

# WAIVERS OF STATE SOVEREIGN IMMUNITY AND THE IDEOLOGY OF THE ELEVENTH AMENDMENT

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## ABSTRACT

*States normally enjoy immunity from suit by private parties, but they may waive this immunity. The Supreme Court's steady contraction of other exceptions to the rule of state sovereign immunity has renewed interest in the previously little-discussed possibilities of waiver. This Article explores the boundaries of waiver doctrine.*

*This Article shows that, prior to 1945, the Supreme Court—even as it enforced a broad, substantive rule of state sovereign immunity—applied a sensible doctrine of waiver that balanced the interests of states with those of private parties and the federal judicial system. The Court's traditional doctrine treated state sovereign immunity like the defense of personal jurisdiction. Failure to assert immunity in a timely fashion waived the immunity defense. This rule prevented unfair gamesmanship.*

*Beginning in 1945, the traditional rules concerning waiver of state sovereign immunity got swept away by the overall ideological tide of state sovereign immunity doctrine. The immunity became so important that it overrode all other considerations, including the need to run the federal judicial system in a sensible way. The new rules of waiver permitted states to abuse their immunity and waste federal judicial re-*

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*sources by litigating the merits of a case while holding an immunity defense in reserve.*

*The Supreme Court's most recent decisions suggest that the Court has returned to its traditional rules concerning waiver. The Court should make clear that it has fully reinstated the traditional, sensible, non-ideologized rules of waiver. Such rules respect the states' prerogative of refusing to be sued in a federal forum, while at the same time requiring states to assert their prerogative in an orderly way that respects the needs of the federal judicial system.*

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## INTRODUCTION

Fifteen years ago—perhaps even ten—hardly anyone would have cared about waivers of state sovereign immunity from suits based on federal law.<sup>1</sup> Traditionally, waivers played only a small and subordinate role in the long saga of state sovereign immunity theory. The sovereign immunity that the federal Constitution guarantees to the states is a personal privilege that the states may waive at pleasure,<sup>2</sup> but cases exploring such waivers have been rare. Far more attention has been paid to other mechanisms by which private parties may sue states.

The last decade has witnessed an abrupt change in this situation. Suddenly, waivers of state sovereign immunity are an important issue. Cases concerning waivers are cropping up all over the federal courts.<sup>3</sup>

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1. As this Article explains, courts and scholars have at times used the term “waiver” of state sovereign immunity to describe three different things: action by Congress that eliminates state sovereign immunity; a state’s voluntary, knowing relinquishment (usually in advance of suit, and usually on a generic basis) of its own sovereign immunity; and other actions by state officers (usually those taken in the course of litigation itself) that have the effect of relinquishing state sovereign immunity. *See infra* Part I.C. Courts, scholars, and litigants have cared very much about the first category, the ability of Congress to eliminate state sovereign immunity by statute. *See, e.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that Congress cannot abrogate state sovereign immunity when acting pursuant to its Article I powers); Jonathan R. Siegel, *The Hidden Source of Congress’s Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539 (1995) (exploring mechanisms Congress could use to achieve the equivalent of abrogation of state sovereign immunity). That category, however, really describes a different situation that should be called by a different name. *See infra* Part I.C.

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

3. At the Supreme Court level, see *Lapides v. Bd. of Regents of the Univ. Sys.*, 535 U.S. 613 (2002); *Raygor v. Regents of Univ.*, 534 U.S. 533 (2002); *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381 (1998).

The lower courts have struggled with, and gone into conflict regarding, the rules of waiver doctrine. *Compare, e.g.*, *Arecibo Cmty. Health Care, Inc. v. Puerto Rico*, 270 F.3d 17, 26–29 (1st Cir. 2001) (holding that waiver occurs when a state files a proof of claim in a bankruptcy proceeding); *In re SDDS, Inc.*, 225 F.3d 970, 973 (8th Cir. 2000) (holding that waiver occurs when a state makes a general appearance and litigates on the merits), *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 756–58 (9th Cir. 1999) (holding that the state waives immunity by failing to raise it until the first day of trial), *amended by* 201 F.3d 1186 (9th Cir. 2000), *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (holding that waiver occurs when a state removes a case from state court to federal court and litigates on the merits), *and In re Burke*, 146 F.3d 1313, 1319–20 (11th Cir. 1998) (holding that waiver occurs when a state files a proof of claim in a bankruptcy proceeding) *with* *Montgomery v. Maryland*, 266 F.3d 334, 338–39 (4th Cir. 2001) (holding that a state defendant is permitted to raise the immunity defense on appeal despite the fact the immunity defense was expressly withdrawn while the case was pending in district court), *vacated*, 122 S. Ct. 1958 (2002), *Lapides v. Bd. of Regents of the Univ. Sys.*, 251 F.3d 1372, 1378 (11th Cir. 2001) (holding that removal does not give rise to waiver),

The reason for this change is simple. Since its landmark decision in *Seminole Tribe of Florida v. Florida*,<sup>4</sup> the Supreme Court has steadily constricted the set of circumstances in which private parties may sue states. As this set diminishes, each remaining element in the set takes on increased importance. Lawyers, courts, and scholars paid little attention to waivers of state sovereign immunity as long as there were other mechanisms available for bringing suits against states; now that waivers are almost the only game in town, everyone wants to play. Because cases in which a state defendant waives its immunity make up one of the very few remaining categories in which private suit against states is permitted, it is essential that the boundaries of this category be fully understood.<sup>5</sup>

Additionally, waivers of state sovereign immunity are of interest because they provide a window into the ideology of state sovereign immunity doctrine. They display, in microcosm, larger ideological trends that run through the Supreme Court's handling of federalism issues. In early cases, the Supreme Court handled the issue of waivers of state sovereign immunity in a reasonable way that appropriately balanced state, federal, and private interests. Later, the issue became ideologized. The larger trend of respecting states' rights, particularly state sovereign immunity, became so strong that it overrode all other considerations. Even the rules regarding waiver had to be recast so

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*rev'd*, 535 U.S. 613 (2002), *Chittister v. Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223, 227 (3d Cir. 2000) (holding that there is no waiver even though the case was tried in district court and the state did not raise immunity until the case was on appeal), *and Kovacevich v. Kent State Univ.*, 224 F.3d 806, 816 (6th Cir. 2000) (same). *See also* *LensCrafters, Inc. v. Sundquist*, 184 F. Supp. 2d 753, 759 n.3 (M.D. Tenn. 2002) (“[C]ircuits are split as to whether voluntary appearance and defense on the merits constitutes waiver of Eleventh Amendment immunity.”).

4. 517 U.S. 44 (1996).

5. Although there has been little interest in waivers of state sovereign immunity until recently, I do not mean to suggest that the subject has been entirely neglected. For some analyses of waivers of state sovereign immunity, see Christiana Bohannon, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 N.Y.U. L. REV. 273 (2002); Gil Seinfeld, *Waiver-In-Litigation: Eleventh Amendment Immunity and the Voluntariness Question*, 63 OHIO ST. L.J. 871 (2002).

Scholars have paid a good deal of attention to the question of whether Congress can induce waivers of state sovereign immunity through the use of the federal spending power or other federal powers. *E.g.*, Michael T. Gibson, *Congressional Authority to Induce Waivers of State Sovereign Immunity: The Conditional Spending Power (and Beyond)*, 29 HASTINGS CONST. L.Q. 439 (2002). This Article is primarily concerned with waivers of state sovereign immunity that result from actions taken by states in the context of litigation, but these other kinds of waivers are discussed *infra* Part II.C and Part III.C.5.

that they would conform to the Court's overall ideology of state sovereign immunity doctrine.<sup>6</sup>

A careful review of the history of waiver doctrine reveals that, in the mid-twentieth century, the Supreme Court erroneously conflated two separate traditions. Prior to 1945, the Court had one line of cases concerning states' voluntary and knowing *consent* to suit, and another line of cases concerning actions by state officers that had the effect of *waiving* a state's immunity from suit without consent. Although the two concepts appear similar (and the term "waiver" is sometimes applied to both), the cases distinguished them and subjected them to quite different rules.<sup>7</sup> These pre-1945 decisions reflected an appropriate balance between the importance of states' rights and the need for sensible rules governing the operation of the federal judicial system.

Beginning in 1945 and continuing, with some backsliding, for decades, the Court conflated the two lines of cases.<sup>8</sup> This conflation led to paradoxes and contradictions that reflected the elevation of state sovereign immunity from an important but waivable defense into an almost sacred principle. Other values, including obvious, common-sense rules about how to run the federal judicial system, were sacrificed. Such elevation and sacrifice are possible only in the context of an ideologized doctrine of state sovereign immunity.

Interestingly, however, notwithstanding the great and continuing strength of the Supreme Court's overall push on federalism issues, the most recent trend regarding waivers of state sovereign immunity represents a return to the prior, more reasonable rules. In two recent cases—*Wisconsin Department of Corrections v. Schacht*<sup>9</sup> and *Lapides v. Board of Regents of the University System of Georgia*<sup>10</sup>—the Court has retreated from the post-1945 waiver cases and explicitly overruled the most troublesome case from the ideologized period.<sup>11</sup> It appears that the Court has once again made room for reasonable, common-sense rules of waiver within the larger doctrine of state sovereign immunity.

The lower courts' reception of the Supreme Court's most recent cases has not, however, been uniform. Some lower courts have cor-

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6. *See infra* Part II.

7. *See infra* Part II.A.

8. *See infra* Part II.B.

9. 524 U.S. 381 (1998).

10. 535 U.S. 613 (2002).

11. *See infra* Part II.E.

rectly understood *Schacht* and *Lapides* to reinstate the reasonable, pre-1945 rules governing state consent to suit and waiver of immunity from suit without consent. Others, however, still embrace the ideology of the post-1945 cases and have given *Schacht* and *Lapides* very narrow readings.<sup>12</sup>

This Article attempts to de-ideologize the doctrine of waiver of state sovereign immunity, to explain the Supreme Court's decisions in this context, and to resurrect the useful distinction between cases about state *consent* to suit and cases about state *waiver* of immunity from suit. The Article seeks to show that there is room, even within the Supreme Court's broad doctrine of state sovereign immunity, for a sensible doctrine of waiver. Such a sensible, non-ideologized doctrine would not be as favorable to states as the rules created by the Court's post-1945 waiver cases,<sup>13</sup> but neither would it deny the importance of respect for state interests that is at the heart of the Court's sovereign immunity doctrine.<sup>14</sup>

Part I of this Article briefly reviews the rule of state sovereign immunity and its chief exceptions, emphasizing the reasons why the exception permitting waiver of state sovereign immunity has taken on increased importance. Part II traces the development of the rules governing state consent to suit and other waivers of state sovereign immunity and notes how these reasonably sensible rules became ideologized in the mid-twentieth century. Part III suggests how to mend the doctrine of waiver of state sovereign immunity.

## I. THE RULE OF STATE SOVEREIGN IMMUNITY AND ITS EXCEPTIONS

The story of the Supreme Court's development and expansion of state sovereign immunity doctrine is a familiar one that need be recounted only briefly here. Without attempting much normative analysis, this Part describes the development of the rule of state sovereign immunity and its most important exceptions. The focus is on understanding why the rules of consent and waiver have taken on increased importance.

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12. See *infra* notes 296–97 and accompanying text.

13. See, e.g., *infra* Part III.C.1 (arguing that a state's failure seasonably to raise the issue of its immunity from suit should constitute a waiver of that immunity).

14. See, e.g., *infra* Part III.C.3 (arguing that a state's removal of a suit from state court to federal court should constitute a waiver only of the state's immunity from a federal forum, not a waiver of the state's immunity from liability).

### A. *The Rule of State Sovereign Immunity*

The issue of state sovereign immunity from suit in federal court is older than the Constitution itself: it arose during debates over the Constitution's ratification, when opponents of ratification drew attention to the provision, in Article III, for federal jurisdiction over suits "between a State and Citizens of another State."<sup>15</sup> This provision, Anti-Federalists observed, appeared to apply just as much to suits in which a state is a defendant as to suits in which a state is a plaintiff. In particular, it appeared to permit suits against states upon their debts, which could be conveyed to someone who was not a citizen of the debtor state.<sup>16</sup> The financial condition of many states at the time was such that suits on their debts could have caused them considerable embarrassment.<sup>17</sup>

Proponents of ratification assured opponents that the Constitution was not intended to countenance suits against states for the payment of debt.<sup>18</sup> Shortly after the Constitution's adoption, however, an out-of-state creditor of Georgia began just such a suit in the United States Supreme Court, in the Court's original jurisdiction.<sup>19</sup> The Court, relying on the plain text of Article III (among other considerations), held that such an action would indeed lie.<sup>20</sup> A shocked<sup>21</sup> Congress quickly adopted, and the states ratified, the Eleventh Amendment, which 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

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15. U.S. CONST. art. III, § 2, cl. 1; 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 526–27 (photo. reprint 1941) (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co. 2d ed. 1836) [hereinafter ELLIOT'S DEBATES] (statement of George Mason); *id.* at 543 (statement of Patrick Henry).

16. ELLIOT'S DEBATES, *supra* note 15, at 542–43 (statement of Patrick Henry); THE FEDERALIST NO. 81, at 487–88 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

17. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 99 (1928).

18. *See, e.g.*, THE FEDERALIST NO. 81, at 487–88 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. . . . [T]here is no color to pretend that the State governments would . . . be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.")

19. *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 419 (1793).

20. *Id.* at 452 (Blair, J.); *id.* at 466 (Wilson, J.); *id.* at 469 (Cushing, J.); *id.* at 479 (Jay, C.J.).

21. *See Hans v. Louisiana*, 134 U.S. 1, 11 (1890) (stating that the decision in *Chisolm* created "a shock of surprise throughout the country"); 1 WARREN, *supra* note 17, at 96 ("The decision fell upon the country with a profound shock.")

one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.<sup>22</sup>

The Eleventh Amendment's enigmatic text created problems and paradoxes that remain difficult to explain today. On the one hand, the amendment clearly seems textually limited to suits against a state by citizens of *another state* (or by foreign citizens or subjects), and so it would appear to have no application to a suit against a state by one of its own citizens. On the other hand, when a suit is brought against a state by a citizen of another state, the amendment's text contains nothing that would appear to limit its application based on the *nature* of the suit (provided it be a "suit in law or equity"). Thus, the amendment would, in particular, appear to apply equally to suits based on state and federal law.

A literal reading of the amendment might, therefore, lead to the conclusion that the amendment bars *all* suits in law or equity brought in federal court against a state by a citizen of another state, but permits suits in federal court against a state by its own citizens—provided, of course, that they are otherwise within the federal jurisdiction.<sup>23</sup> Curiously, this "literal" interpretation of the Eleventh Amendment has almost no adherents.<sup>24</sup> It would lead to the paradoxical result that a private citizen could sue her own state on a federal cause of action, but a citizen of another state could not sue the state on an identical claim. This result is paradoxical because under the Constitution the presence of an interstate element in a case typically enhances, rather than detracts from, the basis for the exercise of fed-

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22. U.S. CONST. amend XI. Congress adopted the amendment in March, 1794, just a little over a year after the *Chisolm* decision. It took the states, however, almost four years to ratify the amendment. 1 JULIUS GOEBEL, JR., *THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 726–37 (1971).

23. I annually ask my students in Federal Courts what they understand to be the literal meaning of the text of the Eleventh Amendment. The reading given above is the most popular answer, but it is not universal. Some students say that the text literally indicates the "diversity" reading explained in the following paragraphs; others offer still other "literal" readings. *See infra* note 24.

24. For a rare exception, see Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1346 (1989). Another scholar also recommends applying the amendment literally, although in his view the literal reading permits congressional abrogation of state sovereign immunity. Steven Breker-Cooper, *The Eleventh Amendment: A Textual Solution*, 38 WAYNE L. REV. 1481, 1482 (1992).



eral jurisdiction.<sup>25</sup> The “literal” reading of the Eleventh Amendment therefore makes little sense.

As a result, most interpretations of the Eleventh Amendment depart from this literal reading. The two principal readings may be termed the “official” reading and the “diversity” reading. The “diversity” reading, advocated by numerous scholars and some judges, argues that the Eleventh Amendment simply repealed the portion of Article III of the Constitution that conferred federal judicial power over cases between a state and citizens of another state.<sup>26</sup> It did not bar a case fitting that description from being heard in federal court if the case was otherwise within the federal jurisdiction.<sup>27</sup> Thus, under this theory, the Eleventh Amendment bars cases such as *Chisolm* itself, in which a private plaintiff sues a state on a state law cause of action and the case is in federal court *only* because of the diversity of the parties.<sup>28</sup> The Eleventh Amendment does not, under the diversity reading, bar a private party from suing a state in federal court on a federal cause of action, whether or not the plaintiff is a citizen of the defendant state, because such a claim can proceed under the “federal question” jurisdiction.<sup>29</sup>

The diversity theory respects the limiting language of the Eleventh Amendment, which limits application of the amendment to suits against states by citizens of other states. Its textual weakness is that it must confront the broad language defining the types of cases that the amendment apparently bars: “any suit in law or equity” that falls within the party configurations listed in the amendment. This weakness is not necessarily insuperable—diversity theorists have explained

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25. See, e.g., U.S. CONST. art. III, § 2, cl. 1 (conferring federal judicial power over cases “between Citizens of different States”).

26. To be precise, it repealed *part* of that provision: it repealed the grant of judicial power over cases between a state and citizens of another state where the state is the defendant. It did not affect the provision’s application to cases where the state is the plaintiff. For judicial explanations of the diversity theory, see *Seminole Tribe v. Florida*, 517 U.S. 44, 101–16 (1996) (Souter, J., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 258–302 (1985) (Brennan, J., dissenting). For scholarly explanations, see, for example, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

27. *Atascadero*, 473 U.S. at 301 (Brennan, J., dissenting) (“If federal jurisdiction is based on the existence of a federal question or some other clause of Article III . . . the Eleventh Amendment has no relevance.”).

28. *Id.* at 289 (Brennan, J., dissenting).

29. *Id.* at 301 (Brennan, J., dissenting).

that the amendment's text is directed specifically at the state-citizen diversity clause of Article III<sup>30</sup>—but it is a textual difficulty.

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30. See, e.g., *id.* at 289 (Brennan, J., dissenting) (explaining that the “rather legalistic terms” of the Eleventh Amendment exist because the amendment was intended to remedy *Chisolm*'s interpretation of the state-citizen and state-alien diversity clauses in Article III as themselves abrogating state sovereign immunity). Justice Brennan's otherwise comprehensive opinion omits one potentially powerful explanation for how the Eleventh Amendment's text could have taken its curious form if it was intended to embody the diversity theory. In 1805, Senator Breckenridge proposed to amend the Constitution to provide that:

The judicial power of the United States shall not be construed to extend to controversies between a State and citizens of another State, between citizens of different States, between citizens of the same State, claiming lands under grants of different States; and between a State or the citizens thereof and foreign States, citizens, or subjects.

14 ANNALS OF CONG. 53 (1805). Evidently this proposal was intended to repeal all forms of diversity jurisdiction, but surely no one could think that the statement that “[t]he judicial power of the United States shall not be construed to extend to controversies . . . between citizens of different States” was intended to eliminate federal judicial power over suits between citizens of different states that were based on federal questions. That would make no sense at all; it would limit the federal question jurisdiction to cases that arose under federal law *and* were between citizens of the *same* state. (Actually, it would also allow a federal question case between aliens, but not between an alien and a citizen—another nonsensical result.)

The language of the Breckenridge proposal closely parallels that of the Eleventh Amendment. If Senator Breckenridge could have imagined, as he evidently did, that his language would have the effect of repealing diversity jurisdiction but not of affirmatively barring cases that fell within the party configurations listed in the amendment if the cases were otherwise within the federal jurisdiction, then perhaps it is not so strange after all to give a similar reading to the text of the Eleventh Amendment: it repeals the state-citizen and state-alien diversity jurisdiction but does not bar cases falling within those party configurations if they are otherwise within the federal jurisdiction.

Countering this argument, Professor Lawrence Marshall finds a “crucial” distinction between the Breckenridge proposal and the actual text of the Eleventh Amendment: the Eleventh Amendment refers to “any suit in law or equity,” whereas the Breckenridge proposal uses the term “controversies.” Lawrence Marshall, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 127, 129 (1990). This latter term, Marshall argues, has a much narrower significance than the broad language used in the Eleventh Amendment; it evokes only the last six categories of Article III judicial power, not the first three, which Article III refers to as “cases” rather than as “controversies.” *Id.* at 129–30.

I would respectfully suggest that Marshall reads far too much into this slight linguistic difference. Marshall claims that “[a]lthough Breckenridge modeled his proposal on the Eleventh Amendment, he deliberately departed from its broad formulation,” but his accompanying footnote provides no support for the key word “deliberately.” *Id.* at 130 n.11. It is easy to imagine a far greater degree of precision in drafting constitutional amendments than likely exists. Think back to the balanced budget amendment that Congress considered in 1995. H.R.J. Res. 1, 104th Cong. (1995). Did anyone really understand the precise meaning of the text of the amendment—including all the different versions of that text that were proposed? *E.g., id.*; H.R.J. Res. 7, 104th Cong. (1995); H.R.J. Res. 15, 104th Cong. (1995); H.R.J. Res. 20, 104th Cong. (1995); H.R.J. Res. 21, 104th Cong. (1995) (each a different version of a balanced budget amendment). Yet the amendment came within one vote of passing the Congress. Michael Wines, *Senate Rejects Amendment on Balancing the Budget; Close Vote Is Blow to G.O.P.*, N.Y. TIMES, Mar. 3, 1995, at A1.

