

Casenote

***Lapides*: Striking a Balance Between State Sovereignty and Fairness to Individual Litigants?**

In *Lapides v. Board of Regents of the University System of Georgia*,¹ the United States Supreme Court held that a state waives its Eleventh Amendment immunity by consenting to removal of the case to federal court, but only for state law claims to which the state had explicitly waived its immunity from state court proceedings.² This decision was quite unexpected in the wake of recent Supreme Court decisions supporting federalism and reinvigorating the doctrine of sovereign immunity.

I. FACTUAL BACKGROUND

Paul Lapides is a tenured professor and the Director of the Corporate Governance Center at Kennesaw State University (“KSU”), which is part of the State University System of Georgia. After a student accused Lapides of sexual harassment, the university conducted an investigation. The investigation produced no evidence to support the accusation, so no action was taken against Lapides. University officials, however,

1. 535 U.S. 613 (2002).

2. *Id.* at 624.

allegedly placed letters about the accusations in Lapidés's personnel file. Lapidés felt these letters interfered with his chances for promotion to other university positions.³

Lapidés filed suit in the Superior Court of Cobb County, Georgia, naming the Board of Regents of the University System of Georgia ("Georgia" or "State") and three KSU administrators as defendants. The lawsuit alleged that the actions of the KSU officials deprived Lapidés of his right to due process of the law in violation of the Fourteenth Amendment. Lapidés sought compensatory and punitive damages under the Georgia Tort Claims Act⁴ and 42 U.S.C. § 1983.⁵ On behalf of all defendants, the Georgia Attorney General filed a Notice of Removal in the United States District Court for the Northern District of Georgia based on federal question jurisdiction over the § 1983 claims.⁶ At the same time, Georgia filed a motion to dismiss the complaint in federal court under Federal Rule of Civil Procedure 12(b)(6).⁷ The individual defendants claimed that "qualified immunity" barred the § 1983 claims against them. Georgia conceded that a state statute waived its sovereign immunity from suits under state law in state court, but claimed that it was immune from suit in federal court pursuant to the Eleventh Amendment.⁸

The district court denied the state's motion to dismiss, holding that the state had waived its Eleventh Amendment immunity by removing the case to federal court. The court found that removal to federal court by a state official was litigation conduct constituting a valid waiver, regardless of whether the state official had the constitutional or statutory authority to waive Eleventh Amendment immunity.⁹ Georgia

3. *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 251 F.3d 1372, 1373 (11th Cir. 2001).

4. O.C.G.A. § 50-21-23 (1998).

5. 42 U.S.C. § 1983 (2000). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law

Id.

6. *See* 28 U.S.C. § 1441 (2000).

7. *Lapides*, 251 F.3d at 1373. A motion to dismiss based on Federal Rule of Civil Procedure 12(b)(6) asserts that the action should be dismissed for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).

8. 535 U.S. at 616.

9. Brief for Petitioner at 5, *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002).

filed an interlocutory appeal from the Eleventh Amendment ruling.¹⁰ The United States Court of Appeals for the Eleventh Circuit reversed, holding that Georgia retained its Eleventh Amendment immunity even after the case was removed to federal court.¹¹ The court based its holding on the conclusion that the attorney general did not have the legal authority to waive the state's immunity.¹²

The United States Supreme Court granted Lapides's petition for certiorari "to decide whether 'a state waives its Eleventh Amendment immunity by its affirmative litigation conduct when it removes a case to federal court.'"¹³ The Court first held that there was no valid federal claim against the state because Lapides's § 1983 claim sought monetary damages and the state is not a "person" from whom money damages can be collected.¹⁴ Therefore, the Court limited its discussion to the state law claims for which the state had waived its immunity from state court suits.¹⁵ In a unanimous decision reversing the ruling of the Eleventh Circuit, the Supreme Court held that a state's removal of a case to federal court is a voluntary invocation of federal jurisdiction sufficient to waive the state's Eleventh Amendment immunity.¹⁶

II. LEGAL BACKGROUND

The Eleventh Amendment provides, "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."¹⁷ Congress passed this amendment to overrule the Supreme Court's decision in *Chisholm v. Georgia*,¹⁸ in which the Court held that sovereign immunity did not protect Georgia in a suit brought by a South Carolina resident.¹⁹ This decision created "such a shock of surprise throughout the country that [Congress] . . . almost unanimously proposed" the Eleventh Amendment.²⁰

Since its inception, courts have expanded the principle of state sovereign immunity and interpreted the Eleventh Amendment as a limit

10. *Id.* at 6.

