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Under Construction: Fairness, Waiver, and Hypothetical Eleventh Amendment Jurisdiction

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Under Construction: Fairness, Waiver, and Hypothetical Eleventh Amendment Jurisdiction*

Hien Ngoc Nguyen†

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*See William N. Eskridge, Jr., Overruling Statutory Precedents, 76 GEO. L.J. 1361, 1396 n.182
(1988) (coining the term “11th amendment jurisdiction” two decades ago). This Comment adopts the
term “Eleventh Amendment jurisdiction” because it accepts that the Eleventh Amendment is often
jurisdictional in effect, but it is distinct from other types of federal court jurisdiction. See infra note 24
and accompanying text. This Comment coins “hypothetical Eleventh Amendment jurisdiction” to
connote Eleventh Amendment jurisdiction assumed hypothetically, as subject matter jurisdiction has
been assumed hypothetically and referred to as “hypothetical jurisdiction.” Steel Co. v. Citizens for a
† J.D. candidate 2005, School of Law, University of California, Berkeley (Boalt Hall). I am
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Under Construction: Fairness, Waiver, and Hypothetical Eleventh Amendment Jurisdiction

Hien Ngoc Nguyen

Recent Eleventh Amendment developments show the Supreme Court’s decreasing willingness to foster tremendous procedural advantages for states being sued. However, only some lower courts accept that the Supreme Court will continue expanding circumstances wherein states may be found to have waived their Eleventh Amendment immunity during litigation. Even those that do rarely note that it is a concern for fairness to litigants that motivates the Court’s waiver developments. Instead, lower courts tend to assess myopically whether Eleventh Amendment jurisdiction should be treated more like other forms of jurisdiction.

Meanwhile, the circuits are wildly split as to whether Eleventh Amendment jurisdiction can be assumed hypothetically, a procedure courts have used to avoid inherently complex Eleventh Amendment issues in favor of dismissing cases on easier merits questions. This Comment argues that the fairness concerns in the Court’s recent waiver developments demand two harmonious results: (1) lower courts should embrace the Court’s waiver developments and take fairness into account when addressing Eleventh Amendment procedural questions; and (2) “hypothetical Eleventh Amendment jurisdiction” should be renounced.

INTRODUCTION

Supreme Court observers have recently noticed that the Rehnquist Court’s long, fierce defense of states’ rights may be weakening.1 The Washington Post wrote that, though the Court’s “scary” federalism jurisprudence is far from undone, its “mood has clearly changed.”2 In noting this change, legal scholars and observers have focused on the Court’s decisions in Nevada Department of Human Resources v. Hibbs3 and Tennessee

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2. Editorial, supra note 1, at A14.

v. Lane,\(^4\) cases contravening the Court’s long trend of upholding states’ immunity\(^5\) from suit under the Eleventh Amendment, as demarcating the Court’s states’ rights shift.\(^6\) Linda Greenhouse, the New York Times’s Pulitzer Prize winning Supreme Court reporter,\(^7\) called Hibbs “an unexpected turn in the Court’s federalism revolution”\(^8\) and Lane the 2003 term’s “major federalism case.”\(^9\) While commentators debate whether the Rehnquist Court is beginning to undo its federalism jurisprudence or simply halting its further expansion, their focus on Hibbs and Lane has obscured other surprising developments in states’ rights under the Eleventh Amendment.

This Comment argues that the Eleventh Amendment’s waiver doctrine, which was not at issue in Hibbs or Lane, is ripest for further change.\(^10\) Earlier, Justice Kennedy argued in concurrence that state defendants should risk waiving their Eleventh Amendment immunity if they did not timely assert it in litigation.\(^11\) However, the long-standing law is that states can hold Eleventh Amendment immunity assertions in reserve while they attempt other litigation strategies.\(^12\) A primary objection to this allowance is that it is unfair to those suing states: “States [may] proceed to judgment without facing any real risk of adverse consequences. Should the State prevail, the plaintiff would be bound by principles of res judicata. If the State were to lose, however, it could void the entire judgment simply by asserting its immunity on appeal.”\(^13\) Though the Court has yet to accept

\(^5\) This Comment will use “Eleventh Amendment immunity” to refer to states’ immunity from suit under the Eleventh Amendment as opposed to common law notions of state sovereign immunity. The court first adopted this terminology in Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 278, 288 (1959).
\(^6\) See Tony Mauro, Pulling Its Punches: The Court Took on Big Issues but Rendered Few Big Decisions, 177 N.J.L.J. 114, 117 (2004) (“In the area of federalism, the Court in Tennessee v. Lane offered the clearest signal this term that its pro-state preferences have limits.”); Jana L. Tibben, Family Leave Policies Trump States’ Rights: Nevada Department of Human Resources v. Hibbs and Its Impact on Sovereign Immunity Jurisprudence, 37 J. MARSHALL L. REV. 599, 599 (2004) (“[F]or legal scholars [Hibbs] was a surprising deviation from the pro-states’ rights path of the Rehnquist Court over the last seven years.”); Greenhouse, supra note 1 (highlighting Lane as emblematic of Chief Justice Rehnquist’s slipping grip on the “Rehnquist” Court).
\(^7\) Felicity Barringer, Gershwin (Posthumously), Graham and Roth Are Among Winners of 22 Pulitzer Prizes, N.Y. TIMES, Apr. 15, 1998, at B8.
\(^8\) Linda Greenhouse, In a Momentous Term, Justices Remake the Law, and the Court, N.Y. TIMES, July 1, 2003, at A1.
\(^9\) Id.
\(^10\) Professor Jonathan Siegel also supports this position, although this Comment attempts to identify exactly how this change will occur. See Jonathan R. Siegel, Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment, 52 DUKE L.J. 1167 (2003).
\(^12\) Id.
\(^13\) Id. at 394.
fully Justice Kennedy's proposals to make Eleventh Amendment waiver fairer, it has shown a willingness to move in that direction.\(^{14}\)

Meanwhile, the concept of hypothetical jurisdiction, a procedural device apparently denounced by the Supreme Court in 1998,\(^{15}\) has split the circuits in the Eleventh Amendment context.\(^{16}\) Lower federal courts had been avoiding difficult jurisdictional questions by ruling on the merits against plaintiffs.\(^{17}\) With cases thus disposed, the jurisdictional issues arguably became moot. In a series of cases beginning with *Steel Company v. Citizens for a Better Environment*, the Court held that jurisdictional questions must typically precede merits determinations.\(^{18}\) The circuits currently disagree whether hypothetical jurisdiction survives for Eleventh Amendment jurisdictional questions.\(^{19}\) Allowing "hypothetical Eleventh Amendment jurisdiction" is another potential disadvantage to plaintiffs suing states, since it is another way Eleventh Amendment immunity may be held in reserve. This Comment argues that Eleventh Amendment waiver can both resolve this circuit split and, in doing so, allow further progress in making Eleventh Amendment jurisdiction fairer.

Part I discusses various characterizations of Eleventh Amendment jurisdiction, since Eleventh Amendment changes must often contend with entrenched notions of whether Eleventh Amendment jurisdiction is akin to subject matter jurisdiction or personal jurisdiction. Part II reviews selected Eleventh Amendment history in which the Rehnquist Court has overseen ever-increasing advantages for state defendants, then highlights why the waiver doctrine is the most viable area for reform. Part III introduces hypothetical jurisdiction doctrine in the Eleventh Amendment context by assessing the intense circuit split over whether federal courts may overlook Eleventh Amendment jurisdictional questions and decide case merits against plaintiffs. Part IV sifts through the various circuits' approaches and identifies how the evolving waiver doctrine can resolve troublesome inconsistencies both among and within the lower courts as well as vindicate the Supreme Court's growing concern with Eleventh Amendment fairness.

I

**WHAT KIND OF JURISDICTION IS "ELEVENTH AMENDMENT JURISDICTION"?**

Much of the difficulty in analyzing Eleventh Amendment issues arises from confusion over how to categorize the doctrine. The full scope of this

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16. *See infra* Part III.
19. *See infra* Part III.
debate—whether state sovereign immunity is a constitutional doctrine that exists beyond the Eleventh Amendment, whether the Eleventh Amendment actually prohibits only a narrow set of suits against states, whether it is an immunity from suit or a defense against liability—is beyond the scope of this Comment. Still, a limited discussion is necessary to give context and help elucidate courts’ behaviors.

Commentators and various judicial arguments have characterized the Eleventh Amendment with a stunning array of theories. However, the Supreme Court is not currently entertaining most of these theories. Instead, the Court has squarely accepted that the Amendment is jurisdictional in nature; the question only concerns what sort of jurisdiction this may be.

The Court’s use of the term “jurisdiction” is often imprecise; sometimes the term is used generally and other times as shorthand for subject matter jurisdiction. This Comment uses “jurisdiction” to refer to bounds on a court’s ultimate ability to hear and decide cases. If only subject matter jurisdiction is meant, it will be identified as such. The debate to be considered, then, is whether the Eleventh Amendment is subject matter jurisdictional or generally jurisdictional. Thus, a separate term is useful here to describe the “jurisdictional bar erected by the Eleventh Amendment”: Eleventh Amendment jurisdiction. Three main jurisdictional models are useful to characterize the Eleventh Amendment: subject matter jurisdiction, personal jurisdiction, and the current hodgepodge of those two, which Justice Kennedy dubs a “hybrid nature.”

A. Subject Matter Jurisdiction

Many courts unquestioningly adhere to the view that “[o]nce effectively raised, the Eleventh Amendment becomes a limitation on [the


21. William A. Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 STAN. L. REV. 1033, 1130 (1983) (arguing that the Eleventh Amendment was meant to clarify Article III’s state-citizen diversity clause to confer federal court jurisdiction when the state was the plaintiff).


23. See Katherine Florey, Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity as an Article III Doctrine, 92 CALIF. L. REV. 1375, 1378-81 (2004) (recounting state sovereign immunity’s many proposed forms: “subject matter jurisdiction . . . an absence of personal jurisdiction, a right, a defense, an absolute immunity, a power reserved to the states under the Tenth Amendment, a common-law doctrine, or simply a state of constitutional being that exists by default because the federal government does not possess the power to alter it” (footnotes omitted)).


