

## NOTES

### UNSHEATHING ALEXANDER'S SWORD: *LAPIDES v. BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA*

ERIC S. JOHNSON\*

Introduction.....	1051
I. Background: Tying the Knot .....	1053
A. Basic Principles of Eleventh Amendment Immunity.....	1053
B. An Overview of <i>Lapides v. Board of Regents of the     University System of Georgia</i> .....	1056
II. Analysis: Understanding the Twists .....	1057
A. Eleventh Amendment Waiver Jurisprudence .....	1057
B. The <i>Lapides</i> Decision: Voluntary Removal Constitutes Waiver of Eleventh Amendment Immunity .....	1059
C. Resting between Subject Matter and Personal Jurisdiction.....	1061
III. Resolution: Sharpening the Sword.....	1063
Conclusion .....	1064

#### INTRODUCTION

According to Greek mythology, King Gordius secured a ceremonial wagon with a knot so perplexing that the Delphic Oracle prophesized that the person who untied the knot would be crowned king of Phrygia and rule Asia.<sup>1</sup> The knot was never untied.<sup>2</sup> The Supreme

---

\* J.D., 2002, *magna cum laude*, American University, Washington College of Law, Articles Editor, *American University Law Review*, Volume 51; B.A., 1995, *The University of Texas at Austin*. I would like to thank Russell Wheeler and Sheryl Dickey for their insightful comments and critique. This casenote is dedicated to Charles M. Johnson and would not have been possible without the loving support of my family and my wife—*ma plouc*.

1. 7 PLUTARCH, PLUTARCH'S LIVES 272-73 (Bernadotte Perrin trans. & G.P. Gould

Court, like a modern King Gordius, has secured the Eleventh Amendment, which defines the boundary between federal judicial power and state sovereignty,<sup>3</sup> with a jurisprudential knot that is equally complex and confusing.<sup>4</sup> The conflicting, inconsistent, and contrived rationales delineating the contours of this Eleventh Amendment Gordian knot often obscure rather than illuminate the boundaries the Eleventh Amendment seeks to define.<sup>5</sup> With the decision in *Lapides v. Board of Regents of the University System of Georgia*,<sup>6</sup> the Court passed on an opportunity to loosen a strand of its own Gordian knot.

The question presented in *Lapides* asked whether a state waives Eleventh Amendment immunity by voluntarily removing a case to federal court.<sup>7</sup> In answering this question in the affirmative, the Supreme Court determined that removal constitutes a voluntary invocation of federal jurisdiction.<sup>8</sup> This Note, however, asserts the Court in *Lapides* should have broadened the analysis to resolve the underlying inconsistency that rests Eleventh Amendment waiver on both the federal court's personal and subject matter jurisdiction

---

ed., Harvard University Press 1999) (1919) (providing the original Greek text with English translation); PIERRE GRIMAL, *THE DICTIONARY OF CLASSICAL MYTHOLOGY* 173 (A.R. Maxwell-Hyslop trans., Blackwell Publishers 1986) (1951); JENNY MARCH, *CASSELL DICTIONARY OF CLASSICAL MYTHOLOGY* 336 (2001).

2. PLUTARCH, *supra* note 1, at 271-73. Of course, mythology famously accredits Alexander the Great with severing the Gordian Knot with a sword stroke. However, Plutarch notes differing accounts, which state Alexander simply removed the pin that fastened the yoke to the knot. *Id.*

3. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 669-70 (1999) (noting the Eleventh Amendment's jurisdictional bar has been consistently interpreted in the last century as prohibiting suits in federal court against un-consenting states); *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (same); *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 283 (1906) (same).

4. *See* discussion *infra* Part I.A-B, II.A-C.

5. *See, e.g.*, ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 7.1 (3d ed. 1999) (noting that the Supreme Court's Eleventh Amendment case law has been described as "tortuous" and "hodgepodge"); 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, 1033 (1983) ("The eleventh amendment is one of the Constitution's most baffling provisions . . ."); Note, *Reconceptualizing the Role of Constructive Waiver After Seminole*, 112 *HARV. L. REV.* 1759, 1759 (1999) ("If consistency is the hobgoblin of small minds, the Supreme Court's Eleventh Amendment jurisprudence is surely the product of great ones.").

6. No. 01-298, 2002 U.S. LEXIS 3220, at \*6 (U.S. May 13, 2002).

7. *Id.* at \*11; *see also* Brief for Petitioner at i, *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 122 S. Ct. 456 (2001) (No. 01-298); Brief for Respondents at i, *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 122 S. Ct. 456 (2001) (No. 01-298).

8. *Lapides*, 2002 U.S. LEXIS 3220, at \*17 (noting the Court's current Eleventh Amendment waiver rules distinguish between states voluntarily and involuntarily in federal court); *see* discussion *infra* Part II.A-B. *See generally* *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906) (stating that Eleventh Amendment immunity may be waived when a state voluntarily invokes federal court jurisdiction).

determinations.<sup>9</sup> By declining to address this inconsistency, the Court's decision in *Lapides* is unnecessarily narrow and fails to clarify the Eleventh Amendment's unique jurisdictional bar.

