answer this precise question in the shadow of the Supreme Court's fluctuating jurisprudence on State Sovereign/"Eleventh Amendment" Immunity. And the High Court itself had granted Lapides' petition for certiorari "to decide whether 'a state waive[s] its Eleventh Amendment immunity by its affirmative litigation conduct when it removes a case to federal court.'"[65]

The short—and correct—answer to Lapides' question is that (1) a State has no "Eleventh Amendment immunity" to waive, but (2) the State's removal in this case did not implicate the Eleventh Amendment because the underlying state court proceedings had been initiated by a Citizen of the defendant State. This was not the answer the *Lapides* Court provided.

Did the *Lapides* Court feel the constraint of precedent in discussing Eleventh Amendment "immunity"? Maybe, but it shouldn't have. Although the Supreme Court precedents are numerous in which Sovereign Immunity problems are discussed as though they included Eleventh Amendment problems, the holdings that invite the *Lapides* Court's "immunity" analysis are almost nonexistent. The *Lapides* Court cites *Atascadero State Hospital v. Scanlon* as its example for the proposition that "[a] State remains free to waive its Eleventh Amendment immunity from suit in a federal court."[66] But *Atascadero*, like nearly all the other decisions that could have been cited for a similar proposition, involves a suit initiated in federal court by a Citizen against his own State—a *Hans v. Louisiana*, Sovereign Immunity case, not an Eleventh Amendment case.

The *Lapides* Court uses *Clark v. Barnard* as its main stand-in for its proposition that "more than a century ago this Court indicated that a State's voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity."[67] But *Clark*'s "indication" was no

65. Lapides v. Bd. of Regents, 535 U.S. 613, 617 (2002) (citation omitted).
66. *Id*. at 618 (citing *Atascadero State Hosp*., 473 U.S. at 238).
67. *Id.* at 619 (citing Clark v. Barnard, 108 U.S. 436, 447 (1883)).

such thing. After sidestepping the Rhode Island Treasurer's argument that the federal suit brought against him was actually brought against his State "contrary to the Eleventh Amendment," *Clark* held that Rhode Island's subsequent voluntary intervention in the lawsuit amounted to a waiver of its sovereign immunity.[68] The Eleventh Amendment was irrelevant to this issue because the Amendment had nothing to say about litigation initiated by a State in federal court, and the Massachusetts plaintiffs in *Clark* had carefully avoided suing the State of Rhode Island.

Clark holds as much, and heads a consistent line of similar "voluntary appearance" or "consent" precedents, some of which refer to the Eleventh Amendment and some of which do not. None of this matters, because, like *Clark* (and *Lapides*), these cases do not involve suits initiated by a Noncitizen against the State. Regardless of any careless—and superfluous—language in them to the contrary, these cases either involve the State as the federal-court claimant or deal with problems implicating State Sovereign Immunity (and its waiver), not the Eleventh Amendment's elimination of federal jurisdiction over suits commenced or prosecuted by Noncitizens against States.

Did the *Lapides* Court have to refer to the Eleventh Amendment after it arrogantly converted the case Georgia removed on federal question grounds into a case devoid of federal questions?[69] No. Indeed, it had no legitimate business doing so. First, Lapides was a Georgia citizen, not a "Citizen[] of another State," bringing claims against Georgia; so the Eleventh Amendment is irrelevant to this litigation. Second, Lapides' federal claims provided the only basis for removal; if they proved so bogus that a court could simply dismiss them *sua sponte*, then one must wonder how Georgia could have been made to stay in federal court after those claims were dismissed. After all, Article III—not the Eleventh Amendment—refuses to recognize federal original jurisdiction over nondiverse litigation involving only state law questions.

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68. *Clark*, 108 U.S. at 447–48.

69. It has become clear that we must limit our answer to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings. That is because Lapides' only federal claim against the State arises under 42 U.S.C. § 1983, that claim seeks only monetary damages, and we have held that a state is not a "person" against whom a § 1983 claim for money damages might be asserted.

Lapides, 535 U.S. at 617.

13. *Hans*, *Clark*, and *Atascadero*, then, neither contradict my argument, nor support the *Lapides* Nine. A handful of other decisions, however, prove more formidable opponents. I briefly identify and respond to them here.

(a) *New Hampshire v. Louisiana* seems to be the first Supreme Court decision to conflate the Eleventh Amendment with Sovereign Immunity.[70] During Reconstruction, Louisiana and other Confederate States encountered considerable trouble in paying their debts, and passed various fiats that discounted or eliminated them. In lawsuit after lawsuit brought by creditors, the U.S. Supreme Court supported these States' behavior. New Hampshire and New York attempted to help out their own citizens by passing legislation under which the citizens could assign their Louisiana bonds and coupons to the respective States.