25. Schacht, 524 U.S. at 394 (Kennedy, J., concurring).
court’s] subject-matter jurisdiction."26 Subject matter jurisdiction is a federal court’s “statutory or constitutional power to adjudicate the case.”27 If a federal court lacks subject matter jurisdiction, such a bar cannot be waived by the defendant, the defendant may note the lack of subject matter jurisdiction at any time during the litigation, and the court must consider whether it has subject matter jurisdiction sua sponte if the court has any doubt.

Plaintiffs cannot waive federal courts’ subject matter jurisdictional limits because “they cannot confer jurisdiction where Congress has not granted it” as allowed under Article III.28 By similar reasoning, federal courts must dismiss cases sua sponte if they have no subject matter jurisdiction, because they are without constitutional authority as granted by Congress to hear such cases.

B. Personal Jurisdiction

Alternatively, Justice Kennedy29 and others30 argue that Eleventh Amendment jurisdiction should be treated more like personal jurisdiction. Unlike subject matter jurisdiction’s structural delineation of federal courts’ power, personal jurisdiction is a doctrine protecting defendants’ due process rights.31 Personal jurisdiction’s due process underpinnings prohibit halting defendants into forums with which they have insufficient relationships or contacts.32 Since these protections are defendants’, defendants may waive such protections and submit to courts’ jurisdictions.

Thus, personal jurisdiction doctrine has evolved such that if defendants do not timely raise challenges to personal jurisdiction, they are waived. Courts need not consider such issues sua sponte,33 since personal jurisdiction implicates the defendants’ rights, not the courts’ fundamental ability to hear a case’s merits.

C. Eleventh Amendment Jurisdiction’s Hybrid Nature

Eleventh Amendment jurisdiction currently conflates aspects of both subject matter and personal jurisdiction. Currently, a state defendant can

26. See, e.g., Cozzo v. Tangipahoa Parish Council-President Gov’t, 279 F.3d 273, 280 (5th Cir. 2002); Joseph A. v. Ingram, 275 F.3d 1253, 1259 (10th Cir. 2002); Harris v. Owens, 264 F.3d 1282, 1288 (10th Cir. 2001); Fromm v. Comm’n of Veterans Affairs, 220 F.3d 887, 890 (8th Cir. 2000).
29. Schacht, 524 U.S. at 394-95 (Kennedy, J., concurring).
32. Id.
33. FED. R. CIV. P. 12(b)(1).
assert Eleventh Amendment immunity at any time within a case, just as it can with subject matter jurisdiction challenges.\(^\text{34}\) A court need not consider Eleventh Amendment jurisdictional questions sua sponte, though, as it would with subject matter jurisdiction.\(^\text{35}\) Subject matter jurisdiction also cannot be waived, whereas Eleventh Amendment jurisdiction can be, allowing states to litigate in federal courts if they wish.\(^\text{36}\) That state defendants can waive Eleventh Amendment jurisdictional challenges while courts need not consider Eleventh Amendment jurisdictional issues sua sponte mirrors principles of personal jurisdiction.

For whatever reason this hybrid nature arose,\(^\text{37}\) its selective conflation of subject matter and personal jurisdiction allows unfairness towards plaintiffs suing states. State defendants can pursue judgments in their favor on the merits, reserving Eleventh Amendment immunity assertions to dismiss cases should they lose on the merits. This can only occur because states do not waive Eleventh Amendment jurisdictional challenges by reserving them, and courts need not raise them sua sponte, an advantage recently criticized in the Supreme Court.\(^\text{38}\)

In a unanimous 1998 decision, the Court clarified that the Eleventh Amendment cannot be seen strictly as subject matter jurisdiction. \textit{Wisconsin Department of Corrections v. Schacht} pointed out the numerous procedural differences between Eleventh Amendment and subject matter jurisdiction. The Court proclaimed “The Eleventh Amendment . . . does not automatically destroy original jurisdiction. Rather, [it] grants the State a legal power to assert a sovereign immunity defense should it choose to do so.”\(^\text{39}\) Concurring, Justice Kennedy elaborated that the Eleventh Amendment possesses a “hybrid nature,” possessing characteristics of both subject matter jurisdiction and personal jurisdiction.\(^\text{40}\) Justice Kennedy then suggested making Eleventh Amendment jurisprudence “more consistent with our practice regarding personal jurisdiction” to make Eleventh Amendment jurisdiction fairer.\(^\text{41}\)


\(^{36}\) \textit{Id}.

\(^{37}\) It is probably fair to say that the Eleventh Amendment possesses its hybrid nature because it implicates both Article III limits on subject matter jurisdiction while retaining common law sovereign immunity characteristics similar to personal jurisdiction. However, whether Eleventh Amendment jurisdiction should be seen as subject matter jurisdictional with personal jurisdictional traits or vice versa is not inconsequential. \textit{See generally} Nelson, supra note 30 (arguing Eleventh Amendment jurisdiction is personal jurisdictional in nature with some subject matter jurisdictional traits).


\(^{39}\) \textit{Id} at 389.

\(^{40}\) \textit{Id} at 394.

\(^{41}\) \textit{Id} at 395; \textit{see also} Oliver B. Rutherford, \textit{Don’t Waive the White Flag Just Yet: Justice Kennedy’s Concurring Opinion in Wisconsin Department of Corrections v. Schacht Breathes Life Into}
This cognizance and other recent actions by the Court signal that further targeted modifications to procedural unfairness in Eleventh Amendment immunity are possible. If the Court's goal is to make Eleventh Amendment jurisdiction procedurally fairer, the development of a waiver doctrine where states waive Eleventh Amendment immunity through litigation actions is an ideal solution.

II
FROM ORIGINAL TEXT TO CURRENT MESS: ELEVENTH AMENDMENT IMMUNITY

The Supreme Court's Eleventh Amendment jurisprudence's difficult history\(^{42}\) has provoked intense outcry from observers calling it, amongst others things, a "tortuous line"\(^{43}\) of "confusing and intellectually indefensible judge-made law."\(^{44}\) This area of constitutional law can be characterized as a long line of intensely criticized doctrine tempered with painstakingly crafted, and equally criticized, exceptions.\(^{45}\) Much inconsistency has accumulated in two hundred years of this "hodgepodge" approach,\(^{46}\) while what has remained stable has been the Court's general reluctance to overhaul longstanding precedent and practice suddenly.

A. The Embodiment of State Sovereign Immunity Through the Eleventh Amendment?

Article III provides, among other things, that "The judicial Power shall extend... to Controversies... between a State and Citizens of another State."\(^{47}\) Though seemingly unambiguous, the meaning and rationale of this clause was subject to intense debate prior to ratification of the Constitution. In the Virginia debates, delegates such as James Madison scoffed at concerns that states could be haled into federal courts without their consent. Madison argued that absent state consent, the grant merely ensured that states could be plaintiffs in federal court.\(^{48}\) Patrick Henry captured Article III critics' skepticism that the text could preclude states from

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\(^{45}\) See, e.g., Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 192-93 (2d ed. 1990); Fletcher, supra note 21; Gibbons, supra note 44, at 1890.

\(^{46}\) Gibbons, supra note 44, at 1891.

\(^{47}\) U.S. Const. art. III, § 2, cl. 1, amended by U.S. Const. amend. XI.

\(^{48}\) The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533 (Jonathan Elliott ed., 2d ed. 1937).
being forced to defend themselves in federal court, asking pointedly, "What says the paper?" Despite such concerns over state sovereign immunity, ratification was successful.

Shortly after ratification, *Chisholm v. Georgia* reached the newfound United States Supreme Court, where Chisholm, of South Carolina, sued Georgia to recover debts. The Court decided four to one that Article III, section two and the corresponding Congressional grant of federal judicial power allowed the suit. At this nascent stage, state sovereign immunity doctrine in America, which Eleventh Amendment jurisprudence has since come to represent, was already fractious. Chief Justice Jay’s opinion and those of the three concurring Justices illustrated early examples of still valid arguments against porting state sovereign immunity from the British system to America’s federalist government. Such criticisms of state sovereign immunity include: a concern of unfairness to private plaintiffs seeking to recover from states; the notion that states gave up their common law immunity upon entering the federal union and accepting the federal Constitution; and that state sovereign immunity is nowhere to be found in the Constitution and is not therefore protected by it.

Justice Iredell, however, argued that Congress’s Judiciary Act did not extend to actions in assumpsit as presented in *Chisholm*. Without any such affirmative grant to the federal courts to hear such a case against a state, Justice Iredell turned his discussion to the common law, and argued that, in fact, the states had not relinquished their common law state sovereign immunity. Justice Iredell’s defense of state sovereign immunity may have lost in *Chisholm*, but within three weeks, both houses of Congress approved the Eleventh Amendment, and the states ratified it within a year. Apparently in “outraged reversal” of the *Chisholm* majority’s reading of the Constitution, the Eleventh Amendment mirrors Article III’s text:

49. *Id.* at 543.
50. 2 U.S. (2 Dall.) 419 (1793).
51. The Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.
52. *Chisholm*, 2 U.S. (2 Dall.) at 420-22; *id.* at 450-51 (Blair, J.); *id.* at 464-66 (Wilson, J.); *id.* at 467-68 (Cushing, J.); *id.* at 476-78 (Jay, C.J.).
53. The opinions in *Chisholm* were announced seriatim, with each Justice writing separately.
54. See *Chisholm*, 2 U.S. (2 Dall.) at 473 (Jay, C.J.); *id.* at 467-68 (Cushing, J.).
55. See *id.* at 474-76 (Jay, C.J.).
56. See *id.* at 454-58 (Wilson, J.).
57. *Id.* at 430-32 (Iredell, J., dissenting).
58. *Id.* at 435-36 (Iredell, J., dissenting).
The Judicial power of the United States shall not be construed to extend to any suit . . . against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.\textsuperscript{61}

The unparalleled speed with which the amendment was adopted attests to the conviction with which legislators sought to overrule \textit{Chisholm}.\textsuperscript{62} The legislative reaction to \textit{Chisholm} may have effectively overruled that case, but Congress’s efficacy in preserving state sovereign immunity more broadly was embarrassingly called into question in \textit{Hans v. Louisiana}.\textsuperscript{63}

