# Removal and Waiver of the Eleventh Amendment

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## INTRODUCTION

Suppose a plaintiff files suit in state court against a state official in their official capacity. The complaint includes both claims arising under federal law and not subject to the Eleventh Amendment[1] and claims that could be heard by the federal court were they not barred by the Eleventh Amendment.[2] The defendant petitions for removal of the case to federal court because the district court has, at the least, federal-question jurisdiction. After the State's petition is granted pursuant to § 1441,[3] it immediately files a motion to dismiss those claims barred by the Eleventh Amendment as the federal court is without jurisdiction.

Prior to the recent decision in *Wisconsin Department of Corrections v. Schacht*,[4] the district court had two choices. When the suit contained any claims barred by the Eleventh Amendment, the approach of the Fifth and Seventh Circuits had been to remand the entire action to the state court from which it was removed.[5] On the other hand, the Sixth and Ninth Circuits allowed the district court to remand to state court those claims barred by the Eleventh Amendment and to hear those claims not affected by the Amendment.[6]

In *Schacht*, the plaintiff, a former correctional officer, brought § 1983[7] claims against the Wisconsin Department of Corrections and some of its employees in state

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1. Examples of such claims not subject to the Eleventh Amendment include those seeking prospective, injunctive, or declaratory relief against a state regarding its policies or programs, or individual-capacity damage claims against state officials for alleged civil rights violations. *See* Edelman v. Jordan, 415 U.S. 651, 664, 666 (1974); *Ex parte* Young, 209 U.S. 123, 155, 167 (1908).

2. Examples of claims barred by the Eleventh Amendment include those naming a state or state agency, *see* Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 150 (1981); official-capacity damage suits against state officials, *see* Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 468 (1945); or state law claims under supplemental jurisdiction, *see* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 121 (1984) (*Pennhurst II*).

3. 28 U.S.C. § 1441 (1994).

4. 118 S. Ct. 2047 (1998).

5. *See* Frances J. v. Wright, 19 F.3d 337, 343 (7th Cir. 1994); McKay v. Boyd Constr. Co., 769 F.2d 1084, 1087 (5th Cir. 1985).

6. *See* Kruse v. Hawaii, 68 F.3d 331, 335 (9th Cir. 1995); Henry v. Metropolitan Sewer Dist., 922 F.2d 332, 338 (6th Cir. 1990).

7. 42 U.S.C. § 1983 (Supp. II 1996).

court.[8] Pursuant to § 1441(a),[9] the defendants removed the case to federal court. Though the district court dismissed the claims barred by the state's Eleventh Amendment sovereign immunity and granted summary judgment in favor of the defendants, the Seventh Circuit Court of Appeals vacated the district court's judgment for lack of subject-matter jurisdiction under the Eleventh Amendment.[10] Furthermore, it instructed the district court to remand all claims back to the state court from which the case came.[11] Upon review, however, the Supreme Court did not decide whether or not the defendant State's invocation of the district court's removal jurisdiction indicated a waiver of the state's Eleventh Amendment immunity.

Part I of this Note will discuss the relevant background information involved in the Eleventh Amendment, including what constitutes an effective waiver of the Amendment, and removal jurisprudence. This groundwork will provide the tools for the analysis. Part II will then discuss the Supreme Court's recent decision in *Schacht*, regarding the issue of whether or not the existence of claims barred by the Eleventh Amendment requires remand of the entire action or just those claims so barred. Finally, Part III will analyze the implications of the Kennedy concurrence in *Schacht* and conclude that a petition for removal should be equated with a state's effective waiver of Eleventh Amendment immunity.

## I. DEVELOPMENT OF THE ELEVENTH AMENDMENT AND REMOVAL JURISDICTION

### *A. Eleventh Amendment*

The Eleventh Amendment has been a source of constant conflict and complexity in the federal courts since its ratification in 1789.[12] The Eleventh Amendment 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."[13] However, the Court's interpretation of this Amendment has not been confined to the

8. Schacht v. Wisconsin Dep't of Corrections, 116 F.3d 1151, 1152 (7th Cir. 1997).

9. 28 U.S.C. § 1441(a) (1994). "[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." *Id.*

10. *See Schacht*, 116 F.3d at 1154.

11. *See id.*

12. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 173 (2d ed. 1987) (The history of the Eleventh Amendment is riddled with "complex and often counterintuitive interpretations . . . that have made the amendment far more controversial than its language would, on its face, suggest."); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1891 (1983) ("The eleventh amendment today represents little more than a hodgepodge of confusing and intellectually indefensible judge-made law.").

13. U.S. CONST. amend. XI.

plain-meaning of its text. Though its language appears rather explicit, the Court has expanded the Amendment's meaning beyond its specific text.