With these assignments in hand, New Hampshire and New York commenced suit against Louisiana in the U.S. Supreme Court seeking a declaration that the bonds evidencing the debts were valid, that Louisiana was prohibited from diverting the tax funds that had been earmarked to pay these debts, and that the actions taken by Louisiana unconstitutionally impaired that State's own obligations under its own contracts. "No one can look at the pleadings and testimony in these cases," a unanimous Supreme Court found, "without being satisfied, beyond all doubt, that they were in legal effect commenced, and are now prosecuted, solely by the owners of the bonds and coupons."[71] It followed that the Eleventh Amendment required dismissal of the suit: "The language of the [Eleventh] amendment is, in effect, that the judicial power of the United States shall not extend to any suit commenced or prosecuted *by* citizens of one State against another State."[72] But on the way to its judgment of dismissal, the Court also stated:

> The evident purpose of the [Eleventh] amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued, and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens.[73]

This statement was a casual one, unaccompanied by any visible means of support. The statement was gratuitous; once the Court found that Noncitizens rather than their State were the true plaintiffs, the terms of the Eleventh Amendment were sufficient to bar the suits. Indeed, neither the fact nor the quality of Louisiana's refusal to consent to the lawsuit was the subject of inquiry in the Court's opinion. And, in light of the

70. New Hampshire v. Louisiana, 108 U.S. 76, 88–91 (1883).
71. *Id*. at 89.
72. *Id*. at 88–89.
73. *Id*. at 91.

Court's statement about the Eleventh Amendment's "effect" a few paragraphs earlier in its opinion, the Court's statement of the amendment's "evident purpose" here proves rather vague. This last quoted passage in *New Hampshire v. Louisiana* has seldom been treated as its holding in subsequent cases.[74]

(b) *Ford Motor Co. v. Department of Treasury* contradicts my argument in the following passage: "Where . . . an action is authorized by statute against a state officer in his official capacity and constituting an action against the state, the Eleventh Amendment operates to bar suit except in so far as the statute waives state immunity from suit."[75] Otherwise, the decision supports my argument.

Ford Motor, a Noncitizen of Indiana, commenced its lawsuit in federal district court against a State department and the members of its board, seeking a refund of state income taxes it had been charged for its sales in the State on the grounds that the tax violated the Commerce Clause and Fourteenth Amendment of the U.S. Constitution. An Indiana statute established a procedure by which a taxpayer could petition the department for such a refund and authorized "suit against the department in any court of competent jurisdiction" in the event the petition was denied.[76] The State's Attorney General, apparently under the impression that the State's statute authorized suit in federal court, successfully defended the federal action in both the District Court and the Court of Appeals. After Ford Motor's petition for certiorari had

74. Of the few Supreme Court decisions referring to *New Hampshire v. Louisiana*, most focus on when a State may invoke the Supreme Court's original jurisdiction. For examples of Supreme Court opinions noting that a State may not invoke original jurisdiction unless it is a real party in interest see Kansas v. Colorado, 533 U.S. 1, 7–8 (2001); Maryland v. Louisiana, 451 U.S. 725, 737–39 (1981); Hawaii v. Standard Oil Co., 405 U.S. 251, 258–59 n.12 (1972); Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387, 392–96 (1938); South Dakota v. North Carolina, 192 U.S. 286, 310 (1904); Missouri v. Illinois, 180 U.S. 208, 231–32 (1901); Louisiana v. Texas, 176 U.S. 1, 16 (1900). Discussion of the Eleventh Amendment in these cases is limited to the statement that States may not circumvent the Eleventh Amendment and create original jurisdiction in the federal courts by suing on behalf of their citizens. In other words, "original jurisdiction against a state can only be invoked by another state acting in its sovereign capacity," New Jersey v. New York, 345 U.S. 369, 372 (1953), and discussions of *New Hampshire* tend to focus on which facts either show or belie a state's interest as a sovereign in a particular suit.

75. Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 462 (1945), *overruled on other grounds*, Lapides v. Bd. of Regents, 535 U.S. 613, 622–23 (2002). And again: "[The Eleventh Amendment] denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent." *Ford Motor Co*., 232 U.S. at 464.

76. *Id*. at 461 n.3.

been granted by the Supreme Court, the State invoked the Eleventh Amendment as a bar to federal suit.[77]

A unanimous Court vacated the judgment of the Court of Appeals and remanded the action to the District Court "with directions to dismiss the complaint for want of consent by the state to this suit."[78] In doing so, the *Ford Motor* Court held: (1) Ford's lawsuit "against the department and the individuals as the board constitutes an action against the State of Indiana" rather than against state officers in their individual capacity.[79] (2) Although the state statute in question authorized a lawsuit against the State, the authorization was "a waiver of state immunity from suit in state courts only,"[80] and "no properly authorized executive or administrative officer of the state has waived the state's immunity to suit in the federal courts."[81] And, most important, (3) despite having litigated the matter through two tiers of federal courts before invoking the Eleventh Amendment, the State's invocation was timely: "The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court."[82]

Not all the language, but certainly all the decision, of the Court fully supports my argument. A State has no authority to redefine the contours of the federal judicial power. The Eleventh Amendment contours the federal judicial power to exclude Noncitizens' suits against States in federal court. That the lower federal courts and the parties in *Ford Motor* had neglected these truths (until reaching the Supreme Court) did not abrogate these truths. The Supreme Court's vacation following order of dismissal of the lower courts' decisions, upon discovery of the error, is entirely consistent with the Eleventh Amendment's text.

(c) At first glance, the two *College Savings Bank* cases contradict my argument. A New Jersey corporation commenced two lawsuits in New Jersey's U.S. District Court against a Florida state agency, claiming patent infringement in one suit and unfair competition in violation of federal law in the other. In the patent infringement case, the Court

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77. "The objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued by Indiana in this Court." *Id*. at 467.

