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Waiver-in-Litigation: Eleventh Amendment Immunity and the Voluntariness Question

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The Supreme Court's decision in College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, *527 U.S. 666 (1999), sharply contracted the number of instances in which constructive waivers of Eleventh Amendment immunity may be exacted from the states. However, a set of cases involving waiver-in-litigation—cases in which waivers of sovereign immunity are implied from the conduct of state officials during litigation—seem to have been undisturbed by the* College Savings *decision. Like the Court's sovereign immunity jurisprudence generally, these particular cases are predicated on a fundamental rule of Eleventh Amendment doctrine: A waiver of immunity is not valid if it is not voluntary. The waiver-in-litigation cases teach that, in many cases, states' access to the federal courts may be conditioned on waiver of sovereign immunity without compromising the voluntariness of the waiver. The "voluntariness principle" notwithstanding, the Supreme Court has held that state-defendants do not waive their immunity from suit by litigating on the merits in trial court. As a result, state-defendants may litigate on the merits without risk; for if the state loses, it may retroactively revoke the jurisdiction of the district court by asserting sovereign immunity on appeal. This article offers a comprehensive picture of the Supreme Court's waiver-in-litigation case law and scrutinizes the rule permitting late-stage claims of Eleventh Amendment immunity. It argues that this rule is not required by the voluntariness principle or any other rule of constitutional law and that it cannot be reconciled with waiver-in-litigation jurisprudence generally. The article suggests two schemes through which states' right to litigate on the merits in federal court might be conditioned on waiver of immunity.*

I. INTRODUCTION

The Supreme Court's controversial decision in *Seminole Tribe of Florida v.*

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Florida[1] made it much more difficult for litigants to sue states in federal court for violations of federal law.[2] In that case, the Court held that the Eleventh Amendment precludes Congress from abrogating state sovereign immunity when legislating pursuant to its Article I powers.[3] As a result, many individuals wishing to sue states for violations of federal law were left to seek recourse in state courts. Three years later, in *Alden v. Maine*,[4] the Supreme Court eliminated this vehicle for relief as well, by holding that (1) the Eleventh Amendment secures for the states immunity from suit in *state* court for violations of federal law, and (2) Congress may not abrogate this immunity when legislating pursuant to its Article I powers.[5] After *Seminole Tribe*, some commentators suggested that aggressive use of the constructive waiver doctrine might reopen, at least partially, the door slammed shut by that decision.[6] Under this doctrine, when Congress clearly expresses its intent to subject states to suit if they engage in certain conduct, states constructively consent to federal jurisdiction by choosing to do so. While the *Seminole Tribe* and *Alden* decisions prevented Congress from affirmatively stripping states of their sovereign immunity, the decisions did not

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[1] 517 U.S. 44 (1996).

[2] *See generally* Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1 (discussing the implications of *Seminole Tribe*). The controversy surrounding this decision is rooted in differing conceptions of what classes of suits the Eleventh Amendment was designed to prohibit. Fuel for the controversy was provided by William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983) and John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983). These articles suggest that the Eleventh Amendment precludes suits against states only when jurisdiction rests on the state-citizen diversity clause of Article III. In federal question or admiralty cases, they argue, the federal courts may exercise jurisdiction over state defendants, the Eleventh Amendment notwithstanding. For examples of this "diversity interpretation" at work in the Supreme Court, see *Seminole Tribe*, 517 U.S. at 109–16 (Souter, J., dissenting); Atascadero State Hospital v. Scanlon, 473 U.S. 234, 258–302 (1985) (Brennan, J., dissenting). In *Seminole Tribe*, Chief Justice Rehnquist contended that in forwarding the diversity interpretation, other Justices had "disregard[ed] our case law in favor of a theory cobbled together from law review articles and [their] own version of historical events." *Seminole Tribe*, 517 U.S. at 68.

[3] *See Seminole Tribe*, 517 U.S. at 72–73.

[4] 527 U.S. 706, 754 (1999).

[5] *See generally The Supreme Court, 1998 Term—Leading Cases*, 113 HARV. L. REV. 200–13 (1999) (analyzing *Alden* and exploring the decision's ramifications for the possibility of keeping states within the bounds of the law).

[6] *See* Kit Kinports, *Implied Waiver After* Seminole Tribe, 82 MINN. L. REV. 793, 795 (1998) (noting that the "doctrine of implied or constructive waiver—whereby a state impliedly waives its Eleventh Amendment immunity—is still alive after *Seminole Tribe*"); Note, *Reconceptualizing the Role of Constructive Waiver After* Seminole Tribe, 112 HARV. L. REV. 1759, 1760 (1999) (arguing that "Chief Justice Rehnquist's majority opinion in *Seminole* provides both the occasion and the impetus to liberate the doctrine of constructive waiver from the confines of recent decisions limiting, and ultimately obviating, its application") (footnotes omitted).

to impede Congress's ability to condition participation in certain regulated activities[7] or enjoyment of certain benefits[8] on a state's willingness to forego its immunity from suit.

On the same day that it decided *Alden*, however, the Supreme Court dramatically reduced the constructive waiver possibilities. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[9] the Court held that a state's right to participate in "otherwise lawful activity" may not be conditioned on waiver of sovereign immunity.[10] Applied to the facts of *College Savings*, this rule dictated that the State of Florida did not consent to federal jurisdiction by marketing and administering its student loan program.[11] This was so even though the Lanham Act, a federal statute regulating false and misleading advertising, purported to condition state participation in this activity on waiver of Eleventh Amendment immunity.[12] The *College Savings* majority explained that constructive waivers, such as that contained in the Lanham Act, "permit[ted] Congress to circumvent the anti-abrogation holding of *Seminole Tribe*" and were therefore constitutionally infirm.[13]

The scaling back of constructive waiver effectuated by the *College Savings* decision is meant to protect states from federal statutes that coerce waiver of immunity. The Court's ruling in that case is predicated on a rule with deep roots in the Supreme Court's sovereign immunity jurisprudence: a waiver of sovereign immunity is not valid if it is not voluntary.[14] *College Savings* provides the impetus for careful consideration of this principle—what I will call "the voluntariness principle"—to assess how it manifests itself in waiver doctrine and to determine whether it is consistently applied.

This article will focus on the role of the voluntariness principle with respect to a subset of constructive waiver cases involving "waiver-in-litigation." Waiver-in-litigation occurs when a waiver of sovereign immunity is implied from the conduct of a state official during litigation; that is, it occurs when individuals who represent the state in the courtroom take action deemed inconsistent with the retention of sovereign immunity. This paper will demonstrate that, due to the unique dynamics of the voluntariness principle in this context, the waiver-in-litigation cases represent an

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[7] *See, e.g.*, Parden v. Terminal Ry. of the Ala. St. Docks Dep't, 377 U.S. 184, 192 (1964) (holding that Congress could condition Alabama's operation of railroads in interstate commerce on waiver of sovereign immunity).

[8] *Cf.* South Dakota v. Dole, 483 U.S. 203, 211–12 (1987) (holding that Congress could condition a grant of federal funds on states' passage of minimum drinking age laws).

[9] 527 U.S. 666 (1999).

[10] *Id.* at 687.

[11] *See id.* at 691.

[12] 15 U.S.C. § 1125(a) (Supp. IV 1998). The Trademark Remedy Clarification Act amended the Lanham Act and made clear that states were subject to suit for violations. 15 U.S.C. § 1122 (1994).

[13] *Coll. Sav. Bank*, 527 U.S. at 683.

[14] *See id.* at 686–87.

exception to the Supreme Court's prohibition against constructive waiver. I will argue, moreover, that this exception should be construed even more broadly than existing case law allows.

In particular, I will examine the Supreme Court's holding, in *Ford Motor Company v. Department of Treasury of Indiana*,[15] that a state-defendant does not constructively waive sovereign immunity by litigating on the merits in trial court; rather, a state may litigate on the merits at the trial level, perhaps lose, and then retroactively revoke the jurisdiction of the federal courts by raising an Eleventh Amendment claim on appeal. I will argue that this holding is not compelled by the Supreme Court's Eleventh Amendment jurisprudence, the voluntariness principle, or any other principle of constitutional law. Thus, the purpose of this paper is twofold: It seeks to offer a comprehensive picture of the waiver-in-litigation case law, and it raises criticisms of one strand of the doctrine that cannot be reconciled with the general principles articulated in the cases.

Part II demonstrates that the voluntariness principle has long served as one of the central themes of the Supreme Court's waiver jurisprudence. Part II.A introduces the seminal constructive waiver cases. In some of these, it is made explicit that the voluntariness principle is the driving force behind the decisions, while in others, the voluntariness requirement is an unspoken premise of the Court's reasoning. Part II.B focuses on waiver-in-litigation. It reveals that the voluntariness principle underlies this subset of constructive waiver cases as well, but that, on the whole, waivers obtained in this fashion do not violate this fundamental rule. Part II.C introduces *Ford Motor Company*—the doctrinal anomaly that will occupy our attention for the remainder of the article.

Part III is dedicated to the problems raised by *Ford Motor Company*. Part III.A describes circumstances in which, relying on the *Ford* rule, states raise the immunity defense for the first time on appeal—thereby "revoking" the jurisdiction of the trial court in order to evade the consequences of losing on the merits—and cases (from the few years in between *Seminole Tribe* and *Alden*) in which states remove to federal court only to seek dismissal on Eleventh Amendment grounds. With respect to these cases, the Supreme Court's jurisprudence is one of "*non*waiver-in-litigation," i.e., these are situations in which state conduct during litigation that might be expected to trigger a waiver of Eleventh Amendment protection (because it seems tantamount to voluntary submission to federal jurisdiction) in fact fails to do so. Part III.B considers criticisms of these quirks of federal jurisdiction. This section raises the possibility of establishing a more robust (and, indeed, more coherent) waiver-in-litigation jurisprudence in order to eliminate these quirks.

Part IV makes the case for overturning *Ford Motor Company*. Employing the doctrines described in Part II and the vision of the voluntariness principle they reflect, it argues that the waiver-in-litigation exception should encompass the *Ford* scenario.

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[15] 323 U.S. 459 (1945).

This Part demonstrates that neither the justification proffered by the *Ford* Court nor the voluntariness principle can support that Court's adoption of a rule of nonwaiver when states fail to raise the immunity defense at the trial level. I conclude by suggesting two possible frameworks for conditioning states' right to litigate on the merits in federal court on waiver of Eleventh Amendment immunity.

II. DOCTRINAL ROOTS

In a variety of different contexts, the Supreme Court has affirmed and reaffirmed the notion that a waiver of Eleventh Amendment immunity is not valid if it is not voluntary. This Part offers a survey of the Supreme Court's constructive waiver jurisprudence and, in the process, seeks to illuminate the central (though not always explicit) role played by the voluntariness principle in the doctrine. It then explores how this principle has been applied in the waiver-in-litigation cases.

A. *Statutory Constructive Waiver—The Basics*

1. *The Paradigm Cases: Regulated Activities and Federal Benefits*

The term "constructive waiver" is most often used to describe waivers triggered by state activity outside of the courtroom. *Parden v. Terminal Railway of the Alabama State Docks Department*[16] served as the foundation for constructive waiver jurisprudence for thirty-five years. In that case, employees of a state-run railroad sued the state agency charged with the railroad's operation for injuries sustained over the course of their employment.[17] The employees brought this suit in federal court under the Federal Employers' Liability Act (FELA).[18] The State claimed immunity under the Eleventh Amendment and moved for dismissal.[19] The Court rejected this claim, holding that Alabama waived its immunity by opting to engage in activity regulated by the FELA.[20] The FELA conditioned "the right to operate a railroad in interstate

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[16] 377 U.S. 184 (1964).

[17] *See id.* at 184.

[18] The employees alleged that as a "common carrier by railroad . . . engaging in commerce between any of the several States," the railway fell within the terms of the Federal Employers' Liability Act. *Id.* (quoting 45 U.S.C. §§ 51–60 (1958)).

[19] *See id.* at 185. The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

[20] *See Parden*, 377 U.S. at 192. The Court explained:

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

commerce upon amenability to suit in federal court,"[21] and, the Court held, "the state, by [choosing to operate a railroad] voluntarily[,] submitted itself to [federal jurisdiction]."[22]

The *Parden* Court contributed a general rule of constructive waiver to sovereign immunity doctrine: "[W]hen a state . . . enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation."[23] Under this rule, states cannot escape the jurisdiction-conferring consequences of their actions by hiding behind the sovereign immunity shield.[24]

This rule was repudiated by the Supreme Court in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*.[25] The defect in the *Parden* holding, the *College Savings* Court found, was its failure to distinguish properly voluntary from involuntary waiver. Writing for the majority, Justice Scalia argued that "where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity."[26] Justice Scalia argued that *Parden*-style waivers were functionally indistinguishable from the abrogation found impermissible in *Seminole Tribe*.[27]

The Court determined that the method of inducing waivers employed in the

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Id.

[21] *Id.*

[22] *Id.* at 191 n.11.

[23] *Id.* at 196.

[24] One of the things that makes the majority opinion in *Parden* somewhat confusing is that the Court seems concurrently to rely on theories of abrogation and constructive waiver. Before turning to constructive waiver, Justice Brennan, writing for the majority, explained that "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce." He reasoned that "it must follow that application of the [FELA] to [a state-operated] railroad cannot be precluded by sovereign immunity." Parden v. Terminal Ry. of the Ala. St. Docks Dep't, 377 U.S. 184, 191–92 (1964). If *Parden* were purely a waiver case, this discussion of how Congress could affirmatively strip a state of its constitutionally-protected immunity would have been unnecessary. Put otherwise, Justice Brennan's opinion seems to identify consent to suit twice—first, via ratification of the Constitution and the grant of Congress's Article I powers, and second, as a function of the state's decision to engage in activity regulated under the FELA; as a logical matter, it would seem that once would suffice. No immunity-stripping rationale would be needed if the notion that the state impliedly consented to federal jurisdiction by engaging in the regulated activity was sufficient to dispose of a claim of Eleventh Amendment immunity. Justice Brennan alludes to the fact that these two issues are somewhat conflated in this opinion, but does not directly confront the question of whether both discussions are necessary to the holding. *See id.* at 193 n.11.

[25] *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 683 (1999).

[26] *Id.* at 687.

[27] *See id.* at 683 ("Forced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin.").

Parden scenario imposed too great a cost on the states and thereby threatened the voluntariness of their conduct. Although as a formal matter, states *choose* to engage in regulated activities, the option of refraining from these activities was deemed by the Court to be illusory. As a result, the decision to forego immunity in exchange for the benefit of continuing such activities was, for constitutional purposes, determined to be coerced. Because the *Parden* rule failed to preserve meaningful choice for states wishing to engage in federally-regulated activity, it was not the proper tool for identifying constitutionally effective waivers of immunity.

College Savings places tremendous emphasis on the link between voluntariness and permissible waiver. The word "voluntary" (or some derivative of it) appears eleven times over the course of the majority opinion. Justice Scalia begins his discussion of constructive waiver by noting that "[t]he decision to waive . . . immunity . . . 'is altogether voluntary on the part of the sovereignty.'"[28] Later in the opinion, Justice Scalia rejects an argument set forth by the government (the United States had intervened on behalf of College Savings Bank)[29] by noting that it had "no bearing upon the voluntariness of the waiver," thus reinforcing the notion that voluntariness is the *sine qua non* of an effective waiver.[30]

The exceptions recognized by the *College Savings* majority to the rule against constructive waiver confirm the vitality of the voluntariness principle. Justice Scalia distinguished two cases, *Petty v. Tennessee-Missouri Bridge Commission*[31] and *South Dakota v. Dole*,[32] from *College Savings*, explaining that those cases involved circumstances in which the federal government could induce waivers of immunity without violating the voluntariness principle. In *Petty*, the Court held that Congress could condition approval of an interstate compact on the states' willingness to waive their immunity from suit.[33] In *Dole*, the Court held that Congress could condition a grant of federal funds on a state's willingness to undertake actions that Congress could not affirmatively require it to perform.[34] Justice Scalia explained that when Congress consents to an interstate compact, "the granting of such consent is a gratuity,"[35] and when Congress disburses funds in the exercise of its spending power, "such funds are gifts."[36] Because, in the Court's view, *Petty* and *Dole* involved "gifts or gratuities" rather than the "otherwise lawful activity" at stake in *College Savings*,

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[28] *Id.* at 675 (quoting Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1858)).

[29] *Id.* at 671.

[30] *Id.* at 684.

[31] 359 U.S. 275 (1959).

[32] 483 U.S. 203 (1987).

[33] *See Petty*, 359 U.S. at 281–82 ("The States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached.").

[34] *See Dole*, 483 U.S. at 207 ("[O]bjectives not thought to be within Article I's 'enumerated legislative fields,' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.").

[35] *Coll. Sav. Bank*, 527 U.S. at 686.

[36] *Id.* at 686–87.

states might reasonably be expected voluntarily to forego these gifts in order to retain their immunity from suit.[37] As a result, waivers elicited in this fashion were deemed not to violate *College Savings*'s prohibition against coerced constructive waiver.

The shift in doctrine from *Parden* to *College Savings* brought the voluntariness principle front and center—though it was by no means submerged in the prior case law on constructive waiver. It is apparent from the trajectory of these cases that the validity of any constructive waiver scheme will depend on whether the privilege or benefit conditioned on waiver of immunity is one that the states might realistically be expected to forego. Participation in otherwise lawful activity, apparently, is not such a

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[37] *See id.* Some commentators have responded to *College Savings* by suggesting that Congress turn to the spending power with greater frequency as a means of extracting waivers of immunity from the states. *See, e.g.*, *The Supreme Court, 1998 Term—Leading Cases*, 113 HARV. L. REV. 213, 222 ("The exception for gifts and gratuities provides Congress with a way to subject the states to private suit even under statutes that do not survive *College Savings*. Congress could reformulate at least some of these statutes so that they use federal spending to induce waiver."); *see also* Kinports, *supra* note 6, at 822–27; Note, *supra* note 6, at 1774–75. The lower federal courts, in a handful of cases, have already applied the spending clause exception identified by Justice Scalia. *See, e.g.*, Sandoval v. Hagan, 197 F.3d 484, 500 (11th Cir. 1999) (holding that the Alabama Department of Public Safety had waived sovereign immunity by voluntarily accepting federal funds under Title VI of the Rehabilitation Act Amendments); Bradley v. Ark. Dep't of Educ., 189 F.3d 745, 753 (8th Cir. 1999) (holding that "Arkansas waived its Eleventh Amendment immunity with respect to IDEA claims when it chose to participate in the federal spending program created by the IDEA"); Litman v. George Mason Univ., 186 F.3d 544, 555 (4th Cir. 1999) (holding that "conditioning federal funds on an unambiguous waiver of a state's Eleventh Amendment immunity is as permissible as a state's direct waiver of such immunity"); Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997) (holding that California waived Eleventh Amendment immunity by accepting federal funds under the Rehabilitation Act); Huffine v. Cal. State Univ.-Chico (*In re* Huffine), 246 B.R. 405, 411–12 (Bankr. E.D. Wash. 2000) (holding that California waived its immunity from suit by accepting funds under Title IV of the Higher Education Act of 1965).