The Amendment was originally enacted in direct response to the Supreme Court's decision in *Chisholm v. Georgia*.[14] The *Chisholm* Court found federal jurisdiction existed over a cause of action brought by a citizen of South Carolina against the State of Georgia.[15] Because of the unpopular implications of the decision, Congress swiftly responded with the Eleventh Amendment.[16]

*Hans v. Louisiana*[17] exemplifies the Court's expansive treatment of the Amendment. Despite the wording of the Amendment, the *Hans* Court concluded that the it barred suits against a state by its own citizens as well as those by non-citizens.[18] The Court wished to avoid the

> anomalous result . . . [whereby] in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts.[19]

The Court treated the Eleventh Amendment as constitutionalizing the state's sovereign immunity and creating a broad limitation on the federal court's jurisdiction.[20] The Supreme Court has repeatedly followed the reasoning in *Hans* by treating the Eleventh Amendment as a limitation on a federal court's subject-matter jurisdiction in many subsequent decisions.[21]

Judges and scholars have advocated at least two other theories in an attempt to define the meaning and scope of the Eleventh Amendment. Justice Brennan pursued the argument that the Eleventh Amendment was only meant to bar actions brought under a federal court's diversity jurisdiction and not its jurisdiction arising under

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

15. *Id.* at 420.

16. In fact, the amendment was introduced to the Senate within two days after the *Chisholm* decision was handed down and finally ratified two years later. *See* JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 20-21 (1987) (discussing the history of the ratification of the Eleventh Amendment).

17. 134 U.S. 1 (1890).

18. *Id.* at 18.

19. *Id.* at 10.

20. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.3, at 375-77 (2d ed. 1994).

21. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985) (stating that the Eleventh Amendment is a limitation on judicial authority under Article III); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 119-20 (1984) (defining the Amendment as a constitutional bar against claims that would normally be within the federal court's jurisdiction); Edelman v. Jordan, 415 U.S. 651, 678 (1974) ("'The Eleventh Amendment . . . sets forth an explicit limitation on federal judicial power . . . .'") (quoting Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 466-67 (1945)); Missouri v. Fiske, 290 U.S. 18, 25 (1933) ("The Eleventh Amendment is an explicit limitation of the judicial power of the United States."). *But see* Calderon v. Ashmus, 118 S. Ct. 1694, 1697 n.2 (1998) (noting the Court's recognition that the Eleventh Amendment is not "co-extensive with the limitations on judicial power in Article III") (citing Idaho v. Coeur d'Alene Tribe, 117 S. Ct. 2028, 2033 (1997); Patsy v. Board of Regents, 457 U.S. 496, 515 n.19 (1982)).

questions of federal law.[22] Though Justice Brennan's diversity theory was the basis for his majority opinion in *Pennsylvania v. Union Gas Co.*,[23] Justice Brennan's reasoning has never been accepted by more than three other members of the Court.[24]

Additionally, some scholars view the Eleventh Amendment merely as the re-establishment of common law sovereign immunity.[25] Advocates of this theory believe the Eleventh Amendment was enacted to reverse *Chisholm* and reenact state sovereign immunity.[26] The Eleventh Amendment was not meant to act as a constitutional bar.[27] Therefore, like common law immunity and unlike subject-matter jurisdiction, the State can waive its immunity from suit.[28] However, the language of the Amendment indicates it is in fact a limitation on the power of the federal courts.[29]

Again, though the language may suggest otherwise, the Court expanded a state's sovereign immunity by barring suits in admiralty in *Ex Parte New York*.[30] In accordance with the expansion in the *Hans* decision, the Court reasoned that the bar could not "with propriety be construed to leave open a suit against a State in the admiralty jurisdiction by individuals, whether its own citizens or not."[31]

The Supreme Court has also gone beyond the plain-meaning in *limiting* the scope of the Eleventh Amendment. In *Ex Parte Young*,[32] the Court held that the Eleventh Amendment did not bar suit in a federal court against a state officer where the plaintiff was seeking injunctive relief for violations of federal law.[33] In what many

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22. *See, e.g.*, Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 509-16 (1987) (Brennan, J., dissenting); *Atascadero*, 473 U.S. at 276-77, 287 (Brennan, J., dissenting). Though the diversity theory was never accepted by a majority of the Court, it is worth noting that Justice Brennan came within one vote of a majority in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). Justice White in concurrence wrote, "I agree with the conclusion reached by Justice Brennan . . . , although I do not agree with much of his reasoning." *Id.* at 57 (White, J., concurring).

23. 491 U.S. 1 (1989). However, the Court explicitly rejected the diversity theory of *Union Gas* in *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996).

24. The diversity theory was embraced by Justices Marshall, Blackmun, and Stevens in *Welch*, 483 U.S. at 496 (Brennan, J., dissenting).

25. *See* Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 538-49 (1978). Actually, Justice Brennan originally advocated this theory. *See, e.g.*, Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 309-22 (1973) (Brennan, J., dissenting).

26. *See* CHEMERINSKY, *supra* note 20, § 7.3, at 378 & n.17.

27. *See, e.g.*, *Atascadero*, 473 U.S. at 258-59 (Brennan, J., dissenting) (stating that "[t]here simply is no constitutional principle of state sovereign immunity").

28. *See infra* Part I.B.

29. *See* CHEMERINSKY, *supra* note 20, § 7.3, at 379.

30. 256 U.S. 490, 497 (1921). The Supreme Court also found the Eleventh Amendment applied to suits brought by a foreign country against one of the states. *See* Principality of Monaco v. Mississippi, 292 U.S. 313, 321-30 (1934). However, this Note will not address that aspect of Eleventh Amendment jurisprudence.

31. *Ex parte New York*, 256 U.S. at 498.

32. 209 U.S. 123 (1908).