78. *Id*. at 470.

79. *Id*. at 463. "Petitioner's right to maintain this action in federal court depends, first, upon whether the action is against the State of Indiana or against an individual." *Id*. at 462.

80. *Id*. at 465 (citing the Court's construction of a "similar provision of an Oklahoma tax refund statute" in *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)).

81. *Id*. at 469 (the penultimate statement concluding the Court's analysis on pages 467–68).

82. *Id*. at 467.

quoted the Eleventh Amendment, transited immediately to State Sovereign Immunity, reiterated that Congress had limited authority under the Fourteenth Amendment to abrogate State Sovereign Immunity (probably also the Eleventh Amendment), and held that Congress's attempt in the Patent Remedy Clarification Act of 1992 to abrogate State Sovereign Immunity (possibly also the Eleventh Amendment) was unsuccessful.[83]

In the unfair competition case, the Court held that "the sovereign immunity of the State of Florida was neither validly abrogated by the Trademark Remedy Clarification Act, nor voluntarily waived by the State's activities in interstate commerce," and therefore that "the federal courts are without jurisdiction to entertain this suit against an arm of the State of Florida."[84] The holding seems at least marginally nonsensical, because "sovereign immunity" is not a doctrine about *jurisdiction* in the usual sense. The point here is that *College Savings Bank* could be a decision about the Eleventh Amendment, but seems much more comprehensible as a decision about the implied constitutional doctrine of State Sovereign Immunity established in *Hans v. Louisiana*. Thus, reference to Eleventh Amendment practically disappears after the third paragraph of the Court's decision. The decision's second paragraph begins with allusion to *Chisholm v. Georgia* and the reaction that led to the Eleventh Amendment, followed by this passage:

> Though its precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign state, we have long recognized that the Eleventh Amendment accomplished much more: It repudiated the central premise of *Chisholm* that the jurisdictional heads of Article III superseded the sovereign immunity that the States possessed before entering the Union. This has been our understanding of the Amendment since the landmark case of *Hans v. Louisiana* . . . .
>
> While this immunity from suit is not absolute, we have recognized only two circumstances in which an individual may sue a State. First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment—an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance. *Fitzpatrick v. Bitzer* . . . . Second, a State may waive its sovereign

83. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 634–37, 639–40 (1999). The suggestion in this case is that the Court may be starting to revisit the idea that the Eleventh Amendment precludes federal question as well as diversity cases; or put differently, that diversity cases are covered by the Eleventh Amendment (and by Sovereign Immunity in the absence of the Eleventh Amendment), while federal question cases of all sorts are covered by State Sovereign Immunity.

84. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999).

> immunity by consenting to suit. *Clark v. Barnard* . . . . This case turns on whether either of these two circumstances is present.[85]

The *College Savings Bank* Court, which abrogated the "constructive consent" doctrine as an exception to State Sovereign Immunity,[86] seems to have understood and respected the argument I am making here. My evidence supporting this inference comes from the court's footnote in response to the dissent:

> It is difficult to square JUSTICE BREYER's reliance upon the distinction that the present case involves a federal question (and is therefore not explicitly covered by the Eleventh Amendment) . . . with its professed fidelity to *Hans*, the whole point of which was that *the sovereign immunity reflected in (rather than created by) the Eleventh Amendment transcends the narrow text of the Amendment itself*.[87]

In any event, the two *College Savings Bank* decisions turn out not to impair my argument, but rather to strengthen it by eliminating one set of possible exceptions (Congress's power to abrogate the Amendment under Article I, and the "constructive consent" doctrine) and by severely

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85. *Id*. at 669–70 (citations omitted). None of the precedents cited in these two paragraphs is an Eleventh Amendment case. I have discussed *Hans*, *Fitzpatrick*, and *Clark* previously in this article. The other cases cited in this passage are *Ex parte* New York, 256 U.S. 490, 496–98 (1921) (action by citizen against State; State Sovereign Immunity bars a plaintiff's admiralty claim in federal court against an unconsenting State); Principality of Monaco v. Mississippi, 292 U.S. 313, 330–32 (1934) (although the Eleventh Amendment only bars suits by individual Noncitizens against States, State Sovereign Immunity bars suits brought by foreign sovereigns in federal court against unconsenting States); Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 98 (1984) (action by Citizens against State; State Sovereign Immunity bars the assertion of federal question claims in federal court against unconsenting States):

> The Amendment's language overruled the particular result in *Chisholm*, but this Court has recognized that its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III . . . . In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III.

Id.; Seminole Tribe v. Florida, 517 U.S. 44, 44–45 (1996) (involving action by Citizen or sovereign against State; neither the Eleventh Amendment nor State Sovereign Immunity can be unilaterally abrogated by Congress in the exercise of its Article I Commerce Power).

> Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." . . . For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States." *Hans* . . . .

Id. at 54.

86. *Coll. Sav. Bank*, 527 U.S. at 676–87 (overruling Parden v. Terminal Ry., 377 U.S. 184 (1964)). As the majority obliquely points out, most if not all of the Eleventh Amendment's piece of the "constructive waiver" doctrine had already been eliminated by *Seminole Tribe*. *Id.*

87. *Id*. at 687–88 n.5 (emphasis added).

limiting the other possible exception (Congress's power to abrogate Eleventh Amendment immunity under the Fourteenth Amendment). Hardly any of the language in these decisions, and none of their results, contradict my argument for the independence of the Eleventh Amendment's jurisdictional bar from the defense of State Sovereign Immunity.