11. 251 F.3d at 1378.

12. *Id.* at 1375.

13. 535 U.S. at 617 (quoting Pet. for Cert. (i)).

14. *Id.* (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989)).

15. *Id.*

16. *Id.* at 622.

17. U.S. CONST. amend. XI.

18. 2 U.S. (2 Dall.) 419 (1793).

19. *Id.* at 425.

20. *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

on federal jurisdiction under Article III. In *Hans v. Louisiana*,²¹ the Supreme Court held that states were immune from suits brought by their citizens,²² even though the Eleventh Amendment only expressly prohibits suits against a state “commenced . . . by Citizens of another State, or by Citizens or Subjects of any Foreign State.”²³

A. *Congressional Abrogation of Immunity under the Fourteenth Amendment*

Recent Eleventh Amendment jurisprudence has focused on the congressional abrogation exception to the Eleventh Amendment’s prohibition of federal court suits against states: Congress may authorize suits against states pursuant to its power to enforce the Fourteenth Amendment.²⁴ The Supreme Court first applied this exception in *Fitzpatrick v. Bitzer*²⁵ in 1976.²⁶ There, state employees sued the state for violation of Title VII of the Civil Rights Act of 1964.²⁷ Congress enacted Title VII pursuant to its power under Section 5 of the Fourteenth Amendment.²⁸ The Court relied on *Ex parte Virginia*²⁹ for the rule that congressional enforcement of the Fourteenth Amendment pursuant to Section 5 is “no invasion of State sovereignty.”³⁰ Therefore, Congress has the authority to require states to be amenable to suit for violations of Title VII.³¹

In 1999 the Court in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*³² reaffirmed Congress’s authority to abrogate state sovereign immunity pursuant to its Section

21. 134 U.S. 1 (1890).

22. *Id.* at 20.

23. U.S. CONST. amend. XI.

24. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999).

25. 427 U.S. 445 (1976).

26. *Id.* at 456.

27. *Id.* at 447. Title VII makes it unlawful for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2000). The 1972 Amendments to Title VII made this provision applicable to public employers. 427 U.S. at 449.

28. *Id.* at 447. Section 5 of the Fourteenth Amendment provides: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5.

29. 100 U.S. 339 (1880).

30. 427 U.S. at 454 (quoting *Ex parte Virginia*, 100 U.S. at 346).

31. *Id.* at 456.

32. 527 U.S. 666 (1999).

5 power to enforce the Fourteenth Amendment.³³ College Savings Bank argued that Florida's sovereign immunity was abrogated because Congress enacted the Trademark Remedy Clarification Act to allow suits against states under the Lanham Act and to remedy "state deprivations without due process of two species of 'property' rights: (1) a right to be free from a business competitor's false advertising about its own product, and (2) a more generalized right to be secure in one's business interests."³⁴ Finding that neither right qualified as a property right protected by the Due Process Clause,³⁵ the Court held that Florida's sovereign immunity was not abrogated.³⁶

The next year, in *Kimel v. Florida Board of Regents*,³⁷ the Supreme Court granted certiorari to resolve the conflict among the lower courts over whether the Age Discrimination in Employment Act³⁸ ("ADEA") abrogates state Eleventh Amendment immunity.³⁹ The Court first held that the language of the ADEA expressed Congress's unequivocal intent to abrogate state immunity by clearly providing for suits against states.⁴⁰ The Court, however, held that "the ADEA is not a valid exercise of Congress[s] power under [Section] 5 of the Fourteenth Amendment" because the ADEA prohibits substantially more conduct than would likely be deemed unconstitutional and because Congress provided no evidence of widespread and unconstitutional age discrimination by states.⁴¹ Therefore, because only Congress's Article I commerce power validated the ADEA, a divided Court concluded that the ADEA does not abrogate state sovereign immunity.⁴²

In 2001 the Court in *Board of Trustees of the University of Alabama v. Garrett*⁴³ addressed an issue very similar to the issue in *Kimel*: whether Title I of the Americans with Disabilities Act⁴⁴ ("ADA") abrogates state sovereign immunity for federal court suits brought by

33. *Id.* at 670.

34. *Id.* at 672.

35. *Id.*

36. *Id.* at 675.

37. 528 U.S. 62 (2000).

38. 29 U.S.C. §§ 621-634 (2000).

39. 528 U.S. at 66-67.