33. *See id.* at 168.

scholars have defined as a legal fiction,[34] the Court concluded that when a state officer acts in opposition to the Federal Constitution he is effectively stripped of his official capacity making him, and not the state, liable for his actions.[35] Since the state is not the defendant, a federal court is not barred by the Eleventh Amendment from hearing the claims filed.[36]

The reach of *Ex Parte Young* was refined by the Court's holding in *Edelman v. Jordan*.[37] The Court found an action brought against a state officer seeking retroactive, rather than prospective, relief was barred by the Eleventh Amendment.[38] Specifically, and of particular concern to the analysis at hand, the Court found the lower court incorrectly held "the Eleventh Amendment . . . constitute[d] a bar to *that portion* of the District Court decree which ordered retroactive payment of benefits found to have been wrongfully withheld."[39] As a result of the *Edelman* decision, a plaintiff is limited to prospective injunctive relief when suing a state defendant.[40]

### *B. Waiver of Eleventh Amendment Immunity*

Perhaps one of the most interesting and perplexing aspects of the Eleventh Amendment is the states' ability to waive it. In this respect, the Eleventh Amendment differs from a federal court's subject-matter jurisdiction, which can never be waived.[41] But, like subject-matter jurisdiction, the Eleventh Amendment immunity can be raised for the first time on appeal.[42]

Eleventh Amendment immunity can be waived in one of two ways. First, the Court will find a state's waiver of immunity "only where stated 'by the most express language or by such overwhelming implications from the text [of a federal statute] as [will] leave no room for any other reasonable construction.'"[43] The intention of Congress to do so must be "unmistakably clear" in the statutory language.[44] Second, Congress may abrogate a State's Eleventh Amendment immunity pursuant to the Fourteenth Amendment.[45]

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34. *See, e.g.*, TRIBE, *supra* note 12, at 189; 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3524, at 154 (2d ed. 1984); Gibbons, *supra* note 12, at 1891.

35. *See Ex parte Young*, 209 U.S. at 159-60.

36. *See id.*

37. 415 U.S. 651 (1974).

38. *See id.* at 678.

39. *Id.* (emphasis added).

40. *See id.* at 677.

41. *See* American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 (1951); Mitchell v. Maurer, 293 U.S. 237, 244 (1934); 13 WRIGHT ET AL., *supra* note 34, § 3522, at 6.

42. *See, e.g.*, *Edelman*, 415 U.S. at 678 (citing Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 467 (1945)).

43. *Id.* at 673 (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909) (second alteration in original)).

44. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

45. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); *cf.* Seminole Tribe v. Florida, 517 U.S. 44, 57-73 (1996) (holding that Congress does not have the power to abrogate a State's sovereign immunity under the Commerce Clause).

Clearly, the test for deciding whether or not there is an effective waiver is a stringent one.[46] For example, the fact that a State has waived its immunity to suit in state court does not necessarily imply that the State has done so in regard to federal court as well.[47] In order for a State to waive its Eleventh Amendment immunity and thereby subject itself to suit in federal court, its intention must be explicit.[48] "[The Court] require[s] an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment."[49] Similarly, the Court has refused to uphold congressional abrogation of a state's Eleventh Amendment immunity where it is not unequivocally expressed in the statute passed by Congress.[50]

### *C. Federal Removal Jurisdiction*

When a suit is filed in state court, the defendant has the option of removing the case to federal court under the district court's removal jurisdiction if the federal court would have had original jurisdiction had the claim originally been filed there.[51] This statutory conferral of jurisdiction was originally created in the Judiciary Act of 1789.[52] The Supreme Court has since upheld the constitutionality of the federal courts' jurisdiction in removal actions as encompassed within Article III, Section 2 of the Constitution.[53] And, since its final revision in the Judiciary Act of 1887, removal jurisdiction has remained virtually the same.[54]

One oft-cited purpose behind the creation of removal jurisdiction was Congress's concern that a nonresident defendant be protected from the prejudice of a local state

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46. *See Atascadero*, 473 U.S. at 241.

47. *See id.*; Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 & n.9 (1984) (citing Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147, 150 (1981) (per curiam)); *Edelman*, 415 U.S. at 677 n.19 (stating that whether a State allows suit in its own courts is not determinative of whether or not Eleventh Amendment immunity has been waived in federal court) (citing Chandler v. Dix, 194 U.S. 590, 591-92 (1904)); *Ford Motor Co.*, 323 U.S. at 465-66.

48. *See Atascadero*, 473 U.S. at 241; Smith v. Reeves, 178 U.S. 436, 441 (1900).

49. *Atascadero*, 473 U.S. at 238 n.1.

50. *See, e.g.*, Quern v. Jordan, 440 U.S. 332, 345 (1979) (stating that 42 U.S.C. § 1983 lacks sufficient evidence to establish Congress's intent to abrogate Eleventh Amendment immunity).

51. The statutes granting this right are located in Chapter 89 of the Judicial Code. 28 U.S.C. §§ 1441-1452 (1994 & Supp. II 1996).

52. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79.

53. The text of Article III, Section 2 reads in part, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. CONST. art. III, § 2; *see also* City of Greenwood v. Peacock, 384 U.S. 808, 833 (1966); Tennessee v. Davis, 100 U.S. 257, 261-62 (1879) (holding that the Constitution grants Congress the power to authorize removal); 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3721, at 285-88 (3d ed. 1998).