14. I now confront four problems that are more substantive in character for my textualist view of the Eleventh Amendment, and for my thesis on the separation of Eleventh Amendment from State Sovereign Immunity.

The Eleventh Amendment and Interstate Compacts. A few cases, led by *Petty v. Tennessee–Missouri Bridge Commission,* hold that Congress does not behave unconstitutionally when it conditions its approval of an Interstate Compact on relinquishment by the Compact's State members of their sovereign immunity.[88] Assuming these precedents continue to state the law, I am not troubled in reconciling them with the Eleventh Amendment. These cases all seem to involve a victim's suit for damages or compensation against an interstate commission or board.[89] From appearances, the victim seems to be a Citizen of one of the State members to the Compact.[90] No matter—Interstate Compacts do not create new States, and suit against a multistate commission doesn't have to be construed as suit against any particular State.

If, nonetheless, the Eleventh Amendment is understood to foreclose damages actions against multistate Compacts, then only actions brought in the federal courts would be foreclosed. On my view, Congress has no power to negotiate a State's waiver of the Eleventh Amendment (at least, not in the exercise of its Article I powers), but it does have power to negotiate a State's waiver of its sovereign immunity. As a result of such a deal, the courts of Compact States would be made available for redress of injuries—as well as the federal courts, at least for a federal question lawsuit by a Citizen against the Compact member that is his or her State.

88. Petty v. Tenn.–Mo. Bridge Comm'n, 359 U.S. 275 (1959).

89. *See, e.g.*, Hess v. Port Auth. Trans–Hudson Corp., 513 U.S. 30 (1994) (involving suit for damages brought by injured railroad employees); Port Auth. Trans–Hudson Corp. v. Feeney, 495 U.S. 299, 301 (1990) (involving suit by injured railroad employees). In both cases the railroad was owned and operated by the states of New Jersey and New York.

90. Neither *Hess* nor *Feeney* mention the citizenship of the railroad workers; however, it seems likely that they resided in either New York or New Jersey as they worked on a railroad that went between the two. *See Hess*, 513 U.S. at 33; *Feeney*, 495 U.S. at 301.

State as Plaintiff, Noncitizen as Counterclaimant. The Eleventh Amendment does not speak to States as litigation commencers or prosecutors. Sometimes States bring suit against Noncitizens in federal court. Does the Eleventh Amendment preclude these defendant Noncitizens from counterclaiming against the plaintiff States? Answering this question cannot legitimately depend on considerations of "efficiency in litigation" or on the extent to which worship of transaction/occurrence civil litigation demands the presence of compulsory (but not permissive) counterclaims.[91] The answer *does* seem to depend on the depth of the principle, quoted by the *Lapides* Court, that "where a State *voluntarily* becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment."[92] *Lapides*, however, does not involve a Noncitizen, and thus is not an Eleventh Amendment case.

The Eleventh Amendment does not tell us whether filing a counterclaim is the equivalent of commencing a lawsuit. If assertion of a counterclaim amounts to "commencement or prosecution" of a "suit," then the Noncitizen defendant's counterclaim is barred from the original jurisdiction of the federal courts. If not, then the issue goes away for the Eleventh Amendment and remains an issue for the Sovereign Immunity doctrine that a State cannot be sued without its consent ("voluntarily becom[ing] a party to a cause and submit[ting] its rights for judicial determination").[93]

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91. Federal courts have confronted problems that threaten transaction/occurrence-based litigation, and have resolved them in favor of honoring the limits of their jurisdiction. For example, the federal courts have exclusive jurisdiction over claims arising under the Securities Exchange Act of 1934. The plaintiff who brings state securities fraud claims against a nondiverse defendant in the state courts, and a parallel Rule 10b-5 claim against the same defendant in federal district court, is understood to be entitled to maintain both lawsuits. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996).

92. Lapides v. Bd. of Regents, 535 U.S. 613, 619 (2002) (quoting Gunter v. Atl. Coast Line R.R. Co., 200 U.S. 273, 284 (1906)). In *Gunter*, South Carolina filed a suit in federal district court to collect taxes against a Noncitizen railroad. The State lost and was enjoined from taxing the railroad. Over ten years later, a successor bought the railroad and South Carolina filed a suit in state court to collect taxes from the successor. While the state prosecution was pending, the railroad sought and obtained a federal injunction against the attorney general of South Carolina from prosecuting the case, based on res judicata. This second injunction was filed as an ancillary case to the original suit from ten years before. The State claimed that the injunction violated the Eleventh Amendment because the attorney general represented the State's interests (by legislative authorization). *Gunter*, 200 U.S. at 277–82. The court held: (1) the attorney general was not the State; (2) to the extent that the State was really a party, the Eleventh Amendment did not bar the suit because the original action—from ten years before—had been commenced by the State. *Id.* at 273–74. For this second holding, *Gunter* relied on *Clark v. Barnard*, 108 U.S. 436 (1883). *Id.* at 284. For discussion of *Clark*, see *supra* notes 69–70 and accompanying text.