In the post-*College Savings* era, some circuits have also held that states constructively waive their sovereign immunity when, under the Telecommunications Act of 1996, Pub L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of Title 47 of the United States Code), they exercise their authority to participate in a federal regulatory scheme, specifically, to act as regulators of local telephone markets. Relying on the fact that Congress could have entrusted regulation of the entire telecommunications industry to the federal government, these courts have classified the offer of regulatory authority as a "gratuity," the permissible price of which is waiver of immunity. *See* AT&T Comm. v. Bellsouth Telecomms., Inc., 238 F.3d 636, 646 (5th Cir. 2001); MCI Telecomms. Corp. v. Ill. Bell Tel. Co., 222 F.3d 323, 343–44 (7th Cir. 2000); MCI Telecomms. Corp. v. Pub. Serv. Comm'n of Utah, 216 F.3d 929, 938 (10th Cir. 2000). In 2001, the Fourth Circuit Court of Appeals held that states that choose to exercise their authority to regulate the telecommunications industry under the 1996 Act do not waive their Eleventh Amendment immunity. Bell Atl. Md., Inc. v. MCI Worldcom, Inc., 240 F.3d 279, 292–93 (4th Cir. 2001). The court found the expression of Congress's intent to condition such state regulatory action on waiver of immunity to be insufficiently clear to trigger waiver. *Id.* Thus, the decision in *Bell Atlantic Maryland* does not speak to the question of whether the grant of such regulatory authority can properly be construed as a "gratuity" within the meaning of *College Savings*.

privilege.

2. *The "Clear Statement" Cases*

During the thirty-five years between *Parden* and *College Savings*, the Supreme Court narrowed the constructive waiver rule substantially.[38] It did so in an effort to ensure that waivers of this sort met the voluntariness requirement. It is worth taking a step backward, then, to examine the erosion of *Parden*'s constructive waiver rule and to assess how the doctrine changed as the Court sought better to assure that only voluntarily offered waivers would be effective.

This process was accomplished primarily through the establishment of clear statement rules. Under a clear statement rule, for Congress or a state to remove the sovereign immunity obstacle via abrogation or waiver, its intention to do so must be communicated with extreme clarity. In *Pennhurst State School & Hospital v. Halderman*,[39] a resident of a state-operated facility for the care and treatment of the mentally retarded sued the facility and various state officials, alleging that conditions at the facility were unsanitary and inhumane. The complaint alleged, *inter alia*, that the conditions at Pennhurst violated the Developmentally Disabled Assistance and Bill of Rights Act.[40] In the course of assessing the conditions imposed by the federal government on states that chose to accept money under this Act, the *Pennhurst I* Court explored the link between clear statement rules and the voluntariness principle:

> Turning to Congress' power to legislate pursuant to the spending power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the states. . . . [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.[41]

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[38] *See Coll. Sav. Bank*, 527 U.S. at 680 (noting that the Court "ha[s] never applied the holding of *Parden* to another statute, and in fact ha[s] narrowed the case in every subsequent opinion in which it has been under consideration").

[39] 451 U.S. 1 (1981) [hereinafter Pennhurst I].

[40] *Id.* at 6; *see* 42 U.S.C. §§ 6000–6081 (1976).

[41] *Pennhurst I*, 451 U.S. at 17 (citing Employees of the Dep't of Health & Welfare of Mo. v. Dep't of Health & Welfare of Mo., 411 U.S. 279, 285 (1973); Edelman v. Jordan, 415 U.S. 651 (1974)).

This excerpt characterizes the clear statement rule as a tool used by the courts to preserve voluntary choice for the states.[42] As this section will demonstrate, a rule requiring that any conditions imposed by the federal government be made explicit—conditions attached either to state participation in regulated activity (in the pre-*College Savings* era) or to states' acceptance of federal funds (a practice not invalidated by *College Savings*)—assures that states are perfectly aware of the consequences of their conduct. Likewise, when a state's desire to waive immunity is communicated through a state statute, a clear statement of such desire signals to the courts that the state perceives the costs of its choice. In short, with clear statement rules in place, the risk of involuntary waiver decreases.

In *Employees of the Department of Public Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri*,[43] for example, the Court held that employees of a state health facility could not sue the State of Missouri in federal court for violations of the Fair Labor Standards Act (FLSA).[44] Congress had amended the FLSA in 1966, explicitly bringing employees of state hospitals, institutions, and schools under the ambit of the Act.[45] Still, the *Parden* rule, under which Missouri would have waived its immunity by choosing to operate hospitals, was not applied, and the suit was dismissed.[46]

Parden was distinguished on two grounds. First, the Court explained that the regulated activity in *Parden* was for profit while the activity in *Missouri Employees* was not.[47] Because the State in *Parden* was acting within a sphere normally occupied by private individuals and corporations, it made sense to treat the State like a private party for jurisdictional purposes. The same could not be said with respect to *Missouri Employees*. Second, the Court emphasized that Congress did not indicate clearly in the FLSA an intent to subject states to suit in *federal* court.[48] The Court held that the 1966 amendments did expose states to suit but only in state courts.[49] The majority refused to "infer that Congress deprived Missouri of her constitutional immunity without . . . indicating in some way by clear language that the constitutional immunity was swept away."[50]

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[42] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 619–23 (1992) (presenting justifications for clear statement rules in the sovereign immunity context and citing *Pennhurst I*).

[43] 411 U.S. 279 (1973) [hereinafter Missouri Employees].

[44] *Id.* at 285.

[45] 29 U.S.C. § 203(d) (Supp. 1970); *Missouri Employees*, 411 U.S. at 282–83.

[46] *Missouri Employees*, 411 U.S. at 285.

[47] *Id.* at 284.

[48] *Id.* at 285.

[49] *Id.* at 287.

[50] *Id.* at 285; *see also id.* at 284–85 ("[W]hen Congress does act, it may place new or even enormous fiscal burdens on the States. Congress, acting responsibly, would not be presumed to take such action silently."); *id.* at 285 ("It is not easy to infer that Congress . . . desired silently to deprive the States of an immunity they have long enjoyed under . . . the Constitution.").

One year after *Missouri Employees*, the Court had occasion to apply and refine the clear statement rule. In *Edelman v. Jordan*,[51] recipients of federal-state Aid to the Aged, Blind, or Disabled (AABD) sued Illinois officials for failure to administer benefits in accordance with federal regulations.[52] The Seventh Circuit, relying on *Parden*, held that Illinois had waived its immunity by participating in the AABD program.[53] The Supreme Court reversed.[54] "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'"[55] Mere participation by a state in a federal-state public aid program was deemed insufficient to establish waiver.[56]

Similarly, in *Atascadero State Hospital v. Scanlon*,[57] respondent brought suit against a state hospital, alleging discriminatory failure to hire in violation of the Rehabilitation Act.[58] The State claimed Eleventh Amendment immunity and moved to dismiss.[59] Scanlon responded with three arguments.[60] First, he argued that California had waived its immunity in a provision of its constitution.[61] Second, he contended that Congress had abrogated state sovereign immunity by passing the Rehabilitation Act.[62] Third, he maintained that California had consented to suit in federal court by accepting federal funds under the Rehabilitation Act.[63]

In rejecting each of these arguments, the Court presented three variations on the clear statement theme. First, the Court noted that the waiver of immunity contained in article III, section 5 of the California Constitution was general—it did not specify the State's willingness to be sued in *federal* court.[64] The Court explained that, as in *Missouri Employees*, "[i]n the absence of an unequivocal waiver specifically applicable to federal-court jurisdiction, we decline to find that California has waived its constitutional immunity."[65] Second, the Court dismissed respondent's contention

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[51] 415 U.S. 651 (1974).

[52] *See id.* at 653–56.

[53] *See* Jordan v. Weaver, 472 F.2d 985, 995 (7th Cir. 1973).

[54] *Edelman*, 415 U.S. at 678.

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

[56] *Id.*

[57] 473 U.S. 234 (1985).

[58] *Id.* at 236.

[59] *Id.*

[60] *Id.* at 240.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *See id.* at 241. The relevant provision of the California Constitution reads: "Suits may be brought against the state in such manner and in such courts as shall be directed by law." CAL. CONST. art. III, § 5.

[65] *Atascadero State Hosp.*, 473 U.S. at 241 (citing Missouri Employees, 411 U.S. 279, 285–

that the Rehabilitation Act abrogated state sovereign immunity.[66] Relying on its holdings in *Pennhurst State School and Hospital v. Halderman*[67] and *Quern v. Jordan*,[68] the Court restated the requirement that "Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court."[69] For Congress to abrogate state sovereign immunity, it would have to do so in "unmistakably clear" language,[70] and the Rehabilitation Act failed to meet this high standard of clarity.[71] Last, the Court turned to the implied waiver question and held that "the mere receipt of federal funds cannot establish that a State has consented to suit in federal court."[72] The Court explained that when waivers of immunity are extracted by attaching conditions to grants offered under the spending power, Congress must "manifest a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity."[73]

Two years later, the Supreme Court decided *Welch v. Texas Department of Highways and Public Transportation*.[74] In that case, an individual attempted to sue the State of Texas under section 33 of the Jones Act for injuries sustained while in the employ of the Texas Highway Department.[75] Welch claimed that Congress had abrogated state sovereign immunity with respect to such suits, but the Court rejected petitioner's claim and dismissed the suit for lack of jurisdiction.[76] The Court held that "to the extent that *Parden v. Terminal Railway* is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled."[77]

The majority opinion in *Welch* blurs the line separating abrogation and constructive waiver. It partially repudiates *Parden*, the seminal constructive waiver case, in the context of a discussion about abrogation. It is difficult to determine, therefore, whether the holding sheds light on the limits of Congress's power either to abrogate state sovereign immunity or to condition participation in federally-regulated

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87 (1973)); *see supra* notes 48–50 and accompanying text.

[66] *Atascadero*, 473 U.S. at 242.

[67] 465 U.S. 89 (1984) [hereinafter Pennhurst II].

[68] 440 U.S. 332 (1979).

[69] *Atascadero State Hosp.*, 473 U.S. at 242 (citing *Pennhurst II*, 465 U.S. at 99; *Quern*, 440 U.S. at 342–45).

[70] *Id.*

[71] *Id.* at 246.

[72] *Id.* at 246–47. Here, the Court calls to mind the *Edelman* holding. *See supra* text accompanying notes 55–56.

[73] *Id.* at 247.

[74] 483 U.S. 468 (1987).

[75] *Id.* at 471. Section 33 of the Jones Act permitted any seaman who suffered an injury in the course of employment to sue for damages in federal court. 46 U.S.C. app. § 688(a) (1986).

[76] *Welch*, 483 U.S. at 495.

[77] *Id.* at 478.

activities on waiver.[78] Still, if it was not clear after *Edelman* and *Atascadero*, there could be no mistake any longer: For Congress to put the pieces in place for a binding constructive waiver, it would have to do so expressly and unambiguously.

Surprisingly, while the Court has had many opportunities to apply and modify the clear statement rule in the sovereign immunity context, only *Pennhurst I* pays significant attention to its justification. In *Missouri Employees*, the Court intimated that it would not be "responsibl[e]" for Congress to elicit a waiver of sovereign immunity without doing so explicitly but did not explain why.[79] The *Edelman* Court noted that "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights,"[80] but failed to articulate why this is so or to identify harmful consequences that would result from permissive standards regarding implied waiver of immunity.[81] The *Atascadero* Court offered multiple applications of the clear statement rule but presented no justification for it.[82] Perhaps the purpose served by the rule seemed so obvious as to render it unnecessary to state the justification explicitly.

In any event, there can be no doubt that the voluntariness principle fueled the development of this body of Eleventh Amendment doctrine and underlies the sea change embodied in *College Savings*. The Court's scrupulous attention to the clarity with which Congress might seek to abrogate, or a state might seek to waive, sovereign immunity is best understood as an effort to protect the states from unknowing waivers of immunity.[83]

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[78] As noted above, the difficulty of keeping the concepts of abrogation and constructive waiver analytically distinct was acknowledged by Justice Scalia in *College Savings*. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 683 (1999) ("Forced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin."); Kinports, *supra* note 6, at 807–09.

[79] *See* Missouri Employees, 411 U.S. 279, 284–85 (1973).

[80] Edelman v. Jordan, 415 U.S. 651, 673 (1974).

[81] *Id.*

[82] *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241–47 (1985).

[83] Professors Eskridge and Frickey note that clear statement rules are also often used as a means of assuring careful legislative deliberation. These rules "are a practical way for the Court to focus legislative attention on [preferred] values." Eskridge and Frickey, *supra* note 42, at 597. At least one commentator has suggested that this is the primary function played by clear statement rules in the sovereign immunity context. Lauren Ouziel, *Waiving States' Sovereign Immunity from Suit in Their Own Courts: Purchased Waiver and the Clear Statement Rule*, 99 COLUM. L. REV. 1584, 1598 (1999) ("The principal reason for the Court's requiring a clear statement is to ensure that Congress has carefully deliberated before infringing on states' autonomy."). In their discussion of clear statement rules and sovereign immunity, however, Professors Eskridge and Frickey focus on the role played by clear statement rules in securing knowing and voluntary waiver rather than on the rules' propensity to trigger legislative deliberation. *See* Eskridge and Frickey, *supra* note 42, at 620 (citing Pennhurst I, 451 U.S. 1, 25 (1981) for "the proposition that 'the crucial inquiry [is] . . . whether Congress spoke so clearly that we can fairly say that the State could make an informed choice.'").

* * *

Little is left of the constructive waiver doctrine. The Supreme Court has rejected the notion that states might voluntarily forego participation in otherwise lawful regulated activity and, as a corollary, it has dramatically reduced the class of cases in which the federal government may extract waivers of immunity from the states. However, a set of waiver cases has survived *College Savings*'s contraction of the implied waiver possibilities: the waiver-in-litigation cases. In contrast to waivers inferred from state participation in primary conduct regulated by statute, these waivers, implied as a result of the conduct of state representatives *in the courtroom*, have been deemed by the Supreme Court to meet the voluntariness requirement.

B. *Waiver-in-Litigation*

This section focuses on circumstances in which the behavior of state actors during the course of litigation has been deemed inconsistent with the retention of sovereign immunity. Hardly abandoning the voluntariness requirement, these cases reflect careful attention to whether the waiver in question can be construed as having been voluntarily offered. This body of case law, together with the *Parden* line of cases, fills out the picture of what the voluntariness requirement entails. It suggests, without clarifying explicitly, the existence of a significant categorical distinction between the sort of waivers at issue in the "ordinary" constructive waiver cases (discussed above) and waiver-in-litigation.

1. *State as Intervenor*

Clark v. Barnard,[84] decided in 1883, is the grandparent of constructive waiver doctrine. In *Clark*, the Supreme Court was confronted with a dispute over funds fraudulently signed over to the State of Rhode Island by the directors of the Boston, Hartford & Erie Railroad Company.[85] After the railroad went bankrupt, assignees of the estate sued to enjoin the State of Rhode Island from collecting these funds.[86] The State filed a demurrer arguing that the Eleventh Amendment prohibited the federal courts from exercising jurisdiction over the suit.[87] In addition, the State intervened as

[84] 108 U.S. 436 (1883). This case is usually cited as support for the proposition that sovereign immunity is waivable. *See, e.g.*, Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999); JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES 124 (1987); Fletcher, *supra* note 2, at 1092 & n.232 (1983). For purposes of this article, however, the significance of this case lies not only in that it established the *possibility* of waiver, but also in the link the Court established between permissible waiver and voluntariness.

[85] The complainants argued that the directors of the corporation had acted without proper authority and that the transaction was therefore void. *Clark*, 108 U.S. at 444.

[86] *Id.*

[87] *Id.* at 445.

a claimant to the estate, pressing its right to the funds in controversy.[88]

The Court rejected the State's Eleventh Amendment claim, holding that Rhode Island had waived its immunity by intervening to stake its claim to the fund. The Court explained that "[t]he immunity from suit belonging to a State . . . is a personal privilege which it may waive at pleasure,"[89] and it held that "the voluntary appearance of the State in intervening as a claimant of the fund" effectuated a waiver of immunity.[90] The Court emphasized that when the State opted to intervene as a claimant, "[i]t became an actor as well as defendant."[91] The actor/defendant distinction was crucial to the Court's reasoning. The State's decision to act voluntarily by employing the federal courts in an effort to claim funds triggered the waiver; had the State been content to remain a simple defendant, it is likely that the protection of the Eleventh Amendment would have been available.[92]

The second pillar of the Court's early constructive waiver jurisprudence is *Gunter v. Atlantic Coast Line Railroad Company*,[93] a case decided in 1906. In *Gunter*, South Carolina challenged Atlantic's claim to an exemption from state taxes.[94] This exemption had been challenged in the federal courts in 1873. At that time, the Supreme Court, in *Humphrey v. Pegues*,[95] upheld the exemption and enjoined the State from taxing the railroad.[96] In 1900, when the State tried to tax the railroad again, Atlantic, as successor to the rights of Pegues, sought the protection of the Court's injunction.[97] The *Gunter* Court was required to determine whether South Carolina had waived its immunity from suit in the prior (1873) litigation; if it had not, that judgment would be unenforceable because the federal courts would have lacked jurisdiction. The Court explained:

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[88] *Id.* at 445–46.

[89] *Id.* at 447.

[90] *Id.* at 447–48.

[91] *Id.* at 448.

[92] Federal courts applying *Clark* have stressed that the holding in that case rested squarely on the voluntariness of the state's waiver-inducing conduct. *See, e.g.*, Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 395 (1998) (Kennedy, J., concurring) (citing *Clark* for the proposition that "a State's voluntary intervention in a federal-court action to assert its own claim constitute[s] a waiver of the Eleventh Amendment"); Sutton v. Utah State Sch. for the Deaf and Blind, 173 F.3d 1226, 1236 (10th Cir. 1999) (citing *Clark* and noting that "where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment"); Woelffer v. Happy States of America, Inc., 626 F. Supp. 499, 502 (N.D. Ill 1985) (explaining that, in *Clark*, "the State of Rhode Island voluntarily appeared in a federal interpleader action . . . [thereby] voluntarily submitting to the federal court's jurisdiction").

[93] 200 U.S. 273 (1906).

[94] *Id.* at 273.

[95] 3 U.S. (16 Wall.) 244 (1873).

[96] *Gunter*, 200 U.S. at 278–79.

[97] *Id.* at 280–81.

> 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.[98]

The Court then held that South Carolina had, in fact, voluntarily submitted to the jurisdiction of the federal courts in *Pegues* by substituting itself as the "real defendant" in a suit that had initially been brought against state taxing officials and not against the state itself.[99] The jurisdiction of the *Pegues* Court having been upheld, the Court went on to vindicate Atlantic's claim.[100]

The emphasis on voluntariness in *Gunter*'s Eleventh Amendment holding is unmistakable. Together with *Clark*, it establishes that a waiver of immunity may, in some circumstances, be inferred from state conduct during litigation, so long as that conduct is voluntary. Crucially, notwithstanding the obvious cost to states of retaining their immunity in these cases—loss of the right to intervene in lawsuits so as to protect certain legal entitlements—the Court did not construe the decision to forego immunity as having been coerced.

2. *When States Initiate Legal Action*

a. *Claims in Bankruptcy Proceedings*

Waiver-in-litigation questions frequently arise in the bankruptcy context. When a state files a proof of claim in bankruptcy court, the trustee of the estate might want to challenge it and litigate over the underlying substantive issues. To be sure, the trustee could not affirmatively sue the state to recover on the underlying claim without the state's consent—sovereign immunity would shield the state from suit. Yet, in these cases, the state voluntarily submits to the jurisdiction of the bankruptcy court by filing its proof of claim. What is the scope of the submission to the bankruptcy court's jurisdiction? When a state accedes to the jurisdiction of a bankruptcy court for the narrow purpose of having that court decide the priority of its claim relative to those of other creditors, does it confer upon that court jurisdiction to adjudicate the substantive merit of the claim itself? How broad is the waiver?