40. *Id.* at 73. Section 216(b) of the Age Discrimination in Employment Act ("ADEA") "permits an individual to bring a civil action 'against any employer (including a public agency) in any Federal or State court of competent jurisdiction.'" *Id.* at 68 (quoting Age Discrimination in Employment Act, 29 U.S.C. § 216(b) (2000)).

41. *Id.* at 91. To determine if an act of Congress is valid under Section 5 of the Fourteenth Amendment, courts apply the "congruence and proportionality" test. *Id.* at 81.

42. *Id.* at 91.

43. 531 U.S. 356 (2001).

44. Americans with Disabilities Act, Title I, 42 U.S.C. §§ 12,111-12,117 (2000).

individuals for money damages.⁴⁵ Like in *Kimel*, a divided Court held that although the language of the statute clearly expressed congressional intent to abrogate state sovereign immunity, such purported abrogation was invalid because Title I of the ADA is not appropriate Section 5 legislation.⁴⁶

B. Waiver of Immunity by State Consent

1. Litigation Conduct. Early in Eleventh Amendment jurisprudence, the Supreme Court held that a state's immunity from suit "is a personal privilege which [the state] may waive at pleasure."⁴⁷ The first cases finding waiver of state sovereign immunity involved the voluntary intervention of the state in a suit. In *Clark v. Barnard*,⁴⁸ Rhode Island voluntarily appeared as an intervenor in a bill in equity to claim money owed on a construction bond.⁴⁹ The Court held that by presenting a claim against the fund in federal court, the state "made itself a party to the litigation to the full extent required for its complete determination" and thereby waived its Eleventh Amendment immunity.⁵⁰

In *Gunter v. Atlantic Coast Line Railroad*,⁵¹ the Court relied on its reasoning from *Clark* to hold that "where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment."⁵² In *Gunter*, suit was brought against county officials to enjoin the collection of taxes. Pursuant to a state statute, the county officials were required to defend the suit to protect the interests of the state.⁵³ The Court held that the attorney general's appearance to defend the right of the state to collect taxes was a voluntary appearance "for and in behalf of the State" that waived the state's Eleventh Amendment immunity.⁵⁴

Nearly forty years later, the Supreme Court departed from its reasoning in *Clark* and *Gunter*.⁵⁵ In *Ford Motor Co. v. Department of*

45. 531 U.S. at 363.

46. *Id.* at 374.

47. *Clark v. Barnard*, 108 U.S. 436, 447 (1883).

48. 108 U.S. 436 (1883).

49. *Id.* at 445.

50. *Id.* at 448.

51. 200 U.S. 273 (1906).

52. *Id.* at 284 (citing *Clark*, 108 U.S. at 447).

53. *Id.* at 285.

54. *Id.* at 288.

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

Treasury,⁵⁶ Ford Motor Company sued the State of Indiana for a refund of improperly collected income taxes. Federal jurisdiction was based on allegations of violations of federal law. The State won on the merits in district court and then raised Eleventh Amendment immunity as a defense before the Supreme Court.⁵⁷ The Supreme Court held that it was permissible for a state to raise Eleventh Amendment immunity for the first time on appeal because of the Amendment's "explicit limitation on federal judicial power."⁵⁸ Another issue for the Supreme Court was whether the attorney general waived the state's immunity by defending the suit on its merits.⁵⁹ The Court emphasized that immunity could only be waived if the attorney general was authorized by state law to consent to suit on behalf of the state.⁶⁰ The Court interpreted Article IV, section 24 of the Indiana Constitution to mean that the state legislature can waive sovereign immunity only by general law.⁶¹ The Court reasoned that "it is not to be presumed in the absence of clear language to the contrary, that [the legislature] conferred on administrative or executive officers discretionary power to grant or withhold consent in individual cases."⁶² Furthermore, the general powers of the attorney general to defend suits against the State did not authorize the attorney general to waive sovereign immunity.⁶³

Soon after *Ford*, the Supreme Court reaffirmed the reasoning from *Clark and Gunter*.⁶⁴ In *Gardner v. New Jersey*,⁶⁵ the state comptroller filed a proof of claim in bankruptcy court for unpaid taxes. After filing an objection to the state's claim, the trustee of the estate filed a petition for adjudication of the state's claims. The attorney general responded to the petition by claiming Eleventh Amendment sovereign immunity.⁶⁶

56. 323 U.S. 459 (1945).

57. *Id.* at 460.

58. *Id.* at 467. "The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." *Id.*

59. *Id.* at 464.

60. *Id.* at 467.

