Congressional Authority to Induce Waivers of State Sovereign Immunity: The Conditional Spending Power (and Beyond)

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I. State Sovereign Immunity vs. American Business

A. State Sovereign Immunity Invades Silicon Valley

Supporters of state sovereign immunity eventually will rue June 23, 1999. On that day, the Supreme Court's conservative justices seemingly produced three triumphs for states' rights.[1] In *Alden v. Maine,* they revealed that sovereign immunity protects States from suits in federal *and* state courts.[2] In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,*[3] they let a state intentionally infringe upon a federal patent without fear of monetary liability.[4] In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, they let the same state violate a federal trademark with the same impunity.[5] In all three cases, they said that Congress could not use Article I to abrogate state sovereign

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1. The conservative wing of the Supreme Court consists of Chief Justice William Rehnquist, and Justices Anthony Kennedy, Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas.

2. 527 U.S. 706, 712, 735-40 (1999). In contrast, the Eleventh Amendment limits only the "judicial power of the United States." U.S. CONST. amend. XI.

3. 527 U.S. 627 (1999).

4. *Id.* at 653, 653 n.4, 654 (Stevens, J., dissenting). Justice Stevens' dissent pointed out the losing plaintiff had alleged that the state of Florida had willfully infringed its patent.

5. 527 U.S. 666 (1999).

immunity.[6]

This article will argue that two aspects of the *Alden* trilogy authorize Congress to substantially limit State sovereign immunity. First, *Florida Prepaid* and *College Savings Bank* gave opponents of states' rights a powerful new ally: corporate America.[7] Even as state university hospitals, state research laboratories, and state university think-tanks blossomed,[8] those cases exempted states from following a variety of federal laws passed under the Commerce Clause[9] and effectively required American businesses to compete against state-owned enterprises which can ignore a wide range of federal laws without risking monetary liability.[10] As the 21st century began,

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6. *See Alden*, 527 U.S. at 730-35; *Fla. Prepaid,* 527 U.S. at 636; *Coll. Sav. Bank,* 527 U.S. at 672.

7. Before June 23rd, 1999, mainstream American businesses had lost only three state sovereign immunity cases since the appointment of Justice Rehnquist in 1974. *See* P. R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) (architecture firm); Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96 (1989) (bankruptcy trustee for nursing home); Fla. Dep't of Health & Rehabilitative Serv. v. Fla. Nursing Home Ass., 450 U.S. 147 (1981) (association of nursing homes and hospitals). Two of those losses could have been prevented by an attorney who had taken a decent course in Federal Jurisdiction. *See infra* text accompanying notes 27 to 35.

A fourth case involved a business outside the normal flow of commerce. Fla. Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982) (Stevens, J., plurality) (treasure hunter's claim to gold and jewels found in a sixteenth-century Spanish shipwreck).

8. *See Fla. Prepaid,* 527 U.S. at 656-57 (Stevens, J., dissenting) (describing state university patent activity and citing Kenneth S. Dueker, *Biobusiness on Campus: Commercialization of University-Developed Biomedical Technologies,* 52 FOOD & DRUG L.J. 453 (1997)).

9. *Fla. Prepaid*, 527 U.S. at 635-36 (Commerce power does not override state sovereign immunity); *Coll. Sav. Bank*, 527 U.S. at 676-84 (State's business activity in area regulated by Congress does not constructively waive its immunity).

10. New Star Lasers, Inc. v. Regents of the Univ. of Cal., 63 F. Supp. 2d 1240, 1243 (E.D. Cal. 1999) ("[A] State engaging in no more than ordinary business activities enjoys a substantial edge over its competitors: total immunity from suit in federal court, an immunity even more impenetrable than that afforded to foreign powers.").

Federal courts have ruled that the following statutes do not abrogate State sovereign immunity:

Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12202; *see* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(b) (1994 ed. and Supp. (III); *see* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); The Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b); *see Alden,* 527 U.S. at 711-12; The Family and Medical Leave Act of 1993, 29 U.S.C. § 2617(a)(2)(a); *see* Chittister v. Dep't of Cmty. & Econ. Dev., 226 F.3d 223, 227-29 (3rd Cir. 2000); Sims v. Univ. of Cincinnati, 219 F.3d 559 (6th Cir. 2000); Hale v. Mann, 219 F.3d 61, 69 (2d Cir. 2000). *But see* Knussman v. Maryland, 935 F. Supp. 659 (D. Md. 1996) (act trumps Eleventh Amendment); Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e, *see* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon, 210 F.3d 814, 816, 819 (8th Cir. 2000), *cert. denied,* 531 U.S. 958 (2000); The Emergency Medical Treatment and Women

American businesses found their high-tech interests endangered by a doctrine based on the medieval notion that monarchs ruled by divine right.[11]

Moreover, *College Savings Bank* and *Alden* gave Congress a powerful sword to wield on behalf of newly angered corporate America. Although the Rehnquist Court has increasingly restricted

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in Active Labor Act of 1986, 42 U.S.C. § 1395dd(d)(2)(A); *see* Lebron v. Ashford Presbyterian Comm'n Hosp., 975 F. Supp. 407 (D.P.R. 1997); Perez-Bourdon v. Commonwealth, 951 F. Supp. 22 (D.P.R. 1997). The circuits have split on whether § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), applies to the States. *See* Kilcullen v. N.Y. State Dep't of Labor, 205 F.3d 77, 82 (2d Cir. 2000) (listing cases).

11. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 96 (1996) (Stevens, J., dissenting) ("[C]enturies ago the belief that the monarch served by divine right made it appropriate to assume that redress for wrongs committed by the sovereign should be the exclusive province of still higher authority."); Employees of the Dep't of Pub. Health & Welfare of Mo. v. Dep't Of Pub. Health & Welfare of Mo., 411 U.S. 279, 323 (1973) (Brennan, J., dissenting) ("Our discomfort with sovereign immunity, born of systems of divine right that the Framers abhorred, is thus entirely natural."). *See also* John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U. L. REV. 1121, 1124 (1993) (concept of divine right consistent with belief of English monarchs "that they were answerable only to God for their sins.").

The doctrine of divine right claimed that since a king's authority came directly from God, kings were not accountable to any earthly authority, much as sovereign immunity frees states from being held accountable in federal court. 4 THE NEW ENCYCLOPEDIA BRITANNICA (Micropedia) 132 (15th ed. 1998) (Encyclopedia Britannica Inc., Chicago). Great Britain extinguished the concept of divine right in the Glorious Settlement of 1689, in which Parliament acknowledged William and Mary as King and Queen but insisted that they agree to respect certain rights of Parliament and individual citizens. *See* G.M. TREVALYAN, THE ENGLISH REVOLUTION 73-77, 81-82 (Oxford University Press 1974).

Two other medieval concepts have links to sovereign immunity. First, the Court has suggested that sovereign immunity originated in the English feudal system, in which no lord could be sued by one of his subjects. Nevada v. Hall, 440 U.S. 410, 414-15 (1979). Second, sovereign immunity has much in common with kingship by hereditary right. Both concepts contend that courts lack power over the sovereign. *Compare* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 235 (photo reprint, Univ. of Chicago Press, 1979) (1765) ("no [s]uit or action can be brought again[s]t the king, even in civil matters, becau[s]e no court can have juri[s]diction over him . . . .") with U.S. CONST. amend. XI ("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 . . . ."). In addition, both concepts regard the sovereign as above the people and the court system; they place great importance on the dignity of the sovereign. *Compare* BLACKSTONE at 234 ("First, then, of the royal dignity . . . . The law therefore a[s]cribes to the king, in his high political character, not only large powers and emoluments which form his prerogative and revenue, but likewi[s]e certain attributes of a great and tran[s]cendent nature; by which the people are led to consider him in the light of a [s]uperior being, and to pay him that awful re[s]pect, which may enable him with greater ea[s]e to carry on the bu[s]ine[s]s of government.") with *Seminole Tribe*, 517 U.S. 44, 58 (1996) (sovereign immunity avoids "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties" (quoting *P. R. Aqueduct & Sewer Auth.*, 506 U.S. 139, 146 (1993)).

the power of Congress to abrogate State sovereign immunity,[12] in those two cases Chief Justice Rehnquist and *all* of his colleagues, conservative and liberal alike, recognized that a Congress with sufficient political will (or sufficient pressure from the business lobbyists), may *purchase* what it cannot abrogate. All nine justices agreed that Congress may use its Spending Power to condition a grant of federal funds upon a State's waiver of its immunity to lawsuits filed by the private beneficiaries of that grant.[13] Even more, in *College Savings Bank*, the Court's five most conservative justices authorized Congress to go *beyond* the Spending Power, saying that Article I's Compact Clause[14] lets Congress condition a *non-monetary* grant (approval of an interstate compact) upon the participating States' waivers of immunity.[15] In other words, American business now can encourage Congress to set a price–monetary or otherwise — on a State's use of sovereign immunity.

How far can Congress -- under pressure from business — take these powers? Does Article I's Intellectual Property clause[16] let Congress condition State access to federal patent protection upon a State's waiver of immunity to claims that it has violated privately-held patents? Does the Bankruptcy Clause let Congress favor a debtor's business creditors over the tax collectors of a State that has not waived its immunity in federal bankruptcy courts?[17]

Moreover can Congress use this same technique to protect *individual* Americans? For the quarter-century before the *Alden*

12. *Compare* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (plurality opinion) (Article I's Commerce Clause permits Congress to abrogate state sovereign immunity) *with Seminole Tribe*, 517 U.S. at 60-73 (overruling *Union Gas* and finding that Article I's Indian Commerce Clause does not let Congress abrogate state sovereign immunity). *Compare also* Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976) (Section 5 of Fourteenth Amendment allows Congress to abrogate state sovereign immunity) *with* City of Boerne v. Flores, 521 U.S. 507, 532, 533 (1997) (Congress can use its § 5 abrogation authority only if it can show "there is reason to believe that many of the [state] laws affected . . . have a significant likelihood of being unconstitutional" and that there is "a proportionality or congruence between the means adopted and the legitimate end to be achieved.").

13. *See Alden*, 527 U.S. at 755 (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, Scalia, and Thomas, JJ.); *Coll. Sav. Bank,* 527 U.S. at 686 (Scalia, J., joined by Rehnquist,, C.J., and Kennedy, O'Connor, and Thomas, JJ.; and *Coll. Sav. Bank,* 527 U.S. at 704 (Breyer, J., dissenting, joined by Ginsburg, Souter, and Stevens, JJ.).

14. U.S. CONST. art. I, § 10, cl. 3.

15. *Coll. Sav. Bank,* 527 U.S. at 687 (Scalia, J., joined by Rehnquist, C.J., and Kennedy, O'Connor, and Thomas, JJ).

16. U.S. CONST. art. I, § 8, cl. 8.

17. U.S. CONST. art. I, § 8, cl. 4.

trilogy, the Court's concern for the dignity of states[18] took its toll on those least able to pay the price: disadvantaged or working-class citizens whose livelihoods were at stake because a state had violated their civil rights.[19] Under the Commerce Clause, could Congress trade some of the regulatory authority it now gives states over

18. *See Alden*, 527 U.S. at 715, 748-49 (states retain dignity of sovereignty, "not becoming" that private citizens may "summon" states to federal court); *Seminole Tribe*, 517 U.S. at 58 (Eleventh Amendment prevents "indignity" of private citizen suing state); P. R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (Eleventh Amendment prevents indignity of subjecting state to coercion of courts).

19. Edmund Randolph, one of the Constitution's Framers, predicted just such an outcome. Randolph said that Article III, which created the federal judicial power, was his favorite part of the Constitution because it would permit suits against states, "secure the widows and orphans, and prevent the states from impairing contracts. I admire that part [of Art. III] which forces Virginia to pay her debts." 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION ELLIOT'S DEBATES at 207 (J. Elliot ed. 1836).

The Court began its use of the Eleventh Amendment at the expense of individuals in 1974, when newly-appointed Justice William Rehnquist told aged, blind, and disabled citizens that the Eleventh Amendment allowed their State to violate with impunity federal regulations intended to provide them money on which to live. Edelman v. Jordan, 415 U.S. 651, 660-78 (1974).

A decade later, the Court used the Eleventh Amendment to forestall efforts to help mentally retarded children trapped in a state facility where they were frequently attacked by staff, injured by fellow residents (or by self-abuse), deprived of basic health care, and forced to live with "urine and excrement on the walls." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 127 n.1 (1984) (Stevens, J., dissenting). *See also* John Paul Stevens, *Is Justice Irrelevant?*, 87 N.W. L. REV. 1121 (1993).

Board of Trustees of the University of Alabama v. Garrett, continued this pattern, dismissing the claims of a state nurse who was fired for missing work after a lumpectomy, radiation treatment, and chemotherapy. 531 U.S. 356 (2001). Chief Justice Rehnquist held that the Eleventh Amendment barred her from suing under Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111-12117. After describing similar cases, such as that of a Kansas state microfilmer who was fired because he was deaf, and deaf workers at the University of Oklahoma who were paid less than those who could hear, Justice Rehnquist said that states can "quite hard headedly–and perhaps hardheartedly–hold to job discrimination requirements which do not make allowance for the disabled." *Id.* at 367-69.

In addition to those examples, the Court has used the Eleventh Amendment to dismiss litigation filed by injured workers; *see* Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 33 (1994); Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 301 (1990); Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 471, 472-94 (1987) (disappointed job seekers); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 236 (1985) (diabetic and partially-blind job seeker); Will v. Mich. Dep't of State Police, 491 U.S. 58, 60 (1989) (police officer seeking promotion and blue collar workers who had lost their jobs); Wis. Dep't of Corr. v. Schacht, 524 U.S. 381 (1998) (corrections officer); Livadas v. Bradshaw, 512 U.S. 107, 110, 115 n.9 (1994) (grocery worker seeking back wages); Paschal v. Didrickson, 502 U.S. 1081 (1992) (denying appeal of claim for unemployment benefits sought in Paschal v. Jackson, 936 F.2d 940, 940-45 (7th Cir. 1991)).

employment discrimination[20] in return for state waivers of immunity to privately-filed discrimination lawsuits? More broadly, now that the nightmares of civil rights activists haunt corporate boardrooms, can the two groups *join* to persuade Congress to impose the biggest condition of them all? Since Congress controls the jurisdiction of the federal courts,[21] can Congress once and for all eliminate the costs state sovereign immunity imposes on American business and American citizens by conditioning state access (as a plaintiff) to the federal court system upon a state's blanket waiver of its immunity to *all* federal lawsuits?

In short, this article will use the language of the Court's conservative wing, particularly that of Chief Justice Rehnquist and Justice Scalia, to show that the *Alden* trilogy and other cases authorize Congress to counteract the Court's seemingly endless expansion of State sovereign immunity and thereby strike a more evenhanded balance between state interests in protecting their sovereignty and federal interests in protecting the rights of all Americans.

B. The Commercial Aspects of the Eleventh Amendment

1. A mercantile birth and growth

In its first one hundred years, the Eleventh Amendment's ban on federal court suits against states affected commercial interests, not personal civil rights. Under the Judiciary Act of 1789, federal courts could hear only diversity cases.[22] This meant that a citizen attainted by his state's legislature (in violation of Art. I, § 9) had to seek protection from the courts of that same state, but out-of-state merchants could use diversity jurisdiction to press their breach of contract actions in the relative neutrality of federal court. Furthermore, while the Court said in 1886 that corporations were "persons" who could use the Fourteenth Amendment to attack State regulations and taxes,[23] not until 1925 would the Court link that

20. *See* discussion *infra* Part III.A.2.

21. U.S. CONST., art. I, § 8, cl. 8 and art. III, § 1.

22. Act of Sept. 24, 1789, 1 Stat. 73. Federal courts finally received federal question jurisdiction in 1875. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470.