The Supreme Court answered these questions in *Gardner v. New Jersey*.[101] That case involved the Central Railroad Company of New Jersey, which had filed for bankruptcy in 1939.[102] The State of New Jersey, acting through its comptroller, filed a

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[98] *Id.* at 284 (citing *Clark*, 108 U.S. at 447).

[99] *Id.* at 284–87 (citing 14 S.C. Stat. 65, the state law provisions that effectively transformed such suits against officials into suits against the state).

[100] *Id.* at 293.

[101] 329 U.S. 565 (1947).

[102] *Id.* at 568.

claim for roughly $20 million in unpaid taxes and interest.[103] Gardner, as trustee of the bankrupt estate, filed an objection to the State's claim, asserting that New Jersey's rights to the estate were governed by a settlement agreement that had been accepted by the state legislature.[104] The trustee filed a petition to have the State's claims adjudicated, and the Attorney General of New Jersey responded by invoking sovereign immunity.[105]

The Supreme Court held that New Jersey had waived its sovereign immunity by filing the proof of claim. "It is traditional bankruptcy law," the Court stated, "that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide by the consequences of that procedure."[106] The Court offered three reasons for its conclusion. Writing for the Court, Justice Douglas first noted that if the bankruptcy court were permitted to adjudicate objections to claims made by all creditors with the exception of state-creditors, "unmeritorious or excessive claims [brought by a state] might dilute the participation of legitimate claimants."[107] For this reason, it would be unfair to subject claims made by states to lesser scrutiny than that applied to all other claims. Second, the Court noted that the jurisdiction of a bankruptcy court is jurisdiction in rem, encompassing the estate as a unit. When a state submits to a court's jurisdiction by making a claim to the res, that court's jurisdiction over the estate extends to multiple ways of disposing of claims made on it, not merely to prioritizing them.[108] Finally, the Court cited *Clark* and *Gunter* and turned to the voluntariness principle. "When the State becomes the *actor* and files a claim against the fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim."[109]

The last of these justifications for the Court's decision has emerged as critical. In fact, the Supreme Court's discussion of *Gardner* in the *College Savings* decision focuses exclusively on the voluntariness principle. The Court indicated that "*Gardner* . . . stands for the . . . proposition that a state waives its sovereign immunity

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[103] *Id.* at 570.

[104] *Id.* Gardner also claimed that the tax assessments against the estate were too high because New Jersey overvalued the debtor's property. *Id.* Further, he argued that the debtor had been intentionally discriminated against in the assessment of taxes, and he objected to the state's claim for interest on the unpaid taxes. *Id.*

[105] *Id.* at 571.

[106] *Id.* at 573 (citations omitted).

[107] *Gardner*, 329 U.S. at 573.

[108] *Id.* at 574 ("The whole process of proof [is] an adjudication of interests claimed in a *res*. It is none the less such because the claim is rejected *in toto*, reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash."); *cf.* Fla. Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 700 (1982) (noting that, when exercising in rem jurisdiction in the admiralty context, adjudicating the rights of a state in full "would be justified if the State voluntarily advanced a claim to the [res]").

[109] *Gardner*, 329 U.S. at 574 (emphasis added).

by *voluntarily* invoking the jurisdiction of the federal courts."[110] Similarly, the lower federal courts, in applying and refining the *Gardner* rule, have repeatedly emphasized that it is the voluntary nature of a state's action that secures the legality of the waiver.[111]

b. *Counterclaims Against State Plaintiffs*

Similar questions regarding the breadth of a state's waiver of immunity arise when a litigant files a counterclaim against a sovereign plaintiff. When a state voluntarily submits to the jurisdiction of a federal court by filing suit, what are the Eleventh Amendment implications?

Much of the case law on this subject has been developed in the area of federal sovereign immunity. In two cases decided on the same day in 1940, *United States v. Shaw*[112] and *United States v. United States Fidelity and Guaranty Company*,[113] the Supreme Court held that when the federal government files suit against a private litigant, it exposes itself to counterclaims up to the amount of the government's claim.[114] The lower federal courts have qualified this rule by explaining that the

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[110] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 681 n.3 (1999) (emphasis added).

[111] *See, e.g.*, Dekalb County Division of Family and Children Serv. v. Platter (*In re* Platter), 140 F.3d 676, 679–80 (7th Cir. 1998):

> Because a state voluntarily chooses to enter a bankruptcy case when it initiates an adversary proceeding, we hold that a state removes itself from the Eleventh Amendment's protection by starting one. . . . When a state chooses to avail itself of the bankruptcy court as a plaintiff, the Eleventh Amendment does not apply and the state will receive the same treatment as other parties. The Eleventh Amendment does not prevent a state from entering a federal forum voluntarily to pursue its own interest. However, if a state embarks down this route, it cannot run back to seek Eleventh Amendment protection when it does not like the result.

(citations omitted); *see also* Rose v. United States Dep't of Educ. (*In re* Rose),187 F.3d 926, 929 (8th Cir. 1999) (relying on *College Savings* for the proposition that, under *Gardner*, filing a proof of claim in bankruptcy court qualifies as voluntary submission to federal jurisdiction); Sutton v. Utah State Sch. for the Deaf and Blind, 173 F.3d 1226, 1234 (10th Cir. 1999) (explaining that a "State waives Eleventh Amendment immunity by voluntarily appearing in bankruptcy court to file a proof of claim"); Ga. Dep't of Revenue v. Burke (*In re* Burke), 146 F.3d 1313, 1318–19 (11th Cir. 1998) (same).

[112] 309 U.S. 495 (1940).

[113] 309 U.S. 506 (1940).

[114] *Shaw*, 309 U.S. at 501; United States Fid. & Guar. Co., 309 U.S. at 511; Bull v. United States, 295 U.S. 247, 262 (1935) (stating that:

> No direct suit can be maintained against the United States; but when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them, it would be a very rigid principle, to deny to him the right of setting up such claim in a court of justice.

government's waiver of immunity is restricted to claims arising out of the transaction upon which the government's suit is based.[115] Put otherwise, the waiver extends to "compulsory" but not "permissive" counterclaims.[116]

The federal courts have applied this rule in the state sovereign immunity context as well. In *In re Monongahela Rye Liquors, Inc.*,[117] the Third Circuit held that "when the United States *or a State* institutes a suit, it thereby submits itself to the jurisdiction of the court, [and] draws in . . . such adverse claims as have arisen out of the same transaction which gave rise to the sovereign's suit."[118] More recently, in *Schlossberg v. Maryland (In re Creative Goldsmiths of Washington D.C., Inc.)*,[119] the Fourth Circuit spelled out the reasoning behind this application of the constructive waiver rule:

> [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. When a state authorizes its officials voluntarily to invoke federal process in a federal forum, the state thereby consents to the federal forum's rules of procedure . . . . For this reason, we hold that to the extent a defendant's assertions in a state-instituted federal action . . . amount to a *compulsory* counterclaim, a state has waived any Eleventh Amendment immunity against that counterclaim in order to avail itself of the federal forum.[120]

(quoting United States v. Ringgold, 33 U.S. (8 Pet.) 150, 163 (1834))).

[115] *See, e.g.*, Federal Sav. & Loan Ins. Corp. v. Quinn, 419 F.2d 1014, 1017 (7th Cir. 1969) ("[W]aiver of immunity is limited to matters in recoupment arising out of the same transaction or occurrence which is the subject matter of the suit, to the extent of defeating the plaintiff's claim."); Frederick v. United States, 386 F.2d 481, 488 (5th Cir. 1967); United States v. Kennedy (*In re* Greenstreet, Inc.), 209 F.2d 660, 663 (7th Cir. 1954); United States v. Kallen (*In re* Oxford Mktg., Ltd.), 444 F. Supp. 399, 403 (N.D. Ill. 1978); *see also* 6 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1427 (2d ed. 1990) ("[W]hen the United States institutes an action, [the] defendant may assert by way of recoupment any claim arising out of the same transaction or occurrence as the original claim in order to reduce or defeat the government's recovery."); 3 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 13.50[2][c] (3d ed. 1999).

[116] FED. R. CIV. P. 13(a) ("A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim."); *Quinn*, 419 F.2d at 1017.

[117] 141 F.2d 864 (3d Cir. 1944).

[118] *Id.* at 869 (emphasis added).

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

[120] *Id.* at 1148; *see also, e.g.*, Genentech, Inc. v. Eli Lilly & Co., 998 F.2d 931, 946–47 (Fed. Cir. 1993) (holding that, by filing suit, states waive their immunity against compulsory counterclaims suitable for recoupment); Woelffer v. Happy States of Am., Inc., 626 F. Supp. 499, 502 (N.D. Ill. 1985) (same); Ga. Dep't of Human Res. v. Bell, 528 F. Supp. 17, 26 (N.D. Ga. 1981) (same); Burgess v. M/V Tamano, 382 F. Supp. 351, 355–56 & n.6 (D. Maine 1974) (same); Bd. of Regents of the Univ. of Neb. v. Dawes, 370 F. Supp. 1190, 1191 (D. Neb. 1974) (same);

Like the bankruptcy cases, the counterclaim cases indicate that a sovereign's decision voluntarily to submit to the jurisdiction of a federal court triggers at least a partial waiver of immunity. While a sovereign entity retains the right to choose whether to press its claim in a federal court, it cannot control the precise parameters of the court's jurisdiction once it initiates proceedings.

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The *College Savings* decision uprooted broad swaths of constructive waiver doctrine, yet it seems to have left the waiver-in-litigation cases intact. Indeed, while the majority explicitly overruled "whatever may remain of [the] decision in *Parden*," it did not intimate that any waiver-in-litigation cases had been disturbed.[121] Thus, when states engage in conduct *in the courtroom* that might reasonably be construed as waiving immunity, it remains within the power of the federal courts to deem that waiver has occurred. Indeed, as these cases have repeatedly confirmed, it is permissible to infer waivers under these circumstances notwithstanding the lack of any clear statement in a federal statute that undertaking these standard litigation tactics will trigger waiver. Perhaps the notion that the fundamental fairness of judicial process requires waiver in these circumstances is so obvious that no clear statement is needed; there is no reason to state clearly what everyone knows already. Perhaps the voluntariness of the State's conduct in these cases is so readily apparent that there is no need to worry about whether states have explicitly been made aware of the consequences of their agents' in-courtroom behavior. Whatever the reasons (and these will be discussed in Part IV), waiver-in-litigation appears to represent a still viable set of constructive waivers possibilities.

C. *The* Ford Motor Company *Decision*

The waiver-in-litigation exception outlined above is not applied consistently. Some conduct undertaken by state agents in the courtroom that one would expect to trigger a waiver of immunity in fact does not.

In *Ford Motor Company v. Department of the Treasury of Indiana*,[122] the Ford Motor Company sued the State of Indiana for a tax refund.[123] Ford had followed the procedures dictated by Indiana law for securing such a refund, but to no avail.[124] After successfully defending on the merits before the district and circuit courts, the

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Dep't of Transp. of the State of Ill. v. Am. Commercial Lines, Inc., 350 F. Supp. 835, 837–38 (N.D. Ill. 1972) (same).

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

[122] 323 U.S. 459 (1945).

[123] *Id.* at 460.

[124] *Id.* at 461.

State appeared before the United States Supreme Court and, for the first time, asserted sovereign immunity as a defense and challenged the jurisdiction of the federal courts.[125] In response, Ford contended that the State had waived its immunity through the conduct of its Attorney General.[126] Specifically, Ford argued that the Attorney General's failure to assert immunity earlier in the proceedings constituted a waiver.[127]

The Court explained, first, that the mere fact that Indiana had failed to raise the Eleventh Amendment defense below did not prevent it from asserting immunity on certiorari. "The Eleventh Amendment," the Court explained, "declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court."[128] The Court noted, however, that "[i]t is conceded by the [State] that if it is within the power of the . . . officers of Indiana to waive the state's immunity, they have done so in this proceeding."[129] The Court then explained that a waiver could take hold only if the official was authorized, under state law, to consent to suit on the State's behalf.[130]

In determining whether state law authorized a particular official to waive immunity, the federal courts were directed to look first to the decisions of the state courts, and, if no holding directly on point existed, to "resort to the general policy of the state as expressed in its Constitution, statutes and decisions."[131] In *Ford Motor Company*, the Supreme Court's analysis of Indiana law and policy revealed a strong presumption against officials waiving Eleventh Amendment immunity.[132] The Court found that the general power bestowed on the Indiana Attorney General to litigate claims on the merits did not, as a matter of state law, include the authority to waive sovereign immunity.[133]

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[125] *Id.* at 464.

[126] *Id.* at 466–67.

[127] *Id.* at 467.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.* at 468 (citing IND. CONST. art. IV, § 24). The Court held that Indiana law did not allow consent to suit on a case-by-case basis, but rather permitted waiver only through the enactment of a general statute by the state legislature. *Id.*

[133] *Id.* It is difficult to understand why the Court felt it necessary to assert both that Eleventh Amendment immunity is jurisdictional in nature, and could, therefore, be raised on appeal for the first time *and* that a waiver could be effective only if the relevant state official was authorized to forego the state's Eleventh Amendment protection. For if the "jurisdictional nature" of sovereign immunity is sufficient to render (at least non-explicit) waiver impossible, then it is not clear why it should matter whether the official who failed to raise an immunity claim was empowered under state law to waive immunity. No such waiver could have occurred anyway—the defense could never be waived by inaction. Similarly, if a state official were not empowered to waive immunity on the state's behalf, then the question of whether an Eleventh Amendment defense could be raised on appeal for the first time would seem moot. The prohibition against an unauthorized

Under *Ford Motor Company*, even if a state official is acting within the scope of her authority and she engages in conduct that appears to submit the State to the jurisdiction of the federal courts, there is no waiver unless the official is specifically authorized by state law to consent to suit. Thus, while, as a threshold matter, federal law might govern what conduct leads to a waiver of immunity, it cannot, of its own force, determine whether there has been waiver through litigation in any particular case.

The *Ford* holding has been applied both within and without the waiver-in-litigation context. For example, many federal courts have been called upon to determine whether a state attorney's decision to remove a case to federal court triggers a waiver of immunity.[134] As one of these courts explained, "the appellate courts have agreed with or rejected claims of waiver by looking to whether the state's law actually authorized the attorney to waive sovereign immunity."[135] Under the *Ford* rule, even if Congress or the federal courts determined that removal to federal court should trigger a waiver of sovereign immunity,[136] such waivers would be effective only if authorized by state law.[137]

Similar issues have been addressed by the lower federal courts in conditional spending cases. These cases raise the question of whether states waive their immunity by accepting federal funds when Congress conditions the receipt of such funds on

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official rendering a binding waiver on the state's behalf would, of necessity, entail the permissibility of raising the defense for the first time on appeal.

[134] The Supreme Court recently heard oral argument in *Lapides v. Board of Regents of the University of Georgia*, 251 F.3d 1372 (11th Cir. 2001), *cert. granted*, 122 S. Ct. 456 (U.S. Oct. 29, 2001) (No. 01-298). *Lapides* squarely raises the question of whether removal triggers waiver. *Id.* at 456.

[135] Cal. Mother & Infant Program v. Cal. Dep't of Corr., 41 F. Supp. 2d 1123, 1128 (S.D. Cal. 1999).

[136] In *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381 (1998), Justice Kennedy advocated the establishment of such a rule. *Id.* at 393 (Kennedy, J., concurring). Justice Kennedy's *Schacht* opinion is discussed in greater detail in Part III.B.2.

[137] *See, e.g.*, Santee Sioux Tribe of Neb. v. Nebraska, 121 F.3d 427, 431–32 (8th Cir. 1997) (noting that under state law, the Attorney General *is not* authorized to waive immunity); Estate of Porter v. Illinois, 36 F.3d 684, 691 (7th Cir. 1994) (same); Silver v. Baggiano, 804 F.2d 1211, 1214 (11th Cir. 1986) (same); Gwinn Area Cmty. Sch. v. Michigan, 741 F.2d 840, 846–47 (6th Cir. 1984) (same); David Nursing Home v. Mich. Dep't of Social Serv., 579 F. Supp. 285, 288 (E.D. Mich. 1984) (same); *see* McLaughlin v. Bd. of Trustees of State Colls. of Colo., 215 F.3d 1168, 1171 (10th Cir. 2000) (noting that under state law, the Attorney General *is* authorized to waive immunity); Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1234–36 (10th Cir. 1999) (same); Newfield House, Inc. v. Mass. Dep't of Pub. Welfare, 651 F.2d 32, 36 n.3 (1st Cir. 1981) (same); *Cal. Mother & Infant Program*, 41 F. Supp.2d at 1127–29 (same); Candela Corp. v. Regents of the Univ. of Cal., 976 F. Supp. 90, 92–93 (D. Mass. 1997) (holding that the board of regents is authorized to waive); Me. Assoc. of Indep. Neighborhoods v. Me. Dep't of Human Serv., 697 F. Supp. 557, 560 (D. Me. 1988) (holding that the Attorney General is authorized to waive); *see also* Frances J. v. Wright, 19 F.3d 337, 341 (7th Cir. 1994) (removal is impermissible unless accompanied by an *authoritative* waiver).

waiver of immunity.[138] For example, in *Innes v. Kansas State University*,[139] the Tenth Circuit was called upon to decide whether the State of Kansas had waived its immunity from suit through the participation of Kansas State University (KSU) in the Federal Perkins Loan Program.[140] Though the State had not explicitly waived its immunity from suit either in its constitution or by statute,[141] waiver of immunity was an express term of KSU's contract with the federal government under this program.[142] The court, citing *Ford Motor Company*, asked "whether KSU had the authority to waive Eleventh Amendment immunity."[143] The court answered this question in the affirmative and upheld the bankruptcy court's dismissal of Kansas' Eleventh Amendment defense.[144]

In *Snyder v. State*,[145] a case "virtually identical" to *Innes*,[146] a bankruptcy court in the District of Nebraska looked to state law to determine whether Nebraska authorized its state university to waive immunity. In *Snyder*, however, the court found that "[e]ven if the debtor . . . could show that the Board of Regents voluntarily and knowingly accepted the terms of the agreement, the Board of Regents did not have the power to waive the state's immunity."[147] Thus, even though federal law (as embodied in the government's contract with the state) conditioned receipt of federal funds on waiver of immunity, and a state official accepted the funds apparently on these terms, the federal government could not extract a waiver in this particular case.[148]

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[138] *College Savings* indicates clearly that waiver may be obtained in this fashion. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999). These cases explore the mechanics of how such waivers take place.

[139] 184 F.3d 1275 (10th Cir. 1999).

[140] *Id.* at 1277.

[141] *Id.* at 1279.

[142] *Id.* at 1281–82 (noting that "the agreement indicates . . . that KSU 'agrees to perform the functions and activities set forth in 34 CFR § 674'" and that under § 674 "KSU necessarily consented to perform certain functions in the federal . . . court" (citation omitted)).

[143] *Id.* at 1284.

[144] *Id.*

[145] 228 B.R. 712 (Bankr. D. Neb. 1998).

[146] *Id.* at 717–18.

[147] *Id.* at 718.