The diversity reading has never received the blessing of the Supreme Court. Instead, since its 1890 decision in *Hans v. Louisiana*,<sup>31</sup> the Court has adhered to what may be called the “official” reading of the Eleventh Amendment, which provides that the amendment bars private suits against states regardless of whether the cause of action is based on state or federal law and regardless of whether the plaintiff is a citizen of the defendant state.<sup>32</sup> The textual problems of this reading are opposite to those of the diversity theory: the official theory respects the broad language in the Eleventh Amendment (specifically, the words “any suit”), but ignores all of the limiting language. To avoid the problem created by the limited text of the Eleventh Amendment, some cases decided under the official theory declared that the Eleventh Amendment is merely an exemplification of a larger principle of state sovereign immunity, a principle that does not derive from the Eleventh Amendment and therefore is not limited by its text.<sup>33</sup> Other cases applying the official theory declared that the amendment itself bars cases without regard to its apparent textual limitations.<sup>34</sup> Freed, one way or the other, from textual limitation, the Supreme Court has held that state sovereign immunity bars suits against states by their own citizens,<sup>35</sup> by federally chartered corporations,<sup>36</sup> by Indian tribes,<sup>37</sup> and by foreign states;<sup>38</sup> it bars private parties

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31. 134 U.S. 1 (1890).

32. *E.g.*, *Edelman v. Jordan*, 415 U.S. 651, 662–63 (1974); *Duhne v. New Jersey*, 251 U.S. 311, 314 (1920).

33. *E.g.*, *Alden v. Maine*, 527 U.S. 706, 713 (1999) (“[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.”); *Ex parte New York*, 256 U.S. 490, 497 (1921):

[T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.

34. *E.g.*, *Lapides v. Bd. of Regents of the Univ. Sys.*, 535 U.S. 613, 616 (2002) (“The Eleventh Amendment grants a State immunity from suit in federal court . . . by its own citizens . . .”); *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 472–73 (1987):

[T]he Eleventh Amendment bars a citizen from bringing suit against the citizen’s own State in federal court, even though the express terms of the Amendment refer only to suits by citizens of another State. . . . [T]he Amendment bars suits in admiralty against the States, even though such suits are not, strictly speaking, “suits in law or equity.”

35. *Hans*, 134 U.S. at 14–15.

36. *Smith v. Reeves*, 178 U.S. 436, 445–49 (1900).

37. *Blatchford v. Native Vill.*, 501 U.S. 775, 787–82 (1991).

38. *Monaco v. Mississippi*, 292 U.S. 313, 329–32 (1934).

from suing states in admiralty;<sup>39</sup> and it bars private parties from suing states in the states' own courts,<sup>40</sup> even though none of these actions fall within the text of the Eleventh Amendment.

The purpose of this Article is not to choose between the official theory and the diversity theory. If one were to choose the diversity theory, then the issue addressed in this Article would evaporate: there would be no need to decide whether a state has waived its immunity from suit under federal law if that immunity did not exist in the first place. Necessarily, then, this Article begins by assuming the official theory *arguendo*—a very natural assumption, given that the official theory has held sway in the Supreme Court for more than a century.<sup>41</sup> The question is whether, even acting on that assumption, and taking seriously the respect for states' rights that the assumption entails, the Supreme Court's rules regarding waiver of state sovereign immunity are justified.

### B. *Three Limited Exceptions*

The expansive, official doctrine of state sovereign immunity creates serious problems of governance. Federal law is the supreme law of the land,<sup>42</sup> and federal law may properly regulate the behavior of states.<sup>43</sup> States are, therefore, bound by federal law, but when they violate it, the doctrine of state sovereign immunity prevents injured parties from suing states for relief.

This rule, if fully applied, would tend to rob federal law of its force insofar as states are concerned. To be sure, state officials might choose to comply with federal law simply out of a sense of duty,<sup>44</sup> but if they knew that no penalty could result from their violations of federal law, they might choose to violate it when the state would derive some benefit from the violation. This is not to suggest that state ac-

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39. *Ex parte New York*, 256 U.S. 490, 497–500 (1921).

40. *Alden v. Maine*, 527 U.S. 706, 741–54 (1999).

41. *Cf.* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1612 (2002) (explaining that even those who disagree with the official theory may find it instructive to consider whether certain premises of the official theory justify current doctrine).

42. U.S. CONST. art. VI, § 1, cl. 2.

43. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554–57 (1985) (holding that Congress may subject states to the minimum wage laws).

44. *See* Peter S. Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 33 LOY. L.A. L. REV. 1399, 1428–49 (2000) (describing social, bureaucratic, and political forces that tend to promote state compliance with federal law).

tors are venal or malicious, but simply to suggest that, like anyone else, they probably have at least some tendency to act in accordance with their economic incentives. Legal liability is a great engine for inducing compliance with legal norms. If that engine were turned off with respect to private actors, one would certainly expect less private compliance with the law; the same is likely true of state actors.<sup>45</sup> Thus, it would appear that, under the official doctrine, the Constitution makes federal law binding upon the states while simultaneously depriving that law of actual force—a paradoxical result.

Things are not quite that bad, however, because even the official theory does not enforce the principle of state sovereign immunity with all possible rigor; rather, it allows certain exceptions to the immunity principle. In light of the pressing need for some mechanism to enforce federal law against the states, these exceptions are of great practical and theoretical importance. The scope of the exceptions determines whether state sovereign immunity really frees state officials to violate federal law without redress or whether it merely makes obtaining redress more difficult and cumbersome.

Current law recognizes four principal exceptions to the rule of state sovereign immunity. Perhaps the most important exception is that state sovereign immunity does not prevent an injured private party from suing a state *officer* and obtaining an order that the officer cease conduct that violates federal law. This exception, commonly associated with the case of *Ex parte Young*,<sup>46</sup> derives from the notion

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45. Alexander Hamilton made this point at the time of the Constitution's adoption in explaining why the federal courts would need to have power to overrule state actions that violated constitutional restrictions on state behavior. See THE FEDERALIST NO. 80, at 475–76 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“No man of sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them.”).

Professor Meltzer rightly observes that whether retrospective monetary remedies would make state officials more likely to comply with federal law is really an empirical question. Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1338 (2001). However, in the absence of a persuasive empirical showing to the contrary, it seems reasonable to start with the presumption that economic incentives play at least some role in determining state officials' behavior. Also, as Meltzer observes, to the extent the question is empirical, Congress must be in a better position than courts to answer it. See *id.* at 1337–43; cf. Menell, *supra* note 44, at 1433–34 (suggesting that social and bureaucratic constraints are likely to operate in “most areas of state activity” but may have less effect on, for example, research conducted at state universities, because of the increasing commercialization of such research).

46. 209 U.S. 123 (1908). Actually, in many respects, the officer suit form predates *Young*. See, e.g., *The Va. Coupon Cases*, 114 U.S. 269, 293 (1885) (permitting suits against state officers as a remedy for the state's failure to honor its promise to accept its own past-due bond coupons

that state sovereign immunity applies only to the state itself and does not protect state officers who are acting unlawfully.<sup>47</sup> The fictional nature of this reasoning is widely recognized.<sup>48</sup> Because a state acts only through its officers, an order restraining the officer restrains the state. The fictional distinction between them exists only to mitigate the rigors of state sovereign immunity doctrine, to provide at least some relief to private parties injured by state violations of federal law, and to permit some mechanism for curing such violations.<sup>49</sup>

The *Ex parte Young* principle provides an important mechanism for the enforcement of federal law, but it has a significant limitation: it applies only to cases in which an injured plaintiff seeks only prospective, injunctive relief. The Supreme Court—without, perhaps, a particularly persuasive explanation—has held that state sovereign immunity bars a suit against a state officer seeking retrospective monetary damages that would have to be paid from the state treasury.<sup>50</sup> Thus, this exception to state sovereign immunity provides some

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in payment of taxes); Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1622–44 (1997) (describing the history of officer suits and the significance of *Young*).

47. 209 U.S. at 159–60.

48. See, e.g., *Stafford v. Briggs*, 444 U.S. 527, 539 (1980) (referring to cases where “the action is based upon the fiction that the officer is acting as an individual”); *Tonkawa Tribe v. Richards*, 75 F.3d 1039, 1048 (5th Cir. 1996) (explaining that Eleventh Amendment immunity is circumvented where “the suit is instituted under a fiction which allows suits for prospective injunctive relief against a state official in vindication of a federal right”); *In re McVey Trucking, Inc.*, 812 F.2d 311, 322 (7th Cir. 1987) (“These cases rely on the admitted fiction that the court order is against the state officer, not against the state.”); *Gray v. Bell*, 712 F.2d 490, 509–10 (D.C. Cir. 1983) (“To avoid the bar of sovereign immunity, courts indulged the fiction that a remedy could be had against a government officer, even though, in reality, relief would come from the government itself.”).

49. See Siegel, *supra* note 46, at 1622–70 (describing the origin and purpose of officer suit fiction).

50. *Edelman v. Jordan*, 415 U.S. 651, 664 (1974). The ultimate reason for this rule is clear enough—without it state sovereign immunity would have no practical force whatever—but the distinction is doctrinally unpersuasive for several reasons. First, the rule raises yet another textual problem. The Eleventh Amendment applies to “any suit in law or equity,” so if the fictional distinction between a state officer and a state avoids the Eleventh Amendment bar with regard to suits in equity (seeking injunctive relief), it is not clear why it should not be equally effective with regard to suits at law (seeking money damages). Second, the rule is undermined by the Supreme Court’s approval of prospective injunctive relief that requires a state to spend money; the Court justifies such relief by the less-than-persuasive distinction that the resulting spending is merely “ancillary” to the permitted injunctive relief. *Id.* at 668. Finally, the Court has stated that once a court issues a prospective injunctive order against a state officer, violation of that order may be punished by imposition of retroactive monetary penalties, *Hutto v. Finney*, 437 U.S. 678, 690–91 (1978), and it is not clear why states should be any less exposed to retroactive monetary

relief to injured parties, but it does not permit them to get full relief for their injuries.

Another important exception is that states have no immunity from suits brought by other states or by the United States.<sup>51</sup> According to the official theory, states consented to such suits when they ratified the Constitution or subsequently joined the Union.<sup>52</sup> The exception for suits by the United States is particularly important, because the United States is always an appropriate party to bring an action for the enforcement of federal law.<sup>53</sup> Accordingly, although private parties may not use damage actions to enforce federal law against states, the federal government may itself enforce federal law—apparently including federal law that regulates the behavior of states toward private parties—by bringing actions for monetary relief against states that violate federal law.<sup>54</sup> Federal officials may even, it appears, collect money from states that have violated federal law and distribute it to the victims of the violations.<sup>55</sup>

The application of this exception, however, may require the approval of federal officials on a case-by-case basis.<sup>56</sup> Thus, an injured private party would get no benefit from this exception if federal officials chose not to sue on the private party's behalf. Private parties typically have no control over whether the federal government chooses to bring a lawsuit, and federal officials might decline to do so for many reasons, such as limited resources, disagreement with the

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damages for violating a federal law than for violating a federal court order enforcing that same law.

51. *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904); *United States v. Texas*, 143 U.S. 621, 642–46 (1892).

52. *Alden v. Maine*, 527 U.S. 706, 755 (1999); *Texas*, 143 U.S. at 646.

53. Jonathan R. Siegel, *Congress's Power to Authorize Suits Against States*, 68 GEO. WASH. L. REV. 44, 67–71 (1999).

54. *Alden*, 527 U.S. at 755–60.

55. *Id.* at 759. The relevant passage in *Alden* is dictum, but it is supported by the uniform holdings of numerous lower courts and does not appear to be controversial. See Siegel, *supra* note 53, at 69–70 (collecting cases upholding this view).

56. See *Alden*, 527 U.S. at 759–60:

The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits of the first kind but not of the second.

*But see* Siegel, *supra* note 53, at 66–110 (explaining statutory mechanisms that Congress might use to achieve all, or nearly all, that might be achieved by permitting private parties to sue states directly).

merits of the private party's case, or a desire not to interfere with state authorities.

Therefore, while these two exceptions provide important mechanisms for bringing suits against states that violate federal law, they leave a core blockage against such suits: private parties may not, on their own, sue states for retrospective monetary relief. In many cases, this bar may leave private parties without an effective means of redress for injuries they have suffered. Also, as noted above, it may be expected to have an adverse effect on state compliance with federal law. Consequently, the question of whether any other exception to the rule of state sovereign immunity permits effective, private suit against states is of great importance.

For a brief period, it looked as though the answer was yes. The third exception to the rule of state sovereign immunity, discovered by the Supreme Court in the 1976 case of *Fitzpatrick v. Bitzer*,<sup>57</sup> is that Congress can *abrogate* state sovereign immunity by passing a statute that expressly provides for private damage suits against states.<sup>58</sup> The Court held in *Fitzpatrick* that a state's employees may sue the state under Title VII of the Civil Rights Act of 1964.<sup>59</sup> The Court said that Congress's power, under Section 5 of the Fourteenth Amendment, to enforce the provisions of the amendment by "appropriate" legislation, permits Congress to override the states' sovereign immunity.<sup>60</sup>

The Court's opinion in *Fitzpatrick* left unclear whether Congress's power of abrogation applied only to statutes, such as Title VII, that are based on Congress's power under Section 5 of the Fourteenth Amendment. In 1989, however, the Court appeared to resolve the matter in favor of Congress's authority. In *Pennsylvania v. Union Gas Co.*,<sup>61</sup> the Court held that Congress can abrogate state sovereign immunity and provide for private actions against states when exercising its powers under the Constitution's Commerce Clause.<sup>62</sup> This decision appeared to promise a broad avenue for enforcement of federal law against states. So long as Congress sanctioned private suits against

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57. 427 U.S. 445 (1976).

58. *Id.* at 456.

59. *Id.* at 447-48, 456.

60. *Id.* at 456.

61. 491 U.S. 1 (1989) (plurality opinion).

62. *Id.* at 23 (plurality opinion); *id.* at 57 (White, J., concurring in part and dissenting in part).



states, and expressed its approval in clear language, such suits would be permitted. *Union Gas* essentially left the matter up to Congress.

The rule of *Union Gas* was, however, short-lived. Just seven years later, in *Seminole Tribe of Florida v. Florida*,<sup>63</sup> the Court overruled it.<sup>64</sup> *Seminole Tribe* held that Congress's ability to abrogate state sovereign immunity was limited to actions provided pursuant to Congress's powers under Section 5 of the Fourteenth Amendment.<sup>65</sup> Congress may not, the Court said, abrogate state sovereign immunity when acting pursuant to its powers under Article I of the Constitution.<sup>66</sup> The "abrogation" exception was thus very significantly reduced.

Moreover, *Seminole Tribe* marked the beginning of a series of cases in which the Supreme Court methodically restricted or eliminated exceptions to the rule of state sovereign immunity. Throughout its history, state sovereign immunity doctrine has followed a meandering course, sometimes expanding, sometimes contracting, and frequently allowing by subterfuge what it has forbidden by direct attack.<sup>67</sup> The current period, however, is one of increasingly strict enforcement. This time, the Supreme Court seems to be saying that it really means to enforce the rule of state sovereign immunity and that it will not permit private parties to finesse it with exceptions.

Thus, for example, following *Seminole Tribe*, the Court held in *Alden v. Maine*<sup>68</sup> that the rule of state sovereign immunity applies just as much to cases brought in state courts as to cases brought in federal courts; private parties cannot avoid sovereign immunity simply by a change of forum.<sup>69</sup> On the same day, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,<sup>70</sup> the Court adopted a very narrow interpretation of Congress's powers under Section 5 of the Fourteenth Amendment, thereby guaranteeing that the use of the "abrogation" exception to state sovereign immunity

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63. 517 U.S. 44 (1996).

64. *Id.* at 66.

65. *Id.* at 65–66.

66. *Id.* at 73.

67. The prime example is of course *Ex parte Young*, 209 U.S. 123 (1908), which held that private parties may sue a state officer for prospective injunctive relief, even though sovereign immunity bars the same relief in an action—exactly equivalent in all practical respects—against the state itself. *Id.* at 168.

68. 527 U.S. 706 (1999).

69. *Id.* at 712.

70. 527 U.S. 627 (1999).

would be very limited.<sup>71</sup> Thus, the Court has substantially cut back on the set of cases in which an exception to the rule of state sovereign immunity permits private suit against states, and the Court continues to cut back further almost every Term.<sup>72</sup>

As a result of this continued tightening of the categories of permitted suits against states, it becomes vital to explore carefully the boundaries of each remaining category. Indeed, the Supreme Court has, since *Seminole Tribe*, taken cases that pursue just such exploration of the three exceptions to state sovereign immunity mentioned above: *Seminole Tribe* itself and the case of *Idaho v. Coeur d'Alene Tribe of Idaho*<sup>73</sup> have placed limits on the *Ex parte Young* exception;<sup>74</sup> the case of *Vermont Agency of Natural Resources v. Stevens*<sup>75</sup> explored the meaning of the exception for suits against states “by the United States” (although it was ultimately decided on a different ground);<sup>76</sup> and a whole series of cases has explored the limits of Congress’s ability to abrogate state sovereign immunity by using its powers under Section 5 of the Fourteenth Amendment.<sup>77</sup> With regard to each category, the result has been a tightening of the remaining exceptions.

### C. *The Fourth Exception—Consent and Waiver*

The continuing pressure placed on these three exceptions to the rule of state sovereign immunity has focused attention on the fourth, little-discussed exception: the exception for cases in which a state consents to suit or in some other way waives its sovereign immunity.

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71. *Id.* at 637–48.

72. In recent Terms, cutbacks have primarily taken the form of cases further constricting Congress’s power under Section 5 of the Fourteenth Amendment. *See, e.g.*, *Bd. of Trustees of Univ. v. Garrett*, 531 U.S. 356, 360, 367, 372–74 (2001) (holding that Section 5 cannot support the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (holding that Section 5 cannot support the Age Discrimination in Employment Act).

73. 521 U.S. 261 (1997) (plurality opinion).

74. In each of these cases, the Court declined to apply the usual principle that sovereign immunity does not bar a suit against a state officer for prospective injunctive relief. In *Seminole Tribe*, the Court held that the remedial provisions of the Indian Gaming Regulatory Act impliedly precluded the courts from granting relief on an *Ex parte Young* theory, 517 U.S. 44, 74 (1996), and in *Coeur d'Alene Tribe* the Court held that the *Ex parte Young* theory does not apply to an Indian tribe’s claim of title to and regulatory jurisdiction over state lands, 521 U.S. at 281 (plurality opinion); *id.* at 289 (O’Connor, J., concurring in part and concurring in the judgment).

75. 529 U.S. 765 (2000).

76. *Id.* at 768. The Court ultimately decided that the statute under which the plaintiff sued did not, as a matter of statutory interpretation, apply to state defendants. *Id.* at 787.

77. *See supra notes* 70–72 and accompanying text.

This exception should be distinguished from the exception, discussed above, for cases in which Congress abrogates state immunity by federal statute. The language of “waiver” is sometimes used, a little carelessly perhaps, to describe both kinds of cases,<sup>78</sup> but it is more expedient to have different terms for the different situations of elimination of a state’s sovereign immunity by the state’s own actions and its elimination by an outside force. Thus, it is best to say (and courts and scholars usually do say) that Congress may sometimes *abrogate* a state’s sovereign immunity, but that a state may *waive* its own immunity.<sup>79</sup>

The principle that a state may waive its own sovereign immunity traces back to the 1883 case of *Clark v. Barnard*.<sup>80</sup> *Clark* concerned the bankruptcy of a railroad.<sup>81</sup> Prior to bankruptcy, the railroad’s directors had given \$100,000 in company funds to the treasurer of Boston (taking his note for that sum in return), and they had given a

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78. See, e.g., *In re Murphy*, 271 F.3d 629, 631 (5th Cir. 2001) (“[T]his court held that Congress’s attempt to waive state sovereign immunity through 11 U.S.C. § 106(a) (1993) was unconstitutional.” (footnote omitted)); *United States v. Township of Brighton*, 153 F.3d 307, 323 n.2 (6th Cir. 1998) (“[T]he Interstate Commerce Clause does not grant Congress the power to waive state sovereign immunity embodied in the Eleventh Amendment . . .”).

79. See, e.g., *Fed. Maritime Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 749–50 (2002) (“Congress, pursuant to its Article I powers, cannot abrogate state sovereign immunity . . .”); *id.* at 782 (noting that a court would not compel a State’s obedience to the Shipping Act’s requirements “absent a State’s voluntary waiver of sovereign immunity”); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (“Congress lacks power under Article I to abrogate the States’ sovereign immunity . . .”); *id.* at 757 (“The sole remaining question is whether Maine has waived its immunity.”); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (“We turn next to the question whether Florida’s sovereign immunity, though not abrogated, was voluntarily waived.”); *Seminole Tribe v. Florida*, 517 U.S. 44, 57 (1996) (“Congress intended through the Act to abrogate the States’ sovereign immunity from suit.”); *id.* at 65 (“States may waive their sovereign immunity . . .”); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 102 n.133 (2001) (“Congress may not abrogate state sovereign immunity when it acts pursuant to its Article I powers.”); *id.* (noting that states can still be held liable for violations of federal law through “conditional federal spending schemes designed to induce the states to waive their immunity”); Joanne C. Brant, *The Ascent of Sovereign Immunity*, 83 IOWA L. REV. 767, 776 (1998) (“*Hans* sheds no light on the question of congressional power to abrogate.”); *id.* (“[C]onstitutionalizing’ *Hans* . . . exacerbates its errors and renders problematic the state’s power to waive its sovereign immunity and consent to suit.”).

