ARTICLES

BEYOND ABROGATION OF SOVEREIGN IMMUNITY: STATE WAIVERS, PRIVATE CONTRACTS, AND FEDERAL INCENTIVES

CHRISTINA BOHANNAN*

Few judicial decisions in recent years have captured the attention of lawmakers, practitioners, and academics more than the Supreme Court's decisions dealing with state sovereign immunity. Holding that Congress may not abrogate state sovereign immunity from federal statutory claims when acting pursuant to its Article I regulatory powers, those decisions seriously limit an individual's ability to enforce rights against state defendants, creating a gap between right and remedy that arguably impairs the rule of law. While much of the scholarship in this area continues to dwell on abrogation as the primary means of allowing individuals to vindicate rights against the states, the Court clearly favors an approach in which states waive their immunity from suit. In this Article, Professor Christina Bohannan examines three common situations in which a state might be deemed to waive its immunity from suit: first, by failure to raise the immunity as a defense at trial; second, by private agreement; and third, by accepting federal benefits made conditional on waiver of immunity from federal claims. She determines that because the Court's sovereign immunity and Spending Clause jurisprudence has been concerned with ensuring that a state's waiver is voluntary and unequivocal rather than coerced, this case law precludes holding that a state waives its immunity by merely failing to raise it at trial. She concludes, however, that where a state voluntarily and unequivocally waives its immunity in a private contract or in exchange for benefits available exclusively from the federal government, its waiver should be enforced notwithstanding a subsequent attempt to revoke it at or before trial. Thus, a waiver approach to state sovereign immunity could provide a constitutional way for individuals to vindicate their rights against the states in a number of cases, thereby narrowing the right-remedy gap created by the Court's abrogation decisions.

INTRODUCTION

Building on its landmark decision in *Seminole Tribe v. Florida*,[1] the Supreme Court recently has struck down several congressional attempts to abrogate state sovereign immunity and subject states to suits

* B.S., 1994; J.D., 1997, University of Florida. Visiting Professor of Law, University of Iowa College of Law, 2001-2002; Associate Professor of Law, University of Iowa College of Law, effective Fall 2002. I wish to thank Randall Bezanson, William Buss, Thomas Cotter, Herbert Hovenkamp, Todd Pettys, John Reitz, and H.S. Udaykumar for helpful comments on earlier drafts of this Article, and Tara Fumerton for her valuable research assistance.

[1] 517 U.S. 44 (1996) (holding that Congress may not abrogate state sovereign immunity when legislating under its Article I Indian Commerce Clause power and suggesting that same restriction applies to Congress's other Article I powers).

by private individuals for money damages under federal law. Specifically, the Court has invalidated laws allowing individuals to sue the states for violations of federal rights against intellectual property infringement,[2] unfair labor standards,[3] discrimination on the basis of age,[4] and discrimination on the basis of disability.[5] These decisions could portend a similar fate for other federal rights as well. Thus, although Congress has given individuals federal statutory rights against the states, the Supreme Court's view of the Eleventh Amendment and related sovereign immunity doctrines has foreclosed much of the judicial relief thought to give meaning to those federal rights. Unsurprisingly, some view the Court's stance on sovereign immunity as an unacceptable affront to the venerable maxim that for every violation of a right, there must be a remedy.[6]

---

[2] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999) (holding that Congress's attempt to abrogate state sovereign immunity from unfair-competition claims under Lanham Act exceeded its Article I powers and its power to enforce Fourteenth Amendment); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 630 (1999) (holding that Congress's attempt to abrogate state sovereign immunity from suit under Patent Act exceeded its Article I powers and its power to enforce Fourteenth Amendment).

[3] Alden v. Maine, 527 U.S. 706, 711-12 (1999) (holding that Congress's attempt to abrogate state sovereign immunity in state courts under Fair Labor Standards Act exceeded its Article I powers). But see Carlos Manuel Vázquez, Sovereign Immunity, Due Process, and the *Alden* Trilogy, 109 Yale L.J. 1927, 1927-28 (2000) (arguing that *Florida Prepaid* and *College Savings Bank*, when read in conjunction with *Alden*, suggest that scope of states' sovereign immunity is limited by Due Process Clause).

[4] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 66-67 (2000) (holding that Congress's attempt to abrogate state sovereign immunity under Age Discrimination in Employment Act exceeded Congress's power to enforce Fourteenth Amendment).

[5] Bd. of Trs. v. Garrett, 531 U.S. 356, 363-64, 368, 374 (2001) (holding that Congress's attempt to abrogate state sovereign immunity under Americans with Disabilities Act exceeded its power to enforce Fourteenth Amendment).

[6] Justice John Marshall articulated this concept in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). On the basis of this promise of redress, Akhil Amar has argued that

> [v]ictims of government-sponsored lawlessness have come to dread the word "federalism." Whether emblazoned on the simple banner of "Our Federalism" or invoked in some grander phrase, the word is now regularly deployed to thwart full remedies for violations of constitutional rights . . . .
>
> So too, "sovereignty" has become an oppressive concept in our courts. A state government that orders or allows its officials to violate citizens' federal constitutional rights can invoke "sovereign" immunity from all liability—even if such immunity means that the state's wrongdoing will go partially or wholly unremedied.

Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1425-26 (1987).

Other scholars have argued that providing an effective remedy for all rights is aspirational, subject to the practical shortcomings of remedial mechanisms. See, e.g., Richard H. Fallon Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1778 (1991) ("*Marbury's* apparent promise of effective redress for all constitutional violations reflects a principle, not an ironclad rule, and its ideal is not

The Supreme Court rejected the diversity theory in *Hans v. Louisiana*,[28] holding that, contrary to the plain language of the Eleventh Amendment, sovereign immunity protected a state from being sued under federal law by a citizen of the same state.[29] And although it seems that the Court went along with the common-law theory for a time, rendering a splintered decision in *Pennsylvania v. Union Gas Co.*[30] while suggesting that Congress sometimes could abrogate sovereign immunity when acting pursuant to its Article I Commerce Clause power,[31] the Court later rejected the common-law theory in *Seminole Tribe v. Florida*, in which it overruled *Union Gas* and held that Congress may not abrogate state sovereign immunity from suit in federal court for federal-law claims when acting pursuant to its Article I powers.[32]

Indeed, in the more recent case of *Alden v. Maine*,[33] the Court espoused a theory of sovereign immunity that is much broader than either the diversity theory or the common-law theory. The *Alden* Court rejected the idea that the language of the Eleventh Amendment plays *any* role in limiting state sovereign immunity. While the Eleventh Amendment speaks only to suits brought against the states in federal court, the Court held that Congress may not abrogate state sovereign immunity for most federal-law claims in *state* court either.[34] Thus, although divining the Court's full theory of sovereign immunity is beyond the scope of this Article, it is fair to say that the current Court views state sovereign immunity as an implicit constitutional principle which applies to suits brought against a state by any private party in any court.[35]

---

28 134 U.S. 1 (1890). For a more complete discussion of *Hans*, see infra Part II.B.

29 *Hans*, 134 U.S. at 18.

30 491 U.S. 1 (1989), overruled by Seminole Tribe v. Florida, 517 U.S. 44 (1996).

31 Justice Brennan, writing for himself and three other justices, explained that "to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable." Id. at 19-20. Justice White provided the fifth vote necessary for a majority by concurring in the judgment, but stated, without explanation, that he did "not agree with much of [Justice Brennan's] reasoning." Id. at 57 (White, J., concurring).

32 *Seminole Tribe*, 517 U.S. at 66 (1996).

33 527 U.S. 706 (1999).

34 Id. at 712-13, 754 (emphasizing "history, practice, precedent, and the structure of the Constitution" rather than text of Eleventh Amendment).

35 Although the Court seems to view sovereign immunity in both state court and federal court as an implicit constitutional principle, it is not clear whether the immunity is coextensive in state court and federal court. Some portions of the *Alden* decision suggested that states might enjoy broader sovereign immunity in their own courts than in federal courts, either because state law would play a greater role in determining the scope of state sovereign immunity in state court, or because, even under federal law, principles of federalism require conferring greater immunity to states in their own courts. For example,

B. *Waivers of Sovereign Immunity and* College Savings Bank

Despite its ever-expanding view of state sovereign immunity, the Court consistently has acknowledged that a private party may sue a state where the state has waived its immunity and consented to suit.[36] Indeed, at one point, in *Parden v. Terminal Railway*,[37] the Court went so far as to say that a State "constructively waives" its immunity by engaging in activity that Congress regulates through its Article I pow-

---

in discussing Congress's power to abrogate sovereign immunity from private suits in state court, the *Alden* Court stated as follows:

> In some ways . . . a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum. Although the immunity of one sovereign in the courts of another has often depended in part on comity or agreement, the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself. A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals. Such plenary federal control of state governmental process denigrates the separate sovereignty of the States.

Id. at 749 (internal citations omitted).

On the other hand, much of the *Alden* opinion seemed to treat state sovereign immunity in state court or federal court as a unitary constitutional principle governed by federal law. *Alden* involved a suit against the state in state court, but in discussing the limits of sovereign immunity from such suit, the *Alden* Court cited a number of decisions limiting the scope of state immunity in federal court. Id. at 755-57 (citing Principality of Monaco v. Mississippi, 292 U.S. 313 (1934), for proposition that "[i]n ratifying the Constitution, the States consented to suits brought by the other States or by the Federal Government," and citing Ex parte Young, 209 U.S. 123 (1908), for proposition that sovereign immunity "does not bar certain actions against state officers for injunctive or declaratory relief"). Most important for present purposes, the *Alden* Court seemed to treat immunity in state court and federal court the same with regard to when a state will be deemed to waive its immunity. The Court cited South Dakota v. Dole, 483 U.S. 203 (1987), which upheld conditional spending legislation, for the proposition that "[n]or, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits." *Alden*, 527 U.S. at 755. These portions of the *Alden* decision suggest that, at least for some purposes, state sovereign immunity is subject to the same limitations under federal law regardless of whether the state is sued in state court or federal court. See also infra note 95 (explaining that Beers v. Arkansas, 61 U.S. (20 How.) 527 (1857), which involved state immunity from suit in state court for contract claim, has been cited repeatedly by Supreme Court in decisions discussing immunity from suit in federal court).

Because the *Alden* decision sends mixed signals as to whether the scope of sovereign immunity in state court is different from the scope of sovereign immunity in federal court, this Article focuses primarily on federal law dealing with sovereign immunity in federal court. It is likely, however, that much of the analysis herein also would apply to sovereign immunity in state court.

[36] See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944); Clark v. Barnard, 108 U.S. 436, 447-48 (1883).

[37] 377 U.S. 184 (1964), overruled in part by Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 478 (1987), and overruled by *Coll. Sav. Bank*, 527 U.S. at 680.

Although the Court's recent decisions constrain the use of only one mechanism for enabling private parties to enforce rights against the states—the unilateral congressional abrogation of state sovereign immunity—the other remedial mechanisms still available to private parties aggrieved by state action[7] provide only piecemeal relief.[8] For

always attained."); Vicki C. Jackson, Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity, 75 Notre Dame L. Rev. 953, 954 (2000) ("Let me be clear at the outset that I do not ground my critique of the Court's *Seminole Tribe v. Florida* and *Alden v. Maine* decisions . . . on a claim that the Constitution requires 'full remediation' for all wrongs or for all violations of federal law."); John C. Jeffries Jr., The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 87, 87 (1999) ("The distance between the ideal and the real means that there will always be some shortfall between the aspirations we call rights and the mechanisms we call remedies.").

[7] The Court has made it clear that states still are obligated by the Supremacy Clause to comply with federal law, and some mechanisms for enforcing federal law against the states are still available. E.g., *Alden*, 527 U.S. at 754-55 (

> The constitutional privilege of a State to assert its sovereign immunity . . . does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design.).

The Eleventh Amendment does not preclude private parties from seeking money damages against state officers in their personal capacity or injunctive relief against state officers in their official capacity to prevent ongoing violations of federal law. Id. at 756-57; Seminole Tribe v. Florida, 517 U.S. 44, 71 n.14 (1996). However, although the recent decisions ostensibly leave open private party remedies against state officers, some scholars have argued that the opinions could signal the future expansion of sovereign-immunity doctrines and concomitant contraction of these forms of relief. E.g., Carlos Manuel Vázquez, Eleventh Amendment Schizophrenia, 75 Notre Dame L. Rev. 859, 900-16 (2000) (discussing "Coming Contractions"). Alternatively, because the Eleventh Amendment never has been interpreted as preventing the federal government from suing the states, it is possible that private parties may obtain complete statutory remedies when the federal government sues states on their behalf. See *Alden*, 527 U.S. at 755 (noting that "[i]n ratifying the Constitution, the States consented to suits brought by other States or by the federal government" (citing Principality of Monaco v. Mississippi, 292 U.S. 313, 328-29 (1934))).

[8] Professor John Jeffries has defended the Eleventh Amendment's prohibition on individual suits brought against the states for money damages, arguing that the existing alternative remedies not only virtually eliminate the right-remedy gap, but also make for sounder policy. John C. Jeffries Jr., In Praise of the Eleventh Amendment and Section 1983, 84 Va. L. Rev. 47 (1998). Jeffries contends that because injunctions provide only prospective relief, and because the qualified-immunity defense available to officers in § 1983 claims ensures that any damages awards will be based on fault rather than strict statutory liability, the officer liability regime results in a more optimal level of deterrence for state officials than would result from holding the states themselves strictly liable for any violation of law. Id. at 68-81. If the Court's decisions portend greater limitations on judicial relief against state officers, see Vázquez, supra note 7, at 912, there will be a tremendous need to find constitutional ways to vindicate individual rights against state entities under Jeffries' view.

Even the current state officer liability regime, however, fails to provide adequate relief to individuals aggrieved by state conduct in some circumstances. For example, the plaintiff oftentimes cannot identify the particular state employee who is responsible for her harm. In addition, as Jeffries concedes, the courts occasionally have invoked a wild-card exception to the availability of relief against state officers when "the state is the real, substantial

this reason, much of the scholarship on the Court's recent sovereign immunity decisions continues to focus primarily on abrogation.[9] As a result, this scholarship provides little guidance in the immediate and ongoing search for constitutional ways to vindicate rights against the states.

In this Article, I look beyond abrogation toward waiver, a largely undeveloped area of sovereign-immunity law, to see what promise it may hold for enforcing rights against the states. The Court's sovereign-immunity jurisprudence repeatedly has confirmed that states may waive immunity at their pleasure, yet surprisingly little has been said about the potential for obtaining and enforcing state waivers as a means of vindicating the rights of private parties against state government entities. Too little attention has been paid to *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[10] the Court's most recent decision addressing waiver of sovereign immunity. In *College Savings Bank*, the Court held that the State of Florida had not "constructively" waived its immunity from federal unfair-competition claims under the Lanham Act by engaging in federally regulated commercial activity after Congress had passed legislation purporting to abrogate state sovereign immunity.[11] Although the decision rejected the notion of "constructive" waiver in the

party in interest." Jeffries, supra, at 59, 60 (discussing Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459 (1945)). Moreover, with regard to federal statutes, choosing the proper level of deterrence is typically a matter to be decided by Congress, not by the courts. Thus, whether or not the officer-liability scheme remains unchanged, it is important to find constitutional ways to enforce rights against the states.

[9] Some scholars have sought merely to understand and explain the Court's abrogation decisions. E.g., Vázquez, supra note 7, at 859, 860 (arguing that two conflicting strains of thought seem to suffuse Supreme Court's Eleventh Amendment jurisprudence, one which is most concerned with upholding supremacy of federal law, and one which is most concerned with maintaining state sovereignty); Ann Woolhandler, Old Property, New Property, and Sovereign Immunity, 75 Notre Dame L. Rev. 919, 920-21 (2000) (defending Court's decisions on ground that "the historical record provides strong support for constitutional compulsion of damages remedies for deprivations of old but not new property").

On the other hand, at least one sovereign-immunity scholar has stridently called for the complete reversal of the abrogation decisions on the ground that they are unworthy of explanation. Vicki C. Jackson, supra note 6, at 953 (

> While I believe it is an important function of legal scholarship to constructively critique and seek to rationalize the Court's decisions, I . . . do not think these decisions are worthy of that effort, and . . . scholars who believe the Court is incorrect in its expansion of sovereign immunity into a first order constitutional principle ought to call for the overruling of these decisions.);

see also Daniel J. Meltzer, State Sovereign Immunity: Five Authors in Search of a Theory, 75 Notre Dame L. Rev. 1011, 1012 (2000) (arguing that Supreme Court has failed "to promote any coherent conception of states' rights or state autonomy while harming legitimate national objectives").

[10] 527 U.S. 666 (1999).

[11] Id. at 683-84, 691.

context of federal statutory claims against the states, careful analysis of the Court's reasoning in this case and others indicates that many state waivers still might be enforceable.

In this Article, I examine three common situations in which a state might be deemed to waive its immunity from suit in federal court:[12] first, by failure to raise the immunity as a defense at trial; second, by agreement in a private contract; and third, by accepting federal benefits made conditional on waiver of immunity from federal claims. I address, under *College Savings Bank* and many other decisions, the extent to which waivers may be obtained and enforced in these situations, such that individuals may vindicate their rights against a state in federal court.

Part I provides background information on the Court's sovereign-immunity jurisprudence. Part II.A considers whether a state's failure to raise the immunity at trial constitutes an effective waiver. I conclude that a state does not waive its immunity by failing to raise it at trial, despite prior decisions that have led at least one Eleventh Amendment scholar to think otherwise. Part II.B explores the extent to which a state's contractual obligations give rise to an enforceable waiver of sovereign immunity. While some very early decisions seem to suggest that sovereign immunity may not be alienated by contract, a closer analysis of these decisions, coupled with language in *College Savings Bank*, leads to the conclusion that where a state explicitly waives its immunity by contract, that waiver should be enforced even where the state subsequently attempts to revoke the waiver at or before trial.

Part III examines whether, and under what circumstances, Congress may use federal incentives to encourage states to waive their immunity from federal statutory claims. In light of the Court's recent decisions striking down Congress's attempts to abrogate the states' immunity from federal-law claims, Congress's ability to elicit waivers of immunity for those claims is of the utmost importance. For example, following the Court's decisions holding that Congress could not abrogate sovereign immunity under the federal intellectual property laws,[13] Senator Patrick Leahy introduced a bill (the Leahy Bill) in the Senate that would require each state, as a condition for applying to obtain a patent or to register a copyright or trademark, to give assurance that it would not assert a sovereign-immunity defense in any fu-

[12] For reasons I will discuss at length, infra note 35, I have chosen to limit the scope of this Article to consideration of sovereign immunity in federal court, though much of the analysis may apply to sovereign immunity in state court as well.

[13] See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

ture infringement or declaratory-judgment action brought against the state under the federal intellectual property statutes.[14] Although the Leahy Bill was not widely considered during the first session of the 106th Congress,[15] Congress likely will take up a revised version of that bill in the next session.[16] Moreover, with conditional federal spending at an all-time high,[17] it is easy to see how Congress might attempt to use federal funds to induce waiver.

Whether Congress may condition the receipt of federal benefits on a state's waiver of immunity—such as to burden the state's constitutional right of immunity—is an issue best resolved under the doctrine of unconstitutional conditions.[18] I examine this issue under four different theories of unconstitutional conditions, concluding that Congress probably has significant latitude in using federal incentives to obtain state waivers of immunity. If this view is correct, then private parties likely can enforce federal statutory rights against the states in many cases.

I
SOVEREIGN IMMUNITY AND *COLLEGE SAVINGS BANK*

A. Historical Development of Sovereign Immunity and the Eleventh Amendment

State sovereign immunity, generally thought to descend from an English law doctrine protecting the monarchy, began in this country as an immunity protecting states from being sued by private citizens in

---

[14] See 145 Cong. Rec. S13,555 (daily ed. Oct. 29, 1999) (statement of Sen. Leahy) (introducing bill entitled "Intellectual Property Protection Restoration Act of 1999" (hereinafter Leahy Bill)).

[15] Neither Congress's efforts nor the Patent and Trademark Office's (PTO's) own conference discussing the issue has produced a clearly workable solution. In the meantime, courts are confronting the issue without congressional guidance. At least one district court has held that because Congress made clear its intent to abrogate state sovereign immunity in the Patent Remedy Clarification Act (RCA), a state has adequate notice that its participation in the patent system (obtaining and enforcing its own patents) constitutes a voluntary waiver of its immunity. New Star Lasers, Inc. v. Regents, 63 F. Supp. 2d 1240, 1242-45 (E.D. Cal. 1999). For a fuller discussion of this case, see infra Part III.C.4.

[16] See Restoring State Liability for IP Suits, 61 Pat. Trademark & Copyright J. 332, 332-33 (2001) ("A bill . . . to restore the right to bring infringement suits against the states made little progress in the 106th Congress but could find new momentum in the 107th . . . . While the legislation stalled last year, there are plenty of indications that sovereign immunity remains a viable concern.").