[148] Since the *College Savings* decision, many other federal courts have acknowledged the permissibility of exacting waivers of immunity from the states as a condition of receiving federal funds. These courts, however, have often *failed* to consult state law to determine whether the individual or entity accepting federal funds was authorized to waive immunity. *See, e.g.*, Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc); Pederson v. La. State Univ., 213 F.3d 858, 876 (5th Cir. 2000); Bd. of Educ. v. Kelly E., 207 F.3d 931, 935 (7th Cir. 2000); Sandoval v. Hagan, 197 F.3d 484, 500 (11th Cir. 1999); Litman v. George Mason Univ., 186 F.3d 544 (4th Cir. 1999); Clark v. California, 123 F.3d 1267 (9th Cir. 1997); Huffine v. Cal. State Univ.-Chico (*In re* Huffine), 246 B.R. 405, 411–12 (Bankr. E.D. Wash. 2000).

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The *Ford* rule is something of an anomaly in the Supreme Court's waiver-in-litigation jurisprudence. It involves conduct that, when voluntarily undertaken by state actors in the courtroom, might reasonably be expected to trigger a waiver of immunity; it does not, however, effectuate this result. Instead, for reasons that will be examined in greater depth below, the federal courts are not permitted to infer a waiver of immunity when states litigate on the merits at the trial level.

Unsurprisingly, a form of the voluntariness principle motivates the *Ford* decision and subsequent cases applying it. By structuring the waiver-identification process around state law, control of the decision whether to waive immunity is firmly cemented in state hands. The behavior of state officials will entail a waiver of immunity only when the sovereign state, through its legislature, so desires.[149] If federal law established the parameters of what conduct constitutes a waiver, and unauthorized officials were permitted to issue binding waivers, then there might be cases in which waiver occurred over a state's objection. Binding states to ultra vires waivers of Eleventh Amendment immunity creates tension with the voluntariness principle even though these waivers are not elicited through coercion (as one might find in the abrogation context) or through ignorance (as might be the case in the absence of clear statement rules). This tension exists because, in these cases, Eleventh Amendment protection seems to be withdrawn against the will of the sovereign legislature.

The following two sections of this paper are dedicated to illustrating that the *Ford* rule is inconsistent with the waiver-in-litigation case law and is not compelled by the voluntariness principle or any other principle of constitutional law. Part III examines the *Ford* rule in greater detail, demonstrating how it has been applied by the lower federal courts. One purpose of Part III is to highlight the burdens this rule places on private litigants. Part IV attempts to show that (1) the basic principles of constructive waiver doctrine—most fundamentally, the voluntariness principle—do not require the result in *Ford*, and (2) the decision in that case cannot be reconciled with waiver-in-litigation jurisprudence more generally.

III. APPLICATIONS OF THE *FORD* RULE

A. *Non-Waivers in Litigation—Stacking the Deck in States' Favor*

In the absence of a federal law effectively governing the question of whether a state has waived its immunity, states are able to parlay the advantages they enjoy as

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[149] *See* Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN L. REV. 1331, 1387 (2001) (noting, in discussing *Ford*, that "the underlying presumption seems to be that ordinarily waiver must be effected either by the legislature or by an official whom the legislature has authorized to waive").

possessors of sovereign immunity into other benefits in the litigation process. The holding in *Ford* transforms sovereign immunity from a shield, to be raised before litigation to protect states from suit, into a sword, to be wielded during litigation to fight off adverse holdings.[150] This section presents two examples of how the *Ford* rule might be employed in this fashion.

1. *Delayed Presentation of the Sovereign Immunity Defense*

As mentioned above, in *Ford Motor Company*, the State of Indiana did not want to refund taxes that Ford had paid.[151] Instead of accomplishing this by responding to the taxpayer's suit with a motion for dismissal on sovereign immunity grounds, the State litigated on the merits in the District Court and in front of the Seventh Circuit.[152] When the case came before the Supreme Court, however—a tribunal from which there is no appeal—the State took cover behind the Eleventh Amendment and claimed immunity rather than risk a binding loss on the merits.[153]

The Supreme Court reasoned that "[t]he Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court."[154] Because, as a matter of Indiana law, "no properly authorized executive or administrative officer of the state ha[d] waived the state's immunity to suit in the federal courts," the Supreme Court determined that the State had not constructively waived its immunity by litigating the case on the merits.[155]

In reaching this conclusion, the Court declined to follow what, given our analysis of the voluntariness principle, would seem to be the most doctrinally sound path. That is, it declined to articulate a rule pursuant to which a state that voluntarily litigates on the merits in federal court waives its immunity from suit in that case.

The justification offered by the Supreme Court for its decision is ambiguous and will be explored in depth in Part IV. For the time being, however, it is important to perceive that much control over the waiver question and, in fact, over federal procedure, was ceded to the states in *Ford Motor Company*. With no federal standard conclusively dictating that litigating on the merits constitutes waiver, state law is the ultimate determinant of the import of state conduct in federal court. By deciding *who*

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[150] *See* Michelle Lawner, *Why Federal Courts Should Be Required to Consider State Sovereign Immunity Sua Sponte*, 66 U. CHI. L. REV. 1261, 1272 (1999) ("[T]he Supreme Court's Eleventh Amendment jurisprudence currently permits states to use the Amendment as both a sword and a shield . . . .").

[151] Ford Motor Co. v. Dep't of the Treasury of Ind., 323 U.S. 459, 460 (1945).

[152] *Id.* at 466–67.

[153] *See id.* at 467.

[154] *Id.*

[155] *Id.* at 469.

may waive immunity, states implicitly decide *what conduct* waives immunity.

Under these conditions, states are able to use the federal courts while remaining free from federally-imposed pressure to waive immunity. Indeed, insofar as an assertion of sovereign immunity on appeal can always expunge an adverse judgment, states are totally free from the fundamental constraint faced by private litigants who appear in federal court: submission to the binding authority of the tribunal. It is in this respect that the *Ford* rule introduces an odd twist into the Court's sovereign immunity jurisprudence. There is no doubt that the Eleventh Amendment places the states in a very different position from private citizens, and thus the mere fact of different treatment for a sovereign state is unremarkable. The circumstances surrounding the *Ford* rule, however—specifically, the fact that the state seemingly[156] submits voluntarily to the jurisdiction of the federal courts and is able, nonetheless, to revoke retroactively that jurisdiction—make this aspect of sovereign immunity doctrine anomalous.

In *Ford Motor Company* itself, Indiana was permitted to litigate with the sovereign immunity card tucked safely away in its back pocket. When the stakes got high at the Supreme Court level, the State was not forced to test the strength of its hand against the plaintiff's; instead, it used sovereign immunity to trump Ford's claim. The permissibility of raising immunity for the first time on appeal (even on certiorari before the Supreme Court), coupled with the federal courts' powerlessness to classify the State's conduct as waiver-inducing, enabled Indiana to pursue the benefits of litigating in federal court without exposing itself to any risk. A victory on the merits would mean a judicially-confirmed right to retain plaintiff's tax payment, res judicata, and the establishment of precedent sympathetic to state interests. Loss at the trial or appellate level could be remedied by the Eleventh Amendment. After *Ford Motor Company*, a state could extract the benefits of litigating the merits of a case in federal court without incurring costs other than legal fees. So long as the state withholds from its attorneys the power to waive sovereign immunity, its conduct in federal court can be rendered entirely without consequence.[157]

2. *Removal from State to Federal Court*

The removal cases discussed in Part II.C[158] reveal another way in which the *Ford* rule might permit states to use the Eleventh Amendment strategically. In these cases,

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[156] I say "seemingly" because to say that "the State" has waived immunity under such circumstances begs one of the critical questions here; specifically, whether "the State" can be said voluntarily to have waived immunity by way of the ultra vires conduct of its officials. Part IV.D will take up this question in detail.

[157] As one commentator put it, "permitting assertions of Eleventh Amendment immunity for the first time on appeal enables a state defendant to condition its grant of federal court jurisdiction over the state on a favorable decision on the merits." Lawner, *supra* note 150, at 1276.

[158] *See supra* notes 134–37 and accompanying text.

the state removes to federal court and then seeks dismissal by invoking sovereign immunity. The reasons to reject this immunity claim are powerful. First, by removing the case, the state affirmatively invokes the jurisdiction of a federal forum. But for the state's behavior, the case would never enter the federal courts.[159] In this respect, the venerable *Clark* rule—which distinguishes passive state defendants from active litigants—suggests implying waiver.[160] Second, this strategy is ripe for exploitation. States that waive their immunity from suit in state court but not federal court might evade the consequences of their state court waiver by removing to federal court and then seeking dismissal. Used in this fashion, the removal power permits states to play a kind of shell game with potential litigants—holding out the promise of amenability to suit in state court, then disposing of cases through the federal system.[161]

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[159] *See* Sutton v. Utah Sch. for the Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir. 1999) (quoting Gunter v. Atl. Coast Line R.R., 200 U.S. 273, 284 (1906)). The court reasoned:

> The Attorney General's Office *having caused the removal to federal court here*, and having litigated throughout on the merits here, we feel it would be contrary to these precedents as well as grossly inequitable to allow assertion of the Eleventh Amendment bar by the contention made at oral argument before us.

Id. (emphasis added).

Using the removal tactic is otherwise similar to defending a case on the merits and then raising the immunity defense on appeal. And, of course, the two could be used in tandem. A state that expected the federal courts to be more hospitable to its claim than state courts could invoke federal jurisdiction by removing from state court. If the state's expectations were upset, and the federal court found for the plaintiff, the state could raise the immunity defense on appeal.

[160] *See supra* text accompanying note 91.

[161] The Supreme Court's decision in *Alden* renders this discussion at least partially moot. Because *Alden* made clear that states enjoy immunity from suit in both state and federal court, Alden v. Maine, 527 U.S. 706, 754 (1999), the manipulative aspect of the "remove and dismiss" strategy largely evaporates. Indeed, under this regime, with states enjoying Eleventh Amendment immunity in both fora, a rule under which removal triggers waiver would place states in a considerably *worse* position than other parties, who may remove from state to federal court without waiving certain jurisdictional defenses. For example, a number of federal courts have held that removal from state to federal court *does not* entail waiver of a challenge to the court's personal jurisdiction. *See, e.g.*, Cantor Fitzgerald, LP v. Peaslee, 88 F.3d 152, 157 n.4 (2d Cir. 1996) ("Removal does not waive any Rule 12(b) defenses."); Silva v. City of Madison, 69 F.3d 1368, 1376 (7th Cir. 1995); Fields v. Sedgwick Associated Risks, Ltd., 796 F.2d 299, 300–01 (9th Cir. 1986) ("Fields contends that the defendant's failure to raise personal jurisdiction in its state court motion waived the issue. We disagree."). And, indeed, under these conditions, there appears to be no justification for treating the state's presentation of an Eleventh Amendment defense differently from a private party's objection to the court's exercise of personal jurisdiction. In both cases, the defendant might reasonably want to have a federal court, rather than a state court, adjudicate the jurisdictional challenge.

The discussion of the removal cases remains relevant for the following reasons. First, and most important, the structure of the problem that existed during the relatively brief period between *Seminole Tribe* and *Alden*, when the "remove and dismiss" strategy might have been employed by states to craft immunity claims where they otherwise would not exist, has significant parallels to

One way of rendering this move ineffective would be to establish remand, rather than dismissal, as the proper disposition of a case in which a state has removed to federal court and then asserted Eleventh Amendment immunity. And, indeed, a number of federal courts have done exactly that.[162] As the leading commentators have noted, however, "the question of dismissal or remand of claims barred by the Eleventh Amendment" is "up in the air."[163] And if sovereign immunity is, for these purposes, construed as something like an affirmative defense—as some courts have suggested it should be understood[164]—then dismissal would be the proper procedural

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the *Ford* scenario. Specifically, this removal scenario gives rise to the question of whether state or federal law ultimately controls the import of state official's conduct in federal court. It is, therefore, useful to consider this aspect of the doctrine, even if it is far less likely to occur.

Moreover, there are at least two circumstances in which the "remove and dismiss" strategy might still be effective: (1) where the state has waived immunity in state but not federal court, and (2) where state courts are *required* to entertain private damages action against non-consenting states. *See* Reich v. Collins, 513 U.S. 106, 110 (1994) (noting that in the absence of an adequate pre-deprivation remedy, a state court remedy must be available to taxpayers who wish to challenge the constitutionality of a state tax, "the sovereign immunity States traditionally enjoy in their own courts notwithstanding").

As to the first possibility, political concerns might lead a state legislature to pass a statute waiving immunity from state court suits in certain classes of cases, knowing all the while that the possibility of serious loss to the state treasury is controlled by the availability of the removal-dismissal two-step. State legislators would enjoy the political benefits of enacting a broad waiver of immunity and then might blame the Attorney General's office for the litigation tactics in any particular case where the state managed to exercise its Eleventh Amendment immunity by employing this removal scheme. In addition to the complications this creates for a particular litigant with respect to whom the state engendered expectations of amenability to suit by passing a statute waiving immunity, this scheme creates an accountability problem. The roles played by the state legislature and executive might be insufficiently transparent to permit voters to perceive whom to hold responsible for the evaporating waiver of immunity.

[162] *See, e.g.*, Estate of Porter v. Illinois, 36 F.3d 684, 691 (7th Cir. 1994) (remanding, rather than dismissing, a claim removed to federal court and subsequently barred by the Eleventh Amendment); Silver v. Baggiano, 804 F.2d 1211, 1219 (11th Cir. 1986) (vacating and remanding a claim removed to federal court); Gwinn Area Cmty. Sch. v. Michigan, 741 F.2d 840, 847 (6th Cir. 1984) (directing the district court to remand claims to state courts).

[163] RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 138–39 (Supp. 1999) (noting that if an Eleventh Amendment defense goes to subject matter jurisdiction, "remand would seem not only appropriate but mandatory. But if not, . . . dismissal [might be] the correct remedy, just as in the case of any other successful non-jurisdictional defense"). For more on the "nature" of the sovereign immunity defense see *infra* Part IV.A.

[164] *See, e.g.*, Higgins v. Mississippi, 217 F.3d 951, 953 (7th Cir. 2000) (suggesting that Eleventh Amendment immunity might be deemed jurisdictional in diversity cases, but an affirmative defense in others); ITSI TV Prod., Inc. v. Agric. Assocs., 3 F.3d 1289, 1291 (9th Cir. 1993) ("Eleventh Amendment immunity thus does not implicate a federal court's subject matter jurisdiction in any ordinary sense. . . . Rather, we believe that Eleventh Amendment immunity, whatever its jurisdictional attributes, should be treated as an affirmative defense.").

mechanism for disposing of such cases.

In any event, and critically for purposes of this article, even if the Supreme Court determined that removal to federal court does trigger a waiver of immunity,[165] under *Ford Motor Company* the effectiveness of such a rule would ultimately turn on state and not federal law. State authorization would be necessary for removal to be accompanied by a waiver of immunity. As mentioned above, some federal courts that have determined that removal should trigger waiver have also inquired—in accordance with the *Ford* rule—whether the official who engineered the removal was empowered to waive immunity.[166] Thus, the right combination of rules would permit states to evade the consequences of state court waivers of immunity in every case.[167]

Both of these applications of the *Ford* rule leave private litigants at a serious disadvantage when trying to sue states. In the first scenario, a litigant might expend a great deal of resources in making her case against a sovereign defendant, only to have the rug pulled out from under her as a consequence of her success. In the second example, the removal power permits states to upset the expectations of litigants engendered by the passage of legislation exposing the state to suit. Critically, in the first scenario, the federal courts serve as mere tools of state will—their judgments are binding only if states approve.

B. *Criticisms of the* Ford *Rule*

One federal court, when called upon to adjudicate a sovereign immunity defense, noted that "[t]he Eleventh Amendment is not designed to give procedural advantage to state litigants, but to shield states from unconsented actions against them."[168] The cases discussed in Part III.A demonstrate that states *have* been able to squeeze procedural advantages out of the Eleventh Amendment. By "us[ing] the Eleventh Amendment as a tool of strategic litigation" in the ways described above, states have been able (unlike any other litigant) to proceed in the federal courts without risk.[169] Criticism of the rules that permit such opportunistic behavior appeared in a study conducted by the American Law Institute during the late 1960s[170] and, more pointedly, in a concurring opinion authored by Justice Kennedy thirty years later in *Wisconsin Department of Corrections v. Schacht*.[171] I will consider these critiques in turn.

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[165] The Supreme Court will decide this question this Term. *See supra* note 134.

[166] *See supra* note 137 (examples of courts using this approach).

[167] *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 92–93 (Supp. 1998) (explaining that "if dismissal is the appropriate remedy, any effort to sue a state on a federal claim in a state court will inevitably fail").

[168] *In re* Regents of the Univ. of Cal., 964 F.2d 1128, 1134 (Fed. Cir. 1992).

[169] Lawner, *supra* note 150, at 1262.

[170] AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969) [hereinafter ALI STUDY].

[171] 524 U.S. 381, 393–98 (1998).

1. *The ALI Study*

In 1969, the American Law Institute published its *Study of the Division of Jurisdiction Between State and Federal Courts*. In a section entitled "Raising and Foreclosure of Jurisdictional Issues," the Study proposed a rule that might reduce manipulation of the federal courts, including (potentially) strategic use of Eleventh Amendment immunity. That rule states:

> After the commencement of trial on the merits in the district court, or following any prior decision of a district court that is dispositive of the merits, no court of the United States shall consider, either on its own motion or at the insistence of any party, a question of jurisdiction over the subject matter of the case . . . .[172]

This proposal is a general one. It applies to delayed presentation of any objection to a federal court's subject matter jurisdiction, not merely to deferred assertions of a sovereign immunity defense. In fact, applied in the Eleventh Amendment context, the rule is in unmistakable tension with the *Ford* decision. If enforced, it would strip a state of its immunity if it litigated a case on the merits in federal court—the very outcome explicitly deemed unacceptable by the *Ford* Court.[173]

The Study took up the argument, unenthusiastically relied upon in *Ford* itself,[174] that prohibiting late-stage assertion of an Eleventh Amendment claim runs afoul of Article III of the Constitution insofar as such a rule would permit federal courts to hear cases that are, as a technical matter, beyond their subject matter jurisdiction.[175] The authors of the Study acknowledged that if parties could not bring defects in subject matter jurisdiction to the courts' attention once trial has begun, the federal

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[172] ALI STUDY, *supra* note 170, § 1386(a).

[173] Perhaps with an eye to avoiding this tension with Supreme Court precedent and, potentially, with Article III of the Constitution, the Study established exceptions to the proposed rule, including one for circumstances in which "[c]onsideration of a jurisdictional defect at [a late] stage of the proceedings is required by the Constitution." ALI STUDY, *supra* note 170, § 1386(a)(5). The other exceptions to the rule on foreclosure of jurisdictional issues in the ALI Study are geared primarily toward permitting litigants to raise jurisdictional challenges that could not have been raised earlier due to lack of information and toward giving the federal courts the flexibility to defer consideration of jurisdictional questions when appropriate. *See id.* § 1386(1)–(4). If the *Ford* rule is, in fact, necessary to preserve the voluntariness of waivers of sovereign immunity, then it might be constitutionally compelled within the meaning of this exception and sovereign immunity cases would fall outside the ambit of the rule proposed by the ALI Study. *See infra* Parts IV.B & C.

[174] *See supra* text accompanying note 128.