93. *Gunter*, 200 U.S. at 284; *see also Clark*, 108 U.S. at 447–48 (dismissing the

In any event, relegating a Noncitizen defendant's claim to the state courts for its prosecution—with only a "set off" or some other defensive version of the claim admitted in federal court—would not signal the end of the world, or even the end of an otherwise compulsory counterclaim.[94]

Negotiated Waiver or Consent. In recent decisions, the Supreme Court has indicated that States can negotiate away their "Eleventh Amendment immunity" and, accordingly, be deemed to have "consented" to suit in federal court, in return for the receipt of Congress's largess. Then, in one contentious decision after another, the Court has whittled away at the concept of State "consent," has demanded ever increasing evidence of State consent, and has insisted on ever clearer manifestation of congressional intent to extract State consent.[95] During this period, the State defendants have never been made to stay in federal court in the lawsuits paying lip service to this principle. Indeed, only two of these cases involved Noncitizen plaintiffs and thus fell within the terms of the Eleventh Amendment.[96] The decisions in these two cases, as well as in all the other cases dating back to *Atascadero State Hospital v. Scanlon*, have fostered considerable tension between Congress and the Supreme Court.[97]

The two *College Savings Bank* decisions, and not *Atascadero*, are the most problematic pre-*Lapides* decisions for my argument. Once the

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Eleventh Amendment claim immediately and moving into a discussion of whether sovereign immunity bars the case).

94. Indeed, Justice Breyer—who authored the *Lapides* opinion—seems to have made this point in *Wisconsin Department of Corrections v. Schacht*:

> [W]here original jurisdiction rests upon the Statute's grant of "arising under" jurisdiction, the Court has assumed that the presence of a potential Eleventh Amendment bar with respect to one claim, has not destroyed original jurisdiction over the case . . . . Since a federal court would have original jurisdiction to hear this case had Schacht originally filed it there, the defendants may remove the case from state to federal courts. See [28 U.S.C.] § 1441(a).

524 U.S. 381, 389–90 (1998) (citations omitted).

95. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985); South Dakota v. Dole, 483 U.S. 203, 210–12 (1987); Welch v. Tex. Dep't of Highways and Pub. Transp., 483 U.S. 468, 474–74 (1987); *Feeney*, 495 U.S. at 305–06; Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 627, 675–87 (1999), *aff'd*, 527 U.S. 666 (1999).

96. *Coll. Sav. Bank*, 527 U.S. at 670–71; *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. at 630.

97. Immediately after the two *College Savings Bank* decisions, members of Congress set about to overturn them. Bills to that effect have been introduced repeatedly in Congress since 2000. *See, e.g.*, Intellectual Property Protection Restoration Act of 2002, S. 2031, 107th Cong. (2d Sess. 2002) (introduced by Senators Leahy and Brownback, March 19, 2002).

proposition is accepted that the Eleventh Amendment applies to Noncitizens' federal question claims, as well as to their diversity claims against a State,[98] they fall clearly within the terms of the Amendment's barricade against federal original jurisdiction. On my argument, they should have been dismissed *sua sponte* by the district court—but for sloppy precedents on "Congress's abrogation of Eleventh Amendment" and "State constructive waiver." As I previously pointed out, the Supreme Court used the two *College Savings Bank* decisions to overrule those precedents. The references to "Eleventh Amendment immunity" in the *College Savings Bank* decisions contradict the argument I am making here, as do the parties' and federal courts' efforts and expense in enabling these decisions, but the results in these decisions do not.

Congress and the States might well control the contours of State Sovereign Immunity. Congress may well be able to exact a State's waiver of sovereign immunity in return for extension of the federal government's benefits. If a State abides by its bargain, it will offer its own courts for redress of claims regarding those benefits, and will submit to suits by its own Citizens commenced and prosecuted in federal district court. (I note in passing that States seldom are required to provide, for example, federal employment or welfare benefits to Noncitizens). If a State reneges on the bargain it is constitutionally authorized to make, then the United States can sue it in federal court, or can withdraw the benefits it has conditioned on waiver. In these bargaining situations, however, neither Congress nor the States should legitimately be understood to control the contours of the Eleventh Amendment, because the Amendment does not offer "immunity," but rather removes a class of lawsuits from the original jurisdiction of the federal courts.

15. *Lapides* involved none of Eleventh Amendment problems I have just discussed. Indeed, a properly understood *Lapides* does not involve the Eleventh Amendment at all. The case does, however, involve removal by the State of claims originally commenced against it in its own courts. And the case, in treating the Eleventh Amendment as though it equaled State Sovereign Immunity—that is, that "[a] State remains free to waive its Eleventh Amendment immunity from suit in a federal court"[99]—clearly holds that a State is entitled to avail itself of the federal removal jurisdiction in lawsuits brought against it in its own courts. If *Lapides* means what it so clearly says in the context of a Citizen's action against his State in his State's courts, then "Eleventh

98. Welch v. Tex. Dep't of Highways and Pub. Transp., 483 U.S. 468, 476–88 (1987); s*ee supra* section 3, pages 6–10.

99. *Lapides*, 535 U.S. at 618.

Amendment equals waivable State Sovereign Immunity" must apply to Noncitizen suits as well as to Citizen suits. (After all, the Eleventh Amendment actually mentions Noncitizen suits; it says nothing about Citizen suits).