The discussion is divided into three parts. Part I briefly reviews the Supreme Court's Eleventh Amendment jurisprudence and provides an overview of *Lapides*. Part II analyzes the Court's Eleventh Amendment waiver jurisprudence and the Court's holding in *Lapides* that voluntary removal to federal court constituted an explicit waiver of Eleventh Amendment immunity. Framed by this analysis, Part II argues that the Court's inconsistent treatment of the Eleventh Amendment as a restriction on subject matter jurisdiction represents the source of the confusion in *Lapides*. Part III argues that, to resolve this inconsistency, the Court should conform Eleventh Amendment jurisprudence, within the context of removal, to the requirements of personal jurisdiction.

## I. BACKGROUND: TYING THE KNOT

### A. *Basic Principles of Eleventh Amendment Immunity*

Although a detailed review of the Court's Eleventh Amendment jurisprudence lies well beyond the scope of this Note, coherency demands a brief review.<sup>10</sup> Article III of the Constitution invests the federal courts with federal judicial power<sup>11</sup> and defines the types of cases and controversies that fall within this judicial power.<sup>12</sup> Following the Constitutional Convention, delegates to the state ratification conventions inconclusively debated the extent of Article III's effect on state sovereign immunity.<sup>13</sup> With *Chisholm v. Georgia*,<sup>14</sup>

---

9. See discussion *infra* Part II.C (discussing the aspects of personal jurisdiction and subject matter jurisdiction that are found in Eleventh Amendment jurisprudence). See generally CHEMERINSKY, *supra* note 5, § 7.3 (noting that permitting waiver of Eleventh Amendment immunity runs counter to the well-established principles of subject matter jurisdiction, which reiterate that parties cannot agree to federal court jurisdiction).

10. See, e.g., 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-25-27 (3d ed. 2000) (providing an excellent summary of the Supreme Court's Eleventh Amendment jurisprudence).

11. See U.S. CONST. Art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

12. *Id.* § 2, amended by U.S. CONST. amend. XI. As ratified in 1787, Article III contained two clauses that extended judicial power to controversies "between a State and Citizens of another State . . . and between a State, or Citizens thereof, and foreign . . . Citizens," both which arguably permitted states to be sued in federal court. *Id.*

13. Compare CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 27-40 (1972) (noting that Pennsylvania, Massachusetts, Virginia, New York,

the Supreme Court resolved that debate by finding that the state-citizen diversity clause of Article III<sup>15</sup> subjected states to federal court jurisdiction.<sup>16</sup> This decision led to the adoption of the Eleventh Amendment,<sup>17</sup> which states: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>18</sup>

The Supreme Court’s early jurisprudence interpreted the Eleventh Amendment as protecting states only from suits by citizens of other states.<sup>19</sup> The Court’s seminal decision in *Hans v. Louisiana*,<sup>20</sup> however, extended the Eleventh Amendment’s jurisdictional bar to suits by in-state plaintiffs,<sup>21</sup> thereby prohibiting all suits against non-consenting

---

North Carolina and Rhode Island debated, with differing levels of rigour, the effect of Article III upon state sovereignty, and concluding that those states failed to reach a definitive determination regarding whether state sovereign immunity survived Article III), with Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C.L. REV. 485, 493-98 (2001) (concluding that the state ratification debates demonstrate that the states assumed they had retained sovereignty and arguing that the passage of the Eleventh Amendment confirmed this assumption). See generally Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1429-51 (1987) (discussing the competing theories of English and Colonial-American “governmental” sovereign immunity contemporary with the drafting of the Constitution); JACOBS, *supra*, at 3-74 (discussing the doctrine of state sovereign immunity before the Constitution’s ratification).

14. 2 U.S. (2 Dall.) 419 (1793).

15. U.S. CONST. Art. III, § 2 (“The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State . . .”).

16. *Chisholm*, 2 U.S. (2 Dall.) at 451, 466, 469, 479 (pinpointing the seriatim opinions of Justices Blair, Wilson, Cushing and Chief Justice Jay). But see *id.* at 434-36 (Iredell, J., dissenting) (arguing that the Judiciary Act of 1789 implicitly incorporated the common-law principles of sovereign immunity and therefore barred the Court’s jurisdiction because those principles were not explicitly altered by the Judiciary Act of 1789). Justice Iredell refused to reach the Article III question. *Id.* at 450.

17. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669 (1999) (stating “[t]he ‘shock of surprise’ created by this decision, prompted the immediate adoption of the Eleventh Amendment . . .”) (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 325 (1934)) (citation omitted). See generally William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1268-71 (1989) (detailing the drafting process that culminated in Congress approving an amendment in early 1794 that was ratified as the Eleventh Amendment in 1795). Representative Theodore Sedgwick of Massachusetts proposed an amendment barring states from being sued in federal court the day after *Chisholm* was announced. *Id.* at 1269.