80. 108 U.S. 436 (1883). *Clark* is the standard early case cite for the proposition that a state may consent to suit or waive its immunity. E.g., *Raygor v. Regents of the Univ.*, 534 U.S. 533, 547 (2002) (citing to *Clark v. Barnard*); *Coll. Sav. Bank*, 527 U.S. at 670 (same); *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 389 (1998) (same); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990) (same).

81. 108 U.S. at 442.

\$100,000 bond to the treasurer of Rhode Island.<sup>82</sup> The railroad's assignees in bankruptcy initially sued both of these treasurers and sought an order that the Boston treasurer pay the money to them, not to the Rhode Island treasurer.<sup>83</sup> Rhode Island asserted its sovereign immunity from such a suit.<sup>84</sup> The Boston treasurer paid the money into court, after which Rhode Island made a claim on it.<sup>85</sup> The court awarded the money to the railroad's assignees, and Rhode Island again objected on the ground of sovereign immunity.<sup>86</sup>

The Supreme Court held that Rhode Island had waived its sovereign immunity by intervening as a claimant to the fund in the federal court.<sup>87</sup> Although it had begun the proceeding as a defendant, the proceeding subsequently changed: once the Boston treasurer had paid the money into court, the proceeding essentially became an interpleader action.<sup>88</sup> Rhode Island voluntarily appeared in that action.<sup>89</sup>

A state's sovereign immunity, the Court observed, "is a personal privilege [that the state] may waive at pleasure."<sup>90</sup> By voluntarily appearing in the federal court and making an affirmative claim to the fund within the court's control, Rhode Island had "made itself a party to the litigation to the full extent required for its complete determination."<sup>91</sup>

At least since *Clark*, the courts have taken as a given that cases in which a state waives its immunity constitute an exception to the rule that state sovereign immunity bars private actions against states.<sup>92</sup> What, however, are the boundaries of this exception? Who can waive immunity on behalf of a state? What actions constitute such a waiver? Are waivers irrevocable? In light of the continued tightening of other mechanisms for private actions against states, these questions have taken on a new urgency.

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82. *Id.* at 443–44.

83. *Id.* at 444–45.

84. *Id.* at 445.

85. *Id.* at 445–46.

86. *Id.* at 446–47.

87. *Id.* at 447.

88. *Id.* at 448.

89. *Id.*

90. *Id.* at 447.

91. *Id.* at 448.

92. *E.g.*, *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) ("We have long recognized that a State's sovereign immunity is 'a personal privilege which it may waive at pleasure.'" (quoting *Clark*, 108 U.S. at 447)).

## II. THE IDEOLOGIZATION OF WAIVER DOCTRINE

The Supreme Court's approach to the issue of waiver may be divided into distinct periods, with the 1945 case of *Ford Motor Co. v. Department of Treasury of Indiana*<sup>93</sup> marking an important dividing line. Two notable principles characterized the pre-1945 cases. First, the pre-1945 cases recognized two distinct traditions governing two different kinds of waivers. In some cases, a state voluntarily, knowingly, and intentionally agreed to be sued.<sup>94</sup> In other cases, state officials took actions that had the effect of relinquishing the state's sovereign immunity whether they knew it or not and whether they intended it or not.<sup>95</sup> Very different rules governed these different kinds of cases.

Unfortunately, these two kinds of cases do not have distinct, standard names. Both may be said to involve "waiver" of state sovereign immunity.<sup>96</sup> Inasmuch, however, as the cases were governed by quite different rules, it will prove useful to have different terms for them. Drawing on the language of the pre-1945 cases, this Article will say that when a state voluntarily and knowingly agrees to be sued, it has *consented to suit*, and that when a state's actions otherwise eliminate its immunity, the state has *waived its immunity from suit without consent*.<sup>97</sup> The choice of these terms is somewhat arbitrary (and, where context permits, the term "waiver" will still refer to both kinds of cases), but the key point is that, whatever terms are used, there were two different concepts that the cases treated very differently.<sup>98</sup>

The second notable point about the pre-1945 cases is that they struck a balance between states' rights and the reasonable and legitimate interests of private plaintiffs and the federal judicial system. State sovereignty was not the only value the Court considered as it made its decisions. The Court also considered the effect of immunity on plaintiffs and on the judicial system itself.

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93. 323 U.S. 459 (1945).

94. See *infra* Part II.A.1.

95. See *infra* Part II.A.2.

96. See, e.g., *Lapides v. Bd. of Regents of the Univ. Sys.*, 535 U.S. 613, 624 (2002) ("[T]he State's action joining the removing of this case to federal court waived its Eleventh Amendment immunity . . ."); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) ("A State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision . . .").

97. See *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906) ("Although a state may not be sued without its consent, such immunity is a privilege which may be waived . . .").

98. See *infra* Part II.A.

Starting in 1945 and continuing until quite recently, the Court's rulings reflected a sharp hardening and ideologization of state sovereign immunity principles. The Court conflated the lines of cases concerning consent and waiver. State sovereign immunity was transformed from an important but rather easily waivable defense into an almost sacred principle that could be avoided only by the clearest and most unequivocal consent to suit or waiver of immunity.<sup>99</sup>

Then, starting in 1998, the Court created a countertrend. The Court's most recent cases overruled *Ford Motor Co.* and vitiated the rules of the post-1945 period. The trend is to return to the traditional rules regarding waivers of state sovereign immunity.<sup>100</sup>

This Part first explores these little-known cases descriptively, in order to understand what the Court has done and to exhume the useful, but lost, distinction between consent cases and waiver cases. The next Part examines this area normatively and explains the way in which a non-ideological doctrine would approach the question of waivers of state sovereign immunity.

#### A. *The Traditional Rules of Consent and Waiver*

Prior to 1945, the Supreme Court's Eleventh Amendment jurisprudence combined severity with mildness. On the one hand, during this period, the Court created and continually expanded the rule that state sovereign immunity bars suits against states without regard to the text of the Eleventh Amendment.<sup>101</sup> It also looked askance at claims that a state had consented to suit in federal court.<sup>102</sup> On the other hand, the Court tempered the rigors of immunity by recognizing waivers of a state's immunity from suit without consent.<sup>103</sup> In general, the Court treated the defense of state sovereign immunity rather

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99. See *infra* Part II.B.

100. See *infra* Part II.E.

101. See *Monaco v. Mississippi*, 292 U.S. 313, 329–30 (1934) (holding that immunity applies to suits against a state by a foreign state, although a foreign state is not a “citizen or subject of” a foreign state); *Ex parte New York*, 256 U.S. 490, 497 (1921) (holding that immunity applies to suits in admiralty against a state, even though the Eleventh Amendment refers only to suits in law or equity); *Smith v. Reeves*, 178 U.S. 436, 449 (1900) (holding that immunity applies to suits against states by federally chartered corporations, even though such corporations are neither citizens of any other state nor citizens or subjects of a foreign state); *Hans v. Louisiana*, 134 U.S. 1, 20 (1890) (holding that immunity bars a suit against a state by one of its own citizens, even though the Eleventh Amendment covers suits only by citizens of other states or by citizens or subjects of a foreign state).

102. See *infra* Part II.A.1.

103. See *infra* Part II.A.2.

like the defense of personal jurisdiction. The defense certainly existed and could lead to dismissal of a case, but the defendant had to assert the defense, and had to do so in a timely fashion. If the defense was not seasonably asserted, it was waived and could not be reasserted thereafter.

1. *Consent Cases.* In cases in which a state had allegedly consented to suit against itself, the Supreme Court employed very strict, pro-state rules. Consent to suit, the Court held, was “altogether voluntary” on the part of a state, and a state was free to set conditions on any consent that it chose to give.<sup>104</sup> In particular, a state could consent to be sued in its own courts, but not in federal courts.<sup>105</sup> Indeed, not only could a state give such a limited consent, but the Supreme Court held as early as 1900 that it was appropriate to read state consent statutes narrowly and interpret them to permit suit against the state only in its own courts, even when that restriction was not clearly specified.<sup>106</sup> This rule has persisted.<sup>107</sup>

Moreover, and perhaps most strikingly, the Court held that, because a state’s consent to suit was wholly voluntary, a state remained free to withdraw its consent, even after a suit against it had commenced in accordance with that consent. In *Beers v. Arkansas*,<sup>108</sup> the plaintiff sued Arkansas in its own courts, as state law permitted, for failure to pay on state bonds.<sup>109</sup> Subsequently, the state legislature enacted a new statute providing that, in any such suit, the court should order that the original bonds be filed with the court, and, if they were not so filed, the case should be dismissed.<sup>110</sup> The plaintiff, upon being

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104. *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858).

105. *Reeves*, 178 U.S. at 441.

106. *Id.*

107. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985).

108. *Beers*, 61 U.S. (20 How.) at 527.

109. *Id.* at 528.

110. *Id.* Arkansas’s requirement was just one of many schemes used by states to avoid paying bond debts throughout the nineteenth century. For example, Virginia, after defaulting on its bond obligations, managed to obtain new credit in 1871 by issuing bonds with a statutory promise that the bond coupons, if past maturity, could be used to pay any tax owed to the state. Then, in 1882, the state passed a new statute directing its tax collectors to refuse to accept the coupons in payment of taxes. *Poindexter v. Greenhow (Virginia Coupon Cases)*, 114 U.S. 269, 273–74 (1885). Other states, including Mississippi and Florida, simply repudiated their debts. MARGARET G. MYERS, *A FINANCIAL HISTORY OF THE UNITED STATES* 144 (1970). The frustration of state bondholders following Pennsylvania’s repudiation of its debts in 1843 was expressed in this acerbic letter to the *Morning Chronicle*:

ordered to file his bonds in accordance with the law, failed to do so, and his case was dismissed.<sup>111</sup> The plaintiff took the case to the Supreme Court on the claim that Arkansas's modification of its prior consent to be sued impaired the obligation of its contracts in violation of the Contracts Clause of the federal Constitution.<sup>112</sup>

The Supreme Court might have treated the case narrowly; it could have held that Arkansas had not withdrawn its consent to be sued but had merely regulated the procedures to be followed in a suit based on that consent. Instead, the Court announced a broad rule. It held that, inasmuch as a state's consent to suit is voluntary, the state "may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it."<sup>113</sup> The state's consent to be sued was not, the Court held, a contract subject to the Contracts Clause.<sup>114</sup>

The consent cases thus reflect a strongly pro-state rule. A state could consent to suit, or not, as it pleased; it could attach such conditions to its consent as it thought appropriate; and it could withdraw its consent even after a suit against it had commenced.

2. *Waiver Cases.* Simultaneously with these consent cases, however, the Supreme Court decided cases evincing a quite different tradition regarding *waiver* of a state's immunity from suit without consent. Unlike consent, such waiver did not have to occur expressly. It could arise by implication, and it could occur without regard to the intent of the state or its officials. Moreover, a state's waiver of sovereign immunity was irrevocable.<sup>115</sup>

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[I never meet a Pennsylvanian at a London dinner] without feeling a disposition to seize and divide him—to allot his beaver to one sufferer and his coat to another—to appropriate his pocket-handkerchief to the orphan, and to comfort the widow with his silver watch, Broadway rings, and the London Guide, which he always carries in his pockets. How such a man can set himself down at an English table without feeling that he owes two or three pounds to every man in company, I am at a loss to conceive.

HESKETH PEARSON, *THE SMITH OF SMITHS: BEING THE LIFE, WIT AND HUMOUR OF SYDNEY SMITH* 268 (1977).

111. *Beers*, 61 U.S. (20 How.) at 529.

112. *Id.*

113. *Id.*

114. *Id.* at 529–30.

115. *See infra* notes 132–33 and accompanying text.



The waiver cases began, as noted earlier, with *Clark v. Barnard*,<sup>116</sup> in which Rhode Island's claim to money in the possession of a federal district court was held to constitute a waiver of any objection to the court's power to determine that claim.<sup>117</sup> *Clark* was a somewhat unusual case in that the state appeared not solely in the character of a defendant, but also as a party that had made an affirmative claim to a fund that was in a federal court's possession.<sup>118</sup> The Court might therefore have chosen to write a narrow opinion in *Clark*, establishing nothing more than the principle that when a state affirmatively invokes the jurisdiction of a federal court, it necessarily consents to the court's determination of the claim that the state has brought to it. Such a rule has, indeed, persisted in the bankruptcy area, where a state's filing of a proof of claim acts as a waiver of any objection to the federal courts' ability to rule on that claim, even if the ruling goes against the state.<sup>119</sup>

Notably, however, the *Clark* opinion contained broad language regarding waiver that would support a more general rule. The Court said:

The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction . . . .<sup>120</sup>

Notwithstanding the particular circumstances presented by *Clark*, this language—directed specifically at cases in which a state's interest was as a defendant—suggested that the Court believed that a state waives its immunity not only by affirmatively *invoking* the jurisdiction of a federal court, but also by merely *appearing* in federal court in a case in which it has been summoned as an ordinary defendant.

Subsequent cases confirmed the rule implied by *Clark*'s broad language. *Gunter v. Atlantic Coast Line Railroad Co.*<sup>121</sup> concerned a

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116. 108 U.S. 436 (1883).

117. *Id.* at 447–48.

118. *Id.* at 447.

119. *Gardner v. New Jersey*, 329 U.S. 565, 573–75 (1947).

120. *Clark*, 108 U.S. at 447.

121. 200 U.S. 273 (1906).

tax exemption granted to a railroad by South Carolina.<sup>122</sup> After the railroad and its successors had enjoyed the exemption for thirteen years, the state passed a new tax law, pursuant to which the treasurers of two counties within the state started taxing the railroad's property.<sup>123</sup> The railroad sued the treasurers and claimed that the new law impaired the obligations of a contract between the state and the railroad company.<sup>124</sup> The treasurers were represented in this litigation by the state attorney general.<sup>125</sup> No issue of immunity was, apparently, raised in this litigation, which proceeded to the United States Supreme Court and was resolved in favor of the railroad.<sup>126</sup>

Another twenty-five years passed, after which the state attempted once again to tax the railroad.<sup>127</sup> In subsequent litigation, the Supreme Court decided that the state was effectively a party to, and was therefore bound by the judgment in, the first case.<sup>128</sup> Although noting that private parties may not sue a state without its consent, the Court observed that:

Although a State may not be sued without its consent, such immunity is a privilege which may be waived, and hence 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.<sup>129</sup>

The *Gunter* case made several noteworthy points. First, the Court distinguished a state's *consent* to be sued from the subtly different concept of the state's *waiver* of its immunity from suit without consent. The Court had jealously guarded the states' right to limit the former,<sup>130</sup> but here it said that the latter may occur when a state simply "voluntarily becomes a party to a cause and submits its rights for judicial determination."<sup>131</sup> Moreover, the Court held such a waiver to be irrevocable: the state could not later invoke its immunity to "escape

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122. *Id.* at 277.

123. *Id.*

124. *Id.* at 278.

125. *Id.*

126. *Humphrey v. Pegues*, 83 U.S. (16 Wall.) 244, 249 (1872).

127. *Gunter*, 200 U.S. at 279.

128. *Id.* at 289.

129. *Id.* at 284 (citing *Clark v. Barnard*, 108 U.S. 436, 447 (1883)).

130. *See supra* Part II.A.1.

131. *Gunter*, 200 U.S. at 284.

the result of its own voluntary act.”<sup>132</sup> The Court determined that the state attorney general, by virtue of his authority to litigate on behalf of the state, could effectively bind the state and waive the state’s immunity by failing to assert it in the initial litigation.<sup>133</sup> Finally, and most important, *Gunter* extended the rule of *Clark* to the situation in which the state was an ordinary defendant and not the party invoking federal jurisdiction; even in such a case, the state’s voluntary appearance would constitute a waiver of its immunity. Thus, although *Gunter* was another slightly peculiar case (because immunity was waived in the first, separate suit), it applied a broad rule that states waive their immunity by simply failing to assert it.

Further developments confirmed the broad rule of waiver. *Porto Rico v. Ramos*<sup>134</sup> was a somewhat tangled case concerning title to real property. The plaintiff, Ramos, claiming to be the owner of certain real property, sued Eduardo Wood, who was holding the property as an estate administrator.<sup>135</sup> Because Wood was an alien, Ramos sued in federal district court.<sup>136</sup> Wood asserted that the property had escheated to Puerto Rico.<sup>137</sup>

Puerto Rico then appeared by its attorney general and sought time to determine whether it should be made a party defendant in the case.<sup>138</sup> The case was continued, after which Puerto Rico again appeared and claimed an interest in the action.<sup>139</sup> The district court ordered Puerto Rico to be made a party defendant, and Ramos amended his complaint accordingly.<sup>140</sup> Puerto Rico then, however, demurred to the complaint on the ground of sovereign immunity.<sup>141</sup> The demurrer was overruled, and Ramos won at trial.<sup>142</sup>

The Supreme Court affirmed.<sup>143</sup> Puerto Rico, it noted, was not the defendant in the beginning; it had voluntarily petitioned to be

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132. *Id.*

133. *Id.* at 288.

134. 232 U.S. 627 (1914).

135. *Id.* at 628.

136. *Id.*

137. *Id.* at 628–29.

138. *Id.* at 629.

139. *Id.*

140. *Id.*

141. *Id.* at 630.

142. *Id.* at 630–31.

143. *Id.* at 633.

made a defendant.<sup>144</sup> The attorney general had taken time to consider this action, and had decided to intervene so as to be better able to look after Puerto Rico's interests in the litigation.<sup>145</sup> Having done so, Puerto Rico had consented to be a party to the case.<sup>146</sup> Moreover, its consent was irrevocable. The Court explained, "the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it, and to come in and go out of court at its will, the other party having no right of resistance to either step."<sup>147</sup>

Like *Clark*, *Ramos* shows the willingness of the Supreme Court to hold sovereign defendants to the consequences of their own litigation decisions. Puerto Rico challenged the court's jurisdiction immediately upon being made a defendant; nonetheless, the Court held that it could not first ask to be made a defendant and then challenge the court's power over it. The case also evinces judicial concern for the interests of the private plaintiff. By observing that the sovereign cannot "come in and go out of court at its will, the other party having no right of resistance to either step," the Court suggests that, notwithstanding the sovereign character of the defendant, some regard must be given to the interests of the other party.

Although *Ramos* is yet another slightly unusual case in that the sovereign defendant itself sought to be made a party to the suit, the case represents an extension beyond *Clark*, because in *Ramos*, the sovereign intervened as a defendant, not as a claimant to a fund in the possession of the court. Moreover, *Ramos* continued the pattern of *Clark* and *Gunter* in that its language and reasoning were broad. The Court stated a strong pro-plaintiff rule that, without reference to the particular circumstances of the case, constricted the ability of sovereign defendants to assert sovereign immunity.

Moreover, once again, further developments showed the Court giving full effect to the broad language employed in the previous cases. The starkest example of this period's jurisprudence came in *Richardson v. Fajardo Sugar Co.*,<sup>148</sup> decided in 1916. In *Richardson*, the plaintiff, a corporation, sought a refund of an allegedly unlawful

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144. *Id.* at 631.

145. *Id.*

146. *Id.* at 632.

147. *Id.*

148. 241 U.S. 44 (1916).

tax, which it had paid under protest to the treasurer of Puerto Rico.<sup>149</sup> The plaintiff sued the treasurer in federal court.<sup>150</sup> The treasurer answered the plaintiff's complaint, and some other steps were also taken: the parties fixed a day for trial by stipulation, and the plaintiff filed an amended and supplemental complaint, which the defendant answered.<sup>151</sup> Then, eight months after the action was first instituted, the defendant moved for dismissal on the ground of sovereign immunity.<sup>152</sup>

The Supreme Court briskly denied the defendant's assertion of immunity as untimely. Citing *Ramos* and *Gunter*, the Court simply said: "Whatever might have been the merit of [defendant's] position if promptly asserted and adhered to, we hold . . . that having solemnly appeared and taken the other steps above narrated, [defendant] could not thereafter deny the court's jurisdiction."<sup>153</sup> The Court did not appear to believe that the case required any lengthy discussion.

*Richardson* unequivocally evinces a strongly pro-plaintiff rule of waiver. The case is simple and straightforward. It shows that, unlike the rules regarding *consent* to suit, the traditional rule regarding *waivers* of sovereign immunity strongly favored plaintiffs.

The defendant in *Richardson* appeared in the ordinary character of a defendant; he was not the one invoking the federal court's jurisdiction. The defendant never expressly waived immunity or consented to suit. The waiver of immunity arose only implicitly, from the defendant's failure to assert immunity at the proper time. Moreover, the defendant did not wait very long before attempting to assert immunity. The assertion was made while the case was still in trial court and was, indeed, only a few months old and still in its pretrial stages. Notwithstanding all of these points, the Supreme Court held that the defendant had waited too long and that his implicit waiver of immunity from suit was binding.<sup>154</sup>

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149. *Id.* at 46–47.

150. *Id.* at 44, 47.

151. *Id.* at 47.

152. *Id.*

153. *Id.* (citations omitted).