[175] Indeed, the Supreme Court has explained that "no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant . . . and a party does not waive the [subject matter jurisdiction] requirement by failing to challenge jurisdiction early in the proceedings." Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

courts might be compelled to adjudicate claims beyond their constitutional reach.[176] The authors emphasized, however, that "[i]t is necessary and proper to the exercise of Article III power that procedures be devised to require issues of jurisdiction to be timely raised, and to prevent their use to take unfair advantage of opposing parties or to impede the administration of justice."[177]

In the commentary accompanying its formal recommendations, the ALI justified its proposal in language that calls to mind the tactics employed by states in the Eleventh Amendment cases considered in the previous section. The Study explained that "a wily defendant may conceal a known jurisdictional defect . . . , then obtain dismissal, and achieve total immunity from suit."[178] "[T]he party who has invoked jurisdiction may subsequently challenge it if the result of a trial on the merits is unfavorable. . . . [T]his fetish of federal jurisdiction is wholly inconsistent with sound judicial administration"[179] and, the report would later note, "unfair."[180] These concerns are equally implicated when state sovereign immunity provides the basis for the jurisdictional challenge.

2. *Justice Kennedy's Approach*

In *Wisconsin Department of Corrections v. Schacht*,[181] the Supreme Court faced the question of whether the presence of a claim that is barred by the Eleventh Amendment in an otherwise removable case destroys removal jurisdiction over the entire suit.[182] The Court held that, under such circumstances, a federal court need not remand the entire case, and it may exercise jurisdiction over the non-barred claims.[183] Justice Kennedy, meanwhile, authored a concurring opinion in which he noted that the Court had "neither reached nor considered the argument that, by giving its express consent to removal of the case from state court, Wisconsin waived its Eleventh Amendment immunity."[184] Justice Kennedy proceeded to make the case that removal should trigger waiver.[185] He presented two arguments, one rooted in precedent, the

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[176] *See* ALI STUDY, *supra* note 170, at 368.

[177] *Id.*

[178] *Id.* at 366.

[179] *Id.* at 366; *see also id.* at 367 (noting that the proposed rule would "provide every incentive to both sides to seek resolution of the issue of subject-matter jurisdiction prior to the commencement of trial").

[180] *Id.* at 368.

[181] 524 U.S. 381 (1998).

[182] *Schacht*, 524 U.S. at 383. The fact scenario at play in *Schacht* is less likely to arise in the post-*Alden* era. After *Alden*, a state could, in most cases, as easily assert Eleventh Amendment immunity in state court as in federal court.

[183] *Id.* at 392–93.

[184] *Id.* at 393 (Kennedy, J., concurring).

[185] For reasons discussed above, Justice Kennedy's opinion had much more bite before *Alden v. Maine* was decided. *See supra* note 161.

other in considerations of fairness.

First, Justice Kennedy called to mind the distinction drawn in *Clark* between the state as an active or passive litigant. "By electing to remove, the State *created* the difficult problem confronted in the Court of Appeals and now here. This is the situation in which law usually says a party must accept the consequences of its own acts."[186] As indicated in Part II.B.1, when a state stops behaving as a "mere defendant," there are, ordinarily, Eleventh Amendment ramifications.[187] Justice Kennedy used the rhetoric of voluntariness to emphasize this point:

> Since a State which is made a defendant to a state court action is under no compulsion to appear in federal court and, like any other defendant, has the unilateral right to block removal of the case, any appearance the State makes in federal court may well be regarded as *voluntary* in the same manner as the appearances which gave rise to the waivers in *Clark* and *Gardner*.[188]

From this perspective, Justice Kennedy explained, the voluntariness principle (as expounded in the Supreme Court's waiver-in-litigation precedents) does not compel upholding the State's claim to immunity. In Justice Kennedy's view, the Court could infer waiver from the State's decision to remove, and it could do so without infringing upon that State's power to choose.

Justice Kennedy then noted:

> In permitting the belated assertion of the Eleventh Amendment bar, we allow States to proceed to judgment without facing any real risk of adverse consequences. Should the State prevail, the plaintiff would be bound by principles of res judicata. If the State were to lose, however, it could void the entire judgment simply by asserting its immunity on appeal.[189]

Justice Kennedy expressed "doubts about the propriety of this rule," and advocated "modif[ication] of our Eleventh Amendment jurisprudence" so as to "eliminate the unfairness" it permits.[190]

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The next section of this article will consider how the modifications encouraged by Justice Kennedy might be established, and it will argue that *Ford Motor Company* is out-of-step with constructive waiver jurisprudence generally and the waiver-in-

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[186] *Id.* (emphasis added).

[187] *See supra* text accompanying note 91.

[188] *Schacht*, 524 U.S. at 395–96 (Kennedy, J., concurring) (emphasis added).

[189] *Id.* at 394.

[190] *Id.* at 394–95 (noting that with such modifications "States would be prevented from gaining an unfair advantage").

litigation cases in particular.[191] My primary focus will be the rule that permits states to raise an Eleventh Amendment defense for the first time on appeal and the related rule that the question of what conduct triggers a waiver of immunity is ultimately one of state law. I will argue that the act of litigating a case on the merits in federal court should trigger a waiver of state sovereign immunity. This argument will not be qualified, as the ALI proposal is, with exceptions for cases of tension with the Constitution. Instead, I contend that this rule does no violence to the voluntariness principle and that it is within the constitutional limitations identified in the Supreme Court's waiver jurisprudence stretching all the way from *Clark* to *College Savings*.

IV. ESTABLISHING FEDERAL RULES—CONDITIONING STATES' USE OF THE FEDERAL COURTS ON PARTIAL WAIVER OF SOVEREIGN IMMUNITY

States may be required to waive their sovereign immunity as a condition of litigating on the merits in federal court without offending the Eleventh Amendment. The holding of *Ford Motor Company*—which allows the state to raise an Eleventh Amendment claim for the first time on appeal—cannot be reconciled with the body of waiver jurisprudence as a whole.[192] This part of the article offers a defense for this claim, and it urges that a rule implying waiver of immunity from failure to raise an Eleventh Amendment claim at the trial level would produce greater doctrinal consistency in the Court's waiver-in-litigation jurisprudence.

First, this section will assess the Court's unwillingness to institute a constructive waiver rule in *Ford Motor Company*. The Court's initial justification for its conclusion—the notion that Eleventh Amendment immunity is inherently jurisdictional—cannot withstand even minimal scrutiny. Next, and crucially, this section will turn to the voluntariness principle and show that it poses no obstacle to conditioning access to the federal courts on waiver of immunity. Though important additional complications exist, satisfying the voluntariness requirement is essential, for it represents the primary constitutional constraint on waiver. This section will conclude by addressing the second justification offered in *Ford Motor Company*, which is also grounded in a version of the voluntariness principle: the notion that state law must determine who is empowered to waive immunity. I will demonstrate that a rule conditioning federal court access on waiver may coexist with state control over official authority to waive Eleventh Amendment rights.

A. *The* Ford *Court's Explanation*

The *Ford* Court justified its holding, first, by appealing to Article III and to the "nature" of Eleventh Amendment immunity. Justice Reed explained that the Eleventh

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[191] Justice Kennedy noted that *Ford* "is not an insuperable obstacle" to such changes in waiver doctrine. *Id.* at 397.

[192] Ford Motor Co. v. Dep't of Treasury of Ind., 323 U.S. 459, 466 (1945).

Amendment bar is inherently jurisdictional,[193] and therefore, like other claims going to the subject matter jurisdiction of the federal courts, it may be raised at any time during the proceedings.[194] The Court cited no authority for this proposition and failed to account for the characteristics of Eleventh Amendment immunity that distinguish it from conventional issues of subject matter jurisdiction. For example, in *Patsy v. Board of Regents of the State of Florida*,[195] the Supreme Court held that Eleventh Amendment claims, unlike claims that go directly to the federal courts' subject matter jurisdiction, need not be raised by the federal courts sua sponte.[196] And it is well-established that, in contrast to other purely jurisdictional claims, sovereign immunity is waivable.[197] These traits of Eleventh Amendment immunity suggest strongly that it does not fit neatly into the subject matter jurisdiction category, thereby calling into doubt Justice Reed's line of argument in *Ford*. Notwithstanding the flimsiness of its roots, the authority of the *Ford* Court's holding on this point was confirmed by the Supreme Court decades later in *Edelman v. Jordan*:

> Respondent urges that since the various Illinois officials sued in the District Court failed to raise the Eleventh Amendment as a defense to the relief sought by respondent, petitioner is therefore barred from raising the Eleventh Amendment defense in the Court of Appeals or in this Court. . . . [I]t 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 . . . .[198]

The shakiness of the foundation on which the *Edelman* holding rests has not escaped the notice of the federal courts. In *Hill v. Blind Industries and Services of Maryland*,[199] the Ninth Circuit explained:

> Notwithstanding the assertion that th[is] rule was "well settled," *Edelman* did not cite (and we have not found) any Supreme Court decision during the 29-year interval between *Ford Motor* and *Edelman* in which the Court stated that an Eleventh Amendment defense need not be raised in the trial court.[200]

The panel went on to question the notion that the Eleventh Amendment "sufficiently partakes of the nature of a jurisdictional bar," such that it may be raised at any time

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[193] *Id.* at 467 ("The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power.").

[194] *Id.*

[195] 457 U.S. 496 (1982).

[196] *Id.* at 515 n.19.

[197] *See* Clark v. Barnard, 108 U.S. 436, 447 (1883) (indicating that "[t]he immunity from suit belonging to a state . . . is a personal privilege which it may waive at pleasure").

[198] Edelman v. Jordan, 415 U.S. 651, 677–78 (1974).

[199] 179 F.3d 754 (9th Cir. 1999).

[200] *Id.* at 762.

during the proceedings.[201] This reasoning, the court explained, "might be considered the judicial equivalent of being 'almost pregnant.' Either the Eleventh Amendment limits the court's subject matter jurisdiction, in which case it can never be waived, or else it is not a jurisdictional bar."[202]

Though the Ninth Circuit's approach is excessively formalistic (i.e., there is no reason sovereign immunity *could* not be classified as some combination of jurisdictional bar and affirmative defense[203]—though perhaps it *should* not be), it shows that the *Ford* and *Edelman* Courts' unqualified reliance on the jurisdictional nature of the sovereign immunity defense is inadequate. As the Supreme Court explained, "[w]hile the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power . . . we have recognized that it is not coextensive with the limitations on judicial power in Article III."[204] And numerous other federal courts have acknowledged that Eleventh Amendment immunity defies strict classification as "jurisdictional" in nature.[205] To the extent that the *Ford* Court's justification for permitting delayed presentation of the immunity defense rests on an assertion about the intrinsic "nature" of Eleventh Amendment immunity, the justification fails to persuade. The Amendment's nature is deeply ambiguous.

B. *The Voluntariness Principle and* Ford Motor Company

Though the first justification offered by the *Ford* Court for its holding is lacking, it would be a mistake to jump to the conclusion that a rule conditioning states' right to litigate on the merits in federal court on waiver of sovereign immunity is unproblematic. It remains necessary to consider whether such a rule is in tension with the voluntariness principle. I begin this analysis by returning to the Supreme Court's most recent extended discussion of constructive waiver.

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[206] a bare majority of the Court defined as "coercive" circumstances in which a State's refusal to waive its immunity prompts its exclusion from "otherwise lawful activity."[207] Under such conditions, Justice Scalia explained, "the point of coercion is automatically passed—and the voluntariness of waiver [is] destroyed."[208] This understanding of voluntariness casts doubt upon rules that attach conditions to use of the federal courts. It is undoubtedly lawful for a State to defend itself against suits in

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[201] *Id.* (quoting *Edelman*, 415 U.S. at 678).

[202] *Id.*

[203] *See* Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring) (taking note of the "hybrid nature of the jurisdictional bar erected by the Eleventh Amendment").

[204] Calderon v. Ashmus, 523 U.S. 740, 745 n.2 (1998).

[205] *See, e.g.*, Higgins v. Mississippi, 217 F.3d 951, 953 (7th Cir. 2000); ITSI T.V. Prod. v. Agric. Ass'ns, 3 F.3d 1289, 1291 (9th Cir. 1993).

[206] 527 U.S. 666 (1999).

[207] *Id.* at 687.

[208] *Id.*

federal court. So, to the extent that a rule conditioning the right to litigate on the merits in federal court on waiver of immunity obstructs states' participation in otherwise lawful activity, it seems to be inconsistent with Justice Scalia's instruction in *College Savings*.[209]

There is compelling evidence, however, that this language from *College Savings* should not be taken too literally—it is not the stuff of a strict doctrinal test. The *College Savings* majority expressly recognized two exceptions to the "otherwise lawful activity" rule: Congress is permitted to condition both the grant of federal funds and its consent to an interstate compact on states' willingness to waive immunity.[210] In both of these scenarios, states are excluded from what would otherwise be lawful conduct if they refuse to forego their immunity from certain suits. Nevertheless, such conditions are permissible because the right to engage in these activities is bestowed as a "gift" or "gratuity" by the federal government.[211] The withholding of "gifts or gratuities" from the states, in the *College Savings* Court's view, is not the kind of threatened sanction that destroys the voluntariness of a waiver. When gifts or gratuities are withheld, it seems, the states do not really "lose anything" significant. In contrast, the loss associated with exclusion from regulated activity was deemed too great for the states to bear. Accordingly, *Parden*-style waivers were held invalid.[212]

From this perspective, Justice Scalia's admonition with respect to otherwise lawful activity does not seem, of its own force, to identify a clear line between voluntary and involuntary waiver. Rather, it directs the federal courts to assess carefully the sanction imposed upon states for their refusal to waive immunity. The appropriate question, then, is not whether the act of litigating on the merits in federal court is "otherwise lawful." Like participation in federally regulated activity, entry into interstate compacts, or acceptance of federal funds, it surely is. Instead, the critical inquiry seems to be whether excluding states from the practice in question exacts too high a cost.

The inquiry into cost is, at bottom, a normative one. Assessments of how high is too high will inevitably be colored by differing perceptions of the value of state sovereign immunity and of the benefits accrued by exacting waivers. Whether one deems voluntary constructive waivers of the sort at issue in *Ford Motor Company* will depend largely on one's assessment of the costs to states of their partial exclusion from the federal courts and of the costs to private litigants and the federal courts of permitting states to use sovereign immunity to their advantage in the ways described in Part III.A.

The Supreme Court has not left us entirely without direction in assessing these

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[209] The Eleventh Circuit acknowledged, without embracing, this line of argument in *Lapides v. Board of Regents of the University of Georgia*, 251 F.3d 1372, 1378 n.5 (11th Cir. 2001).

[210] *See supra* text accompanying notes 31–37.

[211] *Coll. Sav. Bank*, 527 U.S. at 686–87.

[212] *See supra* text accompanying notes 25–30.

costs. The cases outlined in Part II.B provide insight into how the Supreme Court has traditionally valued states' right of access to the federal courts. Waiver-in-litigation jurisprudence indicates that it is not at all uncommon for states' uses of standard litigation practices to be conditioned on waiver of Eleventh Amendment protection. Consider the following: *Clark* sets limits on a state's right to intervene as a claimant to a fund in controversy before a federal court;[213] *Gardner* attaches conditions to states' decisions to file proofs of claim in bankruptcy court and to press their rights to part of a bankrupt estate;[214] cases such as *Creative Goldsmiths* assign costs to states' filing suits as plaintiffs.[215] In all of these scenarios, exclusion from the federal courts is the price of retaining immunity, yet the cost has not been deemed impermissibly high.[216]

Is there a reason to treat the proposed rule—conditioning the right to litigate on the merits on waiver of immunity—differently from these other waiver-in-litigation cases? Do the bankruptcy and counterclaim cases differ in some significant way from cases involving state defendants?

One might contend that these other waiver-in-litigation cases do not actually involve waivers of immunity at all, while a rule that conditions litigating on the merits on amenability to suit would entail genuine waivers.[217] This contention rests on the notion that states are exposed to damages liability in the latter context but not the former. The possibility of affirmative relief against a state does not exist in the *Clark*, *Gardner*, or *Creative Goldsmiths* scenarios. A state does not expose its treasury to potential losses by laying claim to a fund as an intervenor, and the federal courts have been careful to confine the implied waivers in the bankruptcy and counterclaim cases to claims for recoupment.[218] Unlike a traditional counterclaim, "recoupment only

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[213] Clark v. Barnard, 108 U.S. 436, 447–48 (1883).

[214] Gardner v. New Jersey, 329 U.S. 565, 573–74 (1947).

[215] Schlossberg v. Maryland (*In re* Creative Goldsmiths of Washington D.C., Inc.), 119 F.3d 1140, 1148 (4th Cir. 1997).

[216] Though, on the surface, these cases do not seem to present conditional benefits questions, on closer analysis it is easy to conceptualize them as such. States wishing to lay claim to the estate of a bankrupt party are faced with a choice. They can forego their claim to the funds they wish to recover and retain their immunity from suit, or they can file a proof of claim in federal bankruptcy court and expose themselves to counterclaims up to the amount they affirmatively seek to recover. Similarly, states wishing to intervene and lay claim to a fund in controversy do so on condition of waiver. The conditional nature of these activities becomes apparent when one considers the impossibility (after cases such as *Clark* and *Gardner*) of a state intervening or filing a proof of claim *without* waiving immunity.

[217] *Cf.* Arecibo Comm. Health Care, Inc., v. Puerto Rico, 270 F.3d 17, 25 n.11 (1st Cir. 2001) ("Indeed, the court in *College Savings* could have limited the import of *Gardner* by characterizing it as a decision that does not implicate the Eleventh Amendment at all.").

[218] *See, e.g.*, United States v. Kennedy (*In re* Greenstreet, Inc.), 209 F.2d 660, 663 (7th Cir. 1954) ("[A] party sued by the United States may recoup damages arising out of the same transaction . . . so as to reduce or defeat the government's claim."); *In re* Monongahela Rye Liquors, 141 F.2d 864, 869 (3rd Cir. 1944) ("A defendant's right . . . is one of recoupment [which]

reduces [a] plaintiff's claim; it does not allow recovery of affirmative money judgment for any excess over that claim."[219] From this perspective, the counterclaims to which a state exposes itself as a plaintiff or by filing a proof of claim might be conceived of as "defenses" to the state's claim rather than affirmative suits which raise Eleventh Amendment problems. In contrast, permitting a suit to go forward against a state-defendant necessitates a true surrender of immunity insofar as state funds are put at risk in a way that they are not in the other waiver-in-litigation cases. And, the Supreme Court cases repeatedly emphasize that the federal courts should exercise caution when implying waiver under circumstances that might expose states to damages liability, so perhaps implied waiver would be inappropriate here.[220]

This argument, however, proves to be rooted entirely in formalism and misses the more important points of similarity between different varieties of waiver-in-litigation. For starters, the federal courts have not characterized the counterclaims permitted in the bankruptcy cases as "defenses" against sovereign plaintiffs. The courts have not shied away from the fact that these decisions authorize actual waivers of immunity.[221] Thus, the notion that these waiver-in-litigation scenarios do not involve "true" waivers of immunity is not supported by the language of the cases themselves. The proper question to ask when determining whether there has been a waiver of immunity is whether a state is susceptible to a suit that it otherwise would not be. Whether the otherwise-barred suit can be recast as a "defense" is beside the point.

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is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded.") (internal quotation marks and citations omitted).

[219] BLACK'S LAW DICTIONARY 1275 (6th ed. 1990).

[220] For example, in *Edelman v. Jordan*, 415 U.S. 651, 665 (1974), the Court stated:

> It is one thing to tell [a state official] that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs he administers. It is quite another thing to order the [state official] to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment.