18. U.S. CONST. amend. XI.

19. See, e.g., *Cohnes v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821) (holding the Eleventh Amendment inapplicable because the state and one of its own citizens were adverse parties and thus the controversy fell outside the language of the Eleventh Amendment). See generally JACOBS, *supra* note 13, at 75-105 (surveying the early Eleventh Amendment cases and concluding that the Court’s strict textual interpretation limited the Eleventh Amendment’s scope).

20. 134 U.S. 1 (1890).

21. *Id.* at 20-21.

states.<sup>22</sup> The *Hans* Court justified its atextual interpretation<sup>23</sup> and departure from its own precedent by reasoning the Eleventh Amendment embodied deeply rooted principles of state sovereign immunity.<sup>24</sup>

The Supreme Court's decision in *Hans* established a broad Eleventh Amendment immunity. Although the Court has created exceptions to this immunity,<sup>25</sup> the Court's modern jurisprudence continues to affirm the jurisdictional bar erected by *Hans* and its underlying rationale.<sup>26</sup> In *Seminole Tribe v. Florida*,<sup>27</sup> which held that

22. *Id.*; see, e.g., *Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 280 (1973) (acknowledging that although the Eleventh Amendment on its face does not bar suits by in-state plaintiffs, the current Eleventh Amendment jurisprudence holds that "an unconsenting State is immune from suit brought in federal courts by her own citizens as well as by citizens of another State").

23. See generally John Randolph Prince, *Forgetting the Lyrics and Changing the Tune: The Eleventh Amendment and Textual Infidelity*, 104 DICK. L. REV. 1, 38 (1999) (arguing that because the suit in *Hans* claimed Louisiana violated the Constitution's Contract Clause, the Court's departure from the Eleventh Amendment's text in *Hans* necessarily led to the creation of a "parallel Eleventh Amendment" that also barred federal question suits against states).

24. See *Hans*, 134 U.S. at 10-11, 15-16 (noting that prohibiting suits against states by citizens of another state, yet permitting suits by citizens of the same state, would be an "anomalous result" and further asserting that suing an unconsenting State "was a thing unknown to the law").

25. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) (holding that Congress may abrogate Eleventh Amendment immunity only under Section 5 of the Fourteenth Amendment and not under its general Article I legislative powers); *Ex parte Young*, 209 U.S. 123, 159-60 (1908) (holding the Eleventh Amendment does not bar injunctive relief from state officials who engage in unconstitutional conduct); see also discussion *infra* Part II (discussing waiver of Eleventh Amendment immunity).

26. See *Seminole Tribe*, 517 U.S. at 47, 69 (1996) (mimicking the hyperbolic prose of *Hans* in stating that the decision drew not only from English common law notions of sovereign immunity but also from "the much more fundamental 'jurisprudence in all civilized nations'"); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934) (asserting that the states retain "attributes of sovereignty" that survived the ratification of Article III of the Constitution and were not limited by the text of the Eleventh Amendment); *Ex parte New York*, 256 U.S. 490, 497-98 (1921) (stating that a state's sovereignty is a "fundamental rule of jurisprudence," which the Eleventh Amendment partially embodies). See generally Hill, *supra* note 13, at 517-20 (acknowledging the "overwhelmingly negative" academic response to *Hans*, while arguing that *Hans* reflected the original pre-constitutional understanding of state sovereign immunity). But see THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1525-26 (Johnny H. Killian & George A. Costello eds., 1996) (recognizing that the economic reality of post-Reconstruction America, where numerous states were burdened by tremendous Civil War era debt, required the Supreme Court to hold that the Eleventh Amendment prohibited both suits by in-state and out-of-state plaintiffs in order to prevent open rebellion by debt-burdened states); Prince, *supra* note 23, at 37-41 (arguing that the decision in *Hans* was rooted in the Court's "acontextual" reading of the Eleventh Amendment and the Court's overly broad Contract Clause jurisprudence); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1998-2002 (1983) (arguing that the Court's decision in *Hans* stemmed from a politically astute choice to avoid open conflict with the states on the issue of repayment of Civil War era debt).

Congress may abrogate Eleventh Amendment immunity only under Section 5 of the Fourteenth Amendment,<sup>28</sup> the Court cited one hundred years of case law affirming *Hans*.<sup>29</sup> Moreover, the Court explicitly reaffirmed its atextual Eleventh Amendment interpretation by stating “blind reliance upon the text of the Eleventh Amendment is ‘to strain the Constitution and the law to a construction never imagined or dreamed of.’”<sup>30</sup> In holding that Congress may not abrogate sovereign immunity in state courts under Article I, the Court in *Alden v. Maine*<sup>31</sup> cited *Hans* to again emphasize its rejection of a strict adherence to the Eleventh Amendment’s text.<sup>32</sup> Therefore, despite over one hundred years of subsequent case law, *Hans* remains the touchstone of any Eleventh Amendment analysis and the source of the Eleventh Amendment’s constitutional bar to federal jurisdiction.<sup>33</sup>

*B. An Overview of Lapides v. Board of Regents of the University System of Georgia*

Kennesaw State University Professor Paul Lapides sued the University Board of Regents in Georgia state court for damages arising from sexual harassment accusations.<sup>34</sup> Georgia’s Attorney General removed the case to federal district court and claimed Eleventh Amendment immunity.<sup>35</sup> The district court held that Georgia waived Eleventh Amendment immunity by removing the case to federal court.<sup>36</sup> On interlocutory appeal,<sup>37</sup> the Court of Appeals for

---

27. 517 U.S. 44 (1996).