[17] See Lynn A. Baker, Conditional Federal Spending After *Lopez*, 95 Colum. L. Rev. 1911, 1918 (1995) ("Federal funds totaling billions of dollars each year constitute an increasingly large proportion of each state's revenue. And none of this federal money is offered the states unconditionally.").

[18] See infra Part III. For a description of the doctrine of unconstitutional conditions, see infra notes 145-147 and accompanying text.

state courts.[19] During the debates over ratification of the United States Constitution, opponents of ratification argued that Article III seemed to divest states of that immunity in federal courts by creating federal jurisdiction over "all Cases . . . between a State and Citizens of another State."[20] Despite this objection, the Constitution was ratified, and, indeed, the Supreme Court subsequently held in *Chisholm v. Georgia* that Article III permitted a state to be sued in federal court.[21] Because states were concerned with protecting their treasuries from suits brought against them for the collection of Revolutionary War debts, Congress reacted swiftly to the Court's decision in *Chisholm* by adopting the Eleventh Amendment.[22] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[23]

The language of the Eleventh Amendment has given rise to several theories which would limit the scope of state sovereign immunity. The two primary theories are the diversity theory and the common-law theory.

The diversity theory holds that because the Eleventh Amendment says federal jurisdiction does not extend to suits brought against a state "by Citizens of another State," it limits only federal diversity

---

19 See, e.g., Vicki C. Jackson, The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity, 98 Yale L.J. 1, 126 (1988) (describing state sovereign immunity as derived from "a common law tradition . . . of English law misunderstood in its transposition to the United States"); Henry Paul Monaghan, The Sovereign Immunity "Exception," 110 Harv. L. Rev. 102, 132-33 (1996) (arguing that *Seminole Tribe* majority's attempt to ground sovereign immunity not in English common law but instead in practice of all "civilized nations" is "mystifying" and "perpetuates a questionable line of reasoning").

20 U.S. Const. art. III, § 2. Notably, Patrick Henry argued, "If gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant." See 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 543 (Jonathan Elliot ed., 2d ed. 1836); see also Erwin Chemerinsky, Federal Jurisdiction 392 (3d ed. 1999) (discussing ratification debates over relationship between Article III and state sovereign immunity).

21 See 2 U.S. (2 Dall.) 419, 420-26 (1793). In *Chisholm*, the Supreme Court held that a South Carolina citizen could bring an action of assumpsit against the State of Georgia in the Supreme Court for the state's breach of a war supplies contract. Id.

22 See Chemerinsky, supra note 20, at 395 ("The consensus among historians is that states were particularly concerned about the *Chisholm* decision because they feared suits against them to collect unpaid Revolutionary War debts . . . . Thus, within a few years after *Chisholm*, the Eleventh Amendment was adopted . . . .").

23 U.S. Const. amend. XI.

jurisdiction.[24] Thus, under this theory, states still would be subject to suit for claims arising under federal law.[25]

The common-law theory, on the other hand, emphasizes the portion of the amendment that says "[t]he Judicial power . . . *shall not be construed* to extend to any suit. . . ." This language suggests that the federal jurisdiction conferred in Article III does not, of its own force, divest states of their immunity. Under this view, the Eleventh Amendment was intended only to overrule *Chisholm*'s mistaken conclusion that Article III itself abrogated sovereign immunity.[26] The Eleventh Amendment would restore the common-law immunity that existed prior to *Chisholm*, but, as with any common-law doctrine, the immunity still could be abrogated by federal statute under the Constitution's Supremacy Clause.[27]

---

[24] See Amar, supra note 6, at 1473-75 (arguing that Eleventh Amendment was intended only as limit on federal diversity jurisdiction in cases brought against states and not "as a barrier cutting across the other jurisdictional grants of Article III"); William A. Fletcher, The Diversity Explanation of the Eleventh Amendment: A Reply to Critics, 56 U. Chi. L. Rev. 1261, 1297-99 (1989) (arguing that diversity explanation is superior to any competing explanation of Eleventh Amendment); 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, 1034 (1983) (arguing that Eleventh Amendment requires narrow construction, not prohibition of federal court jurisdiction); John J. Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889, 1890-94 (1983) (arguing that historical background of Eleventh Amendment supports inference that amendment never was intended to provide "sweeping doctrine of state sovereign immunity from federal jurisdiction"); Herbert Hovenkamp, Judicial Restraint and Constitutional Federalism: The Supreme Court's *Lopez* and *Seminole Tribe* Decisions, 96 Colum. L. Rev. 2213, 2240 (1996) (arguing that Eleventh Amendment was designed to limit diversity jurisdiction over suits against states through preservation of common-law doctrine of traditional sovereign immunity in diversity suits).

[25] See Jackson, supra note 19, at 45 ("Understanding the amendment only as a repeal of the party-based head of original Supreme Court jurisdiction implies that the judicial power over all cases arising under federal law was unimpaired by its enactment . . . .").

[26] See Laurence H. Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682, 694 (1976). Tribe argues that:

> On this view, it remains true after the eleventh amendment, just as it was true prior to *Chisholm*, that Congress, acting in accordance with its article I powers as augmented by the necessary and proper clause, or acting pursuant to the enforcement clauses of various constitutional amendments, can effectuate the valid substantive purposes of federal law by (1) compelling states to submit to adjudication in federal courts and/or (2) compelling states to entertain designated federal claims in their own courts.

Id.

[27] See Tribe, supra note 26, at 696 (arguing that this theory is supported by "the peculiar institutional competence of Congress in adjusting federal power relationships" that results from state representation in Congress).

ers when Congress has made engagement in the activity conditional upon amenability to suit.[38] Subsequent decisions, including *Seminole Tribe*, raised doubts as to *Parden*'s continued viability, however, and in *College Savings Bank*, the Court expressly overruled *Parden* altogether.[39] Although *College Savings Bank* reaffirmed that a state may waive immunity at its pleasure, the Court's rejection of *Parden*'s constructive-waiver doctrine has led to uncertainty regarding what types of waivers are enforceable.

Because *College Savings Bank* is the Court's most recent decision dealing specifically with waiver, it warrants detailed discussion. *College Savings Bank*, along with a companion case styled in the reverse as *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[40] were handed down on the same day.[41] The two cases originated as a single case in the trial court, but subsequently that case was split into two cases for purposes of appeal.[42]

In the original case, petitioner College Savings Bank (the Bank) was a New Jersey bank that marketed and sold certificates of deposit (CDs) designed to finance college education.[43] The Bank held a patent on the methodology for administering the CDs.[44] Respondent Florida Prepaid was an arm of the State of Florida that administered its own program for prepayment of college tuition.[45] The Bank brought claims against Florida Prepaid in the United States District Court for the District of New Jersey alleging that Florida Prepaid had infringed its patent in violation of the Federal Patent Act and had made misstatements about its own savings plan in violation of the unfair competition provisions of the Federal Lanham Act.[46]

The Bank contended that Congress had abrogated state sovereign immunity through the Patent and Trademark Remedy Clarification Acts (RCAs), which purported to subject states to suit under the Pat-

---

38 The Court held that the State of Alabama, by owning and operating a railroad, had consented to suit in federal court for a claim arising under the Federal Employers' Liability Act (FELA). See id. at 194-98. The Court reasoned that because "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce" under Article I, and because FELA did not exempt the states from liability, the State of Alabama implicitly consented to suit when it acted as a "common carrier" under the statute. Id. at 187-91.

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

40 527 U.S. 627 (1999).

41 *College Savings Bank* and *Florida Prepaid* were decided on the same day that the Court decided *Alden*. Some scholars refer to these three cases as "the *Alden* trilogy." See, e.g., Vázquez, supra note 3, at 1927.

42 See infra notes 49-51 and accompanying text.

43 *Coll. Sav. Bank*, 527 U.S. at 670-71.

44 Id. at 671.

45 Id.

46 Id.

ent Act and Lanham Act to the same extent as individuals.[47] The Bank also asserted that "under the doctrine of constructive waiver articulated in *Parden v. Terminal Railway*, Florida Prepaid had waived its immunity from [these] suits by engaging in the interstate marketing and administration of its program after [Congress] made clear that such activity would subject Florida Prepaid to suit."[48] The district court held that the Patent RCA, but not the Trademark RCA, was valid legislation for abrogating state sovereign immunity.[49]

Both the Patent Act and Lanham Act claims were appealed. Because the Federal Circuit has exclusive appellate jurisdiction over patent appeals,[50] different circuit courts reviewed the Patent Act and Lanham Act claims,[51] and those claims came separately before the Supreme Court.

In *Florida Prepaid*, the patent case, the Supreme Court explained that under *Seminole Tribe*, Congress could not abrogate sovereign immunity when legislating pursuant to its Article I power to regulate commerce among Indian tribes.[52] In a five-to-four decision authored by Chief Justice Rehnquist,[53] the *Florida Prepaid* Court held that *Seminole Tribe's* rule applied to other Article I provisions as well, and

---

[47] See id. at 670; Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 630 (1999). The Patent and Trademark RCAs are substantially the same. The Patent RCA amended the Patent Act to provide the following:

> 35 U.S.C. § 271 Infringement of Patent . . . .
>
> (h) As used in this section, the term "whoever" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.
>
> 35 U.S.C. § 296 Liability of States, instrumentalities of States, and State officials for infringement of patents
>
> (a) In General.—Any State, any instrumentality of a State, and any officer or employee of a State acting in his official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person . . . for infringement of a patent under section 271, or for any other violation under this title.

35 U.S.C. §§ 271, 296 (1994).

[48] *Coll. Sav. Bank*, 527 U.S. at 671.

[49] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 948 F. Supp. 400, 425-28 (D.N.J. 1996), aff'd, 131 F.3d 353 (3d Cir. 1997), aff'd, 527 U.S. 666 (1999), and aff'd, 148 F.3d 1343 (Fed. Cir. 1998), rev'd, 527 U.S. 627 (1999).

[50] See 28 U.S.C. § 1295 (1994).

[51] The Federal Circuit affirmed the district court on the patent claim. 148 F.3d 1343 (Fed. Cir. 1998). The Third Circuit affirmed the unfair competition claim. 131 F.3d 353 (3d Cir. 1998).

[52] *Fla. Prepaid*, 527 U.S. at 636.

[53] Justices O'Connor, Scalia, Kennedy, and Thomas joined the majority opinion. Justices Souter, Ginsburg, and Breyer joined a dissenting opinion written by Justice Stevens.

therefore that the Patent RCA could not be sustained under the Patent and Copyright Clause.[54] The Court noted, however, that Congress may abrogate state sovereign immunity with appropriate legislation enacted under the Enforcement Clause of the Fourteenth Amendment.[55] Nevertheless, it held that the Patent RCA was not a valid exercise of power under the Fourteenth Amendment, because subjecting states to patent suits to the same extent as individuals was not a "proportional and congruent" measure for remedying state violations of the Due Process Clause.[56]

Justice Scalia wrote for the same five justices in *College Savings Bank*, the unfair competition case. In that case, the Court agreed with the lower courts that the federal right against unfair competition is not property for purposes of the Fourteenth Amendment, and therefore that subjecting states to unfair-competition suits brought by individuals was not a valid exercise of power to enforce the Due Process Clause of the Fourteenth Amendment.[57] The Court explained that "[t]he hallmark of a protected property interest is the right to exclude others,"[58] and that "Florida Prepaid's alleged misrepresentations concerning its own products intruded upon no interest over which petitioner had exclusive dominion."[59] Thus, the Court held that Congress had not validly abrogated the states' sovereign immunity from unfair-competition claims.[60]

---

[54] *Fla. Prepaid*, 527 U.S. at 636.

[55] Id.

[56] See City of Boerne v. Flores, 521 U.S. 507 (1997). In *City of Boerne*, the Court had explained that because the enforcement power in section 5 of the Fourteenth Amendment was limited to remedying or preventing violations of the substantive guarantees of the Fourteenth Amendment, any legislation adopted under that power must be a congruent and proportional response to state violations of those guarantees. Id. at 520. The *Florida Prepaid* Court held that Congress's attempt to subject states to suit for any violation of the Patent Act could not be viewed as a proper measure for remedying violations of the Due Process Clause because (1) there was no record of widespread patent infringement by the states amounting to constitutional violations; (2) merely negligent deprivations of property do not implicate the Due Process Clause, while the Patent Act provides for strict liability; and (3) the Due Process Clause is not violated in most cases unless the state fails to provide a postdeprivation remedy, while the Patent Act provides a cause of action immediately upon patent infringement without considering any remedies offered by the state. *Fla. Prepaid*, 527 U.S. at 639-48; see also Christina Bohannan & Thomas F. Cotter, When the State Steals Ideas: Is the Abrogation of State Sovereign Immunity from Federal Infringement Claims Constitutional in Light of *Seminole Tribe*?, 67 Fordham L. Rev. 1435, 1499-1503 (1999) (predicting Court's decision in *Florida Prepaid*).

[57] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672-75 (1999).

[58] Id. at 673.

[59] Id. The Court explained that although business assets and goodwill (potentially including trademarks, which are also protected by the Lanham Act) are property, the activity of doing business or turning a profit ordinarily is not. Id. at 675.

[60] Id. at 675.

The Court then examined the question of whether the State of Florida waived its immunity by marketing and administering its tuition program after Congress had clearly expressed an intent to make anyone who violated the intellectual property laws subject to suit in federal court. In general, the Court noted, a state may waive its immunity from suit in federal court either by bringing a suit in federal court, thereby voluntarily invoking federal jurisdiction,[61] or by unequivocally expressing its consent to be sued in federal court.[62] Finding that the State of Florida had neither voluntarily invoked federal jurisdiction nor clearly expressed its consent to be sued in federal court, the Court addressed the Bank's argument that under *Parden*, the State of Florida had constructively waived its immunity by engaging in commercial activities that it knew were regulated by the Lanham Act.

The Court forcefully asserted that the notion of "constructive waiver" is incompatible with cases holding that waivers of sovereign immunity must be voluntary and unequivocal.[63] The Court pressed an analogy between waiver of a state's sovereign immunity and waiver of an individual's constitutional trial rights. Quoting *Johnson v. Zerbst*, [64] the well-known criminal case involving waiver of the right to counsel, the Court stated that "[t]he classic description of an effective waiver of a constitutional right is the 'intentional relinquishment or abandonment of a known right or privilege.'"[65] Moreover, the Court suggested that case law involving waiver of the constitutional right to jury trial should set the standard for deciding when a state has voluntarily waived its sovereign immunity, because sovereign immunity is "constitutionally protected . . . no less than the right to trial by jury in criminal cases."[66] Elevating state sovereign immunity to the status of a fundamental constitutional right, the Court explained that "courts indulge every reasonable presumption against waiver of fundamental

---

61 Id. at 675-76 (citing Gunter v. Atl. Coast Line R.R. Co., 200 U.S. 273, 284 (1906)).

62 Id. (citing Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944)).

63 Id. at 680.

64 304 U.S. 458 (1938).

65 *Coll. Sav. Bank*, 527 U.S. at 682 (quoting *Johnson*, 304 U.S. at 464).

66 Id. Justice Scalia also posed the following hypothetical to illustrate his point about the constructive waiver of sovereign immunity:

> [I]magine if Congress amended the securities laws to provide with unmistakable clarity that anyone committing fraud in connection with the buying and selling of securities in interstate commerce would not be entitled to a jury in any federal criminal prosecution of such fraud. Would persons engaging in securities fraud after the adoption of such an amendment be deemed to have "constructively waived" their constitutionally protected rights to trial by jury in criminal cases? . . . The answer, of course, is no.

Id. at 681-82.

constitutional rights,"[67] and "do not presume acquiescence in the loss of fundamental rights."[68]

College Savings Bank expressly overruled *Parden*'s "constructive-waiver experiment," seeing "no merit in attempting to salvage any remnant of it."[69] The Court elaborated, stating that "[t]here is a fundamental difference between a State's expressing unequivocally that it waives immunity and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity."[70] In the absence of a clear declaration of waiver by the state, the Court explained, "there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation."[71]

Yet, while purporting to destroy all vestiges of *Parden*'s constructive-waiver doctrine, the Court distinguished between the impermissible *Parden*-style waiver, in which waiver is inferred merely from a state's presence in a field regulated by Congress, and another type of waiver that arises out of a state's acceptance of a federal "gift or gratuity" that has been conditioned on the waiver of immunity.[72] The Court explained as follows:

> Under the Compact Clause, U.S. Const., Art. I, § 10, cl. 3, States *cannot* form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity. So also, Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts. In the present case, however, what Congress threatens if the State refuses to agree to its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity. . . . [W]e think 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.[73]

This passage suggests a new regime in which Congress may offer some types of federal benefits to a state in exchange for the state's waiver of sovereign immunity from federal statutory claims. More

---

[67] Id. at 682 (quoting Aetna Ins. Co. v. Kennedy ex rel. Bogash, 301 U.S. 389, 393 (1937) (internal quotations omitted)).

[68] Id. (quoting Ohio Bell Tel. Co. v. Pub. Util. Comm'n of Ohio, 301 U.S. 292, 307 (1937) (internal quotations omitted)).

[69] Id. at 680.

[70] Id. at 680-81.

[71] Id. at 680.

[72] See infra Part III.

[73] *Coll. Sav. Bank*, 527 U.S. at 686-87.

generally, the *College Savings Bank* decision as a whole emphasizes that any waiver of sovereign immunity is valid only if it is voluntary and unequivocal.

The remainder of this Article is devoted to analyzing, under *College Savings Bank* and other decisions, three common situations in which a state might be deemed to waive its immunity. I conclude that many state waivers of immunity will be enforceable, which will enable private parties to enforce rights against the states in many cases.

II
STATE WAIVERS OF SOVEREIGN IMMUNITY

The Court repeatedly has confirmed that sovereign immunity from suit in federal court is a privilege that the state may waive at its pleasure.[74] Federal courts have held that waivers of sovereign immunity may be asserted or revoked only by an official designated or authorized to do so under state law.[75] Almost every state has enacted laws describing claims for which it waives its immunity[76] and designating the official responsible for asserting that immunity.

Waivers of sovereign immunity can take many forms. The paradigmatic form of waiver is an explicit waiver given through a declaration by an authorized state official pursuant to state law at the commencement of a suit against the state, but waivers may be deemed to occur in other ways as well. In the remainder of this Article, I address three common ways in which a waiver of immunity might oc-

---

[74] See supra note 36 and accompanying text.

[75] See, e.g., Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 467 (1945) (stating that waiver by state officials is valid only if it is authorized by state "in its Constitution, statutes and decisions"); Lapides v. Bd. of Regents, 251 F.3d 1372, 1374-75 (11th Cir. 2001), cert. granted, 122 S. Ct. 456 (Oct. 29, 2001) (considering whether Attorney General of Georgia had authority to waive state sovereign immunity under Georgia law).

[76] See, e.g., Ga. Const. art. I, § 2, ¶ 9 (waiving immunity for breach of any written contract entered into by State or its departments and agencies and permitting General Assembly to enact legislation waiving immunity in additional situations); Conn. Gen. Stat. Ann. § 4-61 (West 2001) (waiving immunity for highway and public-works contracts entered into with state); Haw. Rev. Stat. § 661-1 (2000) (waiving immunity for all claims founded upon any state statute or regulation as well as claims founded upon any express or implied contract entered into by authorized officer of state); 705 Ill. Comp. Stat. Ann. 505/8 (West 2001) (waiving immunity for tort claims up to $100,000 in damages, contract claims, and claims against State for time unjustly served in prison); Me. Rev. Stat. Ann. tit. 5, § 1510-A (West 2001) (waiving immunity for claims of $2000 or less); Minn. Stat. Ann. § 3.751 (West 2002) (waiving immunity for suits arising out of contracts with state but excluding certain highway repair contracts); N.D. Cent. Code § 32-12-02 (2001) (waiving immunity for actions respecting title to property or arising out of contract, requiring plaintiffs to provide sufficient surety to pay any judgment for costs they might incur); Or. Rev. Stat. § 30.320 (2000) (waiving immunity for actions to quiet title, certain tort claims, and contracts with state agencies, except for contracts relating to care and maintenance of inmates or patients of any county or state institution).

cur. In Part II.A, I address whether a state would be deemed to waive its immunity by failing to assert the immunity at trial. In Part II.B, I address whether a state would be deemed to waive its immunity by entering into a contractual agreement with a private party. In Part III, I address whether a state would be deemed to waive its immunity through agreement with the federal government in exchange for a federal benefit. I conclude that states probably will not be held to have waived their immunity by failure to raise it at trial, but that promises to waive sovereign immunity given in a private contract or as part of an exchange with the federal government ordinarily should be enforced.