23. Santa Clara County v. So. Pac. R.R. Co., 118 U.S. 394 (1886). Later examples include Allgeyer v. Louisiana, 165 U.S. 578 (1897) (invalidating state statute regulating insurance policies); Mo. Pac. RR. Co. v. Nebraska, 164 U.S. 403 (1896) (invalidating state statute requiring railroads to allow private grain elevators on their property); Mugler v. Kansas, 123 U.S. 623 (1887) (warning that Court had authority to set and enforce limits on

amendment and the Bill of Rights to protect the civil rights of "natural persons" from State interference.[24] In short, corporations could ask federal courts for protection against states, while natural persons could not. Consequently, Eleventh Amendment cases were limited to business disputes.

Indeed, the Eleventh Amendment sprang from a commercial dispute. *Chisholm v. Georgia* let the executor of a South Carolina businessman sue Georgia for the price of war supplies that State had purchased,[25] prompting the "profound shock" that led to the amendment's adoption.[26] Later, Chief Justice John Marshall's pronouncements on the Eleventh Amendment involved businessmen running a national lottery[27] and the owners of the first federally-chartered bank.[28]

The Eleventh Amendment remained a commercial issue after the Civil War, when the Court used it to let Southern States escape liability to thousands of bond holders.[29] Later, railroad attacks on state regulation of their rates produced a series of Eleventh

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State regulation of business). *See also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §11.3, at 411 (WestGroup, 6th ed. 2000) and cases cited.

Professor Orth writes "In one of the cruellest [sic] ironies of American constitutional history, the central Reconstruction Amendment was converted to the use of business. Following the Negro's short span in the sun, the corporation enjoyed a long season as the 'special favorite of the laws.'" JOHN ORTH, THE JUDICIAL POWER OF THE UNITED STATES 126-27 (Oxford, 1987).

24. Gitlow v. New York, 268 U.S. 652, 666 (1925).

25. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). The first suit filed in the Supreme Court's fall 1791 term was by Dutch bankers against the State of Maryland. *See* Vanstophorst v. Maryland, 2 U.S. (2 Dall.) 401 (1791), *cited in* Edelman v. Jordan, 415 U.S. 651, 661-62 (1974).

26. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 96 (rev. ed. 1926); *Alden,* 527 U.S. at 720-21; *Seminole Tribe,* 517 U.S. at 69; *Hans v. Louisiana,* 134 U.S. at 10.

27. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 289, 378-92 (1821) (State sovereign immunity does not bar writ of error from U.S. Supreme Court to Virginia Supreme Court on indictment by state officials). Marshall referred twice to the Eleventh Amendment by name, though most of the opinion spoke of State sovereign immunity. *Id.* at 405, 412. Mr. Barbour, counsel for the defendant in error, repeatedly invoked the Eleventh Amendment, as did contemporary supporters of Virginia. *Id.* at 290, 306-07, 315. *See* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35, *in* III-IV HISTORY OF THE SUPREME COURT 508-09 (1988) (Note: table of contents does not say where III ends and IV begins).

28. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 738, 847-59 (1824). (Eleventh Amendment exempts states from suits by citizens of another state, but federal court still can hear suit against state agents).

29. *E.g.*, Hans v. Louisiana 134 U.S. 1, 1-3 (1890). For a thorough discussion, *see* ORTH, *supra* note 23, at 58-86.

Amendment decisions.[30] By the end of the nineteenth century, the nation's financial and transportation sectors were all too familiar with State sovereign immunity.

2. A corporate-state balance

The start of the twentieth century produced even more state-business clashes, requiring the Court to use some creative arguments to balance corporate interests and state sovereignty.

Did a corporation, contracting with a state, want to preserve its right to sue for damages? In 1906, *Gunter v. Atlantic Coast Line R.R.* let a state waive its sovereign immunity to federal suits,[31] despite the Eleventh Amendment's apparently absolute ban on such waivers.[32] *Gunter* meant that in-house counsel doing business with the state could overcome the almighty doctrine of sovereign immunity merely by inserting a bit of fine print -- a waiver clause — into the contract.

Did an industry oppose state regulations? In 1908, *Ex parte Young* said a federal court could enjoin state officials who were enforcing Minnesota's limits on railroad freight rates.[33] Even though the defendants were *state* officials obeying the *state* legislature, the Court found the lawsuit was *not* against the state, so the Eleventh Amendment did not apply.[34] Today, the Court recognizes *Ex parte Young* as a legal fiction,[35] but it was a fiction that balanced the needs of businesses and states.[36]

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30. *E.g.*, Reagan v. Farmers' Loan & Trust Co., 154 U.S. 420 (1894); Smyth v. Ames, 171 U.S. 361 (1898); Fitts v. McGhee, 172 U.S. 516 (1899); Prout v. Starr, 188 U.S. 537 (1903); *Ex parte Young*, 209 U.S. 123 (1908); Hunter v. Wood, 209 U.S. 205 (1908).

31. 200 U.S. 273 (1906).

32. *Id.* at 284. This conflicts with the amendment's text, which flatly says that the "Judicial Power of the United States shall not be construed to include" suits against states. Despite that absolute ban, the Court described Eleventh Amendment immunity as "a privilege which may be waived . . . ." ORTH, *supra* note 23, at 124-26 (quoting *Gunter,* 200 U.S. at 284).

33. *Ex parte Young*, 209 U.S. 123 (1908).

34. *Id.* at 159-60.

35. *See* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 269, 270, 281 (1997) (Kennedy, J.); Pennhurst State Schl. & Hosp. v. Halderman, 465 U.S. 89, 114 n.25 (1984) ("We have noted that the authority-stripping theory of *Young* is a fiction . . . .") (Powell, J.). *See also* Fla. Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 685 (1982) (Stevens, J.) (recognizing "irony" that a state official's conduct is "'state action'" for purposes of the Fourteenth, but not the Eleventh Amendment).

36. While federal injunctions protected companies against states, states were protected by the standard requirement that a company had to show imminent, irreparable injury to get that injunction. *See* Morales v. Trans World Airlines, 504 U.S. 374, 380-83 (1992) (requiring proof of irreparable injury in company's effort to obtain injunction to

What if a state unconstitutionally taxed a corporation? A company that paid the tax and sought a refund had to ask for monetary relief from the state treasury, a clear violation of the Eleventh Amendment. But *Young* let a company which had *not* paid the tax ask a federal court to enjoin state officials from collecting. Companies so often used this rule to delay tax payments[37] that the Court and Congress eventually rebalanced the scales, allowing a state to use the Eleventh Amendment to bar corporate tax claims only if it provided adequate remedies for such claims in its own courts.[38] Corporate tax attorneys began lobbying state legislatures to adopt reasonable procedures for contesting taxes, a campaign that produced mixed results.[39]

Together, the Court's rules meant that the Eleventh Amendment was no longer a major problem for business, as long as corporate counsel took simple precautions—insisting on waivers in contracts with the state, seeking injunctions before state laws took effect, and taking advantage of state procedures for contesting taxes.

3. The Modern Clash Between States and Corporate America

a. The gauntlet thrown: Medicaid and bankruptcy statutes

Corporate-state conflicts reemerged in the 1970s as Congress tested its authority to override the Eleventh Amendment.

The Supreme Court thrice had recognized such an authority. In *Petty v. Tennessee-Missouri Bridge Commission,* the Court said

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against state).

37. 81 CONG. REC. 1416 (1937) (statement of Rep. Bone) ("tax injunction suits in federal court let corporations withhold state taxes in such vast amounts and for such long periods as to disrupt state and county finances . . . .").

38. Matthews v. Rodgers, 284 U.S. 521, 524-29 (1932) (federal courts should not interfere with state tax collection if state law provided an adequate remedy); The Tax Injunction Act, Act of Aug. 21, 1937, 50 Stat. 738, codified at 28 U.S.C. § 1341. Of course, neither Court nor Congress defined "adequate state remedy." Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 512-27 (1981) (discussing whether a state remedy system which pays no interest despite a two-year wait is "plain, speedy, and efficient").

39. *See, e.g.,* Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946) (Utah Code Ann. § 80-5-76 (1943) waives Eleventh Amendment immunity regarding *state* court suits for tax refunds); Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944) (dismissing out-of-state insurance company suit against Oklahoma for refund of taxes assessed in excess of those on in-state companies); Ford Motor Co. v. Dep't of Treasury of Ind., 323 U.S. 459 (1945) (dismissing non-resident manufacturer's suit for refund of allegedly discriminatory taxes); Ga. R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952) (state did not provide "plain, speedy, and efficient remedy," so railroad could sue to block collection of back taxes).

Congress could condition its approval of a compact between two states on their waiver of immunity to suits concerning the bridge they were building.[40] In *Parden v. Terminal Railway of Ala. Docks Department*,[41] the Court said that under the Commerce Clause, a state that operated a railroad in interstate commerce for twenty years constructively waived its immunity to federal suits.[42] Finally, in *Fitzpatrick v. Bitzer*, the Court held that section 5 of the Fourteenth Amendment authorized Congress to override the Eleventh Amendment.[43]

So armed, Congress and American business attacked state sovereign immunity on two fronts. First, in 1975, Congress conditioned federal grants to care for indigent and elderly residents upon a state's written consent to federal suits brought by the program's beneficiaries.[44] A State that did not consent would lose ten percent of its grant.[45] Thirty-four states consented,[46] but Congress quickly (and retroactively!) repealed the provision, with little explanation.[47]

After that legislative defeat, nursing homes and hospitals turned to the federal courts for relief against states determined to reduce expenses by reducing reimbursement rates. Companies whose counsel understood *Ex parte Young*[48] protected their clients with federal injunctions that barred State officials from implementing

40. 359 U.S. 275, 276-77, 280-82 (1959).

41. 377 U.S. 184 (1964), *overruled by* Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 478 and n. 8. (1987) and *Coll. Sav. Bank*, 527 U.S. at 680.

42. *Id.* at 187-197 (discussing the Federal Employers Liability Act, 45 U.S.C. § 51 *et seq*).

43. 427 U.S. 445 (1976).

44. Act of Dec. 31, 1975, Pub. L. No. 94-182, § 111(a), 89 Stat. 1051, 1052, amending 42 U.S.C. § 1396a(g).

45. *Id.* at § 111(b)(1).

46. H.R. REP. NO. 503-19, at 10-11 (App. II) (1976).

47. Act of Oct. 18, 1976, Pub. L. No. 94-552, 90 Stat. 2540, amending 42 U.S.C. §§ 1396a and 1396b. The House report supporting repeal recounted the inability of some states to act legislatively in time to meet the statute's deadlines, opposition from state governors and attorneys general, and legal action by a dozen states, all problems whose potential should have been obvious at the time of Congress' original vote. H.R. REP. NO. 503-19, at 4-5.

The House Report in favor of repeal said twelve states had sued to contest the original statute's constitutionality, H.R. REP. No. 94-1122, 94th Cong., 2d Sess., May 11, 1976, at 5, but apparently the rapid repeal mooted the issue. I cannot find a published opinion that addresses the original statute's constitutionality.

48. *See* text accompanying notes 29 to 32, *supra*.

cutbacks;[49] those with less astute counsel lost.[50] One such loser was the Florida Nursing Home Association, which had foolishly trusted Florida's written, signed promise to "recognize and abide by all State and Federal laws, Regulations, and Guidelines applicable to participation in and administration of the Title XIX Medicaid program."[51]

The second effort to protect business from the Eleventh Amendment was the Bankruptcy Act of 1978. It used Article I's Bankruptcy power to prevent states from gaining advantages over a debtor's private creditors;[52] its constitutionality would not be resolved

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49. *See* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 505 n.4 (1989); Wash. State Health Facilities Ass'n v. State of Wash. Dep't of Social & Health Serv., 698 F.2d 964, 965-66 (9th Cir. 1982); Hillhaven Corp. v. Wis. Dep't of Health & Human Serv., 634 F. Supp. 1313, 1321-23 (E.D. Wis. 1986); Ciampa v. Schweiker, 511 F. Supp. 670, 678 (D. Mass. 1981), *aff'd*, 687 F.2d 518 (1st Cir. 1982); Neb. Health Care Ass'n, Inc. v. Dunning, 578 F. Supp. 543, 545-46 (D. Neb. 1983).

50. *See* Wis. Hosp. Ass'n v. Reivitz, 630 F. Supp. 1015, 1019-21 (E.D. Wis. 1986) (Eleventh Amendment barred recovery of unpaid Medicaid expenses incurred before date of court order invalidating new rates); Friedman v. Perales, 616 F. Supp. 1363, 1368-69 (S.D.N.Y. 1985) (Eleventh Amendment barred reimbursement for past years' denied payments); Cal. Ass'n of Bioanalysts v. Rank, 577 F. Supp. 1342, 1351 (C.D. Cal. 1983) (Eleventh Amendment barred retroactive award of Medicaid reimbursement rates which arose before court order).

Some counsel for Medicaid providers were reduced to arguing that their clients' relief was prospective (and thus permitted under *Edelman*), because while their clients had performed services before the district court judgment date, the injury occurred only when the clients submitted their bills to the state, which had happened after the district court judgment. Those counselors lost. *See* N.Y. City Health & Hosps. Corp. v. Perales, 50 F.3d 129, 135-37 (2d Cir. 1995) (*citing* Kimble v. Solomon, 599 F.2d 599 (4th Cir. 1979)); and Wis. Hosp. Ass'n v. Reivitz, 820 F.2d 863 (7th Cir. 1987).

51. Fla. Dep't of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n, 450 U.S. 147, 149-50 (1981). *Compare* THEODORE S. GEISEL, HORTON HATCHES AN EGG (Random House, Inc. 1940) (unpaginated) ("I meant what I said, and I said what I meant. . . . . An elephant's faithful, one hundred percent.") (ellipsis in original).

52. By including states within the definition of a "governmental unit," the Act said that a state which filed a claim against a debtor's estate waived immunity to any disputes arising out of the same transaction as that claim. 11 U.S.C. § 106(a). Otherwise, if the state and the debtor had mutual breach of contract action against each other, the state could use the bankruptcy court to collect from the debtor (at the expense of other creditors) but the bankruptcy court could not enforce even a debtor's valid claim against the state, again, hurting the creditors who would have divided any sums collected from the state.

The Act also let bankrupt estates offset against a state government's claim any debts the government owed it. 11 U.S.C. § 106(b). Obviously, this also protected the debtor's private creditors by increasing the debtor's asset at the expense of the state.

Finally, the Act expressly bound all "government units" to the bankruptcy court's decisions. 11 U.S.C. § 106(c)(2). As we shall see later, without this provision, a state would be tempted to pressure a debtor into paying its state taxes in full, at the expense of

for a decade.

b. A temporary lull: the 1980s.

Congress next attacked state immunity in 1986. Using the Commerce Clause, Congress opened states to liability for the costs of cleaning hazardous waste sites.[53] Also in 1986, the Rehabilitation Act Amendments made states liable under several civil rights statutes.[54]

Two years later, the impending clash between state immunity and American business appeared in the legal literature. Two Atlanta attorneys predicted that the Court would use the Eleventh Amendment to strike down Congressional efforts to expose states to monetary liability under federal antitrust, copyright, and environmental statutes.[55]

The end of the decade produced two inconclusive decisions. A plurality opinion in *Pennsylvania v. Union Gas* said that Congress could use the Commerce Clause to make states liable for harming the environment.[56] The Court also invalidated the 1978 Bankruptcy Act's attempt to override the Eleventh Amendment, but only because Congress had not made sufficiently clear its intent to abrogate state sovereign immunity.[57] The first decision obviously was too weak to

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private creditors.

53. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, amending the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* Sections 9604, 9606, and 9607 permitted the United States to clean up hazardous waste sites and impose the costs on "operators" responsible for the sites; Section 9601(21) included states within the definition of site "operators."

54. The Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Title X, § 1003, 100 Stat. 1807, 1845 (1986). The amendments abrogated State immunity regarding Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, the Age Discrimination in Employment Act of 1975, and Title VI of the Civil Rights Act of 1964.