28. *Id.* at 72-73.

29. *Id.* at 54 n.7 (collecting cases).

30. *Id.* at 69 (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)).

31. 527 U.S. 706, 712 (1999).

32. *See id.* at 728-29 (stating that the Court’s Eleventh Amendment case law subsequent to its decision in *Hans* demonstrates that the doctrine of state sovereign immunity rests not only upon the Eleventh Amendment but also upon extra-Constitutional principles of sovereign immunity).

33. *See Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 01-298, 2002 U.S. LEXIS 3220, at \*10 (U.S. May 13, 2002) (citing the text of the Eleventh Amendment as interpreted by *Hans* as defining the scope of state sovereign immunity); *Seminole Tribe*, 517 U.S. at 64-65, 69-70 (stating the decisions since *Hans* have consistently affirmed that the Eleventh Amendment limits federal jurisdiction through the incorporation of the principle of state sovereign immunity); *see also* sources cited *supra* note 26.

34. *See Lapides*, 2002 U.S. LEXIS 3220, at \*6-7 (suing under Georgia state tort law and Section 1983).

35. *Id.* at \*7; *see also* 28 U.S.C. § 1441(a) (2002) (authorizing the removal of cases from state to federal court).

36. *Lapides*, 2002 U.S. LEXIS 3220, at \*7. The U.S. District Court’s opinion is unreported.

37. *See generally* *R.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 141 (1993) (holding a denial of Eleventh Amendment immunity may be immediately

the Eleventh Circuit reversed, holding that, absent explicit statutory or constitutional waiver authorization, removal to federal court does not constitute waiver of Eleventh Amendment immunity.<sup>38</sup> In dicta, the Eleventh Circuit acknowledged that its holding allows a state to invoke federal jurisdiction and yet “simultaneously argu[e] with equal force” that the Eleventh Amendment bars federal jurisdiction.<sup>39</sup> This “seemingly inconsistent position”<sup>40</sup> prompted the Eleventh Circuit to note Justice Kennedy’s concurrence in *Wisconsin Department of Corrections v. Schacht*.<sup>41</sup> There, Justice Kennedy theorized that a waiver-by-removal rule would place states on notice that officials authorized to represent the state could waive immunity and thereby render the requirement of explicit authorization to remove irrelevant.<sup>42</sup> The Eleventh Circuit declined to adopt Justice Kennedy’s reasoning.<sup>43</sup> However, the Supreme Court, in a unanimous decision, reversed the Eleventh Circuit, and held that removal from state to federal court waives Eleventh Amendment immunity.<sup>44</sup>

## II. ANALYSIS: UNDERSTANDING THE TWISTS

### A. Eleventh Amendment Waiver Jurisprudence

The Supreme Court has consistently held that Eleventh Amendment sovereign immunity is not absolute.<sup>45</sup> The Court’s

---

appealed).

38. *Lapides*, 2002 U.S. LEXIS 3220, at \*8; see also *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 251 F.3d 1372, 1374-77 (11th Cir. 2001) (finding that the attorney general lacks any explicit constitutional or statutory authorization to waive Eleventh Amendment immunity) (citing *Ford Motor Co. v. Dep’t of Treasury*, 323 U.S. 459, 467-69 (1945)), *rev’d*, No. 01-298, 2002 U.S. LEXIS 3220, at \*1 (U.S. May 13, 2002).

39. *Lapides*, 251 F.3d at 1377; see also *Calderon v. Ashums*, 523 U.S. 740, 645 n.2 (1998) (noting that Eleventh Amendment immunity may be asserted for the first time on appeal after the State has defended on the merits). See generally discussion *infra* Part II.C.

40. *Lapides*, 251 F.3d at 1377.

41. 524 U.S. 381 (1998) (Kennedy, J., concurring).

42. See *id.* at 393-98 (Kennedy, J., concurring) (noting the “hybrid nature” of Eleventh Amendment immunity, which shares both characteristics of personal and subject matter jurisdiction, creates an inconsistency that unfairly allows states to claim immunity after litigating on the merits). The holding in *Schacht* states that the presence of Eleventh Amendment barred claims “does not destroy removal jurisdiction.” *Id.* at 386; see also discussion *infra* Part II.

43. *Lapides*, 251 F.3d at 1377 (noting that the court is bound only by the majority’s opinion in *Schacht*). But see, e.g., *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1233-36 (10th Cir. 1999) (emphasizing the state’s affirmative conduct in removing to federal court in holding that removal constitutes waiver of Eleventh Amendment immunity).

44. *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 01-298, 2002 U.S. LEXIS 3220, at \*20-21 (U.S. May 13, 2002).