61. *Id.* at 468. Article 4, § 24 of the Indiana Constitution provides: "Provision may be made, by general law, for bringing suit against the State, as to all liabilities originating after the adoption of this Constitution; but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed." *Id.* at 467-68.

62. *Id.* at 468.

63. *Id.*

64. *See Gardner v. New Jersey*, 329 U.S. 565 (1947).

65. 329 U.S. 565 (1947).

66. *Id.* at 570-71.

Relying on the voluntariness principle from *Clark* and *Gunter*, the Court reasoned that “[w]hen the State becomes the actor and files a claim against the fund, it waives any immunity . . . respecting the adjudication of the claim.”⁶⁷ Therefore, New Jersey had waived its sovereign immunity by filing the proof of claim in bankruptcy court.⁶⁸

More recently, lower courts have considered the effect of removal on a state’s Eleventh Amendment immunity, but the circuit courts were split on the issue. In *Gwinn Area Community Schools v. Michigan*,⁶⁹ the Sixth Circuit held that the actions of the attorney general in removing the case to federal court did not constitute a waiver of the state’s sovereign immunity.⁷⁰ The court found no evidence of legislative intent to waive immunity in the state statute providing that the state board of education could be sued “in all the courts of [the] state.”⁷¹ Because no state statute evinced intent of the legislature to allow consent to suits in federal court, removal did not waive Michigan’s sovereign immunity.⁷²

Similarly, in *Silver v. Baggiano*,⁷³ the Eleventh Circuit held that Alabama did not waive its Eleventh Amendment immunity by removing the case to federal court.⁷⁴ The court relied on *Ford Motor Co.* for the rule that “a waiver of Eleventh Amendment immunity by state officials must be explicitly authorized by the state ‘in its Constitution, statutes and decisions.’”⁷⁵ Because neither the Commissioner of the Alabama Medicaid Agency nor the State Attorney General had the authority to waive the state’s immunity, removal did not constitute waiver.⁷⁶

In 1998 the Supreme Court touched on the issue of removal acting as a waiver of a state’s Eleventh Amendment immunity in *Wisconsin Department of Corrections v. Schacht*.⁷⁷ Without discussing whether removal waived the state’s sovereign immunity, the majority held that the presence of a claim barred by the Eleventh Amendment in a removed case does not destroy removal jurisdiction over the remaining claims.⁷⁸ However, in a concurring opinion, Justice Kennedy opined that it is

67. *Id.* at 574.

68. *Id.*

69. 741 F.2d 840 (6th Cir. 1984).

70. *Id.* at 847.

71. *Id.* at 846-47 (quoting MICH. COMP. LAWS ANN. § 388.1007 (West 1997)).

72. *Id.* at 847.

73. 804 F.2d 1211 (11th Cir. 1986).

74. *Id.* at 1215.

75. *Id.* at 1214 (quoting *Ford Motor Co.*, 323 U.S. at 467).

76. *Id.*

77. 524 U.S. 381 (1998).

78. *Id.* at 392.

unfair to allow a state to remove a case to federal court and then file an objection to the federal jurisdiction by claiming Eleventh Amendment immunity.⁷⁹ Such action by the state effectively allows the state to “proceed to judgment without facing any real risk of adverse consequences.”⁸⁰ When a state is involuntarily brought into a state court action, the state has the choice to remove the case to federal court. Therefore, any appearance in federal court should be regarded as “voluntary in the same manner as the appearances which gave rise to the waivers in *Clark* and *Gardner*.”⁸¹

Shortly after the decision in *Schacht*, the Tenth Circuit decided two cases involving removal and claims of Eleventh Amendment immunity.⁸² In *Sutton v. Utah State School for the Deaf & Blind*,⁸³ the court relied on Kennedy’s concurrence in *Schacht* and held that the state’s actions in making a general appearance, “join[ing] in the removal petition . . ., [and moving] to dismiss for failure to state a claim,” constituted waiver of the state’s immunity even though the state official did not have the express authority to consent to suit on behalf of the state.⁸⁴ The court reasoned that “an unequivocal intent to waive immunity seems clear when a state, facing suit in its own courts, purposefully seeks a federal forum.”⁸⁵ The next year, in *McLaughlin v. Board of Trustees*,⁸⁶ the Tenth Circuit found waiver by the state’s removal of the case to federal court, even though the attorney general was precluded from waiving the state’s immunity.⁸⁷

2. State Statutory Consent. In *Ford Motor Co.*, discussed earlier, Ford alleged that the Indiana Department of Treasury violated a state statute and argued that the statute waived Indiana’s sovereign immunity.⁸⁸ To determine whether the state had consented to suit in federal court, the Court looked to the statute, which authorized suit against the Department of Treasury with original jurisdiction in the

79. *Id.* at 393 (Kennedy, J., concurring).