55. H. Stephen Harris & Michael P. Kenny, *Eleventh Amendment Jurisprudence After Atascadero: The Coming Clash with Antitrust, Copyright, and Other Causes of Action Over Which the Federal Courts Have Exclusive Jurisdiction,* 37 EMORY L.J. 645, 704-17 (1988).

56. Pennsylvania v. Union Gas, 491 U.S. 1 (1989) (Brennan, J., plurality opinion), *overruled by Seminole Tribe of Fla.,* 517 U.S. at 44. Three justices joined Justice Brennan's opinion. Justice White's concurrence provided the fifth vote for Justice Brennan's result, but Justice White did not explain how his position differed from the plurality. *Union Gas* upheld state liability under the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, § 101(20)(D), amending Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601, 9601(21), 9607(d) (1982 ed., Supp. IV).

57. Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96, 101 (1989).

survive long, and the second gave little clue as to what would happen if Congress spoke more clearly.

c. The growth of state competition with private business

Even as Congress tested its abrogation authority, states entered business, working with and competing against for-profit enterprise. In 1980, Congress allowed universities, private and public, to patent results developed through federally-funded research.[58] Seven years later, the Library of Congress' Copyright Office formally sought public commentary about problems that private copyright holders had enforcing copyright infringement claims against states and the Eleventh Amendment's effects in copyright infringement cases.[59] Since then, university technology departments have become increasingly commercial.[60] States are furnishing universities large sums of money to develop both hardware and software.[61]

The increasingly commercial nature of state universities extends beyond intellectual property and computer technology. State university hospitals compete against private hospitals;[62] agricultural departments at state land grant institutions develop and market genetically-engineered crops and livestock, as well as pesticides, herbicides, etc. According to the chief executive officer of the

58. Act of Dec. 12, 1980, Pub. L. No. 96-517, 94 Stat. 3019, §§ 200, 202.

59. Request for Information, Eleventh Amendment, 52 Fed. Reg. 42045, 42045 (Nov. 2, 1987).

60. Almost every American research university has an office of technology licensing. Eyal Press and Jennifer Washburn, *The Kept University*, 285 ATLANTIC MONTHLY 39, 46 (March 2000). Those offices often spend substantial sums on attorneys' fees to protect their copyrights. *Id.* at 48. According to the Association of University Technology Managers, a 300-university consortium devoted to technology transfers, in 1998 alone, university-produced patents and licenses formed the basis of 364 startup companies. *Id.* at 46. *See also* Sonya Colberg, *City Drug Company to Sign Production Deal,* DAILY OKLAHOMAN 1-C (Aug. 29, 2001) (announcing $10 million deal with pharmaceutical company involving technologies developed at University of Oklahoma Health Sciences Center).

61. For example, former Wisconsin Gov. Tommy G. Thompson (now Secretary of Health and Human Services for the Bush Administration) asked his state legislature for $317 million to build several research centers at the University of Wisconsin-Madison; Illinois Governor George H. Ryan wanted $196 million for biotechnology research at his state's universities, and California Governor Gray Davis wanted $75 million to create "Institutes for Science and Innovation" at three campuses of the University of California. CHRONICLE OF HIGHER EDUCATION, Feb. 25, 2000, p. A42.

62. *See* Stein v. Regents of the Univ. of Minn., 282 N.W.2d 552, 556-59 (Minn. 1979) (operation of state university hospital was proprietary, not governmental); Hoeffner v. Univ. of Minn., 948 F. Supp. 1380, 1387 (D. Minn. 1996) (describing how state university hospital developed and globally distributed drug that reduced transplant rejections).

National Business Incubation Association, universities now run 150 of the nation's 600 non-profit business incubators, and she expects *every* university to have such an incubator in the next twenty years.[63] It was only a matter of time before state business and private business clashed.

4. No Prisoners Taken: the 1990s

Between 1990 and 1994, as state competition with private business increased, Congress invoked its powers under the Patent, Copyright, and Commerce Clauses to adopt the Remedy Clarification Acts, making states liable for violations of patents, copyrights, and trademarks.[64] Congress also revised the Bankruptcy Act of 1978 to satisfy the Court's clear statement requirement.[65] Finally, it used the Indian Commerce Clause to require states to negotiate in good faith with tribes that wanted to establish casinos.[66]

The Court responded in 1996. Even though the Indian Commerce Clause gives Congress plenary and exclusive authority over tribes, *Seminole Tribe of Fla. v. Florida* said it did not allow Congress to abrogate state sovereign immunity.[67] If a plenary and exclusively Congressional power could not override that immunity, how could any other enumerated power do so? *Seminole Tribe* doomed the Remedy Clarification Acts, even though their obituaries would not appear until June 23, 1999, in *Florida Prepaid* and *College Savings Bank*.

Consequently, we should focus less on the funerals and more on the mourners. For the first time in a decade, and for only the third time since Justice Rehnquist joined the Court, mainstream corporations found themselves on the wrong end of state sovereign immunity. *Florida Prepaid* and *College Savings Bank* mean a state university's agricultural program can pirate a gene-splicing patent; a state research university can infringe a software copyright; a state hospital can engage in predatory pricing, all without fear of monetary

63. Martin van der Werf and Goldie Blumenstyk, *A Fertile Place to Breed Business,* CHRONICLE OF HIGHER EDUCATION, A28 (March 2, 2001).

64. Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4230 (codified at 35 U.S.C. §§ 271(h) and 296(a) (2000)); Trademark Remedy Clarification Act, Pub. L. No. 102-542, 106 Stat. 3567 (codified at 15 U.S.C. § 1122) (2000). Copyright Remedy Clarification Act Pub. L. No. 101-553, 104 Stat. 2749, 2749 (codified at 17 U.S.C. § 511(a)) (2000).

65. Bankruptcy Act of 1994, 11 U.S.C. §§ 101, 106 (2000).

66. Indian Gaming Regulatory Act, 102 Stat. 2475, 25 U.S.C. § 2710 (2000).

67. 517 U.S. 44 (1996).

liability. Injured corporations can use *Ex Parte Young* to persuade federal courts to enjoin *future* violations, but they cannot obtain monetary relief for injuries already done. Meanwhile, as Professor Kenneth Klee has written, the two decisions "almost completely insulate [States] from the power of the bankruptcy courts," leaving them free to extract preferential payments from debtors at the expense of the most well-secured creditors.[68] Silicon Valley and Wall Street have a new enemy: state sovereign immunity.

C. New Weapons for the Corporate Arsenal: Conditional Spending (and Beyond)

Since Congress cannot use Article I's enumerated powers to abrogate state sovereign immunity, corporate lawyers need a new approach. This article presents that solution, based largely upon the work of Chief Justice William Rehnquist. In *South Dakota v. Dole*, then-Justice Rehnquist held that Article I's Spending Clause permitted Congress to do indirectly what it could not do directly.[69] He wrote that while the Twenty-first Amendment barred Congress from directly establishing a national minimum drinking age, Congress could use its Spending Power to withhold federal highway funds from states that did not raise their drinking age to twenty-one.[70]

That approach strongly suggests that Congress can condition federal grants upon a state's waiver of its sovereign immunity to private suits involving the administration and implementation of those grants. For example, Congress should be able to condition Medicare grants upon a state's waiver of immunity to suit by Medicare patients.

That idea suggests a second step. If Congress can condition federal *monetary* benefits upon a state's waiver of immunity regarding those benefits, can Congress condition federal *non-*monetary benefits upon a similar waiver? For example, can Congress grant copyrights or patents only to those entities who agree, as a condition of that protection, to respect and obey the federal courts in all proceedings involving copyrights or patents?

That second step presents a third. Copyright protection is a

68. *Tobacco Company Filings Could Be a Seminole Event*, 35 BR. CT. WEEKLY NEWS AND COMMENT A1, A11. (April 25, 2000) (statement of Professor Kenneth Klee). *See also* Kenneth N. Klee, James O. Johnston, and Eric Winston, *State Defiance of Bankruptcy Law*, 52 VAND. L. REV. 1527 (1999).

69. 483 U.S. 203, 206 (1987).

70. *Id.* at 208-12.

specific benefit that Congress can extend or retract. What about a more general benefit, such as access to the independent judges of federal courts? Could Congress use its Article I powers over the jurisdiction of the lower federal courts to condition state access (as a plaintiff) to federal court upon that state's *blanket* waiver of its sovereign immunity regarding *all suits filed against it* in federal courts?

In short, might one of state sovereign immunity's great supporters – Chief Justice Rehnquist – have laid the foundation for the deconstruction of State sovereign immunity?

II. The Spending Clause *vis-a-vis* State Sovereign Immunity

A. The Proposal

To aid in assuring that states adhere to the goals of its programs, Congress should condition financial grants to states upon a waiver, by statute or constitutional amendment, of a state's sovereign immunity to suits filed by private parties regarding the funded program. Congress also should require the lower federal courts to report to the U.S. Attorney General a state's use of its immunity, enabling the federal government to determine if a state had violated a waiver.

This section will show four things. First, the Spending Power is broad enough to encompass this use of federal funds. Second, the Supreme Court has gone out of its way, albeit in *dictum*, to say that conditional spending can overcome state sovereign immunity. Third, the proposal satisfies *South Dakota v. Dole's* tests for conditional spending, and fourth, the lower federal courts repeatedly have approved this use of conditional spending.

B. The Breadth of the Spending Power

1. The Spending Power and the general welfare

The use of federal funds to encourage states to act began long before *Dole*: the Federalist Papers bluntly suggested that the federal government use its revenues to "attach [State officials] to the Union by an accumulation of their emoluments."[71]

As ratified, Article I, Section 8 gave Congress authority "To lay

71. THE FEDERALIST No. 36 (Alexander Hamilton), *quoted in* Printz v. United States, 521 U.S. 898, 914 (1997) (Scalia, J.). Justice Scalia also noted that the first Congress offered to pay state jailers to house federal prisoners. Act of Sept. 23, 1789, 1 Stat. 96, *cited in Printz*, 521 U.S. at 909.

and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States. . . ." Section 8 then listed more specific powers, such as regulating commerce, but it did not say how the powers to Tax and Spend relate to the enumerated powers. Madison argued that Congress could tax and spend only to carry out an enumerated power.[72] Hamilton countered that taxing and spending were separate powers that Congress could use for any purpose that furthered the general welfare.[73]

Congress soon adopted Hamilton's meaning and gave infant States large sums with strings attached.[74] In 1817, for example, Congress granted the new State of Mississippi five percent of all proceeds of federal land sales in that State, but only if Mississippi would pay off the private claimants to that land.[75] Congress gave land to other new states, conditioned on their agreement to use the revenues from that land to support public schools and a "seminary of learning,"[76] a system that produced today's land-grant universities.[77] The Conditional Spending power even confronted slavery. In 1832, U.S. Senator Henry Clay proposed allocating land sale proceeds to States that would use those funds to buy privately-held slaves and transport them to Africa.[78]

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72. United States v. Butler, 297 U.S. 1, 65 (1936); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution,* 39 STAN L. REV. 1103, 1112 & n.40 (1987).

73. *Butler,* 297 U.S. at 65-66.

74. Early Congressional actions "provide contemporaneous and weighty evidence of the Constitution's meaning." *Alden,* 527 U.S. at 743-44 (quoting *Printz,* 521 U.S. at 905).

75. Act of March 1, 1817, ch. 23, § 5, 3 Stat. 348, 349.

76. Act of April 19, 1816, ch. 57, § 6(1), § 6(4), 3 Stat. 289, 290. *See also* S. REP. NO. 1735, at 1, 2 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3963, 3963 (long practice of Congress to give States land to support public schools).

77. 7 ENCYCLOPEDIA BRITANNICA 134 (15th ed. 1998). Ironically, although land grant universities exist because of federal largesse, some have used state sovereign immunity to avoid appearing in federal court. *See* Innes v. Kan. State Univ., 184 F.3d 1275 (10th Cir. 1999), *cert. denied,* 529 U.S. 1037 (2000); Brine v. Univ. of Iowa, 90 F.3d 271 (8th Cir. 1996), *cert. denied,* 519 U.S. 1149 (1997); Hoeffner v. Univ. of Minn., 948 F. Supp. 1380 (D. Minn. 1996).

78. SEN. COMMITEE ON MANUFACTURES, 22d CONG., 1st Sess., REPORT ON THE PUBLIC LANDS (April 16, 1832), reprinted in GALES & SEATON'S REGISTER, APP. 112, 117 ("A portion of the committee would have preferred that the residue should be applied to the objects of internal improvement and colonization of the free blacks, under the direction of the General Government. But a majority of the committee believes it better . . . that the residue be divided among the twenty-four States . . . to be applied to education, internal improvement, or colonization . . . as each State, judging for itself, shall deem most comfortable . . . .").

I uncovered Clay's proposal in WILLIAM W. FREEHLING'S fascinating work, ROAD TO

Federal conditional grants continued during and after the Civil War. The 1862 Land Grant bill expressly barred federal educational funding to any State "in rebellion,"[79] and an 1890 statute barred federal funding for state colleges that rejected students because of race.[80]

Despite conditional spending's long use, the Supreme Court first discussed this power in *United States v. Butler*, a 1936 challenge to federal grants to farmers who reduced production.[81] The grants did not further an enumerated power, but the Court ruled Congress could spend for any purpose that promoted the general welfare,[82] a position the Court maintains today.[83]

2. Conditional spending and the States

a. In general

A year after *Butler* approved conditions on federal grants to individuals, the Court upheld conditions on grants to states. *Charles M. Steward Machine Co. v. Davis* approved a federal employment tax whose proceeds went to states with unemployment compensation

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DISUNION: SECCESSIONISTS AT BAY 1776-1854, at 158 (Oxford Univ. Press, 1990). Freehling says Thomas Jefferson and U.S. Senator Rufus King made similar proposals, though I cannot tell if they would have distributed the money through the states or directly to slaveholders. *See id.* at 156 (citing Jefferson's letter to Gallatin, Dec. 26, 1820, 10 JEFFERSON'S WRITINGS 175-78 (Ford, ed.)). *See id.* at 159 (citing STATE DOCUMENTS ON FEDERAL RELATIONS 203–04 (Herman V. Ames, ed. 1906)).

Clay's final proposal did not mention slaves, but it did require states to use the federal money for specific purposes. S. 179, 22d Congress, 1st Sess., April 16, 1832.

79. Act of July 2, 1862, ch. 130, § 5(6), 12, 503, 505 (1862).

80. Act of Aug. 30, 1890, ch. 841, § 1, 26, 417, 418 (1890). The statute said a state could comply by "equitably dividing" the money between separate colleges for blacks and whites.

81. 297 U.S. 1, 66 (1936) ("This court has noticed the question, but has never found it necessary to decide which is the true construction."). A WESTLAW search produced only two pre-*Butler* uses of the phrase "spending power." Neither concerned the federal government. *See* Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 514 (1937) (states' spending power); Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 628 (1895) (farmers' spending power).

82. *Butler*, 297 U.S. at 65-66.

83. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 654 (1999) (Kennedy, J., dissenting) (congressional spending power "not limited by the direct grants of legislative power found in the Constitution.") (quoting *Butler*, 297 U.S. at 66); *Dole*, 483 U.S. at 206 (Congress may use Spending Power "to further broad policy objectives") (quoting Fullilove v. Klutznik, 448 U.S. 448, 474 (1980) (Burger, J.); (Spending Power outside of "Article I's 'enumerated legislative fields,") (quoting *Butler*, 291 U.S. at 65); Buckley v. Valeo, 424 U.S. 1, 90 (1976) (Spending Clause is grant of power); Helvering v. Davis, 301 U.S. 619, 640 (1937) (adopting Hamiltonian view of Spending Clause).

systems that met federal standards.[84] Justice Benjamin Cardozo said that the program violated neither the Tenth Amendment nor "restrictions implicit in our federal form of government."[85] He rejected claims that the program coerced states or impaired their autonomy,[86] saying pressure and persuasion were not the same as coercion.[87] And while the program did not create a state-federal contract,[88] Justice Cardozo wrote:

> By this we do not intimate that the conclusion would be different if a contract were discovered. Even sovereigns may contract without derogating from their sovereignty. . .The states are at liberty, upon obtaining the consent of Congress, to make agreements with one another. . .We find no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment. . . Nowhere in our scheme of government—in the limitations express or implied of our Federal Constitution—do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received.[89]

Since *Steward Machine*, the Court repeatedly has upheld Congress' authority to impose conditions on a wide variety of federal grants to states.[90]

b. Methods of federal enforcement

Steward Machine assumed that Congress would enforce its conditions by simply halting disbursements to states who recanted on their pledges,[91] but in 1983, a unanimous Court broadened that enforcement authority. Although the Court had long barred private

84. 301 U.S. 548 (1937).