\textit{Hans} involved another private citizen’s suit, here against Louisiana, but this time the plaintiff hailed from the defendant state.\textsuperscript{64} Though it took a full century, \textit{Hans} presented the Court with a private suit against an unwilling state that was wholly unprovided for by the Eleventh Amendment’s text. Hans therefore argued reasonably that he was “not embarrassed by the obstacle of the Eleventh Amendment”\textsuperscript{65} which only explicitly forbade suits against a given state by citizens of other or foreign states. The Court stretched credulity in its textual analysis by beginning glumly, “It is true the amendment does so read,” but then proposed that the textually required result of allowing a citizen to sue her own state would lead to an “anomalous” and unanimously unacceptable outcome.\textsuperscript{66} The \textit{Hans} Court was therefore willing to close the loophole left by the drafters of the Eleventh Amendment, concluding that any result otherwise would be “unknown to the law, and . . . not contemplated by the Constitution.”\textsuperscript{67}

Thus, the \textit{Hans} Court sought to clarify what it considered constitutional ambiguity, but it did so without relying on any constitutional text.\textsuperscript{68} A number of scholars argue that \textit{Hans} effected a return to a pre-constitutional (or pre-Chisholm) common law understanding of state sovereign immunity rather than the limited immunity embodied in the Eleventh Amendment.\textsuperscript{69} Whether the \textit{Hans} court was improperly distorting the Amendment’s unambiguous text or aligning the Amendment with common law as it was

\textsuperscript{61} U.S. Const. amend. XI.
\textsuperscript{62} Georgia made it a felony, punishable by “death, without the benefit of clergy by being hanged,” to attempt to enforce \textit{Chisholm}. CHEMERINSKY, supra note 22, at § 7.2 (footnote omitted).
\textsuperscript{63} 134 U.S. 1 (1890).
\textsuperscript{64} \textit{Hans}, 134 U.S. at 1.
\textsuperscript{65} \textit{Id}. at 10.
\textsuperscript{66} \textit{Id}.
\textsuperscript{67} \textit{Id}. at 15.
\textsuperscript{68} Curiously, Justice John M. Harlan, in a concurring opinion, distanced himself from the Court’s criticism of \textit{Chisholm}, defending that decision as “based upon a sound interpretation of the Constitution” at the time. \textit{Hans}, 134 U.S. at 21 (Harlan, J., concurring). Meanwhile, constitutional interpretation in \textit{Hans} contravened the Eleventh Amendment’s actual terms.
\textsuperscript{69} See Martha A. Field, \textit{The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One}, 126 U. PA. L. REV. 515 (1978); Vicki C. Jackson, \textit{The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity}, 98 YALE L.J. 1, 3-5 (1988) (referencing the understanding that the Eleventh Amendment is part of states’ constitutional, common law-derived sovereign immunity and the alternative that it only implicates Article III).
meant to be, the legacy of Hans remains: Eleventh Amendment immunity is now an obstacle to all private suits against "unconsenting" states in federal courts.¹⁰

B. Exceptions to Eleventh Amendment Immunity: How Citizens Can Sue States

The states do not enjoy complete immunity from suit, however, as the Court has fashioned several important exceptions to Eleventh Amendment immunity: (1) the Young state actor exception; (2) abrogation of immunity by Congress; and (3) state waiver of immunity or consent to suit. Although this Comment is predominantly concerned with the third class of exceptions, the diminished strength of the first two elucidates the importance of the waiver exception.

1. Ex parte Young: The State Actor Exception to State Immunity

In Ex parte Young, Minnesota Attorney General Edward Young petitioned for a writ of habeas corpus to the Supreme Court, claiming that the Eleventh Amendment barred a federal court injunction against him. The Court held that individuals may sue state officers to enjoin violation of federal law. The Court reasoned that when acting outside federal law, state actors act beyond any state's authority and therefore cannot be shielded from suit by the Eleventh Amendment. Since Young was acting pursuant to state law, as state actors often are when they are sued, the Court's decision in Young creates a legal fiction that it is state actors and not states themselves that are subject to suit. This theoretically allows many suits against states, since it is hard to imagine a state acting without doing so through its actors.

However, the limits of the Young exception became evident after the Court decided Edelman v. Jordan. Edelman only allows Young exceptions to Eleventh Amendment immunity that would provide prospective relief from injuries by state actors. While full discussion of the elusive prospective/retroactive relief distinction is far beyond the scope of this

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¹². Id. at 159-60.

¹³. Id.


paper, suffice it to say that the ability to obtain non-injunctive relief under Young has been made fairly anemic. Still, Young technically remains good law and theoretically provides some means of addressing state violations of federal laws.

2. Congressional Abrogation of State Sovereign Immunity

The Court created a second exception to state sovereign immunity in Fitzpatrick v. Bitzer when it upheld Congress’s ability to abrogate state sovereign immunity pursuant to section five of the Fourteenth Amendment. The Court reasoned that “In [section five] Congress is expressly granted authority to enforce . . . the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority.” The Court noted that amendments to Title VII of the Civil Rights Act of 1964, allowing private plaintiffs to collect money damages from a state, had been made under the authority granted by section five, were clearly intended to abrogate state sovereign immunity, and were therefore valid.

The Court’s internally conflicted views of Congress’s ability to abrogate state sovereign immunity surfaced twenty years later when the Court refuted previous extensions of Fitzpatrick which allowed abrogating state sovereign immunity pursuant to other, non-section five, constitutional grants of Congressional power. Seminole Tribe v. Florida provided relatively clear guidance on when Congress may abrogate state sovereign immunity—with only the clearest of intent and acting pursuant only to section five. The effective limitations on Congressional abrogation were severe. Justification for Seminole Tribe was grounded upon acceptance of Hans and the majority’s interpretation of history over the dissent’s. The constitutional grant of power to Congress at issue in Seminole Tribe was the Indian Commerce Clause, but the decision did not leave room for valid sources of Congressional power to abrogate Eleventh Amendment immunity other than section five.

77. See id. at 8-23.
78. CHEMERINSKY, supra note 22, at § 7.5.
80. Id.
81. Id. at 447-48.
83. Id. at 56, 59-60.
85. See Seminole Tribe, 517 U.S. at 69-70 (dismissing arguments that Hans was incorrectly decided and Chisholm was a defensible decision).
86. See id. at 47, 65-66.
Justice Souter, in dissent, argued the Court erred in narrowing the scope of Congressional abrogation, especially since Hans overextended the Eleventh Amendment immunity of states.\(^8\) However, he did not advocate overruling Hans, despite its disregard for the Eleventh Amendment’s plain meaning. Instead, Justice Souter suggested that since Hans overprotects states, then Seminole Tribe should allow some robust exceptions to “Hans immunity” even if such exceptions are legal fictions or otherwise of questionable pedigree\(^8\)—essentially advocating two wrongs to make a right.

3. Limitations on Young and Abrogation

Young and Fitzpatrick both demonstrated that members of the Court were uncomfortable with the existing Eleventh Amendment state protections. The Eleventh Amendment’s text allowed private plaintiffs to sue their own states, a powerful possibility excised by Hans. Rather than overruling Hans, though, the Court crafted exceptions to states’ otherwise formidable immunity in the federal system in Young and Fitzpatrick. By never overruling Hans, the Court’s Eleventh Amendment immunity skeptics left the doctrine prone to returning to strong state protections whenever the Court’s membership swung back that way. To expand Eleventh Amendment immunity again, the Court could simply weaken the exceptions allowed in Young and Fitzpatrick, thereby reinvigorating Hans, which always remained good law.

Accordingly, the initial post-Hans Eleventh Amendment options for plaintiffs suing states—allowing privately instigated suits against Young-excepted state actors for violations of federal laws, in federal courts—have mostly eroded through the years.\(^9\) First, although states may still be sued by other states or the federal government,\(^9\) Edelman has limited Young to private-party suits for injunctive relief and prospective, but not retrospective, damages.\(^9\) Second, the ambit of state sovereign immunity through the

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87. Id. at 101-02, 116-19, 127-28 (Souter, J., dissenting).
88. Id. at 169-70 (Souter, J., dissenting) (suggesting that though “Young may be seen as merely the natural consequence of Hans,” Seminole Tribe “could, and should, readily be decided” under Young alone).
89. See Siegel, supra note 10, at 1170.
Eleventh Amendment has been stretched to prohibit suits against uncon-senting states on matters of state law, as well as federal law.\textsuperscript{92} Most recently, in \textit{Alden v. Maine}, the Court extended Congress's difficulties in abrogating states' Eleventh Amendment immunity to state courts as well as federal courts. The \textit{Alden} majority argued sweepingly that the Eleventh Amendment does not delineate the constitutional bounds of state sovereign immunity, but rather state sovereign immunity exists as a constitutional doctrine even without the Eleventh Amendment.\textsuperscript{93} Thus, the Amendment merely emphasized this fact to redress the error made by the Court in \textit{Chisholm}. Again, the Court relied on \textit{Hans}, dismissed any view of history that might suggest that such robust state sovereign immunity might not be appropriate in the United States' federalist government, and therefore circumvented the Eleventh Amendment's actual text.\textsuperscript{94}