Id. (quoting Rothstein v. Wyman, 467 F.2d 226, 236–37 (2d Cir. 1972) (internal quotation marks omitted)). *But see id.* at 668 (noting that "an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*"—suits seeking injunctions against state officials may go forward without violating the Eleventh Amendment).

[221] *See, e.g.*, *Creative Goldsmiths*, 119 F.3d at 1147 (discussing in the bankruptcy context "whether a state has *waived its Eleventh Amendment immunity*") (emphasis added); Fed. Sav. & Loan Ins. Corp. v. Quinn, 419 F.2d 1014, 1017 (7th Cir. 1969) ("[T]he *waiver of immunity* is limited to matters in recoupment . . . .") (emphasis added); Frederick v. United States, 386 F.2d 481, 488 (5th Cir. 1967) (inquiring, in the context of a counterclaim against the United States, whether "when the sovereign sues *it waives immunity* as to claims of the defendant which assert matters in recoupment") (emphasis added); United States v. Kallen (*In re* Oxford Mktg., Ltd.), 444 F. Supp. 399, 403 (N.D. Ill. 1978) ("Courts have applied a parallel analysis to determine the scope of the Government's *waiver of sovereign immunity* when its complaint is answered with a counterclaim.") (emphasis added). *But see* United States v. Iron Mountain Mines, Inc., 952 F. Supp. 673, 676 (E.D. Cal. 1996) (stating that "[a] claim in recoupment is traditionally described as purely a defensive claim").

Moreover, as a functional matter, while it is reasonable to proceed with caution when making state funds susceptible to collection, the effort to distinguish these cases on such terms does not hold up. When a state files suit as a plaintiff, the proceeds from a successful suit enrich the state treasury but for any counterclaims made possible by the implied waiver of immunity. Therefore, the potential for private litigants to diminish the amount of funds in the state treasury is present in the counterclaim context just as it is when a state is made a defendant. The only difference is that, in the counterclaim case, the funds are not formally transferred to the state before the opposing party is permitted to collect.[222]

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[222] The argument could be made that the formal act of transferring funds to the state treasury is of dispositive significance in the sovereign immunity context and that counterclaims are therefore meaningfully different from suits against state-defendants. In an article surveying the history of sovereign immunity, Professor Jaffe explored circumstances in which a similar distinction seemed to control. He took note of differences in the Supreme Court's disposition of suits against the government to recover private property that was wrongfully held by the government (claims sounding in tort) and suits seeking specific performance of contracts with the government. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 24 (1963). Jaffe explained that "[f]or the most part the Court will not entertain actions to compel the transfer of land which has come lawfully into the possession of the state or actions to enforce contracts." *Id.* The cases collected by Jaffe suggest that, in the contract scenario, permitting suit to go forward might require "delivery [of] property of the United States." *Id.* at 31. In contrast, a tort suit "would not expend itself on the public treasury or domain, or interfere with the public administration." *Id.* (quoting Land v. Dollar, 330 U.S. 731, 736–38 (1947) (internal quotation marks omitted)). Thus, the apparent distinction between contract and tort claims is that the former, but not the latter, might entail invasion of the state treasury. When states possess specifically identifiable properties or funds that were unlawfully obtained, they are not "a part of the state treasury" in the same way that lawfully obtained funds are.

This reasoning could also provide the basis for a rule permitting counterclaims against state plaintiffs to go forward but prohibiting suits against state defendants, even when the state chooses to litigate on the merits. Counterclaim suits permit the courts to assess whether the funds that the state wishes to absorb into the treasury might lawfully be transferred to the state as an original matter. Suits against state defendants, on the other hand, seek to extract funds that lawfully came into the state's possession.

Of course, the state treasury suffers a loss even when it returns property that it is holding unlawfully. That property might otherwise be dedicated to some public use or sold. Regardless of how it came to be in the government's possession, if property is to be returned to private hands, any governmental purpose it was to serve must either be abandoned or served, at some cost, by property from another source. Thus it is not the mere fact of "interfering with the public administration" that distinguishes these cases. Furthermore, the failure to perform contractual duties arguably transforms some fragment of the funds in the state treasury into unlawfully-held funds—compliance with the law would demand turning them over to the party seeking performance. So the tort-contract distinction, at least insofar as it rests on assertions about the lawful containment of funds in the state treasury or on the real costs to the sovereign of susceptibility to suit, proves to be a distinction without a difference.

In his dissenting opinion in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), Justice Frankfurter examined complications arising from the tort-contract distinction. He

Of course, in the sovereign immunity context, peculiar formalities are not at all unusual.[223] And, for this reason, the functional similarities between permissible counterclaims on the one hand, and waivers of immunity by state-defendants on the other, might be perceived as inadequate to justify any further incursion on the states' sovereign power.

It is especially important, therefore, that cases in which states decide to litigate on the merits share a vital characteristic with other waiver-in-litigation cases. In all of these circumstances, a state seeks to extract a benefit from the federal courts. It is true that when a state is made a defendant, it is involuntarily haled into court. In contrast, the state is a more active player when it intervenes or otherwise files in federal court when it need not. Still, when the sovereign immunity defense is available, *a state-defendant is under no obligation to proceed.* As Justice Kennedy stressed in his *Schacht* concurrence, a state that removes a case "is under no compulsion to appear in

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noted that "the right of control over property may depend on compliance with the terms of a contract." *Id.* at 727–28 (Frankfurter, J., dissenting). Therefore, determining whether a suit may go forward by asking who is the rightful owner of the contested property is question-begging. For the viability of a tort claim for wrongful withholding of property may very well turn on whether there has been a breach of contract. Justice Frankfurter went on to explain that the federal courts "had jurisdiction over [such] controvers[ies] because only after a consideration of the merits of [such a] claim could it be determined whether the decree would affect Government property." *Id.* at 728–29 (Frankfurter, J., dissenting). The same reasoning applies to a distinction between counterclaims and suits against state defendants. Whether the state treasury is *improperly* diminished can only be determined after consideration of the merits of a plaintiff's claim. Counterclaims do not represent any less of a threat to state funds than do affirmative suits.

Another way of conceptualizing this difficulty is to contend that just as there is a cap in play in the bankruptcy and counterclaim cases—limiting the scope of a claim against the state to the amount it seeks as a plaintiff or claimant—there should be a similar limitation placed on suits against state defendants, thus rendering the claim essentially one for a declaratory judgment by limiting the state's damage exposure to the amount it seeks to recover by defending on the merits (zero dollars). But this way of understanding the recoupment cap misses the mark. The best way to read these waiver-in-litigation cases is as establishing a rule pursuant to which invoking the jurisdiction of the federal courts triggers a waiver of immunity from suit. The cap contains the scope of the waiver so that it does not exceed an amount reasonably within the contemplation of the state when it files suit or files a claim. If limitless counterclaims were permitted, a state might reasonably argue that it did not *voluntarily* consent to have a court decide a claim against it for, say, $1 million by filing a suit to recover $50,000. In contrast, where a state decides to litigate on the merits as a defendant, it cannot claim ignorance of the potential scope of its exposure, for this amount will be clarified in the complaint. Thus, while the recoupment cap is necessary to preserve the voluntariness of the waivers in the bankruptcy and counterclaim cases, it is not needed for this purpose when a state is a defendant.

[223] *See, e.g.*, *Ex Parte* Young, 209 U.S. 123, 155–56 (1908) (acknowledging that, while the Eleventh Amendment prevents suits for injunctive relief directly against a state, "individuals, who, as officers of the State . . . threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action").

federal court."[224] His point is equally applicable to a state's decision to litigate a case on the merits, for a state, as a beneficiary of Eleventh Amendment protection, is likewise under no compulsion to proceed to judgment. It is useful to recall the language of *Gunter*: "[W]here a State . . . *submits its rights* for judicial determination, it will be bound thereby . . . ."[225]

A simple analogy should help to clarify this point. Imagine a boxing champion is challenged to a bout by a young upstart fighter. The champ is not required by any of the boxing authorities to meet this challenge; he is free to fight other challengers or not to fight at all.[226] Still, the public pressure to fight the spunky challenger is mounting, and the champ likes his chances. If the champ wins, then under the boxing authority's rules the challenger cannot return for a rematch, and other fighters will be deterred from fighting a champion with so strong a record. With these thoughts in mind, he chooses to fight but on one condition: He insists that if he is knocked out, he not be stripped of his title as champion and the loss not be counted on his professional record.

The inherent illegitimacy of this condition is readily apparent—the boxer may choose not to fight, but he may not escape the consequences of fighting once he enters the ring. By deciding to exchange blows with his opponent when he need not, the champ submits to the authority of the referee and the decision of the judges.

So too with sovereign immunity. A state that chooses not to assert its immunity is using the federal courts to "fight" when it need not. This is no less an invocation of federal jurisdiction than the decision to intervene or file a proof of claim. Justice Kennedy explained in *Schacht* that "like any other defendant, [the State] has the unilateral right to block removal of the case, [thus] any appearance the State makes in federal court may well be regarded as voluntary."[227] The same can be said when a state does not assert immunity. It has the unilateral right to prevent the suit from going forward, but chooses not to exercise that right. As the *Creative Goldsmiths* court emphasized, when a state "affirmatively enter[s] a federal forum voluntarily to pursue its own interest[,] it would violate the fundamental fairness of judicial process to allow a state to proceed in federal court [while retaining full Eleventh Amendment protection]."[228] Under such circumstances, states should be made to abide by the judgment of the court as all other parties must. A state that litigates a case on the merits in federal court instead of exercising its right unilaterally to terminate the

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[224] Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 395–96 (1998) (Kennedy, J., concurring).

[225] Gunter v. Atl. Coast Line R.R., 200 U.S. 273, 284 (1906) (emphasis added).

[226] In truth, boxing authorities often do require title-holders to fight certain contenders. To make this analogy tighter, however, presume that the fighter has as much leeway as states do in the federal courts context.

[227] *Schacht*, 524 U.S. at 396 (Kennedy, J., concurring).

[228] *In re* Creative Goldsmiths, 119 F.3d 1140, 1148 (4th Cir. 1997); *see also In re* Platter, 140 F.3d 676, 680 (7th Cir. 1998) ("The Eleventh Amendment does not prevent a state from entering a federal forum voluntarily to pursue its own interest. However, if a state embarks down this route, it cannot run back to seek Eleventh Amendment protection when it does not like the result.").

proceeding "submits its rights for judicial determination" within the meaning of *Gunter*.

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There is no principled basis on which to distinguish a rule implying waiver from states' failure to assert immunity from the well-established rules of constructive waiver that apply when states engage in other conduct as litigants. The next section delves deeper into the waiver-in-litigation exception to the *College Savings* rule. It explains why conditioning access to the federal courts on waiver of immunity has (implicitly) been deemed not to violate the voluntariness principle. This explanation brings together both the theoretical and the doctrinal justifications for overturning *Ford*.

C. *Why a Waiver-in-Litigation Exception?*

Two characteristics of the waiver-in-litigation cases distinguish them from cases such as *Parden* and *College Savings*, which involve waivers induced by attaching conditions to states' decisions to engage in primary conduct.[229] First, the litigation cases reflect a normative conclusion about the cost of exclusion from federal court. The decision to forego immunity from suit in order to gain a right of access to the federal courts (as a plaintiff, claimant, or otherwise) can be classified as voluntary only if one concedes that the cost of exclusion from the federal courts is not impossibly high. If the cost of exclusion were perceived as too high, then the choice to forego immunity would be no choice at all; rather, it would be the only possible response to the threatened sanction. Second, the waiver-in-litigation cases reveal the doctrinal significance of the close relationship between the right waived and the benefit conferred. The determination that waivers extracted through the litigation process are voluntarily offered rests, in part, on the congruity of permitting states to submit to federal jurisdiction on the condition that they relinquish their power to revoke this submission.[230] A doctrinal foundation for this analysis can be found in the

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[229] The exceptions noted in *College Savings* also involve primary conduct, but the very factors that distinguish waiver-in-litigation from *Parden*-style constructive waivers also differentiate Spending Clause or Compact Clause waivers from the *Parden* scenario.

[230] *See Creative Goldsmiths*, 119 F.3d at 1148 ("When a state authorizes its officials voluntarily to invoke federal process in a federal forum, the State thereby consents to the federal forum's rules of procedure."). The significance of either of the factors discussed above will vary from case to case. For example, in the bankruptcy cases, the costs of refusal to waive immunity are comparatively high given that the federal courts have exclusive jurisdiction over such matters. Thus the latter justification presented above—which focuses on a kind of symmetry inherent in establishing exposure to suit as the cost of suing someone else—must do the heavy lifting. In this respect, the *Gardner* Court's suggestion that, because a bankrupt estate is a kind of limited fund, staking a claim to that fund should trigger waiver, is significant. This justification is predicated on

case that serves as the basis for the Spending Clause exception identified by the *College Savings* majority, *South Dakota v. Dole*.[231] It is to this case that I now turn my attention.[232]

1. *Non-Coercion*

a. *A Substantive Analysis*

The *Dole* Court considered whether Congress could condition a state's receipt of federal highway funds on its establishment of a minimum drinking age.[233] Writing for the majority, Chief Justice Rehnquist explained that "[t]he offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans . . . is not unusual."[234] The Court noted, however, that "in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[235] The federal government could not offer the states a benefit that they "could not refuse" on the condition that they legislate in a certain way or waive a certain right. Such a conditional offer would strip the states of voluntary choice.

On the facts of *Dole*, however, the Court ruled that "the argument as to coercion is shown to be more rhetoric than fact."[236] Because "Congress . . . offered relatively

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the notion that there is a set of standard rules that apply within the courtroom and that such rules should apply uniformly.

[231] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999) (citing South Dakota v. Dole, 483 U.S. 203, 212 (1987)).

[232] The continued vitality of the *Dole* holding is in doubt. One might infer from the Rehnquist Court's recent federalism decisions, *see, e.g.*, Alden v. Maine, 527 U.S. 706 (1999); Printz v. United States, 521 U.S. 898, 933 (1997) (holding unconstitutional a law requiring state law enforcement officers to perform background checks on gun purchasers); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (discussed *supra* notes 1–3 and accompanying text); New York v. United States, 505 U.S. 144, 149 (1992) (invalidating a provision of the Low-Level Radioactive Waste Policy Act Amendments due to its unconstitutional commandeering of state legislatures), that if *Dole* appeared before the Court today, the outcome would be different. *See* Meltzer, *supra* note 149, at 1373 (noting that the "themes in Justice O'Connor's dissent in *Dole* resonate with those of more recent majority opinions on federalism issues, and many have suggested, or hoped, that *Dole* will be limited by a subsequent Supreme Court decision"). Then again, as the *College Savings* decision made clear, *Dole* is still binding precedent. This article focuses on the arguments in *Dole* only to underscore the contention that, as a normative matter, it is reasonable to perceive a state's decision to litigate on the merits in federal court as a voluntary waiver of immunity. I do not mean to imply that *Dole* is a perfectly stable precedent.

[233] *Dole*, 483 U.S. at 205.

[234] *Id.* at 210 (quoting Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127, 143–44 (1947) (internal quotation marks omitted)).

[235] *Id.* at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

[236] *Id.*

mild encouragement to the States to enact higher minimum drinking ages than they would otherwise [have chosen,] . . . the enactment of such laws remain[ed] the prerogative of the States not merely in theory but in fact."[237] The Court found that the ultimate decision whether to accept federal funds was truly South Dakota's to make, and thus the Court upheld the conditional grant in *Dole*.[238]

Critically, the *Dole* Court assessed the voluntariness of state conduct by examining the substance of the exchange between the states and the federal government. Underlying the Court's finding of non-coercion was the sense that withholding the "gift" of federal funds[239] was not too harsh a sanction to impose on states that were unwilling to legislate in accordance with federal directives.

And, indeed, this sort of subjective, normative analysis of costs has been employed by the federal courts in their efforts to determine whether federal statutes that establish waiver of immunity as a precondition to a grant of federal funds are unconstitutionally coercive. For example, in *Jim C. v. United States*,[240] the Eighth Circuit, sitting en banc, held that the requirement that states waive immunity from suit under section 504 of the Rehabilitation Act as a condition of receiving federal financial assistance under the Act was not unduly coercive.[241] In reaching this conclusion, the court explained:

> [T]he Arkansas Department of Education can avoid the requirements of Section 504 simply by declining federal education funds. The sacrifice of all federal education funds, approximately $250 million or 12 per cent of the annual state education budget . . . would be politically painful, but we cannot say that it compels Arkansas's choice. The choice is up to the State: either give up federal aid to education, or agree that the Department of Education can be sued under Section 504. We think the Spending Clause allows Congress to present States with this sort of choice.[242]

A group of dissenting judges rested its argument, in large part, on a different assessment of the gravity of the costs of refusal to waive immunity:

> In sum, the proportion of federal funds for education in Arkansas here placed at risk by the federal scheme (100%), the amount of those funds (some $250,000,000), and the difficulty of making up for the loss of those funds if the State elects not to waive its Eleventh Amendment immunity with respect to Rehabilitation Act claims all lead

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[237] *Id.* at 211–12. Only five percent of state highway funds were at stake in *Dole*. *Id.* at 211.

[238] *Id.* at 211–12. A similar analysis is applicable to the second exception carved out in *College Savings*. The permissibility of conditioning federal consent to an interstate compact on a waiver of immunity rests on the premise that it is not unduly coercive to put this choice to the states. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999).

[239] *Coll. Sav. Bank*, 527 U.S. at 687.

[240] 235 F.3d 1079 (8th Cir. 2000) (en banc).

[241] *Id.* at 1082.

[242] *Id.* (citation omitted).

> to the conclusion that pressure has turned into compulsion and that the waiver given by the State is therefore unenforceable.[243]

This decision lays bare the kind of balancing that underlies the federal courts' inquiries into what counts as coercion.

Cases in the *Clark-Gunter-Gardner* line reflect the same kind of assessment, though these cases involve conditional benefits in the litigation context. They indicate that conditioning access to the federal courts on waiver of immunity does not exact too high a cost, and therefore the sanction of limited exclusion from the federal courts is not inherently coercive. These cases teach that the decision to waive immunity under these circumstances "remains the prerogative of the states not merely in theory but in fact,"[244] and so the voluntariness of the state's decision is undisturbed.

Critically, in the specific context of a constructive waiver rule which would condition the right to litigate on the merits on waiver of immunity, the costs of retaining immunity are actually *lower* than the costs of doing so in these other waiver-in-litigation cases. For example, a state that does not wish to surrender its immunity from suits for recoupment may not file a proof of claim in bankruptcy court. The cost of retaining Eleventh Amendment protection under these circumstances may include loss of the opportunity to recover debts from a private party. In the *Ford* setting, however, a state wishing to retain its immunity from suit sacrifices only the opportunity to generate state-friendly precedent in the federal courts and the political benefits that might accompany offering a substantive defense for the conduct that led to the filing of the lawsuit.[245] The economic costs associated with foregoing affirmative claims are not present in the *Ford* scenario. Thus, there is strong evidence that conditioning the right to litigate on the merits in federal court on waiver of immunity does not, in constitutional terms, impose too strict of a sanction on states.

b. *Unconstitutional Conditions?*

Notwithstanding the clear indicia from the case law that waivers extracted through the litigation process are not coercive, the doctrine of unconstitutional conditions provides the basis for a challenge to this conclusion. This doctrine holds that "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold the benefit

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[243] *Id.* at 1083 (Bowman, J., joined by Beam, Loken, and Bye, J.J., dissenting).

[244] South Dakota v. Dole, 483 U.S. 203, 211–12 (1987).