154. One detail remains: in *Richardson*, and in *Ramos* as well, the defendant was Puerto Rico, which is a United States territory, not a state. Several indications, however, show that the cases provide the rule that would have applied to state defendants in the same period. Most importantly, the Court's opinions in the two cases make no reference to the territorial status of Puerto Rico. The opinions appear to treat the cases as involving general rules of sovereign immunity that would apply equally to the case of a state defendant. Moreover, a year before *Ramos*, the Court had expressly stated that Puerto Rico "is of such nature as to come within the

Considered together, the Supreme Court's early cases on waiver of state sovereign immunity reflected a very different, and much more pro-plaintiff, rule than its cases regarding state consent to suit. Even where a state never consented to suit, it could be held to have waived its immunity from suit without consent. Such waivers could arise implicitly from a state's conduct, including its mere failure to assert its immunity at the proper time. A state could be bound by the actions of its litigation counsel. Finally, a state's waiver of its immunity, once made in litigation, was irrevocable. These principles persisted until 1945.<sup>155</sup>

### B. Waiver Doctrine Constricted

The year 1945 witnessed a marked shift in the Supreme Court's approach to waiver issues, which occurred in the case of *Ford Motor Co. v. Department of Treasury of Indiana*.<sup>156</sup> *Ford Motor Co.* was in form quite similar to the *Richardson* case just discussed: it was an action brought in federal court to recover an allegedly illegal tax collected by state officials.<sup>157</sup> The defendants were the state's Department of the Treasury and three officials who together constituted the department's board.<sup>158</sup> The defendants, represented by the state's attorney general, defended the case on its merits throughout proceedings in the trial and appellate courts. They made no mention of the issue of sovereign immunity in either court.<sup>159</sup> When the case reached

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general rule exempting a government sovereign in its attributes from being sued without its consent." *Porto Rico v. Rosaly*, 227 U.S. 270, 273 (1913). This statement suggests that the rules for suits against Puerto Rico would be the same as those for cases against state sovereigns. The Court cited this case in *Richardson*, 241 U.S. at 47, so it had not forgotten about it. Similarly, Puerto Rico is today treated as a state for Eleventh Amendment purposes. See *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141–42 n.1 (1993) (assuming this point *arguendo*); *Ramirez v. P.R. Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983) (holding that the Eleventh Amendment applies to Puerto Rico in all aspects). Finally, in *Richardson*, the Court relied upon *Gunter*, a case involving a state defendant. 241 U.S. at 47; see *supra* notes 148–53 and accompanying text. The fair inference from all these indications is that the holdings of *Richardson* and *Ramos* would apply to state defendants.

155. See *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 760 (9th Cir. 1999) ("Before 1945, it was generally acknowledged that a state waives its Eleventh Amendment immunity by litigating a case on the merits without timely objecting to the federal court's assertion of jurisdiction."), *amended by* 201 F.3d 1186 (9th Cir. 2000); *The Sao Vicente v. Transportes Maritimos do Estado*, 281 F. 111, 115 (2d Cir. 1922) ("The underlying principle of *Clark v. Barnard* has been consistently followed."), *cert. dismissed*, 260 U.S. 151 (1922).

156. 323 U.S. 459 (1945).

157. *Id.* at 460–61.

158. *Id.* at 460.

159. *Id.* at 466–67.

the Supreme Court, however, the defendants, for the first time, asserted that sovereign immunity barred the plaintiff's suit.<sup>160</sup> Possibly the defendant's tardiness resulted from another shift in the Supreme Court's sovereign immunity doctrines: it was only a year earlier, in the case of *Great Northern Life Insurance Co. v. Read*,<sup>161</sup> that the Supreme Court had ruled that an action against state officials seeking a refund of wrongfully collected taxes constituted a suit against the state itself subject to the defense of sovereign immunity, rather than an action against officials subject to the rule of *Ex parte Young*.<sup>162</sup> Therefore, it might not have occurred to the defendants to assert immunity from suit until after the appellate proceedings were already concluded.<sup>163</sup> In any event, the defendants did not raise their immunity until the case reached the last possible court.

The Supreme Court made several important rulings in favor of the defendants. First, it reiterated its holding from *Read*, that the suit, although naming individual defendants, was effectively a suit against the state of Indiana and subject to the rules of state sovereign immunity.<sup>164</sup> Second, the Court, relying on its earlier decision in *Reeves*, held that the state had not consented to be sued in federal court, even though a state statute authorized a refund action against the state treasury department "in any court of competent jurisdiction."<sup>165</sup> The Court held that the statute evinced the state's consent only to suits in the state's own courts.<sup>166</sup>

Finally, the Supreme Court determined that the defendants' assertion of immunity "was in time."<sup>167</sup> The defendants added a new wrinkle to the issue of waivers of state sovereign immunity: the issue of state law authority. Defense counsel conceded that their failure to assert immunity from suit in the lower courts constituted a waiver of immunity, but only if they were authorized by state law to make such

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160. *Id.* at 467.

161. 322 U.S. 47 (1944).

162. *Id.* at 53.

163. The *Read* decision did not come until one month after Indiana had already prevailed in the court of appeals on the merits of Ford's suit against it. *Id.* at 47; *Ford Motor Co. v. Dep't of Treasury*, 141 F.2d 24, 24, 26 (7th Cir. 1944).

164. *Ford Motor Co.*, 323 U.S. at 462-63.

165. *Id.* at 465-66 (quoting BURNS, IND. STAT. ANN. § 64-2602 (1943 Replacement)).

166. *Id.*

167. *Id.* at 467.

a waiver.<sup>168</sup> They claimed that under the relevant state law they were not competent to waive the state's sovereign immunity.<sup>169</sup>

The Supreme Court agreed. The Constitution of Indiana, the Court observed, provided that the state legislature might generally waive immunity for a class of cases, but expressly forbade it to waive immunity in a particular case or to pay damages to a particular claimant.<sup>170</sup> From this provision, the Court inferred that the legislature would not, except by clear language, confer discretion on state executive or administrative officials to waive immunity in a particular case.<sup>171</sup> Although the state attorney general was generally authorized to represent the state in litigation, the state supreme court had construed his powers strictly and had held that he did not have the broad authority of an attorney general at common law.<sup>172</sup> Accordingly, the Court held that the defendants could not have effected a waiver of the state's sovereign immunity.<sup>173</sup>

The Court's holding represented a considerable departure from the waiver cases discussed in Part II.A.2. In none of the previous cases had the Court demanded that, before a court could find that a state had waived its sovereign immunity from suit, the court first inquire into the authority of the state's attorneys to waive immunity as a matter of state law. To the contrary, in *Gunter*, the Court had held that the state attorney general's appearance had waived the state's sovereign immunity based simply on his general authority under state law to represent the state in litigation.<sup>174</sup> In *Ford Motor Co.*, the Court said that in *Gunter*, the state's submission to the court was authorized by state statute, not by the unauthorized consent of an official.<sup>175</sup> This argument, however, hardly seems like a persuasive distinction, inasmuch as the attorney general's authority in both cases was simply the authority to represent the state in litigation. In one case this was held to be sufficient to bind the state to a waiver of immunity; in the other,

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168. *Id.*

169. *Id.*

170. *Id.* at 468.

171. *Id.*

172. *Id.* at 468–69.

173. *Id.* at 469–70.

174. *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 288 (1906).

175. *Ford Motor Co.*, 323 U.S. at 469–70.



it was not.<sup>176</sup> The Court also dismissed *Richardson* with the cryptic observation that in that case “without consideration of any limitations on his powers, we held that the attorney general of Puerto Rico could waive its sovereign immunity.”<sup>177</sup> The Court’s statement acknowledges that it had previously recognized a waiver of sovereign immunity based on the mere failure of counsel to assert the immunity seasonably.

*Ford Motor Co.* thus tightened waiver doctrine considerably. A state’s counsel’s inadvertent—or even, apparently, advertent—failure to raise immunity could not waive state sovereign immunity unless state law authorized the counsel to waive. Most state attorneys general have, of course, the power to represent the state in litigation, but few if any have express statutory authority to waive the state’s sovereign immunity from suit.<sup>178</sup>

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176. The Court also suggested that *Gunter* had turned on res judicata principles. *Id.* This suggestion at least had the merit of pointing to a real distinction between *Gunter* and *Ford Motor Co.*, although it was not consistent with the broad waiver language used in *Gunter*.

177. *Id.* at 469 n.14.

178. *See, e.g., id.* at 468:

[None] of the general or specific powers conferred by statute on the Indiana attorney general to appear and defend actions brought against the state or its officials can be deemed to confer on that officer power to consent to suit against the state in courts when the state has not consented to be sued.

*See also* *Montgomery v. Maryland*, 266 F.3d 334, 399 (4th Cir. 2001) (“[T]he Attorney General of Maryland lacks the authority to waive Eleventh Amendment immunity on behalf of the state and its officials.” (quoting *Booth v. Maryland*, 112 F.3d 139, 145 n.2 (4th Cir. 1997))), *vacated*, 122 S. Ct. 1958 (2002); *Lapides v. Bd. of Regents of the Univ. Sys.*, 251 F.3d 1372, 1375 (11th Cir. 2001) (concluding that “the Attorney General of the State of Georgia lacks the statutory authority to waive the State’s Eleventh Amendment immunity”), *rev’d on other grounds*, 535 U.S. 613, 624 (2002); *Santee Sioux Tribe v. Nebraska*, 121 F.3d 427, 432 (8th Cir. 1997) (“The Tribe has failed to demonstrate that waiver of the State’s Eleventh Amendment immunity is within the authority of Nebraska’s attorney general.”); *Estate of Porter v. Illinois*, 36 F.3d 684, 691 (7th Cir. 1994) (“As Illinois law now stands, the Attorney General is *not* authorized to waive Illinois’ Eleventh Amendment immunity.”); *Dagnall v. Gegenheimer*, 645 F.2d 2, 3 (5th Cir. 1981) (“Louisiana law does not clearly give attorneys for the State authority to waive its eleventh amendment immunity.”); *Taylor v. Perini*, 503 F.2d 899, 905 (6th Cir. 1974) (Weick, J., concurring) (“The Attorney General of Ohio had no power or authority to waive sovereign immunity of either the State or its officers and agent . . . .”), *vacated*, 421 U.S. 982, 982–83 (1975); *Mallon v. City of Long Beach*, 11 Cal. Rptr. 15, 22 (Cal. Ct. App. 1961) (“At bar there was no evidence that any authority had been conferred on the attorney general to waive the state’s right of immunity.”); *Dep’t of Pub. Safety v. Great Southwest Warehouses, Inc.*, 352 S.W.2d 493, 495 (Tex. Civ. App. 1961) (noting that the Texas Attorney General is “without legal power or authority to waive the right of the State to immunity”). *But see* ALASKA STAT. § 44.23.020(c) (Michie 2002) (giving Alaska’s Attorney General power, expiring January 1, 1999, to waive the state’s Eleventh Amendment immunity in a very limited class of cases).

Moreover, the Court expanded the holding of *Ford Motor Co.* even further with its later decision in *Edelman v. Jordan*.<sup>179</sup> The case is known principally for its holding that the “officer suit fiction” of *Ex parte Young* is limited to cases in which the plaintiff seeks prospective, injunctive relief and cannot be applied to cases seeking retroactive monetary damages.<sup>180</sup> The case also, however, almost casually, effected a significant extension of *Ford Motor Co.*

*Edelman* was a class action challenge to the administration of the Aid to the Aged, Blind, or Disabled (AABD) program by Illinois.<sup>181</sup> Like many welfare programs, AABD was a combined federal-state program that was administered largely by state officials and partially funded by the federal government.<sup>182</sup> Plaintiffs sued the state officials administering the program in Illinois and asserted that the state’s implementation of the program violated federal law in various respects.<sup>183</sup> The district court agreed with the plaintiffs. It ordered the defendants to administer the program properly in the future and to pay benefits it had wrongfully denied in the past.<sup>184</sup>

On appeal, the defendants, for the first time, asserted sovereign immunity from suit.<sup>185</sup> The Supreme Court held that the defendants could raise immunity on appeal for the first time.<sup>186</sup> Quoting *Ford Motor Co.*, the Court simply observed that “it has been well settled since the decision in *Ford Motor Co. v. Department of Treasury*, . . . that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.”<sup>187</sup>

As the above discussion suggests, the Court’s statement is not a fully accurate rendering of *Ford Motor Co.* It is true that, in *Ford Motor Co.*, the Court made the following broad statement: “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

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179. 415 U.S. 651 (1974).

180. *Id.* at 664–71.

181. *Id.* at 653.

182. *Id.*

183. *Id.*

184. *Id.* at 656.

185. *Id.* at 657–58, 677.

186. *Id.* at 677–78.

187. *Id.*

case even though urged for the first time in this Court.”<sup>188</sup> This statement was, however, immediately followed by the Court’s discussion of whether the state’s counsel had waived the issue of immunity by failing to raise it in the lower courts and its determination that they had not because they lacked authority to effect such a waiver.<sup>189</sup> The Court’s discussion suggests that *Ford Motor Co.* cannot fairly be read to impose the flat rule that a state is always free to assert its sovereign immunity on appeal for the first time. Rather, *Ford Motor Co.* held that a state may still raise immunity in an appellate court despite its counsel’s failure to raise the issue below *if* that counsel lacked authority under state law to waive the state’s sovereign immunity. Such a rule is, to be sure, already quite generous to state defendants, but *Edelman* took the rule even further by apparently holding that a state is always free to raise immunity on appeal after having remained silent on the issue in a trial court, without regard to the issue of state counsel’s authority.

*Edelman*’s broad statement did not prove that states have an absolutely unlimited power to raise sovereign immunity at any time. The case was one in which there was apparently no consideration of sovereign immunity, either way, in the district court. So the case did not clearly determine what would happen if, for example, a state’s counsel expressly and affirmatively waived sovereign immunity in trial court, only to reassert it on appeal. Still, *Edelman* certainly suggested a very broad power on the part of states to raise immunity issues belatedly, and subsequent cases sometimes stated that, because state sovereign immunity is a jurisdictional defense, states can assert it “at any point in a proceeding.”<sup>190</sup>

Indeed, a few years later, in *Patsy v. Board of Regents of the State of Florida*,<sup>191</sup> the Supreme Court applied *Edelman*’s rule very broadly. The case is best known for its holding that plaintiffs bringing an action under 42 U.S.C. § 1983 are not obliged to exhaust state law remedies first.<sup>192</sup> The parties had argued the case as an exhaustion case; the state defendants, although invited by the Court to do so, raised no immunity defense and urged the Court to decide the case

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188. 323 U.S. at 467.

189. *Id.* at 467–69.

190. *E.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 n.8 (1984); *Crosetto v. State Bar*, 12 F.3d 1396, 1402 n.10 (7th Cir. 1993); *Rose v. Nebraska*, 748 F.2d 1258, 1262 (8th Cir. 1984).

191. 457 U.S. 496 (1982).

192. *Id.* at 516.

solely on the exhaustion issue.<sup>193</sup> Still, in its opinion the Court stated in a footnote that the defendant remained free to raise Eleventh Amendment immunity even after the Supreme Court decided the case. The defendant could, the Court said, raise immunity on remand.<sup>194</sup>

Thus, the post-1945 cases presented a very different view of the waiver issue. Whereas the Court in *Richardson* unhesitatingly found a waiver in the state's counsel's mere failure to raise the defense of immunity promptly upon being sued, the post-1945 cases demanded an inquiry into counsel's authority to waive immunity. Moreover, possibly without regard to the issue of authority, the post-1945 cases sanctioned the raising of immunity very late in litigation—even in, or after, a case comes to the Supreme Court.

### C. *Constructive Consent—Comeback and Decline*

Notwithstanding the post-1945 conflation of the concepts of state consent to suit and state waiver of immunity from suit (with the concomitant tightening of the latter), the 1960s witnessed a revival of a pro-plaintiff attitude as the Supreme Court invoked the theory of “constructive consent” to suit. The Court applied this important—if short-lived—theory to cases different from either kind of case discussed so far. In the consent cases discussed above, a state voluntarily and intentionally agreed to be sued. In the waiver cases, the actions of state officers had the effect of waiving state immunity from suit whether anyone intended it or not. The waiver cases discussed so far, however, all concerned actions taken by state officers in the course of individual litigation.<sup>195</sup> In the 1960s, the Court confronted cases in which a state was said to have relinquished its immunity by taking actions outside the litigation context—specifically, by engaging in con-

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193. *Id.* at 515 n.19. Actually, there was some dispute among the Justices as to whether the defendant had raised an Eleventh Amendment defense or not. It appears that the defendant had not raised immunity in the district court; it had raised the issue in the court of appeals, but that court failed to rule on the issue. *Id.* The defendant then mentioned the issue in its reply to the plaintiff's petition for certiorari, but did not argue the issue in its brief on the merits in the Supreme Court. *Id.* In response to questions at oral argument, the defendant stated that it did not pursue the immunity issue in its merits brief in light of the Court's grant of certiorari and that it wanted the Court to decide the exhaustion question. *Id.*; *id.* at 520–25 (Powell, J., dissenting). The Court understood the defendant as not pressing the immunity issue, *id.* at 515 n.19, but dissenting Justices did not agree with that assessment, *id.* at 524–25 (Powell, J., dissenting).

194. *Id.* at 515 n.19.

195. See *supra* Part II.A.2–II.B.

duct regulated by federal law. It was in these cases that the Court deployed the doctrine of constructive consent.

The Court created the constructive consent doctrine in the case of *Parden v. Terminal Railway of Alabama State Docks Department*.<sup>196</sup> Parden, a railroad employee, was injured on the job and brought suit against his employer under the Federal Employer's Liability Act (FELA).<sup>197</sup> Because the railroad was a state entity, the lower courts dismissed Parden's suit.<sup>198</sup> The Supreme Court, however, reinstated it.<sup>199</sup>

FELA, the Court observed, clearly provides that "every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce."<sup>200</sup> By operating an interstate railroad after passage of the FELA, the Court held, the state "necessarily consented to such suit as was authorized by that Act."<sup>201</sup> That is, the state had not made an actual, "altogether voluntary" consent to suit, as would have been required by the Court's traditional consent cases.<sup>202</sup> Rather, the state's "consent" was a constructive consent imposed on it as a matter of federal law by virtue of its conduct.<sup>203</sup>

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196. 377 U.S. 184 (1964).

197. *Id.* at 184–85.

198. *Id.* at 185.

199. *Id.*

200. *Id.* at 185–86 (quoting 45 U.S.C. § 51 (2000)).

201. *Id.* at 192.

202. *See supra* Part II.A.1.

203. The Court has actually referred to *Parden* as creating a doctrine of constructive waiver. *E.g.*, *Alden v. Maine*, 527 U.S. 706, 737 (1999). Inasmuch, however, as Part II.A.2 showed that waiver of sovereign immunity is simply the legal consequence of certain actions taken by state officials without regard to their intent, there could hardly be a need for a doctrine of constructive waiver. If the actions taken by states in cases such as *Parden* were such as to give rise to a waiver of state sovereign immunity, the waiver would be a real waiver, not a constructive one. Indeed, the Court might have treated *Parden* as a waiver case; it could have held that a state's engaging in federally regulated conduct waived the state's sovereign immunity without regard to the state's intent. Probably the Court chose not to use such a theory because it would have been inconsistent with the Court's tightening of waiver doctrine in cases such as *Ford Motor Co.* Instead, therefore, the Court said that states, by engaging in certain federally regulated conduct, have "necessarily consented" to suit on matters arising out of that conduct. That fiction brought the case within a recognized category of cases in which state sovereign immunity could be avoided. Because the state did not actually intend such consent, the term "constructive consent" properly describes the fictional consent invoked by the Court.

Notably, although four Justices dissented,<sup>204</sup> the dissenting opinion questioned only whether, as a matter of statutory interpretation, FELA should be understood to impose liability on state railroads.<sup>205</sup> The dissenting opinion expressly agreed that “it is within the power of Congress to condition a State’s permit to engage in the interstate transportation business on a waiver of the State’s sovereign immunity from suits arising out of such business.”<sup>206</sup> The only question was whether Congress had expressed its intent to do so by a sufficiently clear statement.<sup>207</sup> Thus, all nine Justices accepted the concept of constructive consent.

Subsequently, however, the Court first limited, and then ultimately overruled, *Parden*. First, in a series of cases, the Court adopted the stance of the *Parden* dissenters and determined that any congressional abrogation of state sovereign immunity must be accomplished by clear statutory language—indeed, as the Court ultimately held, by “unmistakably” clear statutory language.<sup>208</sup> The mere use of a generic phrase that could describe private and state actors equally (such as “every common carrier by railroad”) would not suffice.<sup>209</sup>

Even more significantly, the Court later overruled the very concept of constructive consent by mere participation in federally regulated activity.<sup>210</sup> The cases just mentioned governed only the *standard of clarity* by which Congress must act before courts will find that states have constructively consented to suit, an issue that seems clearly distinct from the issue of whether Congress can provide for constructive consent at all (as to which all nine Justices agreed in *Parden*). Nonetheless, the Court subsequently determined that it had “narrowed” and “severely undermined” *Parden*,<sup>211</sup> and in ultimately overruling it, said that it was overruling “[w]hatever may remain of

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204. *Parden*, 377 U.S. at 198 (White, J., dissenting).

205. *Id.* (White, J., dissenting).

206. *Id.* (White, J., dissenting).

207. *Id.* at 198–200 (White, J., dissenting).

208. *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985); *Employees of the Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279, 284–85 (1973).

209. *Dellmuth*, 491 U.S. at 231; *Scanlon*, 473 U.S. at 246; *Employees of the Dep’t of Pub. Health & Welfare*, 411 U.S. at 284–85.

210. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999).

211. *Id.* at 680, 689.

our decision in *Parden*”<sup>212</sup>—as though there were some question whether anything remained at all. In any event, the Court determined that “express waiver of sovereign immunity [must] be unequivocal” and could not arise constructively from the state’s mere participation in federally regulated activity.<sup>213</sup> Indeed, the Court hinted, if it did not actually say, that even express consent by the states, if wrongfully exacted, might not be sufficient: although Congress, the Court appeared to say, may condition a state’s receipt of a federal “gift or gratuity” on the state’s consent to be sued, the opinion left some doubt whether Congress could require a state to consent to suit before the state can engage in “otherwise permissible activity.”<sup>214</sup> And certainly, the *Parden* concept of constructive consent by mere participation in federally regulated activity is gone.