\textit{Alden} thus brought the Court and Eleventh Amendment immunity full circle. \textit{Chisholm} had interpreted Article III, section two literally, allowing citizens to sue their own states, prompting enactment of the Eleventh Amendment. \textit{Hans} sought to preserve what that Court considered the central purpose of the Amendment—protecting a broad version of state sovereign immunity—but in doing so, the Court began building a house of cards that extended the Eleventh Amendment beyond its explicit terms. \textit{Young} and \textit{Fitzpatrick} tempered the combined might of the amendment and its \textit{Hans} extension, thereby creating further doctrinal conflict. \textit{Young} was an obvious legal fiction, and the exception to Eleventh Amendment immunity in \textit{Fitzpatrick} seemed almost tacked on to Eleventh Amendment jurisprudence, leaving it vulnerable to extreme limitation. These flawed exceptions to flawed precedent were in turn hamstrung by \textit{Edelman} and \textit{Seminole Tribe},\textsuperscript{95} decisions relying on the very case the exceptions had sought to redress but failed to eliminate: \textit{Hans}. \textit{Hans} survives as viable precedent, repeatedly reaffirmed for over a century\textsuperscript{96} and unlikely to be overruled, despite the efforts of numerous Justices.\textsuperscript{97} Finally, \textit{Alden} effectively constitutionalized state sovereign immunity, making it now more difficult to

\begin{itemize}
  \item \textsuperscript{93} Alden v. Maine, 527 U.S. 706, 732 (1999) ("The Constitution, by delegating to Congress the power to establish the supreme law of the land when acting within its enumerated powers, does not foreclose a State from asserting immunity to claims arising under federal law merely because that law derives not from the State itself but from the national power.").
  \item \textsuperscript{94} \textit{Id.} at 728-29.
  \item \textsuperscript{95} Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996); \textit{Edelman}, 415 U.S. at 662.
  \item \textsuperscript{96} \textit{E.g., College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.}, 527 U.S. 666, 670 (1999); \textit{Seminole Tribe}, 517 U.S. at 54; Dellmuth v. Muth, 491 U.S. 223, 229 n.2 (1989); Smith v. Reeves, 178 U.S. 436, 446 (1900).
  \item \textsuperscript{97} See, \textit{e.g.}, Welch v. Tex. Dep't of Highways & Public Transp., 483 U.S. 468, 478 (1987) ("Today, for the fourth time in little more than two years... four Members of the Court urge that we overrule \textit{Hans v. Louisiana}... and the long line of cases that has followed it.") (citations omitted).
\end{itemize}
limit states’ immunity via the Eleventh Amendment, even if \textit{Hans} were overturned.\footnote{Alden, 527 U.S. at 714-15 ("The States thus retain a residuary and inviolable sovereignty.") (internal citations and quotations omitted).}

\section*{4. Waiver}

Unlike the \textit{Young} state actor doctrine and Congressional abrogation, which are arguably court-crafted exceptions to Eleventh Amendment immunity,\footnote{Although the \textit{Young} exception is in its effect similar to the common law doctrine that a sovereign's agents are distinguishable from the sovereign itself, see Chemerinsky, supra note 22, at § 7.5 n.16, the Court's reasoning in circumventing state sovereign immunity in \textit{Young}—that the state agent is stripped of state authority—has recently been branded "an obvious fiction" by the Court. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 270 (1997).} waiver is a historically recognized limit on sovereign immunity dating from English common law.\footnote{Cheperinsky, supra note 22, at § 7.6; Randall S. Abate & Carolyn H. Cogswell, Sovereign Immunity and Citizen Enforcement of Federal Environmental Laws: A Proposal for a New Synthesis, 15 Va. Envtl. L.J. 1, 4 (1995); see supra Part I.B (discussing the conflict between a subject matter jurisdiction theory of the Eleventh Amendment and allowing Eleventh Amendment immunity to be waived).} Nevertheless, the Court has placed stringent limitations on the application of this historically unimpeachable doctrine. Waiver is limited by first, allowing only states’ explicit and not constructive consent to suit, and second, requiring actual waivers to be extremely explicit.\footnote{The apparent redundancy of this description is not superfluous, given the Court's guidance. See infra notes 109-11 and accompanying text.} Recently, though, waiver as a limitation on Eleventh Amendment immunity is enjoying renewed acceptance by the Court.\footnote{See Siegel, supra note 10.}

\subsection*{a. Earlier Limitations of the Waiver Exception to Eleventh Amendment Immunity}

The notion of constructive waiver, whereby a state voluntarily conducts itself in an arena regulated by federal law that allows suits against states, was entertained briefly by the Court.\footnote{Parden v. Terminal Ry. of Ala. State Docks Dep't, 377 U.S. 184 (1964), overruled by College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).} In \textit{Parden v. Terminal Railway of the Alabama State Docks Department}, Alabama operated an interstate railroad under the purview of the Federal Employers' Liability Act.\footnote{Id. at 192.} Noting that Alabama had pursued an enterprise in a federally regulated arena that subjected violators to suit, the Court held that Alabama had constructively waived its immunity to suit.\footnote{Id.} However, the five Justices in the \textit{Parden} majority enjoyed less than a decade of allowing constructive waivers of Eleventh Amendment immunity before a new majority sharply curtailed and eventually excised the possibility of constructive waivers.
In its next term, the Court decided *Edelman v. Jordan*, finding there was no express Congressional intent to allow constructive waiver of Eleventh Amendment immunity, despite the plaintiffs' argument that the state had consented to suit under a federally regulated program by accepting federal funds from it.106 The Court demanded clear and express Congressional intent to abrogate Eleventh Amendment immunity in order for states to waive that immunity constructively, leaving almost no room for the constructive waivers envisioned in *Parden*.107 When *Seminole Tribe* curtailed Congress's ability to abrogate Eleventh Amendment immunity, it also signaled the demise of constructive waiver: three years after *Seminole Tribe*, the Court explicitly confirmed that states cannot constructively waive sovereign immunity.108

Explicit waiver of Eleventh Amendment immunity by a state, whether by its own legislation or other expressions on its behalf, must also meet a very high standard. Furthermore, consent to suit in state courts does not itself allow suit in federal court.109 General waivers of state sovereign immunity such as a state law allowing suit "in any court of competent jurisdiction"110 have been held not to include federal courts because of the Eleventh Amendment's presumptive applicability. Federal courts must typically be mentioned explicitly in waivers of state sovereign immunity, making them extremely rare.111 However, recent developments in Eleventh Amendment immunity waiver doctrine, not easily classified as constructive or explicit, may allow for some reasonable broadening of this inroad to suits against states.

b. *The Return of Waiver*

In 2002, *Lapides v. Board of Regents*112 presented the Court with a question anticipated by Justice Kennedy in his *Schacht* concurrence: does a state waive its Eleventh Amendment immunity by removing a case from state court to federal court?113 Justice Breyer, writing for a unanimous Court, as he had in *Schacht*, answered the question affirmatively, writing broadly how fairness demands that removal from state to federal court by a state defendant constitutes waiver of Eleventh Amendment immunity.114 Given its unanimity and the Court's many decades of weakening waiver

doctrine.115 Lapides represented a bold step in returning to a yesteryear of meaningful waiver.116 This was somewhat odd given that only three years earlier, a five-member majority of the Court had denounced "constructive" waivers.117 However, though the case's language and rationale were broad, the actual holding was somewhat narrower. As mentioned in one short paragraph, Lapides involved a waiver of immunity in state court regarding a state law claim that was the only valid cause of action.118 This left open the possibility that Lapides could be interpreted quite narrowly to cases with similar procedural histories of state law causes of actions brought in state courts.

Still, Lapides, combined with Schacht and Justice Kennedy's concurrence therein, has highlighted the waiver doctrine as the Eleventh Amendment area to watch in the coming years. That both opinions were unanimous decisions from a Court membership notorious for a long string of five to four decisions typically favoring states119 may signal that Eleventh Amendment jurisprudence is ripe for further revision. While other Eleventh Amendment immunity exceptions have weakened under the Rehnquist Court, Lapides's demonstrated revival of waiver confirms waiver as a key area for coming Eleventh Amendment evolution.

However, such change can only be expected to be incremental. It is rare that the Court has overruled or otherwise suddenly amended any of its major Eleventh Amendment jurisprudence, even rarer that such developments in Eleventh Amendment jurisprudence favor plaintiffs, and almost unheard of that such a development could be unanimous.120 Though Lapides involved overruling past precedent, it also was only a modest step towards the fairness advocated by Justice Kennedy in Schacht, comporting with the Court’s long-demonstrated propensity for incremental development of Eleventh Amendment law.

115. See Siegel, supra note 10, at 1171.
116. See Estes v. Wyo. Dep't of Transp., 302 F.3d 1200, 1205-06 (10th Cir. 2002) (arguing that Lapides recently built on the Court’s prior precedent” and discussing the Court’s mid-twentieth century findings of waiver through litigation behavior); Siegel, supra note 10.
118. Lapides, 535 U.S. at 617-18.
119. CHEMERSKIN, supra note 22, at § 7.1.
III
FROM HYPOTHETICAL JURISDICTION TO HYPOTHETICAL ELEVENTH AMENDMENT JURISDICTION

Part II argued that waiver is the area of Eleventh Amendment jurisprudence that can most appropriately make litigation fairer for citizens suing states. However, if, as this Comment also contends, such change must come gradually, what litigation procedures provide the best targets for waiver developments to continue making Eleventh Amendment doctrine fairer? This Part identifies “hypothetical Eleventh Amendment jurisdiction” as a prime candidate.

A. Hypothetical Eleventh Amendment Jurisdiction Splits the Circuits

1. Steel Co. Denounces “Hypothetical Jurisdiction”

In Steel Co. v. Citizens for a Better Environment, the Supreme Court denounced “hypothetical jurisdiction,” the previously prevalent practice whereby lower courts decline to make difficult determinations of subject matter jurisdiction if a case’s merits could be decided more easily and in favor of the same party that would prevail on the jurisdictional question. Steel Co. disavowed hypothetical jurisdiction, demanding that “jurisdiction be established as a threshold matter.” This inflexible and absolute requirement “spring[s] from the nature and limits of the judicial power of the United States . . . .” However, the “jurisdiction” at issue in Steel Co. is a “question the court is bound to ask and answer for itself, even when not otherwise suggested . . . .” It is not surprising, given this jurisdictional description, that Steel Co. is understood to address subject matter jurisdiction. Thus, Steel Co. reasoned that courts acting outside of their proper subject matter jurisdictions were lawless and violated separation of powers requirements.

The Supreme Court’s ambiguous use of the term “jurisdiction” to mean “subject matter jurisdiction” as exemplified in Steel Co. has led to

121. Steel Co. sought to eliminate “hypothetical jurisdiction,” but it seemed only to contemplate the assumption of hypothetical subject matter jurisdiction. As the circuit split discussed in this section shows, what this Comment terms “hypothetical Eleventh Amendment jurisdiction” is distinct and may have survived.