80. *Id.* at 394. “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.” *Id.*

81. *Id.* at 396.

82. See *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226 (10th Cir. 1999); *McLaughlin v. Bd. of Tr. of State Coll. of Colo.*, 215 F.3d 1168 (10th Cir. 2000).

83. 173 F.3d 1226 (10th Cir. 1999).

84. *Id.* at 1234-35 (quoting *Gallagher v. Cont’l Ins. Co.*, 502 F.2d 827, 830 (10th Cir. 1974)).

85. *Id.* at 1234.

86. 215 F.3d 1168 (10th Cir. 2000).

87. *Id.* at 1171-72.

88. 323 U.S. at 461-62.

“superior court of the county in which the taxpayer resides.”⁸⁹ The Court held that this statute evinced no clear legislative intent to consent to federal court suits.⁹⁰

In 1985 the Supreme Court considered a similar issue in *Atascadero State Hospital v. Scanlon*.⁹¹ Relying on Article III, section 5 of the California Constitution,⁹² Scanlon argued that unless the state legislature imposes sovereign immunity, the state is subject to suit in state or federal court.⁹³ The Court held that “for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State’s intention to subject itself to suit in *federal court*.”⁹⁴ Finding that the language of the constitutional provision did not expressly indicate the state’s intent to waive immunity for suits in federal court, the Court held that California did not waive its Eleventh Amendment immunity.⁹⁵

3. Constructive Waiver. With its 5-4 decision in *Parden v. Terminal Railway of the Alabama State Docks Department*⁹⁶ in 1964, the Supreme Court created the doctrine of “constructive waiver” of Eleventh Amendment immunity.⁹⁷ Alabama citizens employed by Terminal Railway sued the State of Alabama for violations of the Federal Employers’ Liability Act (“FELA”).⁹⁸ The State appeared specially and moved to dismiss based on sovereign immunity. The district court granted the state’s motion, and the Fifth Circuit affirmed.⁹⁹ The Supreme Court reversed, holding that Alabama had consented to suit by operating as a common carrier under the FELA.¹⁰⁰

89. *Id.* at 465 (quoting IND. CODE ANN. § 64-2614(a) (Michie 1943 Replacement)).

90. *Id.* at 466. The statute “indicates that the state legislature contemplated suit in the state courts.” *Id.*

91. 473 U.S. 234 (1985).

92. Article III, section 5 provides: “Suits may be brought against the State in such manner and in such courts as shall be directed by law.” CAL. CONST. art. III, § 5.

93. 473 U.S. at 241.

94. *Id.* “Although a State’s general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment.” *Id.*

95. *Id.*

96. 377 U.S. 184 (1964).

97. *Id.* at 192.

98. Federal Employers’ Liability Act, 45 U.S.C. §§ 51-60 (2000).

99. 377 U.S. at 185.

100. *Id.* at 192. The Court declared:

It remains the law that a State may not be sued by an individual without its consent. Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act.

The Court reasoned that the states gave up some of their sovereignty by granting Congress the power to regulate commerce and that to allow immunity from suit under the circumstances of that case “would result . . . in a right without a remedy.”¹⁰¹ The Court’s reasoning also appealed to federalism—Alabama’s operation of the railway made the state’s activities subject to federal regulation, thereby requiring compliance with the Act’s condition of amenability to suit.¹⁰² In his dissenting opinion, Justice White emphasized that abrogation of sovereign immunity should not be inferred from an act of Congress without express language indicating that states will be subject to suit for violation of the act.¹⁰³

The doctrine of constructive waiver was limited by the Supreme Court’s decision in *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*¹⁰⁴ in 1973.¹⁰⁵ Distinguishing that case from the “dramatic circumstances of the *Parden* case,”¹⁰⁶ the Court declined to extend *Parden* to cover suits against states under the Fair Labor Standards Act of 1938.¹⁰⁷ One year later, in *Edelman v. Jordan*,¹⁰⁸ the Court observed that sovereign immunity jurisprudence was “no place” for the doctrine of constructive waiver and held that waiver would be found only by express language in the statute leaving no room for other reasonable construction.¹⁰⁹ Because the applicable provisions of the Social Security Act¹¹⁰ contained no such language, the state of Illinois did not consent to suit in federal court through its involvement in the Aid to the Aged, Blind, or Disabled program.¹¹¹

Id.