54. Judiciary Act of 1887, ch. 373, 24 Stat. 552, *corrected by* Act of August 13, 1888, ch. 866, 25 Stat. 433. The 1887 statute raised the jurisdictional amount, limited the right of removal to defendants, and barred removal when the defendant relied on federal law as his or her defense. *See id.* § 2, at 553.

court.[55] "The existence of removal jurisdiction reflects the belief that both the plaintiff and the defendant should have the opportunity to benefit from the availability of a federal forum."[56] Another concern removal addressed was the avoidanee of piecemeal litigation by allowing a case containing both federal and state claims to be removed by the defendant to federal court,[57]

The availability of a federal forum to a defendant sued in state court is not absolute. Of primary importance is the requirement that the district court have original jurisdiction over the action.[58] Thus, a federal district court can only hear a claim removed from state court if it originally could have been filed in the federal court, had the plaintiff chosen to do so.[59] The district court, therefore, must have either federal-question jurisdiction[60] or diversity jurisdiction[61] over the civil action.[62] If the district court's original jurisdiction is based on the existence of a federal question, the right of removal extends to all defendants.[63] This, of course, is where the question of the Eleventh Amendment and removal is of particular

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55. *See, e.g.*, Thermton Prod., Inc. v. Hermansdorfer, 423 U.S. 336, 341 (1976); 14B WRIGHT ET AL., *supra* note 53, § 3721, at 289 & n.7; Mitchell N. Berman, Note, *Removal and the Eleventh Amendment: The Case for District Court Remand Discretion to Avoid a Bifurcated Suit*, 92 MICH. L. REV. 683, 692 (1993).

56. CHEMERINSKY, *supra* note 20, § 5.5, at 323.

57. *See* David D. Siegel, *Commentary on 1988 and 1990 Revisions of Section 1441, in* 28 U.S.C.A. § 1441, at 6-13 (West 1994).

58. *See* 28 U.S.C. § 1441(a) (1994); *see also* City of Chicago v. International College of Surgeons, 522 U.S. 156, 163 (1997); Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987).

59. *See, e.g.*, West v. Missouri Bd. of Law Exam'rs, 520 F. Supp. 159, 160 (E.D. Mo.), *aff'd*, 676 F.2d 702 (8th Cir. 1981) (holding that the removal statute does not grant an independent basis for federal court jurisdiction, but rather allows for removal where original jurisdiction already exists).

60. *See* 28 U.S.C. § 1331 (1994). "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.*

61. *See id.* § 1332 (1994 & Supp. II 1996). The statute reads in part, "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States." *Id.* § 1332(a).

62. A case is not removable from state to federal court based on a federal defense. *See* Rivet v. Regions Bank, 118 S. Ct. 921, 925 (1998). "'[T]he presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.'" *Id.* (quoting *Caterpillar*, 482 U.S. at 392).

63. *See* 28 U.S.C. § 1441(b) ("Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.").

concern to our analysis.[64] Congress has also provided certain areas where the plaintiff's forum choice is the only available forum.[65]

Similarly, there are specific instances in which a defendant may have a right of removal regardless of whether or not the district court has original jurisdiction.[66] Whatever the basis for the notice of removal, the defendant always bears the burden of proving removal was proper.[67]

The procedure for removal is rather simple.[68] In order to remove the case, all of the defendants in the action must consent.[69] Once the defendant files a notice of removal, the state court can no longer hear the action until the federal court remands it back.[70] The plaintiff thus challenges removal by filing a motion to remand.[71]

## II. *WISCONSIN DEPARTMENT OF CORRECTIONS V. SCHACHT*—THE ELEVENTH AMENDMENT BARS CLAIMS, NOT CASES

In much the way Congress has allowed federal courts to hear removed claims originally filed in a state court, it has granted district courts the ability to "send back" certain claims. Federal district courts are conferred with the power to remand when dealing with various claims arising under federal law.[72]

First, a district court is granted some discretion in certain instances, including the joining of both removable and nonremovable claims in one cause of action. Section 1441(c) states:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be

64. However, it is likewise important to mention that if the case is removable only by invoking federal diversity jurisdiction, a defendant cannot remove the case if any of the parties are a citizen of the State where the action was originally filed. *See id.* ("Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.").

65. *See, e.g., id.* § 1445(a) (Supp. II 1996) (action against a railroad or its receivers or trustees); *id.* § 1445(b) (action arising under workmen's compensation of a state). *See generally* 16 ROBERT C. CASAD ET AL., MOORE'S FEDERAL PRACTICE § 107.17 (3d ed. 1998).

66. *See, e.g.*, 28 U.S.C. § 1441(d) (any action against a foreign state); *id.* § 1442(a)(1) (Supp. II 1996) (prosecution or suit against a federal officer); *id.* § 1442a (1994) (against members of the armed forces); *id.* § 1443 (where defendant unable to secure federal civil rights in state court); *id.* § 1444 (actions in foreclosure against the United States).

67. *See generally id.* § 1441 (referring to the defendant or defendants as the party responsible for filing and supporting the petition for removal); *id.* § 1447 (Supp. II 1996) (same).

68. *See id.* § 1446 (1994 & Supp. II 1996).

69. *See* Chicago, Rock Island & Pac. Ry. Co. v. Martin, 178 U.S. 245, 248 (1900); 14C WRIGHT ET AL., *supra* note 53, § 3731, at 251, 258.

70. *See* 28 U.S.C. § 1446(d).