123. See Steel Co., 523 U.S. at 93.

124. Id. at 94 (citing Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884)).

125. Id. at 94-95 (quoting Mansfield, 111 U.S. at 382).

126. Id. at 94 (citing Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 453 (1900)).

127. See supra Part I.A.

128. Steel Co., 523 U.S. at 94.
widespread confusion as to whether lower courts may assume hypothetical jurisdiction regarding Eleventh Amendment jurisdiction,\textsuperscript{129} which shares features of both subject matter and personal jurisdiction.\textsuperscript{130} Possibly clarifying that \textit{Steel Co.} addressed only subject matter jurisdiction, the Court’s opinion next term in \textit{Ruhrgas AG v. Marathon Oil Company} strongly suggested that validly raised personal jurisdiction issues must be resolved before merits questions.\textsuperscript{131}

Since the Supreme Court has not clearly indicated whether Eleventh Amendment jurisdiction ought to be considered akin to subject matter or personal jurisdiction,\textsuperscript{132} lower courts awaiting such indication are in disarray about whether the Court eradicated “hypothetical Eleventh Amendment jurisdiction”\textsuperscript{133} in \textit{Steel Co.} Some circuits conclude that the Eleventh Amendment confines federal courts’ subject matter jurisdiction and that \textit{Steel Co.} bars hypothetical Eleventh Amendment jurisdiction.\textsuperscript{134} Alternatively, other circuits deny that the Eleventh Amendment is a matter of subject matter jurisdiction, thereby freeing them enough to apply hypothetical Eleventh Amendment jurisdiction.\textsuperscript{135} This Part explores the circuit courts’ approaches to this issue, highlighting that they have not recognized how recent developments in waiver should guide their hypothetical Eleventh Amendment jurisdiction decisions. This sets up Part IV’s argument that the hypothetical Eleventh Amendment jurisdiction issue should be resolved by focusing on waiver rather than subject matter jurisdiction.\textsuperscript{136}

2. Initial Circuit Denunciations of Hypothetical Eleventh Amendment Jurisdiction

As the preceding section introduced, the type of hypothetical jurisdiction specifically banned in \textit{Steel Co.} was hypothetical subject matter jurisdiction. To those who do not include Eleventh Amendment jurisdiction

\textsuperscript{129}. In an opinion which predominantly discusses “subject-matter jurisdiction” the majority uses the term only four times. Instead, “jurisdiction” is used a separate ninety-seven times, whether the Court is clearly discussing subject-matter jurisdiction or whether more general jurisdiction seems equally applicable. \textit{Id.} at 86-110.

\textsuperscript{130}. \textit{See supra} Part I.C.

\textsuperscript{131}. \textit{Ruhrgas AG v. Marathon Oil Co.}, 526 U.S. 574 (1999).


\textsuperscript{133}. \textit{See supra} note *.

\textsuperscript{134}. \textit{See, e.g.}, Brockman v. Wyo. Dep’t of Family Servs., 342 F.3d 1159 (10th Cir. 2003), \textit{cert. denied}, 124 S. Ct. 1509 (2004); \textit{United States ex rel. Foulds v. Tex. Tech Univ.}, 171 F.3d 279, 286 n.9 (5th Cir. 1999).

\textsuperscript{135}. \textit{See, e.g.}, \textit{In re Hechinger Inv. Co. of Del.}, 335 F.3d 243 (3d Cir. 2003); \textit{Endres v. Ind. State Police}, 334 F.3d 618 (7th Cir. 2003) (“[T]he eleventh amendment does not curtail subject-matter jurisdiction . . . .”), \textit{vacated by} Holmes v. Marion County Office of Family & Children, 349 F.3d 914 (2003).

\textsuperscript{136}. \textit{See infra} Part IV.
within subject matter jurisdiction, this left open whether Eleventh Amendment jurisdiction could be assumed hypothetically.\textsuperscript{137} For those who considered the Eleventh Amendment to be a limit on federal courts’ subject matter jurisdiction, though, it was clear that Steel Co. applied to deciding Eleventh Amendment issues before case merits.

Only two months after Steel Co., the Court held that whether litigation presented a case or controversy per Article III—and therefore could come within the federal courts’ subject matter jurisdiction—was an issue to be determined before Eleventh Amendment jurisdictional issues.\textsuperscript{138} Thus, in Calderon v. Ashmus, the Supreme Court addressed subject matter jurisdiction before Eleventh Amendment jurisdiction, just as subject matter jurisdiction must be determined before a case’s merits. Calderon did not, however, discuss Eleventh Amendment issues’ decisional order relative to case merits: could courts assume hypothetical Eleventh Amendment jurisdiction by disposing of a case on the merits to avoid a difficult Eleventh Amendment jurisdictional question?

In the first circuit court consideration of hypothetical Eleventh Amendment jurisdiction in light of Steel Co., the Eleventh Circuit concluded in a single sentence, “An assertion of Eleventh Amendment immunity essentially challenges a court’s subject matter jurisdiction,” to find that Steel Co. absolutely controlled in the Eleventh Amendment context.\textsuperscript{139} Six days later, the Supreme Court, in its unanimous decision in Schacht, gave its strongest recent pronouncement regarding the Eleventh Amendment’s distinction from subject matter jurisdiction. Again, Schacht emphasized the procedural differences between Eleventh Amendment and subject matter jurisdiction and included Justice Kennedy’s explicit argument that Eleventh Amendment jurisdiction should be treated more like personal jurisdiction in its litigation effects than subject matter jurisdiction.\textsuperscript{140}

However, Schacht did not immediately determine the fate of hypothetical Eleventh Amendment jurisdiction. Shortly after Schacht, the Fifth Circuit wrestled with what Justice Kennedy had termed the Eleventh Amendment’s hybrid nature, acknowledging the Supreme Court’s refusal to express definitively whether Eleventh Amendment jurisdiction fell under subject matter jurisdiction.\textsuperscript{141} However, controlling Fifth Circuit


\textsuperscript{138.} Calderon v. Ashmus, 523 U.S. 740 (1998). Calderon was argued only twenty days after Steel Co. was decided.

\textsuperscript{139.} Seaborn v. Fla. Dep’t of Corr., 143 F.3d 1405 (11th Cir. 1998).


\textsuperscript{141.} United States ex rel. Foulds v. Tex. Tech Univ., 171 F.3d 279, 285-86 n.9 (5th Cir. 1999) (citing Marathon Oil Co. v. Ruhrgas, 145 F.3d 211, 222-23 (5th Cir. 1998) (en banc), rev’d by Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999)).
precedent tied Eleventh Amendment jurisdiction to subject matter jurisdiction and required that issues of personal jurisdiction precede rulings on the merits. Thus, the Fifth Circuit in United States ex rel. Foulds v. Texas Tech University held that whether Eleventh Amendment jurisdiction was akin to subject matter or personal jurisdiction, it could not be assumed hypothetically.

3. The Circuits Split

Not similarly constrained by circuit precedent, the First Circuit created the circuit split one month later in Parella v. Retirement Board of the Rhode Island Employees' Retirement System, finding Steel Co. did not apply to hypothetical Eleventh Amendment jurisdiction on several grounds. First, Steel Co., despite being a five Justice majority opinion, was tempered by two of those Justices—Justice Kennedy joining Justice O'Connor—who cautioned separately that there may exist other circumstances under which federal courts could exercise judgment in “reserving difficult questions of jurisdiction when the case alternatively could be resolved on the merits in favor of the same party.” Second, the First Circuit noted the Supreme Court’s “narrow use of the term ‘jurisdiction’ distinguishing between “Article III jurisdiction,” which could not be assumed hypothetically, and “statutory jurisdiction,” which could be. There could be room, then, for hypothetical Eleventh Amendment jurisdiction. Third, the court reiterated Schacht’s analysis that the Eleventh Amendment was procedurally irreconcilable with typical subject matter jurisdiction. In response to concerns raised by Steel Co., the court emphasized that “because Eleventh Amendment immunity can be waived, the presence of an Eleventh Amendment issue does not threaten the court’s underlying power to declare the law,” aiming at the core concern of Steel Co. that courts would hear cases which they did not have authority to hear.

Two weeks after Parella, the District of Columbia Circuit almost apologetically issued a supplemental opinion for United States ex rel. Long v. SCS Business & Technical Institute, Inc. The circuit stated that in light of the Fifth Circuit's Foulds decision, it seemed necessary to address why it had not originally considered the implications of Steel Co. on

142. See id. at 286 (citing numerous decisions equating dismissing cases on Eleventh Amendment grounds with dismissing for lack of subject matter jurisdiction).
143. Id. at 286-87.
146. Parella, 173 F.3d at 54.
147. Id. at 55.
148. See supra Part III.A.1.
149. 173 F.3d 890 (1999).
The court carefully distinguished Eleventh Amendment jurisdiction from subject matter jurisdiction, citing Justice Kennedy’s Schacht concurrence that advocated aligning Eleventh Amendment jurisdiction more with personal jurisdiction. Thus, the court sided with the First Circuit in allowing hypothetical Eleventh Amendment jurisdiction since it was not the hypothetical assumption of subject matter jurisdiction denounced in Steel Co.  

B. Misplaced Focus in Considering Hypothetical Eleventh Amendment Jurisdiction

By focusing on the uncertain jurisdictional nature of the Eleventh Amendment, these circuits missed the consonance between striking down hypothetical jurisdiction and following the Supreme Court’s recent waiver developments. In his Schacht concurrence, it was fairness that prompted Justice Kennedy’s advocacy of aligning Eleventh Amendment jurisdiction more with personal jurisdiction. Justice Kennedy pointed out it would be unfair to allow defendant states to remove cases from state court to federal court and then proclaim Eleventh Amendment immunity barred the federal courts’ jurisdiction. Hypothetical Eleventh Amendment jurisdiction allows courts to accommodate defendant states wishing to pursue merit decisions in their favor and raise Eleventh Amendment immunity claims only if they fail on the merits. Justice Kennedy explicitly denounced similarly reserving Eleventh Amendment immunity defenses in Schacht.  

Given this, it seems unlikely that Justice Kennedy would favor preserving hypothetical Eleventh Amendment jurisdiction, because it grants defendant states an unfair litigation advantage. In Lapides, a unanimous Court affirmed and advanced this concern for fairness. The Court’s interest in fairness is perfectly consistent with Justice Kennedy’s advocacy for making Eleventh Amendment jurisdiction waivable like personal jurisdiction. However, the circuit courts that approvingly reference Justice Kennedy’s Schacht concurrence inadvertently undermine his intentions by focusing on subject matter jurisdiction analogies rather than fairness. The First and District of Columbia Circuits uphold hypothetical Eleventh Amendment jurisdiction while approving Justice Kennedy’s distinction between Eleventh Amendment jurisdiction and subject matter jurisdiction.