101. *Id.* at 190.

102. *Id.* at 196.

103. *Id.* at 198-99 (White, J., dissenting). “The majority in effect holds that with regard to sovereign immunity, waiver of a constitutional privilege need be neither knowing nor intelligent.” *Id.* at 200 (White, J., dissenting).

104. 411 U.S. 279 (1973).

105. *Id.* at 285.

106. *Id.* *Parden* involved the railroad business, “a rather isolated state activity,” whereas *Employees of the Department of Public Health and Welfare* could have possibly involved many state employees. *Id.*

107. *Id.* at 286-87. The Fair Labor Standards Act is codified as amended at 29 U.S.C. §§ 201-219 (2000).

108. 415 U.S. 651 (1974).

109. *Id.* at 673. “Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here.” *Id.*

110. 42 U.S.C. §§ 1381-1383f (2000).

111. 415 U.S. at 674.

In 1999 the Supreme Court expressly overruled *Pardeen* and the doctrine of constructive waiver in *College Savings Bank*.¹¹² In a federal court suit alleging violation of Section 43(a) of the Lanham Act,¹¹³ College Savings Bank argued that the Florida Prepaid Postsecondary Education Expense Board constructively consented to suit by engaging in interstate marketing after the Trademark Remedy Clarification Act (“TRCA”) amended Section 43(a) of the Lanham Act to provide that states would not be immune from suit for violation of Section 43(a).¹¹⁴ The Court emphasized that waiver would be found only where the state voluntarily invokes federal jurisdiction or where the state clearly declares that it intends to consent to suit in federal court.¹¹⁵ The Court expressly overruled *Pardeen* and held that the TRCA did not abrogate Florida’s sovereign immunity for suits alleging violations of the Lanham Act.¹¹⁶

III. COURT’S RATIONALE

In *Lapides* the Supreme Court granted certiorari to resolve the conflict among the circuit courts over whether a state waives its Eleventh Amendment immunity when it removes a case to federal court.¹¹⁷ The Court first held that *Lapides*’s federal claim for violation of 42 U.S.C. § 1983 was not viable because *Lapides* sought only monetary damages and the state was not a “person” from whom money damages can be collected.¹¹⁸ The Court therefore limited its discussion to the waiver of immunity for state law claims to which the state had explicitly waived its Eleventh Amendment immunity from state court proceedings.¹¹⁹ The Court declined to address the scope of waiver by removal when the state has not waived its immunity from state court proceedings.¹²⁰

Affirming the principle from *Clark v. Barnard*¹²¹ that a state’s voluntary appearance in federal court results in waiver of Eleventh Amendment immunity, the Court reasoned that it would be “inconsistent

112. 527 U.S. at 680.

113. 15 U.S.C. § 1125(a) (2000).

114. 527 U.S. at 670-71. See Trademark Remedy Clarification Act, 15 U.S.C. § 1122 (2000). Section 3(b) of the TRCA provides that states “shall not be immune, under the [E]leventh [A]mendment . . . or under any other doctrine of sovereign immunity, from suit in Federal court by any person . . . for any violation under this Act.” *Id.*

115. 527 U.S. at 676-77.

116. *Id.* at 680.

117. *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 617 (2002).

118. *Id.*

119. *Id.*

120. *Id.* at 617-18.

121. 108 U.S. 436 (1883).

for a State both (1) to invoke federal jurisdiction, thereby contending that the ‘Judicial power of the United States’ extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the ‘Judicial power of the United States’ extends to the case at hand.”¹²² The Court then cited, without elaboration, the many Supreme Court decisions approving the principle from *Clark*.¹²³

Turning to the issue presented in this case, the Court noted that although Georgia was brought involuntarily into the state court suit, the State voluntarily invoked the federal court’s jurisdiction by removing the case to federal court.¹²⁴ The Court stated that such facts would invoke the general principle requiring waiver “unless we are to abandon the general principle . . . , or unless there is something special about removal or about this case.”¹²⁵