71. *See id.* § 1447(e).

72. *See id.* § 1441(c).

> removed and the district court *may* determine all issues therein, or, in its discretion, *may* remand all matters in which State law predominates.[73]

The plain language of the statute allows a defendant to remove a case brought in state court by joining a federal question claim to one which does not arise under federal law.[74]

Writing for a unanimous Court, Justice Breyer rejected the approach of the Fifth and Seventh Circuits[75] in *Wisconsin Department of Corrections v. Schacht*.[76] The Court held that the presence of a claim barred by the Eleventh Amendment in an otherwise removable cause of action did not destroy the jurisdiction of the federal court.[77] The district court is then left with the discretion to either remand the claims unaffected by the Eleventh Amendment or hear the nonbarred claims.[78]

### *A. Recent Supreme Court Precedent*

In *Carnegie-Mellon University v. Cohill*,[79] the Supreme Court determined that a district court had the discretion to remand a case removed from state court after all federal law claims had dropped out of the action.[80] Arguing that remand of a case barred from federal court is preferable to dismissal,[81] the Court specifically noted the language of § 1441(c). Congress, through the statute, allows a district court to either adjudicate all claims in the suit or remand those which are independently nonremovable.[82] The Court constantly refers to removal of individual claims based on whether or not they alone are within the subject-matter jurisdiction of the district court.

In *City of Chicago v. International College of Surgeons*,[83] the Supreme Court recently addressed whether or not a district court had jurisdiction to hear complaints based on both state and federal law.[84] Looking to principles of pendent and ancillary jurisdiction, the Court reasoned that a district court had jurisdiction if the state claims shared a common nucleus of fact with the federal question issues raised in the case.[85] Rejecting the plaintiff's arguments, the Court found that the existence of claims not within the subject-matter jurisdiction of the district court did not bar the entire action when federal issues of law still remained. Rather, the district court was

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73. *Id.* (emphasis added).

74. This is precisely the situation the Fifth Circuit faced in *McKay v. Boyd Construction Co.*, 769 F.2d 1084, 1087-88 (5th Cir. 1985).

75. *See supra* text accompanying note 5.

76. 118 S. Ct. 2047, 2051 (1998).

77. *See id.*

78. *See id.* at 2054. In *Schacht*, the case included only claims arising under federal law and not state law claims. *Id.* at 2050.

79. 484 U.S. 343 (1988).

80. *See id.* at 357.

81. *See id.* at 351-55.

82. *See id.* at 354.

83. 522 U.S. 156 (1997).

84. *See id.* at 159.

85. *See id.* at 164-65.

free to hear those claims well within the jurisdiction of the district court.[86] This supports the argument not only that a claim-specific approach is mandated, but also that the existence of claims outside the subject-matter jurisdiction of the district court did not divest the federal court of all subject-matter jurisdiction.

### *B. Background of* Schacht

Schacht had been a prison guard dismissed by the Wisconsin Department of Corrections for stealing various items from the prison facility where he was employed.[87] In response, Schacht brought several claims in state court under the United States Constitution and federal civil rights laws against the Wisconsin Department of Corrections and its employees.[88] The defendants then removed the action to the federal district court. The answer filed in federal court included the defense that, "the '[E]leventh [A]mendment to the United States Constitution, and the doctrine of sovereign immunity, bars any claim under 42 U.S.C. § 1983 against'" the state agency, the Department of Corrections, and the named defendants in their official capacities.[89]

In response, the district court granted summary judgment on those claims not barred by the Eleventh Amendment against the individual defendants,[90] and dismissed those filed against the state based on the Eleventh Amendment.[91] Though Schacht's appeal only asserted that the district court's decision was legally erroneous, the Seventh Circuit raised the issue sua sponte as to whether or not the district court had jurisdiction to hear the nonbarred claims in the first place.[92]

The Seventh Circuit held that because the district court lacked subject-matter jurisdiction over some of the claims, it therefore lacked jurisdiction over all the claims, thereby making removal improper under 28 U.S.C. § 1441.[93] The Seventh Circuit looked to *Frances J. v. Wright*[94] in concluding that § 1441(a) only conferred jurisdiction where "the district court has the authority to adjudicate *all* of the claims in the case."[95] In *Frances J.*, the Seventh Circuit interpreted the Eleventh

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86. *See id.* at 165-67.

87. *See* Wisconsin Dep't of Corrections v. Schacht, 118 S. Ct. 2047, 2050 (1998).

88. *See id.* The complaint included claims under the Fourteenth Amendment Due Process Clause as well as violations under 42 U.S.C. § 1983 (1994). *See Schacht*, 118 S. Ct. at 2050.

89. *Schacht*, 118 S. Ct. at 2050.

90. These are the claims against the defendants in their "personal capacity." *Id.* (citing Schacht v. Wisconsin Dep't of Corrections, No. 96-C-122-S (W.D. Wisc. Sept. 13, 1996)). The district court granted summary judgment after finding Schacht had not been deprived of due process under the Fourteenth Amendment. *See id.*

91. *See id.*

92. *See* Schacht v. Wiseonsin Dep't of Corrections, 116 F.3d 1151, 1153 (7th Cir. 1997).

93. *See id.* at 1152.

94. 19 F.3d 337 (7th Cir. 1994).