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150. Id.
151. Id. at 892-93.
152. Id. at 894-95.
154. Id. at 394-95.
155. Id. at 394.
156. See id. (disavowing “allow[ing] States to proceed to judgment without facing any real risk of adverse consequences” by holding Eleventh Amendment immunity defenses in reserve).
True adherence to Justice Kennedy and the Court’s recent waiver developments would focus on fairness, thereby striking down hypothetical Eleventh Amendment jurisdiction.

The Supreme Court did not help shift the focus from jurisdictional classification when it affirmed the Fifth Circuit’s decision in *Ruhrgas*.\(^{158}\) In dictum, the unanimous Court said that questions of personal jurisdiction, like those of subject matter jurisdiction, must also precede merits considerations.\(^{159}\) To lower courts focused on the jurisdictional nature of the Eleventh Amendment rather than the Court’s waiver developments to increase fairness, this decision suggested that *Steel Co.* barred hypothetical Eleventh Amendment jurisdiction, even if Eleventh Amendment jurisdiction were treated like personal jurisdiction. Though this treatment was something Justice Kennedy suggested in his *Schacht* concurrence, his underlying rationale was to increase fairness, which the lower courts have mostly overlooked. Subsequently, the Fourth and Tenth Circuits both concluded that Eleventh Amendment jurisdiction was akin to subject matter jurisdiction and that *Steel Co.* required that Eleventh Amendment jurisdiction issues precede merits.\(^{160}\)

Simply deciding whether to treat Eleventh Amendment jurisdiction as subject matter jurisdiction is overly simplistic and fails to address the Eleventh Amendment’s complex jurisdictional qualities. If, as the Supreme Court has noted, Eleventh Amendment jurisdiction is currently inconsistent with other forms of jurisdiction,\(^{161}\) it is improper for lower courts to continue deciding the hypothetical Eleventh Amendment jurisdiction questions solely in terms of subject matter jurisdiction.

C. Vermont Agency: *The Supreme Court Muddies Hypothetical Eleventh Amendment Jurisdiction*

It was not until *Vermont Agency of Natural Resources v. Stevens* that the Supreme Court gave its first and only direct guidance on hypothetical Eleventh Amendment jurisdiction.\(^{162}\) First, the Court supported the proposition that *Ruhrgas* and *Steel Co.* together required subject matter jurisdiction and personal jurisdiction questions to be answered before merits are addressed.\(^{163}\) However, this alone did not answer whether Eleventh Amendment jurisdictional questions must also be answered before merits.

159. Id. at 577 (stating that “jurisdiction generally must preceed merits in dispositional order”); see also Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 7, 11-20 (2001) (calling Eleventh Amendment jurisdiction quasi-jurisdictional and considering when such issues should be considered relative to other jurisdictional issues).
160. Martin v. Kansas, 190 F.3d 1120 (10th Cir. 1999).
163. Id. at 778-79.
are addressed. This should have indicated to lower courts that whether their circuits treat Eleventh Amendment jurisdiction like subject matter jurisdiction alone could not answer whether hypothetical Eleventh Amendment jurisdiction is lawful.

However, the Court then offered two twists. First, the majority reverted to discussing the Eleventh Amendment in implicit terms of subject matter jurisdiction despite having moved away from this approach in *Schacht* and *Lapides*. This change is somewhat confounding, but not completely so: Justice Scalia wrote for the majorities both in *Vermont Agency* and in *Steel Co.* and has generally supported treating Eleventh Amendment jurisdiction as subject matter jurisdiction. Second, and perplexingly in light of the first point, the Court declined to decide the “jurisdictional” question of whether Eleventh Amendment jurisdiction even allowed the action against the state agency defendant, and it instead addressed the “merits” question of whether the False Claims Act subjected states to suit.

By forgoing the Eleventh Amendment jurisdictional question and deciding the merits in favor of the state agency defendant, the Court assumed hypothetical Eleventh Amendment jurisdiction while maintaining that Eleventh Amendment jurisdiction was akin to subject matter jurisdiction. This directly contradicted Justice Scalia’s opinion in *Steel Co.* and the outcomes of the Fifth, Fourth, Tenth, and Eleventh Circuits thus far, which all found that Eleventh Amendment jurisdiction must exist before courts could address merits questions.

Justice Scalia’s majority opinion reasoned that if (1) a statutory merits question logically preceded the Eleventh Amendment jurisdictional question, and (2) "there [was] no realistic possibility that addressing the statutory question [would] expand the Court’s power beyond the limits that the jurisdictional restriction has imposed," then hypothetical Eleventh Amendment jurisdiction is not barred. However, it was unclear if this demarcated the only instances hypothetical Eleventh Amendment jurisdiction was proper, or simply a justification for why it was proper in *Vermont Agency*.

While *Vermont Agency* offers a potential exception to *Steel Co.* in the Eleventh Amendment context, circuit courts have rarely considered it when

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164. *See id.*
166. *Vermont Agency*, 529 U.S. at 780.
167. *Id.*
applying Steel Co. to Eleventh Amendment jurisdiction.\textsuperscript{168} This is probably attributable to the case's facts-specific reasoning and the ambiguous scope of its rule. The Court argues that merits may be addressed when the effects of the decision do not eclipse the effects of deciding any Eleventh Amendment jurisdictional issues,\textsuperscript{169} but the Court provided scant guidance when such disjunction does or does not occur. Vermont Agency implied that determining whether Eleventh Amendment jurisdiction is like subject matter jurisdiction or personal jurisdiction does not resolve the question of whether hypothetical Eleventh Amendment jurisdiction survived Steel Co.,\textsuperscript{170} but it also did little to answer that question.

IV
USING WAIVER AND FAIRNESS TO ASSESS HYPOTHETICAL ELEVENTH AMENDMENT JURISDICTION

Thus, by focusing on the Eleventh Amendment's jurisdictional nature in determining hypothetical Eleventh Amendment jurisdiction's fate, the lower courts have been confused by the Supreme Court's guidance. However, if the circuits instead looked to the Court's recent developments in Eleventh Amendment waiver, they would be better able to resolve their split on hypothetical Eleventh Amendment jurisdiction.

A. The Current Spectrum of Hypothetical Eleventh Amendment Jurisdiction

The circuit courts' decisions create three models of Eleventh Amendment jurisdictional interpretation.\textsuperscript{171} First, in what this Comment terms the "unified jurisdiction model," Eleventh Amendment jurisdiction is treated like subject matter jurisdiction and personal jurisdiction in preceding merits questions, so hypothetical Eleventh Amendment jurisdiction is not allowed. Second, in the "springing defense model," courts may assume hypothetical Eleventh Amendment jurisdiction when defendant states request they do so. Last, under the "exceptional jurisdiction model," some courts would find the Eleventh Amendment entirely outside any limits on hypothetical jurisdiction.

\textsuperscript{168} See, e.g., Nieves-Márquez v. Puerto Rico, 353 F.3d 108 (1st Cir. 2003); Brockman v. Wyo. Dep't of Family Servs., 342 F.3d 1159 (10th Cir. 2003), cert. denied, 124 S. Ct. 1509 (2004); Bowers v. Nat'l Collegiate Athletic Ass'n, 346 F.3d 402 (3d Cir. 2003); 31 Foster Children v. Bush, 329 F.3d 1255 (11th Cir. 2003); Hospitality House, Inc. v. Gilbert, 298 F.3d 424 (5th Cir. 2002); Strawser v. Atkins, 290 F.3d 720 (4th Cir. 2002); Greenless v. Almond, 277 F.3d 601 (1st Cir. 2002); Cox v. City of Dallas, 256 F.3d 281 (5th Cir. 2001); Floyd v. Thompson, 227 F.3d 1029 (7th Cir. 2000).

\textsuperscript{169} See supra note 166 and accompanying text.

\textsuperscript{170} See supra notes 166-67 and accompanying text.

\textsuperscript{171} Most decisions falling wholly within the Vermont Agency exception to Steel Co. do not elucidate the circuit split over Steel Co. and thus are not included in this analysis.
1. The Unified Jurisdiction Model: Hypothetical Eleventh Amendment Jurisdiction Barred

This first model adopts the position exemplified by the Fifth and Tenth Circuits in the wake of *Foulds*, *Ruhrgas*, and *Vermont Agency* that, despite some discrepancies, courts cannot assume hypothetical Eleventh Amendment jurisdiction. The Fifth Circuit has consistently found that the Eleventh Amendment questions are sufficiently jurisdictional to warrant application of *Steel Co.*172 The Tenth Circuit's results are essentially identical to those of the Fifth Circuit.173 Though the Tenth Circuit noted the discrepancies between subject matter jurisdiction and Eleventh Amendment jurisdiction, this was not enough to keep the court from applying *Steel Co.*174 *Steel Co.*, in conjunction with *Ruhrgas*, requires questions of subject matter and personal jurisdiction to be settled before case merits can be addressed. This precedent places these two circuits on rather secure footing, presuming that the Eleventh Amendment's jurisdictional nature should control whether hypothetical Eleventh Amendment jurisdiction is valid. However, this ignores the Court's waiver developments and concern with fairness. As noted above, proper reliance on this new direction of the Court would achieve the same result: disallowing hypothetical Eleventh Amendment jurisdiction. Instead, these circuits ignore the changing tide in Eleventh Amendment waiver and fairness concerns.

2. The "Springing Defense" Model

The second model does not explicitly preclude deciding the merits of a case in favor of a defendant state before Eleventh Amendment jurisdiction is decided. Under this model, *Vermont Agency* is not a narrow exception to *Steel Co.* and *Ruhrgas*. Instead, *Vermont Agency* merely confirmed that neither case curtailed hypothetical Eleventh Amendment jurisdiction. The rationale is that *Steel Co.* addressed hypothetical subject matter jurisdiction, which the Eleventh Amendment is not. The argument could be made, although these courts typically have not done so explicitly, that *Ruhrgas*, though it sometimes discussed "jurisdiction" in general terms, was really only concerned with subject matter jurisdiction and personal jurisdiction, not Eleventh Amendment jurisdiction. In addition, *Ruhrgas* merely held that personal jurisdiction could be decided before courts decide subject matter jurisdiction. This approach would allow state

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174. *Thompson*, 278 F.3d at 1023 ("[A]ssertion of Eleventh Amendment immunity calls into question the subject matter jurisdiction of the district court."); *Martin v. Kansas*, 190 F.3d 1120, 1126 (10th Cir. 1999). *But see* *Cisneros v. Wilson*, 226 F.3d 1113, 1136, 1137 (10th Cir. 2000) (Kelly, J., concurring in part and dissenting in part) (arguing that "[w]ere the Eleventh Amendment truly jurisdictional, a court would not be free to ignore it" and stating that the court should not have reached the Eleventh Amendment issue).
defendants to create a two-stage defense similar to that decried by Justice Kennedy and a unanimous Supreme Court. In Schacht, Justice Kennedy eloquently elucidated the unfairness to plaintiffs in allowing Eleventh Amendment immunity defenses at any time during litigation: “Should the State prevail, the plaintiff would be bound by principles of res judicata. If the State were to lose, however, it could void the entire judgment simply by asserting its immunity on appeal.” Nonetheless, the springing defense is currently allowed in the Fourth and District of Columbia Circuits, with an Eleventh Circuit decision approving it as well.