A. Waiver by Omission

One way in which a state could be deemed to waive its sovereign immunity is by failure to raise the defense of immunity in the trial court. Given *College Savings Bank*'s insistence that the state's waiver must be "voluntary and unequivocal," it seems very unlikely that the Court would hold that immunity may be waived in this fashion. By comparing a state's right of sovereign immunity to an individual's right to counsel and right to trial by jury, the Court in *College Savings Bank* incorporated a crucial distinction between voluntary waiver, on the one hand, and forfeiture of a right through silence, on the other. As Justice Scalia explained in an earlier case,

> [Waiver and forfeiture] are really not the same, although our cases have so often used them interchangeably that it may be too late to introduce precision. Waiver, the "intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst*, is merely one means by which a forfeiture may occur. Some rights may be forfeited by means short of waiver, *see, e.g., Levine v. United States* (right to public trial); *United States v. Bascaro* (right against double jeopardy); *United States v. Whitten* (right to confront adverse witnesses), but others may not, *see, e.g., Johnson, supra* (right to counsel); *Patton v. United States* (right to trial by jury). A right that cannot be waived cannot be forfeited by other means (at least in the same proceeding), but the converse is not true.[77]

Thus, the Court's reference, in *College Savings Bank*, to the law on waiver of the right to counsel and the right to trial by jury seems to foreclose the possibility that a state could be held to waive its sovereign immunity by mere silence.

Nevertheless, Eleventh Amendment scholar William Fletcher recently has argued that the Court has "unfinished business" on the is-

[77] Freytag v. Comm'r, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring) (portions of internal citations omitted).

sue of whether a state official defending the state against suit (usually the state's Attorney General) forfeits the state's immunity by failing to assert it first in the trial court:

> [T]he Court needs to clarify what it meant in *Edelman* [*v. Jordan*] in holding that an Eleventh Amendment defense may be raised for the first time on appeal. *Edelman* is now commonly read (or misread) to mean that the Amendment may be raised late in the proceedings before the trial court or for the first time on appeal, without regard to whether it could have been raised earlier and without regard to whether the state's attorney had the power under state law to waive it. . . . *Edelman* relied on *Ford Motor Co. v. Department of Transportation*[, which] did hold that the defense could be asserted for the first time on appeal, but only because the state Attorney General, who had litigated the case in the trial court, did not have the power to waive it. Indeed, *Ford Motor Co.* stated explicitly that, if the Attorney General had had the power under state law to waive the Eleventh Amendment, he would have done so by failing to assert it in a timely fashion.[78]

Contrary to Professor Fletcher's argument, however, the *Ford* Court did not actually decide the issue of whether, assuming the Attorney General had power under state law to waive Eleventh Amendment immunity, he would have done so by failing to raise it in the trial court proceedings. Instead, the Court merely said, "[i]t is conceded by the respondents that if it is within the power of the administrative and executive officers of Indiana to waive the state's immunity, they have done so in this proceeding. The issue thus becomes one of their power under state law to do so."[79] Because the respondents, who included the State of Indiana's Department of Treasury and other state officials, had conceded the issue, there was no occasion for the Court to address it. Accordingly, the Court moved directly to the issue of whether the Attorney General had the power to waive the immunity under state law, ultimately concluding that he did not. Thus, *Ford* does not affect *Edelman*'s holding that even where a state official has the power to waive the state's immunity, the official does not effect a waiver by failing to assert the immunity in the trial court. In that case, the defense of sovereign immunity may be raised for the first time on appeal.

Indeed, it is even possible that a state could collaterally attack a final judgment against it where the state had not waived its immunity explicitly in the original proceeding. Because sovereign immunity is

---

[78] William A. Fletcher, The Eleventh Amendment: Unfinished Business, 75 Notre Dame L. Rev. 843, 850 (2000).

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

treated as a limitation on subject matter jurisdiction,[80] the collateral attack would be governed by the ordinary rules dealing with enforcement of judgments where subject matter jurisdiction of the rendering court is challenged. In *Chicot County Drainage District v. Baxter State Bank*,[81] the Supreme Court decided that a party could not collaterally attack a judgment against it on subject matter jurisdiction grounds where the jurisdictional question could have been litigated, but actually was not litigated, in the initial proceeding.[82] In the same term *Chicot* was decided, however, the Court also decided *Kalb v. Feuerstein*,[83] which involved collateral attack of a state court's erroneous exercise of jurisdiction in a matter over which federal bankruptcy legislation had given the federal courts exclusive jurisdiction.[84] The *Kalb* Court held that the issue of subject matter jurisdiction provided a basis for collateral attack of a judgment, even though the issue had been fully and fairly litigated in the previous proceeding, because the jurisdictional limitation in the initial proceeding was intended to protect the federal interest of balancing federal and state power.[85]

If a suit is brought against a state, and the state official defending against the suit does not have the power to waive sovereign immunity under state law, there is probably not a full and fair opportunity to litigate the jurisdictional issue in the first proceeding under *Chicot*. In that case, the state probably could collaterally attack a judgment against it for lack of jurisdiction.[86] Moreover, even where the state official does have the power to waive the state's immunity, if the official does not raise immunity as a defense in the initial proceeding, the state arguably could attack an adverse judgment under *Kalb*, because of the federal interest in maintaining the balance of power between federal and state governments by ensuring that waivers of sovereign immunity are completely voluntary.

Thus, states likely will not be held to have waived their sovereign immunity by merely failing to raise the immunity as a defense in the trial court. Where a state has not waived its immunity, it may raise the immunity defense for the first time on appeal, and even may be permitted to collaterally attack an adverse judgment against it on the

---

80 See Edelman v. Jordan, 415 U.S. 651, 677-78 (1974).

81 308 U.S. 371 (1940).

82 Id. at 378.

83 308 U.S. 433 (1940).

84 Id. at 438-39.

85 Id.

86 Cf. United States v. U.S. Fid. & Guar. Co., 309 U.S. 506 (1940) (allowing collateral attack on judgment against United States on ground of federal sovereign immunity where attorneys for United States had no power to waive immunity and thereby consent to jurisdiction).

ground that the state's immunity deprived the rendering court of subject matter jurisdiction.

B. State Waivers and Private Contracts

Another common situation in which a state might be deemed to waive its immunity is by contract with a private party. There are at least a couple of reasons why it is important to examine the enforceability of private contracts with the state in the aftermath of the Supreme Court's recent decisions. First, although the Court's recent abrogation rulings dealt with the issue of whether private parties could sue a state for violations of federal law and not whether they could sue a state for breach of contract, a private party understandably might be nervous about contracting with the state given the Court's recent sovereign-immunity jurisprudence. Second, as one scholar has argued in the intellectual property context, the Court's recent abrogation decisions "undermine[ ] the utility of property rights, . . . push[ing] private firms toward reliance on contract to manage the risks of misappropriation."[87] Of course, the efficacy of protecting intellectual property rights, or any other rights, against state infringement through contractual relationship depends largely upon the private party's ability to enforce contract rights against the state.

There always has been considerable tension between the contractual obligations of the states and state sovereign immunity from suit for breach of those contractual obligations. The Contract Clause, Article I, Section 10, clause 1, of the Constitution, provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."[88] In addition, Article III, Section 2, states that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, . . . [and] to Controversies . . . between a State and Citizens of another State . . . ." Thus, based solely on the text of the

[87] See Robert G. Bone, From Property to Contract: The Eleventh Amendment and University-Private Sector Intellectual Property Relationships, 33 Loy. L.A. L. Rev. 1467, 1469-70 (2000) (discussing impact of "Eleventh Amendment jurisprudence on intellectual property relationships between state universities and private industry").

[88] Like the Fourteenth Amendment, the language of the Contract Clause explicitly restricts the states' sovereign power by declaring that "*No State shall* . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. art. 1, § 10, cl. 1 (emphasis added). Indeed, although many other constitutional provisions have been interpreted broadly as applicable to the states, the Fourteenth Amendment and the Contract Clause are unusual in that they explicitly speak to the states in their text. See Herbert Hovenkamp, Judicial Restraint and Constitutional Federalism: The Supreme Court's *Lopez* and *Seminole Tribe* Decisions, 96 Colum. L. Rev. 2213, 2244 (1996) ("[L]ike the text of the Fourteenth Amendment, the Contract Clause of the main body of the Constitution is an express limitation on state power that appears to create a positive, individual constitutional right that the state may not prevent contracts from being honored.").

Constitution as originally ratified, it might appear that the states were prohibited from impairing any contractual promises, and that the federal judiciary could exercise jurisdiction over any case brought by an individual to enforce a state's contractual obligation.[89] But when the Supreme Court decided in *Chisholm v. Georgia* that Article III authorized federal jurisdiction over a suit brought against the State of Georgia by a citizen of South Carolina for repayment of debt,[90] Congress quickly responded by passing the Eleventh Amendment, which provides that "[t]he 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."

The Court could have reconciled the Contract Clause and the Eleventh Amendment early on by interpreting the Contract Clause as applying to a state's modification of private contractual obligations but not to a state's modification of its own contractual obligations. Indeed, many constitutional historians agree that "[t]he primary intent behind the drafting of the clause was to prohibit states from adopting laws that would interfere with the contractual arrangements between private citizens."[91] In 1810, however, the Supreme Court held in *Fletcher v. Peck* that the clause applies equally to a state's modification of its own obligations.[92] The Court reaffirmed that holding twice in the nine years following *Fletcher*,[93] and that view has been the law ever since.

---

89 See Hovenkamp, supra note 88, at 2244 ("The Contract Clause itself was designed to prevent states from reneging on Revolutionary War debts or relieving resident debtors of such obligations."); cf. Martha A. Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States, 126 U. Pa. L. Rev. 1203, 1266 (1978) (explaining argument that recognizing state sovereign immunity from Contract Clause claims would render Contract Clause ineffective).

90 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

91 John E. Nowak & Ronald D. Rotunda, Constitutional Law 395 (4th ed. 1991) (emphasis added). But see Hovenkamp, supra note 88, at 2244. Professor Hovenkamp has argued that:

> In a typical case, a creditor would name a debtor as party defendant, the debtor would cite a state debtor relief statute as protecting him from collection, and the federal court would be invited to consider whether the state statute was unconstitutional. But that procedure would not work when the debtor was the state itself, and from the beginning the Court held that the Clause applied to the state's own obligations as well as to those between private parties.

Id.

92 10 U.S. (6 Cranch) 87 (1810).

93 Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812).

This Section addresses the circumstances under which private parties may enforce their contractual rights against a state in federal court notwithstanding state sovereign immunity. I will argue that although the Court's jurisprudence in this area is somewhat ambiguous, if the state voluntarily and unequivocally agrees by contract to waive its immunity from suit in federal court, that waiver would be enforced, notwithstanding the state's subsequent attempt to assert the immunity at trial.

One of the earliest cases to address the issue of whether a private party may sue a state for enforcement of the state's contractual obligations was *Beers v. Arkansas*,[94] decided in 1857. In *Beers*, an individual sued the State of Arkansas to recover interest due on state-issued bonds.[95] At the time the plaintiff brought the suit, the state constitution provided that "'the General Assembly shall direct by law in what courts and in what manner suits may be commenced against the State.'"[96] A state statute designated the appropriate courts and manner for bringing an action against the State, and at trial the State conceded that the plaintiff's suit complied with that law.[97] After the plaintiff had commenced suit, however, the Arkansas legislature passed a new law changing the requirements for suing the State.[98] The new law provided

> "that in every case in which suits or any proceedings had been instituted to enforce the collection of any bond or bonds issued by the State, or the interest thereon, before any judgment or decree should be rendered, the bonds should be produced and filed in the office of the clerk, and not withdrawn until final determination of the suit or proceedings, and full payment of the bonds and all interest thereon . . . ."[99]

After the plaintiff failed to produce and file the bonds pursuant to the new law, the court dismissed the suit.[100]

---

94 61 U.S. (20 How.) 527 (1857).

95 See id. at 528. Although *Beers* involved a suit against the state in state court, the Court has repeatedly cited *Beers* in subsequent decisions dealing with sovereign immunity from suit in federal court. See infra text accompanying notes 107-117 for a discussion of the Court's reliance on *Beers* in *In re Ayers*, *Hans v. Louisiana*, and *College Savings Bank*. Consequently, understanding the reasoning of *Beers* is important to understanding the scope of sovereign immunity from contract claims in either state court or federal court. For further discussion of the relationship between sovereign immunity in federal court and sovereign immunity in state court, see supra note 35.

96 Id. (quoting provision of Arkansas State Constitution in effect at time of suit).

97 See id.

98 See id.

99 Id. (quoting Arkansas statute enacted on December 7, 1854).

100 See id. at 529.

The plaintiff argued that the new law impaired the State's contractual obligations in violation of the Contract Clause[101] and was therefore invalid.[102] The Supreme Court held that the new law was valid, because although it modified the prior law on the conditions of suing a state, "the prior law was not a contract."[103] The Court stated that the prior law "was an ordinary act of legislation, prescribing the conditions upon which the State consented to waive the privilege of sovereignty."[104] The Court went on to say that "[i]t is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission . . . ."[105] Finally, the Court concluded that because granting such permission is altogether voluntary on the part of the State, the state legislators could go so far as to "repeal[ ] the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so . . . ."[106]

Subsequently, in *In re Ayers*,[107] the Court addressed whether plaintiffs could enjoin Virginia state officials from implementing a new law that would have violated the State's prior contractual promise to accept certain certificates as payment of state taxes.[108] Although the plaintiffs had sued state officials instead of the state itself, the Court held that the State was the real party in interest.[109] While the State had not agreed to waive its immunity in the contract, the Court discussed in dicta the effect that such a waiver would have. It cited both *Beers* and *Railroad Co. v. Tennessee*[110] for the proposition that "[a]lthough the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity, without any violation of the obligation of its contract in the constitutional sense."[111]

Three years after *Ayers*, the Supreme Court decided *Hans v. Louisiana*,[112] a case similar to *Beers*, in which a citizen of Louisiana sued the State of Louisiana, demanding payment of coupons repre-

101 U.S. Const. art. I, § 10.
102 See *Beers*, 61 U.S. at 529.
103 Id.
104 Id.
105 Id.
106 Id. at 530.
107 123 U.S. 443 (1887).
108 Id. at 492-93.
109 Id. at 487-92.
110 101 U.S. 337 (1879).
111 *Ayers*, 123 U.S. at 505.
112 134 U.S. 1 (1890).

senting interest due on bonds issued by the State.[113] At the time the bonds were issued, the State of Louisiana passed a statute and constitutional amendment clearly stating that issuance of the bonds was intended to create an enforceable contract between the State and each bondholder. Subsequently, however, the State adopted a new constitution, which substantially modified the State's contractual obligations. [114] Hans argued that the new constitution altered the State's obligation to pay interest on the bonds and therefore impaired his contract with the State in violation of the Contract Clause.[115] The *Hans* Court relied heavily on *Beers* in holding that the State of Louisiana was entitled to assert its immunity from suit despite clearly having broken its contract with bondholders.[116] The Court also quoted extensively from Hamilton's Federalist No. 81, saying "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without . . . consent."[117]

At first blush, *Beers*, *Ayers*, and *Hans* seem to establish that states have the sovereign right to pass laws to either assert their immunity or revoke a previous waiver of their immunity, even where such laws prevent enforcement of contract rights against a state. In short, they seem to say that states have an inalienable right to assert their sovereign immunity at trial.

Yet *College Savings Bank* cites *Beers* for the more limited proposition "that a State may, *absent any contractual commitment to the contrary*, alter the conditions of its waiver and apply those changes to a pending suit."[118] This language suggests that a state might not be completely free to modify the conditions of a prior waiver where the modification would be incompatible with its contractual obligations. Of course, this statement is inconclusive, because it merely gives rise to a negative implication that a contractual commitment would limit a

---

[113] The State of Louisiana asserted Eleventh Amendment immunity, and Hans responded that the Eleventh Amendment by its text applies only to suits brought against one state by citizens of another state. Id. at 9-10. The Court first stated, "That a State cannot be sued by a citizen of another State, or of a foreign state, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established . . . ." Id. at 10. Having interpreted Eleventh Amendment immunity as a restriction on federal-question jurisdiction as well as on diversity jurisdiction, the Court concluded that limiting the immunity to suits brought by out-of-state citizens would produce an "anomalous result." Id. Accordingly, the Court held that despite its text, the Amendment also shields a state from suit brought by one of its own citizens. Id. at 10-16.

[114] Id. at 2-3.

[115] Id. at 9-10.

[116] Id. at 17-18.

[117] Id. at 13.

[118] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 676 (1999).

state's discretion to assert its immunity. Nevertheless, after cases like *Ayers* and *Hans*, it is curious that the Court would state the *Beers* holding so narrowly.

College Savings Bank's characterization of the holding in *Beers* makes more sense when *Beers* is examined in light of its historical context. Indeed, it seems that the *Beers* decision was based on an interpretation of the Contract Clause, not on a rule that sovereign immunity is inalienable.

As was discussed previously, in *Beers*, the State initially had passed a law waiving sovereign immunity and providing for state court jurisdiction over suits brought against the State for payment on state-issued bonds.[119] Later, the State had enacted a new law imposing additional conditions that plaintiffs had to meet before the State would agree to be sued.[120] The Supreme Court held that the new law was valid, because although it modified the prior law which had set forth the conditions for suing a state, "the prior law was not a contract."[121] The *Beers* Court did acknowledge, however, that the bonds themselves gave rise to a contract.[122] Thus, even if the new state law violated no specific contractual promise allowing the State to be sued, the new law still prevented enforcement of the bondholders' rights and therefore altered the contract to pay on state-issued bonds. Nevertheless, the Court concluded that the legislature had not violated the Contract Clause by passing the new law.

This apparent paradox is best understood in light of a right-remedy distinction that has been a factor, in varying degrees, in contract impairment cases since the early nineteenth century.[123] *Bronson v.*

---

119 See supra notes 96-97 and accompanying text.

120 See supra notes 98-99 and accompanying text.

121 See supra notes 103-104 and accompanying text.

122 Beers v. Arkansas, 61 U.S. (20 How.) 527, 528 (1857).

123 See, e.g., W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935) (holding that statutes which changed existing plan to enforce payment of assessments were unconstitutional impairments of contractual obligations); Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843) (holding that state statute, passed after execution of mortgage, altered terms of mortgage in violation of Contract Clause); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (holding that State of New York's bankruptcy law was unconstitutional impairment of contracts for repayment of debt). The right-remedy distinction still plays a role, albeit a more subtle one, in contract impairment cases today. Under the modern contract impairment analysis, a court will find a violation of the Contract Clause only where state legislation causes a substantial impairment of the contractual obligations. Thus,

> [w]hile the Supreme Court no longer follows a rigid distinction between laws that regulate only remedies to contracts and laws that regulate the substantive obligations of contracts, state legislation which is designed to alter contract remedies, rather than to directly alter the rights and responsibilities of parties[,] . . . may well constitute only an insignificant or insubstantial impairment of contract.

Kinzie,[124] which was decided just fourteen years prior to *Beers*, was one of the earliest Supreme Court decisions to articulate the right-remedy distinction clearly. The *Bronson* Court explained the distinction as follows:

> If the laws of the state passed afterwards [do] nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. . . . Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity.[125]

Placed in this context, it is clear what the *Beers* Court meant when it said, just fourteen years after *Bronson*, that the Arkansas law modifying the conditions for suing the State had "violated no contract with the parties [but instead] merely regulated the proceedings in its own courts, and limited the jurisdiction it had before conferred in suits when the State consented to be a party defendant."[126] The holding in *Beers* was not that a state has an inalienable right to assert sovereign immunity (a right that necessarily overrides its prior contractual promises), but instead that changes in state immunity law generally fall on the remedy side of the right-remedy line and therefore do not impair substantive contractual obligations under the Contract Clause.

This interpretation of *Beers* could have two different implications. Under one view, *Beers* could suggest that where the state actually *has* contracted to waive its immunity, it will not be permitted to modify or revoke its waiver subsequently, because to do so would impair the substantive contractual obligation itself. If a state agrees in a contract to certain obligations but does not agree therein to waive its sovereign immunity from suit for enforcement of those obligations, the state would not impair the contract by subsequently passing a law that directs its officials to invoke the immunity in those suits. In that case, an assertion of sovereign immunity might affect the ability of a party to obtain a remedy, but would not itself alter the substantive contractual obligations. But where the state promises in a contract not to assert sovereign immunity in certain circumstances, or promises not to change the conditions of its prior waiver, the state's subsequent

---

Nowak & Rotunda, supra note 91, at 405-06.

[124] 42 U.S. (1 How.) 311 (1843).

[125] Id. at 315.

[126] *Beers*, 61 U.S. at 530.

passage of a law invoking the immunity in those circumstances would constitute a breach of its substantive contractual obligation and therefore violate the Contract Clause.