85. *Id.* at 585.

86. *See id.* at 589.

87. *Id.* at 589-90.

88. *See id.* at 596-97 (the program let states opt out at any time).

89. *Id.* at 597-98 (citations omitted).

90. *See, e.g.,* Lawrence County v. Lead-Deadwood School Dist., 469 U.S. 256, 269-70 (1985) (statute conditioned in-lieu-of-tax payments on state promise to let counties spend such payments as they choose); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (Congress may fix terms on which it disperses federal funds); King v. Smith, 392 U.S. 309, 333 n.34 (1968) (Congress permissibly conditioned welfare grants upon state agreement to pay welfare benefits to child whose mother lives with man to whom she is not married); Oklahoma v. U. S. Civil Serv. Comm'n, 330 U.S. 127, 142-44 (1947) (cutoff of federal highway funding to state which did not remove state officials who had violated Hatch Act).

91. 301 U.S. 548 (1937).

actions against states for monetary relief,[92] *Bell v. New Jersey* held that the Tenth Amendment did not bar the federal government from recovering grant money that states had misused:[93]

> Requiring states to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty. The state chose to participate in the Title I program and, as a condition of receiving the grant, freely gave its assurances that it would abide by the conditions of Title I.[94]

c. In areas reserved for state authority: *South Dakota v. Dole*

The next major step for conditional spending was *South Dakota v. Dole*,[95] in which Congress reduced by five percent its grant of highway funds to any state that did not raise its drinking age to twenty-one.[96] Since the Twenty-first Amendment gives states "virtually complete control" over the sale of liquor,[97] South Dakota said the condition interfered with one of its core powers.[98] The argument was simple: since Congress could not directly order a state to raise its drinking age, it could not use the Spending Power to do so indirectly.

Chief Justice Rehnquist's answer was equally simple: Congress *could* indirectly encourage what it could not directly regulate.[99] He said that neither the Twenty-first[100] nor the Tenth Amendment limited Congressionally-imposed conditions.[101] After all, a state always has "'the simple expedient' of not yielding to what she urges is federal coercion."[102] And there was no coercion here. Rehnquist said that

92. *Edelman*, 415 U.S.at 663-71; *Ex parte Young*, 209 U.S. at 167.

93. 461 U.S. 773, 780-89 (1983). The Court rejected New Jersey's argument that the federal government, like a private party, could get only injunctive relief. *Id.* at 780-83.

94. *Id.* at 790.

95. 483 U.S. 203 (1987).

96. 23 U.S.C § 158 (1984).

97. *Dole*, 483 U.S. at 205 (quoting Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980)).

98. *Id.* at 205.

99. *Id.* at 206, 212.

100. *Id.* at 209-10.

101. *Id.* at 210 (citing Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127, 143-44 (1947)) (upholding Hatch Act's grant of federal funds conditioned on state officials' obedience to campaign finance laws).

102. *Dole*, 483 U.S. at 210 (quoting Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127, 143-44 (1947)).

losing five percent of a state's highway funds was "relatively mild encouragement" which made the State's claim of coercion "more rhetoric than fact."[103]

Dole displayed little concern about how Congress might abuse the Conditional Spending power. Justice Rehnquist presented neither horror stories about past conditions nor dire predictions of how future conditions might harm the states. This failure to sound the alarm was *not* because the Court could not foresee the clash between the Conditional Spending power and the Eleventh Amendment. In the decade before *Dole,* the Court had confronted this problem in at least five cases. I turn next to that part of the story.

C. The Conditional Spending Power *vis-a-vis* State Sovereign Immunity

1. The Supreme Court from Edelman *to* Dole

The Court apparently first confronted the conflict between the Spending Clause and the Eleventh Amendment in 1974. In *Edelman v. Jordan,*[104] aged, blind, and disabled citizens argued that Congress had conditioned Illinois' participation in a federal entitlement program upon a waiver of its sovereign immunity to suits by applicants who believed it had not followed the program's rules.[105]

Justice Marshall agreed in dissent.[106] He described the relationship between Illinois and the federal government as an "essentially contractual agreement,"[107] in which the "lure of federal funds" had caused the state to agree voluntarily to obey the relevant federal statutes and regulations.[108] Marshall said that the federal government could not ensure state compliance with those federal rules unless federal courts could issue monetary awards against a state: if the Eleventh Amendment limited federal courts to prospective injunctive relief, state officials would have considerable incentive to save state funds by ignoring those rules until a federal court enjoined them.[109] He also argued that by participating in the federal entitlement program with the knowledge that the relevant

103. *Id.*

104. 415 U.S. 651 (1974).

105. *Id.* at 415 U.S. at 676 n.18 (quoting brief for respondent at 42-43).

106. *Id.* at 688-96 (Marshall, J., dissenting).

107. *Id.* at 693 (Marshall, J., dissenting). Justice Cardozo had reached a similar conclusion in *Steward Machine Co. v. Davis*, 301 U.S. 548, 597 (1937).

108. *Edelman,* 415 U.S. at 693.

109. *Id.* at 691-92.

federal statutes permitted suits against states, Illinois had waived its Eleventh Amendment immunity.[110] On the last page of his dissent, Marshall invoked a 1959 decision, *Petty v. Tennessee-Missouri Bridge Commission* that will resurface again in this Article.[111] In *Petty,* the Court upheld an interstate compact that Congress had approved, but only on the condition that the two involved states waive their immunity to lawsuits involving the compact.[112] Justice Marshall pointed out that even the *Petty* dissenters had agreed Congress could condition its consent to a federal-state agreement on the state's waiver of sovereign immunity, just as Congress had done with Illinois.[113]

Justice Rehnquist's majority opinion avoided the issue, finding that Illinois' participation in the program was not enough to create a waiver.[114] Nevertheless, Justice Marshall's argument did not go unnoticed. A year after *Edelman*, Congress required the Secretary of Health, Education, and Welfare to withhold ten percent of federal Medicaid funds from states that did not waive its immunity to suits by Medicaid participants.[115]

Meanwhile, the clash between conditional spending and the Eleventh Amendment continued to appear before the Court.[116]

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110. *Id.* at 694. Justice Marshall said that since Illinois was acting outside "a sphere that is exclusively its own," it was easier to find a waiver. *Id.* at 695-96. Although he did not identify it as such, Justice Marshall was using the constructive waiver concept developed in *Parden v. Terminal R. Co. of Ala. Docks Dep't.,* 377 U.S. 184 (1964), and decisively buried in *College Savings Bank.* Coll. Sav. Bank, 527 U.S. at 666, 676-86.

111. *Edelman*, 415 U.S. at 696 (citing Petty v. Tenn.-Mo. Bridge Comm'n, 359 U.S. 275 (1959)).

112. 359 U.S. at 279-82.

113. *Edelman,* 415 U.S. at 696 (citing *Petty*, 359 U.S. at 285 (Frankfurter, J., dissenting)).

114. *Id.* at 671-74.

115. Act of Dec. 31, 1975, Pub. L. 94-182, § 111(a), 89 Stat. 1051, 1054 (amending 42 U.S.C. § 1396a(g)). Ten months later, Congress repealed the statute, with little explanation. Act of Oct. 18, 1976, Pub. L. 94-552, 90 Stat. 2540, 2540, repealing 42 U.S.C. § 1396a (repeal effective Jan. 1, 1976). The repeal's retroactive effective date was the day after the amendment had been passed.

The House report on the repeal complained that the amendment required states to waive "one of their basic rights," exposed states to "an unreasonable burden of suits," and failed to provide states sufficient time to provide the waivers. H.R. No. 94-1122, pt. VI, at 4 (1976). All of those claims should have been obvious before Congress adopted the original statute.

116. *See* Nat'l League of Cities v. Usery, 426 U.S. 833, 880 (1976) (Brennan, J., dissenting) (asking if Congress might condition federal grants on compliance with federal minimum wage standards), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). *See* Fla. Dept. of Health v. Fla. Nursing Home Ass'n., 450 U.S. 147, 153

Rehnquist again avoided this clash in two cases – *National League of Cities v. Usery*[117] and *Pennhurst State School and Hospital v. Halderman*[118]–though he strongly suggested that such conditions were permissible: "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."[119]

And since both *Employees* and *Edelman* were Eleventh Amendment cases, Rehnquist may already have concluded that conditional spending circumnavigates state sovereign immunity.

The Conditional Spending power's relationship to the Eleventh Amendment returned to the Court in 1985, in *Atascadero State Hospital v. Scanlon*.[120] The trial court had ruled for a disabled job seeker against a state hospital which received federal funds.[121] The Court responded by tightening the clear statement rule, making abrogation more difficult.[122] But again, the clear statement rule was the only limit the Court seemed to impose,[123] causing one of President Reagan's assistant attorney generals to say "*Atascadero* provides the blueprint for Congressional action to waive the Eleventh Amendment's ban to suit in Federal court under the Fourteenth

(1981) (Stevens, J., concurring) (Congress can "unambiguously condition . . . state participation in federal programs on a waiver of the Eleventh Amendment defense.").

117. *Usery*, 426 U.S. at 852 (expressing "no view" on use of Spending Power to "affect integral operations of state governments").

118. 451 U.S. 1 (1981).

119. *Id.* at 17. Justice Rehnquist relegated possible problems to a footnote, saying only that the conditional spending power has "limits," which he did not identify, and that the litigants "recognize the 'constitutional difficulties' with imposing affirmative obligations on the states pursuant to the spending power, (citation omitted). That issue, however, is not before us." *Id.* at 17.

120. 473 U.S. 234 (1985).

121. Scanlon v. Atascadero, 735 F.2d 359, 361-62 (9th Cir. 1984). The Ninth Circuit noted that funds were provided under the Rehabilitation Act of 1973, 29 U.S.C. § 794. *Id.* at 360.

122. *Atascadero*, 473 U.S. at 239-243 (Congress may abrogate state immunity only "by making its intention unmistakably clear in the language of the statute"). Earlier cases had said that the Court also would examine the legislative history. *See, e.g., Edelman*, 415 U.S. at 673 (requiring "the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction."); Quern v. Jordan, 440 U.S. 332, 345 (1979) (statute lacks "a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate" state immunity).

123. *Atascadero*, 473 U.S. at 245-46.

Amendment and the spending power."[124]

In short, in the thirteen years before *Dole*, the Court had discussed the Conditional Spending Power in four Eleventh Amendment cases and another landmark federalism case. This suggests that Justice Rehnquist was well aware of what his decision in *Dole* might mean for state sovereign immunity.

2. *The prelude to the* Alden *trilogy*

In the decade after *Dole*, states won one victory after another before the Supreme Court.[125] Several of those cases involved state sovereign immunity.[126] Many scholars pointed out how pro-states' rights the Court was and how hostile it was toward various federal interests.[127] However, buried in one of those victories were three

124. 132 CONG. REC. S28624 (daily ed. Oct. 3, 1986) (report of John R. Bolton, Assistant Attorney General). Bolton was speaking of the proposed Civil Rights Remedies Equalization Act of 1986; he also said that if Congress would remove the bill's retroactive effect, the Justice Department would have "no objection" to it.

In addition, Senator Cranston told the Senate that *Atascadero* "clearly established [that. . .] Congress has the authority to waive the states' 11th Amendment immunity under . . . the commerce clause, the spending clause, and section 5 of the 14th Amendment." 131 CONG. REC. S22346 (daily ed. Aug. 1, 1985) (statement of Sen. Cranston).

125. United States v. Morrison, 529 U.S. 598 (2000) (invalidating §13981 of Violence Against Women Act of 1994, 42 U.S.C. § 13981, which made violence against women a federal crime); Printz v. United States, 521 U.S. 898 (1997) (invalidating federal statute requiring state officials to administer federal gun control laws); United States v. Lopez, 514 U.S. 549 (1995) (invalidating Gun Free Schools Zone Act, 18 U.S.C. § 922(q) (1988 & Supp. V 1993)); City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* (1988 & Supp. V 1993) which limited extent to which states could regulate religious activities); New York v. United States, 505 U.S. 144 (1992) (state not bound to terms of federal compact which other states had developed, signed, and obeyed).

126. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59-66, 72 (1996) (overturning Pennsylvania v. Union Gas, 491 U.S. 1 (1989)). In *Idaho v. Coeur d'Alene Tribe of Idaho,* Justices Rehnquist and Kennedy went so far as to suggest restrictions on the use of *Ex parte Young's* prospective relief concept, 521 U.S. 261, 27-80 (1997) (Kennedy, J.). *Ex parte Young,* of course, said that while private citizens could not sue a State directly, they could sue state officials for injunctive relief. 209 U.S. 123 (1908).

See also Wis. Dept. of Corrections v. Schacht, 524 U.S. 381 (1998) (state which removed civil rights case from state court still could seek dismissal of the case it had made federal).

127. *See, e.g.,* SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 136-88 (1989) (contending that Chief Justice Rehnquist excessively defers to state regulations when considering their constitutionality, advocates a highly-relaxed standard of review for state statutes, construes § 5 of the Fourteenth Amendment narrowly, and tries to insulate States from the federal judiciary); Erwin Chemerinsky, *Congress, The Supreme Court, and the Eleventh Amendment: A Comment on the Decisions During the 1988-89 Term*, 39 DEPAUL L. REV. 321, 339 (1989) (Supreme Court's Eleventh Amdendment decisions suggest that Court's conservatives "do all they can" to protect states from federal courts); Owen Fiss & Charles Krauthammer, *The Rehnquist Court*, THE NEW REPUBLIC, March

sentences written by a justice who had been concerned that *Dole* inadequately protected states.[128] In *New York v. United States*, Justice O'Connor's discussion of federalism, coercion, and the Tenth Amendment concluded with these lines:

> This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests .... First, under Congress' spending power, "Congress may attach conditions on the receipt of federal funds."[129]

Justice O'Connor expressly distinguished coercion and conditional spending, and she listed conditional spending as the first and, presumably, the most important limitation on State sovereign immunity. Joining her were Justices Rehnquist, Scalia, Kennedy, Souter, and Thomas, all but one of whom belong to the Court's conservative wing. Even the advocates of states' rights had admitted that Conditional Spending could circumnavigate state sovereign immunity.

3. *The* Alden *Trilogy's* dicta

In many ways, the June 23, 1999 decisions in *Alden, Florida Prepaid,* and *College Savings Bank* continued the long string of state victories in the Supreme Court.[130] But even as the conservative majority of the Court read state sovereign immunity more expansively than ever before, it made substantial concessions to the Conditional Spending power.[131]

10, 1982, at 20 (alleging that Chief Justice Rehnquist confuses the Constitution with the Articles of Confederation and ignores Civil War Amendments when discussing fedral-State relations).

128. South Dakota v. Dole, 483 U.S. 203, 213-17 (1987) (O'Connor, J., dissenting).

129. New York v. United States, 505 U.S. 144, 166-67 (1992) (citing *Dole*, 483 U.S. at 206).

130. *Alden* said that since state sovereign immunity is based on the *Tenth* Amendment, a state court could not hear a state employees' suit under the Fair Labor Standards Act, even though the text of Eleventh Amendment limits only the *federal* judicial power. 527 U.S. at 706. *Fla. Prepaid Postsecondary Ed. Expense Bd.* said that federal patent holder could not seek money damages from a state's allegedly deliberate infringement of that patent. 527 U.S. 627. *College Savings Bank* held that the same federal patent holder could not invoke federal protections against a state's false and misleading advertising. 527 U.S. 666.