45. See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) (stating that a state must expressly agree to be sued in “federal court” in order for there to be a

current jurisprudence recognizes two circumstances in which a state loses Eleventh Amendment immunity.<sup>46</sup> First, Congress may override immunity pursuant to Section 5 of the Fourteenth Amendment.<sup>47</sup> Second, a state may waive immunity by consenting to be sued in federal court.<sup>48</sup> Although the Court once recognized the doctrine of constructive waiver,<sup>49</sup> the Court presently only finds waiver when a state statutorily or constitutionally expresses “unequivocally that it waives its immunity . . . .”<sup>50</sup>

Embedded within this waiver jurisprudence are two further elements relevant to the Supreme Court’s analysis in *Lapides*. First, in *Ford Motor Co. v. Department of Treasury of Indiana*,<sup>51</sup> the Supreme Court held that the power to waive Eleventh Amendment immunity will not be imputed to state officers in individual cases against a state without “clear [statutory] language to the contrary.”<sup>52</sup> Second, a state waives

---

waiver of Eleventh Amendment immunity); *Clark v. Barnard*, 108 U.S. 436, 447 (1883) (noting that the Constitution implicitly recognizes a state’s sovereign immunity, which a state “may waive at pleasure”).

46. See generally *TRIBE*, *supra* note 10, § 3.26 (surveying the Court’s abrogation and waiver jurisprudence). The Eleventh Circuit’s decision in *Lapides* rested on an analysis of the Supreme Court’s Eleventh Amendment waiver jurisprudence. See *Lapides*, 251 F.3d at 1374-76 (noting that the test to determine whether a state has waived Eleventh Amendment immunity “is a stringent one” that requires clear explicit language or intent to effectuate) (citing *Atascadero State Hosp.*, 473 U.S. at 241; *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). “[A] waiver of Eleventh Amendment Immunity by state officials must be explicitly authorized by the state . . . .” *Id.* at 1367.

47. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (reasoning that because the Fourteenth Amendment embodies “limitations on state authority” and was drafted specifically to alter the state-federal balance, Congress possesses the authority under Section 5 to abrogate Eleventh Amendment immunity); see also *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) (holding that Congress may not abrogate Eleventh Amendment immunity under Article I). See generally *CHEMERINSKY*, *supra* note 5, § 7.7 (discussing the Supreme Court’s congressional abrogation case law and noting that the point of analysis following *Seminole Tribe* is determining whether Congress enacted a given statute under Section 5 of the Fourteenth Amendment).

48. See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999) (stating Eleventh Amendment immunity may be waived); *Wisconsin Dep’t of Corr. v. Schacht*, 524 U.S. 381, 389 (1998) (same).

49. See, e.g., *Pardeen v. Terminal Ry.*, 377 U.S. 184, 190-96 (1964) (holding that despite the state’s denial of federal court jurisdiction, the state nonetheless constructively waived immunity by operating an interstate railroad following the enactment of a federal statute that authorized suits against states in federal court), *overruled by Coll. Sav. Bank*, 527 U.S. at 680 (“We think that the constructive-waiver experiment of *Pardeen* was ill-conceived, and . . . [w]hatever may remain of our decision in *Pardeen* is expressly overruled.”).

50. *Coll. Sav. Bank*, 527 U.S. at 680.

51. 323 U.S. 459 (1945).

52. See *id.* at 468 (holding that a statute granting the state’s attorney general the power to defend suits against the state cannot also be construed to empower the attorney general with the authority to waive immunity on behalf of a non-consenting state). The Supreme Court granted certiorari to decide whether the Seventh Circuit incorrectly applied Indiana state law. However, due to Eleventh Amendment immunity, the Court never reached the merits of the case. *Id.* at 462.

immunity by voluntarily invoking federal jurisdiction.<sup>53</sup> Relying on *Ford Motor Co.*, the Eleventh Circuit determined that neither Georgia's constitution nor relevant Georgia statutes contained sufficiently clear language authorizing Georgia's Attorney General to waive the state's sovereign immunity.<sup>54</sup>

*B. The Lapidès Decision: Voluntary Removal Constitutes Waiver of Eleventh Amendment Immunity*

The Supreme Court disagreed with the Eleventh Circuit's analysis, finding that its reliance on *Ford Motor Co.* was misplaced. Unlike the defendant state in *Ford Motor Co.*, Georgia, faced with a suit in its own courts in *Lapides*, affirmatively chose a federal forum<sup>55</sup> by its voluntary removal to federal district court.<sup>56</sup> Under the removal statute and relevant case law, removal requires both that the federal district court have original jurisdiction over the case,<sup>57</sup> and that all the defendants must consent to removal.<sup>58</sup> Moreover, once the removal petition is filed, the state court ceases to exercise jurisdiction.<sup>59</sup> In *Lapides*, the federal district court exercised jurisdiction based on the federal

---

53. *Coll. Sav. Bank*, 527 U.S. at 675; *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284-85 (1906); *Clark v. Barnard*, 108 U.S. 436, 447 (1883).

54. *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 251 F.3d 1372, 1375 (11th Cir. 2001), *rev'd*, No. 01-298, 2002 U.S. LEXIS 3220, at \*1 (U.S. May 13, 2002). However, the court did note that the state attorney general was authorized to "represent the state in all civil actions tried in any court." *Id.* (citing GA. CODE ANN. § 45-15-3(6) (2001)). In dicta, the Eleventh Circuit reasoned that removal does not invoke federal jurisdiction because the state did not "initiate [the] cause of action." *Id.* at 1378.