Alternatively, *Beers* could stand for the proposition that changes in the conditions under which a state will agree to be sued are *always* remedial, and therefore *never* impair the contract, regardless of whether the state previously agreed by contract not to assert immunity from suit. This view finds at least superficial support in *Ayers*, in which the Court opined that a state may withdraw a prior contractual waiver of immunity "without any violation of the obligation of its contract in the constitutional sense."[127]

The former view of these decisions is probably the correct one, for at least a couple of reasons. First, the former view would explain why the *Beers* Court emphasized that "the prior law [waiving immunity] was not a contract."[128] Clearly, if a state's assertion of immunity is always remedial and therefore is always constitutional under the Contract Clause despite a prior contractual waiver of immunity, then it would have been irrelevant whether the prior law waiving immunity was a contract. Second, there are several reasons why the *Ayers* Court's statement supporting the second view should be accorded little weight. As an initial matter, the statement was merely *obiter dictum*, because the State of Virginia had not waived its immunity by contract. Moreover, the statement is not supported by either of the two cases cited by the Court as authority for the proposition. In *Beers*, as I have already shown, the Court was careful to point out that the State's prior law consenting to suit was not a contract, and therefore the *Beers* Court did not address whether the State could have modified its consent to suit if it had been given in a contract.[129] Similarly, in *Railroad Co. v. Tennessee*, the State had consented to suit unilaterally by law, not by contract.[130] More importantly, the State had consented to suit only for the purpose of giving "persons holding claims against the State the privilege of having them audited by the courts instead of some appropriate accounting officer."[131] The State had not consented to allow a court to enforce a judgment against it, and therefore payment of the judgment could be obtained only through legislative appropriation.[132] Because the remedy given by the State was discretionary, the Court held that the State did not impair

127 In re Ayers, 123 U.S. 443, 505 (1887).
128 See supra notes 103-104 and accompanying text.
129 See supra note 103 and accompanying text.
130 R.R. Co. v. Tennessee, 101 U.S. 337, 338 (1879).
131 Id. at 340.
132 Id. at 338.

its contractual obligations by taking that remedy away.[133] Accordingly, the *Railroad Co.* Court explicitly stated that it did not "find it necessary to determine . . . whether, if such a remedy had been given, the obligation of a contract entered into by the State when it was in existence would be impaired by taking it away."[134]

Interpreting the foregoing decisions to mean that a state's contractual promise to waive its immunity should be enforced notwithstanding a subsequent attempt to assert the immunity at trial would also give the plainest meaning to Scalia's statement in *College Savings Bank* "that a State may, *absent any contractual commitment to the contrary*, alter the conditions of its waiver and apply those changes to a pending suit."[135] The obvious implication (albeit a negative implication) of this statement is that a state may *not* alter its waiver where it has made such a contrary contractual commitment.

In cases where the state promises in a contract not to assert its sovereign immunity in certain circumstances, the state probably may not revoke that waiver without breaching its substantive contractual obligations under the Contract Clause. Nevertheless, if states have a constitutional right to assert their sovereign immunity at trial despite a prior waiver, then it cannot be unconstitutional under the Contract Clause for a state to do so. As I shall show, however, the states' constitutional right of sovereign immunity does not require that states be given an opportunity at trial to revoke a prior waiver of immunity.

The Court's analogy in *College Savings Bank* between state sovereign immunity and individual trial rights might suggest, at first blush, that only a waiver given at trial will be enforced.[136] The Court emphasized, for example, that sovereign immunity is "constitutionally protected . . . no less than the right to trial by jury in criminal cases."[137] With regard to constitutional trial rights like the right to trial by jury, the Court has held that a plea agreement waiving the accused's constitutional rights is unenforceable unless and until the accused voluntarily waives the rights in court before a judge.[138] This analogy, taken to its extreme, suggests that a state's contractual promise to waive its constitutional right of immunity is unenforceable unless and until the state voluntarily waives its immunity at trial.

---

133 Id. at 340.

134 Id. at 340-41.

135 See supra note 118 and accompanying text.

136 See supra text accompanying notes 64-67.

137 Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999); see also supra notes 64-67 and accompanying text.

138 See Boykin v. Alabama, 395 U.S. 238, 242-43 (1969) (explaining that guilty plea involves waiver of right against self-incrimination, right to trial by jury, and right to confront one's accusers).

There are, however, at least two reasons for rejecting this view. First, so long as the trial court is able to ascertain that the state clearly waived its immunity by contract, there is no justification for additional inquiries into the state's intent at the time of trial. Existing law ensures that any waiver of immunity will be enforced only if given voluntarily and unequivocally, and courts have had a great deal of practice in evaluating alleged waivers.[139] If a state may change its mind after having waived its immunity voluntarily by contract, then there can be no end to the inquiry. This is a particularly salient point in the context of sovereign immunity, because the immunity typically is treated as a limitation on subject matter jurisdiction.[140] The issue of whether a court has subject matter jurisdiction typically is decided at the time the suit is filed, and allowing subsequent events—such as a state's revocation of a prior waiver of immunity—to oust the court of its jurisdiction would cause a great deal of uncertainty in litigation.[141]

Second, although the analogy between a state's right to sovereign immunity and individual trial rights is valid insofar as it helps to ensure that a state's waiver is voluntary, it does not support the proposition that a state's contractual waiver of immunity is enforceable only after it has been confirmed at trial. When a criminal defendant enters into a plea agreement waiving his constitutional trial rights, the trial judge's confirmation of that waiver takes place prior to the prosecu-

---

139 See, e.g., Petty v. Tenn.-Mo. Bridge Comm'n, 359 U.S. 275, 278-82 (1959) (construing interstate compact); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54-56 (1944) (construing Oklahoma statute); Gunter v. Atl. Coast Line R.R. Co., 200 U.S. 273, 285-88 (1906) (construing South Carolina statute).

140 This is certainly the case with Eleventh Amendment immunity in federal court. See, e.g., Edelman v. Jordan, 415 U.S. 651, 677-78 (holding 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"). It is often the case with state sovereign immunity in state court as well. See, e.g., Ark. Pub. Defender Comm'n v. Greene County Circuit Court, 32 S.W.3d 470, 473 (Ark. 2000) (holding that, in action against state where sovereign immunity is not waived, trial court has no jurisdiction); Hartman v. Regents, 22 P.3d 524, 529 (Col. Ct. App. 2000) (holding that "[m]otions to dismiss on governmental immunity grounds are treated as motions to dismiss for lack of subject matter jurisdiction"); Fed. Deposit Ins. Corp. v. Peabody, N.E., Inc., 680 A.2d 1321, 1324 (Conn. 1996) (holding that "the doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss"); Claremont Sch. Dist. v. Governor, 761 A.2d 389, 391 (N.H. 1999) (holding that sovereign immunity is jurisdictional question and therefore sovereign-immunity challenge to costs awarded against state is challenge to court's subject matter jurisdiction); Tex. Dept. of Transp. v. Jones Bros. Dirt & Paving Contractors, 24 S.W.3d 893, 900 (Tex. App. 2000) (holding that "immunity from suit deprives the trial court of subject matter jurisdiction").

141 See, e.g., Anderson v. Beaulieu, 555 N.W.2d 537, 540 (Minn. 1996) (holding that employment of putative father, who was member of Indian tribe, outside reservation at time of commencement of suit gave state court jurisdiction over paternity suit, and subsequent termination of employment did not remove court's jurisdiction).

tion's performance of its promises under the plea agreement. In that case, if the defendant changes his mind and revokes the waiver and plea agreement at the plea colloquy, the prosecution loses nothing, except perhaps the time it invested in plea negotiations. By contrast, where the state promises to waive its immunity in a contract with a private party, that party performs its obligations in reliance on the state's contractual promises. In many cases, by the time the private party sues the state for breach, the party has performed all or most of its contractual obligations, and merely seeks payment from the state for the goods or services rendered. Allowing the state to revoke every contractual promise to waive its immunity would thus pave the way for the systematic violation of vested contractual rights.

Given the Court's recent abrogation decisions, however, it may seem unrealistic to suggest that abstract concerns such as fairness or the rule of law will trump the Court's calculus of sovereign immunity in evaluating waivers. In *Florida Prepaid* and *Alden*, for example, the parties suing the states argued that if Congress may not abrogate state sovereign immunity from suit brought by private parties for violations of federal law, the states could flout federal law with impunity.[142] The Court flatly rejected those arguments, stating that it refused to assume that the states would engage in such behavior and reasoning that the "good faith" of the states would prevent widespread state-backed lawlessness.[143]

Whatever the merits of the Court's "good faith" approach to sovereign immunity in the congressional abrogation context, that approach clearly is inapplicable in the private contractual-waiver context. In the abrogation cases, the Court was troubled by the idea of allowing Congress to divest a state of its right of immunity before it was known whether or not the state would act wrongfully by violating federal law.[144] Conversely, where a state voluntarily and unequivocally promises to waive its immunity by contract, and the other party acts in reliance on the state's promise, the state's subsequent assertion of immunity would itself be the wrongful act demonstrating a lack of good faith on the part of the state. Even assuming that most states ultimately would act in good faith and confirm the prior waiver of immunity at trial, the uncertainty of contractual enforcement could result in unwillingness on the part of private parties to contract with the state. Indeed, if the doctrine of sovereign immunity requires a court to reject a state's own voluntary promise to waive its immunity

142 Alden v. Maine, 527 U.S. 706, 749 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 641-42 (1999).

143 *Alden*, 527 U.S. at 751; *Fla. Prepaid*, 527 U.S. at 641-42.

144 *Alden*, 527 U.S. at 758-59; *Fla. Prepaid*, 527 U.S. at 646.

and mandates that a state be given an opportunity to assert its immunity at trial, then a state wishing to act in good faith and comply fully with its contractual promises would have no way to assure those with whom it desires to contract that it will not repudiate its contractual obligations in the future. This would produce an untenable result for states entering into contracts with private parties.

Where a state waives its immunity by contract, allowing the state to revoke that waiver subsequently in a suit for breach of contract would permit the violation of vested contractual rights. As I have shown, however, allowing a state to revoke its prior contractual waiver of immunity at trial is neither permitted by the Contract Clause nor required by the doctrine of sovereign immunity. Thus, so long as a court determines that a state's contractual waiver of immunity was given voluntarily and unequivocally, the waiver should be enforced, and the state should not be given an opportunity to reconsider its waiver at the time suit is brought against it to enforce its contractual obligations.

In Part III, I consider state waivers given pursuant to a different type of contract—a contract between a state and the federal government in which the state accepts a federal benefit that is conditional upon the state's waiver of immunity. Although federalism issues complicate the enforcement of such a waiver, I conclude that so long as there is sufficient evidence that the state has waived its immunity voluntarily, a waiver given in exchange for a federal benefit likewise should be enforced.

III
STATE WAIVERS, FEDERAL INCENTIVES, AND UNCONSTITUTIONAL CONDITIONS

An additional situation in which a state might waive its immunity is in exchange with the federal government for a federal benefit. In light of the recent sovereign-immunity decisions holding that Congress may not abrogate state sovereign immunity from private claims brought against a state under federal law, Congress's ability to obtain state waivers for those claims has taken on increased importance. Several circuit court decisions recently have addressed whether states waived their immunity by accepting federal funds or participating in spending programs.[145] In addition to spending legislation, Congress

145 See, e.g., Bell Atl. Md., Inc. v. MCI Worldcom, Inc., 240 F.3d 279, 309 (4th Cir. 2001) (holding that suit by Bell Atlantic against Maryland Public Service Commission for violation of Telecommunications Act of 1996 was barred by Eleventh Amendment because waiver of sovereign immunity was not made condition of participation in federal regulatory scheme); Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000) (holding that Arkan-

also is considering a bill that would propose an exchange of "in-kind" benefits for waivers of immunity. The Leahy Bill, for example, would condition a state's ability to obtain federal patent, copyright, and trademark rights on the state's promise not to assert its immunity in future intellectual property-infringement claims brought against the state by private parties.

Because courts have observed that congressional spending legislation is often "much in the nature of a contract,"[146] the discussion in Part II.B of state waivers of immunity in the context of state contracts with private parties might be instructive with regard to waivers in the context of state agreements with the federal government. In the context of private contractual waivers, states should be held to contractual promises to waive their immunity so long as the waiver was voluntary and unequivocal.[147] Although contract principles suggest that the same result should obtain in agreements between the state and federal governments, issues of federalism complicate the enforcement of contracts between the sovereigns.[148] The constitutionality of such exchanges between state and federal governments is the focus of this Section. As with contracts between a state and private parties, I conclude that agreements between a state and the federal government in which the state waives its immunity should be enforceable so long as the waiver is voluntary and unequivocal.

---

sas Department of Education waived sovereign immunity from suit under Section 504 of Rehabilitation Act by accepting federal funds that statute made conditional on waiver of immunity); Burnette v. Carothers, 192 F.3d 52, 60 (2d Cir. 1999) (holding that state did not waive its immunity from suit under Clean Water Act, Resource Conservation and Recovery Act, or Comprehensive Environmental Response, Compensation, and Liability Act by engaging in activities regulated by these acts or by accepting federal funds where Congress had not clearly manifested its intent either to abrogate immunity or to make receipt of funds conditional on waiver of immunity); Litman v. George Mason Univ., 186 F.3d 544, 555 (4th Cir. 1999) (holding that university waived its sovereign immunity from sex discrimination claims under Title IX by accepting federal funds pursuant to statute which made clear that states would not be immune from suit under Title IX); see also In re Huffine, 246 B.R. 405, 412 (Bankr. E.D. Wash. 2000) (holding that state waived its immunity from bankruptcy dischargeability action by participating in federal student-loan program whose statutory authority contained overwhelming implication that states waived their immunity by participating in program).

146 See, e.g., Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("[I]n return for federal funds, the States agree to comply with federally imposed conditions."); Westside Mothers v. Haveman, 133 F. Supp. 2d 549, 557-58 (E.D. Mich. 2001) (quoting "contract" language from *Pennhurst* to support conclusion that federal Medicaid program is essentially contract between sovereigns).

147 See supra Part II.B.

148 See, e.g., *Westside Mothers*, 133 F. Supp. 2d at 558 (stating that where "contract is between sovereigns and not individuals, the 'contractual nature' of the relationship is more . . . truncated tha[n] it would be in a purely private contract").

The issue of whether Congress may use federal benefits to encourage states to surrender their constitutional right of sovereign immunity falls within the purview of the doctrine of unconstitutional conditions. The doctrine of unconstitutional conditions scrutinizes the extent to which government benefits may be conditioned or distributed in ways that burden constitutional rights or principles.[149] Although the doctrine is used most often to evaluate conditions placed on government benefits that burden individual rights,[150] it also may invalidate legislation that conditions the disbursement of federal benefits in a way that shifts power from the states to the federal government in violation of constitutional principles of federalism.[151] It is this application of the doctrine in the federalism context that is relevant for present purposes.

Because the Supreme Court has never clearly articulated a rule for determining when Congress may use federal incentives to pressure the constitutional rights of states, it is necessary to consider each of the cases in which the Court has applied the doctrine of unconstitutional conditions in the federalism context. The first case to apply the doctrine to limit Congress's bargaining power on federalism grounds was *United States v. Butler*,[152] decided in 1936. In *Butler*, the Court struck down provisions of the Agricultural Adjustment Act of 1933, which offered subsidies to farmers on the condition that the farmers decrease their crop production.[153] Although the condition violated no constitutional right of individual farmers, the Court's view of the Commerce Clause at the time would not have empowered Congress to command farmers to curb production,[154] and the Court was concerned with permitting Congress to use the spending power to regulate beyond the scope of its other Article I powers.[155] Thus, the Court

149 See, e.g., Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1415 (1989) (arguing that doctrine of unconstitutional conditions reflects rule that "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right").

150 The combinations of benefits and conditions to which the doctrine potentially applies are numerous and varied. The Court has held, for example, that the doctrine was violated where a state had conditioned a property-tax exemption for veterans on their taking an oath of loyalty, see Speiser v. Randall, 357 U.S. 513, 518-19 (1958) (holding that condition placed on receipt of government benefit burdened right to free speech), and where a state denied unemployment compensation benefits to a woman who refused to work on Saturday because it was her Sabbath, see Sherbert v. Verner, 374 U.S. 398, 410 (1963) (finding that condition placed on receipt of government benefit burdened right to free exercise of religion).

151 See United States v. Butler, 297 U.S. 1, 71-72 (1936).

152 Id.

153 Id. at 74.

154 Id. at 71-72.

155 Id. at 74-75.

noted a difference between a condition that regulates how federal money may be spent and one that requires submission "to a regulation which otherwise could not be enforced."[156] Moreover, the Court observed that because "[t]he amount offered is intended to be sufficient to exert pressure on [the farmers] to agree to the proposed regulation," the farmers' ability to forgo the subsidy was "illusory."[157]

For many years *Butler* stood as the only decision in which the Court invalidated, on federalism grounds, a condition that had been placed on the receipt of a federal benefit.[158] In *Steward Machine Co. v. Davis*,[159] the Court upheld federal Social Security Act provisions that induced the states to establish unemployment compensation programs by offering federal payroll tax credits to employers who contributed to such state programs.[160] The Court distinguished *Butler* on the ground that the Social Security Act at issue in *Steward* involved no undue coercion, but "only a condition which the state is free at pleasure to disregard or to fulfill."[161] Similarly, in *Oklahoma v. United States Civil Service Commission*,[162] the Court upheld provisions of the Hatch Act that granted federal subsidies to states on the condition that state employees refrain from participating in certain political activity.[163] There, the Court stressed that a state could choose the "'simple expedient' of not yielding to what [the state] urges is federal coercion."[164] And in *Petty v. Tennessee-Missouri Bridge Commission*,[165] the Court held that Congress had the power to condition its approval of an interstate compact on a bistate commission's waiver of sovereign immunity, where the bistate commission had been created under the interstate compact and was assumed to partake of sovereign immunity.[166]

---

156 Id. at 73.

157 Id. at 70-71 ("The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits.").

158 See South Dakota v. Dole, 483 U.S. 203, 216 (1987) (O'Connor, J., dissenting) (describing *Butler* as "the last case in which this Court struck down an Act of Congress as beyond the authority granted by the Spending Clause"). In 1989, Kathleen Sullivan wrote that "*United States v. Butler*, the case that first set forth the [unconstitutional conditions] doctrine in this context, was the last to apply it." Sullivan, supra note 149, at 1431 (citation omitted).

159 301 U.S. 548 (1937).

160 Id. at 573-78, 598.

161 Id. at 595.

162 330 U.S. 127 (1947).

163 Id. at 129 n.1, 133, 146.

164 Id. at 143-44.

165 359 U.S. 275 (1959).

166 Id. at 277-80, 282.

Similarly, in the more recent case of *South Dakota v. Dole*,[167] the Court held that federal legislation conditioning South Dakota's receipt of federal highway funds on the State's adoption of a specified minimum drinking age was a valid exercise of Congress's spending power.[168] The Court explained, however, that Congress's spending power is not unlimited but is instead subject to several conditions.[169] Among other limitations,[170] the Court said that the condition placed on the benefit probably should be germane to the purpose of giving the benefit,[171] and the federal inducement must not be so coercive that the state is essentially compelled to consent to the condition.[172] The *Dole* Court found that the germaneness requirement had been met,[173] and it also found little or no coercion, because "Congress [had] directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage of certain federal highway funds."[174]

By contrast, in *College Savings Bank*, the Court held that Congress could not make a state's ability to engage in certain commercial activity conditional on the waiver of its sovereign immunity.[175] The Court's explanation of the difference between this condition and other potentially legitimate types of conditions bears repeating:

---

167 483 U.S. 203 (1987).

168 Id. at 205-06.

169 Id. at 207-08.

170 Besides the factor prohibiting coercion, discussed infra at Part III.C, and a germaneness factor, discussed infra at Part III.A, the *Dole* Court listed three requirements that must be met for Congress's exercise of spending power to be valid. First, "the exercise of the spending power must be in pursuit of 'the general welfare.'" Id. at 207. Second, any conditions that Congress wishes to place on the states' receipt of the federal funds must be clear and unambiguous, so that the states may exercise their choice knowingly. Id. Third, the spending power may not be used to induce the states to engage in unconstitutional conduct. Id. at 210. These three requirements should not pose a substantial obstacle to Congress's ability to condition a state's receipt of a federal benefit on waiver of its sovereign immunity. The first condition is not a serious impediment because the Court generally defers to Congress's judgment as to what serves the general welfare. See id. at 207 & n.2. The second requirement imposes no additional restriction on Congress's power to elicit waivers of sovereign immunity because even congressional legislation attempting to abrogate state sovereign immunity must make its intent to abrogate clear and unambiguous. See Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."). The third requirement also is no obstacle to Congress's ability to elicit a waiver of immunity, because the state is permitted to waive its immunity under the Constitution. See supra note 35 and accompanying text.