131. In *Alden*, the Court said for the first time that state sovereign immunity was based on the Tenth Amendment. 527 U.S. at 713. *See also Alden,* at 760-61 (Souter, J.,

a. Justice Kennedy in *Alden*

One can hardly claim that, in 1999, Justice Kennedy suddenly became soft on federalism. In May of that year, he warned that the Spending Power might "obliterate" the distinction between national and local governments.[132] A month later, in *Alden*, he announced that while the Eleventh Amendment prohibits suits against states only in *federal* court, state sovereign immunity meant that a *state* court did not have to hear a federal civil rights claim against the state.[133] He based this decision on the revelation that state sovereign immunity is based on the *Tenth* Amendment,[134] a position that even states' rights supporters had not taken three years earlier in *Seminole Tribe.*[135]

Yet, even as he expanded State sovereign immunity, Justice Kennedy seemed comfortable with Congressional use of conditional spending to encourage states to waive their immunity. Indeed, that tactic was the second item on his list of limitations on State immunity:

> Rather, certain limits are implicit in the constitutional principle of sovereign immunity.
>
> The first of these limits is that sovereign immunity bars suits only in the absence of consent. Many States, on their own initiative, have enacted statutes consenting to a wide variety of suits. The rigors of sovereign immunity are thus "mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign." Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits.[136]

Attached to Justice Kennedy's signature on *Alden* were those of four colleagues: Justices Rehnquist, O'Connor, Scalia, and Thomas, who also had endorsed O'Connor's near-identical statements about conditional spending in *New York v. United States.*[137] Justice Marshall's 1974 dissent had become 1999 majority *dicta.* The issue

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dissenting) (attacking Court's use of the Tenth Amendment).

132. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 654-55 (1999) (Kennedy, J., dissenting). Justice Kennedy has said that Conditional Spending now is the major states' rights issue facing the Court. Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL'Y. 95, 103 n.49 (1998).

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

134. *Id.* at 713-14. *But see Alden*, at 760-61 (Souter, J., dissenting) (attacking Court's use of the Tenth Amendment).

135. *Id.* at 761 (Souter, J., dissenting) (noting that *Alden's* Tenth Amendment argument would have made it unnecessary for *Seminole Tribe* to discuss the Eleventh Amendment).

136. *Id.* at 755. (citations omitted) *Seminole Tribe's* list did *not* include the Spending Power. *See Seminole Tribe,* 517 U.S. at 71 n.14.

137. *Alden*, 527 U.S. at 710.

the Court had so carefully avoided in earlier Eleventh Amendment cases had been resolved in what was essentially a laundry list. But more was to come.

b. Justice Scalia and *College Savings Bank*

In *College Savings Bank*, Justice Scalia continued to advance the cause of State sovereign immunity.[138] However, even as he did so, he went out of his way to justify the use of the Conditional Spending power as a counterweight to state sovereign immunity.

College Savings Bank's dispute over a state's allegedly willful violation of a privately-held trademark did not involve conditional spending.[139] But it did offer Justice Scalia an easy way to eliminate that Article I power. Since the case involved Congressional authority under the Commerce Clause, it turned in part on the breadth of *Seminole Tribe's* holding. That decision had begun narrowly by asking if the *Indian Commerce Clause* let Congress *abrogate* state sovereign immunity,[140] but it had ended broadly by saying that "*Article I* cannot be used to *circumvent* the constitutional limitations placed upon federal jurisdiction."[141] Had *Seminole Tribe* used "Article I" merely as shorthand for the Indian and Domestic Commerce Clauses? Did "Article I" include all of Article I's *enumerated* clauses? [142] Or did it include *all* of Article I, including the general spending power? Some lower federal courts already had adopted the latter interpretation,[143] which would prevent the use of

138. *See id.* at 687-88 (accusing Justice Breyer of repeating, "the now-fashionable revisionist accounts of the Eleventh Amendment set forth in other opinions in a degree of repetitive detail that has despoiled our northern woods.").

139. *Id.* at 668-71. At issue was the Trademark Remedy Clarification Act of 1992, Pub. L. No. 102-542, 106 Stat. 3567, amending Section 43(a) of the Trademark Act of 1946, 60 Stat. 441, 15 U.S.C. § 1125(a).

140. *Seminole Tribe*, 517 U.S. at 47.

141. *Id.* at 73 (emphasis added).

142. *Alden* had adopted this approach, 527 U.S. at 733 ("[N]either the Supremacy Clause nor the enumerated powers of Congress confer authority to abrogate the States' immunity . . . ."), as would a later case, *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356, 364, (2001) ("Congress may not, of course, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I.").

143. *See, e.g.,* Close v. New York, 125 F.3d 31, 38, 39 n.2 (2d Cir. 1997) ("Congress cannot abrogate the states' Eleventh Amendment sovereign immunity pursuant to any Article I power"), *cert. denied sub nom.* Schlossburg v. Md. Comptroller of Treasury, 523 U.S. 1075 (1998); *In re* Creative Goldsmiths of D.C., 119 F.3d 1140, 1145 (4th Cir. 1997) (*Seminole Tribe* "extended to restrict all federal jurisdiction over the states based on Article I powers. . ."); New Star Lasers, Inc. v. Regents of Univ. of Cal., 63 F. Supp. 2d 1240, 1241 (E.D. Cal. 1999) (Congress cannot abrogate the Eleventh Amendment

conditional spending regarding state immunity. Which approach would Justice Scalia take?

And what of "circumvent"? *Seminole Tribe* had used "abrogate" or its derivatives at least forty-six times.[144] Why did the last page use "circumvent," a broader verb? Had Justice Rehnquist, who wrote *Seminole Tribe,* remembered his references to conditional spending in *Edelman, Usery,* and *Pennhurst*? To eliminate the Conditional Spending Power's threat to state sovereign immunity, Justice Scalia in *College Savings Bank* merely had to quote *Seminole Tribe's* last-page statement that Congress could not use its "Article I powers" to "circumvent" the Eleventh Amendment.

He did not. Instead, this supporter of State sovereign immunity limited *Seminole Tribe* to both Commerce Clauses (instead of all of Article I) and to "abrogation," instead of the broader concept of circumvention.[145]

Justice Scalia then passed up a second chance to protect state immunity from conditional spending. *College Savings Bank* and the United States had argued that Florida had constructively waived its immunity, even though the Court had started to erode that doctrine almost immediately after its birth in *Parden v. Terminal Ry. County of Alabama Docks Department*[146] This was Justice Scalia's chance to kill the doctrine of constructive waiver once and for all, and he did.[147] But for reasons that remain obscure, the United States gave Justice Scalia a second shot at conditional spending by labeling it a form of constructive waiver.[148] Having watched the Court drive nail after nail into the constructive waiver coffin, the federal government gave Justice Scalia the chance to permanently bury it.

Justice Scalia did more than decline the opportunity. He found in the structure of the Constitution justification for the authority of

"pursuant to its powers under Article I of the Constitution."); *In re* C.J. Rogers, 212 B.R. 265, 273 (E.D. Mich. 1997) (after *Seminole Tribe*, "under any Article I power Congress can neither abrogate, nor deem to be waived, the states' sovereign immunity").

144. *See* 517 U.S. at 47, 52, 53, 55 (5), 56 (5), 57 (2), 58 (4), 59 (6), 60 (4), 61 (4), 62 (3), 63 (2), 65 (1), 66 (1), 68, 70 n.13, 71 (4). "Circumvent" appears only on page 73 of Justice Rehnquist's opinion. *Id.* at 73.

145. 527 U.S. at 672. Justice Scalia used "abrogation" and its variations nineteen times in *College Savings Bank*. 527 U.S. at 667, 671 (3 times), 672 (3 times), 675, 678, 683 (3 times), 684 (4 times), 687 n.5, 688 n.5, and 691. He used "circumvent" only once, in connection with constructive waiver. *Id.* at 683.

146. *Coll. Sav. Bank,* 527 U.S. at 676 (invoking *Parden*, 377 U.S. 184 (1964). *See id.* at 680 (court has consistently narrowed *Parden's* rule)).

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

148. *See id.* at 686.

Congress to use conditional spending to override state immunity. Having said that Congress could not abrogate state sovereign immunity using the Commerce Clause, the Fourteenth Amendment, or constructive waiver, Justice Scalia wrote:

> 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. These cases seem to us *fundamentally different* from the present one.[149]

In other words, *College Savings Bank* gave Justice Scalia the opportunity to lump conditional spending with Congressional efforts to abrogate immunity (which *Seminole Tribe* had invalidated) or with constructive waivers (which he had just buried). Instead, he intentionally distinguished them. Then he went further:

> 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. Justice Breyer's dissent acknowledges the intuitive difference between the two, but asserts that it disappears when the gift that is threatened to be withheld is substantial enough. *Post*, at 697. Perhaps so, which is why, in cases involving conditions attached to federal funding, we have acknowledged that 'the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[150]

It is unclear where Justice Scalia found this distinction between Article I clauses that sanction and Article I clauses that give. I am relatively confident that he did not create it out of sympathy for state immunity opponents.[151] But in coupling the Spending Power with the Interstate Compact Power,[152] instead of with the enumerated Article I

149. *Id.* at 686 (citation omitted, emphasis added).

150. *Id.* at 687.

151. Only a paragraph later, Justice Scalia accused state immunity opponents of creating "now-fashionable revisionist accounts of the Eleventh Amendment set forth in . . . a degree of repetitive detail that has despoiled our northern woods." *Id.* at 688.

152. *See* Petty v. Tenn.-Mo. Bridge Comm'n, 359 U.S. 275 (1959) (explaining that, under the Interstate Compact Clause, Congress can condition approval of interstate compact upon immunity waivers by participating states).

powers (which *Seminole Tribe* said cannot override state immunity), Justice Scalia recognized that Justice Marshall had been correct back in 1974. And attached to Justice Scalia's signature were those of Justices Rehnquist, O'Connor, Kennedy, and Thomas. The Court's five most conservative members, its five strongest defenders of states' rights, recognized that conditional spending could override state sovereign immunity. Together with the four remaining justices, who, in a *College Savings Bank* dissent, also said conditional spending could override state immunity,[153] the Court was unanimous. When it came to sovereign immunity, money would talk.

4. The lower federal courts and conditional spending

The lower federal courts have proved remarkably willing to let Congress use conditional spending to override state sovereign immunity. As Judge Easterbrook of the Seventh Circuit has written, "[t]hus we hold that states must take the bitter with the sweet; having accepted the money, they must litigate in federal court."[154] At least sixteen courts (including all thirteen circuit courts) have upheld federal grants conditioned upon state waivers of immunity to suits involving the funded programs. These decisions concerned:

1. The Education for All Handicapped Children Act of 1975,[155]
2. The Federal Aid Highways Act of 1968,[156]
3. The Individuals with Disabilities Education Act,[157]
4. The Personal Responsibility and Work Opportunity Reconciliation Act,[158]

153. *Coll. Sav. Bank,* 527 U.S. at 704 (Breyer, J., dissenting).

154. Bd. of Educ. of Oak Park v. Kelly E., 207 F.3d 931, 935 (7th Cir. 1999), *cert. denied sub nom.* Bd. of Educ. of Oak Park v. Ill. State Bd. of Educ., 531 U.S. 824 (2000).

155. 20 U.S.C. § 1401-91 (1976); *see* Dep't of Educ. v. Katherine D., 727 F.2d 809, 818-19 (9th Cir. 1983) (state waived sovereign immunity under Act).

156. 23 U.S.C. § 101-06 (1988 & Supp. II 1990); *see* Hatmaker v. Ga. Dep't of Transp., 973 F. Supp. 1047, 1053-54 (M.D. Ga. 1995) (highway department waived immunity when it received funds).

157. 20 U.S.C. § 1400-1491o (1997). *See* Bd. of Educ. of Oak Park v. Kelly E., 207 F.3d 931, 935 (7th Cir.), *cert. denied, sub nom.* Bd. of Education of Oak Park v. Ill. State Bd. of Educ., 531 U.S. 824 (2000) ("States that accept federal money, as Illinois has done, must respect the terms and conditions of the grant."); Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 820, 831-32 (8th Cir. 1999) (participating states in IDEA waive sovereign immunity), *abrogated by* Bradley v. Ark. Dep't of Educ., 189 F.3d 745, 752-53 (8th Cir. 1999), *overruled by* Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000) (en banc), *cert. denied*, 533 U.S. 949, 121 S. Ct. 2591 (2001).

158. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (replacing Aid to Families with Dependent Children with federal block grants to states). *See* Kansas v. United States, 214 F.3d 1196, 1198-1204 (10th Cir. 2000), *cert. denied,* 531 U.S. 1035 (2000).

5. The Randolph-Sheppard Act,[159]
6. Section 504 of the Rehabilitation Act of 1973,[160]
7. The Rehabilitation Act Amendments of 1986,[161]
8. The federal student loan program,[162]
9. Title VI of the Civil Rights Act of 1964, [163] and
10. Title IX of the Education Amendments Act of 1972.[164]

Another fifteen courts have avoided the issue by finding that particular statutes did not require a waiver,[165] although seven of them

159. 20 U.S.C. §§ 107-107f (2000). Under this act, the federal government agrees to provide equipment if states will give blind people first preference as operators of vending stores in state-owned facilities. Two circuit courts have said the act effectively conditions this federal aid on a state's waiver of immunity to suits involving the blind vendors. *See* Premo v. Martin, 119 F.3d 764, 769-71 (9th Cir. 1997); Del. Dep't of Health & Soc. Serv. v. U.S. Dep't of Educ., 772 F.2d 1123, 1126-33, 1137-38 (3d Cir. 1985).

160. 29 U.S.C. § 793; 42 U.S.C. § 2000d-7(a)(1) (2000) (stating the waiver provision); *see* Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000) (en banc), *cert. denied*, 533 U.S. 949, 121 S. Ct. 2591 (2001); Stanley v. Litscher, 213 F.3d 340, 344 (7th Cir. 2000); Clark v. California, 123 F.3d 1267, 1269-71 (9th Cir. 1997) (Rehabilitation Act abrogates state sovereign immunity); Robinson v. Kansas, 117 F. Supp. 2d 1124, 1134 (D. Kan. 2000).

161. 42 U.S.C. § 2000d-7 (2000); *see Robinson*, 117 F. Supp. 2d at 1131-34 .

162. *See, e.g.*, Perkins Loan Program, 34 C.F.R. § 674.1-674.63 (2002). *See In re* Innes, 184 F.3d 1275, 1281-83 (10th Cir. 1999), *cert. denied sub nom.* Innes v. Kan. State Univ., 529 U.S. 1037 (2000).

163. 42 U.S.C. § 2000d to 2000d-4 (2000); *see* Sandoval v. Hagan, 197 F.3d 484, 493-94 (11th Cir. 1999), *rev'd on other grounds*, Alexander v. Sandoval, 532 U.S. 275 (2001); Gratz v. Bollinger, 122 F. Supp. 2d 811, 836 (E.D. Mich. 2000) (university regents conceded it consented to action for monetary relief in federal court when it accepted Title VI funds), *rev'd on other grounds, sub nom.* Grutter v. Bollinger, 188 F.3d 394 (6th Cir. 1999).

164. 20 U.S.C. § 1681-88 and its waiver provision, 42 U.S.C. § 2000-7(a)(1) (2000). *See* Pederson v. La. State Univ., 213 F.3d 858, 875-76 (5th Cir. 2000); Litman v. George Mason, 186 F.3d 544, 547, 550-56 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000); Beasley v. Ala. State Univ., 3 F. Supp. 2d 1304, 1308-22 (M.D. Ala. 1998).