Georgia first attempted to distinguish *Clark*, *Gunter*, and *Gardner*, which support waiver by voluntary appearance, because those cases did not involve suits for money damages against the State, which are “the heart of the Eleventh Amendment’s concern.”¹²⁶ Reasoning that the previous cases were not decided based on the nature of relief sought, the Court rejected Georgia’s argument and held that the principle of waiver by voluntary appearance applies in suits for money damages.¹²⁷ Next, Georgia argued that *Clark*, *Gunter*, and *Gardner* were decided before more recent Supreme Court cases requiring a state to clearly express its intent to waive its Eleventh Amendment immunity.¹²⁸ The Court rejected this argument on the grounds that *College Savings Bank* distinguished between waivers by litigation conduct, which are permitted, and constructive waivers, which are prohibited.¹²⁹ The Court also relied on Justice Kennedy’s concurring opinion in *Schacht* for the policy reasoning that finding waivers by litigation conduct is supported by the need for courts to avoid inconsistency and unfair-

122. 535 U.S. at 619 (quoting U.S. CONST. amend. XI).

123. *Id.*

124. *Id.* at 620.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* (citing *Coll. Sav. Bank*, 527 U.S. 666, 675-81 (1999)).

129. *Id.* (citing *Coll. Sav. Bank*, 527 U.S. at 681 n.3).

ness.¹³⁰ The act of removal, the Court held, is a “clear” indication of a state’s intent to waive its Eleventh Amendment immunity.¹³¹

After finding no reason to abandon the principle from *Clark*, the Court considered whether there was anything special about removal or about the facts of this case that would justify an exception to the general principle.¹³² Georgia argued that it had a benign motive for removing the case, but the Court found that a benign motive does not make a critical difference when it comes to waiver by litigation conduct.¹³³ Accepting Georgia’s argument would give states an unfair advantage in litigation because after invoking federal jurisdiction, a state could challenge that jurisdiction with a benign motive argument.¹³⁴

Georgia also argued that it did not waive its immunity because state law does not authorize the attorney general to waive the state’s immunity.¹³⁵ Georgia law authorizes the attorney general “[t]o represent the state in all civil actions tried in any court.”¹³⁶ Georgia argued that it should be able to retain its immunity because in *Ford Motor Co.* the Supreme Court allowed the state to regain its immunity after it litigated the case because state law did not authorize the attorney general to waive the state’s immunity.¹³⁷ Relying on the waiver-by-voluntary-appearance principle from *Clark*, *Gunter*, and *Gardner*, the Court distinguished the facts in *Lapides* from *Ford Motor Co.* on the grounds that *Ford Motor Co.* involved a state being involuntarily brought into a federal court suit, whereas this case involved a state voluntarily invoking federal jurisdiction.¹³⁸ The Court reasoned that a rule finding “waiver through a state attorney general’s invocation of federal court jurisdiction” was consistent with *Clark*, *Gunter*, and *Gardner*.¹³⁹ A contrary rule would result in inconsistency and unfairness and would be against the intent of those who drafted the Eleventh Amendment.¹⁴⁰ The Court then overruled *Ford Motor Co.* insofar as

130. *Id.* “[A]n interpretation of the Eleventh Amendment that finds waiver in the litigation context rests upon the need to avoid inconsistency, anomaly, and unfairness, and not upon a State’s actual preference or desire, which might, after all, favor selective use of ‘immunity’ to achieve litigation advantages.” *Id.* (citing *Schacht*, 524 U.S. at 393 (Kennedy, J. concurring)).

131. *Id.*

132. *Id.* at 621.

133. *Id.*

134. *Id.*

135. *Id.*

136. O.C.G.A. § 45-15-3(6) (2002).

137. 535 U.S. at 621-22.

138. *Id.* at 622.

139. *Id.* at 622-23.

140. *Id.* at 623.

it was inconsistent with the rationale from *Clark*, *Gunter*, and *Gardner*.¹⁴¹

As a final consideration, the Court rejected Georgia's argument that a rule finding waiver by removal would be confusing:

[T]he rule is a clear one, easily applied by both federal courts and the States themselves. It says that removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter (here of state law) in a federal forum.¹⁴²

The Court concluded that the Georgia Attorney General's removal of the case to federal court resulted in a waiver of Georgia's Eleventh Amendment immunity.¹⁴³

IV. IMPLICATIONS

From the inception of the Eleventh Amendment, the Supreme Court's Eleventh Amendment jurisprudence has been committed to protecting state sovereign immunity. The federal courts have been reluctant to find waivers of state sovereign immunity. With recent decisions requiring waiver of immunity to be unequivocally expressed, the Rehnquist Court seemed to be attempting to reinvigorate federalism and the doctrine of sovereign immunity. The Court's unanimous decision in *Lapides*, finding waiver of a state's immunity by removal to federal court, was quite unexpected. In *Lapides*, the Court shifted its focus from concern for federalism and the states to concern for fairness and the individual litigants who have claims against a state.