[245] Public pressure might compel states to pass statutes waiving immunity in the first place. The public—instilled with a sense that the state, like other parties, should be compelled to comply with the law and should pay the costs that ordinarily attach to its violation—might prefer to see the state defend itself on the merits rather than hide behind the Eleventh Amendment. State officials who fail to direct state waiver policy in accordance with public demands for state accountability run the risk of losing office.

altogether."[246] The usual justification for the doctrine is that it limits governmental power to elicit waivers of constitutional rights under conditions inconsistent with voluntary choice.[247] Applying the unconstitutional conditions framework to a rule conditioning federal court access on waiver of immunity raises the following question: Even if Congress may withhold the benefit of using the federal courts from states altogether, may it offer federal court access to states on the condition that they waive their constitutionally guaranteed immunity from suit?

First, the threshold question must be resolved—may states be denied access to the federal courts altogether? The answer is yes. States have no right to litigate in federal court. This follows from the fact that the Constitution does not require the creation of lower federal courts.[248] Article III, Section I of the Constitution states that "[t]he judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress *may* from time to time ordain and establish."[249] This permissive language reflects a tradeoff between those who felt there should be no federal courts other than the Supreme Court and those who felt the Constitution should require the creation of lower federal courts.[250] By leaving the creation of inferior federal courts to Congress's discretion, the framers tabled resolution of this difficult question. Though there has been significant debate over Congress's power to exercise its constitutional authority to create federal courts and then limit their jurisdiction,[251] these debates proceed from the common assumption that the constitutional plan does not mandate the establishment of lower federal courts so long as the possibility of Supreme Court review is preserved.[252] States cannot have

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[246] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1988); *see also* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6–7 (1988) ("In its canonical form, this doctrine holds that even if a state has absolute discretion to grant or deny a privilege or a benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights.").

[247] *See* Sullivan, *supra* note 246, at 1456 (describing unconstitutional conditions as "patrolling the elusive border between coercion and voluntary exchange").

[248] *See generally* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 348–87 (4th ed. 1996) (discussing the scope of Congress's power to control federal jurisdiction).

[249] U.S. CONST. art. III, § 1 (emphasis added).

[250] *See* HART & WECHSLER, *supra* note 248, at 348 (discussing the so-called "Madisonian Compromise").

[251] *Compare* Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990), *and* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) (suggesting that the Constitution requires either original or appellate federal jurisdiction in certain classes of cases), *with* Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990) (defending the conventional view that congressional control of federal court jurisdiction is broader than Amar suggests).

[252] *But see* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian*

a constitutional right of access to courts that need not exist.

The next step in a conventional unconstitutional conditions analysis would be to ask whether Congress may condition the availability of federal courts on waiver of constitutionally protected rights. To put a finer point on it, the next step in such an analysis would be to argue that this sort of conditional grant of access to the federal courts is impermissible. It would be a mistake, however, to concede that the proposed rule (and waiver-in-litigation generally) is constitutionally suspect simply because unconstitutional conditions analysis raises that possibility.

For starters, the Supreme Court has not applied unconstitutional conditions doctrine with any consistency.[253] It is difficult to know when the unconstitutional conditions framework will persuade the Court and when it will not.[254] In particular, this doctrine is absent from the Supreme Court's assessments of the problems associated with constructive waiver.[255] As noted earlier, Justice Scalia's opinion in *College Savings Bank* expressly *preserves* the possibility of conditioning the federal government's grant of a "gift or gratuity" on a state's waiver of immunity.[256] Such conditional grants are irreconcilable with the unconstitutional conditions argument,[257] yet the Court unequivocally kept this avenue toward waiver open. Supreme Court precedent thus suggests that the applicability of the unconstitutional conditions model to analysis of constructive waiver is highly dubious.

The academic literature on unconstitutional conditions offers further reason to

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Compromise, 1995 WIS. L. REV. 39, 45 (questioning the "force of the permissive language regarding the creation of lower federal courts"). Professor Collins' approach is in tension with the plain language of Article III and by the historical information suggesting that this language did, in fact, reflect a compromise between those committed to making the creation of inferior federal courts constitutionally mandatory and those altogether opposed to their creation.

[253] *See* Sullivan, *supra* note 246, at 1416 ("As applied, . . . the doctrine of unconstitutional conditions is riven with inconsistencies."); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 594 (1990) ("The various puzzles produced by the [unconstitutional conditions] doctrine have created considerable doctrinal confusion.").

[254] *See* Sullivan, *supra* note 246, at 1417 (detailing the Supreme Court's haphazard use of the doctrine and remarking "[n]o wonder the lower courts divide in deciding identical unconstitutional conditions challenges").

[255] None of the discussions in the waiver-in-litigation cases conceptualizes the problem with such implied waivers as one of unconstitutional conditions. *Cf. id.* ("[T]he Court has . . . rejected every federalism-based challenge to conditions on federal subsidies since the New Deal.").

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

[257] Indeed, *Dole* itself cannot be reconciled with the unconstitutional conditions argument. *See* Sullivan, *supra* note 246, at 1501 (discussing *Dole* and arguing that "[i]t is perhaps the worst mistake in current unconstitutional conditions analysis that such flagrant instances of rights-pressuring intent have been immunized on the theory that the government has committed no coercive act"). The decision in *Dole* contributes to the strong sense that the constitutionality of waiver-in-litigation rules will not, ultimately, turn on application of unconstitutional conditions doctrine.

doubt that the doctrine could effectively defeat these kinds of waiver-in-litigation rules.[258] Many scholars have pointed out that the question of whether a given condition unconstitutionally coerces a waiver of rights turns decisively on the selection of the baseline from which to assess the beneficiary's decision to waive. Professor Sunstein, for example, has explained that "generating the appropriate baseline from which to distinguish [permissible] subsidies from [impermissible] penalties is exceptionally difficult."[259] In addressing this difficulty, Professor Epstein explained that "[w]hen the baseline gives a right to the government, government may condition the benefits that it imposes. When it gives the right to the individual, then the government's extraction of a concession amounts to impermissible coercion."[260] Without guidance in the process of selecting the baseline from which to assess a waiver of rights, the unconstitutional conditions analysis is inconclusive.

The baseline-identifying quandary complicates analysis of the waiver-in-litigation rule at stake in *Ford*. Is the appropriate baseline from which to measure the voluntariness of a state's decision to waive immunity determined by examining what, as a constitutional matter, Congress *could have done* in structuring federal court jurisdiction? If so, then perhaps there is nothing unconstitutionally coercive about providing conditional access to the federal courts rather than refusing to provide federal courts at all. If, however, the appropriate baseline is defined in light of modern federal court practice, then changing course and imposing new demands on state litigants appears more troubling.

A more sensible (and, hopefully, more conclusive) analysis would focus on the substantive concerns underlying the unconstitutional conditions inquiry instead of using the doctrine, as it is all-too-often used, as a misleading shorthand for them.[261] "[W]hat is necessary," Professor Sunstein has explained, "is a highly particular, constitutionally-centered model of reasons: an approach that asks whether, under the provision at issue, the government has constitutionally sufficient reasons for affecting

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[258] Professor Sunstein has gone so far as to argue that the unconstitutional conditions doctrine should be "abandoned." *See* Sunstein, *supra* note 253, at 594. He stresses that "[t]he Constitution offers no general protection against the imposition of penalties on the exercise of rights." *Id.* at 603.

[259] *Id.* at 602; *see also* Epstein, *supra* note 246, at 13 ("[T]he greatest difficulty with the coercion question is to identify the appropriate baseline against which the possibly coercive effects of government action may be evaluated.") (citing Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in Positive State*, 132 U. PA. L. REV. 1293, 1352 (1984)); Sullivan, *supra* note 246, at 1436 (noting that "the characterization of a condition as a 'penalty' or as a 'nonsubsidy' depends on the baseline from which one measures").

[260] Epstein, *supra* note 246, at 13 (citing Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in Positive State*, 132 U. PA. L. REV. 1293, 1352 (1984)).

[261] *See* Sunstein, *supra* note 253, at 606 ("Whether the greater power includes the lesser, and whether there is a legal obstacle to an apparently free choice, depend on a reading of the constitutional provision at issue, not on shorthand phrases.").

constitutionally protected interests."[262] It is just this kind of substantive analysis that took place in *Dole* and that underlies the Court's conclusions in cases such as *Clark*, *Gunter*, and *Gardner*.

Applied to the constructive waiver rule eschewed in *Ford*, the question is whether there is sufficient justification for the federal government's decision to burden states' exercise of their Eleventh Amendment rights.[263] I believe there is. The burden on states' Eleventh Amendment rights implicated by conditioning federal court access on waiver is minimal and is carefully crafted to remedy a particular injustice. The burden is minimal because the proposed rule would not contract the set of cases in which states may enjoy the protection of the Eleventh Amendment, should they choose to invoke it. While the rule I recommend does compel states to decide earlier in the litigation process whether to exercise their immunity, it does not make this immunity unavailable in any particular case. In addition, this rule is justified because it is designed to preclude conduct by state-defendants that imposes great costs on private litigants and on the federal courts. As discussed above,[264] delayed presentation of an Eleventh Amendment defense essentially structures federal court litigation such that a private citizen cannot win. It wastes judicial resources and undermines the integrity of the federal courts by transforming them into bodies capable of issuing binding judgments only to the extent that they are beneficial to state interests. Furthermore, a rule transforming Eleventh Amendment immunity into a "use it or lose it" objection—to be raised before trial, or not at all—is targeted carefully to resolve a particular problem; it is not susceptible to challenges of over-inclusiveness.[265] The proposed rule would, on a case-by-case basis, trade access to federal court in exchange for consent to be bound by the court's judgment. The waiver is confined to each specific case in which the state enjoys the benefit offered by the federal government.[266]

One final complication merits attention before leaving the unconstitutional conditions analysis behind. Conditioning state access to the federal courts on waiver of immunity seems to treat states differently from other litigants—it seemingly would require states, but no other parties, to waive constitutionally-guaranteed rights as a

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[262] *Id.* at 595; *see also id.* at 608 ("[T]he question is whether the measure at issue interferes with a constitutional right, properly characterized, and, if so, whether the government has sufficient justification for its interference.").

[263] *See id.* at 609 (asking whether "government ha[s] available to it distinctive justifications . . . because of the context in which the relevant burden is imposed").

[264] *See supra* Part III.A.

[265] *See infra* Part IV.C.2; *cf.* South Dakota v. Dole, 483 U.S. 203, 207 (1987) (noting that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest [at stake]'" (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion))).

[266] *Cf.* Jim C. v. United States, 235 F.2d 1079, 1081 (8th Cir. 2000) (en banc) ("The acceptance of funds by one state agency . . . leaves unaffected both other state agencies and the State as a whole. . . . By accepting funds offered to an agency, the State waives its immunity only with regard to the individual agency that receives them.").

condition of litigating in federal court. Perhaps the unconstitutional nature of the condition lies in the unequal treatment of state and private litigants.

This analysis, too, raises a confounding question regarding identification of the appropriate baseline. What does it mean to treat parties before the federal courts "equally"? On the one hand, equal treatment might entail requiring all parties to raise immunities or jurisdictional arguments, including Eleventh Amendment immunity, before trial begins or not at all. From this perspective, the proposed rule treats states no differently from other litigants. On the other hand, equal treatment might be construed differently. It might require non-interference with the *constitutional* rights of all parties before the federal courts, regardless of what this bundle of rights may be. Under this analysis, requiring states, but not private litigants, to waive Eleventh Amendment immunity as a condition of litigating on the merits seems problematic.[267]

In this instance, however, the choice of baselines proves to be an illusory difficulty. For regardless of which baseline is selected, a rule conditioning the right to litigate on the merits on waiver of immunity treats states as all other litigants are treated. It is true that this rule requires only those entities that enjoy Eleventh Amendment immunity to waive it before proceeding as defendants in federal court. In this narrow sense, states are treated differently from private litigants who, of course, enjoy no such immunity and, therefore, are in no position to waive it. However, *all* litigants are required to waive certain constitutional rights as a condition of proceeding as defendants in federal court. For example, a litigant with a valid claim that a federal court lacks personal jurisdiction over her is not permitted to litigate on the merits and then raise this argument at the appellate level if she is unsuccessful in district court.[268] The decision not to raise claims sounding in personal jurisdiction at the trial level implies waiver.

The rules of personal jurisdiction are constitutional in nature[269] and therefore

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[267] One could argue that states are entitled not simply to *equal* treatment in this context, but to *preferential* treatment. Justice Scalia explained in *College Savings* that "[i]n the sovereign-immunity context . . . 'evenhandedness' between individuals and States is not to be expected: '[T]he constitutional role of the States sets them apart . . . .'" Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 685–86 (1999) (quoting Welch v. Tex. Dep't of Highways and Pub. Transp., 483 U.S. 468, 477 (1987)). This statement, however, is dictum and was meant specifically to distinguish states from private citizens with regard to "market participant" doctrine.

[268] FED. R. CIV. P. 12(h)(1) ("A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof."). Indeed, it is exactly this sort of manipulative behavior that concerned the authors of the ALI Study discussed *supra* Part III.B.

[269] The Due Process Clause requires that a defendant "have certain minimum contacts with [a judicial forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); *see also id.* at 319 (discussing "the fair and orderly administration of the laws which it was the purpose of the due process clause to insure").

merit protection from coerced waiver just as states' rights under the Eleventh Amendment deserve such protection. Private litigants, however, are regularly compelled to choose between retaining their immunity from suits in which the federal courts lack personal jurisdiction and litigating on the merits. Similarly, as to questions of subject matter jurisdiction, litigants are not permitted to try their luck in trial court and raise jurisdictional defenses at the appellate stage. This is avoided by not simply allowing but *requiring* the federal courts to raise defects in subject matter jurisdiction sua sponte.[270] The permissibility of conditioning private parties' right to litigate on the merits in federal court on a waiver of their constitutionally-protected immunity from suits in which there is a defect in the court's personal jurisdiction creates the strong implication that it is likewise permissible to condition states' rights to litigate on the merits on waiver of Eleventh Amendment immunity.[271]

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This analysis shows that unconstitutional conditions doctrine is not an impediment to a rule that would make Eleventh Amendment immunity a "use it or lose it" defense. The doctrine has had no bearing on waiver-in-litigation questions to this point and there is little reason to believe that it will suddenly assume a prominent role in the Court's waiver-in-litigation jurisprudence. Moreover, because the unconstitutional conditions slant on the voluntariness principle raises serious questions about the constitutional validity of basic rules of federal court procedure in the personal jurisdiction context, it is exceedingly unlikely that it would be applied in this context.

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[270] FED. R. CIV. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action.") (emphasis added); Ins. Corp. of Ir. v. Compagnie des Bauxites des Guinee, 456 U.S. 694, 704 (1982) (noting that "even an appellate court may review *sua sponte*" a defect in the court's subject matter jurisdiction). Of course, a party could still try to engage in strategic litigation by staying silent with respect to a defense that goes to the subject matter jurisdiction of the court, knowing all the while that if she loses at trial, she can still assert this defense at the appellate level. Nevertheless, the rule requiring federal courts to consider such issues sua sponte should dramatically reduce the number of cases in which this can be done successfully.

[271] One might argue that Eleventh Amendment rights merit greater protection than the Due Process rights at stake in the personal jurisdiction context. *See supra* note 267. But this argument is undermined (though not entirely neutralized) by the evident lack of special treatment of sovereign immunity relative to other constitutional rights with respect to waiver-in-litigation. While it might not follow ineluctably from the permissibility of waiver of Due Process rights during litigation that waiver of Eleventh Amendment rights may similarly be induced, the Supreme Court's treatment of sovereign immunity in cases such as *Clark* and *Gardner* does not permit the conclusion that Eleventh Amendment rights are inviolate in a way that Due Process rights are not.

2. *Germaneness*

The second key factor contributing to the permissibility of waivers in litigation is the close relationship between the conditioned benefit and the right waived. As noted above, Chief Justice Rehnquist's majority opinion in *Dole* established that "conditions on federal grants might be illegitimate if they are unrelated to the federal interests [at stake]."[272] Thus, for example, the federal government presumably could not condition a grant of Title IX funds on a waiver of immunity from suits brought under the Americans with Disabilities Act. However, demanding a waiver of immunity from suits brought under Title IX would be permissible.[273] The waiver must be related to the benefit conferred in order to be valid.[274]

The germaneness requirement sets a limit on Congress's ability to use its power in one sphere in order to control conduct in another. Even when the non-coercion requirement is satisfied, if the link between the benefit conferred and the right waived is too attenuated, the conditional grant will not pass muster.

In the waiver-in-litigation cases, the waivers extracted from states are undeniably germane to the benefit granted in exchange. In return for the benefit of having a federal court adjudicate a dispute (whether it is one in which the state seeks affirmative relief or in which the state is a defendant), the state must submit to the authority of that court. As the *Creative Goldsmiths* court acknowledged, the link between invocation of federal process and consent to that court's ultimate authority is nothing short of "fundamental."[275] It is revealing to recall, at this juncture, that the waiver-in-litigation cases do not apply the kind of clear statement rules that dominated the rest of constructive waiver jurisprudence during the period between *Parden* and *College Savings Bank*. As suggested earlier, it seems likely that the reason such rules never evolved in this context is that there is something obvious about the relationship between invoking and submitting to jurisdiction. This relationship is a structural feature of our system of courts, so no special warning is necessary to inform states that

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[272] South Dakota v. Dole, 483 U.S. 203, 207 (1987) (citing Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion) (internal quotation marks omitted)).

[273] *See, e.g.*, Litman v. George Mason University, 186 F.3d 544, 547 (4th Cir. 1999) (holding that George Mason University, an arm of the State of Virginia, had waived sovereign immunity from suits brought under Title IX by accepting Title IX funding from the federal government).

[274] Of course, this begs the question—how germane is germane enough? The federal courts are struggling with this question. In *Jim C.*, for example, the Eighth Circuit, sitting en banc, upheld the constitutionality of section 504 of the Rehabilitation Act, which conditions the grant of federal education funds on a waiver of immunity from suits under that provision. In reaching this conclusion, the court noted that "[t]he acceptance of funds by one state agency . . . leaves unaffected both other state agencies and the State as a whole. . . . By accepting funds offered to an agency, the State waives its immunity only with regard to the individual agency that receives them." Jim C. v. United States, 235 F.2d 1079, 1081 (8th Cir. 2000) (en banc).

[275] Schlossberg v. Maryland (*In re* Creative Goldsmiths of Washington, D.C., Inc.), 119 F.3d 1140, 1147 (4th Cir. 1997).

it will frame their experience when they opt to litigate when they need not.

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The different strands of case law that offer insight into how voluntary choice is defined suggest that a rule establishing waiver of Eleventh Amendment immunity as a user fee for the federal courts is within constitutional limits. *College Savings* explicitly contemplates the bargaining away of sovereign immunity, and the waiver-in-litigation cases, as well as the rules governing personal jurisdiction, demonstrate that federal court access may be part of the bargain. From this perspective, then, the voluntariness principle poses no obstacle to a constructive waiver rule in the *Ford* scenario.

This article will conclude by examining one last element of the voluntariness question—the requirement that state law determine which officials are authorized to waive immunity. It will suggest two possible schemes for structuring the states' conditional right of access to the federal courts and consider the complications associated with each.