A good general proposition is that a lawsuit commenced in state court is removable to federal courts if the lawsuit, as it looks when the removal occurs, could have been commenced in federal court in the first place.[100] So let's make Lapides an Alabama citizen, instead of the Georgia citizen he actually was. Noncitizen Lapides sues Georgia in a proper Georgia state court. Under these circumstances, defendant Georgia may remove the suit to federal district court if Lapides is asserting a federal claim against it. That is so because "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[101] Removal, though voluntary on Georgia's part, does not make Georgia the plaintiff and Lapides the defendant in the federal action. Alabama Lapides did not *commence* his action in federal court, but, upon Georgia's removal of the action to "the district court of the United States for the district and division embracing the place where such action is pending,"[102] he will be the Noncitizen who is *prosecuting* his federal question "suit in law or equity" against a State in apparent contradiction of the terms of the Eleventh Amendment. No matter, because, according to a unanimous United States Supreme Court decision, the Eleventh Amendment does not mean what it says; instead, it means waivable State Sovereign Immunity.

Georgia might not be able to remove Alabama Lapides' lawsuit if it asserts only state law claims. That is so because the removal statute states that such lawsuits "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."[103] At this point, the question becomes whether a State, as a defendant sued in its own courts on nonfederal claims, is a citizen of itself for purposes of removal. The *Lapides* Court seems to indicate that a State is not a citizen of itself for this purpose, because it unanimously allowed the state claims Lapides was prosecuting against Georgia to remain in the district court after effectively dismissing his bogus federal claim:

100. 28 U.S.C. §§ 1441(a) & 1446(b) (2000).
101. *Id.* § 1331.
102. *Id.* § 1441(a).
103. *Id.* § 1441(b).

> [T]his case does not present a valid federal claim against the State. . . . Nonetheless, Lapides' state-law tort claims against the State 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. We possess the legal power here to answer that question as limited to the state-law context just described.[104]

So far we have been working through Alabama Lapides' lawsuit as though he had initiated it in Georgia's state courts. The *Lapides* analysis, however, does not require the complications of a removal step; it only requires a State to engage in an effective waiver of its *Eleventh Amendment equals Sovereign Immunity*. Removal is permitted only of lawsuits, commenced in state court "of which the district courts of the United States have original jurisdiction."[105] Therefore, in permitting removal by Georgia of Georgia Lapides' lawsuit, *Lapides* must hold, contrary to the text of the Eleventh Amendment, that the federal district courts have original jurisdiction of Alabama Lapides' lawsuit, subject only to Georgia's waiver or consent.

According to the *Lapides* analysis, then, Alabama Lapides' lawsuit, expressing federal claims against Georgia, clearly can be commenced in federal district court. How about Alabama Lapides' lawsuit expressing only state claims against Georgia? Here, although we have clear diversity—the same diversity as that involved in *Chisholm v. Georgia*—we may encounter difficulty. That is so because the original diversity jurisdiction of the federal district courts is defined by a statute that, in keeping with what almost everyone thought the Eleventh Amendment said before *Lapides*, does not specifically provide for a Noncitizen's civil action against a State.[106] And thus, the implication in *Lapides* that a State is not a citizen of itself, latent in the Court's decision to leave the action the State removed in the district court when only state claims remained, must extend at least this far:

> (1) Contrary to what it seems to say, the Eleventh Amendment does not serve to contour the jurisdiction of the federal courts. Instead, it simply gives States an immunity from suit in federal court that a State is free to waive.

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104. *Lapides*, 535 U.S. at 617–18.
105. 28 U.S.C. § 1441(a).
106. 28 U.S.C. § 1332(a) provides:
> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state . . . as plaintiff and citizens of a State or of different States.

(2) Contrary to what it seems to say, the Eleventh Amendment makes no distinction between Citizens and Noncitizens for purposes of federal original jurisdiction of their lawsuits against States.

(3) Lawsuits including federal claims lie within the original jurisdiction of the federal district courts and can be commenced against States by Noncitizens and Citizens alike in either federal or state court, and prosecuted there so long as the State consents to suit or otherwise effectively waives its Sovereign Immunity.

(4) Lawsuits including federal claims against States and commenced in state courts can be removed by States to federal district court and thereafter can be prosecuted in federal courts by Noncitizens and Citizens alike. And this is so even after the federal claims have been dismissed postremoval and only state claims remain. A State's act of removal is one of the ways a State waives its Sovereign Immunity.

(5) By virtue of the federal diversity jurisdiction statute, lawsuits that include only state claims against States do not fall within the original jurisdiction of the federal district courts, and therefore can neither be commenced by Noncitizens or Citizens in, nor removed by States to, federal district court.

Of course, with respect to proposition (5), the federal diversity jurisdiction statute is subject to modification by Congress within the limits set by Article III of the U.S. Constitution. And thus,

(6) Congress is free to amend the federal diversity jurisdiction statute to authorize federal district courts to entertain suits involving only state law claims and commenced by Noncitizens against States, with the requirement that the State must consent to suit or otherwise effectively waive its Sovereign Immunity. Congress could amend the same statute (or the removal statute) to authorize federal district courts to entertain diversity suits commenced by Noncitizens against States and removed by States to federal district court. *And, beyond what has been said so far, the Eleventh Amendment has nothing more to say about these possibilities.*

16. Perhaps our guess will be comfortable, after *Lapides*, that Congress will not amend the federal diversity jurisdiction statute to give the federal district courts original jurisdiction of Noncitizens' state lawsuits commenced against States and expressing only nonfederal claims, with the vagaries of State Sovereign Immunity (and its waiver) doing the

work of what the Eleventh Amendment might have been supposed crisply and cleanly to have been doing. But federal district court original jurisdiction is not the only original jurisdiction within the federal judicial power. And here is where the *Lapides* decision turns from risky to explosive.