#### D. *The Ideology of Waiver Doctrine*

What inspired the marked shift in the Court’s doctrine regarding waivers of state sovereign immunity? As discussed in Part II.A.2, prior to 1945, the Supreme Court’s cases recognized a rather generous, pro-plaintiff set of rules by which courts could determine that states had waived their sovereign immunity. *Ford Motor Co.* and subsequent cases took a significantly different approach, greatly narrowing, almost to the point of nonexistence, the possibility of a state’s waiving its immunity from a particular suit against it in federal court.

One possibility—a possibility never to be neglected in any human endeavor—is that the Court slipped into its new doctrine through error. The Court may have inadvertently conflated its previously separate lines of cases regarding state consent to suit and waiver of a state’s immunity from suit without consent. As discussed above, prior to 1945, the Court maintained quite different rules in these different kinds of cases. *Ford Motor Co.* and subsequent decisions could simply reflect a failure to appreciate the distinction between these two lines of authority.

Some language in Court opinions does suggest casual thinking on this issue. For example, a decade after *Ford Motor Co.*, the Supreme Court, in *Petty v. Tennessee-Missouri Bridge Commission*,<sup>215</sup> remarked that state sovereign immunity “is an immunity which a State may

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212. *Id.* at 680.

213. *Id.*

214. *Id.* at 686–87.

215. 359 U.S. 275 (1959).

waive at its pleasure . . . as by a general appearance in litigation in a federal court . . . or by statute. The conclusion that there has been a waiver of immunity will not be lightly inferred.”<sup>216</sup> The Court here puts together one rule from the waiver cases (waiver by general appearance) with another rule from the consent cases (consent by statute), and then, apparently, subjects both to the principle that waiver of immunity will not be lightly inferred. Prior to 1945, that principle was applicable only to consent cases, not to waiver cases.

The slip in *Petty* was, at most, a venial one, because the case was in fact about consent, not waiver.<sup>217</sup> Application of the stringent test was, therefore, correct for the case at hand. Any implication that the stringent test would also apply in a case that was about waiver was really just dictum.<sup>218</sup>

More seriously, however, courts have also, without much apparent thought, conflated the waiver and consent cases in the context of cases that are about *waiver*. The Supreme Court’s most notable instance of such conflation occurred in *College Savings Bank*,<sup>219</sup> the case in which it overruled *Parden*’s doctrine of constructive waiver.<sup>220</sup> The Court, speaking through Justice Scalia, had this to say:

We have long recognized that a State’s sovereign immunity is “a personal privilege which it may waive at pleasure.” *Clark v. Barnard*, 108 U.S., at 447. The decision to waive that immunity, however, “is altogether voluntary on the part of the sovereignty.” *Beers v. Arkansas*, 20 How. 527, 529 (1858). Accordingly, our “test for determining whether a State has waived its immunity from federal-

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216. *Id.* at 276 (citations omitted).

217. The case considered whether two states had consented to suit against a bi-state commission created by a compact between the two states that was approved by Congress in accordance with the Constitution’s Compacts Clause. *Id.* at 277–79; see U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . .”).

218. Moreover, notwithstanding anything the Court said about not lightly inferring waiver, it did in fact find waiver on arguably rather slim grounds: it determined that the compact’s provision that the bi-state entity could “sue and be sued” was sufficient to waive its immunity, in light of a congressional proviso that the compact was not to impair federal authority over interstate commerce. See *id.* at 279–83 (discussing how any doubt as to the provision’s meaning disappeared when Congress’s acceptance was conditioned on the reservation of all federal right, power, and jurisdiction).

219. 527 U.S. 666 (1999).

220. *Id.* at 680.



court jurisdiction is a stringent one.” *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985).<sup>221</sup>

Each sentence quoted here is independently unimpeachable. Together, however, they constitute the same solecism that occurred in *Petty*. The first sentence quotes *Clark*’s recognition of a state’s ability to waive its immunity from suit. The second sentence, however, relies on *Beers*, a case from the other line of authority—the line of cases concerning consent, not waiver.<sup>222</sup> The third sentence then ties the two together and suggests that the stringent rules applied in the consent cases should apply to waiver cases as well. Thus, even though the issue was whether the state’s actions amounted to waiver whether the state liked it or not, the Court held that there could be no waiver, because there was not a sufficiently “clear declaration” by the state that it had made an “altogether voluntary’ decision to waive its immunity.”<sup>223</sup>

Similar conflation is also common in the lower courts. For example, the Fourth Circuit case of *In re Creative Goldsmiths of Washington, D.C., Inc.*<sup>224</sup> raised the issue of whether a state waives its immunity by filing a proof of claim in bankruptcy.<sup>225</sup> In discussing this issue, the court noted that “the Supreme Court has consistently held that ‘a State will be deemed to have waived its immunity only where [the waiver is] stated by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction.’”<sup>226</sup> The quoted language is from, and is appropriate to, consent cases; the Fourth Circuit incorrectly applied it to waiver cases.

The very language that the Fourth Circuit quoted should have alerted the court that something was wrong. The quoted language says that a state may waive its immunity only by “the most express language” or by “overwhelming implication from the text.” This test, appropriately applied in examining the text of state statutes that pur-

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221. *Id.* at 675.

222. The point here is not to criticize the Court for using the word “waiver” to describe both contexts; the separate meaning for “consent” and “waiver,” suggested in this Article, is not a standard usage. The problem is the failure to recognize the substantive difference between the previously distinct lines of authority governing consent cases and waiver cases.

223. *Id.* at 680–81 (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858)).

224. 119 F.3d 1140 (4th Cir. 1997).

225. *Id.* at 1143.

226. *Id.* at 1147 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239–40 (1985)) (alteration in original).

portedly consent to suit, can have no application to the question whether a state waives its immunity by filing a proof of claim in bankruptcy. In such a case there is no “language” or “text” to consider. The state takes a particular action—namely, filing a proof of claim—and the question is whether that action, not any text that the state has promulgated, constitutes a waiver of sovereign immunity.

Indeed, the Fourth Circuit determined in *Creative Goldsmiths* that filing a proof of claim in bankruptcy constitutes a waiver of the state’s immunity from any claim by the debtor that is a compulsory counterclaim to the state’s claim.<sup>227</sup> The court reached this conclusion not by examining any state language or text, but by considering “the fundamental fairness of judicial process,” which requires a court considering the state’s claim to consider the defendant’s defenses, including compulsory counterclaims.<sup>228</sup> So, even having stated the stringent test from the other line of cases, the Fourth Circuit did not really apply it; the court must have sensed that the test was inappropriate to the case at hand, even though it did not clearly explain what it was doing.<sup>229</sup>

Thus, it is certainly possible that the conflation of the consent and waiver cases has come about simply through error and through a

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227. *In re Creative Goldsmiths*, 119 F.3d at 1148.

228. *See id.* (“[I]t would violate the fundamental fairness of judicial process to allow a state to proceed in federal court and at the same time strip the defendant of valid defenses because they might be construed to be affirmative claims *against* the state.”).

229. For another, similar decision, see *Arecibo Cmty. Health Care, Inc. v. Puerto Rico*, 270 F.3d 17 (1st Cir. 2001). As in the cases cited in the text, the Court began by citing the rule of *Clark*, that state sovereign immunity is a personal privilege which a state may waive at pleasure, but then it applied the rule from the consent cases, that because such waiver is altogether voluntary, the court must apply a stringent test for waiver. *Id.* at 24. Yet the court went on to hold that a state’s filing of a proof in bankruptcy waives immunity from compulsory counterclaims, even if the counterclaims exceed the value of the state’s claim. *Id.* at 29. Again, the court cannot really be applying the stringent test from the consent cases, under which, as Part II.A.1 discusses, the state is free to attach conditions to its consent or even to withdraw its consent in mid-course.

The Seventh Circuit, in *In re Friendship Medical Center, Ltd.*, 710 F.2d 1297 (7th Cir. 1983), similarly took the attitude that “[a] plaintiff bears a heavy burden in showing waiver,” and that it could arise only by express language or overwhelming implication from the text of a statute, *id.* at 1300, even though the action allegedly waiving immunity was again the filing of a proof of claim in bankruptcy. *Id.*

For similar conflation in scholarly commentary, see Siegel, *supra* note 53, at 55–56 (discussing *College Savings Bank* in terms of consent, whereas it truly dealt with waiver). That was written before I had thought carefully about the difference between consent and waiver. *See also* Jennifer Cotner, Note, *How the Spending Clause Can Solve the Dilemma of State Sovereign Immunity from Intellectual Property Suits*, 51 DUKE L.J. 713, 717 (2001) (referring to the stringent consent test while discussing waiver).

failure to appreciate that the Court previously recognized these cases as two distinct lines of authority. This explanation, however, seems incomplete. It fails to account for a vital factor in state sovereign immunity cases: ideology.

Decisions in the sovereign immunity area do not come free of judges' ideological predispositions. As Justice Frankfurter remarked in *Great Northern Life Insurance Co. v. Read*,<sup>230</sup> “[t]he readiness or reluctance with which courts find such consent has naturally been influenced by prevailing views regarding the moral sanction to be attributed to a State’s freedom from suability.”<sup>231</sup> State sovereign immunity stands at the very center of highly charged debates about federalism and states’ rights. In recent years it has “become the bulwark principle of federalism.”<sup>232</sup> The issue of whether a state has consented to suit or otherwise waived its immunity from suit gets tied up with ideological assumptions regarding the value of the immunity that may have been waived.

As the Supreme Court decides cases and creates doctrines, some matters become more ideological than others. Strange patterns emerge in how strongly such ideologization affects decisionmaking. Few issues, for example, could be more sensitive than the death penalty, as was attested by the practices of Justices who opposed it and who noted their opposition in every death penalty case, even those in which the Court denied certiorari.<sup>233</sup> Yet, charged as the matter was,

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230. 322 U.S. 47 (1944).

231. *Id.* at 59 (Frankfurter, J., dissenting).

232. David J. Bederman, *Admiralty and the Eleventh Amendment*, 72 NOTRE DAME L. REV. 935, 937 (1996).

233. Justice Brennan and Justice Marshall engaged in this practice for years in cases too numerous to cite. See Jordan Steiker, *The Long Road up from Barbarism: Thurgood Marshall and the Death Penalty*, 71 TEX. L. REV. 1131, 1132 (1993) (noting Justice Marshall’s dissents and arguing for a new understanding of his position). According to Westlaw, they issued literally thousands of such dissents. See, e.g., *McCleskey v. Bowers*, 501 U.S. 1282, 1282 (1991) (Marshall, J., dissenting) (setting forth Justice Marshall’s last summary dissent from the denial of certiorari in a death penalty case); *Bradley v. Ohio*, 497 U.S. 1011, 1011 (1990) (Brennan, J., dissenting) (setting forth Justice Brennan’s last summary dissent from the denial of certiorari in a death penalty case); *Gregg v. Georgia*, 428 U.S. 153, 227–28 (1976) (Brennan, J., dissenting) (expressing the view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments); *id.* at 231 (Marshall, J., dissenting) (same). Justice Blackmun began a similar practice shortly before his retirement from the Court and had occasion to apply it to only about 160 cases. See *Drew v. Scott*, 512 U.S. 1266, 1266 (1994) (Blackmun, J., dissenting) (setting forth Justice Blackmun’s last summary dissent from the denial of certiorari in a death penalty case); *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (expressing the view that the death penalty cannot be fairly applied).

all the Justices were able to agree in *Heckler v. Chaney*<sup>234</sup> that the Food and Drug Administration had discretion not to enforce the Food and Drug Act against state officials who executed convicted criminals by lethal injection, even though such a practice probably violated the act by using drugs for a non-approved purpose.<sup>235</sup> Justice Rehnquist, writing the Court's opinion, noted expressly that

[t]he fact that the drugs involved in this case are ultimately to be used in imposing the death penalty must not lead this Court or other courts to import profound differences of opinion over the meaning of the Eighth Amendment to the United States Constitution into the domain of administrative law.<sup>236</sup>

Other areas of law, however, seem to generate views that spill over into tangentially related matters. For example, in *Thornburgh v. American College of Obstetricians and Gynecologists*,<sup>237</sup> the Supreme Court held provisions of Pennsylvania's Abortion Control Act unconstitutional.<sup>238</sup> The ruling came in an unusual posture: the district court had passed only on the plaintiffs' motion for a preliminary injunction against enforcement of the act, based on a stipulation of facts that expressly reserved the parties' ability to controvert the facts when the case was later tried.<sup>239</sup> The district court denied most of the requested preliminary injunction.<sup>240</sup> Although the Supreme Court acknowledged that the appellate role in such a case is normally "limited to determining whether the trial court abused its discretion in finding the presence or absence of irreparable harm and a probability that the plaintiffs would succeed on the merits,"<sup>241</sup> and although the defendants stated their intent to develop a complete factual record that they believed could affect the disposition of the case,<sup>242</sup> the Court decided the merits of the case and issued a final judgment holding provisions of the act unconstitutional.<sup>243</sup> Justice O'Connor strongly protested: "Today's decision . . . makes it painfully clear that no legal rule

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234. 470 U.S. 821 (1985).

235. *Id.* at 826–27; *id.* at 832 (Brennan, J., concurring); *id.* at 840–41 (Marshall, J., concurring in the judgment).

236. *Id.* at 838. Justice Brennan agreed. *Id.* at 839 n.2 (Brennan, J., concurring).

237. 476 U.S. 747 (1986).

238. *Id.* at 772.

239. *Id.* at 752–53.

240. *Id.* at 753.

241. *Id.* at 755.

242. *Id.* at 826–27 (O'Connor, J., dissenting).

243. *Id.* at 772.

or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion.<sup>244</sup>

Waiver doctrine appears to have experienced a similar ideological spillover from developments in the doctrine of state sovereign immunity more generally. The conflation of consent and waiver cases within Eleventh Amendment doctrine, the determination that state counsel cannot waive state sovereign immunity unless authorized to do so, and the determination that state sovereign immunity can be raised on appeal for the first time, all had the effect of making waivers of state sovereign immunity much harder to obtain. It cannot be an accident that the post-1945 shift in the rules regarding waiver of state sovereign immunity moved the doctrine even further in its primary direction of protecting state's rights; indeed, in each of the critical cases, the constriction of waiver doctrine was a small matter compared to the expansion of the immunity held not to be waived. In *Ford Motor Co.*, the holding that state counsel could not waive state sovereign immunity unless authorized to do so under state law accompanied the new judicial recognition that refund suits against state tax collectors implicated state sovereign immunity in the first place.<sup>245</sup> *Edelman v. Jordan* expanded the procedural ability of states to assert their immunity belatedly, even as it took the much larger substantive step of expanding the underlying immunity to cover any suit against a state officer seeking retrospective monetary damages.<sup>246</sup>

Nor can it be an accident that the short-lived doctrine of constructive consent emerged during the 1960s, the era of the Warren Court.<sup>247</sup> During that period, the Court tended to favor federal power at the expense of state governments.<sup>248</sup> It was only four years after

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244. *Id.* at 814 (O'Connor, J., dissenting).

245. *See Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 462–70 (1945) (noting that because the suit was based on Indiana's refund statute, it was an action against the state and sovereign immunity was implicated). As noted earlier, the Court had presaged this tightening of the underlying immunity just a year earlier, in *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47 (1944). *See supra* Part II.B.

246. *See Edelman v. Jordan*, 415 U.S. 651, 664–65, 671, 678 (1974) (holding that suits against officers where the judgment award would come from the general revenues of the state are similar enough to an award against the state itself to justify Eleventh Amendment protection).

247. *See supra* Part II.C.

248. *See, e.g.*, Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & MARY BILL RTS. J. 585, 623 (2002) (noting that in 1958, state chief justices issued a report condemning the Warren Court's expansion of federal power at the expense of the states).

*Parden*, for example, that the Court held, in *Maryland v. Wirtz*,<sup>249</sup> that the federal government could compel states to pay their employees the minimum wage.<sup>250</sup>

Each of these movements suggests that the stringency of waiver doctrine ebbed and flowed with the overall ideological tide of the Eleventh Amendment. It might seem that the issue of waiver of state sovereign immunity is a purely procedural matter upon which all might agree despite differing views on the substantive scope of the immunity itself. It appears, however, that ideological trends in Eleventh Amendment immunity overwhelmed the previously settled scope of waiver doctrine. The waiver doctrine became ideologized.<sup>251</sup>

### E. *The Countertrend*

Perhaps surprisingly, in light of the Supreme Court's current attitude of extreme stringency regarding state sovereign immunity generally, its most recent cases have created a countertrend within the doctrine of waivers. The Court, in two recent cases, explicitly overruled *Ford Motor Co.*, the most troublesome case from the post-1945 era, and vitiated the rule, suggested by *Edelman v. Jordan*, that state sovereign immunity is a jurisdictional defense that a state may assert at

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249. 392 U.S. 183 (1968).

250. *Id.* at 195–97. This decision was, of course, overruled by *National League of Cities v. Usery*, 426 U.S. 833, 854–55 (1976), which was in turn overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 557 (1985).

251. Professor David Bederman has documented a similar transformation of the law of state sovereign immunity with regard to admiralty cases. Bederman, *supra* note 232. Professor Bederman observes that one early case, *United States v. Bright*, 24 F. Cas. 1232 (C.C.D. Pa. 1809), read the Eleventh Amendment as not applying to admiralty suits, because of the amendment's limitation to cases in "law or equity." Bederman, *supra* note 232, at 963–66. Even during what Professor Bederman calls the "sovereign immunity revolution" of the late nineteenth and early twentieth centuries, when the courts began to recognize state sovereign immunity from admiralty actions, the courts still drew careful distinctions and preserved federal power over some cases, particularly in *rem* admiralty actions brought against a *res* not in the actual possession of state officials, or not used for public purposes, even though a state might have an interest in the *res*. *Id.* at 984–85. In the late twentieth century, however, admiralty cases got indiscriminately swept up in the rush of cases broadening state sovereign immunity. Courts began to hold that state sovereign immunity bars an admiralty case, even an *in rem* case, if a state claims ownership of the *res*, even if the state does not possess the *res* and the claim of ownership is disputed. *Id.* at 985–1000. Just as this Article suggests that a more nuanced law regarding waivers is consistent even with the broad, official theory of state sovereign immunity, Professor Bederman's article suggests that, notwithstanding the general broadening of state sovereign immunity, courts should respect the historic understanding that in *rem* admiralty actions, brought against a *res* not actually possessed by state officials, or not used for public purposes, do not implicate state sovereign immunity. *Id.* at 1005–07.

any point in litigation. Some lower courts have concluded that the Court has reinstated its pre-1945 rules with regard to waivers of state sovereign immunity.<sup>252</sup>

The countertrend began in 1998 with the case of *Wisconsin Department of Corrections v. Schacht*,<sup>253</sup> which concerned a state prison guard who was fired for allegedly stealing state property.<sup>254</sup> The prison guard sued his former employer, the state department of corrections, and several of its individual officials in state court for alleged violation of the federal Constitution's Due Process Clause and federal civil rights laws.<sup>255</sup> The defendants removed the case to federal court. Once there, the defendants successfully asserted that the Eleventh Amendment barred suit against the Department itself and against the individual defendants insofar as they were sued in their official capacities.<sup>256</sup>

The removal of the case posed a jurisdictional puzzle: the removal statute, 28 U.S.C. § 1441, permits removal of a case to federal district court only if the district court has original jurisdiction over the case.<sup>257</sup> The defendants in *Schacht*, in removing the case to federal court, necessarily asserted that the case was within the federal jurisdiction. This assertion seemed sound, because the suit arose under federal law and so fell within the federal question jurisdiction conferred by 28 U.S.C. § 1331.<sup>258</sup> The defendants, however, asserted sovereign immunity from suit once the case was in federal court.<sup>259</sup> If sovereign immunity is a jurisdictional defense, the defendants' assertion of the defense amounted to a claim that the case was *not* within the federal jurisdiction. If that was correct, then the case should not have been removed to federal court. Because of this problem, the Seventh Circuit, following the district court's dismissal of the case on immu-

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252. See, e.g., *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 760 (9th Cir. 1999) (stating that the Court has "returned to its original understanding of Eleventh Amendment immunity"), *amended by* 201 F.3d 1186 (9th Cir. 2000); *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 631 (10th Cir. 1998) (characterizing the Court as having held that "sovereign immunity is in the nature of an affirmative defense that may be asserted or waived at a state's discretion").

253. 524 U.S. 381 (1998).

254. *Id.* at 383.

255. *Id.*

256. *Id.* at 384–85.

257. 28 U.S.C. § 1441 (2000).

258. 28 U.S.C. § 1331 (2000).