55. *Compare Ford Motor Co. v. Dep't of Treasury*, 141 F.2d 24, 24 (1944), *vacated*, *Ford Motor Co.*, 323 U.S. at 470 ("The plaintiff . . . brought suit in the District Court . . ."), *with Lapides*, 251 F.3d at 1373 ("Lapides sued . . . in the Superior Court Cobb County, Georgia . . .").

56. *Lapides*, 251 F.3d at 1373. *See generally* 28 U.S.C. § 1446 (2002) (stating the procedure for removal); CHEMERINSKY, *supra* note 5, § 5.5 (summarizing federal court removal jurisdiction).

57. 28 U.S.C. § 1441(a) (2002) (stating that "any civil action brought in State Court of which the district courts of the United States have original jurisdiction, may be removed . . ."). Original jurisdiction in the federal courts may be based on either federal-question jurisdiction, *id.* § 1331, or diversity jurisdiction, *id.* § 1332. The removal statute does not create an independent basis for federal jurisdiction. *See Rivet v. Regions Bank*, 522 U.S. 470, 474-75 (1998) (quoting 28 U.S.C. § 1441(a) to state that cases may be removed from state court only when the case could have been originally filed in federal court).

58. *See, e.g., Chi. Rock Island & Pac. Ry. v. Martin*, 178 U.S. 245, 248 (1900) (stating axiomatically that "it was well settled that a removal could not be effected unless all the parties on the same side of the controversy united in the petition"); *see also Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring) (stating simply that "[r]emoval requires the consent of all of the defendants").

59. 28 U.S.C. § 1446(d) (2002) (stating that after the defendant notifies all relevant parties and the state court, "the State court shall proceed no further unless and until the case is remanded.").

question present in the section 1983 claims,<sup>60</sup> and Georgia filed the removal petition on behalf of all the consenting defendants.<sup>61</sup>

In *Ford Motor Co.*, the central presumption was that the defendant state did not explicitly consent to federal jurisdiction.<sup>62</sup> Accordingly, the Supreme Court in *Ford Motor Co.* required explicit state authorization permitting state officers to waive immunity before rebutting the presumption that the state did not consent to “federal judicial power.”<sup>63</sup> Given that Georgia voluntarily removed to federal court in *Lapides*, the Eleventh Circuit could not properly presume that Georgia refused to consent to federal court jurisdiction.<sup>64</sup> Without the benefit of *Ford Motor Co.*’s central presumption, the Eleventh Circuit’s reliance on *Ford Motor Co.*’s requirement of explicit authorization emerged as misplaced.<sup>65</sup> Consequently, the Georgia Attorney General’s lack of explicit waiver authority became irrelevant when weighed against Georgia’s voluntary consent to and invocation of federal jurisdiction through its removing to federal district court.<sup>66</sup> This voluntary consent constituted waiver of Eleventh Amendment immunity.<sup>67</sup>

However, as the Eleventh Circuit correctly noted, Eleventh Amendment immunity may be asserted for the first time on appeal,<sup>68</sup> which allows states to litigate on the merits and to subsequently have adverse judgments vacated through assertion of Eleventh

---

60. *But see* *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 01-298, 2002 U.S. LEXIS 3220, at \*8-9 (U.S. May 13, 2002) (noting that because states are not “persons” under § 1983 claims, no federal question existed, yet finding the question in *Lapides* was not moot due to the state-law tort claims pending in federal district court). *See generally* CHEMERINSKY, *supra* note 5, § 5.1 (stating that the two most important elements of federal subject matter jurisdiction are federal question jurisdiction and diversity jurisdiction).

61. *Lapides*, 251 F.3d at 1373.

62. *See* *Ford Motor Co. v. Dep’t of Treasury*, 323 U.S. 459, 464 (1945) (noting that whether Indiana consented to be sued had yet to be decided). Although Indiana belatedly asserted immunity, the Supreme Court deemed the Eleventh Amendment’s “explicit limitation on federal judicial power” sufficiently compelling to permit immunity to be raised on appeal. *Id.* at 467.

63. *Id.* at 467-68.

64. *Supra* notes 55-61 and accompanying text.

65. *Lapides*, 2002 U.S. LEXIS 3220, at \*16-19.

66. *See, e.g.*, *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 675-76 (1999) (declaring Eleventh Amendment immunity will be waived “if the State voluntarily invokes [federal court] jurisdiction”).

67. *See Lapides*, 2002 U.S. LEXIS 3220, at \*20-21; *supra* notes 48, 50-53 and accompanying text.

68. *See Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 251 F.3d 1372, 1378 (11th Cir. 2001) (noting that “previous cases have held that the Eleventh Amendment immunity may be asserted at any point in a case”), *rev’d*, No. 01-298, 2002 U.S. LEXIS 3220, at \*1 (U.S. May 13, 2002); *see also* *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974) (citing *Ford Motor Co.* and noting that Eleventh Amendment immunity need not be raised at trial in order to preserve the defense on appeal).