171 *Dole*, 483 U.S. at 207.

172 Id. at 211 (citing Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

173 *Dole*, 483 U.S. at 208 & n.3.

174 See id. at 211.

175 See supra notes 69-71 and accompanying text.

> Under the Compact Clause, U.S. Const., Art. I, § 10, cl. 3, States cannot form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity. So also, Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts. In the present case, however, what Congress threatens if the State refuses to agree to its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity. . . . [W]e think 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.[176]

Thus, *College Savings Bank* seems to provide a test, albeit vague, for distinguishing permissible incentives—like those upheld in *Steward*, *Oklahoma*, *Petty*, and *Dole*—from impermissible incentives—like the one struck down in *College Savings Bank* itself. Consequently, the decision has created quite a stir, leading some commentators to speculate on whether and under what circumstances Congress may condition a state's receipt of a federal benefit on its waiver of sovereign immunity from suit for violations of federal law.[177]

While this may be a complicated inquiry, in essence it is merely an application of the doctrine of unconstitutional conditions. Four different theories potentially explain the circumstances under which courts might invalidate proposed exchanges between state and federal governments under the doctrine of unconstitutional conditions: the germaneness theory, the utilitarian theory, the coercion theory, and the inalienability theory.

The first theory, the germaneness theory, asks "whether the government's proposal reflects illegitimate legislative process, and should therefore be condemned even if the offeree is free to refuse it."[178] In

---

176 Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686-87 (1999) (emphasis omitted); see also supra note 73 and accompanying text.

177 See, e.g., Vázquez, supra note 7, at 889 (interpreting *College Savings Bank* to mean "that states have a constitutional right to engage in any activity that private parties can legally engage in, only on more favorable terms"); Brenda Sandburg, States May Lose IP Immunity, Recorder (Sept. 14, 2000) (interview with patent and trademark attorney Justin Hughes, in which Hughes states that whether "a patent is a gift or gratuity" under *College Savings Bank* "is a big open question"), http://www.law.com.

178 Sullivan, supra note 149, at 1456-57 (advancing "germaneness" as coming "closest to providing possible foundation for such a theory"); see also Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293, 1333 (1984) (explaining that appeal of "purpose analysis," includes fact that it allows courts to avoid weighing interests in defining which legislative actions are permissible).

the context of exchanges between the state and federal governments, Justice O'Connor has expressed concern that allowing the federal government to condition the states' receipt of federal benefits in any way it pleases could "render academic" the constitutional limitations on federal power.[179] Accordingly, this theory requires that the condition placed on a state's receipt of federal benefits be germane to the purpose of giving the benefits to the state.[180]

The second theory potentially underlying the doctrine of unconstitutional conditions is utilitarian in nature. The utilitarian theory ordinarily would uphold exchanges between state and federal governments unless market irregularities such as monopolistic behavior or externalities indicate that the exchange is inefficient.[181]

The third theory of unconstitutional conditions is that government should not coerce individuals and entities to make a choice regarding the waiver of a constitutional right that they would not otherwise make.[182] Under this theory, the doctrine seeks to ascertain whether the will of the rightholder has been overcome such that giving up a right is deemed an involuntary act.[183] The coercion theory has dominated the case law on unconstitutional conditions in the federalism context.[184]

The fourth theory, the inalienability theory, deals with the more fundamental question of whether constitutional rights may be sold or bartered away in any type of exchange.[185] That is, although many constitutional rights, including sovereign immunity, may be waived

---

179 See New York v. United States, 505 U.S. 144, 167 (1992).

180 See id.; see also South Dakota v. Dole, 483 U.S. 203, 207-08 (suggesting that Congress's ability to condition states' receipt of highway funds on raising drinking age depends, in part, on germaneness of condition to federal purpose).

181 See Frank H. Easterbrook, Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information, 1981 Sup. Ct. Rev. 309, 349 (arguing that perhaps people should not be able to waive or sell their constitutional rights when government is exercising monopoly power); Richard A. Epstein, Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4, 43 (1988) (arguing that Congress should not have "power to admit goods into interstate commerce subject to conditions that drastically shift the distribution of power within the federal system").

182 See Kreimer, supra note 178, at 1351-74 (arguing that conditions are coercive and therefore unconstitutional when they narrow state's ex ante range of choices rather than enlarging range of choices); Sullivan, supra note 149, at 1428 (stating that Supreme Court treats conditions as unconstitutional when they pass point of merely applying pressure on states and leave states no choice but to comply, but arguing that Court's empirical approach is unsustainable); see also infra Part III.C.1-3.

183 See Sullivan, supra note 149, at 1428 (stating that Court holds conditions unconstitutional when they become compulsory).

184 See infra Part III.C.

185 See Kreimer, supra note 178, at 1389 ("Even when a right is waivable, there may be aspects of the alienation of the right that would overcome any presumption of legitimacy arising from a desire to vindicate individual choice."); Sullivan, supra note 149, at 1478

unilaterally in any particular case, the inalienability theory questions whether constitutional rights may be treated as ordinary commodities to be bought and sold on the open market, regardless of the terms of the agreement.[186] This theory would preclude otherwise legitimate and voluntary exchanges of constitutional rights for benefits.[187]

Addressing these four theories in turn, I conclude that neither the germaneness theory nor the utilitarian theory provides a persuasive rationale for the Court's approach in *College Savings Bank* and prior cases, and that, in any event, these theories probably would not prove to be substantial obstacles to congressional waiver schemes.[188] Applying the coercion theory, I conclude that none of the baselines that have been offered in the literature for distinguishing between coercive and noncoercive incentives adequately accounts for the Court's approach in *College Savings Bank* and other decisions, and I propose a new baseline, developed specifically for the sovereign immunity context.[189] I argue that the Court is less concerned with making arbitrary distinctions between permissible and impermissible federal incentives and more concerned with ensuring that a state's waiver of sovereign immunity is voluntary and unequivocal. Finally, turning to the inalienability theory, I conclude that the Court's recent sovereign immunity decisions are inconclusive on the fundamental question of whether sovereign immunity may be bartered away to the federal government in exchange for any type of federal benefit. I argue, however, that the reasons usually proffered for holding constitutional rights inalienable do not apply in the context of state sovereign immunity. Thus, when states voluntarily and unequivocally waive their immunity in exchange for federal benefits, those waivers should be enforced.[190]

(explaining that one argument for alienability assumes that "citizens should be able to sell what they can waive").

186 Compare Easterbrook, supra note 181, at 347 ("If people can obtain benefits from selling their rights, why should they be prevented from doing so?"), with Kreimer, supra note 178, at 1378-80, 1385-87 (discussing why courts should second guess person who feels it is in her best interest to sell her constitutional rights and identifying elements which signal that real choice has been made), and Sullivan, supra note 149, at 1476-77 (stating that one theoretical explanation of unconstitutional conditions is that it is harmful to treat rights as transferable objects).

187 See Kreimer, supra note 178, at 1389-90 (discussing negative consequences of alienating rights); Sullivan, supra note 149, at 1476-77 (stating that this theory holds that some constitutional rights are inalienable and may not be surrendered even through completely voluntary exchange).

188 See infra Part III.A-B.

189 See infra Part III.C.

190 See infra Part III.D.

A. Germaneness Theory

The germaneness theory of the unconstitutional conditions doctrine would invalidate any condition placed on a government benefit if the condition burdens a constitutional right and does not serve legitimate legislative ends. In the federalism context, the Court has explained that "conditions must (among other requirements) bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority."[191]

With the possible exception of *Butler*, which was decided both on the grounds of coerciveness and germaneness,[192] the Court never has struck down federal legislation on the grounds of germaneness. In *Dole*, Justice Rehnquist was tentative in introducing the germaneness requirement, stating that "our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"[193] Rehnquist's reticence in *Dole* hinted at his view, which he has made known elsewhere, that where Congress may deny a federal benefit altogether, this greater power to deny the benefit includes the lesser power to condition receipt of the benefit in any way Congress chooses.[194]

The *Dole* Court found it unnecessary to "define the outer bounds" of the germaneness requirement, concluding that the requirement had been satisfied in any event.[195] The Court first noted that a primary federal purpose for giving highway funds to the states was to promote "safe interstate travel,"[196] and went on to explain that "[t]his goal of the interstate highway system had been frustrated by varying drinking ages among the States. . . . [T]he lack of uniformity . . . created 'an incentive to drink and drive' because 'young persons commut[e] to border States where the drinking age is lower.'"[197] It concluded that "Congress conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment to a

191 New York v. United States, 505 U.S. 144, 167 (1992) (citations omitted).

192 See supra notes 154-157 and accompanying text.

193 South Dakota v. Dole, 483 U.S. 203, 207-08 (1987) (quoting plurality opinion in Massachusetts v. United States, 435 U.S. 444, 461 (1978)).

194 See Kreimer, supra note 178, at 1308-10 (discussing Justice Rehnquist's opinions in due process cases); Sullivan, supra note 149, at 1462-63 (discussing Justice Rehnquist's opinion in Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986)).

195 *Dole*, 483 U.S. at 208 n.3.

196 Id. at 208.

197 Id. at 209 (quoting Presidential Commission on Drunk Driving, Final Rep. 11 (1983)).

purpose for which the funds are expended."[198] Thus, it seems that the *Dole* majority required minimal connection between the purpose of the funds and the condition placed on receipt of the funds.

Only Justice O'Connor, in dissent, would have required a more significant nexus between the purpose of the federal funds and the condition placed on the states' receipt of the funds. Justice O'Connor thought that the condition of requiring the states to raise the drinking age to twenty-one was not germane to the purpose of interstate highway safety because the condition was "far too over- and under-inclusive." [199] She explained that "[i]t is over-inclusive because it stops teenagers from drinking even when they are not about to drive on interstate highways. It is under-inclusive because teenagers pose only a small part of the drunken driving problem in this Nation."[200]

Whether or not the germaneness requirement retains much independent significance, some commentators have argued that germaneness often helps to explain why the Court finds some conditions unconstitutional under a coercion theory.[201] Accordingly, although the Court in *College Savings Bank* spoke only of the coerciveness of the threat to exclude the state from commercial activity, it is possible that the decision may be explained on grounds of germaneness. The Court might have concluded that the condition requiring a state to waive its immunity from unfair-competition claims was not sufficiently related to Congress's purposes in allowing the state to engage in commercial activity like the marketing of CDs for financing college education. Arguably, because Congress's purposes in allowing the states to engage in this type of commercial activity are very diffuse, conditioning this benefit upon waiver of immunity in unfair-competition suits was significantly underinclusive, at least under Justice O'Connor's approach.

Nevertheless, germaneness concerns probably did not animate the Court's decision in *College Savings Bank*. It is highly unlikely that the Court would strike down a statute on grounds of germaneness—

---

198 *Dole*, 483 U.S. at 209.

199 Id. at 214 (O'Connor, J., dissenting).

200 Id. at 214-15 (O'Connor, J., dissenting). Justice O'Connor elaborated as follows:

> When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety.

Id. at 215.

201 See Sullivan, supra note 149, at 1463-64 (discussing Nollan v. California Coastal Commission, 483 U.S. 825 (1987), in which Supreme Court deemed conditions placed on government benefits to be coercive where condition did not bear appropriate relationship to benefit).

something it has not done in the federalism context since the New Deal—without even referring to the germaneness doctrine. Moreover, even assuming that germaneness concerns were at work in the *College Savings Bank* decision, or assuming that the Court does adopt a germaneness requirement in the future, the requirement probably would not present a significant obstacle to federal legislation granting benefits to the states in exchange for waivers of sovereign immunity. The germaneness theory, as currently formulated, subjects federal legislation to minimal scrutiny,[202] and the waiver of state sovereign immunity under federal statutory programs tends to enhance enforcement of the statutes. Thus, it seems likely that courts applying minimal scrutiny would find Congress's decision to condition federal funds on waivers to be sufficiently germane to the purpose behind the statutory program. The germaneness requirement is also unlikely to threaten most federal incentive plans involving "in-kind" exchanges, such as the Leahy Bill.[203] It seems clear, for example, that a condition requiring states to waive their immunity from claims under the Federal Patent Act or Copyright Act would be sufficiently germane to the purpose of granting patents and copyrights to the states. In that case, both the benefit given to the state and the condition attached to the benefit would serve the same constitutional purpose, which is "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."[204]

B. Utilitarian Theory

Utilitarian theorists argue that the doctrine of unconstitutional conditions "serves to control cases of externalities and monopoly, problems that would cause contracts to lead to less-than-desirable results."[205] Under this view, the doctrine would invalidate an agreement in which a state consents to an exercise of federal power where such market irregularities are present.[206]

---

202 Of course, if a majority of the Court adopts a stricter germaneness test like the one advocated by Justice O'Connor, then many more conditional spending arrangements could be threatened. See infra Part III.E (discussing future implications of germaneness theory).

203 See supra note 14 and accompanying text (describing Leahy Bill).

204 U.S. Const. art. I, § 8, cl. 8; see also Sony Corp. v. Universal City Studios, 464 U.S. 417, 429 (1984) (stating that purpose of copyright law is to "motivate the creative activity of authors and inventors by the provision of a special reward"); Graham v. John Deere Co., 383 U.S. 1, 5-10 (1966) (stating that purpose of patent law is to stimulate innovation by providing reward to inventors).

205 Easterbrook, supra note 181, at 349.

206 See id. (giving examples of governmental monopolies); see also Epstein, supra note 181, at 43 (same).

Professor Richard Epstein has argued, for example, that *Hammer v. Dagenhart*[207] was decided correctly on utilitarian grounds.[208] In that case, Congress, acting pursuant to its power to regulate interstate commerce, enacted legislation prohibiting the shipment in interstate commerce of goods produced by private firms that employed child labor.[209] Congress essentially had used its monopoly power over interstate commerce to set labor standards for local firms, which Congress could not do directly under the Court's view of the Commerce Clause prevailing at that time.[210] Epstein has argued that the Court correctly struck down the legislation, because "[t]he ability to close down all modes of interstate transportation threatened to work an enormous redistribution of wealth from firms that were unwilling to comply with the restrictions to firms that were not."[211]

The utilitarian theory could explain the result in *College Savings Bank*. A utilitarian analysis suggests that Congress used its vast power over interstate commerce to extract "constructive" waivers of sovereign immunity, which it could not directly compel.[212] In addition, removing a state's protection of immunity would result in a redistribution of wealth from state treasuries to private parties, which is one of the concerns that seems to be driving the Court's recent sovereign-immunity decisions.[213]

While the utilitarian theory can be used to explain the Court's decision in *College Savings Bank*, it is unlikely that this was actually the basis for the decision. First, as Kathleen Sullivan has argued, Epstein's utilitarian theory "intersect[s] only fortuitously with the particular forms of pressure on rights at issue in unconstitutional conditions cases[, because the] focus on controlling government abuse in the distribution of benefits makes the question whether a condition burdens a preferred constitutional liberty secondary or even unnecessary."[214]

Second, the Court seemed to reject application of the utilitarian theory in *Dole*. The *Dole* Court upheld spending legislation that con-

---

207 247 U.S. 251 (1918), overruled by United States v. Darby, 312 U.S. 100, 116-17, 122-23 (1941) (holding that Fair Labor Standards Act of 1938, which set minimum wages and maximum hours for employees engaged in production of goods moving in interstate commerce, is valid exercise of Congress's Commerce Clause power).

208 Epstein, supra note 181, at 42-43.

209 See *Hammer*, 247 U.S. at 268-69.

210 See Epstein, supra note 181, at 42-43.

211 Id. at 42.

212 See supra notes 63-71 and accompanying text.

213 See infra notes 313-314 and accompanying text (viewing Court's federalism decisions as protective of states' public funds).

214 Sullivan, supra note 149, at 1475.

ditioned a percentage of the federal funds available to a state for interstate highway construction on the state's setting the legal drinking age at twenty-one years.[215] The Court reasoned that even if the Twenty-First Amendment gave states the exclusive power to regulate intoxicating liquors, Congress could use its spending power to do that which is prohibited by the Amendment.[216] Epstein has argued that the *Dole* decision "misse[d] the essential point" under utilitarian theory, because "[s]o long as the twenty-first amendment identifies structural limitations upon federal power, the doctrine of unconstitutional conditions should ensure that these limitations . . . are not overridden by the vast discretionary power of the federal government over the distribution of its general revenues."[217]

Given the Court's apparent rejection of the theory in *Dole*, and the fact that the Court made no mention in *College Savings Bank* of either Congress's monopoly power over commerce or the efficiency of the exchange between the state and federal governments, it is unlikely that the utilitarian theory was actually the basis for the decision. In any event, after *Dole*, the utilitarian theory would not preclude Congress from using federal funds to obtain a waiver of sovereign immunity in all cases. While application of utilitarian theory could lead to invalidation of the Leahy Bill given Congress's significant monopoly power over intellectual property (especially patents and copyrights),[218] it is unclear whether Congress's monopoly power over intel-

---

215 South Dakota v. Dole, 483 U.S. 203, 211-12 (1987).

216 Id. at 209-12.

217 Epstein, supra note 181, at 44-46. Arguably, however, the utilitarian theory would have applied with more force in a case like *College Savings Bank* than in *Dole*. In *Dole*, Congress had used fungible money as an incentive to obtain the state's consent to the condition, and Congress has no monopoly power over money. By contrast, in *College Savings Bank*, Congress attempted to use its vast monopoly power over interstate commerce to induce states to do what it otherwise could not require them to do. See supra notes 63-71 and accompanying text. It should be noted that this argument is undercut, at least to some extent, by Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959). In *Petty*, the Court apparently permitted Congress to condition its approval of an interstate compact, a power which resides exclusively in Congress under the Constitution, on an interstate commission's waiver of sovereign immunity. Id. at 278-82. Of course, because Congress's monopoly over approval of interstate compacts is much less likely to distort transactions than Congress's vast monopoly power over interstate commerce, *College Savings Bank* would appear to be the stronger candidate for application of the utilitarian theory.

218 The Patent Act and the Copyright Act preempt most state laws affecting rights similar to those provided in the federal acts. See, e.g., Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 144 (1989) (holding that Florida statute prohibiting use of process for duplicating boat hulls was preempted by federal patent law); Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 268-70 (5th Cir. 1988) (finding Louisiana license statute preempted by federal copyright law). In addition, subject matter jurisdiction over patent and copyright claims is vested exclusively in the federal courts. See 28 U.S.C. § 1338 (1994).

lectual property would cause a significant redistribution of wealth from states to private individuals.[219]

In sum, the Court has not adopted a utilitarian approach to unconstitutional conditions, and therefore it is unlikely that the utilitarian theory poses a significant threat to legislation offering states federal benefits in exchange for waivers of their immunity.[220] Instead, most of the Court's decisions dealing with unconstitutional conditions in the federalism context have focused primarily on the coerciveness of Congress's proposed exchange. Accordingly, I now turn to consider application of the coercion theory.

C. Coercion Theory

Because the coercion theory is the theory that has been applied most often to unconstitutional conditions cases in the federalism context, it offers the most promise for determining whether federal benefits may be used as incentives for encouraging states to surrender their sovereign immunity. The Court has said that unconstitutional coercion occurs when an "inducement offered by Congress [is] so coercive as to pass the point at which pressure turns into compulsion."[221] Coercion may arise in two ways under this definition; in both, one might argue that the state essentially is compelled to accept the inducement offered by Congress, even though there is ostensibly still a choice to be made. The first scenario in which coercion might occur is when a benefit offered by Congress is too good or too big to pass up, so that the state cannot, practically speaking, resist the benefit or the conditions that come along with it.[222] Although this is at least a theoretical concern given the *Butler* decision, the Court's subsequent decisions upholding conditional benefits on the ground that a state could simply reject the offer suggest that the size of the benefit will not ordinarily invalidate a proposed exchange. [223] The second situation in which coercion arises (and the more relevant one for present purposes) is when Congress, instead of offering a benefit to the state, threatens some harm to the state if the state does not comply with certain condi-

---

219 See infra notes 313-314 and accompanying text (viewing Court's federalism decisions as protective of states' public funds).

220 I will return to the utilitarian theory briefly in Part III.E, infra (analyzing future ramifications of utilitarian theory).

221 *Dole*, 483 U.S. at 211 (citations and internal quotations omitted).

222 See United States v. Butler, 297 U.S. 1, 70-72 (1936) (holding unconstitutional congressional effort to use subsidies to induce farmers "to surrender their independence of action").