Since *Ford Motor Co.* in 1945, the Court has permitted states to use the Eleventh Amendment as both a "shield" and a "sword."¹⁴⁴ States could remove a case to federal court and defend the suit on the merits without facing any real consequences because if the state received an unfavorable result, the state could claim Eleventh Amendment immunity as a defense on appeal. By overruling *Ford Motor Co.*, the *Lapides* decision alleviates some of the unfairness to individual plaintiffs by remedying the unfair advantage that states had under *Ford Motor Co.* The *Lapides* holding results in a better balance between state sovereign-

141. *Id.* The Court found *Ford Motor Co.* to be inconsistent with the rationale of *Clark*, *Gunter*, and *Gardner* because the Court in *Ford Motor Co.* denied waiver "despite the state attorney general's state-authorized litigating decision." *Id.*

142. *Id.* at 623-24.

143. *Id.* at 624.

144. Michelle Lawner, *Why Federal Courts Should Be Required to Consider State Sovereign Immunity Sua Sponte*, 66 U. CHI. L. REV. 1261, 1272 (1999).

ty and state accountability. However, the decision may not be enough to prevent strategic litigation by state defendants. The decision may have only a limited impact because the issue of whether removal waives a state's sovereign immunity still turns on whether *state* law authorizes the attorney general to engage in litigation conduct that would waive the state's immunity. This characteristic of the decision evinces the Court's desire to preserve federalism and the doctrine of sovereign immunity.

The Court in *Lapides* expressly limited its holding to state law claims to which the state had already waived its Eleventh Amendment immunity in state court proceedings.¹⁴⁵ The Court has yet to address waiver of sovereign immunity when the state has not waived its immunity in state court proceedings. In that situation, the Court will likely hold that removing the case to federal court does not result in the state waiving its sovereign immunity. First, when the state has not yet waived immunity in state court, it is less likely that the state is using removal to gain a tactical advantage over the individual plaintiff. Second, the Court's commitment to preserving state sovereignty also supports such a holding.

Circuit court decisions since *Lapides* have refused to extend *Lapides*.¹⁴⁶ In August of 2002, in *Rhode Island Department of Environmental Management v. United States*,¹⁴⁷ the First Circuit held that the state did not waive its sovereign immunity by appearing before an administrative law judge in federal administrative proceedings.¹⁴⁸ Department of Environmental Management ("DEM") employees brought administrative proceedings against the state. The state brought suit in federal court to enjoin the administrative proceedings on the ground that the proceedings violated the state's sovereign immunity. Finding that the administrative proceedings were barred by the state's sovereign immunity, the district court issued a preliminary injunction against the administrative proceedings.¹⁴⁹ On appeal, the First Circuit considered whether, in light of *Lapides*, the state waived immunity by bringing suit in federal court.¹⁵⁰ The court distinguished *Lapides* and rejected the DEM employees' argument that Rhode Island waived its sovereign immunity.¹⁵¹ First, rather than waiving immunity in state court and

145. 535 U.S. at 617.

146. See *Watters v. Wash. Metro. Area Transit Auth.*, 295 F.3d 36 (D.C. Cir. 2002); *R.I. Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31 (1st Cir. 2002).

147. 304 F.3d 31 (1st Cir. 2002).

148. *Id.* at 50.

149. *Id.* at 38-40.

150. *Id.* at 48.

151. *Id.* at 49.

then removing the case and reasserting immunity, Rhode Island “consistently asserted its sovereign immunity.”¹⁵² Second, when Rhode Island invoked the aid of the federal courts, it was “an entirely new and different proceeding than the one in which it sought immunity.”¹⁵³ The final distinction rested on the fact that Rhode Island’s federal court claim was brought for the sole purpose of receiving a determination of the state’s immunity for the claims pending in the administrative proceedings.¹⁵⁴ Declining to extend *Lapides*, the court emphasized the states’ ability to make choices in litigation.¹⁵⁵

With the focus on fairness rather than state sovereignty, the decision in *Lapides* is a step in the right direction for placing individual litigants on even ground with the states against which they have claims. However, the limited nature of the decision may not be enough to prevent states from using the Eleventh Amendment as a strategic litigation tactic.

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152. *Id.*

153. *Id.*

154. *Id.* at 50.

155. *Id.*