Amendment immunity on appeal.<sup>69</sup> This inequitable situation arises from one of the inconsistent jurisprudential twists within the Supreme Court's Eleventh Amendment Gordian knot and represents the source of the issue presented in *Lapides*.

C. *Resting between Subject Matter and Personal Jurisdiction*

To properly adjudicate a case, the federal courts must exercise both subject matter jurisdiction over the dispute and personal jurisdiction over the parties.<sup>70</sup> Subject matter jurisdiction limits the types of cases the federal courts may hear<sup>71</sup> and cannot be consented to or waived.<sup>72</sup> In contrast, personal jurisdiction restricts the power of the federal courts over parties and can be consented to or waived.<sup>73</sup>

The split nature of the Eleventh Amendment jurisdictional restrictions represents the unstable foundation upon which the waiver-by-removal rule set forth in *Lapides* rests.<sup>74</sup> The Supreme Court interprets the Eleventh Amendment as embodying the doctrine of sovereign immunity, which restricts federal subject matter jurisdiction by prohibiting suits in federal court against non-consenting states.<sup>75</sup> Underscoring the assumption that Eleventh Amendment immunity rests on subject matter jurisdiction,<sup>76</sup> the Court allows an immunity

---

69. See, e.g., *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring) (outlining the "hybrid nature" of the Eleventh Amendment that allows a state "to proceed to judgment without facing any real risk of adverse consequences"); Oliver B. Rutherford, Note, *Don't Waive the White Flag Just Yet: Justice Kennedy's Concurring Opinion in Wisconsin Department of Corrections v. Schacht Breathes Life into Eleventh Amendment Waiver*, 38 BRANDEIS L.J. 581, 594-95 (2000) (noting that the current Eleventh Amendment jurisdictional bar potentially places plaintiffs in a "no-win situation" because if the state loses at trial, the state may assert immunity on appeal or if the state wins at trial, the state benefits from *res judicata*).

70. See *Ins. Corp. of Ireland v. Compagnie des Bauxities de Guinee*, 456 U.S. 694, 701 (1982) (stating that "[t]he validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties").

71. See generally CHEMERINSKY, *supra* note 5, § 5.1 (outlining the basic elements of subject matter jurisdiction). Those basic elements are: (1) federal courts must have constitutional and statutory authority to hear the case; (2) parties seeking federal court jurisdiction must demonstrate the existence of that jurisdiction; (3) consent does not create jurisdiction; (4) federal courts may raise, *sua sponte*, jurisdictional defects; (5) state courts possess concurrent jurisdiction; and (6) dismissal destroys subject matter jurisdiction. *Id.*

72. See *Ins. Corp. of Ireland*, 456 U.S. at 702 (noting that "a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings").

73. See *id.* at 703 (noting that an individual may submit to or waive personal jurisdiction).

74. See, e.g., *supra* note 69 and accompanying text.

75. See discussion *supra* Part I.A (reviewing Eleventh Amendment jurisprudence); see also *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) ("[W]e reconfirm the background principle of state sovereign immunity embodied in the Eleventh Amendment . . .").

76. See generally *Ins. Corp. of Ireland*, 456 U.S. at 702 (reviewing the basic tenants of federal subject matter jurisdiction, which is derived from Article III and federal

claim to be raised at any point in the proceedings.<sup>77</sup>

However, by permitting Eleventh Amendment immunity to be waived,<sup>78</sup> the Court undermines this assumption—and treads into personal jurisdiction jurisprudence—because waiver or party consent cannot create subject matter jurisdiction.<sup>79</sup> Furthermore, federal courts are not required to raise Eleventh Amendment jurisdictional defects *sua sponte*,<sup>80</sup> contrary to normal subject matter jurisdiction requirements.<sup>81</sup> Those characteristics, instead, comport with the federal court's personal jurisdiction requirements,<sup>82</sup> which parties may waive or be estopped from challenging.<sup>83</sup>

The decision in *Lapides* rests upon the principle that a state waives Eleventh Amendment immunity when the state voluntarily invokes federal court jurisdiction.<sup>84</sup> The Court held a state's removal to federal court is voluntary,<sup>85</sup> and to hold contrary would permit states to unfairly invoke while simultaneously arguing against federal jurisdiction.<sup>86</sup> Accordingly, while the holding in *Lapides* did not depend on resolving the inconsistent nature of the Eleventh Amendment's jurisdictional bar, the Court's unwillingness to clarify

---

statutes).

77. *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 467 (1945).

78. *See supra* notes 46-55 and accompanying text (providing brief summary of Eleventh Amendment waiver jurisprudence).

79. *See Ins. Corp. of Ireland*, 456 U.S. at 702 (“[N]o action of the parties can confer subject-matter jurisdiction upon a federal court . . . the consent of the parties is irrelevant . . . and a party does not waive [subject matter jurisdiction] by failing to challenge jurisdiction early in the proceeding.”).