223 See supra notes 158-174.

tions.[224] Even in this case there is some choice to be made, but as Seth Kreimer has put it,

> [t]he difference between a highwayman confronting a victim with the dilemma of "your money or your life" and a street vendor propositioning a pedestrian with the offer of "your money or my watch" is not that the highwayman removes the *possibility* of choice. The bold, greedy, or foolish victim still has the choice of refusing to part with his funds at the risk of death. Rather, the distinction lies in the fact that the highwayman has narrowed the *range* of choices; the victim no longer has the opportunity, which existed before the intervention, of choosing to retain *both* money and life.[225]

In applying the coercion theory in the latter form, the Court has deployed a particular vocabulary: terms like "offer" are used to refer to proposals that expand the beneficiary's range of choices, while terms like "threat" are used to refer to proposals that would narrow the range of choices.[226] The Court's approach in *College Savings Bank* appears to be a direct application of this theory—the Court seems to say that a benefit offered to a state by Congress will be constitutional if it is in the nature of "a gift or gratuity," but unconstitutional if it is more in the nature of "a sanction."[227] Indeed, one of the issues that most concerns the lawmakers who are considering the Leahy Bill is whether intellectual property rights constitute "gifts or gratuities" within the meaning of *College Savings Bank*.[228]

In order to decide whether a federal benefit would expand or contract a state's range of choices, however, one must know what are the state's ex ante choices. Those ex ante choices represent the state's baseline of entitlement.[229] Thus, if a state has no pre-existing right to a benefit offered by Congress, then Congress's giving of the benefit constitutes a gift or gratuity; but if a state does have a preexisting right

---

224 See Kreimer, supra note 178, at 1353-54 (discussing difference between threats and offers).

225 Id. at 1354.

226 See id. at 1352-59; see also Sullivan, supra note 149, at 1435-42 (discussing government's use of "benefits" and "penalties" to induce surrender of rights).

227 See supra text accompanying note 176.

228 See Legislation/Sovereign Immunity: House Panel Hears from Experts on State Immunity from IP Suits, 60 Pat. Trademark & Copyright J. 257, 258 (2000) ("While the *College Savings* case suggested Congress may, in the exercise of its spending power, condition its grant of funds or 'gratuities' to the states on their waiver of immunity, the Supreme Court might question whether federal intellectual property rights are 'gratuities.'"); see also Sandburg, supra note 177 (quoting Patent and Trademark Office attorney who said, "We don't know if a patent is a gift or gratuity . . . . This is a big open question.").

229 See Kreimer, supra note 178, at 1358-59; Sullivan, supra note 149, at 1436 (discussing use of baselines to distinguish penalties from "nonsubsidies").

to a benefit offered by Congress, then Congress's withholding of the benefit constitutes a sanction.[230]

In many cases it is easy to determine whether a state has a pre-existing entitlement to the benefit being offered by Congress. The *Steward*,[231] *Oklahoma*,[232] and *Dole*[233] decisions establish that federal monies or the equivalent (tax credits, for example) constitute gifts, and therefore will be deemed coercive only if the amount offered is so substantial as to be practically impossible to refuse.[234] The states have no right to federal funds, because Congress is not required by the Constitution to give them funds.[235] Likewise, because the Constitution gives Congress the discretion whether to grant approval of interstate compacts to the states, the states have no right to such approval.[236] Therefore, that approval constitutes a gratuity and is likely a permissible federal incentive, as was suggested in *Petty*.

By contrast, the characterization of the condition in *College Savings Bank* is not so clear. The United States argued that the Trademark Remedy Clarification Act, which was an exercise of Congress's commerce power, effectively conditioned the state's ability to engage in commercial activity on the state's constructive waiver of sovereign immunity. The Court concluded that threatening to exclude the state from this "otherwise permissible" commercial activity constituted an unlawful "sanction."[237] The Court did not elaborate, however, on why it thought that excluding the state from this commercial activity constituted a sanction rather than merely the withholding of a gift or gratuity. Of course, the answer to that question depends on the states' baseline of entitlement.

Three baselines of entitlement outlined in the literature are potentially helpful in explaining why some proposed exchanges are considered valid offers while others are deemed unlawful threats. As we

---

230 See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686-87 ("Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts."); see also Sullivan, supra note 149, at 1435-36 (discussing when conditioning of benefit becomes penalty).

231 Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

232 Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127 (1947).

233 South Dakota v. Dole, 483 U.S. 203 (1987).

234 See supra notes 158-173 and accompanying text (tracing doctrinal progression through coercion cases). Although the *Butler* decision struck down a similar federal subsidy, these decisions undercut *Butler*'s authority. In any event, *Butler* may be distinguished on the ground that the condition was more coercive because the subsidy targeted individual farmers instead of the states.

235 See Baker, supra note 17, at 1923 ("In the context of conditional grants of federal money to the states, it is clear that the Constitution does not guarantee the states any federal funds.").

236 See U.S. Const. art. I, § 10, cl. 3.

237 See supra text accompanying note 176.

shall see, however, none of these baselines adequately accounts for existing case law.

1. *A Historical Baseline*

The first baseline would measure a state's entitlement by the rights it has enjoyed historically.[238] Thus, in *College Savings Bank*, threatening to exclude the states from engaging in commercial activity might have constituted an unlawful sanction because the states had been permitted to engage in commercial activity in the past.

A state is entitled to participate in commercial activity under its police powers and even to favor its own residents when acting as a market participant.[239] Equally true, however, under the Dormant Commerce Clause, a state may exercise this commercial power only where Congress has not enacted contrary legislation pursuant to its affirmative Commerce Clause power.[240] Because Congress had enacted contrary legislation in this case (the Trademark RCA), it is difficult to conclude that the states had a constitutional right to engage in the commercial activity.[241] Moreover, because there is a great deal of variation among the states with regard to the type and extent of commercial activity they engage in, as well as in the period of time they have engaged in it historically, use of a historical baseline to determine whether Congress may conditionally withhold a particular benefit from a state would require a court to make factual findings regarding the nature, extent, and duration of the state's past activities. Yet, in *College Savings Bank*, the Court did not even mention the State of Florida's history of engaging in the commercial activity at issue in that case. As a result, it seems that the historical baseline does not provide a plausible explanation for the *College Savings Bank* decision.[242]

---

238 See Kreimer, supra note 178, at 1359.

239 See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 684-86 (1999) (refusing to apply "constructive waiver" to "market-participant" states).

240 See Nowak & Rotunda, supra note 91, at 274 (discussing scope of state authority to engage in commerce where Congress has not exercised its Commerce Clause power).

241 The Trademark RCA amended the Lanham Act to provide, in pertinent part, as follows:

> Any State, instrumentality of a State or any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity for any violation under this chapter.

15 U.S.C. § 1122(a) (1994).

242 But see Bone, supra note 87, at 1479 n.41. Professor Bone assumes, without in-depth analysis of *College Savings Bank*, that the Court will use a historical baseline to differenti-

2. *An Equality Baseline*

The second potentially applicable baseline of entitlement focuses on equality.[243] Under this view, a state's entitlement depends on the entitlement of "everyone else."[244] Thus, it is possible that *College Savings Bank* afforded states the right to engage in commercial activity because, as one Eleventh Amendment scholar has suggested, "states have a constitutional right to engage in any activity that private parties can legally engage in, only on more favorable terms."[245]

In her informative and entertaining essay "States Are People Too,"[246] Professor Suzanna Sherry surveys the curious ways in which the Court's recent sovereign-immunity decisions, including *College Savings Bank* and *Alden*, seem to treat states like people. She writes that "[n]ot since extending the language of the Fourteenth Amendment to corporations has the Court so anthropomorphized an abstract entity."[247] Sherry points out, for example, how the Court not only compares sovereign immunity to individual fundamental rights, but also ascribes to states the dignity and feelings of human beings.[248] She observes that

> [t]his personification of states echoes the personification of corporations. One author describes the personification of the corporation as "vital" because it "defines, encourages and legitimates the corporation as an autonomous, creative self-directed economic being," and "captures rights, ultimately even constitutional rights, for corporations." The language of *Alden* and *College Savings Bank* projects the same attributes onto states.[249]

---

ate between gifts and sanctions, and he concludes that "[g]iven the long history and considerable importance of federal intellectual property rights, it seems likely that the Court will include federal patents and copyrights in the set of baseline entitlements and thus classify their denial as unconstitutional coercion." Id.

243 See Kreimer, supra note 178, at 1363.

244 Id. (arguing that equality baseline measures from "the course of events that is the statistical norm: what happens to everyone else").

245 Vázquez, supra note 7, at 889 (interpreting *College Savings Bank* and *Alden*). In *College Savings Bank*, for example, the Court emphasized 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 from other employers and defendants.'" Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 685-86 (1999) (quoting Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 477 (1987) (alteration in original)). Similarly, the *Alden* Court said that "[w]hen Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system . . . ." Alden v. Maine, 527 U.S. 706, 758 (1999).

246 Suzanna Sherry, States Are People Too, 75 Notre Dame L. Rev. 1121 (2000).

247 Id. at 1127.

248 See id. at 1125-28.

249 Id. at 1128 (emphasis omitted).

Sherry suggests that the Court's recent personification of the states is similar to the personification of corporations that occurred just prior to the Court's extension of Fourteenth Amendment rights to corporations. If the Court further extends the Fourteenth Amendment's guarantees, such as equal protection, to cover state entities, then it is possible that Congress would not be permitted to withhold from the states federal benefits, such as the right to engage in certain commercial activity, that are available to private parties.

To be sure, some of the Court's "personal" language in *Alden* and *College Savings Bank* may be justified on federalism grounds. For example, the Court's comparison of state sovereign immunity to individual trial rights in *College Savings Bank* safeguards the values of federalism inherent in the immunity by measuring the voluntariness of a state's waiver of immunity by the strict standards applicable to waivers of individual rights.[250] By contrast, the wholesale application of individual rights to the states would seem to be unjustifiable under the Court's prior federalism decisions. As the Supreme Court stated in *New York v. United States*: [251]

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself . . . .[252]

Given that there is no textual basis in the Constitution for extending Fourteenth Amendment guarantees to the states, and that the Fourteenth Amendment was intended to limit rather than expand state prerogative, it would seem preposterous for the Court to hold that the states are entitled to the same rights as individuals under the Equal Protection Clause.[253] Thus, it is unlikely that the equality baseline accounts for the Court's decision in *College Savings Bank.*

---

250 See supra notes 63-71 and accompanying text.

251 505 U.S. 144 (1992).

252 Id. at 181. As other commentators have observed, however, the Court has been somewhat "schizophrenic" in its approach to the Eleventh Amendment; at times Eleventh Amendment jurisprudence seems more concerned with preserving values of federalism, while at other times it seems more concerned with protecting the states' rights and dignity. See Vázquez, supra note 7, at 859-60; see also Meltzer, supra note 9, at 1038 ("[T]he Court's normative defense of state sovereign immunity [in *Alden*] rested on two somewhat more abstract notions: the dignity of states and the sovereignty of states.").

253 See Sherry, supra note 246, at 1128-29.

3. *A Predictive Baseline*

The third baseline of entitlement is predictive.[254] This baseline holds that states are entitled to any benefits Congress would confer if Congress were not permitted to burden the state's right of immunity.[255] According to this baseline, Congress's threat to exclude the state from commercial activity would constitute an impermissible sanction if Congress would have allowed the state to engage in the activity even without requiring the state to waive its immunity.

This baseline would require the Court to speculate as to what Congress might have done under hypothetical circumstances. Because it is difficult enough for courts to determine Congress's actual intent in enacting legislation, let alone "predictive" intent, this approach would be unworkable in practice.[256] In addition, given that a majority of the current Court generally disfavors the use of legislative history and other indicators of intent besides statutory language, it is unlikely that the predictive baseline motivated the Court in *College Savings Bank*. Moreover, the predictive baseline seems at least as concerned with germaneness as coercion,[257] because the more germane the condition is to the purpose for giving the benefit, the less likely it is that Congress would have given the benefit without attaching the condition. As we saw in our previous discussion of germaneness, however, it is unlikely that the Court's decision in *College Savings Bank* rested on germaneness concerns.[258]

Thus, although the Court's approach in *College Savings Bank* seems to be a direct application of the coercion theory, the decision

---

254 See Kreimer, supra note 178, at 1371. Professor Kreimer argues:

> Under [the predictive baseline] the normal course of events is the course of events that would follow if the government could not impose the condition in question, or could not take the exercise of constitutional rights into account. If, without taking into account potential recipients' exercise of their constitutional rights, the government would *deny* the benefit, then the conditional allocation in question has increased the options available to the right-holder, and there is no constitutional violation. By contrast, if, without taking into account potential recipients' exercise of their constitutional rights, that same government would *provide* the benefit, the conditional allocation is not an offer that expands options, but rather is a threat that contracts the right-holder's scope of autonomy.

Id. at 1372.

255 See id.

256 See id. at 1373 ("Admittedly, this baseline gets the courts into the risky business of predicting what the government would do, and the courts' normative vision of the public interest will inevitably intrude.").

257 See id. at 1375 (noting that "germaneness provides some evidence of what the normal course of events would be if the government were unable to take into account" rights that would be burdened).

258 See supra Part III.A.

may not be explained easily under any of the three baselines that should ordinarily account for the Court's decisions under that theory. What is needed is another baseline of entitlement that deals specifically with federal conditions that burden the state's right of sovereign immunity.

4. *A Proposed Baseline*

In order to develop an appropriate baseline for distinguishing between permissible and impermissible federal incentives, it is important to consider the difference between the federal incentives described as coercive and those described as noncoercive in *College Savings Bank*. For present purposes, the primary difference between federal funds or congressional approval of an interstate compact, on the one hand, and a state's ability to engage in commercial activity, on the other,[259] is that with the former benefits, a state cannot obtain or realize the benefit without the federal government's prior approval. The benefit is a creature of federal law, offered exclusively by Congress.[260] Where a state wishes to obtain a benefit offered exclusively by Congress, it must negotiate with Congress before it can enjoy the benefit. If Congress conditions the state's receipt of the benefit on a waiver of immunity, the state's acceptance of the benefit provides evidence that the state has weighed its alternatives and has chosen the federal benefit over the immunity. By contrast, in *College Savings Bank*, the state was capable of engaging in commercial activity without Congress's prior authorization or waiving its immunity (the states are not required to obtain federal commercial licenses). Therefore, there was no real evidence that the state, by engaging in the activity, had chosen to waive its immunity. As the Court said, the state merely was engaging in "otherwise permissible activity."[261] Because the state could engage in commercial activity without Congress's prior approval and therefore without prior waiver of sovereign immunity, the state's ex ante range of choices included the option of *both* engaging in the commercial activity *and* keeping its immunity. By attempting to make the state elect one or the other, Congress narrowed the state's range of options and therefore did not give it any choice that it did not have already. Thus, Congress did not offer the state anything in exchange

---

[259] See supra note 176 and accompanying text.

[260] Although money is fungible and not all money is offered exclusively by Congress, I refer here to federal funds, which would not be available freely to the states from another source.

[261] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999).

for its waiver of immunity, but instead threatened a sanction if the state did not comply.[262]

In this light, the Court's decision in *College Savings Bank* is virtually identical to *New York*, although *New York* was decided under the Tenth Amendment and related principles of federalism instead of the Eleventh Amendment and related principles of sovereign immunity.[263] In *New York*, the Court held that Congress had acted unconstitutionally by offering the states a choice of either legislating pursuant to a federal plan for creating radioactive waste disposal sites or taking title to all of the radioactive waste generated within the state.[264] The Court explained that although Congress has the power to regulate radioactive waste pursuant to its commerce power, Congress could not commandeer state officials into federal service or require the states to legislate at its direction.[265] The Court elaborated as follows:

> On one hand, the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers. . . . [This] type of federal action would "commandeer" state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments. On the other hand, the second alternative held out to state governments—regulating pursuant to Congress's

---

262 See supra notes 225-230 and accompanying text.

263 A complete discussion of the relationship between the Tenth and Eleventh Amendments is beyond the scope of this Article. It is important to note, however, that the two are similar in that the Court treats both amendments as merely representative of more implicit and fundamental constitutional limitations on the power of the federal government vis-à-vis the states. Compare Alden v. Maine, 527 U.S. 706, 713 (1999) (

> [T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . .),

with New York v. United States, 505 U.S. 144, 156-157 (1992) (

> The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself . . . . Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power.).

264 *New York*, 505 U.S. at 175-76.

265 Id. at 177. The Court observed that this is so whether it is viewed as an inherent limitation on Congress's Article I powers, or as (what is the mirror image) an affirmative prohibition placed on Congress's power by the Tenth Amendment. Id.

> direction—would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction.[266]

Thus, in *New York*, the state had the ex ante option (before Congress acted) of *both* declining Congress's invitation to legislate according to Congress's directive *and* refusing to take title to waste produced by private parties. Of course, in *New York*, as in *College Savings Bank*, the state still had a "choice," but just like the gunman's offer of "your money or your life," Congress's offer of one or the other was coercive because it removed the ex ante option of enjoying *both*.[267]

Because the law at issue in *New York* gave only the appearance of choice, and the state was directly compelled to act pursuant to Congress's directive no matter which option it chose, the legislation was no different from other commandeering legislation.[268] Similarly, because the legislation challenged in *College Savings Bank* afforded the state no meaningful choice, it was the same as abrogation legislation struck down by the Court in *Florida Prepaid* and *Seminole Tribe*.

In order to move beyond abrogation in the sovereign immunity context, a state must be given a real choice as to whether to waive its immunity. This would occur only where a state actually is unable to realize a particular federal benefit without Congress's prior approval, and Congress clearly makes the state's receipt of that benefit conditional on a waiver of sovereign immunity. In that case, the state never has the option of enjoying both the benefit and the immunity at the same time—the state is required to seek Congress's prior approval in order to obtain the benefit, which will be forthcoming only if the state agrees to the condition of waiving its immunity. The state's subsequent acceptance of that benefit therefore would constitute a voluntary waiver, not an impermissible constructive waiver. In *College Savings Bank*, by contrast, the state was capable of engaging in the activity without prior negotiation with Congress, and therefore the United States could argue only that the state had "constructively" waived its immunity.[269] As the Court explained, "there is little reason

---

266 Id. at 175-76.

267 See supra text accompanying note 225.

268 See, e.g., Printz v. United States, 521 U.S. 898 (1997). In *Printz*, the Court struck down provisions of the Brady Handgun Violence Act mandating that state and local law enforcement officers conduct background checks on handgun purchasers. Id. at 933. The Court explicitly distinguished between commands to the states like those in the Brady Act and conditions placed on the grant of federal benefits, and therefore did not address the constitutionality of the latter. Id. at 917-18.

269 Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 676 (1999).

to assume actual consent based upon the State's mere presence in a field subject to congressional regulation."[270]

Thus, *College Savings Bank* does not usher in a new era of arbitrary judicial line-drawing between permissible and impermissible federal incentives as some commentators have feared.[271] Rather, it merely applies the rule that a state's waiver must be voluntary and unequivocal to the context of federal benefits made conditional on waivers of immunity. The decision establishes that the appropriate baseline by which to measure the permissibility of a congressional offer of a federal benefit for a waiver of immunity is one that ensures a state really intended to waive its immunity.

Where Congress clearly has conditioned a state's receipt of a federal benefit on the state's promise to waive its immunity, and the state has accepted the offer by explicitly agreeing to waive its immunity, there can be no doubt that the state intended to waive its immunity. In that case, the state's promise to waive its immunity should be enforceable under the coercion theory. A somewhat more difficult question arises where the state does not agree explicitly to waive its immunity but instead merely accepts a benefit that Congress clearly has made conditional upon waiver of immunity. Given the Court's insistence in *College Savings Bank* that waivers of immunity must be unequivocal,[272] the Court very well may decide that only explicit promises to waive immunity can provide sufficient evidence of the state's intent. As I have discussed herein, however, where the federal benefit offered to the state in exchange for a waiver of immunity is one that the state cannot enjoy without Congress's prior approval, and the benefit clearly has been made conditional on the state's waiver of immunity, the state's acceptance of the benefit should provide adequate evidence of the state's intent to waive the immunity. The state's acceptance of the benefit would constitute an implicit waiver because it is manifested by an act rather than by words, but such acceptance would not constitute a constructive waiver of the type condemned in *College Savings Bank*, which provided no evidence of the state's intent to waive its immunity at all.

Under the proposed baseline, a federal benefit ordinarily may be used to induce a state to waive its sovereign immunity so long as (1) the benefit is available exclusively from the federal government and may not be obtained without prior approval, (2) the benefit clearly is

270 Id. at 680.

271 See supra note 177.

272 See supra note 63 and accompanying text.

made conditional on the state's waiver of immunity,[273] and (3) the state accepts the benefit. All three requirements must be met to ensure that the state intends to waive its immunity. Permissible incentives under the first part of the test would include federal funds and congressional approval of interstate compacts, as well as other exclusively federal benefits like federal intellectual property rights. The second part requires that Congress make clear not only its intent to divest states of their immunity, but also that waiver of the immunity is a condition of receiving the benefit. The third part of the test requires acceptance of the benefit, with or without an explicit promise to waive the immunity.