165. McGinty v. New York, 251 F.3d 84, 95 (2d Cir. 2001) (Congress may use Spending Power to extract waiver, but no evidence defendants receive federal funding);

Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehab. Serv., 225 F.3d 1208, 1226 n.13 (11th Cir. 2000) (while state may waive sovereign immunity by accepting federal funds, Medicaid Act lacks clear statement of Congressional intent to condition funds on waiver); Bradley v. Ark. Dep't of Educ., 189 F.3d 745, 757-58 (8th Cir. 1999) (Section 504, Rehabilitation Act, 29 U.S.C. § 794(a)), *overruled,* Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000) (en banc), *cert. denied*, 533 U.S. 949 (2001); Tenn. Dep't of Human Serv. v. U.S. Dep't of Educ., 979 F.2d 1162, 1166, 1168 (6th Cir. 1992) (Randolph-Shepard Act does not mention availability of citizen suits against state); Yorktown Med. Lab., Inc. v. Perales, 948 F.2d 84, 88 (2d Cir. 1991) (repeal of amendments expressly conditioning Medicaid funds on waiver showed Congress intended not to require state waiver); McNabb v. U.S. Dep't of Educ., 862 F.2d 681, 685-687 (8th Cir. 1988) (per curiam) (Randolph-Shepard Act could have, but did not, condition receipt of funds on sovereign immunity waiver); Hosp. Ass'n of N.Y., Inc. v. Toia, 577 F.2d 790, 793-96 (2d Cir. 1978) (Medicaid Act did not create waiver of immunity); New Holland Vill. Condo. v. DeStaso

expressly said they would uphold a properly-worded statute.[166] Other courts declined to determine if a particular statute created an effective waiver.[167]

I found only one naysayer, a Second Circuit panel that overlooked crucial parts of *College State Bank.*[168]

Enter. Ltd., 139 F. Supp. 2d 499, 502 (S.D.N.Y. 2001) (state use of federal funds under National Dam Safety Act, 33 U.S.C. § 467 (1996), did not waive immunity, since statute did not mention immunity); Westside Mothers v. Haveman, 133 F. Supp. 2d 549, 558-61 (E.D. Mich. 2001) (although Congress can influence states via spending clause programs, and states are bound if they agree to participate in federal program, plaintiffs cannot use *Ex parte Young* to require states to provide services, since Spending Clause programs are not the "supreme law of the land"); Appalachian Outdoor Adver. Co. v. N.C. Dep't of Transp., 61 F. Supp. 2d 459, 461 (E.D.N.C. 1998) (state's "mere participation" in federal program under Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601, did not show waiver of immunity); Heckman v. Univ. of N.C., 19 F. Supp. 2d 468, 469, 474 (M.D. N.C. 1998), *appeal dismissed*, 166 F.3d 1209 (4th Cir. 1998) (state's contract with federal government under Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C. §§ 4100 and 4212 (2000), did not waive state's sovereign immunity); Kinnison v. Miss. Dep't of Wildlife, 990 F. Supp. 481, 484 (S.D. Miss. 1998) (plaintiff failed to allege statute conditioned federal wildlife funds on waiver); Nihiser v. Ohio Envtl. Prot. Agency, 979 F. Supp. 1168, 1169 (S.D. Ohio 1997) (Rehabilitation Act of 1973, 29 U.S.C. § 791-94, does not condition receipt of federal funds on immunity waiver); Taylor v. Virginia, 951 F. Supp. 591, 603 (E.D. Va. 1996) (Fair Labor Standards Act not spending program; neither Federal Highway Act nor Intermodal Surface Transportation Efficiency Act of 1991 show Congressional intent to condition funds on waivers); Selman v. Harvard Med. Sch., 494 F. Supp. 603, 616 (S.D.N.Y 1980), *aff'd without opinion sub nom.* Burton Selman v. Harvard Med. Sch., 494 F.2d 1204 (2d Cir. 1980) (although Congress may condition program participation on waiver of immunity, Public Health Services Act did not include such condition and mere receipt of federal funds does not create waiver).

166. *McGinty*, 251 F.3d at 95; *Fla. Ass'n of Rehab. Facilities, Inc.*, 225 F.3d at 1226 n.13; Ass'n of Cmt. Orgs. for Reform Now v. Edwards, 81 F.3d 1387, 1389, 1389 n.2 (5th Cir. 1996); *In re* Sec'y of Dep't of Crime Control, 7 F.3d 1140, 1145-47 (4th Cir. 1993); *McNabb*, 862 F.2d at 685-687; Westinghouse Elec. Corp. v. West Va. Dep't of Highways, 845 F.2d 468, 470 (4th Cir. 1988), *cert. denied*, 488 U.S. 855 (1988) (although federal statute may condition funds on immunity waiver, plaintiff presented only state statutes); Nihiser v. Ohio Envtl. Prot. Agency, 979 F. Supp. 1168, 1169 (S.D. Ohio 1997) (Congress can require state to waive immunity before receiving funds).

167. Kilcullen v. N.Y. State Dep't of Labor, 205 F.3d 77, 82 (2d Cir. 2000) (Section 504 of Rehabilitation Act of 1973); Marie O. v. Edgar, 131 F.3d 610, 617-18 (7th Cir. 1997) (Unclear if legislative history and caption of 20.U.S.C. § 1403 (2000), I.D.E.A. provided state sufficient notice to establish waiver).

168. Burnette v. Carothers, 192 F.3d 52, 56, 59 (2d Cir. 1999), *cert. denied*, 531 U.S. 1052 (2000). The Second Circuit read *College Savings Bank* to say that Congress can abrogate state immunity only under the Fourteenth Amendment. That is true, but the Conditional Spending Power involves a waiver, not abrogation. Moreover, *College Savings Bank* explicitly cited *Dole* for the point that "Congress may, in the exercise of its spending power, condition its grant of funds to states upon their taking certain actions that Congress could not require them to take." 527 U.S. at 686-87. *Alden v. Maine* also endorsed such use of conditional spending, saying Congress may "seek the states' voluntary consent to private suits. *Cf. South Dakota v. Dole*, 483 U.S. 203 (1987)." 527

In short, all nine Supreme Court justices and sixteen lower courts have said that conditional spending can trump state sovereign immunity. But what limits has the Court imposed on that power?

D. The Limits of Conditional Spending

1. The Four Dole *tests*

The Conditional Spending Power must have limits,[169] but the Court has long said that Article I, Section 8's enumerated powers do not provide such a limit.[170] Instead, *South Dakota v. Dole* identified (and numbered) four tests. To be valid, a condition must:

(1) involve spending for the "general welfare";[171]
(2) unambiguously appear in the relevant statute;[172]
(3) sufficiently relate to "the federal interest in particular national projects or programs";[173] and
(4) not violate an independent constitutional bar.[174]

The first test poses little danger to conditional spending, since the Court traditionally has deferred to Congress' definition of the

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U.S. 706, 755 (1999). *Burnette* referred to neither of those points.

The Second Circuit probably was not helped by the *pro se* plaintiff homeowners, who invoked the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et. seq.* (1982), as amended by Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986). *Pennsylvania. v. Union Gas,* 491 U.S. 1 (1989) had held these statutes abrogated the Eleventh Amendment, but by the time the plaintiffs filed suit, *Seminole Tribe* had struck down *Union Gas. Seminole Tribe*, 517 U.S. at 62-66.

169. *Dole,* 483 U.S. at 217 (O'Connor, J.) (Unlimited Spending Power would let Congress invade states' jurisdiction); Davis v. Monroe Co. Bd. of Educ., 526 U.S. 629, 654-55 (1999) (Kennedy, J.) (Unrestrained Spending Power might "obliterate" distinctions between national and local governments); Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1914, 1932-33 (1995) (without limits, the Spending Clause would let Congress evade Constitutional restrictions on its power); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1105-06 (1987) (unlimited conditional spending could destroy balance between federal and state governments). *But see* RICHARD EPSTEIN, BARGAINING WITH THE STATE 150, 157 (arguing that modern interpretations of the taxing and spending power leave no limits on those powers).

170. New York v. United States, 505 U.S. 144, 167, 175-76 (1992); Rust v. Sullivan, 500 U.S. 173 (1991); Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 270 (1990); United States v. Butler, 297 U.S. 1, 65-66 (1936).

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

172. *Id.*

173. *Id.* at 208 (citing Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).

174. 483 U.S. at 208.

general welfare.[175] The second requirement — an unambiguous statement — is likewise easy for the drafter to satisfy. She need only include the "Eleventh Amendment" or "state sovereign immunity" in the text of the statute.[176]

The third, "sufficient relation" test has at least two meanings. Justice Rehnquist read it loosely when he found that encouraging a state to raise its drinking age "directly relate[s]" to the legitimate goal of making interstate travel safer, the main purpose of federal highway funding.[177] Justice O'Connor, however, would have invalidated the condition because it went "beyond specifying how the money should be spent."[178] Use of the Conditional Spending power to induce sovereign immunity waivers should satisfy even Justice O'Connor's tighter approach. In asking states to waive their immunity, Congress seeks state consent to private suits designed to enforce the rules and regulations of a particular spending program. These private suits help Congress make sure that states spend the money as Congress has directed.[179]

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175. *Id.* at 207; Helvering v. Davis, 301 U.S. 619, 640, 645 (1937). The lower federal courts have said little about this.

176. A federal statute is sufficiently unambiguous when it says a state "shall not be immune under the Eleventh Amendment;" it need not mention "waiver." Litman v. George Mason Univ., 186 F.3d 544, 547, 554 (4th Cir. 1999), *cert. denied,* 528 U.S. 1181 (2000).

I found only four published cases that used this test to strike down conditional spending. Two involved conditions imposed by an administrative agency (not Congress) *after* the state had signed onto the program. Doe v. Oak Park & River Forest High Sch., 115 F.3d 1273, 1278 (7th Cir. 1997); Va. Dep't of Educ. v. Riley, 106 F.3d 559, 561, 566-67 (4th Cir. 1997).

Two other cases involved the Randolph-Sheppard Vending Stand Act, 20 U.S.C. §§ 107-107f (2000), which requires states to arbitrate disputes with blind vendors who operate snack bars in government buildings. The Act does not mention sovereign immunity, the Eleventh Amendment, or the availability of monetary relief. Tenn. Dep't of Human Serv. v. U.S. Dep't of Educ., 979 F.2d 1162, 1168 (6th Cir. 1992); McNabb v. U.S. Dep't of Educ., 862 F.2d 681, 686, 687 (8th Cir. 1988) (Fagg, J. and Doty, J., concurring and dissenting); *but see* Del. Dep't of Health & Soc. Serv. v. U.S. Dep't of Educ., 772 F.2d 1123, 1128, 1138 (3d Cir. 1985) (upholding constitutionality of the Act).

177. *Dole,* 483 U.S. at 208, 209.

178. *Id.* at 215-16 (O'Connor, J., dissenting).

179. The lower federal courts have said little about this relevancy or germaneness requirement. One court has said that the waiver could apply only to those state departments that received federal funds under the particular spending program. *Jim C.*, 235 F.3d at 1081. Several courts have approved conditions which were intended to increase state compliance with federal law. A pre-*Dole* case, *Oklahoma v. Schweiker*, upheld conditions that required states to "pass-through" to welfare recipients cost of living increases granted by Congress, saying "[g]uaranteeing the proper use of federal funds is certainly an appropriate congressional concern . . . ." 655 F.2d 401, 408 (D.C. Cir. 1981).

The fourth of *Dole's* tests should give surprisingly little difficulty. The condition must not violate "an independent constitutional bar," which Justice Rehnquist explained "stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional": Congress may not require a state to discriminate or inflict cruel and unusual punishment.[180] Conditional spending tied to waivers of state immunity would face little objection on these grounds. The sole purpose of such conditions would be to encourage states to *follow* – not to violate – federal law that they (the states) already had agreed to follow when they signed on to the relevant federal program. And since Justice Rehnquist did not use the Twenty-First Amendment, which assigns authority over liquor to the states, to satisfy the "independent constitutional bar" test, we know that this fourth test does not prevent Congress from imposing conditions in areas reserved to state control.[181]

2. Coercion

a. The problem

The *Dole* Four tests are relatively easy to satisfy. But in the most puzzling part of the opinion, *Dole* also talked about "coercion." Having identified, numbered, and applied four tests, Justice Rehnquist next said "Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.' *Steward Machine Co. v. Davis, supra,* 301 U.S., at 590."[182]

That passage created several problems. It did not explain coercion's relationship to the four tests earlier identified and numbered. Indeed, the opinion's structure and language suggested that "coercion" might be simply a synonym for *Dole's* four numbered

More recently, two trial courts upheld a federal welfare program that required states to operate systems that trace the out-of-state movements of parents who failed to pay child support. Both courts said that the goals of federal welfare programs had been hindered by local enforcement systems that could not track delinquent parents who moved out of state, so the conditions were rationally related to the purpose of the federal statute. Hodges v. Shalala, 121 F. Supp. 2d 854, 874 (D.S.C. 2000); Children's & Parents' Rights Ass'n v. Sullivan, 787 F. Supp. 724, 735 (N.D. Ohio 1991) (noting that such conditions on child support were much more closely related to the purpose of the federal funding involved than was the condition in *Dole*).

180. *Dole,* 483 U.S. at 210-11.

181. *Id.* at 211.

182. *Id.*

tests or a part of the fourth and final of those tests (the independent constitutional bar).[183] It did not define "coercion."[184] And, assuming that "coercion" is a standard independent of *Dole's* four enumerated tests, it does not say whether we should read the word in terms of constitutional law or contract law. *Dole*'s discussion of coercion rests on a single case —*Steward Machine Co. v. Davis*—and *Steward Machine* analyzed coercion from both constitutional[185] *and* contractual perspectives.[186] Furthermore, Justice Rehnquist himself has recognized that conditional spending is a form of contract,[187] as has the rest of the Court.[188]

183. Justice Rehnquist carefully numbered the *Dole* Four tests, 483 U.S. at 207-08, and later *repeated* those numbers. *Id.* at 208-11. But he did not assign a number to coercion. *Id.* at 211-12. In addition, after saying that the spending power is "subject to several general restrictions," Justice Rehnquist listed the *Dole* Four tests in a single paragraph, without referring to "coercion." 483 U.S. at 207. Similarly, in *New York v. United States,* Justice O'Connor's discussion of conditional spending asked if Congress had "exceeded its authority in any of the four respects our cases have identified," cited *Dole*, and listed *Dole's* four factors. 505 U.S. 144, 171-72 (1992). Third, Justice Rehnquist began his discussion of *Dole's* fourth test (the "independent constitutional bar") by writing: "The *remaining question* . . . is whether the Twenty-first Amendment constitutes an 'independent constitutional bar' to the conditional grant of federal funds." 483 U.S. at 209 [emphasis added]. His use of the singular "question" leaves no room for an additional fifth test. Fourth, *Dole* gave no clue as to where the independent constitutional bar test ends and coercion begins. No transition sentence or phrase indicated the end of the "independent constitutional bar" test in particular or the *Dole* Four tests in general, nor was there a clue Justice Rehnquist had started to discuss a new, independent test. *See id.* at 211.

184. *Id.* at 210-12.

185. *See, e.g.*, 301 U.S. 548, 585 (1937) (Tenth Amendment); *id.* at 585 ("restrictions implicit in our federal form of government"); *id.* at 586 ("the autonomy of the states"); *id.* at 593 ("surrender by the states of powers essential to their quasi sovereign existence."); *id.* at 598 ("limitations express or implied of our Federal Constitution").

186. After using contract terms such as "duress" three times, *id.* at 586, 589, 590, and "undue influence" twice, *id.* at 590, *Steward Machine* determined that a state's right to withdraw from the conditional spending program at issue at any time meant that no contract existed. *Id.* at 596-97. The decision then speaks of "contract" (three times), "assent," "agreement" (twice), and "just and fair requital for benefits received." *Id.* at 597-98. This use of contract was not accidental: *Steward Machine's* author was Benjamin Cardozo, one of the twentieth-century's leading contract experts. *See* GRANT GILMORE, DEATH OF CONTRACT 109-10 (1974) (describing the RESTATEMENT OF CONTRACTS as a debate between Oliver Wendell Holmes, Jr., and Justice Cardozo); Arthur Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 39 COLUM. L. REV. 56, 52 HARV. L. REV. 426, 48 YALE L.J. 426 (1939).

187. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981); Sch. Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 290 (1987) (Rehnquist, J., majority opinion).

188. *See, e.g.*, Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (O'Connor, J.); Blessing v. Freestone, 520 U.S. 329, 349 (1997) (Scalia, J., concurring) (explaining why federal-state spending programs are similar to contracts with third-party beneficiaries);

So what do constitutional law and contract law tell us about "coercion," the key term that *Dole* used but did not define?

b. Coercion as a constitutional concept

If *Dole's* coercion test is constitutional, what does it mean? For a quarter-century, Justice Rehnquist and his conservative colleagues have argued that Constitution law must be based on the original intent of its framers.[189] That has been particularly true in the area of state sovereign immunity, where the Court expressly has used its perception of the Founders' views on state immunity to go beyond

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Guardians Ass'n. v. Civil Serv. Comm'n, 463 U.S. 582, 598-99 (1983) (White, J., plurality opinion, joined as to that part of the opinion only by Rehnquist, J.) (describing Title VI as a "typical contractual spending power provision."). Justice Rehnquist and other members of the Court also have used the phrase "*quid pro quo*" to describe federal conditional spending programs. *See, e.g., Sch. Bd. of Nassau Co., Fla.,* 480 U.S. at 290 (citing U.S. Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605 (1986) (quoting Consol. Rail Corp. v. Darrone, 465 U.S. 624, 633 n.13 (1984)).

189. Paul Finkelman, *Intentionalism, The Founders, and Constitutional Interpretation*, 75 TEX. L. REV. 435, 449 (1996) (book review) (identifying Justices Rehnquist, Scalia, and Thomas as "most prominent devotees" of Original Intent); William H. Rehnquist, *The Notion of a Living Constitution,* 54 TEX. L. REV. 693, 695 (1976) (impermissible to substitute "some other set of values for those which may be derived from the language and intent of the framers."); *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.; Hearings Before the Senate Comm. on the Judiciary,* 92d Cong., 1st Sess. 156 (1971), 18-19, 55, 81-82, 138, 167-69 (original intent of Framers is gauge for measuring fidelity to Constitution) (*quoted in* Russell M. Mortyn, *The Rehnquist Court and the Establishment Clause,* 19 HAST. CON. L.Q. 567, 567 (1992)); *see* Wallace v. Jaffree, 472 U.S. 38, 91-107, 107 (1985) (Rehnquist, J., dissenting) (using Framers' discussion of religion to interpret First Amendment; describing "greatest injury" of Jefferson's wall of separation phrase as "its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights.").

See also Henry Jaffa, *Slaying the Dragon of Bad Originalism: Jaffa Answers Cooper*, 1995 PUB. L. REV. 209 (unpaginated) (1995) (Justice Rehnquist as "philosopher-king of the legal positivist version of original intent jurisprudence); H. Jefferson Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism,* 91 YALE L.J. 1317, 1366 (1982) (Justice Rehnquist's version of original intent based on views of Constitution's opponents, the Anti-Federalists); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 856-57 (judge must "immerse" self in "political and intellectual atmosphere of the time."); Wyoming v. Houghton, 526 U.S. 295, 299 (1999) (Scalia, J.) (primary method of interpreting Fourth Amendment's "search and seizure" clause is "the common law when the Amendment was framed."); David A. Sklansky, *The Fourth Amendment and Common Law,* 101 COLUM. L. REV. 1739, 1739, 1769 (2001), (citing *Wyoming*, 526 U.S. at 299); Florida v. White, 526 U.S. 559, 563 (1999); Harmelin v. Michigan, 501 U.S. 957, 966-85, 985 (1991) (Scalia, J.) (using nineteen page discussion of original meaning of Cruel and Unusual Punishment Clause to interpret Eighth Amendment; "enough" that Constitution's framers chose not to include guarantee against disproportionate sentencing); David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology,* 48 EMORY L.J. 1377, 1392-95 (1999) (explaining Scalia's "Original Meaning" approach).

the text of the Eleventh Amendment. [190] Although that approach has bedeviled those concerned with state abuses of power, I now embrace it. Indeed, I welcome it.

Why? To the Founders of 1787, coercion's meaning was significantly narrower than a modern lawyer would suspect, and it does not come close to including the economic pressure involved in conditional spending.

The brutal fact is that to the Founders, "coercion" meant force, real *force*. In 1765, Blackstone defined it in terms of the authority a husband then had over his wife and the authority of the judiciary.[191] One could say that in 1774, "coercion" became almost a term of art to the Founders. Between March and June 1774, Parliament adopted the Coercive Acts in response to the Boston Tea Party.[192] The Acts closed the port of Boston until the colony paid for the destroyed tea, made the governor directly subject to the Crown, gave him the power to appoint the colony's council and *all* her judges, authorized him to transfer any Massachusetts case to England for trial, and permitted

190. The keystone of the Court's immunity jurisprudence explicitly said it was based not on the text of the Eleventh Amendment, *id.* at 10-11, but on the intent of the Constitution's Framers and their reaction to *Chisholm v. South Carolina,* 2 U.S. (2 Dall.) 419 (1793); *Hans,* 134 U.S. 1, 11-16 (1890).

Today, the Court's conservative members use this argument even as they admit it extends state immunity beyond the Eleventh Amendment's text. *See Alden*, 527 U.S. at 733-35 (Kennedy, J.) (rejecting "blind reliance upon the text of the Eleventh Amendment"; describing Framers' opinions on sovereign immunity); *Seminole Tribe of Fla.*, 517 U.S. at 54, 69-71 (Rehnquist, C.J.) (recognizing that Eleventh Amendment's power *not* limited to its text, endorsing *Hans* because it had "a much closer vantage point" to Framers than do its modern opponents, and discussing intent of Framers); Pennsylvania v. Union Gas, 491 U.S. 1, 31-34 (1989) (Scalia, J., concurring and dissenting) (Eleventh Amendment interpretation based on "original understanding against which the Constitution was adopted").

191. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *442 (1765) (Univ. of Chi. fascimile ed.) (coercion of wife by husband); IV BLACKSTONE at 64 ("feeble coercion" of a spiritual court) (1769).

192. SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 205, 207-210 (4th prtg. 1965); Rebeccas K. Starr, *Political Mobilization, 1775-1776*, THE BLACKWELL ENCYCLOPEDIA OF THE AMERICAN REVOLUTION 236 (Jack P. Greene & J.R. Pole, eds.) (1991); David L. Ammerman, *The Tea Crisis and Its Consequences, through 1775*, DOCUMENTS 202-03, 220; Robert M. Calhoon, *Loyalism and Neutrality,* DOCUMENTS 248; DIRK HOERDER, CROWD ACTION REVOLUTIONARY MASSACHUSETTS 1765-1780, 276-77, 280 (1977). They also were known as the Intolerable Acts. DOCUMENTS OF AMERICAN HISTORY 71 (Henry Steele Commager, ed.) (Appleton-Century-Crofts, Inc. 1948); Ammerman, *supra* at 201; Colin Bonwick, *Opposition in Britain*, DOCUMENTS 242; ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE 230, 262-63 (1982); HOERDER, *supra* at 271-93.

British troops to live and eat in private homes.[193] Parliament sent a squadron of the Royal Navy and five regiments to Boston.[194] Lt. General Thomas Gage was named governor and captain-general of the colony, and on September 1st, he launched the first of several military expeditions that would lead to Lexington and Concord.[195]

While the American Revolution made the Coercion Acts moot, "coercion" continued to be recognized as military force or as the force needed to enforce judicial orders. The Federalist Papers discussed "coercion" only in terms of military force or the force exercised by the judiciary, which was but one step from force of arms.[196] Alexander Hamilton told New York's constitutional convention in 1787 that because states would refuse to be "instrument[s] of coercion" against other states, the federal government would have to maintain a standing army that it could use against states.[197] The early Supreme Court echoed his sentiment.[198]

193. *See* The Boston Port Act, 1774, 14 Geo. 3, c.19 (Eng.) (quoted in DOCUMENT OF AMERICAN HISTORY, *supra* note 192, at 71); the Massachusetts Government Act, 1774, 14 Geo. 3, c.45 (Eng.), *quoted in* DOCUMENT OF AMERICAN HISTORY, *supra* note 192, at 72; Administration of Justice Act, 1774, 14 Geo. 3, c.39 (Eng.) *quoted in* DOCUMENT OF AMERICAN HISTORY, *supra* note 192, at 77; the Quartering Act, 1775, 15 Geo. 3, c.15 (Eng.).

Morrison includes the New England Restraining Act, 1775, 15 Geo. 3, c.10 (Eng.), which barred the New England colonies from trading with any nation other than the United Kingdom and prohibited New England fisherman from the Newfoundland and Nova Scotia fisheries. MORISON, *supra* note 192, at 210.

194. MORISON, *supra* note 192, at 206.

195. DAVID HACKETT FISCHER, PAUL REVERE'S RIDE 44 (1994).

196. *See* THE FEDERALIST NO. 15, at 145 (Alexander Hamilton) (John C. Hamilton ed., 1904) ("the COERCION of the magistracy, or by the COERCION of arms.") [capitalization in the original]; *id.*, NO. 16, at 149-50 (Hamilton) (nation lacks resources to maintain army large enough to "confine the larger States"; states will dismiss federal plans "to be executed by a coercion applicable to them" in their collective capacities"); *id.* ("the principle of legislation for sovereign states supported by military coercion has never been found effectual."); *id.* (efforts to coerce the disobedient have started "bloody wars" between members of confederacy"); THE FEDERALIST NO. 18, at 158-59 (Alexander Hamilton & James Madison) (noting Greek Amphictyonic council could "employ the whole force of the Confederacy against the disobedient," and "declared authority to use coercion against refractory cities. . ."); *id.*, No. 19, at 168 ("this scheme of military coercion"); *id.*, NO. 20, at 177 ("by substituting *violence* in place of the mild and salutary *coercion* of the *military*.") (all emphasis in the original).

The Oxford English Dictionary similarly implicates force and arms. III OXFORD ENGLISH DICTIONARY 435 (2d ed. 1989) ("application of force to control the action of a voluntary agent"; "compulcion, cohercion, and imprisonment," 1495, Act II, VII, c. 36 preamble; "By strong coercion of our arms subdued," (citing COWPER, THE ILIAD xx.185 (1791)); "forceable restraint" and "government by force" (citing the English Coercion Acts; and "physical pressure, compulsion.").

197. 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 233 (2d ed. 1863),

(*quoted in* New York v. United States, 505 U.S. 144, 166-67 (1992)).

Madison also contemplated that the federal government might use force against the states. In 1781, state refusals to fulfill requisitions under the Articles of Confederacy prompted a Congressional committee to recommend use of the Continental army and navy. Madison was a member of that committee, and wrote Jefferson that "[t]he situation of most of the states is such that two or three vessels of force employed against their trade will make it their interest to yield prompt obedience to all just requisitions on them." JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 23 (Harper Collins, 1990), citing 5 THE PAPERS OF THOMAS JEFFERSON 473-474 (Boyd ed., 1951).

198. The Supreme Court used "coercion" or its derivatives eleven times between 1791 and 1820. Eight of those uses concerned the authority of courts to enforce their orders. *See* Bank of Colum. v. Okely, 17 U.S. (4 Wheat.) 235, 243 (1819) (debtor's voluntary bankruptcy submits him to "personal coercion" by court); Williams v. Peyton's Lessee, 17 U.S. 77, 81 n.a (1819) (public officials should let landlord voluntarily pay tax, before resorting to "coercive means."); Parker v. Rule's Lessee, 13 U.S. (9 Cranch) 64, 70 (1815) (Marshall, C.J.) (legislature wanted to "avoid coercive means of" collecting taxes); The Venus, 12 U.S. (8 Cranch) 253, 283 (1814) (Peace treaty that permits subjects of warring countries to remove or remain in enemy country "does not coerce those subjects either to remove or remain."); Taylor v. Brown, 9 U.S. 234, 242-43 (1814) (Marshall, C.J.) (while statute directs surveyor to record every survey he makes, it does not permit landowner to coerce surveyor into recording survey); United States v. Gurney, 8 U.S. (3 Cranch) 333, 345 (1808) (Marshall, C.J.) ("stipulated damages, of which the law will coerce the payment . . . ."); United States v. Hooe, 7 U.S. (3 Cranch) 73, 85 (1805) (Marshall, C.J.) (voluntary deed is document, signed by bankrupt debtor, "made without coercion of law," to give preference to some creditors); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 452 (1793) (Blair, J.) ("Is it altogether a vain expectation, that a state may have other motives than such as arise from the apprehension of coercion, to carry into execution a judgment of the Supreme Court of the United States . . . ?").

On four other cases, the Court used "coercion" in conjunction with force of arms. *See* The Rugen, 14 U.S. 62, 72-73 (1816) (merchant ship who obeyed British brig of war, even though brig did not put crew aboard or escort merchant ship, did not enter British port under coercion); The Brig Short Staple v. United States, 13 U.S. (9 Cranch) 55, 56, 60 (1815) (Marshall, C.J.) (ship captured by British armed vessel, boarded by British prize-master, and abandoned by that vessel in sight of British ship of war was "under the coercion of a force she was unable to resist."); Hylton v. United States, 3 U.S. (3 Dall.) 171, 178 (1796) (Paterson, J.) (under Articles of Confederation, "Congress could not. . . raise money by taxes . . . . They had no coercive authority–if they had, it must have been exercised against the delinquent states, which would be ineffectual, or terminate in a separation.").

Counsel arguing before the Court used "coercion" to refer to the power of courts. *See* United States v. Howland, 17 U.S. (4 Wheat.) 108, 117 (court cannot reach out-of-state debtors, "still they may appear without coercion."); Sturges v. Crowninshield, 17 U.S. 122 (4 Wheat.) (1819) (statement of Mr. Hunter, for Defendant) ("Whether a contract shall be a matter for judicial coercion"); *id.* at 188 (statement of Mr. Hopkinson, for Plaintiff) ("If the right of coercing the debtor by imprisonment"); The Anne, 16 U.S. (3 Wheat.) 436, 442 (1823) (statement of Mr. Ogden and Mr. Winder, for Defendant) ("donec nostra custodia coercertur" (captured ship is ours while in our custody)); Thelusson v. Smith, 15 U.S. (2 Wheat.) 396, 409 (1817) (statement of Mr. Jones, Defendant in Error) (judgment creditor's advantage gained by "sheer coercion upon his debtor," and operation of law; argument that United States, as creditor, has preference gives U.S. "a more extensive and coercive remedy against an ordinary debtors"). Other counsel spoke of judicial and

As the Court itself is fond of pointing out, Madison said that at the Constitutional Convention, "The practicability of making laws, with coercive sanctions, for the states as political bodies, had been exploded on all hands."[199] But Madison's language proves my point. When the Founders talked about "coercion," they meant government use of arms, either through the military or through judicial decisions enforced by the military. Offers to give states money, even with strings attached, are far different than the barrel of the gun.[200]

When Justice Cardozo wrote *Steward Machine* in 1937, "coercion" retained its association with military or judicial power. Justice Cardozo asked if the taxing and spending programs at issue were "weapons of coercion, destroying or impairing the autonomy of the states."[201] Contemporary legal dictionaries said coercion will be

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military coercion. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 377 (1819) (statement of Mr. Pinkney, for Plaintiff in error) (Articles of Confederation gave national government "no power of coercion but by arms" against states); The Nereide, 13 U.S. 388, 409 (1815) (statement of Mr. Emmett, for Appellant) (recognizing, in challenge to U.S. privateer's capture of neutral goods in belligerent vessel, that nations may retaliate as "means of coercing justice from the other party."); The Aurora, 12 U.S. (8 Cranch) 203, 215 (1814) (statement of Mr. Pinkney, for Appellee) (war-time American embargo on West Indies "was one of the means which the United States were using to coerce the enemy").