A Supreme Court that unmoors the Eleventh Amendment from its text and says "a State remains free to waive its Eleventh Amendment immunity from suit in a federal court," one hopes, has taken full account of itself. That is so because Article III quite clearly states: "In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction."[107] And a State "free to waive its Eleventh Amendment immunity" surely must be as free to waive it in actions commenced against the State in the United States Supreme Court as in actions commenced against the State in the federal district courts. Indeed, the road to the Eleventh Amendment started with *Chisholm v. Georgia*, an original proceeding in the United States Supreme Court.

Speaking of *Chisholm*, we do well to remember that Justice Iredell's dissent had two main parts to it, one of which seems generally to have been ignored in the bashing *Chisholm* has taken since *Hans v. Louisiana.* Iredell argued that regardless of the terms of Article III of the Constitution, State Sovereign Immunity had not been abrogated by them. He also argued that regardless of the terms of Article III, the enablement of those terms was up to Congress, and Congress had not enabled the terms to abrogate State Sovereign Immunity.

> I have now, I think, established the following particulars. 1st. That the Constitution, so far as it respects the judicial authority, can only be carried into effect by acts of the Legislature appointing Courts, and prescribing their methods of proceeding. 2d. That *Congress* has provided no new law in regard to this case, but expressly referred us to the old. 3d. That there are no principles of the old law, to which we must have recourse, that in any manner authorise the present suit, either by precedent or by analogy. The consequence of which, in my opinion, clearly is, that the suit in question cannot be maintained, nor, of course, the motion made upon it be complied with.[108]

Although the Supreme Court has applauded Iredell's treatise on the sovereignty of the States, it has jealously guarded its Article III original jurisdiction against any notion that Congress might alter it.[109] Thus,

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107. U.S. CONST. art. III, § 2, cl. 2.

108. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 449 (1793) (Iredell, J., dissenting).

109. South Carolina v. Regan, 465 U.S. 367, 395–97 (1984) (O'Connor, J., concurring):

> [This case raises] a grave constitutional question: namely, whether Congress constitutionally can impose remedial limitations so jurisdictional in nature that they effectively withdraw the original jurisdiction of this Court.
>
> . . . In its broadest textual delegation, [Article III] authorizes Congress to establish the "inferior Courts" and places no express limits on the

unless saved by the Eleventh Amendment, the Supreme Court's original jurisdiction extends to all suits between Noncitizens and States in law or equity, whether federal question or simple diversity, subject to a defendant State's assertion, case by case, of Sovereign Immunity. So says *Lapides*.

We may not feel too badly about the federal question lawsuits that are filed within the High Court's original jurisdiction, because the Court has devised means for shuttling them off to lower federal courts.[110] And

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> congressional power to regulate the courts so created. See U.S. Const., Art. III, § 1, cl. 1. By contrast, that Article itself creates the Supreme Court and textually differentiates between Congress' relationship with the appellate and original jurisdictions of that Court. . . . U.S. Const., Art. III, § 2, cl. 2 . . . .
>
> Though the original history of Art. III is sparse, what is available indicates that these textual differences were purposeful on the Framers' part. The Framers obviously thought that the National Government should have a judicial system of its own [with its own] Supreme Court. However, because the Framers believed the state courts would be adequate for resolving most disputes, they generally left Congress the power of determining what cases, if any, should be channelled to the federal courts. The one textual exception to that rule concerned the original jurisdiction, where the Framers apparently mandated that Supreme Court review be available. "The evident purpose was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a State or a diplomatic or commercial representative of a foreign government." *Ames v. Kansas*, 111 U.S. 449, 464 (1884). . . . [S]ee also The Federalist No. 81, pp. 507–509 (H. Lodge ed. 1888) (A. Hamilton). Perhaps more importantly, the Framers also thought that the original jurisdiction was a necessary substitute for the powers of war and diplomacy that these sovereigns previously had relied upon. See *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 450 (1945); *United States v. Texas*, 143 U.S. 621, 641 (1892). "The Supreme Court [was] given higher standing than any known tribunal, both by the *nature* of its rights and the *categories* subject to its jurisdiction," A. de Toqueville, Democracy in America, p. 149 (J. Mayer ed. 1969) (emphasis in original), precisely to keep sovereign nations and States from using force "to rebuff the exaggerated pretensions of the Union . . . ." *Id*. at 150.

Id. at 395–97; a*ccord* California v. Arizona, 440 U.S. 59, 65 (1979) (per curiam) ("The original jurisdiction of the Supreme Court is conferred not by the Congress but by the Constitution itself. This jurisdiction is self-executing, and needs no legislative implementation.") (citations omitted); Illinois v. City of Milwaukee, 406 U.S. 91, 101 n.2 (1972) (noting that Congress may provide for or deny alternate forums to the Supreme Court's original jurisdiction). *See generally*, James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555 (1994).