95. *See Schacht*, 116 F.3d at 1152 (emphasis added). The Seventh Circuit rejected the "futility" argument raised by the defendants in this case, stating that there was "no 'futility' exception to § 1447(c)." *Id.* at 1153. Section 1447(c) states: "If at any time before final judgment it appears that the district court lacks subject-matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c) (Supp. II 1996). The Seventh Circuit in *Schacht* found the federal court is "not free to disregard a jurisdictional defect" even if it would result in duplicate litigation in the state and

Amendment as a limit on the subject-matter jurisdiction of the federal court rather than a form of common law immunity.[96] The *Frances J.* court had held that an action containing claims barred by sovereign immunity barred a federal court from hearing claims in whole or in part for lack of original jurisdiction.[97] The Seventh Circuit found that since the district court lacked original jurisdiction over the action, due to the bar imposed by the state's sovereign immunity, the case was improperly removed from state court minus an explicit waiver.[98]

The *Frances J.* court found the real issue to be the federal court's removal jurisdiction as granted by statute.[99] Reasoning that the district court lacked jurisdiction unless it could have heard the claim had it originally been filed in the district court,[100] the Seventh Circuit directed the district court to remand the entire action to the state court from which it came.[101]

In further support of their decision, the Seventh Circuit invoked various policy arguments.[102] First, it cited the premise that state courts are as capable as federal district courts to hear questions arising under federal law.[103] Second, it found that state courts have jurisdiction concurrent with a lower federal court in hearing suits invoking federal law.[104] Finally, the Seventh Circuit found that concerns of judicial economy encourage remanding entire actions rather than taking a claim-specific approach.[105]

### *C. The Reasoning of* Schacht

The Supreme Court rejected the reasoning of the Seventh Circuit in holding that the existence of an Eleventh Amendment-barred claim did not automatically destroy

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federal court systems. *Schacht*, 116 F.3d at 1153.

96. *Frances J.*, 19 F.3d at 340.

97. *Id.* at 341.

98. *See id.* at 342. The Supreme Court has found a waiver of a state's Eleventh Amendment immunity by either Congress's abrogation or a state's "unequivocal expression" within its statute. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238-41 (1985). Of essential importance to the analysis at hand is the generally accepted view that merely filing a motion or notice of removal is not an effective waiver of a state's sovereign immunity unless the Attorney General or other state official is granted such powers expressly in the state statute. *See, e.g.*, Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 466-67 (1945); Silver v. Baggiano, 804 F.2d 1211, 1214-15 (11th Cir. 1986) ("[R]emoval by state officials of a suit containing state law claims to federal court does not amount to waiver of Eleventh Amendment immunity unless those state officials are authorized to waive such immunity."); Gwinn Area Community Sch. v. Michigan, 741 F.2d 840, 846-47 (6th Cir. 1984).

99. The Seventh Circuit agreed that the *McKay* court did not erroneously read *Hans* to bar federal jurisdiction over actions, rather than claims, even though it does go against the reasoning in *Pennhurst II*, which consistently refers to the Eleventh Amendment's bar of claims, rather than actions. *See Frances J.*, 19 F.3d at 341; *see also* text accompanying *supra* notes 5, 17-21.

100. *See generally* 28 U.S.C. § 1441(a) (1994).

101. *See Frances J.*, 19 F.3d at 343.

102. *See id.* at 341.

103. *See id.* (citing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816)).

104. *See id.* (citing Stone v. Powell, 428 U.S. 465, 493 n.35 (1976)).

105. *See id.*

the federal court's original jurisdiction over the entire action.[106] As a result, removal to the district court was proper, and the district court could hear and decide the nonbarred claims.[107]

In support of the Seventh Circuit's decision, Schacht raised three arguments. All three were rejected by the Supreme Court. First, Schact posited that an action containing federal law claims joined with a claim barred by the Eleventh Amendment was a different situation than when a cause of action included questions arising under both federal and state law.[108] Schacht argued that when federal and state claims are joined, the state claims fall within the federal court's supplemental jurisdiction under 28 U.S.C. § 1367(a).[109] On the other hand, where federal claims are joined with an Eleventh Amendment-barred claim, the federal claims are not within the court's pendent jurisdiction.[110] The Supreme Court rejected this argument.

Second, the Court rejected Schacht's argument that the Eleventh Amendment acted as a limit on a federal court's jurisdiction.[111] If the Eleventh Amendment acts as an affirmative limitation on federal jurisdiction, a district court could never be given the power to hear such claims under the Constitution.[112]

Finally, Schacht's analogy to removal jurisdiction based on diversity jurisdiction was rejected.[113] In prior cases, the Court had found removal improper where even one claim against a nondiverse defendant existed.[114] The *Schacht* Court, however, rejected this analogy. The presence of a nondiverse party automatically destroys the original jurisdiction of the federal court.[115] This is different, however, from an Eleventh Amendment defense. Unlike the Eleventh Amendment, the federal court must raise the lack of diversity sua sponte, thus making it unwaivable.[116] The Eleventh Amendment grants a defense to a state, but does not automatically destroy the federal court's jurisdiction.[117]

Concluding that the Eleventh Amendment bars claims and not actions, the *Schacht* Court next looked to the specific statutory language of the remand statute, § 1447(c).[118] "If at any time before final judgment it appears that the district court lacks subject-matter jurisdiction, the case shall be remanded."[119] Schacht argued

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106. *See* Wisconsin Dep't of Corrections v. Schacht, 118 S. Ct. 2047, 2052 (1998).