Two fairly recent cases underscore the importance of meeting all three requirements of this test. In *New Star Lasers, Inc. v. Regents*,[274] decided after *College Savings Bank* and *Florida Prepaid*, the plaintiffs sued the regents of a state university for a declaratory judgment that the patent owned by the regents was invalid.[275] The regents moved to dismiss for lack of federal subject matter jurisdiction on the ground of sovereign immunity.[276] The court concluded, however, that the state had waived its immunity by obtaining the patent after Congress passed the Patent RCA,[277] which purported to abrogate sovereign immunity by making it clear that States were not immune from suit under the Patent Act but instead were subject to the provisions of the Act "in the same manner and to the same extent" as private parties.[278] The *New Star Lasers* court reasoned that the patent was a "federal gift or gratuity" under *College Savings Bank*, and that the abrogation legislation had made known Congress's intent to divest States of their immunity from Patent Act claims prior to the state's receipt of the patent.[279] The court went on to say that "[a]menability to a suit chal-

---

273 This part of the test is essentially the same as the existing clear-statement requirement applicable to all conditional spending legislation under *Dole*. See supra notes 170-172 and accompanying text. The Court has adopted similar clear-statement rules for clarification of Congress's intent where Congress attempts to apply generally applicable legislation to the states, see, e.g., Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991), and where Congress attempts to abrogate state sovereign immunity, see, e.g., Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

274 63 F. Supp. 2d 1240 (E.D. Cal. 1999).

275 Id. at 1241.

276 Id.

277 The *Florida Prepaid* Court had previously held that the Patent RCA was an unconstitutional attempt to abrogate sovereign immunity. See supra notes 54-58 and accompanying text.

278 See supra note 47.

279 *New Star Lasers*, 63 F. Supp. 2d at 1244.

lenging the validity of a patent thus is not only a *quid pro quo*—it is an integral part of the patent scheme as a whole."[280]

The *New Star Lasers* court was correct in observing that a patent is an exclusively federal benefit that "does not independently spring into existence" but is instead "a unique form of nationally recognized intellectual property, created by Congress pursuant to its authority under the Patent Clause."[281] Thus, the court's analysis satisfies the first part of the test set forth above. In addition, it is clear that the State had applied for and accepted its patent rights as would be required under the third part of the test. The court's analysis, however, does not satisfy the second part of the test, because there is a fundamental problem with relying on abrogation legislation to provide the clear statement of congressional intent required in the waiver context. In order for there to be a valid waiver of immunity, the state needs to know not only that it may lose its immunity, but also that losing its immunity is a condition of accepting the benefit. After the abrogation legislation was passed, the state reasonably would have assumed that it had been stripped of its immunity from intellectual property claims already, whether it subsequently attempted to obtain patents or not. As a result, it is impossible to conclude that the state voluntarily or unequivocally waived its immunity in exchange for the patent.[282] Accordingly, this case involved no more than a constructive waiver of the type rejected in *College Savings Bank*—the fact that the State got something in return for losing its immunity might make it seem more equitable, but does not make it constitutional.

Another case addressing essentially the same issue was *Genentech, Inc. v. Regents*.[283] In *Genentech*, the regents of a state university threatened to bring a federal cause of action against Genentech for patent infringement.[284] Genentech responded by

---

280 Id.

281 Id.

282 See State Contracting & Eng'g Corp. v. Florida, 258 F.3d 1329, 1337 (Fed. Cir. 2001) (holding that State did not waive its immunity by filing counterclaim in patent infringement suit where counterclaim was filed prior to Supreme Court's decision in *Florida Prepaid* and therefore State reasonably would have thought that sovereign-immunity defense was unavailable); Wis. Bell, Inc. v. Pub. Serv. Comm'n, 57 F. Supp. 2d 710, 715 (W.D. Wis. 1999) (refusing to find that State had constructively waived its immunity by continuing to regulate local telephone carriers under Telecommunications Act of 1996 because "[a] state's continued regulation of local enterprise . . . is an otherwise permissible activity that can yield no inference as to a State's motivation for doing it" (internal quotations omitted)).

283 143 F.3d 1446 (Fed. Cir. 1998), vacated and remanded, 527 U.S. 1031 (1999). The Supreme Court granted certiorari, vacated the decision, and remanded for consideration in light of its decisions in *Florida Prepaid* and *College Savings Bank*. No final disposition of the case has been reported yet.

284 *Genentech*, 143 F.3d at 1453.

bringing a declaratory-judgment action against the State in federal court.[285] The regents argued that it was immune from the suit under the Eleventh Amendment, but the court held that the State had waived its immunity.[286]

Like the court in *New Star Lasers*, the *Genentech* court found it relevant that the university's patent was a "federally-created property right[ ] of national scope that [is] enforceable only by federal judicial power."[287] The court explained, however, that the State did not waive its immunity "simply by the act of obtaining federal patents."[288] Instead, the court said that in order to waive its immunity,

> [t]he state must not only have entered a field of activity that is subject to federal law, but must have actively invoked federal judicial power to aid that activity. It is thus highly relevant that the University acted to create the federal cause of action by its charge of patent infringement and threat of federally imposed and enforced remedial action.[289]

The *Genentech* court is correct that, as was noted previously, a state may waive its immunity by "actively invoking" federal judicial power.[290] But the court failed to explain how sending cease-and-desist letters, or even threatening a cause of action, could constitute such an invocation of judicial power. Of course, one should not be overly critical of *Genentech*, because the decision was handed down prior to the Supreme Court's decision in *College Savings Bank*, at a time when *Parden*'s constructive-waiver doctrine was still ostensibly good law.[291] Nevertheless, after *College Savings Bank*, it is clear that threats to bring a cause of action could not possibly constitute a voluntary and unequivocal waiver of immunity.[292]

---

285 Id. at 1448.

286 Id. at 1453.

287 Id.

288 Id.

289 Id.

290 See supra note 61 and accompanying text.

291 Indeed, the *Genentech* court seemed to apply *Parden* without mentioning it by name. The court explicitly concluded that the university had "constructively consented" to suit, saying "[i]t is also a factor to be considered that the University's actions are not at the core of the educational/research purposes for which the University was chartered as an arm of the state . . . ." *Genentech*, 143 F.3d at 1453.

292 It is important to note that this critique of the *New Star Lasers* and *Genentech* decisions does not undermine federal patent policy. Congress's attempt to abrogate state sovereign immunity from Patent Act claims does not necessarily indicate that Congress would support these decisions. Under the abrogation regime, Congress believed that it could enhance the efficacy of the patent system by subjecting states to suit under the Patent Act while still encouraging states to conduct research and participate in the patent system. The result is different under the *New Star Lasers* and *Genentech* decisions, which require states to choose between participating in the patent system and retaining their immunity from

In sum, *Genentech* and *New Star Lasers* illustrate why all three parts of the proposed test must be met in order to ensure that state waivers of immunity are not coerced but are instead voluntary and unequivocal under *College Savings Bank*. Congress easily can amend existing legislation or pass new legislation to provide explicitly that a state's receipt of exclusively federal benefits is conditional on a state's waiver of sovereign immunity.[293]

D. Inalienability Theory

I have argued that the germaneness, utilitarian, and coercion theories of the doctrine of unconstitutional conditions ordinarily should not preclude Congress's use of federal incentives for eliciting state waivers of sovereign immunity. Assuming that a particular congressional proposal is not invalid under one or more of these theories, a more fundamental question of federalism and constitutional law remains. That question is whether the federal government should be able to induce states to surrender their sovereign immunity at all, regardless of the terms of a particular exchange. Put another way, the issue is whether constitutional rights such as sovereign immunity may

---

patent claims. Because the purpose of granting patent rights is to encourage research and innovation, it cannot be assumed that Congress would want to condition the states' ability to obtain patent rights on waiver of their immunity. This is especially true when one compares the high number of patents routinely awarded to the states with the low incidence of patent infringement committed by the states. For example, the *Genentech* court cited a press report documenting that the University of California obtained 126 patents in 1994 alone. Id. at 1454 n.6. By contrast, in *Florida Prepaid* the Supreme Court noted that the legislative history of the Patent Remedy Clarification Act cited only a handful of patent claims that had been filed against the states. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640-41 (1999). Thus, requiring Congress to state its intent to condition the states' ability to obtain and enforce patents on their waiver of sovereign immunity is sound as a matter of patent policy.

293 The proposed Leahy Bill provides a good model for clear congressional intent to condition a federal benefit on a state's waiver of immunity. It provides, in relevant part, as follows:

> SEC. 111. OPT-IN PROCEDURE.
>
> (a) IN GENERAL—No State or any instrumentality of that State may acquire a Federal intellectual property right unless the State opts into the Federal intellectual property system.
>
> (b) AGREEMENT TO WAIVE SOVEREIGN IMMUNITY—A State opts into the Federal intellectual property system by providing an assurance under the procedures established in subtitle D of this title with respect to the State's agreement to waive sovereign immunity from suit in Federal court in any action against the State or any instrumentality or official of that State—
>
> (1) arising under a Federal intellectual property law; or
>
> (2) seeking a declaration with respect to a Federal intellectual property right.

S. 1835, 106th Cong. § 111 (1999).

be bought and sold like ordinary commodities. This question is the focus of the fourth theory potentially underlying the doctrine of unconstitutional conditions—the theory of inalienability.

In the sovereign-immunity context, the inalienability theory asks the fundamental question of whether a State's constitutional right of immunity may be "bartered away"[294] to the federal government at all, regardless of the benefit being offered or the terms of the exchange. The Court's recent sovereign-immunity decisions establish that a state may choose unilaterally to waive its immunity in any particular suit.[295] The decisions also make clear that Congress may abrogate sovereign immunity under its Fourteenth Amendment enforcement power, but not under its Article I powers.[296] The question that remains is whether Congress, acting pursuant to Article I or any power other than its Fourteenth Amendment enforcement power, may "buy" a state's promise not to assert the immunity in future cases.

1. Alden *and* College Savings Bank

The Supreme Court never has addressed this issue squarely, but it suggested in both *Alden* and *College Savings Bank* that Congress might be permitted to use federal benefits under certain Article I powers to induce states to consent to suit. In *Alden*, the Court held that Congress, when acting pursuant to its Article I powers, may not abrogate state immunity from federal statutory claims brought in state courts.[297] The Court observed, however, that there are some limitations on state sovereign immunity, such as where a state consents to suit.[298] Citing *Dole*, a spending case, the Court added, "[n]or, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits."[299] Although this language seems to indicate that Congress could negotiate with a State for a surrender of immunity, the qualification "subject to constitutional limitations" injects ambiguity into the meaning of this statement.[300]

---

294 Cf. Lynch v. United States, 292 U.S. 571, 582 (1934) (discussing sovereign immunity of United States).

295 See supra notes 61-62 and accompanying text.

296 See supra notes 54-58 and accompanying text.

297 Alden v. Maine, 527 U.S. 706, 754 (1999).

298 See id. at 755.

299 Id.

300 The Court cited to *Dole*, and therefore it is likely that the "subject to constitutional limitations" language refers to the limitations on Congress's power to enact spending legislation discussed in *Dole*. As was discussed previously, those limitations include (1) that the spending legislation must be intended to promote the general welfare, (2) that the conditions placed on the states' receipt of funds must be germane to the purpose of the spending, (3) that the conditions placed on the states' receipt of funds must be made clear to the

Moreover, in *College Savings Bank*, the Court elaborated on the kinds of waivers which were constitutionally appropriate:

> The United States points to two other contexts in which it asserts we have permitted Congress, in the exercise of its Article I powers, to extract "constructive waivers" of state sovereign immunity. In *Petty v. Tennessee-Missouri Bridge Comm'n*, we held that a bistate commission which had been created pursuant to an interstate compact (and which we assumed partook of state sovereign immunity) had consented to suit by reason of a suability provision attached to the congressional approval of the compact. And we have held in such cases as *South Dakota v. Dole* that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions. . . . In the present case, however, what Congress threatens if the State refuses to agree to its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity.[301]

This paragraph strongly suggests that so long as Congress uses the right kinds of incentives, sovereign immunity would be a proper object of negotiation between a state and the federal government. But again, the above-quoted language is not conclusive, because neither of the two cases discussed by the Court provides a binding precedent on the issue of the alienability of sovereign immunity. In *Dole*, the Court held that Congress could require states, as a condition of receiving federal transportation funds, to set the minimum drinking age at twenty-one years.[302] Thus, *Dole* did not involve a waiver of sovereign immunity, and *College Savings Bank* merely cites *Dole* for the unexceptional proposition that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take . . . ."[303] By contrast, because *Petty* did involve the exchange of sovereign immunity for congressional approval of an interstate compact,[304] it strongly suggests that such an exchange would be enforceable. But the *Petty* Court had merely assumed, without deciding, that the bistate

states, (4) that the spending legislation must not be overly coercive, and (5) that the spending legislation would not violate any other constitutional provision. See supra note 170 and accompanying text.

301 See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686-87 (1999) (citations omitted).

302 See *Dole*, 483 U.S. at 205.

303 *Coll. Sav. Bank*, 527 U.S. at 686.

304 *Petty*, 359 U.S. at 278-79.

commission enjoyed sovereign immunity.[305] *College Savings Bank* points out, albeit parenthetically, that the *Petty* decision rested on that assumption.[306] Thus, while the Court's discussion of *Dole* and *Petty* in *College Savings Bank* does suggest that Congress might be permitted to use federal benefits in order to influence a state to give up its immunity, neither of those cases provides a binding precedent to that effect.

2. *Sovereign Immunity and the Purposes of Inalienability*

In order to answer the question of whether a state may barter its sovereign immunity for federal benefits, it is important to consider the purposes that would be served by making constitutional rights inalienable. Proponents of allowing the commodification of constitutional rights argue that these rights are no different from other commodities whose value lies in exchange. For example, Judge Easterbrook has argued that in cases implicating the unconstitutional conditions doctrine, "people sell their constitutional rights in ways that, they believe, make them better off. They prefer the benefits of the agreement to the exercise of their rights. If people can obtain benefits from selling their rights, why should they be prevented from doing so?"[307]

Other commentators have proffered a number of reasons for prohibiting the commodification of individual constitutional rights. Some of these do not apply comfortably to the context of state rights. For example, paternalistic concerns over protecting people from their own poor choices regarding constitutional rights[308] would not apply to

---

305 Id. at 278. The plurality opinion "assume[d] arguendo that [the] suit must be considered as one against the States since this bi-state corporation is a joint or common agency of Tennessee and Missouri." Id. Three members of the *Petty* Court, whose votes made up part of the majority, decided to "concur in the judgment and opinion of the Court with the understanding that [they did] not reach the constitutional question as to whether the Eleventh Amendment immunizes from suit agencies created by two or more States under state compacts which the Constitution requires to be approved by the Congress." Id. at 283 (Black, Clark & Stewart, JJ., concurring).

306 *Coll. Sav. Bank*, 527 U.S. at 686.

307 Easterbrook, supra note 181, at 347 (arguing that "[t]hose who believe in the value of constitutional rights should endorse their exercise by sale as well as their exercise by other action").

308 Professor Seth Kreimer has argued in the individual rights context that

> [t]hirteenth and fourteenth amendment rights, as well as the education right, raise yet another reason why a right might not be deemed waivable: paternalism. For education, the argument is easy. Children may not know what is in their own best interest, and the relative competence of parents and the state is problematic. For fourteenth amendment rights, one might argue that victims of a caste system would be so beset by false consciousness that their choices would be unreliable.

Kreimer, supra note 178, at 1388; see also Sullivan, supra note 149, at 1480 ("Making constitutional rights inalienable because citizens may undervalue the worth of those rights to

a state, because the state is (presumably) a more sophisticated, well-informed entity than most individuals. Distributive arguments against the commodification of constitutional rights[309] also apply with less force in the context of exchanges between state and federal governments, because state governments have greater bargaining power vis-à-vis the federal government than do most individuals.

There are, however, two arguments against the commodification of constitutional rights that warrant closer scrutiny in the state sovereign-immunity context. First, commentators including Professors Laurence Tribe and Seth Kreimer have argued that constitutional rights should be inalienable where the rights serve structural or relational purposes other than just to protect the individual rightholder.[310] In the case of a state's constitutional right of sovereign immunity, the right serves the structural purpose of federalism by preventing federal encroachment into spheres of state autonomy.[311] This division of power is intended not to protect the state itself, but to protect individuals from the excessive accumulation of power in either branch.[312] Moreover, the Court's recent sovereign-immunity decisions suggest that the right of sovereign immunity serves the relational purpose of

---

themselves would be classic paternalism—overruling individuals' choices for their own good.").

309 Kreimer, supra note 178, at 1390 (arguing that voluntary transfer of right to vote would "violate the appropriate distribution of the right"); Sullivan, supra note 149, at 1483 (noting that distributive "argument for inalienability of constitutional rights in exchange for government benefits would focus on increasing the power of one group in the trade in relation to another").

310 See Kreimer, supra note 178, at 1391-92 ("If federalism dictates that certain decisions be withheld from the federal government and entrusted to the states, a state waiver should be irrelevant."); Laurence H. Tribe, The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence, 99 Harv. L. Rev. 330, 335 (1985) (arguing that right to abortion must be inalienable because it "respond[s] at least in part to the subordinate place women as a group occupy as long as they confront unwanted pregnancy and unwanted motherhood").

311 See, e.g., Alden v. Maine, 527 U.S. 706, 750-51 (1999) ("A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens.").

312 As the Supreme Court explained in *New York v. United States*:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself.

505 U.S. 144, 181 (1992).

subordinating individual and corporate claims to the states,[313] thereby protecting the integrity of the public fisc.[314]

Second, it has been argued in the individual-rights context that because some rights are so closely intertwined with a person's sense of self, commodification of constitutional rights might injure "personal identity."[315] Although many immediately would dismiss this concern as inapplicable to the states, the current Court is greatly concerned with protecting the dignity of the states.[316]

Although the structural, relational, and dignitary interests served by federalism are legitimate and important, none of these interests compels the conclusion that Congress may not offer benefits to states in exchange for their waiver of immunity. The primary purposes of the structural and relational interests in federalism are by now almost too familiar to warrant recitation. They are, of course, to promote local control, maintain political accountability, and protect state treasuries.[317] The Court repeatedly has invoked the federalism mantra to invalidate legislation that threatens these goals. For example, as was discussed in the previous section on coercion, in *New York*, the Court struck down portions of the Low-Level Radioactive Waste Policy

313 See *Alden*, 527 U.S. at 750 ("When the State's immunity from private suits is disregarded, 'the course of their public policy and the administration of their public affairs' may become 'subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests.'" (quoting In re Ayers, 123 U.S. 443, 505 (1887))).

314 See id. at 751 (

> While the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made.).

315 See Sullivan, supra note 149, at 1485 (arguing that, where constitutional rights are closely intertwined with "personal identity," the commodification of these rights would cause citizens to "have a different and inferior conception both of those constitutional rights and of themselves").

316 E.g., *Alden*, 527 U.S. at 715 (explaining that states "retain the dignity, though not the full authority, of sovereignty," and that "immunity from private suits [is] central to sovereign dignity"); Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 268 (1997) (discussing "the dignity and respect afforded a State, which the immunity is designed to protect"); *Ayers*, 123 U.S. at 505 ("The very object and purpose of the 11th amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."). Professor Daniel Meltzer has observed that this view cannot be dismissed too quickly, because there is evidence of support for this view among the framers of the Constitution as well. Meltzer, supra note 9, at 1039-40 (noting, for example, that "Article III itself reflects, in its Original Jurisdiction Clause, a particular concern with suits to which states are parties, by vesting original jurisdiction over them in a court of special dignity—the Supreme Court of the United States").

317 See *Alden*, 527 U.S. at 750-51; Printz v. United States, 521 U.S. 898, 919-22 (1997); *New York*, 505 U.S. at 181-83; Gregory v. Ashcroft, 501 U.S. 452, 457-60 (1991); see also Meltzer, supra note 9, at 1028-30 (listing "mind-numbingly familiar" values underlying federal structure, including "maintaining political accountability" and "preventing tyranny").

Amendments Act of 1985 that purported to give states the "choice" of either enacting state legislation regarding the location of radioactive waste disposal facilities pursuant to federal directives or taking title to radioactive waste produced within the state.[318] The Act invalidated in *New York* threatened to burden state treasuries and usurp local control by exposing states to liability and management costs for radioactive waste if they did not submit to federal directives.[319] Furthermore, the Court found that the legislation would have undermined political accountability, because state and federal officials could play a blame game in which Congress would attempt to make states seem responsible for what was essentially federal legislation by requiring a state's legislative machinery to enact law, while at the same time "state officials [would] purport to submit to the direction of Congress . . . ."[320] The Court concluded that because Congress may not directly require state governments either to take title to radioactive waste or to legislate pursuant to a federal directive, Congress could not mandate that the state choose one or the other.[321]

The *New York* Court rejected the United States' argument that the states had waived the constitutional limitation on commandeering by supporting passage of the legislation in Congress.[322] The Court noted, however, that the situation would be different where Congress offered each individual state a federal benefit in exchange for legislating pursuant to Congress's directive. It explained that "[w]here Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people."[323] Indeed, subsequently, in *Dole*, the Court upheld federal spending legislation that threatened to withhold a percentage of federal highway funds from states who refused to enact a minimum drinking age of twenty-one

---

318 *New York*, 505 U.S. at 174-75.