259. *Schacht*, 524 U.S. at 384.

nity grounds, held that the district court lacked jurisdiction over the case and should have remanded the case to state court.<sup>260</sup>

The Supreme Court resolved the puzzle by determining that the Eleventh Amendment “does not automatically destroy original jurisdiction.”<sup>261</sup> Rather, the Court said, “the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense.”<sup>262</sup> Furthermore, the Court held, a federal district court is not obliged to raise the immunity defense *sua sponte*. The Court said, “[u]nless the State raises the matter, a court can ignore it.”<sup>263</sup> Accordingly, the Court held, the district court properly exercised removal jurisdiction over the case.<sup>264</sup> Once the state asserted Eleventh Amendment immunity, the district court was obliged to dismiss claims barred by that immunity, but it could proceed to hear such claims as the case presented that were not so barred.<sup>265</sup>

The determination, in *Schacht*, that state sovereign immunity does not automatically destroy a federal court’s subject matter jurisdiction, but gives a state a defense that it may choose to raise or not, is inconsistent with the post-1945 view, suggested by *Edelman*, that state sovereign immunity is a jurisdictional defense. Moreover, if the defense is not jurisdictional, the rule that a state may raise the defense at any time is undermined.<sup>266</sup> *Schacht*’s statement that the defense is not jurisdictional and may be waived by a state would logically seem to entail reinstatement of the prior, traditional rule that the defense *is* waived if it is not seasonably asserted. Indeed, some lower courts concluded that *Schacht* had reinstated that traditional rule.<sup>267</sup>

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260. *Id.* at 385.

261. *Id.* at 389.

262. *Id.*

263. *Id.*

264. *Id.* at 386.

265. *Id.* at 392–93. The non-barred claims in the case were the claims against the individual defendants in their individual capacities. *Id.* at 385–86.

266. See *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 760 (9th Cir. 1999):

Once it is clear that the Eleventh Amendment is not a true limitation upon the court’s subject matter jurisdiction, but rather a personal privilege that a state may waive, it is difficult to justify or explain a rule that allows this defense to be invoked at any time in the proceedings.

*amended* by 201 F.3d 1186 (9th Cir. 2000).

267. See *In re SDDS, Inc.*, 225 F.3d 970, 972 (8th Cir. 2000) (holding that a state waives immunity by actively litigating a case’s merits without raising immunity); *Hill*, 179 F.3d at 760 (stating that the Court has “returned to its original understanding of Eleventh Amendment immunity” and holding that a state waives its immunity defense by failing to raise the defense until



Moreover, a concurring opinion in *Schacht* explicitly considered, and expressed concern about the fairness of, the Court's post-1945 waiver doctrine. Justice Kennedy (who is usually one of the strongest supporters of state sovereign immunity among all the Justices)<sup>268</sup> expressed doubts as to the propriety of the rule permitting states to assert sovereign immunity for the first time on appeal.<sup>269</sup> Justice Kennedy noted that this rule confers an unfair advantage on states, and he suggested that the Court could eliminate the unfairness by "modifying our Eleventh Amendment jurisprudence to make it more consistent with our practice regarding personal jurisdiction."<sup>270</sup>

The trend of *Schacht* continued, last Term, with the Supreme Court's unanimous determination that a state automatically waives its Eleventh Amendment immunity, at least on some claims, by removing a case from state court to federal court. In *Lapides v. Board of Regents of the University System of Georgia*,<sup>271</sup> the plaintiff, a state university professor, brought suit against his Board of Regents and against individual university officials.<sup>272</sup> He asserted that, by placing allegations of sexual harassment in his personnel file, the defendants had violated both state and federal law.<sup>273</sup> The plaintiff sued in Georgia state court, and the parties agreed that a state statute waived the state's immunity from suit in state court on state law causes of action.<sup>274</sup>

The defendants removed the case to federal district court.<sup>275</sup> The individual defendants preferred the federal forum because federal courts, but not Georgia state courts, permit interlocutory appeal of

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the first day of trial); *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (holding that a state waives immunity by removing a case to federal court).

268. This was most notably demonstrated in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). Justice Kennedy's opinion (joined, on this point, only by Chief Justice Rehnquist) suggested that, in applying the rule of *Ex parte Young*, courts should engage in a case-specific balancing of state and federal interests before deciding whether a private party may sue a state officer for prospective, injunctive relief under federal law. *Id.* at 270–80. Even Justices O'Connor, Scalia, and Thomas (the other three Justices who support the official theory of state sovereign immunity) did not approve this view and stated that it "unnecessarily recharacterizes and narrows much of our *Young* jurisprudence." *Id.* at 291 (O'Connor, J., concurring in part and concurring in the judgment).

269. *Schacht*, 524 U.S. at 393–94 (Kennedy, J., concurring).

270. *Id.* at 395.

271. 535 U.S. 613 (2002).

272. *Id.* at 616.

273. *Id.*

274. *Id.*

275. *Id.*

adverse rulings on the defense of qualified immunity.<sup>276</sup> The state itself agreed to join in seeking removal—as all defendants must, for removal to be effective<sup>277</sup>—in order to accommodate the individual defendants.<sup>278</sup> Once the case was removed, however, the state defendant asserted sovereign immunity from all of the plaintiff's claims.<sup>279</sup> The state asserted that, although it had waived immunity from suit on state law claims in state court, it had not waived immunity from suit on any claims in federal court.<sup>280</sup> The district court held that the state had waived its immunity by joining in the removal petition, but the court of appeals reversed, noting that the authority of Georgia's attorney general to waive the state's immunity was doubtful as a matter of state law.<sup>281</sup>

When the case reached the Supreme Court, the Court first observed that the plaintiff's federal claims, based on 42 U.S.C. § 1983, must fail against the state defendant, because, as the Court had previously held, states are not "persons" suable under § 1983.<sup>282</sup> Thus, the case was really limited to the plaintiff's state law claims. Moreover, the case was further limited, the Court held, by the state's concession that it would have had no immunity from those claims in the original, state-court forum.<sup>283</sup>

With the case thus limited, the Court held that the state had waived its sovereign immunity by removing the case from state court to federal court.<sup>284</sup> It would seem "anomalous or inconsistent," the Court observed, for a state to invoke federal jurisdiction by removing and then to assert immunity from that jurisdiction.<sup>285</sup> Citing *Gunter*<sup>286</sup> and *Clark*,<sup>287</sup> the Court applied the rule that once a state voluntarily becomes a party to a case and submits its rights for judicial determination, it is bound by that action.<sup>288</sup> By consenting to removal, Geor-

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276. *Id.* at 621.

277. 28 U.S.C. § 1441 (2000); *Chi., Rock Island & Pac. Ry. Co. v. Martin*, 178 U.S. 245, 247–48 (1900).

278. *Lapides*, 535 U.S. at 620–21.

279. *Id.* at 616.

280. *Id.*

281. *Id.* at 617.

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

283. *Id.* at 619.

284. *Id.* at 624.

285. *Id.* at 619.

286. *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273 (1906).

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

288. *Lapides*, 535 U.S. at 619–20.

gia had consented to having the federal district court rule on the state law claims against it.

Moreover, the Court held, the alleged incapacity of the state's counsel, as a matter of state law, to waive the state's immunity was irrelevant.<sup>289</sup> The Court first distinguished its previous cases on this topic (such as *Ford Motor Co.*) on the ground that they did not involve state parties that had voluntarily invoked the jurisdiction of a federal court.<sup>290</sup> Even more importantly, however, the Court also observed that the rule governing voluntary invocations of federal jurisdiction was based on "the problems of inconsistency and unfairness" that would inhere in permitting a state to first invoke, and then claim immunity from, federal jurisdiction.<sup>291</sup> To avoid such inconsistency and unfairness, the Court held, the question of whether state laws, rules, or activities amount to a waiver of the state's sovereign immunity must be a question of federal law, not state law.<sup>292</sup> The Court therefore overruled *Ford Motor Co.* "insofar as it would otherwise apply."<sup>293</sup>

*Lapides* provides a strong (and unanimous) shift back in the direction of the traditional rule regarding waivers of state sovereign immunity. The Court did not apply a "stringent" test that demanded a "clear declaration" of a state's "altogether voluntary" waiver of its immunity from suit.<sup>294</sup> The Court distinguished waivers subject to that stringent test from "waivers effected by litigation conduct."<sup>295</sup> The Court thus reinvoked the distinction between cases involving state *consent* to suit and cases involving *waivers* of a state's immunity from suit without consent. As to the latter, *Lapides* returned to the traditional rule that a waiver may be inferred from a state's litigation conduct.

The impact of *Lapides* has, however, been disputed. Lower courts are already in disagreement about how to read it. Some have treated it as a narrow decision applicable only to cases following its

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289. *Id.* at 621–23.

290. *Id.* at 622.

291. *Id.*

292. *Id.* at 622–23.

293. *Id.* at 623.

294. See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–76 (1999) (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858)); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) (describing the limited conditions under which a state waives its sovereign immunity).

295. *Lapides*, 535 U.S. at 620.

precise pattern (i.e., cases removed from state court to federal court by a sovereign state defendant),<sup>296</sup> while others have applied a broad rule of waiver in light of the “spirit” of *Lapides*.<sup>297</sup>

Further thinking about this area of law is, therefore, still very necessary. Having examined the ideologization of waiver doctrine descriptively, it is now time to form a normative judgment about it. As the next Part shows, the ideologization of waiver doctrine is regrettable. The rules of *Ford Motor Co.* and *Edelman* fail basic tests of common sense. They simply do not provide reasonable rules for running a judicial system. Even starting from the official theory of the Eleventh Amendment, rather than the diversity theory, there is no sufficient explanation for the post-1945 rules of waiver. They make sense only in the context of an ideologized doctrine of state sovereign immunity.

To recapture a reasonable doctrine of waiver, the Supreme Court must follow *Schacht* and *Lapides*. It must make clear that these cases are not limited in the ways in which some lower courts are attempting to read them. It must confirm that, as other lower courts have held, these cases have vitiated the rule of *Edelman* and have reinstated the traditional rules governing waivers of state sovereign immunity.

### III. WAIVER DOCTRINE, NON-IDEOLOGIZED

A sensible, non-ideologized waiver doctrine would balance the importance of state sovereign immunity against the legitimate needs of the federal judicial system. State sovereign immunity is, without question, an important value under the official theory of the Eleventh Amendment. As this Part shows, however, even the official theory

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296. See, e.g., *Bravo Perazza v. Puerto Rico*, 218 F. Supp. 2d 176, 179 (D.P.R. 2002) (stating that *Lapides* is “particular” to the situation of removal and finding no waiver where a state defendant failed to assert immunity prior to filing a motion for summary judgment); *Montgomery v. Maryland*, No. 00-1019, slip op. at 1 (D. Md. July 8, 2002) (stating that *Lapides* is “confined to the proposition that a state that has removed a case to the federal court is estopped from asserting Eleventh Amendment immunity”) (on file with the *Duke Law Journal*).

297. See *In re Bliemeister*, 296 F.3d 858, 862 (9th Cir. 2002) (finding waiver of immunity where the state makes a “tactical” decision to argue the merits of the case, as otherwise states would have the unfair advantage of hearing the court’s substantive comments on the merits of a case before asserting an immunity defense); see also *Ku v. Tennessee*, 322 F.3d 431, 435 (6th Cir. 2003) (stating that “the rule [of *Lapides*] is consistent only with the view that the immunity defense in cases otherwise falling within a federal court’s original jurisdiction should be treated like the defense of lack of personal jurisdiction”); *Howard v. Food Lion, Inc.*, 232 F. Supp. 2d 585, 593–94 (M.D.N.C. 2002) (concluding that an official defendant waived state sovereign immunity, even as to claims under federal law, by removing the case to federal court).

does not require courts to regard state sovereign immunity as the only value to be taken into account, with all other considerations excluded. If courts placed even minimal weight on the other values affected by rules of waiver, the doctrine would produce results consistent with the traditional rules of waiver applied by the Supreme Court prior to 1945.

A. *The Ability to Waive at All*

The first question is why states can waive their immunity at all. One of the many paradoxes of state sovereign immunity doctrine is that the Eleventh Amendment, as the Supreme Court likes to point out when it is in a restrictive mood, is phrased as a limitation on the federal judicial power.<sup>298</sup> Usually, such limitations are not avoidable at all, not even by Act of Congress,<sup>299</sup> and certainly not by the mere consent of the parties to a federal case.<sup>300</sup> And yet, a state may “waive at pleasure” its immunity defense. How something can be both jurisdictional and waivable is a paradox.<sup>301</sup>

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298. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 64 (1996) (“The text of the Amendment itself is clear enough on this point: ‘The Judicial power of the United States shall not be construed to extend to any suit . . .’” (alteration in original) (quoting U.S. CONST. amend. XI)). Of course, the Court’s convenient ellipsis omits the words “commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state,” U.S. CONST. amend. XI, which show that the amendment does not, textually, apply to suits such as *Seminole Tribe*. The Court’s argument incongruously suggests that courts are strictly bound by *some* of the text of the Eleventh Amendment, but are free to ignore the rest. See Siegel, *supra* note 53, at 60 & n.124 (discussing this point).

299. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–80 (1803) (finding that Congress may not add to the Supreme Court’s constitutionally specified original jurisdiction); cf. *Mesa v. California*, 489 U.S. 121, 136–39 (1989) (construing a federal officer removal statute narrowly so as to avoid the “grave constitutional problems” that would be presented if the statute were construed so as to grant removal jurisdiction over cases that did not present any federal question).

300. See, e.g., *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986) (“[T]he parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2.”); cf. *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 126–27 (1804) (holding that the jurisdiction of a federal court may be challenged even by the plaintiff who chose to sue there).

301. Similarly, state sovereign immunity occupies an unusual position as a defense that need not be raised by a court *sua sponte*, *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 389 (1998); *Patsy v. Bd. of Regents Fla.*, 457 U.S. 496, 515 n.19 (1982), and yet (at least according to some courts of appeals) can be raised by a court *sua sponte* at the court’s discretion. E.g., *Howard v. Virginia*, 8 Fed. Appx. 318, 319–20 (6th Cir. 2001); *Burge v. Parish of St. Tammany*, 187 F.3d 452, 465–66 (5th Cir. 1999). Indeed, despite its waivability, some courts have raised Eleventh Amendment immunity *sua sponte* even over the defense counsel’s express objection. See *Linkenhoker v. Weinberger*, 529 F.2d 51, 53–54 (4th Cir. 1975) (rejecting the attorney general of

Diversity theorists might resolve the paradox by determining that the Eleventh Amendment sets up a limitation on federal judicial power that is, in fact, not waivable. The amendment repeals federal judicial power, a diversity theorist would say, over cases that are brought against a state by a citizen of another state or a citizen or subject of a foreign state and that are not otherwise within the federal judicial power. Thus, a modern-day *Chisolm* could not sue a state in federal court on a simple breach of contract claim, whether the state consented or not.

Such a rule would make sense of the language of the amendment and would be consistent with the traditional understanding that limitations on the federal judicial power cannot be avoided or waived. After all, if a modern-day *Chisolm* sued his *own* state in federal court for breach of contract, no one would imagine that the suit could proceed if only the state consented to it. No one would say that the problem really lay in the defendant's lack of consent to suit; the problem would be that the suit simply failed to fall within any of the categories of federal judicial power under Article III. It would not arise under federal law, nor would it be within any of the categories of diversity cases. State consent to suit would be irrelevant; the court would have a clear duty to dismiss the case, acting *sua sponte* if necessary. The Eleventh Amendment suggests that a similar result should apply to cases based on state law brought against states in federal court by citizens of other states. The amendment removes such cases from the federal judicial power, and they cannot be heard in federal court regardless of any state's consent or any federal statute purporting to confer jurisdiction.<sup>302</sup>

To the extent that state sovereign immunity continued to exist following adoption of the Eleventh Amendment (if at all), the immunity would not, under the diversity theory, be derived from a constitutional limitation on the federal judicial power, but rather derived from common law limits on recovery against states—limits that provided a substantive defense to suit. Even assuming that this defense applied to actions based on federal law, such a common law, substan-

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Maryland's attempt to waive Maryland's Eleventh Amendment immunity on the basis that he had not been authorized to do so under state law).

302. Justice Stevens has expressed his support for this view. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23–26 (1989) (Stevens, J., concurring) (noting that there are “two Eleventh Amendments,” the first a literal interpretation of the text which grants an immunity that Congress cannot abrogate, the second a judicially created doctrine of state immunity that the Court has added to the text, which Congress has plenary power to abrogate).

tive defense, in contrast to a limitation on judicial power, could be waived (or, a diversity theorist would add, abrogated by legislation).<sup>303</sup>

Thus, the diversity theory could provide an appropriate resolution of the tension between the Eleventh Amendment's phrasing as a limit on federal judicial power and the waivability of state sovereign immunity. Indeed, as Justice Stevens has observed, a key significance of the waivability of state sovereign immunity is that it proves that such immunity "is not a product of the limitation of judicial power contained in the Eleventh Amendment."<sup>304</sup>

Adherents of the official theory have to provide a different explanation for the waivability of state sovereign immunity. To the extent that the official theory regards state sovereign immunity as deriving from the Eleventh Amendment itself,<sup>305</sup> it is difficult to reconcile the text of the amendment with the view that the immunity it creates can be waived. Moreover, although the Supreme Court has never squarely held that a state may waive its immunity from suits literally falling within the terms of the Eleventh Amendment,<sup>306</sup> the lan-

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303. For a slightly longer explication of this view, see *Seminole Tribe v. Florida*, 517 U.S. 44, 123–42, 159–69 (1996) (Souter, J., dissenting). Justice Souter's view on this point seems to differ slightly from Justice Brennan's. Justice Brennan's opinions do not appear to recognize a "state sovereign immunity," operating outside of the Eleventh Amendment, that might bar suit against a state in a case to which the Eleventh Amendment did not apply. See, e.g., *Welch v. Tex. Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 497–503 (1987) (Brennan, J., dissenting) (asserting that the Eleventh Amendment does not apply to admiralty suits and suggesting that states therefore have no immunity from any admiralty action, even an action under the common law of admiralty). Justice Souter is more open to the view that, even if Eleventh Amendment immunity does not apply to a case, a state's sovereign immunity might nonetheless bar the suit, but he views such sovereign immunity as a common law doctrine subject to congressional alteration. See *Seminole Tribe*, 517 U.S. at 123–42, 159–69 (Souter, J., dissenting).

304. *Union Gas Co.*, 491 U.S. at 26 (Stevens, J., concurring); see also *Seminole Tribe*, 517 U.S. at 127–28 (Souter, J., dissenting) ("If it is indeed true that 'private suits against States [are] not permitted under Article III' . . . then it is hard to see how a State's sovereign immunity may be waived any more than it may be abrogated by Congress.").

305. See, e.g., *Welch*, 483 U.S. at 472 ("[T]he Eleventh Amendment bars a citizen from bringing suit against the citizen's own State in federal court, even though the express terms of the Amendment refer only to suits by citizens of another State." (emphasis added)); *id.* at 473 ("[T]he Amendment bars suits in admiralty against the States, even though such suits are not, strictly speaking, 'suits in law or equity.'" (emphasis added)). As noted earlier, the official theory also, in other cases, relies on the view that state sovereign immunity derives from the Constitution but not from the Eleventh Amendment. See *supra* note 33 and accompanying text.

306. *Clark v. Barnard*, although nothing more than a dispute arising under state law, might not be regarded as a suit *against* a state under the Supreme Court's approach to the case; the Court said that the state's appearance and claim to the fund within the possession of the court made the case one in the nature of an interpleader. 108 U.S. 436, 448 (1882).

guage in its waiver cases would appear to cover that possibility.<sup>307</sup> Thus, the official theory must explain how this limit on federal judicial power can be waived.

The answer, not clearly articulated in the cases, rests on the view, long held by the official theory, that questions regarding state sovereign immunity are not to be answered by reference to the text of the Eleventh Amendment. Rather, they are governed by nontextual *principles* of state sovereign immunity. The Court has long made this point clear in cases restricting suits against states. In *Alden*, for example, the Court declared that “the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.”<sup>308</sup> This statement, moreover, was merely the capstone of a venerable tradition of disregarding the amendment’s text and appealing to underlying principles instead. As early as *Hans v. Louisiana*,<sup>309</sup> the Court was treating the text with something approaching derision. When the plaintiff in that case tried to invoke the “letter” of the Constitution to show that the Eleventh Amendment did not bar his suit, the Court criticized his argument as “an attempt to strain the Constitution and the law to a construction never imagined or dreamed of.”<sup>310</sup> It called the notion that the amendment’s framers could have regarded its literal text as determining the boundaries of state sovereign immunity “almost an absurdity on its face.”<sup>311</sup> Subsequent cases continued to affirm that the amendment is “but an exemplification” of the underlying “fundamental rule” that really governs cases involving state sovereign immunity,<sup>312</sup> and that what matters in sovereign immunity cases is not the text of the amendment, but the “postulates which limit and control” even the text of the Constitution.<sup>313</sup>

All that is needed is to apply this principle to cases *permitting* suits against states just as much as it applies to cases *barring* suits against states. The Eleventh Amendment’s text that limits the federal judicial power simply does not matter under the official theory, just as

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307. *E.g., id.* at 447 (“The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure . . .”).

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

309. 134 U.S. 1 (1890).

310. *Id.* at 15.

311. *Id.*

312. *Ex parte New York*, 256 U.S. 490, 497 (1921).

313. *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934).



the text limiting the scope of the amendment to suits against states by citizens of other states does not matter, as the Court has made clear over and over again. What matters is not the text itself, but rather the *principles* of state sovereign immunity. Those principles show that the immunity applies only in cases where the state has not consented to suit or otherwise waived its immunity, regardless of what the amendment's text says.

Thus, under both the official theory and the diversity theory, the possibility of waiver of state sovereign immunity ultimately stems from a recognition that the immunity bar does not derive from a textual, constitutional limit on federal judicial power, but from background principles of sovereign immunity (common law principles, diversity theorists would say; constitutional principles, according to the official theory). This point has important implications for the content of the rules of consent and waiver. Once it is properly understood that courts are applying principles rather than a clear, textual rule, they necessarily have more freedom to consult logic and tradition to determine the content of the applicable principles. Logic and tradition show that the problem with suits against a sovereign dissolve when the sovereign consents to suit.<sup>314</sup> The implications of this point are explored in the next Section.