107. *See id.* at 2050.

108. *See id.* at 2051-52.

109. *See id.* at 2051; 28 U.S.C. § 1367(a) (1994). The Supreme Court cited *City of Chicago v. International College of Surgeons*, 118 S. Ct. 523, 529-30 (1997), in support of this argument. *See Schacht*, 118 S. Ct. at 2051.

110. *See Schacht*, 118 S. Ct. at 2051.

111. *See id.* at 2052.

112. *See id.*

113. *See id.*

114. *See id.* (citing Caterpillar, Inc. v. Lewis, 519 U.S. 61, 68-69 (1996)).

115. *See* Insuranee Corp. of Ir. v. Compagnie dcs Bauxites de Guinee, 456 U.S. 694, 702 (1982) (comparing and contrasting personal jurisdiction with federal subjeet-matter jurisdiction).

116. *See Schacht*, 118 S. Ct. at 2052; *Insurance Corp. of Ir.*, 456 U.S. at 702.

117. *See Schact*, 118 S. Ct. at 2052-53; Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985).

118. 28 U.S.C. § 1447(c) (Supp. II 1996).

119. *Id.*

that the district court lacked jurisdiction over the entire case once the Eleventh Amendment was raised and as a result, § 1447(c) requires remand of the entire case. The Court found instead that the district court lacked subject-matter jurisdiction over only those claims barred by the Eleventh Amendment, and not over the entire cause of action.[120] As a result, only the claims so barred had to be remanded to the state court. The claims unaffected by the Eleventh Amendment did not fall under § 1447(c)'s mandatory remand.[121]

The purpose behind § 1447(c) also defeats Schacht's interpretation. Because § 1447(c) deals with procedure after removal, it is focused more on the differences between defective removals based on subject-matter jurisdiction than those that are defective because of procedural oversights.[122] Such a situation was not at issue in *Schacht.*

Alternatively, the Fifth and Seventh Circuits had looked to the plain language of the removal statute in their reasoning. Under § 1441(c), if one claim falls within the federal-question jurisdiction of the district court then the entire cause of action, including those claims which are not removable, may be removed to federal court.[123] The district court is also granted the discretion to remand "all matters in which State law predominates."[124] Congress thus grants federal courts the discretion to hear the entire case or else to remand the independent, non-removable claims. Though the statute does grant the federal judge discretion to remand those claims in which state law outweighs federal concerns,[125] it speaks nothing of those issues which are removable and primarily a matter of federal law.[126] Therefore, by looking to the plain language of the statute, Congress did not grant the district court the discretion to remand or decline to hear those claims over which it possessed federal-question, subject-matter jurisdiction. This conclusion is consistent with the Article III duty of federal courts to hear those claims over which it has jurisdiction.[127]

Because removal jurisdiction is purely an act of Congress, it is necessary to first look at the language of the statute which establishes it in the context of *Schacht.* Suppose a plaintiff files a § 1983 claim in state court which is then removed to federal court pursuant to the state defendant's motion under § 1441(a). A consistent reading of the reasoning in *McKay* and *Frances J.* results in the barring of a civil rights action containing federal claims sufficient to invoke the court's federal-

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120. *See Schacht,* 118 S. Ct. at 2054. The Court declined to discuss whether or not Eleventh Amendment immunity is a matter of subject-matter jurisdiction, as it was not determinative in this case. *See id.*

121. *See id.*

122. *See id.*

123. 28 U.S.C. § 1441(c) (1994).

124. *Id.*

125. *But see* Berman, *supra* note 55, at 700-01 (concluding instead that when a defendant removes a civil action joining a federal question claim to a separate and independent claim which is barred by the Eleventh Amendment the district court must remove the entire action and remand the barred claim).

126. *See supra* note 1.

127. *See* U.S. CONST. art. III, § 2, cl. 1.

question jurisdiction as well as its supplemental jurisdiction under § 1367,[128] thus defeating the purpose of the statute. Rather than defeating the statute's purpose, the court should allow removal of those portions of the civil rights action over which the federal court has jurisdiction so as to allow a plaintiff a forum for the vindication of its rights.

Of further importance is the need to clarify what constitutes a "civil action" as described in the removal statute.[129] Is it referring to a case with various claims or, in the alternative, is it referring to each of the individual claims? By looking to the language in other statutory grants of jurisdiction, we see that the use of the word "action" is perhaps too broad of a term.

"Cause of action" is not synonymous with "case." For example, in the supplemental jurisdiction statute,[130] the language of the statute confers a district court with jurisdiction over any claims "so related to claims in the *action*" that they "form part of the same *case* or controversy."[131] Because both words exist independently in the same statute, we can infer that the terms are not interchangeable and that "civil action" is meant to refer to any claim brought against a party. For purposes of removal and Eleventh Amendment analysis, each claim should, as a result, be reviewed on an individual basis. The finding that one claim is barred, would not bar the entire case from federal court. Specific to the facts in *Schacht*, this allows the district court to remand those claims barred by sovereign immunity and grant summary judgment (or proceed to trial on the merits) on those federal questions over which federal law predominates.