The argument supporting such apparent unfairness is that defendant states can raise Eleventh Amendment immunity objections at any time during litigation, so the springing defense model ultimately does not allow for greater flexibility in when states can raise Eleventh Amendment immunity. The springing defense simply streamlines the process and makes it more transparent. However, this is not an entirely accurate analogy since with the springing defense, defendant states can raise an Eleventh Amendment immunity defense even after losing on the merits but without the expense of or need for an appeal. If anything, this result is even more unfair than that which Justice Kennedy condemned in Schacht.

Like the first model, courts within this model rely heavily, if not exclusively, on assessing whether Eleventh Amendment jurisdiction is subject matter jurisdiction. While the circuit courts align themselves with the Schacht and Lapides distinctions between subject matter jurisdiction and Eleventh Amendment jurisdiction, they entirely overlook Justice Kennedy and the Supreme Court’s underlying rationale of fairness in those cases.

3. The Exceptional Jurisdiction Model: Steel Co. Offers No Constraint on Hypothetical Eleventh Amendment Jurisdiction

The First, Second, Third, Seventh, and Eleventh Circuits advance the boldest hypothetical Eleventh Amendment jurisdiction model. This model, where Eleventh Amendment jurisdiction is treated completely differently than subject matter and personal jurisdictions pushes Steel Co. beyond its likely intended meaning. However, the model is still maintainable under a particular reading of that case and the Court’s ambivalence on the nature of Eleventh Amendment jurisdiction. Unlike the springing defense model, the Court can assume hypothetical Eleventh Amendment jurisdiction whether

177. Schacht, 524 U.S. at 394 (Kennedy, J., concurring).
or not the state defendant requests it, and *Vermont Agency* is no limit to the
types of merits that hypothetical Eleventh Amendment jurisdiction may be
used to reach.

The First Circuit cases center around *Parella*, which caused the initial
circuit split.\(^{180}\) The First Circuit is remarkably consistent in its treatment of
hypothetical Eleventh Amendment jurisdiction. After *Parella*, it has
focused on the principle of avoiding serious constitutional issues, such as
Eleventh Amendment questions, when reasonable.\(^{181}\) *Parella* described the
“positive outcome” of not applying *Steel Co.* as protection against squan-
dering courts’ and litigants’ resources.\(^{182}\) *Tyler v. Douglas* in the Second
Circuit and *Greenless v. Almond* in the First both referenced other deci-
sions regarding settlements between states and tobacco companies, noting
that the cases were inevitably dismissed, regardless of whether they were
decided on the merits or Eleventh Amendment issues.\(^{183}\) In *Floyd v.
Thompson*, relied on by both *Tyler* and *Greenless*, the Seventh Circuit
stated frankly, “[a]lthough the district court rested its decision on the
Eleventh Amendment, we prefer to rely on the terms of the [settlement
agreement] itself to dispose of the case.”\(^{184}\) *Floyd* went on to list the diffi-
cult questions posed by the Eleventh Amendment issues in the case, and
argued that the master settlement agreement allowed a *Vermont Agency-
like exception to *Steel Co.* Thus, merits could be decided before Eleventh
Amendment jurisdiction under *Vermont Agency*. This reasoning neglects
the fact that *Vermont Agency* was strongly concerned with boundaries of
judicial power, whereas *Floyd*, *Tyler*, and *Greenless* sought to preserve
judicial resources.

This expediency justification was made explicit in *Nieves-Márquez v.
Puerto Rico* where the First Circuit inaccurately described *Parella*’s hold-
ing as “courts should avoid unnecessarily reaching Eleventh Amendment
issues because, inter alia, doing so can squander scarce judicial resources
and force defendants to expend resources . . . when not necessary to resolve
the case.”\(^{185}\) However, this rationale distorts *Parella*’s careful, broad analy-
sis and exposes the court’s underlying desire to dispose of cases more eas-
ily. This lower court tendency to assume hypothetical jurisdiction to
dispose of cases is what prompted the Supreme Court’s virulent reaction in

\(^{180}\) *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 124 (1st Cir. 2003) (noting “this court has
repeatedly endorsed *Parella*”); *Greenless v. Almond*, 277 F.3d 601, 605-06 (1st Cir. 2002) (“[T]his
circuit has held that federal courts need not answer questions of state sovereign immunity under the
Eleventh Amendment before answering other, easier legal questions that would decide a case.”) (citing
*Parella* v. Ret. Bd. of the R.I. Employees’ Ret. Sys., 173 F.3d 46 (1st Cir. 1999)).

\(^{181}\) *Greenless*, 277 F.3d at 607.

\(^{182}\) *Parella*, 173 F.3d at 56.

\(^{183}\) *Greenless*, 277 F.3d at 605-07; *Tyler v. Douglas*, 280 F.3d 116, 121 (2d Cir. 2001).

\(^{184}\) *Floyd v. Thompson*, 227 F.3d 1029, 1034 (7th Cir. 2000).

\(^{185}\) *Nieves-Márquez*, 353 F.3d at 124.
Steel Co. listed the effect on judicial efficiency as a serendipitously positive outcome, not as a persuasive argument. Expediency may be a beneficial outcome, but it is not a sufficient justification for assuming jurisdiction.

In re Hechinger Investment Company of Delaware also finds the Third Circuit in this final model, allowing hypothetical jurisdiction on the basis of an expanded reading of Calderon in conjunction with Ruhrgas. Because Ruhrgas allowed either subject matter jurisdiction or personal jurisdiction to be decided first, and since both of these jurisdictional requirements must be met before proceeding to the merits, and because Calderon demanded that Eleventh Amendment issues come after subject matter jurisdiction, the Hechinger court followed these propositions to an interesting conclusion: (1) personal jurisdiction enjoys no particular order priority relative to subject matter jurisdiction; (2) Eleventh Amendment issues do have an enforced order—after subject matter jurisdiction per Calderon; (3) Eleventh Amendment issues therefore come after "jurisdictional" issues; and thus (4) "jurisdictional" matters must be addressed before the merits of a case per Ruhrgas and Steel Co. The Third Circuit then took the liberty of declaring that Eleventh Amendment issues would be addressed amidst the merits.

Logically, however, the possibility actually remains that Eleventh Amendment issues might simply come between the two "jurisdictional" questions and decisions on the merits. Although Hechinger was discussing the limited context of whether Steel Co. applies to Eleventh Amendment issues, its conclusion was not so narrow: the Eleventh Amendment is not really jurisdictional. This statement is particularly bold given that the Supreme Court still seems to analogize Eleventh Amendment jurisdiction to either subject matter or personal jurisdiction, especially in light of Lapides and its development of waiver doctrine.

B. Finding the Proper Role of Waiver and Fairness in Hypothetical Eleventh Amendment Jurisdiction

Given the direction of Eleventh Amendment waiver doctrine and its underlying concern with fairness, courts would be prudent to consider fairness in assessing hypothetical Eleventh Amendment jurisdiction. A broad interpretation of hypothetical jurisdiction in the Eleventh Amendment context creates the potential for a huge power imbalance in plaintiff versus defendant state litigation since the Supreme Court has severely curtailed

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188. Id.
189. Id. at 251.
the other available exceptions to Eleventh Amendment immunity. The remedies, forums, and bodies of law available to plaintiffs have also dwindled. However, four years after Justice Kennedy noted the above-mentioned "unfairness" in favor of state defendants, the Court took an opportunity to pursue some improvement in *Lapides*. As discussed earlier, *Lapides* and *Schacht* were both unanimous opinions while the Court's Eleventh Amendment opinions were typically decided five to four, strongly suggesting that further development of waiver to increase fairness can be expected.

Despite the Court's unity in *Lapides*, circuit courts have not uniformly implemented its precedent. These lower court decisions can be divided into two categories. The first category involves a split on how narrowly or broadly to apply *Lapides*. While *Lapides* clearly states that a defendant state cannot raise Eleventh Amendment immunity once it has removed a case from state to federal court, some lower courts have limited this rule to excruciatingly specific situations. The second category includes decisions that radically challenge the current notion that states may assert immunity for the first time late in litigation. While lower courts' considerations of hypothetical Eleventh Amendment jurisdiction indicated that they could recognize the Supreme Court's developing waiver doctrine, their degree of adherence to *Lapides* shows otherwise. Circuit court acceptance of *Lapides* can be broken down into three groups: courts resisting *Lapides* and therefore applying it narrowly, those willingly following it, and those pushing for further revision of waiver to increase fairness.

1. **Intense Skepticism of Lapides**

Circuits following a narrow interpretation of *Lapides* and limiting it to its particular procedural history include the First, Seventh, and District

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190. *See* Siegel, *supra* note 10, at 1185; *supra* Part II.B (organizing the Eleventh Amendment exceptions for this Comment as: (1) for state actors under *Young*, (2) for Congressional abrogation of Eleventh Amendment immunity, and (3) regarding waiver or consent).


196. *R.I. Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31 (1st Cir. 2002) (differentiating the case at hand because *Lapides* involved waiver in state court before removal to federal court).

197. *Omosegbon v. Wells*, 335 F.3d 668, 673 (7th Cir. 2003) (concluding, because of a narrow reading of *Lapides* and Seventh Circuit practice, that court "must first satisfy ourselves that Indiana's state-law immunity rules would have allowed an Indiana court to hear [plaintiff's] state-law contract claim had this lawsuit not been removed to federal court").
of Columbia Circuits. These Circuits also found that Steel Co. does not bar hypothetical Eleventh Amendment jurisdiction.