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314. To the extent that sovereign immunity derives “from the laws and practices of our English ancestors,” *United States v. Lee*, 106 U.S. 196, 205 (1882), it would naturally be subject to the English rule, which permitted suit against the sovereign with the sovereign's consent. *Id.*

Professor Caleb Nelson explains waivability differently in his notable article, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002). For Professor Nelson, the Eleventh Amendment states a limitation on the federal judicial power, and, to the extent that that limitation applies, it can neither be abrogated nor waived. *Id.* at 1615, 1623. This limitation on federal subject matter jurisdiction, however, applies only to suits described by the Eleventh Amendment itself. *Id.* at 1556. Professor Nelson does not determine whether the amendment applies to federal question suits or whether the “diversity” reading of the amendment is correct, *see id.* at 1623–24 (discussing the implications of accepting or rejecting the “diversity” reading of the Eleventh Amendment), but, in either event, he regards the sovereign immunity that states enjoy with regard to suits not described by the text of the Eleventh Amendment (for example, suits against a state by one of its own citizens) as arising from doctrines related to personal jurisdiction, not subject matter jurisdiction, *see id.* at 1567–1608 (using historical and textual evidence to support this claim). The protection that states enjoy in suits not described by the Eleventh Amendment is therefore waivable. *Id.* at 1617.

Insofar as waivability is concerned, Professor Nelson's provocative thesis is somewhat similar to the view expressed in this Article, in that both regard waivability as resulting from principles of state sovereign immunity, not from anything in the text of the Eleventh Amendment. The difference is that this Article observes that the same point is true, even under the official theory, even if the immunity is regarded as going to a federal court's subject matter jurisdiction. The official theory has always determined the extent of that immunity by looking to background principles governing immunity, not to the text of the Eleventh Amendment; this

*B. The Rules of Consent and Waiver*

Once it is understood that states may take action that eliminates their own immunity from suit in federal court, the next question is what actions have that effect. The traditions of state sovereign immunity and the fundamental principles underlying that immunity show that the pre-1945 cases were correct to apply quite different rules to cases involving consent than to cases involving waiver.

Certainly one basis for finding elimination of a state's sovereign immunity is that a state has made its own decision to eliminate the immunity; this is the basis of the consent cases. When a federal court is asked to entertain a suit against a state on this ground, it is appropriate for the court to look to state law to determine whether such consent exists. The essence of this basis for suit is that the state has made its own decision to consent; what a state's "own decision" is must be determined by reference to the state's own law, under which the state may have consented or not and may have attached conditions or limitations to the consent.

Moreover, the Supreme Court has appropriately applied a stringent test to determine whether a state has consented to suit. The reason for this is not so much any constitutional command as it is a common-sense estimation of a state's likely attitude toward suits in federal court. There are many important reasons why a state might wish to permit itself to be sued: a state can enhance its credit by permitting itself to be sued on its contracts, and a state's desire to do justice, particularly toward its own citizens, may cause a state to waive its immunity in tort actions and actions based on statutes. The greater part of these objectives can, however, be achieved without the necessity of a state's subjecting itself to suit in a forum beyond its control. Subjecting itself to suit in federal court might, to be sure, do even more to enhance a state's credit and promote justice in cases in which the state is a defendant, but the choice of forum is surely a marginal point compared with the willingness of the state to be sued at all. Accordingly, the rule providing that state statutes waiving immunity from suit should normally be interpreted to apply only to a state's own courts provides a good judicial estimation of likely legislative intent.

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Article simply observes that reliance on principles rather than text is as appropriate when permitting suits as when barring them.

Thus, the Court's traditional rules regarding state consent to suit, which give states plenary control over such consent, make sense. But it cannot be maintained that states have a like degree of control over *waivers* of immunity from suit. Even the official theory, if one just stops to examine it, has never granted states plenary control over waivers of immunity. For example, everyone accepts that when a state files a proof of claim in bankruptcy, it necessarily waives immunity from the federal courts' determination of the validity of the claim; the federal court may consider the debtor's objections to the claim, determine the claim's proper amount and its priority, and, if appropriate, discharge the debtor from the claim.<sup>315</sup> It even appears to be generally agreed that the state's filing of a proof of claim waives the state's immunity from federal consideration of the debtor's compulsory counterclaims.<sup>316</sup>

Even this simple example demonstrates that states do not have plenary control over waivers of their immunity comparable to their plenary control over consent to suit. Similarly, even before *Lapides*, the official theory permitted a state's litigation counsel to take actions that waived the state's sovereign immunity regardless of the counsel's lack of competence to do so under state law.<sup>317</sup> These examples show that although state consent to suit is "altogether voluntary" and may be attended with such conditions as the state thinks proper, waiver is different. Certain actions taken by a state have the effect of waiving state sovereign immunity in certain ways whether the state likes it or not and notwithstanding any attempts by the state to set conditions. In other words, consent to suit is purely a matter of state law, but waiver of immunity from suit without consent is judged by federal law. Federal law sometimes finds a waiver of immunity that state law does not countenance.

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315. *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947).

316. *Arecibo Cmty. Health Care, Inc. v. Puerto Rico*, 270 F.3d 17, 27–28 (1st Cir. 2001); *In re Lazar*, 237 F.3d 967, 978 (9th Cir. 2001); *In re Straight*, 143 F.3d 1387, 1390 (10th Cir. 1998); *In re Creative Goldsmiths of Wash., D.C., Inc.*, 119 F.3d 1140, 1148 (4th Cir. 1997); *In re 995 Fifth Ave. Assocs., L.P.*, 963 F.2d 503, 507–08 (2d Cir. 1992); *In re Friendship Med. Care Ctr., Ltd.*, 710 F.2d 1297, 1300–01 (7th Cir. 1983). There is disagreement as to whether the value of the compulsory counterclaim can exceed the value of the claim. Compare *Arecibo Cmty. Health Care*, 270 F.3d at 27 (holding that it can), with *Friendship Med. Care Ctr.*, 710 F.2d at 1300–01 (taking the contrary view). The Seventh Circuit's holding on this point in *Friendship Medical Center* is arguably dictum, inasmuch as the court also indicated that the counterclaim involved in that case was unrelated to the state's claim. 710 F.3d at 1300–01.

317. See *infra* Part III.C.4.

The underlying principles of sovereign immunity justify this distinction. (Recall that, as Part III.A discusses, state sovereign immunity does not derive from an inflexible, textual rule, but rather from principles that are subject to some judicial elaboration.) Even starting with the assumptions of the official theory, under which state sovereign immunity has great value, it does not have *infinite* value. The Constitution requires the federal government to respect the sovereign immunity of the states, but the official theory recognizes that the states took on some obligations to each other and to the United States by joining the Union. These obligations explain, for example, a state's lack of immunity from suit by another state or by the United States.<sup>318</sup> They also justify the rule, recognized even under the official theory, that federal law may sometimes determine that a state has waived its sovereign immunity notwithstanding the state's own, contrary law. This rule is justified so long as the legitimate needs of the federal judicial system are capable of receiving *some*, even if minimal, weight against which the state's sovereign immunity must be balanced. A non-ideologized doctrine of state sovereign immunity would recognize that just as the federal government must respect the states' sovereign immunity, so too must the states exercise their sovereign immunity in a minimally responsible way that does not make it impossible for the federal judicial system to function.

Therefore, as *Lapides* properly recognized,<sup>319</sup> whether a state has waived its immunity from suit is not a question of state law, but a question of federal law. This is the critical point. It still remains to determine what the federal rule should be. This question is best answered by considering the various situations in which waivers of state immunity may arise.

### C. *Varieties of Waivers*

In considering which actions should constitute a waiver of state sovereign immunity, one must recognize the various situations in which such waivers may arise. These situations mostly concern actions taken in litigation, although *Parden*-type cases are somewhat different.

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318. *Alden v. Maine*, 527 U.S. 706, 755 (1999).

319. *See Lapides*, 535 U.S. at 621–22.

1. *Waivers by Failure to Assert Immunity.* The most commonly recurring set of cases are those in which a state defendant initially fails to assert its immunity when sued in federal court, and then tries to assert immunity belatedly.<sup>320</sup> Application of the principles explored in the previous Section shows that the traditional rule from the pre-1945 cases, which treated the defense of state sovereign immunity rather like the defense of personal jurisdiction insofar as waiver is concerned, strikes the appropriate balance between state interests and the legitimate needs of the federal judicial system. On the one hand, the rule prevents states from engaging in unfair tactics that waste federal judicial resources. On the other hand, the rule is respectful of state prerogatives.

The notion that states may assert sovereign immunity “at any time,”<sup>321</sup> which crept into the cases starting in 1945, is simply an invitation for states to play games with justice. Under this rule, a state, when sued, may choose to litigate on the merits, knowing that if it wins, it will have a judgment that it can enforce through *res judicata*, while if it loses, it can still assert its immunity on appeal.<sup>322</sup> Such tactics are unfair and unworthy of sovereign dignity. As some courts have observed, litigating on the merits while holding an immunity defense in reserve “undermine[s] the integrity of the judicial system,”<sup>323</sup> and is “grossly inequitable.”<sup>324</sup> The state can allow the lawsuit to proceed until it senses that things are not going well, and then assert immunity and have the proceedings dismissed.<sup>325</sup>

In addition to its unfairness, such conduct also entails an obvious waste of federal judicial resources. There is no point to having a federal court expend time and energy considering the merits of a case, only to dismiss the case on immunity grounds later. The rule permitting belated assertion of state sovereign immunity requires just such waste.

Delaying assertion of sovereign immunity also unfairly drains the plaintiff’s resources. In the days of the traditional rule, the Supreme

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320. See *supra* Part II.A.

321. *McGinty v. New York*, 251 F.3d 84, 94 (2d Cir. 2001) (quoting *Lyndonville Sav. Bank & Trust Co. v. Lussier*, 211 F.3d 697, 700 (2d Cir. 2000)).

322. *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring) (expressing doubts about the “propriety” of the rule).

323. *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 756 (9th Cir. 1999), *amended by* 201 F.3d 1186 (9th Cir. 2000).

324. *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999).

325. *Hill*, 179 F.3d at 756–57.

Court, although very respectful of state interests, gave at least some consideration to the interests of “the other party.”<sup>326</sup> To permit a sovereign party to “come in and go out of court at its will, the other party having no right of resistance to either step,” would, the Court held, carry the rule of sovereign immunity too far.<sup>327</sup> If a state is going to defeat a plaintiff’s claim by asserting sovereign immunity, prompt assertion of the defense at least has the virtue of ending the case before the plaintiff has devoted unnecessary resources to litigation of the merits.

In short, permitting assertion of state sovereign immunity at any time is simply not a sensible way to run a judicial system. It allows unfair tactics that would never be tolerated if used by other parties, and it wastes the resources of the plaintiff and the judicial system itself.

By contrast, the traditional rule, requiring timely assertion of state sovereign immunity, is in no way incompatible with state dignity or state prerogatives. The traditional rule preserves the sovereign prerogative of declining to answer the suit of private parties. It requires only that states assert this prerogative in an orderly fashion that shows a minimal level of regard for the legitimate interests of the federal judicial system in avoiding unfairness and waste.<sup>328</sup> The rule of state sovereign immunity gives states as much as any defendant could ask for—all a state defendant in a federal case needs to do is say “we don’t care to be sued,” and the case is dismissed. It hardly seems burdensome to require that state defendants actually say this, and say it promptly.

Thus, the traditional rule struck a fair and appropriate balance among the interests of private plaintiffs, state defendants, and the federal judicial system. On the one hand, it required very little of states and preserved their prerogative of not being sued. On the other hand, it provided substantial benefits in terms of fairness and efficiency for the judicial system. In terms of plain common sense, the traditional rule had a great deal going for it.

The rejection of the traditional rule can only be the product of a fully ideologized doctrine of state sovereign immunity. Again, the hallmark of this ideologization is that, in balancing the interests involved, the Court has refused to give any weight whatever to interests

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326. *Porto Rico v. Ramos*, 232 U.S. 627, 632 (1914).

327. *Id.*

328. *See Hill*, 179 F.3d at 763 (reasoning that requiring timely assertion of state sovereign immunity “does not diminish the rights afforded to the states under the Eleventh Amendment”).

other than the interests of the state. Even though the traditional rule made only the most minimal intrusion on state interests (requiring no more than that states assert their interests in a prompt and orderly fashion), and even though the traditional rule provided substantial benefits to other parties and to the federal judicial system (by avoiding waste of resources), the Court rejected it and applied a rule that promotes gamesmanship and waste. A non-ideologized doctrine would give at least *some* weight to the other interests involved and would not abandon basic, common-sense notions of how to run a judicial system. Even accepting the importance of the state interest in sovereign immunity, a non-ideologized doctrine would recognize that the federal system need not further that interest at all costs, and that, just as the federal system respects state rights, it is appropriate to require states to show the minimal degree of respect for the federal system that is entailed by requiring them to assert their sovereign immunity promptly if they desire to assert it at all.

Although the recent decision in *Lapides* concerned the situation of a case removed by a state defendant from state court to federal court, it supports the analysis given above and suggests that the Court has, indeed, returned to its traditional rules regarding waiver. The case contains the critical recognition that federal courts must give at least *some* weight to interests other than those of the state. *Lapides* expressed appropriate concern for “the problems of inconsistency and unfairness” that result from giving a state carte blanche with regard to assertion of its immunity from suit<sup>329</sup>—a statement reminiscent of the Court’s prior concern for the interests of “the other party” in litigation against a state.<sup>330</sup> Once the concern of fairness is brought into the picture, it becomes clear that states cannot simply assert immunity at *any* time in litigation; allowing assertion of immunity at any time would inevitably lead to hardship, waste, and unfairness. Those lower courts that have given a narrow reading to *Lapides* are therefore mistaken. Although the particular circumstances of the case may be limited, the reasoning of the case endorses the crucial values underpinning the traditional rule that sovereign immunity is waived if not timely asserted.<sup>331</sup>

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329. *Lapides v. Bd. of Regents of the Univ. Sys.*, 535 U.S. 613, 622 (2002).

330. *Ramos*, 232 U.S. at 632.

331. Professor Bohannon suggests that states “likely will not be held to have waived their sovereign immunity by merely failing to raise the immunity as a defense in the trial court.” Bohannon, *supra* note 5, at 291. Her argument, however, relies on *Ford Motor Co.*, *see id.* at 290, which has been overruled since

The only remaining detail is to determine the precise rule governing the timeliness of assertions of state sovereign immunity. Should a state be required to assert sovereign immunity in the first response to a plaintiff's complaint (as is true with regard to the defense of personal jurisdiction)? Or should the defense be subject to some other rule?

Although many different rules could be imagined, once one agrees on the basic principle that timely assertion should be required, it seems fairly straightforward to conclude that the rule governing timeliness should be the same as the rule governing the timeliness of assertions of lack of personal jurisdiction: such assertions must be made in a defendant's first response to a plaintiff's complaint, whether that response be an answer or a motion to dismiss. Failure to assert the defense in the initial response to the complaint would constitute waiver.<sup>332</sup>

This rule would have several advantages. First, it is a familiar rule. Even first-year law students know that a defendant needs to think carefully before making the first response to a complaint, because failure to raise certain defenses in that response will have the effect of waiving those defenses. Applying this rule would avoid the need to come up with the details of a rule that would uniquely apply to the state sovereign immunity defense.

The familiar rule is also easy to administer. Other possibilities could require unnecessarily delicate judgments. A rule, for example, that required a court to consider whether the state's failure to assert immunity in a timely fashion had prejudiced the plaintiff would be much harder to apply. The familiar rule provides a clear cutoff for the assertion of sovereign immunity.

Finally, this rule would best serve the goals of the traditional waiver rule: it would best avoid unfairness and waste of federal judicial resources. The Supreme Court has indicated that, if a state asserts

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the publication of her article; also, she does not consider the pre-1945 cases that established waiver by failure to assert immunity as the traditional rule, nor the way that *Schacht* reinstated that rule.

332. See FED. R. CIV. P. 12(g), (h) ("If a party makes a motion under this rule but omits therefrom any defense or objection then available . . . the party shall not thereafter make a motion based on the defense or objection so omitted . . ."). Notice that this rule would mean that if a state passed a statute consenting to suit in federal court, it could not withdraw that consent once its counsel, in accordance with the statute, failed to assert immunity in response to a federal-court complaint. This result is not inconsistent with *Beers v. Arkansas*, 61 U.S. (20 How.) 527 (1858), discussed in *supra* Part II.A.1. That case concerned proceedings in state court, where principles of waiver do not implicate the needs of the federal judicial system.



its immunity from suit, the court must usually consider the immunity issue before any other.<sup>333</sup> Consideration of other issues, particularly merits issues, before consideration of sovereign immunity will normally be wasteful.<sup>334</sup> Accordingly, a rule providing that sovereign immunity, like personal jurisdiction, is waived if not asserted in a state's first response to a plaintiff's complaint would best preserve federal judicial resources.<sup>335</sup>

2. *Waiver by Invoking the Federal Court's Jurisdiction.* The official theory already correctly handles cases in which a state invokes the jurisdiction of a federal court (such as by filing a proof of claim in a bankruptcy proceeding). A state may be immune from suit without

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333. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778–80 (2000). The Court did allow the prior consideration of questions of whether the state is a suitable defendant as a matter of statutory interpretation. *Id.* at 780.

334. One might argue that no time is wasted if a case is dismissed on some non-immunity ground. Still, consideration of such grounds would entail at least potential waste, because if a case survives a challenge based on an issue other than immunity, but then is dismissed later on immunity grounds, the consideration of the initial challenge will have been wasted.

335. Indeed, a straightforward reading of Rule 12 of the Federal Rules of Civil Procedure would suggest that, at least to some extent, this rule already applies to assertions of state sovereign immunity. Rule 12(g) provides that:

If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

The defense of state sovereign immunity is a defense that may “be raised by motion” under Rule 12. It is not one of the defenses provided for in Rule 12(h)(2). Consequently, Rule 12(g) would appear to provide that if a state defendant moves to dismiss a case for some reason besides sovereign immunity (such as failure to state a claim) without asserting the sovereign immunity defense, the defendant may not assert the sovereign immunity defense thereafter; i.e., the defense is waived. Rule 12(h)(3), to be sure, provides that “[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action,” but the Supreme Court has now made clear that an unasserted state sovereign immunity defense is not a jurisdictional obstacle to a federal court's consideration of a case. Accordingly, the plain text of Rule 12 suggests that a state waives its sovereign immunity from a case against it in federal court by moving to dismiss the case on other, non-immunity grounds.

Of course, the Supreme Court might not feel bound by the text of Rule 12, just as, in considering questions of state sovereign immunity, it does not feel bound by the text of the Constitution itself. *See supra* Part I.A. The point is not so much that the text of Rule 12 should necessarily be dispositive as it is that Rule 12 suggests that the waiver rule proposed here is a reasonable one that appropriately balances the interests of state defendants against those of private plaintiffs. Such reasonable balancing of interests is appropriate now that the Supreme Court has made clear that state sovereign immunity is not an inflexible, jurisdictional barrier, and is subject to the general principle of avoiding “inconsistency, anomaly, and unfairness,” *Lapides v. Bd. of Regents of the Univ. Sys.*, 535 U.S. 613, 620 (2002).

consent, but once the state asks a court to take action, the court cannot be prevented from taking action that is legally correct.<sup>336</sup> There is an implicit parallel here between immunity and the famous jurisdiction-stripping debate. Congress may or may not have the power to strip federal courts of jurisdiction to hear specified cases, but it cannot tell a court to hear a case and then command it to decide the case other than according to the law.<sup>337</sup> Similarly, once a state asks a federal court to take some action in its favor, the court is bound to decide the case correctly. Moreover, fair consideration of the state's claims may require the court to consider the defendant's counterclaims. Thus, the official theory is correct to recognize a state's invocation of a federal court's jurisdiction as constituting a waiver of the state's sovereign immunity, notwithstanding anything to the contrary in state law.

The Court's latest decisions in *Schacht* and *Lapides* support this rule.<sup>338</sup> Indeed, as noted earlier, these cases seem rather surprising. Even though the overall trend in state sovereign immunity is quite clearly one of ever increasing stringency, the Court has unanimously eased the rules regarding waiver, retracted its previous intimations that state sovereign immunity is jurisdictional, and even overruled *Ford Motor Co.*, which was perhaps the most troubling case in the area. Thus, the trend in the waiver cases cuts against the general direction of the trend in Eleventh Amendment doctrine, instead of reinforcing it, as was true in earlier eras.<sup>339</sup> The latest cases might, therefore, seem to refute the contention that ideology has driven the developments in this doctrinal area. While it is certainly true that, after 1945, the previous, carefully drawn distinctions between consent cases and waiver cases got swept away amidst the overall trend of developments in state sovereign immunity doctrine, the latest cases may show that ideology does not control everything: the Supreme Court may apply sensible rules governing consent and waiver even while

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336. See, e.g., *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1148 (4th Cir. 1997) (“[I]t would violate the fundamental fairness of judicial process to allow a state to proceed in federal court and at the same time strip the defendant of valid defenses because they might be construed to be affirmative claims against the state.”).

337. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1373 (1953) (“If Congress directs an Article III court to decide a case, I can easily read into Article III a limitation on the power of Congress to tell the court *how* to decide it.”).

338. See *supra* Part II.E.

339. See *supra* Part II.D.

moving the immunity doctrine as a whole very strongly in the direction of states' rights.