D. *Implementation and the State Authorization Difficulty*

A rule conditioning states' access to the federal courts on waiver of immunity must coexist with state laws that limit the authority of the officials responsible for representing states in the federal courts. The *Ford* Court emphasized that when inferring a waiver of immunity from the conduct of state officials, "[t]he issue . . . becomes one of their power under state law to do so."[276] A fundamental feature of the states' sovereign power is the authority to control the behavior of state officials, which includes the authority to define the class of cases in which a given official may act on behalf of the state.[277] The challenge, then, is to negotiate the

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[276] Ford Motor Co. v. Dep't of Treasury of Ind., 323 U.S. 459, 467 (1945); *id.* (noting that a waiver is effective only "if it is within the power of the administrative and executive officers of Indiana to waive the state's immunity").

[277] *Cf.* City of St. Louis v. Praprotnik, 485 U.S. 112, 124 (1988) (plurality opinion) (citing Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986)) (holding that identification of policymaking officials for purposes of 42 U.S.C. § 1983 liability is a question of state law). The *Praprotnik* plurality explained that if courts and juries were permitted to determine which state officials were "policymakers," then states would be unable to structure their conduct so as to avoid liability due to the unpredictability of these determinations. *Id.* at 124 n.1. But there is little reason to believe that similar difficulties will accompany an implied waiver scheme like the one rejected in *Ford*. A state should be able to craft a simple procedure through which district attorneys obtain the authorization of higher-ups before litigating on the merits in federal court. Moreover, in contrast to the *Praprotnik* scenario, it will be perfectly clear what class of conduct triggers waiver. Though the *Praprotnik* case involved an interpretation of section 1983 and did not raise constitutional questions, it raised issues regarding the permissibility of depriving states of the

delicate relationship between federal rules setting conditions on use of the federal courts—conditions that have implications for sovereign rights—and state rules governing the import of state officials' behavior.

As discussed in Part II.C, this dynamic of the waiver question, like so many others, is best understood in terms of the voluntariness principle. For even if it is conceded—on the basis of the arguments elaborated earlier in this Part—that a sovereign state can be made to waive its immunity as a condition of litigating on the merits in federal courts without threatening the voluntariness of its choice, this is a far cry from establishing that a waiver inferred from the conduct of a perhaps-unauthorized state employee is likewise voluntary. If the organizing principle of constructive waiver is to be properly taken into account, it is necessary to face up to the problem of ultra vires waiver.

This section explores two options available to Congress and the courts as a means of conditioning federal court access on waiver of immunity. Neither suggestion imposes significant constraints on the ability of states to limit the authority of the officials who act on their behalf and, as a corollary, both pass muster under the voluntariness analysis.

1. *Presumed Authorization*

One possibility would be for Congress to pass a law under which a state that litigates on the merits at trial waives its Eleventh Amendment immunity. The federal courts would then presume that state officials who are authorized to act on the state's behalf in federal court are also empowered by the state to consent to federal jurisdiction. With a rule of "presumed authorization" in place, states that do not want officials unilaterally to waive immunity will take pains to control the conduct of their attorneys and to make clear to the federal courts that their attorneys lack the authority to waive immunity. With the consequences of litigating on the merits made perfectly clear, there is little reason for concern that a state will waive immunity involuntarily.

Critically, a number of federal courts have already employed this technique in other waiver-in-litigation contexts. In 1998, for example, the Seventh Circuit considered whether the State of Indiana had waived its immunity from suit when a representative of the Indiana Division of Family and Children Services (DFCS) initiated an adversary proceeding against a party in bankruptcy court.[278] The State contended that "because the Indiana General Assembly has not expressly waived its

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power to control the meaning of delegations of sovereign authority. *But cf.* Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256, 269–70 (1985) (holding that "concerns of federalism" do not prevent the federal government from conditioning a grant of funds to local governments on their being used for certain purposes over the objections of the sovereign state). In this case, state power to control the decision-making processes within subdivisions was preempted by federal law.

[278] *In re* Platter, 140 F.3d 676, 678 (7th Cir. 1998).

argument, however, holding that "[b]ecause a state voluntarily chooses to enter a bankruptcy case when it initiates an adversary proceeding . . . [it] removes itself from the Eleventh Amendment's protection by starting one."[280] Similarly, in *Koehler v. Iowa College Student Aid Commission*,[281] a bankruptcy court explained:

> The Attorney General filed a counterclaim seeking affirmative relief in the form of a judgment. . . . [Iowa law] authorizes the Attorney General to bring suit in federal court whenever the state's interests are at stake. It follows from [this] that, *to the extent that such affirmative conduct constitutes a waiver under Eleventh Amendment law, the Attorney General is authorized to constructively waive Iowa's Eleventh Amendment immunity* by bringing a claim in federal court.[282]

And, perhaps most significantly, in *Gardner v. New Jersey*[283] (which was decided a mere two years after *Ford Motor Company*), the Supreme Court said nothing about whether the state official was authorized under state law to waive Eleventh Amendment immunity.[284] The Court simply assumed that the state official's authority to represent the State in litigation included the authority to waive immunity.[285] Thus, the practice of classifying certain conduct as waiver-inducing—and then inferring from the fact that a state has authorized an official to engage in this conduct that the state has also authorized the official to waive immunity—is hardly foreign to the federal courts.[286]

Moreover, as mentioned above, a number of lower courts have already adopted this approach in Spending Clause cases.[287] These courts have held that state acceptance of federal funds that are granted on condition of waiver of immunity qualifies as consent to suit. They have arrived at this conclusion *without* considering

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[280] *Id.* at 679.

[281] 204 B.R. 210 (D. Minn. 1997).

[282] *Id.* at 218 n.13 (emphasis added).

[283] 329 U.S. 565 (1947).

[284] *Id.* at 573.

[285] *Id.* at 573–74.

[286] This approach bears some resemblance to the rules of apparent authority from agency law. *See* RESTATEMENT (SECOND) OF AGENCY § 8 cmt. (a) (1992) ("Apparent authority results from a manifestation by a person that another is his agent"); *id.* § 8 cmt. (d) ("[W]hen one tells a third person that another is authorized to make a contract of a certain sort, and the other, on behalf of the principal, enters into such a contract . . . , the principal becomes immediately a contracting party, with both rights and liabilities to the third person."). It also borrows from a maxim from the criminal law context which teaches that an individual "is presumed to intend the natural and probable consequences of [his] acts." WAYNE R. LAFAVE AND AUSTIN F. SCOTT, JR., CRIMINAL LAW § 3.5(f) (2d ed. 1986); *cf.* Wis. Dep't of Corr. V. Schacht, 542 U.S. 381, 393 (1998) (Kennedy, J., concurring) ("By electing to remove, the State created the difficult problem confronted . . . here. This is the situation in which law usually says a party must accept the consequences of its own acts.").

[287] *See supra* note 148 (citing cases).

this approach in Spending Clause cases.[287] These courts have held that state acceptance of federal funds that are granted on condition of waiver of immunity qualifies as consent to suit. They have arrived at this conclusion *without* considering whether state law expressly authorizes the fund-accepting officials to waive Eleventh Amendment rights. That the officials were authorized to accept the funds (themselves unambiguously conditioned on waiver of immunity) was deemed a sufficiently unequivocal expression of intent to waive.

Further support for this approach can be found in Justice Kennedy's *Schacht* concurrence. There, he explained that "[i]f the States know or have reason to expect that removal will constitute a waiver, then *it is easy enough to presume that an attorney authorized to represent the State can bind it to the jurisdiction of the federal court* (for Eleventh Amendment purposes) by the consent to removal."[288] Justice Kennedy insisted that "the absence of specific authorization [to waive immunity] is not an insuperable obstacle to adopting a rule of waiver in every case where the State, through its attorneys, consents to removal."[289] Only if "it were demonstrated that a federal rule finding waiver of the Eleventh Amendment when the State consents to removal would put States at some unfair tactical disadvantage" should courts not embrace the waiver rule.[290] As Justice Kennedy himself acknowledged, such consequences are to be doubted.[291] And as this article has attempted to show, there is reason to doubt such dire consequences in the *Ford* context as well.[292]

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Notwithstanding the robust support from these different waiver cases for the notion that federal courts may presume authorization of state officials to waive immunity, it is still possible to object to this scheme on the ground that it is unduly

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[287] *See supra* note 148 (citing cases).

[288] Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 397 (1998) (Kennedy, J., concurring) (emphasis added). Though Justice Kennedy addressed the problems associated with raising sovereign immunity for the first time on appeal, he restricted his proposal to removal cases, noting that "the State's consent amounted to a *direct* invocation of the jurisdiction of the federal courts." *Id.* (emphasis added); *see supra* Part III.B.2. In light of the arguments raised in Part IV.B, there should not be a distinction between the removal cases and the *Ford* scenario. *See supra* notes 213–28 and accompanying text.

[289] *Schacht*, 524 U.S. at 397 (Kennedy, J., concurring).

[290] *Id.* at 397–98.

[291] *Id.* at 398.

[292] Indeed, this assumption—that it is not unfair to bind litigants to the conduct of their attorneys—already controls with respect to private individuals. *See, e.g.*, Home Port Rentals, Inc. v. Ruben, 957 F.2d 126, 133 (4th Cir. 1992) (holding that where an attorney had apparent authority to act on the clients' behalf, consent to the agreement into which the attorney entered was binding on the clients—including waiver of objections to assertion of personal jurisdiction—notwithstanding their subsequent objection).

permissive of ultra vires waiver. For even if it could be agreed that it is desirable to create strong incentives for states to monitor the behavior of their agents, one could still contend that when these incentives threaten to appropriate core elements of state sovereign power—such as the authority to determine who speaks on the state's behalf—their constitutional validity remains in doubt.[293]

Here, too, an analogy to the personal jurisdiction context suggests a response to the objection. The cases reflect no such rigorous protection for the constitutional rights of private litigants—which may be waived by attorneys, so long as there is apparent authority to do so, even if the client ultimately has not authorized the waiver. If an attorney makes an appearance in federal court on her client's behalf, for example, and neglects to object to that court's exercise of personal jurisdiction over her client, then the client's right to contest jurisdiction on Due Process grounds is waived. This is true even if the attorney has expressly been instructed to file a motion challenging the court's jurisdiction. By investing the attorney with apparent authority to proceed on her behalf in federal court, a client implicitly authorizes the attorney to waive even constitutionally-rooted objections to the court's jurisdiction.[294]

2. *A Certification Requirement*

If the courts were to deem the scheme outlined above too permissive of ultra vires waiver, an alternative approach is available. The federal courts might perform a gatekeeping function at the outset of suits involving state-defendants. Before permitting trial on the merits to move forward, a federal court would determine whether a properly authorized state actor wishes to waive Eleventh Amendment immunity. A state wishing to proceed to trial on the merits would have to certify, with reference to its "Constitution, statutes and decisions," that it consented to federal

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[293] *Cf.* Office of Personnel Mgmt. v. Richmond, 496 U.S. 414, 432–34 (1990) (holding that the federal government could not be estopped from enforcing laws regarding disability benefits notwithstanding a private party's reasonable reliance on incorrect representations made by federal agents); Monell v. Dep't of Social Serv. of the City of New York, 436 U.S. 658, 658 (1978) (declining to treat local governments like private principals and to establish full respondeat superior liability for the conduct of their agents). Both of these cases suggest that the relationship between government and its agents differs from principal-agent relationships involving private parties. However, the circumstances of these cases were sufficiently different from the waiver-in-litigation scenario so as to suggest the inappropriateness of borrowing from their reasoning. In both *Richmond* and *Monell*, the difficulty of supervising the conduct of government officials seems far greater than is the case here. In fact, demanding that state attorneys keep apprised of state policy regarding waiver of immunity would seem to be a very basic element of internal management within a state Attorney General's office.

[294] As discussed above, there might be important differences between the immunity from suit that private litigants enjoy as an outgrowth of their Due Process rights and the immunity states enjoy under the Eleventh Amendment. *See supra* notes 267, 271. The point is simply that there is clearly no categorical prohibition against ultra vires waiver of constitutional rights; instead, the question of whether such waiver is permitted entails a balancing of competing factors.

jurisdiction.[295] A federal statute would bar the court from exercising jurisdiction over cases involving states that are unwilling to forego their immunity from suit. Such a statute might read as follows:

> (a) The jurisdiction of the federal courts shall not extend to any suit brought against a state unless the state has expressly consented to the jurisdiction of the federal courts;
> (b) Such consent shall be communicated through an affidavit and memorandum of law signed by the state attorney general or the attorney general's delegate certifying that state law authorizes the presenting official to waive Eleventh Amendment immunity.

This approach bears some similarity to one under which federal courts would be required to consider the Eleventh Amendment defense sua sponte.[296] It differs, however, in that, under this scheme, without a certification from the state that waiver is permitted, a federal statute—not the Eleventh Amendment—will formally bar the suit from the federal courts. This avoids (to some extent) entanglement with the question of whether federal courts should, sua sponte, consider the applicability of Eleventh Amendment immunity, a question complicated by the *Clark* Court's teaching that sovereign immunity is a "personal privilege."[297] Under the certification procedure, federal courts would not be called upon to decide a question of constitutional law: Does the defendant enjoy immunity under the Eleventh Amendment? Instead, courts would address a statutory matter: Has the state followed the statutory procedures necessary to submit to the court's jurisdiction? The state, rather than the court, would determine whether the Eleventh Amendment barred the suit.

Because, under this scheme, the default rule presumes that officials are not authorized to waive immunity, it falls neatly in line with cases such as *Edelman* which require waivers to be express and unequivocal.[298] This approach would all but eliminate the possibility of delayed presentation of the immunity defense. Because the federal courts would be briefed on the state law governing the official's authority to waive immunity, the probability of an unauthorized waiver is low.

This scheme would not be without complications. First, it would require federal courts to apply state law every time a state wished to litigate on the merits. This would entail application of relatively unfamiliar precedent and statutes. Second, the possibility of ultra vires waiver persists even under this scheme. For there might be cases in which a state Attorney General is able to persuade a federal court that she has the authority to waive immunity when she actually does not. And the state might then

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[295] Ford Motor Co. v. Dep't of Treasury of State of Ind., 323 U.S. 459, 467 (1945).

[296] *See, e.g.*, Lawner, *supra* note 150, at 1282–88.

[297] Clark v. Barnard, 108 U.S. 436, 447 (1883).

[298] *See* Edelman v. Jordan, 415 U.S. 651, 673 (1974); *see also, e.g.*, Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 680 (1999).

appear at the appellate stage and insist on its Eleventh Amendment rights.

Neither of these objections, however, stands up to scrutiny. First, the necessity of federal courts applying state law in these cases does not involve a modification of existing law. The requirement of consulting state law to answer the question of official authorization is, in fact, expressly commanded by *Ford Motor Company*.[299] So, while the certification requirement might increase the frequency with which the federal courts interpret state law, it does not represent a categorical doctrinal change.[300] Moreover, with this procedure in place, there is reason to believe that federal courts would receive more effective guidance from the state in assessing whether state law in fact authorizes waiver in the case at hand.

As to the problem of ultra vires waiver, it should be emphasized that with the certification procedure in place, the state's argument for a late-stage claim of immunity is at its weakest. For starters, the federal court will have already been persuaded that state law in fact authorizes a waiver of immunity, so there is reason to question the substantive basis for the state's claim on appeal. This is not to say that federal courts will never get questions of state law wrong, only that there should be a heavy burden on the state to prove that the court actually erred.[301] Further, the erection of a precisely defined procedure for waiver of Eleventh Amendment protection creates opportunities for careful state oversight of official conduct. With such procedures in place, a state's failure to monitor the conduct of its attorneys begins to appear grossly negligent, and a justification for offering the state a second chance to assert immunity seems lacking.

A further objection might be made, from the opposite vantage point, that this certification procedure would prove time consuming and costly. It establishes an elaborate procedural safeguard to protect states from conduct that they should arguably be able to control on their own. Whether it is worthwhile for the federal courts to be so zealously protective of states' Eleventh Amendment rights when similar protections are not afforded private citizens' constitutional rights and when states might fairly be expected to offer this protection on their own is subject to debate.[302]

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[299] *Ford Motor Co.*, 323 U.S. at 467.

[300] If addressing these questions of state law proved too burdensome, the Court might certify the matter to the highest court of the relevant state.

[301] An additional complication might arise if the state came forward at the appellate stage and contended not that the federal court had erred in its analysis of state law in determining that there has been an effective waiver of immunity, but instead that state law or policy had simply changed, and that, for example, a new statute had been passed manifesting the sovereign state's unwillingness to submit to suit in cases of the sort before the court. Of course, a "change of heart" is inadequate to salvage a private individual's constitutional rights once they have been waived, so one might question whether states should be treated differently. A fairer approach would apply the state law in effect when the case was initially filed.

[302] Both of the models described above for securing binding waivers of state sovereign immunity have clear application outside of the waiver-in-litigation context. The "presumed authorization" model

V. CONCLUSION

The Supreme Court's sharp contraction of constructive waiver in *College Savings Bank* seems not to have extended to the federal courts' waiver-in-litigation jurisprudence. The fundamental principle of Eleventh Amendment waiver doctrine—only voluntary waivers are valid—does not require waivers elicited through the litigation process to be viewed with skepticism. This is true in part because the cost of exclusion from federal court under these circumstances seems low (and thus a state might reasonably be expected to forego this benefit in order to retain its immunity from suit) and, perhaps more significantly, because the requirement of full submission to the binding authority of the federal courts seems uniquely symmetrical with the privilege of allowing states to employ the federal courts to vindicate their rights.

The odd kink in waiver-in-litigation jurisprudence which permits states to raise the sovereign immunity defense on appeal seems to reflect a kind of lapse in the Supreme Court's concentration on the fundamental fairness of this symmetrical bargain—fairness that has repeatedly been recognized by the federal courts in the waiver-in-litigation cases. That states may litigate on the merits without any risk of adverse consequences cannot be reconciled, as the American Law Institute put it, with "sound judicial administration."[303] This kink might easily be ironed out of constructive waiver jurisprudence simply by bringing the law relating to this issue more in line with the other waiver-in-litigation cases. As demonstrated above, this can be accomplished without running a grave risk of ultra vires waiver and thus without threatening the voluntariness of the states' conduct.

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borrows from established federal court practice in Spending Clause cases. The many examples of federal courts finding waivers of immunity by way of a state official's acceptance of federal funds *without* first inquiring whether the officials receiving the grant are authorized to waive immunity, implicitly rely on agency theory—i.e., they proceed from the premise that Congress or the federal courts may classify certain conduct as waiver-inducing and then infer that those officials who are authorized to engage in that conduct are, likewise, authorized to waive immunity.

Certification requirements like that described above, meanwhile, have been proposed as the basis for a waiver regime governing intellectual property rights. Scholars have suggested that Congress might condition the grant of intellectual property rights to states on consent to suit for violations of the intellectual property rights of others. *See* 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, 1146–66 (2001) (assessing the constitutionality of a bill that would condition the grant of federal intellectual property rights to states on waiver of immunity); Meltzer, *supra* note 149, at 1380. Professor Meltzer has argued that such a system might be erected either by "requir[ing] a state to enact a statute waiving its immunity in federal intellectual property cases" or by "requir[ing] every application for a federal intellectual property right affirmatively to indicate whether it is being sought on behalf of a state entity and, if it is, to include a certification . . . that the state will not assert immunity if sued for infringement under that statutory scheme." Meltzer, *supra* note 149, at 1386. To be sure, a waiver scheme of this kind, in any context, will be scrutinized under the unconstitutional conditions paradigm and questions of coercion and germaneness will abound. *See id.* at 1381–84.

[303] ALI STUDY, *supra* note 170, at 366.