By both favoring hypothetical Eleventh Amendment jurisdiction and remaining skeptical of waiver except for a small set of removal cases, these circuits favor state defendants under both doctrines. By allowing hypothetical jurisdiction in the Eleventh Amendment context, these circuits help state defendants achieve judgments on the merits while saving the backup shield of the Eleventh Amendment with no loss in efficacy—the springing defense. This combination of strict interpretation regarding waiver but more liberal allowances for hypothetical jurisdiction do nothing to remedy the unmatched litigation advantages that state defendants are widely recognized to have. Given that Lapides was a unanimous decision and showed the beginnings of acceptance of Justice Kennedy’s call to make the Eleventh Amendment fairer for private litigants, these strict readings of Lapides are overly cautious and hinder the development led by the Supreme Court.

2. Mindful Following of Lapides: Waiver of Eleventh Amendment Immunity Through Removal

The Tenth Circuit in Estes v. Wyoming Department of Transportation was also cautious, but more reasonably so in its acceptance of Lapides. Unlike the particular circuits discussed above, the Tenth Circuit was not perturbed by the technically narrow holding of Lapides, stressing that “Lapides clearly holds that a State waives its sovereign immunity to suit in a federal court when it removes a case from state court.” The court indicated that it would read Lapides even more broadly if given the opportunity, evidencing willingness to follow the Supreme Court’s lead in making waiver doctrine fairer. The Tenth Circuit has also consistently rejected hypothetical Eleventh Amendment jurisdiction. However, as with

200. This refers to the waiver by affirmative litigation actions suggested by Lapides.
201. See supra Part IV.A.2.
203. 302 F.3d 1200 (10th Cir. 2002).
204. Id. at 1204.
205. “The Supreme Court has consistently held that a State waives its sovereign immunity when it voluntarily appears in federal court. Never has the Court enunciated a requirement of litigation on the merits as a condition of waiver.” Estes, 302 F.3d at 1205-06 (citing Gunter v. Atlantic Coast Line R.R. Co., 200 U.S. 273, 284 (1906); Clark v. Barnard, 108 U.S. 436, 447 (1883)).
206. Brockman v. Wyo. Dep’t of Family Servs., 342 F.3d 1159, 1161 (10th Cir. 2003), cert. denied, 124 S. Ct. 1509 (2004); Thompson v. Colorado, 278 F.3d 1020, 1022 (10th Cir. 2001); Martin
the Fifth Circuit in *Foulds*, this rejection was based on applying *Steel Co.* because the Tenth Circuit considers Eleventh Amendment jurisdiction part of subject matter jurisdiction. Simply equating Eleventh Amendment jurisdiction with subject matter jurisdiction is increasingly questionable after *Lapides*. Even Justice Scalia, a proponent of considering Eleventh Amendment jurisdiction as akin to subject matter jurisdiction, did not reject hypothetical Eleventh Amendment jurisdiction based on that viewpoint. The Tenth Circuit would better comport itself with the Supreme Court’s evolving Eleventh Amendment jurisprudence if it rejected hypothetical Eleventh Amendment jurisdiction on fairness and waiver grounds instead of overly simplistic jurisdictional equations.

3. *Testing the Boundaries of Lapides and the Role of Fairness and Waiver in Interpreting the Eleventh Amendment*

Although *Lapides* was recently decided and dealt only with waiver through removal, extensions of and elaborations on its principles are already percolating through the circuit courts. Some seem so logical that *Lapides* may not have even been necessary to their outcomes. In *Regents of the University of New Mexico v. Knight*, the Federal Circuit held that states bringing suits in federal courts were not protected by the Eleventh Amendment from compulsory counterclaims by the opposing parties. It is difficult to contemplate a court justifying a different result without blatantly trampling the due process rights of those suffering suit by a state but unable to file compulsory counterclaims because of the Eleventh Amendment. *Knight* is perhaps an easy case, but it demonstrates that while *Lapides* only addressed removal, fairness could justify allowing waiver of Eleventh Amendment immunity in other scenarios worthy of Supreme Court validation.

One final consideration remains: Justice Kennedy’s *Schacht* recommendation that states waive their Eleventh Amendment immunity if they do not raise it in a timely manner. Although it has yet to be taken up by the Supreme Court, some circuit courts have addressed this. The First Circuit twice contemplated using *Lapides* to reach the proposition that states waive their Eleventh Amendment immunity by not raising the issue in a timely fashion but shied away both times. The Fifth Circuit already had a
a comparable doctrine prior to Lapides.\textsuperscript{210} However, that doctrine was not as stringent as Justice Kennedy’s proposal. Justice Kennedy contemplated a “rule inferring waiver from the failure to raise the objection at the outset of the proceedings” as would occur under personal jurisdiction.\textsuperscript{211} However, the Fifth Circuit had a far more discretionary system, whereby a state could theoretically waive immunity through a showing of unequivocal intent, such as through asserting claims of its own or evidencing an intent to defend on the merits.\textsuperscript{212} If the state did not trigger waiver through such actions, then it could raise an Eleventh Amendment claim for the first time on appeal, unlike under Justice Kennedy’s proposal.

Two other courts have affirmatively addressed and advanced Justice Kennedy’s proposal in their circuits. In Ku v. Tennessee, the Sixth Circuit reasoned remarkably:

Tennessee engaged in extensive discovery and then invited the district court to enter judgment on the merits. It was only after judgment was adverse to the State that it revealed that it had its fingers crossed behind its metaphorical back the whole time. In our view, this type of clear litigation conduct creates the same kind of “inconsistency and unfairness” the Supreme Court was concerned with in Lapides. Following the rationale of Justice Kennedy in Schacht and the only consistent view of the line of authority endorsed in Lapides, we hold that appearing without objection and defending on the merits in a case over which the district court otherwise has original jurisdiction is a form of voluntary invocation of the federal court’s jurisdiction that is sufficient to waive a State’s defense of Eleventh Amendment immunity.\textsuperscript{213}

Out west, the Ninth Circuit’s pronouncement in Arizona v. Bliemeister was no less grand:

Our holding is consistent with the spirit of a recent unanimous decision by the Supreme Court. Arizona made a tactical decision to argue the merits of the case. When it perceived it was losing the argument, it attempted to try a new approach and claim immunity from suit. While Arizona did not wait until the day of trial... [o]nce again, we see that a state hedged its bet on the... outcome.... Because such conduct undermines the

\textsuperscript{210} See, e.g., Watson v. Texas, 261 F.3d 436, 441 (5th Cir. 2001) (reiterating the view that Eleventh Amendment immunity is a matter of subject matter jurisdiction but is still distinct in that waiver through litigation behavior is possible: “we require that the state employ the power of the federal court in such a way that its intent to forgo its acceptance of immunity be unequivocal”).


\textsuperscript{212} Neinast v. Texas, 217 F.3d 275, 279 (5th Cir. 2000).

\textsuperscript{213} Ku v. Tennessee, 322 F.3d 431, 435 (6th Cir. 2003).
integrity of the judicial system[,] we hold that the State of Arizona waived any sovereign immunity it had available to it.\textsuperscript{214}

Both circuits demonstrate their understanding that fairness will likely drive other Supreme Court waiver decisions. By using this to inform their decisions, these circuits also help further the Court's waiver developments.

These decisions also show some lower courts are willing to go beyond the small, incremental steps this Comment argues the Supreme Court limits itself to taking. Justice Kennedy would no doubt approve of Ku, but only one of his recommendations from Schacht was embraced in the Court's unanimous decision in Lapides.\textsuperscript{215} Though the Supreme Court is unlikely to adopt this radical revision of Eleventh Amendment jurisprudence suddenly, Ku and Bliemeister provide precedent that the Court can lean on should it continue to reform waiver to increase Eleventh Amendment fairness.\textsuperscript{216}

The Sixth and Ninth Circuits have demonstrated their readiness to embrace the Supreme Court's recent developments in waiver, but they have not yet determined whether hypothetical Eleventh Amendment jurisdiction may stand in their circuits. To be consistent with their apparent willingness, they should denounce hypothetical Eleventh Amendment jurisdiction when it arrives before them to help further what may become the Supreme Court's newest Eleventh Amendment doctrine: fairness.

\textbf{Conclusion}

The circuit courts undoubtedly recognized to some degree that Lapides was important in changing Eleventh Amendment waiver doctrine. Most failed to note Lapides' impact on the Court's conceptualization of Eleventh Amendment jurisdiction. This shift was not driven by the Court's conceptualization of Eleventh Amendment jurisdiction as subject matter or personal jurisdiction, but instead by concerns of fairness. By incorporating an increased concern about fairness when assessing waiver of Eleventh Amendment immunity, the lower courts could better comport with the Supreme Court's recent as well as coming steps in making Eleventh Amendment jurisprudence fairer.

The Supreme Court is unlikely to enact a sweeping change in jurisdictional characterization suddenly, but fairness certainly has become more prevalent in determining Eleventh Amendment questions. The decision in Lapides indicated a new propensity towards strengthening waiver to

\textsuperscript{214} Arizona v. Bliemeister, 296 F.3d 858, 862 (9th Cir. 2002) (citations and internal quotations omitted).
\textsuperscript{215} See Schacht, 524 U.S. at 395 (Kennedy, J., concurring) (citing Clark v. Barnard, 108 U.S. 436 (1883)).
\textsuperscript{216} Professor Jonathan Siegel argues that a more robust waiver doctrine would not only be fairer, but would be historically more consonant with original state sovereign immunity doctrine. See Siegel, supra note 10. The Sixth and Ninth Circuits are in accord with his general recommendation, but, again, the Supreme Court is unlikely to demonstrate such alacrity.
increase fairness and also provided lower courts with time to adjust their practices regarding Eleventh Amendment jurisdiction. The unanimity in Lapides suggests that Justice Kennedy’s impassioned push to rectify unfairness in Eleventh Amendment jurisdiction is not likely to disappear, although it is by no means inevitable. The lower courts, by incorporating greater concern for fairness when assessing Eleventh Amendment waiver doctrine, could help the Court’s efforts to make Eleventh Amendment jurisdiction fairer.