110. The Supreme Court exercises discretion over whether to hear cases that fall within its original jurisdiction, and even over those falling within its exclusive original jurisdiction. For examples of such discretion see United States v. Nevada, 412 U.S. 534, 538 (1973) (per curiam); Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 497–99 (1971); Texas v. New Mexico, 462 U.S. 554, 570 (1983); California v. Texas, 457 U.S.

perhaps we ought not feel too badly for the diversity lawsuits we can now expect to see filed originally in the Supreme Court—even though, as I have shown in discussing the statutory diversity jurisdiction of the district courts, no apparent device is available for the Court to rid itself of this trial caseload.[111]

Where was Chief Justice Rehnquist when *Lapides* came along: he who so carefully, in *Seminole Tribe*, bowed to the Eleventh Amendment's text and then distanced the Amendment that offered text from the Sovereign Immunity that did the work?[112] Where was Justice Kennedy, who so painstakingly in *Alden v. Maine* distinguished actions initiated in State court from actions falling within the Eleventh Amendment?[113]

164, 168 (1982) (per curiam); Maryland v. Louisiana, 451 U.S. 725, 739 (1981); Arizona v. New Mexico, 425 U.S. 794, 796–98 (1976) (per curiam). *But see* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

111. *See Maryland*, 451 U.S. at 769 (Rehnquist, J., dissenting in a suit between States brought originally in the Supreme Court):

> The exercise of original jurisdiction in this case is particularly inappropriate since the issues the plaintiff States would have us decide not only can be, but in fact are being, litigated in other forums. Although this case would come within our original and exclusive jurisdiction if appropriate, the question whether it is appropriate depends in part on the availability of alternative forums.

Id. This passage goes, not to whether the Supreme Court has original jurisdiction of a claim between States, but rather to whether the Supreme Court should exercise the original jurisdiction it clearly has. If the Eleventh Amendment equals State Sovereign Immunity, as *Lapides* seems clearly to say, then Justice Rehnquist will have ample opportunity to craft similar dissents in auto accident cases commenced by Noncitizens against States in the United States Supreme Court, after States waive their "Eleventh Amendment immunity" and ask for trial by special master.

One might imagine that another "appropriate forum"—the state courts—present themselves for these diversity claims commenced in the Supreme Court, and that the Court can simply transfer such an action to the state court it deems appropriate. But we must also imagine that if Congress cannot commandeer a State's courts for the entertainment of claims against that State, then neither can the Supreme Court. *See* Alden v. Maine, 527 U.S. 706, 753–54 (1999):

> The text of Article III, § 1, which extends federal judicial power to enumerated classes of suits but grants Congress discretion whether to establish inferior federal courts, does give strong support to the inference that state courts may be opened to suits falling within the federal judicial power. The Article in no way suggests, however, that state courts may be required to assume jurisdiction that could not be vested in the federal courts and forms no part of the judicial power of the United States.
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> . . . .
>
> In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.

112. Seminole Tribe v. Florida, 517 U.S. 44, 54–55 (1996) (Rehnquist, C.J.); s*ee also* Justice Rehnquist's dissent in *Maryland v. Louisiana* quoted and discussed *supra* note 111.

113. We have . . . sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but

Where was Justice Scalia, who went out of his way in *College Savings Bank* to tell Justice Breyer that *Hans v. Louisiana* was a Sovereign Immunity and not an Eleventh Amendment decision?[114] Were these, and perhaps other Justices as well, so interested in displaying consensus that they compromised their earlier views? Have they changed their minds about the distance between the Eleventh Amendment's text and the various Sovereign Immunity/Consent and Congressional Abrogation doctrines they have been fighting over for the last two decades? Or were they asleep at the switch when this easy little cert petition rolled across their desks?

Let's find out. How many straight diversity actions arise every year in which a Noncitizen has claims against one of the fifty States or its ubiquitous agencies? Maybe a thousand—vehicular accidents, tax disputes, bond revisions, breaches of leases or contracts, runarounds at the Office of the Secretary of State—maybe more? I am guessing that hundreds of litigators reading this article would love to hook up with one or two of these claimants and attempt to commence and prosecute *Noncitizen v. State* before the United States Supreme Court. I suspect that many a State would realize how much the public fisc could be spared if, instead of litigating a Noncitizen's claims (for which it had already waived its sovereign immunity) from tier to tier in its own agencies and courts, it simply started at the top by consenting to such a Noncitizen's suit commenced against it in the Supreme Court.

Before *Lapides*, the Supreme Court could join all those federal district courts in pointing to the Eleventh Amendment's text and then *sua sponte* casting these Noncitizen-against-State lawsuits from its original jurisdiction docket. After *Lapides*, the Court will have to docket the Noncitizen's complaint, see to service upon the State, and wait for a sign that the State has exercised its "freedom to waive its Eleventh Amendment immunity" from suit commenced in the United States Supreme Court.

> something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

Alden v. Maine, 527 U.S. 706, 713 (1999).

114. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 687–88 n.5 (1999).

My invitation here is not entirely a playful one. I think that a contemporary *Chisholm v. Georgia* may provide the only sure way to find out whether a unanimous Supreme Court in *Lapides v. Board of Regents* meant what it said about the waivability of the Eleventh Amendment's jurisdictional barricade—a barricade that, I hope it soon discovers, was designed as much for its own protection as for the protection of the federalism the current Court is striving so hard to nurture.