80. *See Patsy v. Bd. of Regents*, 457 U.S. 496, 516 n.19 (1982) (stating federal courts are not required to raise Eleventh Amendment immunity defects); *see also* *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring) (citing *Patsy* for proposition). *But see, e.g.*, Michelle Lawner, Comment, *Why Federal Courts Should be Required to Consider State Sovereign Immunity Sua Sponte*, 66 U. CHI. L. REV. 1261 (1999) (arguing that federal courts should be required to raise Eleventh Amendment immunity jurisdictional defects *sua sponte* to prevent states from gaining unfair advantage).

81. *See Ins. Corp. of Ireland*, 456 U.S. at 702 (stating that federal trial and appellate courts must “raise lack of subject-matter jurisdiction on its own motion”).

82. *See generally id.* at 702-03 (reviewing the basic principles of personal jurisdiction, which are derived from the Due Process Clause).

83. *See id.* at 704-05 (stating the requirements of personal jurisdiction may be explicitly waived by the defendant or the defendant's conduct may be deemed to have implicitly submitted to federal court jurisdiction thereby creating personal jurisdiction).

84. *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 01-298, 2002 U.S. LEXIS 3220, at \*11-13 (U.S. May 13, 2002) (emphasizing the manifest inequity that would arise if a state's voluntary invocation of federal jurisdiction were deemed insufficient to waive state sovereign immunity).

85. *See id.* at \*14-16 (noting a state's altruistic motives cannot be evaluated in determining whether removal was voluntary).

86. *See id.* at \*18 (stating the drafters of the Eleventh Amendment and the states themselves—to the extent of their consent to federal jurisdiction—cannot be assumed to have purposefully created unfairness in the federal courts).

this inconsistency undermines the precedential value of *Lapides* within the Supreme Court's Eleventh Amendment jurisprudence.

### III. RESOLUTION: SHARPENING THE SWORD

Justice Kennedy, who attributed this inconsistency to the "hybrid nature" of the Eleventh Amendment's "jurisdictional bar," offered a possible resolution to this "knot" in a prior concurring opinion.<sup>87</sup> In *Schacht*, Justice Kennedy suggested simply conforming Eleventh Amendment waiver jurisprudence to personal jurisdiction requirements.<sup>88</sup> Thus, once a state voluntarily appeared in federal court, the state would be estopped from later asserting Eleventh Amendment immunity.<sup>89</sup>

The Court has obliquely signaled that such a proposed resolution would square with the Court's current Eleventh Amendment jurisprudence by refusing to recognize the Eleventh Amendment as a "nonwaivable limit on the federal judiciary's subject-matter jurisdiction."<sup>90</sup> The adoption of this proposed modification would have clarified the jurisdictional nature of the Eleventh Amendment and tied the Eleventh Amendment's waiver jurisprudence to the Court's well developed personal jurisdiction jurisprudence.<sup>91</sup> This importation of the Court's personal jurisdiction jurisprudence would have provided a body of sufficiently analogous waiver principles that lower courts and parties could have relied upon when litigating matters implicating Eleventh Amendment immunity. However, the Court in *Lapides* declined to adopt Justice Kennedy's proposed modification to Eleventh Amendment waiver jurisprudence.<sup>92</sup>

---

87. *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 394-95 (1998) (Kennedy, J., concurring). Justice Kennedy indicated that when a state appeared in federal court absent compulsion, he would likely find waiver of immunity. *Id.* at 395-98.

88. *See id.* at 395 (stating that "the Court could eliminate unfairness by modifying . . . Eleventh Amendment jurisprudence to make it more consistent with [the Court's] practice regarding personal jurisdiction").

89. *See Ins. Corp. of Ireland v. Compagnie des Bauxities de Guinee*, 456 U.S. 694, 704-05 (1982) (noting that certain conduct in court constitutes "legal submission" to jurisdiction, despite the party's intentions to the contrary).

90. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267 (1997); *see also Schacht*, 524 U.S. at 391-92 (noting that the Court has not yet determined whether Eleventh Amendment immunity is to be construed as a "matter of subject matter jurisdiction").

91. *Supra* notes 70-83 and accompanying text.

92. *Compare Schacht*, 524 U.S. at 393-98 (Kennedy, J., concurring) (suggesting a waiver-by-removal rule could rectify the unfairness afforded states by the Eleventh Amendment by anchoring a waiver-by-removal rule to the Court's personal jurisdiction jurisprudence), *with Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 01-298, 2002 U.S. LEXIS 3220, at \*15-16, \*18-19 (U.S. May 13, 2002) (citing Justice Kennedy's concurrence in *Schacht* but declining to discuss Justice Kennedy's suggestion to modify the Eleventh Amendment to track personal jurisdiction).

## CONCLUSION

Permitting a state to invoke federal jurisdiction to remove a case to federal court while simultaneously asserting the federal court lacks jurisdiction afforded states an unfair advantage in federal courts. By holding that a state that removes to federal court explicitly waives Eleventh Amendment immunity, the Supreme Court rectified that inequity. However, by declining to tie a waiver-by-removal rule to the restrictions of personal jurisdiction, the Court left a knot that would have baffled even Alexander.