319 Id.

320 Id. at 182-83 ("[W]hile it would be well within the authority of either federal or state officials to choose where the disposal sites will be, it is likely to be in the political interest of each individual official to avoid being held accountable to the voters for the choice of location.").

321 Id. at 176.

322 Id. at 181-82 (

> Respondents note that the Act embodies a bargain among the sited and unsited States, a compromise to which New York was a willing participant and from which New York has reaped much benefit. . . . [But] [w]here Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the "consent" of state officials.).

323 Id. at 168 (discussing conditional spending and cooperative federalism arrangements).

years.[324] In doing so, the Court rejected the argument that the Twenty-First Amendment, which arguably reserves to the states the power to regulate the sale of alcohol,[325] limits Congress's spending power. The Court explained that even if the Twenty-First Amendment does reserve that regulatory power to the states, "the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly."[326]

Likewise, while Congress may not abrogate sovereign immunity for violations of federal law (unless acting pursuant to the Fourteenth Amendment), Congress probably may offer incentives such as federal funds or intellectual property rights in exchange for a state's waiver of sovereign immunity for suits alleging violations of certain federal laws. Unlike Congress's unilateral attempts to abrogate sovereign immunity, a waiver scheme promotes local control by allowing each individual state to choose whether to give up its immunity. A waiver scheme in which Congress makes an offer and each individual state accepts or rejects the offer is also much less likely to blur the line that divides political accountability between state and federal officials than an abrogation regime in which some states vote in their political interest to abrogate the sovereign immunity of all states. Allowing states to choose between a federal benefit and the right to immunity also would safeguard the public fisc, because presumably the states would give up their immunity only in exchange for a federal benefit of greater value. The power to choose also would protect the states' dignity, for obvious reasons. Thus, the structural, relational, and dignitary interests served by sovereign immunity would not be impaired significantly by permitting Congress and the states to negotiate an exchange of federal benefits for a surrender of sovereign immunity.

3. *Sovereign Immunity and Congress's Article I Powers*

Given the Court's decisions striking down abrogation legislation passed pursuant to Congress's Article I powers, it could be problematic that most federal benefits would derive from exercises of the same powers. For example, federal funds would derive from the Article I Spending Clause,[327] and federal intellectual property rights would derive from the Article I Patent and Copyright Clause and Commerce

---

[324] South Dakota v. Dole, 483 U.S. 203, 205-12.

[325] The Twenty-First Amendment states: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

[326] *Dole*, 483 U.S. at 209.

[327] U.S. Const. art. I, § 8, cl. 1.

Clause.[328] Because the Court has drawn a bright line between Article I and the Fourteenth Amendment as sources of power for congressional abrogation of state sovereign immunity, it is at least conceivable that the Court could find that Article I powers may not be used to elicit enforceable waivers of sovereign immunity either.[329] As I shall show, however, the distinction between Article I powers and the Fourteenth Amendment enforcement power should not be dispositive in the waiver context.

The Court held in *Seminole Tribe* that Congress could not abrogate sovereign immunity by federal statute when legislating under the Indian Commerce Clause,[330] and it since has clarified that its reasoning extends to most other Article I powers.[331] But the Court acknowledged its previous decision in *Fitzpatrick v. Bitzer*,[332] which held that Congress may abrogate sovereign immunity with appropriate legislation enacted pursuant to the Enforcement Clause of the Fourteenth Amendment.[333] The Court explained that because the Fourteenth Amendment came after ratification of the Constitution and adoption of the Eleventh Amendment, it "operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment."[334]

Seminole Tribe's chronological explanation of the Fourteenth Amendment "exception" rests on the assumption that passage of the Eleventh Amendment was a pivotal point in the constitutional history

---

328 U.S. Const. art. I, § 8, cl. 8 (Patent and Copyright Clause), cl. 3 (Commerce Clause).

329 See, e.g., Burnette v. Carothers, 192 F.3d 52, 59 (2d Cir. 1999) (stating that even if Comprehensive Environmental Response, Compensation, and Liability Act had been enacted pursuant to Congress's spending power under Article I, "Congress would still lack the power to abrogate the states' immunity" because, "'[a]fter *Seminole*, Congress cannot abrogate the States' Eleventh Amendment sovereign immunity pursuant to any Article I power'" (quoting Close v. New York, 125 F.3d 31, 38 (2d Cir. 1997))).

330 Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996).

331 See Alden v. Maine, 527 U.S. 706, 712 (1999) (holding "that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts"); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (applying *Seminole Tribe*'s rule to Interstate Commerce Clause); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (applying *Seminole Tribe*'s rule to Patent and Copyright Clause).

332 427 U.S. 445 (1976).

333 *Seminole Tribe*, 517 U.S. 65-66 (citing *Bitzer*, 427 U.S. at 454); *Fla. Prepaid*, 527 U.S. at 637 ("College Savings and the United States are correct in suggesting that 'appropriate' legislation pursuant to the Enforcement Clause of the Fourteenth Amendment could abrogate state sovereignty.").

334 *Seminole Tribe*, 517 U.S. at 65-66; see also Vázquez, supra note 7, at 894 (discussing Court's distinction between "Congress's powers under the Fourteenth Amendment [and] its powers under 'antecedent' provisions of the Constitution because of the basic alteration in federal-state relations wrought by that Amendment").

of sovereign immunity: Any provisions that came before the Amendment (Article I, for example) may not be used to abrogate the immunity, while provisions that came after it (the Fourteenth Amendment, for example) may be used for that purpose. But the Court apparently retreated from this position in *Alden*. In *Alden*, the Court extended the *Seminole Tribe* decision, holding that Congress lacked the power under Article I to subject an unconsenting state to suit in state courts as well as in federal courts.[335] Because the text of the Eleventh Amendment restricts only the power of the federal courts, the *Alden* Court explicitly abandoned any pretense of reliance on the Amendment itself. Indeed, the Court disavowed that adoption of the Eleventh Amendment was an independently significant event in the constitutional history of sovereign immunity:

> We have . . . sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . .[336]

If, as *Alden* says, the Eleventh Amendment merely reflects principles of sovereignty that existed before the Constitution was ratified, then there is little difference between Article I and the Fourteenth Amendment vis-à-vis sovereign immunity, because both Article I and the Fourteenth Amendment were adopted after the relevant principles of sovereign immunity had been established. Thus, Congress's ability to strip the states of their sovereign immunity under the Fourteenth Amendment cannot derive merely from the fact that the Fourteenth Amendment was added after the Eleventh Amendment.[337]

---

335 *Alden*, 527 U.S. at 712.

336 Id. at 713. Although *Alden* involved state sovereign immunity from suit in state court, the *Alden* Court discussed the scope of sovereign immunity in both state and federal courts. For further discussion of *Alden* and the relationship between sovereign immunity in state and federal courts, see supra note 35.

337 At least one other commentator has criticized the "somewhat simplistic" distinction between Article I and the Fourteenth Amendment, albeit on other grounds. Professor Fletcher has argued that

> [t]he most familiar (though somewhat simplistic) argument in favor of *Fitzpatrick* is chronological: the Fourteenth Amendment was adopted after the Eleventh and therefore the later must overrule the earlier (even though the adopters of the Fourteenth Amendment had no way of knowing the modern meaning attached to the Eleventh Amendment and even though the post-in-

The *Alden* Court took a slightly different approach, stating that "in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the[ir] sovereignty . . . . [b]y imposing explicit limits on the powers of the States . . . ."[338] If it is true that the reason Congress may abrogate sovereign immunity under the Fourteenth Amendment is because the states "surrendered" their immunity under explicit terms, then it stands to reason that a state's surrender of immunity should be enforceable today, at least when it is an explicit condition of receiving federal benefits.

When Congress abrogates sovereign immunity under its Article I powers, it unilaterally subjects states to statutory liability to the same extent as individuals. This is not permitted under current law, because the state's right of immunity means that "evenhandedness [between states and ordinary individuals] is not to be expected . . . ."[339] By contrast, under the Fourteenth Amendment's Enforcement Clause, legislation must be tailored to remedy or prevent specific unconstitutional conduct by a state.[340] Thus, courts reviewing the constitutionality of legislation enacted under the Enforcement Clause first must determine the nature and extent of the states' Fourteenth Amendment violations, which involves an inquiry into specific state conduct and circumstances.[341] Similarly, under any agreement Congress enters into with a state, the state would be held to surrender its immunity only to the extent the individual state agreed to do so in the agreement.

In addition, although the Court has held that Congress's Article I powers do not include the power to subject states to suit under federal law, the Court has acknowledged that the states still are obligated by the Supremacy Clause to comply with federal law.[342] And while the Eleventh Amendment often precludes individuals from suing the states for violating federal law, the federal government may sue states to enforce federal law, even federal law enacted pursuant to Article I.[343] Accordingly, if the federal government may sue the states on behalf of individuals despite state immunity, it seems to follow, *a forti-*

---

corporation Fourteenth Amendment embodies law of which its adopters had no notion).

Fletcher, supra note 78, at 853-54.

338 *Alden*, 527 U.S. at 756.

339 Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 685 (1999) (internal quotations omitted).

340 See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 637-40 (1999) (discussing City of Boerne v. Flores, 521 U.S. 507 (1997)).

341 Id.

342 See, e.g., *Alden*, 527 U.S. at 753, 755.

343 See id. at 755.

ori, that the federal government may negotiate with the states on behalf of individuals for waiver of the immunity.[344]

In sum, permitting the federal and state governments to bargain over sovereign immunity would not impair, as a general matter, the structural, relational, or dignitary interests served by the immunity. Moreover, in the waiver context, it should not matter whether Congress offers incentives to the states under Article I or some other constitutional authority, because a state will be deemed to give up its immunity only to the extent agreed to by that particular state. Accordingly, the inalienability theory probably would not threaten federal proposals offering federal benefits in exchange for state waivers of sovereign immunity.

E. Implications and Future Directions

In the preceding Sections, I have argued that Congress probably retains significant authority to use federal incentives to elicit state waivers of sovereign immunity under current case law. To summarize, the germaneness theory probably does not present a serious obstacle to congressional waiver schemes. Germaneness apparently did not concern the Court in *College Savings Bank*. Moreover, in previous cases, Justice Rehnquist seemed somewhat skeptical as to whether there is much of a germaneness requirement at all, and a majority of the Court requires only that the condition and benefit serve similar or complementary purposes. Of course, there could be some waiver proposals that lack even the most tenuous connection between the benefit being offered and the condition placed on receipt of the benefit, but those types of schemes likely will be rare.

The utilitarian theory also is unlikely to threaten many waiver proposals, because the Court apparently never has adopted a utilitarian theory of unconstitutional conditions. Indeed, if I am correct that *College Savings Bank* allows Congress to use only exclusively federal

[344] It is possible, however, that the Court still could reject Congress's attempt to render states subject to suits brought by private parties if it would expose the states to excessive liability under federal statutes. The Court seems to assume that allowing only the federal government to sue the states would protect not only the states' dignity, but their treasuries as well. In *Alden*, for example, the Court stated that due to scarce state resources, "[a] general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." Id. at 750-51. Theoretically, if the federal government could sue on behalf of individuals for every violation of federal law (this is, as yet, unclear), the effect on state treasuries would be the same as if private parties could sue the states directly. It is unlikely, however, that permitting Congress to bargain with the states for a surrender of sovereign immunity in some circumstances would result in a "general federal power" to subject states to private suit.

benefits to encourage waivers of sovereign immunity, then the Court's approach is antithetical to the utilitarian concern with controlling the monopoly power of the federal government.

Under my proposed baseline, the coercion theory also will not pose a major obstacle for congressional waiver proposals so long as (1) the benefit is available exclusively from the federal government and may not be obtained without prior approval, (2) the benefit clearly is made conditional on the state's waiver of immunity, and (3) the state accepts the benefit.[345] Congress easily can pass new legislation or amend existing legislation to meet these requirements.[346]

Finally, the inalienability theory also should not pose many problems for Congress in offering incentives to encourage state waivers of immunity. Both *College Savings Bank* and *Alden* suggest that sovereign immunity is alienable, and the values of federalism would not be threatened by permitting a state to decide whether to waive its immunity.

These general conclusions suggest that Congress retains some latitude in using federal incentives to encourage states to waive their sovereign immunity. Ultimately, however, each conditional-benefit proposal must be evaluated according to its particular terms. Although consideration of the full range of potential programs is beyond the scope of this Article, the foregoing analysis suggests some reasonable limitations that Congress would be well-advised to observe. First, Congress should request the state to waive its immunity only for a specific period of time. Clearly, the coercion theory, as well as the principles of federalism underlying the inalienability theory, would be violated if the decision of a present-day state legislature to waive its immunity would bind the state a century from now. Second, given the federalism concern with protecting state treasuries, Congress might do well to limit the states' exposure to damages for federal-law claims. Third, in order to reduce coerciveness due to the size of the benefits offered, Congress should condition only a small portion of the benefits available for each program on the state's waiver of immunity. Fourth, in order to avoid both germaneness and coercion issues, Congress should refrain from placing extraneous conditions on recipients of federal money, and also should try to target specific state agencies or programs that must comply with the conditions rather than requiring state compliance across the board.[347] If Congress operates within

345 See supra Part III.C.

346 See supra note 293.

347 A full treatment of these issues is beyond the scope of this Article. For a discussion of issues such as "cross-cutting" and "cross-over" conditions in the aftermath of *College Savings Bank*, see generally Mitchell N. Berman et al., State Accountability for Violations

these parameters, legislation conditioning benefits on state waivers of sovereign immunity likely will be successful under current law.

If, however, the Court continues to expand its federalism jurisprudence and tightens the standards applicable to legislation under the doctrine of unconstitutional conditions, then Congress may be required to make even more substantial compromises in order to obtain state waivers of sovereign immunity. For example, Justice O'Connor's vision of germaneness, if adopted by the Court, would require not only that the condition and benefit serve the same purpose, but also that the condition serve that purpose without being significantly over- or underinclusive.[348] And as for coercion, Justice O'Connor has au-

---

of Intellectual Property Rights: How To "Fix" *Florida Prepaid* (And How *Not* To), 79 Tex. L. Rev. 1037 (2001) (discussing ways in which federal legislation can be written to hold state governments accountable for violation of federal intellectual property laws); Gordon L. Hamrick IV, Comment, Roving Federalism: Waiver Doctrine After *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 49 Emory L.J. 859 (2000) (arguing that *College Savings Bank* was decided wrongly and discussing ways that states may waive sovereign immunity in future in manner consistent with *College Savings Bank*).

348 See supra notes 199-200 and accompanying text. Some scholars would go even further in demanding increased germaneness and decreased coercion. Professor Lynn Baker, for example, has "propose[d] that the Court presume invalid that subset of offers of federal funds to the states which, if accepted, would regulate the states in ways that Congress could not directly mandate under its other Article I powers." Baker, supra note 17, at 1916. She argues that "[t]his presumption could be rebutted by a judicial finding that the offer of funds constitutes 'reimbursement spending' rather than 'regulatory spending' legislation." Id. Under this proposal, the federal government would be permitted to offer the states only the amount of money necessary to reimburse them for costs of complying with a particular program.

Baker's thesis reflects a number of concerns. She argues, for example, that drastic increases in conditional federal spending have resulted in state dependence on those funds for survival, and therefore states are not able to resist the funds or the strings attached to those funds.

> Over the past fifty years, federal grants to states and localities have increased nearly *20,000%*, growing from $991 million in 1943 to $18.173 billion in 1968 and $195.201 billion in 1993. . . . In addition, these federal grants have constituted an increasingly large proportion of total state and local revenues, increasing from 10.8% in 1950, to nearly twice that—19.9%—in 1991.

Id. at 1918 & n.24. Moreover, she argues that an unfettered conditional spending power allows majoritarian states to oppress other states, either to induce conformity or to discourage the other states from taking the conditional funds in an effort to keep a larger share of the pie for themselves. See id. at 1944.

Clearly, Baker's approach, if adopted, seriously would diminish Congress's ability to use federal funds to encourage states to waive their sovereign immunity. Interestingly, however, it would not necessarily hinder Congress's ability to use "in-kind" benefits such as intellectual property rights to induce waiver. First, few states are financially dependent on intellectual property revenue for ordinary government operations. Second, while some states probably favor stronger intellectual property rights than other states do, states are unlikely to fight over intellectual property rights for themselves. Unlike with federal funds, the fact that one state obtains federal intellectual property rights in its works typically would not prevent other states from obtaining the same rights in their works. Third, a

thored a minority opinion, joined by Justice Rehnquist, in which she suggests that the issue of whether federal legislation is coercive over the states should depend upon the extent to which the legislation reflects teamwork or "cooperative federalism" between state and federal governments.[349] Such a subjective standard would be difficult to apply, and Justice O'Connor's own distinction between coercive and noncoercive federal legislation under this standard is subtle indeed.[350]

These approaches, if adopted by a majority of the Court, could have an impact on Congress's ability to use federal benefits to induce states to waive their immunity from federal claims. These approaches have not garnered majority support on the Court, however, and the Court has given no real indications that it intends to adopt them. Thus, for now, it seems that Congress may proceed with caution in using federal benefits to encourage states to waive their immunity from private suits brought to enforce federal statutory rights.

CONCLUSION

While the Court's recent sovereign-immunity decisions have closed the door on Congress's ability to abrogate sovereign immunity when acting pursuant to its Article I powers, *College Savings Bank* and previous decisions leave open a window that will allow private parties to vindicate their rights against state government entities where the states have waived their immunity. In this Article, I have examined the potential for obtaining and enforcing state waivers of immunity in a variety of situations. I have concluded that because a state's waiver must be voluntary and unequivocal, a state will not be deemed to have waived its immunity merely by failing to raise it at trial. By the same token, however, where a state voluntarily and unequivocally waives its immunity in a private contract, that waiver should be enforced notwithstanding the state's subsequent attempt to

---

quid pro quo offer like that contemplated in the Leahy Bill is roughly analogous to Baker's reimbursement legislation, because it allows a state to enjoy the benefits of participating in the federal intellectual property program as "reimbursement" for the burdens of waiving its immunity from intellectual property claims.

[349] See Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 783 (1982) (O'Connor, J., concurring in part and dissenting in part) (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981)).

[350] Compare *Fed. Energy Regulatory Comm'n*, 456 U.S. at 781-86 (O'Connor, J., concurring in part and dissenting in part) (disagreeing with majority's conclusion that Public Utility Regulatory Policies Act of 1978 was constitutional where Act gave states choice of either adopting federal standards for regulation of electric utilities or abandoning regulation of utilities altogether), with *Hodel*, 452 U.S. at 285-93 (upholding Surface Mining Control and Reclamation Act on ground that it gave each state choice of submitting plan for regulating surface coal mining to federal government for approval or having surface coal mining within state regulated by federal government).

revoke it at or before trial. The Court never has held that the states have a constitutional right to assert the immunity at trial, and permitting a state to breach its contractual promise to waive the immunity would violate vested contractual rights under the Contract Clause, discourage private parties from contracting with states, and cause confusion in the courts.

Finally, despite *College Savings Bank*'s holding that a state does not "constructively" waive its immunity merely by participating in commercial activity that is subject to federal regulation, I have argued that Congress retains substantial latitude in its ability to use federal incentives to encourage states to waive their immunity from federal statutory claims. Because states are sophisticated entities with substantial bargaining power, and both state and federal interests are protected by giving states the choice of whether to surrender their immunity, there is no constitutional reason why Congress should be prevented from negotiating with the states for a waiver of sovereign immunity. Indeed, the Court seems concerned only with ensuring that a state's waiver is voluntary and unequivocal, rather than coerced. Accordingly, I conclude that a state should be deemed to waive its immunity when (1) the benefit offered conditionally on a waiver of immunity is available exclusively from the federal government and may not be obtained without prior approval, (2) the benefit clearly is made conditional on the state's waiver of immunity, and (3) the state accepts the benefit. This framework ensures that a state's waiver is voluntary rather than constructive and allows Congress to barter for state waivers of immunity using a variety of federal benefits. Thus, although a waiver approach does not allow for comprehensive enforcement of federal law against the states, it does provide a window of opportunity for narrowing the right-remedy gap created by the Court's abrogation decisions.