The Eleventh Amendment acts as a bar to certain claims arising under federal law. However, that does not deny a district court from hearing other claims unaffected by a state's sovereign immunity. Removal is appropriate where a federal court has original jurisdiction by the existence of *one* claim establishing as much. Therefore, if some of the claims within one action are barred by the Eleventh Amendment and others are not, the federal court should remand those claims barred by the Eleventh Amendment to the state court in which they were filed, citing lack of subject-matter jurisdiction. However, the district court should hear those claims within its subject-matter jurisdiction as questions of federal law are raised.

On the other hand, if the claims effectively barred by the Eleventh Amendment were the only ones upon which subject-matter jurisdiction could be grounded, then once they are barred, the entire action must follow. Based primarily upon the language of the statute and Supreme Court precedent, the district court currently has the jurisdiction to hear those claims not barred by the Eleventh Amendment despite the existence of others which are not within federal subject-matter jurisdiction.

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128. 28 U.S.C. § 1367 (1994). The pertinent text of the statute reads:

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

*Id.* § 1367(a).

129. *See id.* § 1441(a).

130. *See id.* § 1367.

131. *Id.* (both emphasis added).

The Supreme Court's decision in *Schacht* is a narrow one. Its holding only declares that the presence of a claim barred by the Eleventh Amendment does not destroy the original jurisdiction of the federal court. As a result, the district court can either hear the non-barred claims or remand the entire actiou. The Court refuses to decide whether or not the Eleventh Amendment itself is a matter of subject-matter jurisdiction.[132] Finally, the Court did not address whether or not the petition for removal can be considered a waiver of the state's Eleventh Amendment immunity. Justice Kennedy, in his concurrence, addressed the possibility of such an interpretation.

## III. JUSTICE KENNEDY'S WAIVER THEORY

Though Justice Breyer spoke for a unanimous Court, Justice Kennedy filed a concurring opinion.[133] Specifically, Justice Kennedy addressed whether or not a defendant State expressly waives its Eleventh Amendment immunity by removing the case to federal court, thus voluntarily invoking the federal court's jurisdiction.[134] In addressing this issue, it is necessary to consider the history of Eleventh Amendment waiver and removal jurisdiction.[135]

Because removal requires the consent of all defendants,[136] once the State consents to removal, arguably it waives its Eleventh Amendment defense. It seems rather anomalous to allow a defendant to remove a case, invoking federal jurisdiction, and then argue to the federal court that it lacks that same jurisdiction because of the Eleventh Amendment. The "law usually says a party must accept the consequences of its own acts."[137] In this respect, Justice Kennedy equates the Eleventh Amendment to personal jurisdiction. Under the law of personal jurisdiction, generally, a party expressly waives any arguments against the jurisdiction of the court upon filing in the federal court. However, Supreme Court precedent seems to indicate that a state does not waive its immunity by merely appearing in a suit.[138] In fact, a state may raise the Eleventh Amendment defense for the first time on appeal.[139] In this respect, the Eleventh Amendment acts as a limitation on the federal courts' subject-matter jurisdiction.[140] Kennedy argues that the better

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132. *See* Wisconsin Dep't of Corrections v. Schacht, 118 S. Ct. 2047, 2054 (1998).

133. *See id.* at 2054-57 (Kennedy, J., concurring).

134. *See id.* at 2054. The Court did not address this issue directly in its opinion because it was not raised by either party. *See id.* As a result, Justice Kennedy advocates considering the issue in a later case. *See id.*

135. *See supra* Part I.

136. *See Schacht*, 118 S. Ct. at 2057 (Kennedy, J., concurring); *supra* text accompanying note 69.

137. *Schacht*, 118 S. Ct. at 2055 (Kennedy, J., concurring).

138. *See, e.g., id.*; Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984); Edelman v. Jordan, 415 U.S. 651, 678 (1974).

139. *See Pennhurst*, 465 U.S. at 99; Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 683 (1982); *Edelman*, 415 U.S. at 678; Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 467 (1945).

140. *See Schacht*, 118 S. Ct. at 2055 (Kennedy, J., concurring).

approach would be to treat the Eleventh Amendment more like a waiver of personal jurisdiction.[141]

Justice Kennedy's analysis is not without precedent. "[W]here a State voluntarily become[s] 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."[142] Specifically, in *Clark v. Barnard*, the Supreme Court found that an appearance by the defendant State waived any Eleventh Amendment immunity concerns.[143] The *Clark* Court equated Eleventh Amendment immunity with a personal privilege granted to the states. As a result, if the state appeared in federal court it was a "voluntary submission to [the federal court's] jurisdiction."[144]

## CONCLUSION

In consideration of both statutory analysis and Supreme Court precedent, the removal statute, when considered in the context of the Eleventh Amendment, advocates a review of each claim. Unlike the methodology used in the Fifth and Seventh Circuits, the district court would effectively not be divested of its ability to hear other claims arising under federal law. This claim-specific approach allows for the district court to balance the sovereign immunity concerns of a state against those of the federal government in determining which claims are properly determined in a state forum, and which are better decided by the federal court. Finally, such a concurrent reading of the Eleventh Amendment and removal jurisdiction effectively equates a petition for removal with a waiver of the Eleventh Amendment defense.

141. *See id.*
142. Gunter v. Atlantic Coast Line R.R., 200 U.S. 273, 284 (1906).
143. 108 U.S. 436, 447-48 (1883).
144. *Id.* at 447.