On the other hand, even these latest cases may be consistent with the ideological explanation for the developments in waiver doctrine. The pull of ideology may be strongest at times when the direction of the overall state sovereign immunity doctrine remains contested. In the late twentieth century, prior to *Seminole Tribe*, the Supreme Court gradually strengthened state sovereign immunity, but the overall doctrinal stream contained many eddies and countercurrents. The 1960s saw the rise of constructive consent as a mechanism for avoiding state sovereign immunity; the 1970s and 80s brought the *Edelman* decision barring retroactive monetary relief in suits against state officers and the increasingly strict rule of interpretation applied to federal statutes that purportedly abrogated state sovereign immunity; then the 1989 decision in *Union Gas* appeared to provide a broad avenue for suits against states for retroactive monetary relief. As long as the Court was still locked in a struggle to decide the most fundamental questions of state sovereign immunity law, reasonable compromise may have been impossible on any issues, even issues of consent and waiver. Now that *Seminole Tribe* and subsequent cases have so firmly cemented state sovereign immunity in general, perhaps the Justices who favor it feel they can afford to give way on the issue of waiver.

3. *Waiver by Removal. Lapidés* also successfully resolved the recurring question posed by cases in which a state, upon being sued in its own courts, removes the suit to federal court. Removal provides yet another good illustration of why the consent standard of clear, "altogether voluntary"<sup>340</sup> consent cannot apply to waiver cases. A state that files a removal petition does not thereby clearly and altogether voluntarily declare that it consents to be sued in federal court. The consent is implied, not explicit. But, as the Supreme Court recognized in *Lapidés*, there can be little doubt that permitting a state to remove a case to federal court, only to challenge the court's ability to hear the case, is just the sort of wasteful gamesmanship that a rational, non-ideologized judicial system would not tolerate.<sup>341</sup>

*Lapidés'* particular facts, however, did not give the Supreme Court occasion to note a practically and theoretically important pe-

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340. *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858).

341. *Lapidés v. Bd. of Regents of the Univ. Sys.*, 535 U.S. 613, 621 (2002).

cularity of waiver by removal. Waiver by removal is a particular case of waiver by invoking the federal court's jurisdiction, but it is special in that the waiver it effects should be limited in scope. *Lapides*, as it happened, concerned only claims as to which the state had waived its immunity from suit in state court. The Supreme Court, therefore, had no occasion to determine what should happen if a plaintiff sues a state, in state court, on claims as to which the state would be immune in that court, and the state then removes the case to federal court.<sup>342</sup>

Such cases would require a court to recognize that state sovereign immunity has two independent aspects: it is partly an immunity from suit in a particular forum (federal court) and partly a substantive immunity from liability.<sup>343</sup> The Supreme Court has long held that a state may waive one of these aspects of its sovereign immunity without waiving the other: cases holding that a state may waive its immunity from liability without waiving its immunity from suit in a federal forum are legion.<sup>344</sup>

Although *Lapides* did not require the Court to consider the point, it should logically follow that a state may do exactly the opposite: it may waive its forum immunity without waiving its underlying immunity from liability. Moreover, removal should be understood to waive only forum immunity. A state, upon being sued in state court, and wishing to assert its substantive immunity from liability, might well desire to have the validity of that assertion tested in a federal court. In an appropriate case (say, a case involving a delicate question of whether a federal statute was a proper exercise of Congress's authority under Section 5 of the Fourteenth Amendment), the state might believe that federal judges would better understand the federal constitutional issues surrounding its assertion of immunity than would its own state judges.

In general, any defendant in state court facing such a situation may remove the case to federal court so as to take advantage of federal judges' expertise. Even in less worthy cases—if, for example, a defendant simply believes that federal judges are more biased in favor of defendants than are the state judges in the state involved—the de-

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342. *Id.* at 617 (noting that the Court need not address this situation).

343. See Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1697 (1997) (explaining “forum-allocation” and “immunity-from-liability” interpretations of the Eleventh Amendment).

344. *E.g.*, *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985).

fendant may remove the case, if the case is within the federal jurisdiction, and then have its substantive defenses tested in the federal court.<sup>345</sup> Under a non-ideologized doctrine that seeks sensible procedural rules, as opposed to procedural rules that are but masks for extension of the underlying substantive doctrines, states should certainly be no *less* entitled to this privilege than anyone else.

Accordingly, removal of a case by a state defendant should be understood to waive the defendant's special privilege from being sued in federal court, and to permit the federal court to hear any claim against the defendant that might have been heard in the state court from which the case was removed. It should not, however, waive the defendant's immunity from any claims from which it would have been immune in state court.

4. *The Issue of State Counsel's Authority.* Prior to *Lapides*, particular disarray surrounded the issue of whether a waiver of state sovereign immunity can occur in litigation only when the state's counsel is competent under state law to waive sovereign immunity. The Supreme Court's decision in *Ford Motor Co.* provided an apparently clear answer, but the Supreme Court subsequently permitted departure from its rule on the basis of inadequate distinctions. *Lapides* overruled *Ford Motor Co.*, but it is still necessary to consider the issue in light of the principles discussed above, particularly in light of the Court's somewhat cryptic statement that it was overruling *Ford Motor Co.* "insofar as it would otherwise apply."<sup>346</sup>

In *Ford Motor Co.*, as Part II.B discussed, the state did not raise the issue of immunity until the case reached the Supreme Court.<sup>347</sup> The state's attorneys conceded that they had waived the state's immunity if they were competent to do so, but they claimed that, under state law, they lacked the necessary authority to waive sovereign immunity.<sup>348</sup> The Supreme Court agreed. It determined that a state's counsel's actions could not waive the state's sovereign immunity in the absence of state law authorization, and that the attorneys had no such authorization under Indiana law.<sup>349</sup>

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345. See 28 U.S.C. § 1441 (2000).

346. *Lapides*, 535 U.S. at 623.

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

348. *Id.*

349. *Id.* at 468–69.

The *Ford Motor Co.* rule would appear as clear as one might desire: the state did not assert its immunity until the last possible moment, when the case had reached the Supreme Court itself; moreover, the state conceded that its attorneys' actions would constitute a waiver of sovereign immunity but for the authority issue. The Supreme Court's determination that the state could still assert its immunity under such circumstances suggested that the rule requiring state law authority for waiver of immunity is a very strong one indeed.

Even before *Lapides*, however, *Schacht* had already permitted an inexplicable departure from this rule. In *Schacht*, the Supreme Court determined that federal courts are not obliged to consider a state's immunity defense *sua sponte*.<sup>350</sup> The Court held that state sovereign immunity does not automatically deprive a federal court of jurisdiction over a case; a state must assert its immunity before a federal court is obliged to consider it. If the state fails to assert the issue of immunity, the Supreme Court said, "a court can ignore it."<sup>351</sup>

If one stops to think about it, this holding is clearly inconsistent with the rule of *Ford Motor Co.*, in which the Court held that a state's attorneys must be competent under state law to waive immunity or else any waiver by them will be ineffective. *Schacht* effectively permits such waivers to occur regardless of the scope of a state attorney's authority to waive under state law. If state counsel simply fails to raise the issue of state sovereign immunity, the federal court is entitled to ignore the issue. The Supreme Court did not say that a federal court *must* ignore the issue of immunity if the state does not raise it, but the court at least *may* do so, and, if it does, then the simple fact is that the issue is effectively waived. The issue will not be considered and the case will be decided.<sup>352</sup> The rule of *Ford Motor Co.* should logically demand that, before proceeding with a case against a state on the ground that the state has not asserted its immunity, a federal court must consider *sua sponte* the question of whether state law permits the state's attorneys to waive the state's immunity.

Lower court decisions created similar paradoxes. In *Montgomery v. Maryland*, the state, upon being sued under the federal Family and Medical Leave Act, moved for dismissal on the ground of sovereign

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350. Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 389 (1998).

351. *Id.*

352. This analysis assumes that the failure to raise the issue and the judicial decision not to consider the issue *sua sponte* persist throughout all stages of the litigation.

immunity and for failure to state a claim under the act.<sup>353</sup> Subsequently, however, the state acted erratically. First, it expressly withdrew its assertion of immunity and moved for dismissal solely for failure to state a claim.<sup>354</sup> The district court, nonetheless, invoked immunity *sua sponte* and dismissed the case.<sup>355</sup> Then, on appeal, the state changed course again and asserted its immunity.<sup>356</sup>

The Fourth Circuit held that the district court erred as a matter of law in raising the immunity issue *sua sponte*. Once a state expressly and affirmatively withdraws the issue of its immunity, the court held, a district court is obliged to respect the state's decision and may not impose "on a state a legal argument that the state first advanced but then affirmatively withdrew."<sup>357</sup> The court also, however, permitted the state to reassert its immunity on appeal. In doing so, the court relied on its understanding that Maryland state law did not permit the state's counsel to waive sovereign immunity on behalf of the state.<sup>358</sup>

Whatever one thinks of the ultimate outcome, it would seem that the Fourth Circuit's rulings regarding the district court's authority and its own proper actions contradict one another.<sup>359</sup> With regard to its own decision, the court held that it *must* give effect to Maryland state law, which did not, in the court's view, permit the state's counsel to waive state sovereign immunity. On the other hand, the court held that, once the state's counsel had withdrawn the issue of immunity from the case in district court, the district judge was *barred* from raising the issue *sua sponte*. But if the state's attorney's disavowal of immunity bars the court from considering it, then the state's attorney obviously *can* waive immunity by withdrawing it. If the court really believed that state law controlled the issue of authority, it should have held that the district court was not only permitted to raise the issue of immunity *sua sponte*, but was in fact obliged to do so, at least to the

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353. 266 F.3d 334, 336 (4th Cir. 2001), *vacated*, 122 S. Ct. 1958 (2002).

354. *Id.*

355. *Id.* at 336–37.

356. *Id.* at 337.

357. *Id.*

358. *Id.* at 338.

359. This is a good place to remind the reader that I represent the plaintiff in this case. *See supra* note †. So one might question my objectivity regarding the Fourth Circuit's ruling. Still, speaking respectfully, I must suggest that the court could not logically hold both that the district court was obliged to respect the state's waiver of immunity and also that state counsel's lack of authority rendered that waiver ineffective.

extent necessary to consider whether the state's counsel was properly authorized under state law to waive immunity.

One may hope that *Lapides*' express overruling of *Ford Motor Co.* will put an end to this sort of confusion. Still, the narrow reading that some lower courts have given to *Lapides* gives rise to the possibility that some courts may regard the case as having overruled *Ford Motor Co.* only for cases in which a state, through its counsel, voluntarily invokes federal jurisdiction. As the above discussion shows, however, such a limited reading would make no sense. *Ford Motor Co.* held that a state's attorneys can waive state sovereign immunity only if duly authorized by state law to do so. The application of that rule cannot turn on the *manner* in which immunity is waived. The issue in *Ford Motor Co.* was not the adequacy of the actions taken to waive immunity, but the impossibility of waiver by an attorney not authorized to waive.

To put it another way, in *Lapides* there were two issues: (1) whether the state's action (removing the case to federal court) constituted a waiver of immunity and (2) if so, whether that waiver was effective despite the state's attorneys' purported lack of state law authority to waive immunity. *Ford Motor Co.* involved only the second issue. In *Ford Motor Co.*, the state *conceded* that its actions constituted a waiver of immunity, if such a waiver could occur without state law authority. Hence, the fact that the state's actions in *Lapides* may have constituted a particularly *clear* waiver of state sovereign immunity must be irrelevant. The existence of conduct constituting a waiver can never be any clearer than it was in *Ford Motor Co.*, in which the issue was conceded.

Thus, *Lapides* must have overruled *Ford Motor Co.* broadly, not only for cases that a state removes from state court to federal court. The statement that the Court was overruling *Ford Motor Co.* "insofar as it would otherwise apply" simply meant that the Court was not overruling every holding from *Ford Motor Co.*; the case's holding that refund suits against tax collectors are suits against the state is presumably still valid. But state law authority is simply not required before a state's counsel can waive state sovereign immunity in the course of litigation. The key is that, as noted earlier, although *consent* to suit is a matter of the state's voluntary agreement, which must be determined by looking to state law, *waiver* of immunity is not a matter of voluntary agreement, but of whether the state has taken actions that constitute a waiver, whether the state wants them to or not. The standard of waiver is one of federal law, not state law.



Accordingly, the only question of authority is the question properly analyzed in early cases such as *Gunter*: whether the state's counsel is authorized to represent the state in litigation.<sup>360</sup> Obviously, a state's immunity would not be waived if any lawyer walked in off the street and filed a document purporting to waive it. The court is obliged to check that the attorney purporting to represent the state in fact does so. But if the attorney possesses that degree of authority, then the attorney's actions may, under applicable federal rules, waive the state's immunity whether the state's law so provides or not.

5. *Waiver by Engaging in Federally Regulated Activity.* Finally, there is the issue of *Parden*: can Congress provide that a state's choice to engage in federally regulated activities will constitute waiver of state sovereign immunity (or, as the Court used to say, constructive consent to suit)?<sup>361</sup> If Congress can do so, then a significant area for provision of suits against states would be opened.

As noted earlier,<sup>362</sup> this issue is somewhat different from the other issues discussed in this Article. Its resolution does not call for a balancing of state interests against the reasonable needs of the federal judicial system, because the relevant state actions do not take place in the context of federal litigation. Rather, the issue is more closely related to the question of the powers of Congress with regard to the states.

As I briefly hinted in a prior article,<sup>363</sup> the best way to think about this issue is to begin by imagining that Congress, instead of providing, implicitly or otherwise, that states engaging in certain activities will be *deemed* to have consented to suit in connection with those activities, instead requires that states *expressly* consent to such suits before engaging in the activities. It appears that the Supreme Court would then approve such suits in at least some circumstances. In *College Savings Bank*, the Supreme Court suggested that Congress may require a state to waive its immunity from suit in exchange for a federal "gift or gratuity."<sup>364</sup> Thus, Congress's power appears secure in regard to many important areas of federally regulated activity. *College Savings Bank*

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360. *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 285–86 (1906).

361. *Parden v. Terminal Ry. of the Ala. State Docks Dep't.*, 377 U.S. 184 (1964).

362. *See supra* Part II.C.

363. Siegel, *supra* note 53, at 107 n.358.

364. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687 (1999).

appears to say that Congress may require states to subject themselves to suit in exchange for participation in the many federal-state programs that are administered by states but funded by the federal government.<sup>365</sup> Similarly, in the intellectual property arena—currently much-debated<sup>366</sup>—*College Savings Bank* should imply that Congress may condition a state's receipt of a patent, trademark, or copyright on the state's agreement to be sued when it violates the patents, trademarks, or copyrights of others.<sup>367</sup>

*College Savings Bank* was ambiguous, however, as to whether the problem with the implied waiver allegedly before the Court in that case was that the waiver was merely implied and not express or that the waiver allegedly arose from the state's mere participation in "otherwise permissible activity."<sup>368</sup> What if Congress had provided that the state must *expressly* waive its sovereign immunity from suit before engaging in the federally regulated conduct?

The answer here should turn on whether Congress could prohibit the state from engaging in the federally regulated conduct at all. This perspective can resolve cases such as the original *Parden* case. The issue of Congress's ability to prohibit states from engaging in certain behavior is a complex one that turns on difficult Tenth Amendment issues. But it seems at least reasonable to suggest that Congress could prohibit states from operating interstate railroads. Regulation of the channels of interstate commerce is at the heart of Congress's power under the Commerce Clause, and Congress might, for example, con-

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365. For detailed analyses supporting this view, see Bohannon, *supra* note 5, at 303–44; Michael T. Gibson, *Congressional Authority to Induce Waivers of State Sovereign Immunity: The Conditional Spending Power (and Beyond)*, 29 HASTINGS CONST. L.Q. 439 (2002); Meltzer, *supra* note 45, at 1375–80; Rebecca Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 199–215 (2002). For more general analyses of conditional spending that take a narrow view of Congress's power, see generally Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995); Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001). Of course this point really deserves a larger treatment, but the waivers discussed here are somewhat removed from the kinds of waivers that form the main focus of this Article.

366. See, e.g., Mitchell N. Berman et al., *State Accountability for Violations of Intellectual Property Rights: How to "Fix" Florida Prepaid (and How Not to)*, 79 TEX. L. REV. 1037, 1040 (2001) (discussing methods Congress could use to provide remedies for state violations of private intellectual property rights); Meltzer, *supra* note 45, at 1331 (same).

367. See Gibson, *supra* note 365, at 503–06 (discussing the origins of intellectual property law in relation to state sovereign immunity); Meltzer, *supra* note 45, at 1380–85 (proposing the conditioning of new state intellectual property rights on waiver of state sovereign immunity).

368. *Coll. Sav. Bank*, 527 U.S. at 687.

clude that operating a railroad is a sufficiently dangerous business that entities that are immune from suit should not be allowed to engage in it. So prohibiting state operation of interstate railroads should be within Congress's commerce power.

One might disagree, but the point here is really not whether one agrees with this analysis. The point is that *if* Congress can prohibit states from operating interstate railroads at all, Congress should be able to take the lesser step of permitting states to operate interstate railroads only if they expressly waive their immunity from suits arising out of railroad operations.<sup>369</sup> If Congress can prohibit the state behavior altogether, then the behavior is no longer an "otherwise permissible activity." Congressional permission for the state to engage in the behavior is akin to a federal "gift or gratuity." Accordingly, Congress should be able to condition its permission on state consent to be sued.

A different result would probably occur, however, in connection with other statutes that commonly lead to suits against states, such as the Fair Labor Standards Act, which requires payment of the minimum wage. Again, even without getting deeply into Tenth Amendment analysis, it seems fairly safe to say that Congress could hardly forbid states from having employees and paying them; these are "otherwise permissible activit[ies]" for which states do not require congressional permission. Congress could not, therefore, give states permission to have employees in exchange for state consent to suit based on the minimum wage laws.

The key question in *Parden*-type cases should, therefore, be whether Congress could constitutionally prohibit states from engaging in the underlying federally regulated activity at all. If it could do so, it could compel states to request permission to engage in the activity. And if it could do that, it could set the conditions on that permission, and one such condition could be an express waiver of sovereign immunity from suit. By contrast, where Congress could not forbid states from engaging in the underlying activity, it could not require them to consent to suit before doing so.

One might be troubled by the following potential problem with the above analysis: although Congress probably cannot forbid states from having employees, it *can* forbid states from paying their em-

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369. To avoid a charge of special bias against the states, Congress might require *all* operators of interstate railroads to waive any immunity they might have from suits arising out of railroad operations.

ployees less than the minimum wage.<sup>370</sup> Does the above analysis therefore suggest that Congress can require that, before states pay their employees less than the minimum wage, they consent to be sued for doing so? The absurdity of the very question shows that the answer has to be no. The railroad example is based on the exchange of Congress's permission to engage in certain behavior for the state's consent to be sued for unlawful conduct arising out of the behavior. In the minimum wage example suggested here, Congress would not be giving states *permission* to pay their employees less than the minimum wage. If Congress gave such permission, there would be nothing to sue about. So the concept of the exchange does not work here. One may certainly argue that the Supreme Court was wrong to hold that Congress has power to regulate the wages states pay their employees but not to provide state employees with any effective means of enforcing those regulations. The source of such a means, however, does not lie in any consent by the state or waiver of state immunity; it would have to come from some other theory of federal power.

The constructive consent cases therefore turn out to be fairly straightforward: the critical question is whether Congress could entirely prohibit the states from engaging in a given activity. If it can, it should be able to require the states to consent to suit expressly in exchange for permission to engage in the activity.

Once that point is agreed upon, there is but a little distance to travel to conclude that Congress, in such cases, may likewise provide that the state activity itself shall be deemed to constitute consent to suit even though such consent is not given expressly. Given the Supreme Court's current attitude toward such matters, an express consent to suit would obviously be a much sturdier ground, and one which Congress would be well advised to employ if it desired to rely on consent at all. But even the Supreme Court appears open to the argument that an implicit consent will suffice in cases where Congress could require express consent. In *College Savings Bank*, the Court referred approvingly to *Petty*<sup>371</sup> and to *South Dakota v. Dole*,<sup>372</sup> and it noted that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, *and that acceptance of*

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370. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-56 (1985).

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

372. 483 U.S. 203 (1987).

*the funds entails an agreement to the actions.*”<sup>373</sup> Thus, even the Supreme Court appears to recognize that the real question is whether Congress has the power to exact state consent to suit in exchange for something from Congress; the precise form that the consent then takes is a secondary consideration.

#### CONCLUSION

The ideologization of state sovereign immunity doctrine carried the doctrine to extremes in many directions, including the set of rules regarding waiver of state sovereign immunity. The post-1945 rules created a nonsensical scheme that left the federal judicial system helpless to prevent manifest injustice and waste of judicial resources. A non-ideologized doctrine—even though taking the official theory of state sovereign immunity as its starting point—would recognize rules of waiver that would respect the state prerogative of refusing to be sued in a federal forum while requiring states to assert that prerogative in an orderly way that shows a minimal regard for the legitimate needs of the federal judicial system.

The two critical steps necessary to rationalize the waiver cases are, first, to revive the lost distinction between the consent line of cases and the separate line of cases concerning waiver of state sovereign immunity, and, second, to recognize that principles of state sovereign immunity allow federal courts to give some weight to the interests of the other party in litigation against a state. Courts taking these steps would recognize that consent is a matter of state law, but waiver is a matter of federal law. The correct principles of federal law show that the courts should return to the traditional rules governing waivers of state sovereign immunity.

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373. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) (emphasis added).