One attorney spoke of the President's authority as commander in chief. The Thomas Gibbons, 12 U.S. (8 Cranch) 421, 426 (1814) (statement of Mr. Pinkney, for owners) (attacking legality of ship's capture by U.S. privateers on grounds that U.S. president "cannot coerce the privateers of the United States to do what he pleases," but may restrain them.").

199. 2 RECORDS OF THE FEDERAL CONSTITUTIONAL CONVENTION of 1787, at 9 (M. Farrand ed. 1911), *quoted in* New York v. United States, 505 U.S. 144, 164 (1992); *Alden*, 527 U.S. at 714; Printz v. United States, 521 U.S. 898, 919 (1997).

As an example, the Court might have cited Professor Orth's thesis that the unwillingness of post-Reconstruction America to go to war to force southern states to honor bonds on which they had defaulted caused the Court to interpret the Eleventh Amendment to give states far more immunity than the text or history of the Amendment permitted. ORTHO, *supra* note 23.

200. The contrast between the Founders' understanding of coercion and the modern interpretation becomes even clearer in Professor Sullivan's description of the Unconstitutional Conditions doctrine:

> Coercion in this context obviously does not take the form of force or fraud; the beneficiary who accepts or rejects a conditioned benefit ostensibly expresses some kind of voluntary choice between the right and the benefit. One way to explain the unconstitutional conditions doctrine, however, is to view coercion as possible even in the absence of force or fraud, and even in an apparently consensual bargain; many private and criminal law doctrines and accounts of coercive offers in moral philosophy take the same view.

Kathleen M. Sullivan, *Unconstitutional Conditions,* 102 HARV. L. REV. 1413, 1419-20 (1989).

201. *Steward Machine Co.,* 301 U.S. at 596 ("To find state destruction" in the federal

"implied when a person is legally under subjection to another and forced to act contrary to his will"; they laconically noted that married women provide the "principal case."[202] A decade after Justice Cardozo wrote, Black's Law Dictionary defined coercion to mean "Compulsion, constraint, compelling by force or arms. . . constrained by subjugation,"[203] a meaning very similar to the Framers'.

On the other hand, Justice Cardozo's discussion of coercion goes beyond a fear of federal arms. Do the conditions require "a surrender by the states of powers essential to their quasi-sovereign existence"?[204] Do they impair state autonomy?[205] Those questions suggest a meaning that focuses less on the process used to produce consent than on the substantive results sought.[206]

Under Justice Cardozo's approach, we might ask if Congress has demanded states surrender essential attributes of sovereignty[207] or powers essential to their quasi-sovereign existence.[208] But sovereign immunity is not an "essential attribute" of sovereignty. States may waive their immunity to suit.[209] They are not immune from suits by the United States for monetary damages for misusing federal funds,[210] and they may be sued in another state's courts.[211] Their officials must

statute imposing conditions "is to find it almost anywhere.").

202. *See, e.g.*, BOUVIER'S LAW DICTIONARY (Baldwin's Ed., 1928) at 182; BALDWIN'S LAW DICTIONARY at 182 (1926); BLACK'S LAW DICTIONARY 324 (4th ed. 1951).

203. BLACK'S LAW DICTIONARY 324 (4th ed. 1951).

204. *Steward Machine Co.*, 301 U.S. at 593 (emphasis added).

205. *Id.* at 586, 595, 597.

206. *Cf.* Arthur R. Leff, *Unconscionability and the Code–The Emperor's New Clause,* 115 U. PA. L. REV. 485, 486-87 (1967) (distinguishing procedural and substantive unconscionability in contract law).

207. *Steward Machine Co.*, 301 U.S. at 595, 597.

208. *Id.* at 593 ("surrender by the states of powers essential to their quasi-sovereign existence"); *id.* at 596 ("abdicates its functions"); *id.* at 597 ("The inference of abdication"). *See also* Nevada v. Skinner, 884 F.2d 445, 449-50 (9th Cir. 1989) (coercion test based on fear that Spending Power would let Congress "infringe on integral state functions."). This idea reappears in Justice Rehnquist's opinion in *Nat'l League of Cities v. Usery,* 426 U.S. 833, 845 (1976), which, of course, was overruled by *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528 (1985).

209. The Court first recognized this in *Clark v. Barnard*, 108 U.S. 436, 883 (1883) (Immunity is "personal privilege which [a state] may waive at pleasure"), and later allowed states to waive its immunity regarding contracts made with private citizens, *Gunter v. Atl. Coast Line R.R.,* 200 U.S. 273, 284 (1906).

210. Bell v. New Jersey, 461 U.S. 773, 775 (1983).

211. Nevada v. Hall, 440 U.S. 410 (1979) (California residents injured in car crash by employee of Nevada could sue Nevada in California state courts).

obey federal court orders for prospective injunction relief.[212] None of those rules could be true if immunity was an essential attribute of sovereignty.

One also could argue that sovereign immunity lets a state allocate its scarce resources as it believes best for its constituencies, and that meaning is consistent with a common account of the Eleventh Amendment's origin.[213] Again, that has not stopped the Court from approving a state's waiver of its immunity in a private contract –presumably, the state assesses and allocates its financial resources at the time it enters the contract. And while the Court has expressed concerns that some prospective injunctive awards against state officials may interfere with the state budgeting process, those concerns simply "may counsel moderation in determining the size of the award or in giving the state time to adjust its budget before paying the full amount of the fee."[214]

Another of Justice Cardozo's constitutional concerns was whether federal demands interfered with state autonomy by reducing the accountability of state officials to their constituents.[215] Justice O'Connor made this a major theme in her 1992 discussion of coercion, warning that if Congress forced state officials to take certain

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212. *Ex parte Young*, 209 U.S. 123 (1908); Edelman v. Jordan, 415 U.S. 651, 676-77 (1974).

A related concern would be whether Congress has asked a state to give up inalienable rights and authority. Professor Sullivan identifies, but does not endorse, this approach, Kathleen M. Sullivan, *supra*, note 200 at 1421, and Justice O'Connor has warned that since federalism "secures to citizens the liberties that derive from the diffusion of sovereign power," state officials cannot consent when Congress exceeds its authority relative to the states. New York v. United States, 505 U.S. at 181-82, (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). But to call sovereign immunity an inalienable right would conflict with the Court's recognition that states may waive their immunity, *see* cases cited in *supra* note 209. Indeed, the Constitution (Art. IV, § 3) permits a state to go so far as to consent to give up part of its territory.

213. *See* Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment,* 102 HARV. L. REV. 1342, 1354-55 (1989) (citing Chief Justice Marshall's discussion in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, at 406-07 (1821) that Eleventh Amendment was adopted because of state fiscal crises and fears of being required to repay heavy state debts).

214. Hutto v. Finney, 437 U.S. 678, 692 n.18 (1978); *see also Edelman*, 415 U.S.at 665-68, 666 n.11 (expressing concerns on awards that require payment from state treasuries, but upholding prospective injunctive relief with the ancillary effect of requiring state officials to spend money); Quern v. Jordan, 440 U.S. 332, 345 n.16 (1979) (describing earlier cases' concern of placing "enormous fiscal burdens on the States" but stating that such a situation "might require" a "formal indication" of Congressional intent to abrogate state immunity).

215. New York v. United States, 505 U.S. at 168-69; *Steward Machine Co.,* 301 U.S. at 586, 595, 597.

action, voters might blame those state officials, rather than the federal officials who really made the decision.[216] But a federal spending program conditioned on a waiver of a state's sovereign immunity would *increase* the accountability of state officials. Today, a state enjoys immunity without any requirement that its officials make an affirmative decision. When a state injures a person, that person's attorney's knowledge of the Eleventh Amendment means that he or she usually will omit the state from the list of named defendants or not even file the case. Such omissions require no action or decision by state officials, nor do they produce a court decision which newspapers may report.

Under the proposal this article puts forth, a plaintiff's attorney *would* name the state as a defendant, and state officials then would have to decide whether to invoke sovereign immunity. If they did, the state would lose federal funds in the program in which the state's induced waiver concerned, generating substantial headlines. Voters might begin to ask why state officials were willing to sacrifice federal dollars for the sole purpose of not having to appear in a federal court.

So much for coercion according to the Founders of 1787 and Justice Cardozo of 1937. What has the modern Court done with the word in the context of federalism? The Court has thrice distinguished Conditional Spending programs from federal efforts to compel state obedience or commandeer state officials. In 1985, Justice White wrote "The Federal Government, however, has not presumed to dictate the manner in which the counties may spend [money from a federal spending program]. Rather, it has merely imposed a condition on its disbursement of federal funds."[217] In 1992, Justice O'Connor repeated that distinction. While condemning federal efforts to coerce states,[218] she contrasted impermissible Congressional coercion with *permissible* Congressional action:

> This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices. Our cases have identified a variety of

216. *New York,* 505 U.S. at 169-70.

217. Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269-70 (1985).

218. In discussing Hamilton's vision of a federal standing army to enforce federal requisitions on various states, O'Connor used "coercion" or its derivatives six times in three pages, *New York,* 505 U.S. at 164-66, and then wrote that Congress "lacks the power to compel the states to require or prohibit" certain acts. *Id.* at 166-67. This was consistent with the Founders' meaning of coercion as military force or judicial decree supported by military force.

> methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. Two of these methods are of particular relevance here. First, under Congress' spending power, 'Congress may attach conditions on the receipt of federal funds.'[219]

She repeated this flat distinction between coercion and conditional funding twice.[220]

And in 1997, Justices Scalia and O'Connor again distinguished coercion and funding. Even as he invalidated the Brady Bill's requirement that state officials help implement federal gun controls, Justice Scalia distinguished between "conditions upon the grant of federal funding" and "mandates to the States."[221] Justice O'Connor's concurrence went a step further. She suggested that if Congress really wanted state officials to conduct gun checks for the federal government, it should create a system of conditional funding.[222]

In short, whether one uses a 1787, 1937, or 1987 perspective on coercion as a constitutional concept, conditioning funds on a waiver of immunity is safe.

c. Coercion as a contractual concept

As in constitutional law, contract law at the time of the Founders limited "coercion" to threats of physical force. Blackstone said coercion and duress involved only threats "sufficient to put a brave man in fear of loss of life, of mayhem, or of imprisonment."[223] But not all threats of physical force were sufficient: he pointedly wrote that threats to commit battery, burn a house, or destroy goods were *not*

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219. *Id.* at 166-67 (quoting *Dole*, 483 U.S. at 206).

220. *New York*, 505 U.S. at 168 (Congress may use conditional spending or "any other permissible method of encouraging a state to conform to federal policy choices"); *id.* at 176 ("Congress has not held out the threat of exercising its spending power or its commerce power; it has instead held out the threat . . . of simply forcing the states to submit to another federal instruction.").

221. Printz v. United States, 521 U.S. 898, 917-18 (1997).

222. "Congress is . . . free to amend the interim program to provide for its continuance on a contractual basis with the states if it wishes, as it does with a number of other federal programs. *See, e.g.*, 23 U.S.C. § 402 (conditioning states' receipt of federal funds for highway safety program on compliance with federal requirements.)" *Id.* at 936 (O'Connor, J. concurring).

223. I BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 126-27 (1765) (Univ. of Chi. facsimile ed.). RESTATEMENT OF CONTRACTS § 492, cmt. e (1932) ("Traditionally," coercion and duress limited to threats against life, loss of limb, or imprisonment).

coercion or duress.[224]

The meaning of "coercion" and "duress" had begun to change by the time Justice Cardozo used those words in *Steward Machine*. Some sources retained the original, restrictive meaning.[225] In other sources, the meanings ascribed to those terms had expanded to include threats to injure or wrongfully imprison a spouse, child, or near relative, or to wrongfully destroy, seize, or withhold land, blackmail, and a complete lack of will, such as a signature made under hypnosis.[226] In 1937 (the year of *Steward Machine*), Williston noted that some states had begun to recognize economic duress,[227] and the private plaintiff in *Steward Machine* invoked that new concept.[228] Justice Cardozo rejected it, saying that persuasion and pressure were not coercion.[229] That rejection was consistent with his decisions for the New York Court of Appeals, which used "coercion" in the context of a court's power to enforce its orders.[230] In short, if we use "coercion" as Justice Cardozo intended, a condition placed on a gift of federal funds to a state would fall far short.

Even modern concepts of coercion and duress would not label

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224. *Id.* at 127.

225. The legal dictionaries of Justice Cardozo's time used an even more limited definition. *See, e.g.*, BOUVIER'S LAW DICTIONARY 330 (1934) (force or imprisonment or railroad's refusal to carry goods); BALDWIN'S LAW DICTIONARY 182, (1926) (same).

226. RESTATEMENT OF CONTRACTS § 493 (a)-(d); according to § 493, comment a, threats of imprisonment, physical injury or wrongfully seizing land are "the commoner" examples of duress. All of the duress illustrations to §§ 492, 493, and 495 involve threats of physical violence, § 493, illus. 1 and 4, § 494, illus. 1 and 2; imprisonment, § 493, cmt. b and c; of blackmail, § 493, illus. 2, 3, 7, 18, and 19; seizing a valuable or badly needed item, § 493, Ill. 5-9, 12-14, 16, and 20; or the complete lack of will (a signature made under hypnosis), § 493, illus. 3. A threatened suit that might ruin the victim's business is *not* duress. § 493, illus. 10.

227. SAMUEL E. WILLISTON ON CONTRACTS § 1618, at 4519-20, 4522-23 (1937). He said "economic duress," included liens on realty, § 1618, at 4519; threats that a utility would cut off service, § 1618, at 4520-21; and payments to avoid illegal forfeitures of franchises, § 1618, at 4522-23. Black's Law Dictionary did not add "duress of goods" until 1951.

228. 301 U.S. at 587 ("economic pressure").

229. *Id.* at 587-88.

230. A WESTLAW search for ju(Cardozo) & (Duress coerc!) & da(before 1945) produced 18 hits, which either discussed judicial coercion, (*e.g.*, Hudson v. Yonkers Fruit Co., 179 N.E. 373, 375 (N.Y. 1932) ("coerced by legal process" to pay debt); Finsilver Still & Moss v. Goldberg, Maas & Co., 171 N.E. 579, 580 (N.Y. 1930) (court order "to coerce response to a petition"); *In re* Brown, 150 N.E. 581, 584 (N.Y. 1926) ("a sale coerced by law"); Oswego & S.R. Co. v. State, 124 N.E. 8, 10 (N.Y. 1919) ("coercive power of the state")) or were too general to provide a definition (*e.g.*, Cox v. Lykes Bros., 143 N.E. 226, 227-28 (N.Y. 1924) (absence of duress); People v. Teuscher, 162 N.E. 484, 485 (N.Y. 1928) ("not merely by coercion")).

conditional spending as coercive. While many –but not all– states now recognize economic duress,[231] that doctrine requires a threat that leaves the victim "no reasonable alternative,"[232] because similar goods or services are not available in the open market.[233] A refusal to pay money is not duress, since the victim can find alternative funds by borrowing,[234] or, in the case of a state, by taxation.[235]

Another element of economic duress is an improper threat, and there is no impropriety if the proposed exchange is fair.[236] So what is a fair trade for a waiver of state sovereign immunity? Unfortunately, there is no market for immunity that we can use to set a price for a waiver –a state that insists on preserving its dignity[237] when dealing with private contractors will find their attention shifting to more creditworthy customers,[238] rather than calculating a premium to charge for the increased risk a state seeks to impose.

So what is a fair price to pay for a waiver of immunity? The salaries the federal government will save when it does not have to hire more attorneys to enforce a program's regulations? The average annual amount of attorneys' fees generated in the past by private lawsuits regarding similar programs? But how does one calculate the value to the commonwealth of the United States, the value of knowing that private citizens will be able to enjoy the protection of federal rules and regulations, even if a U.S. Attorney's Office or an agency's in-house counsel have neither the time nor motivation to start their own enforcement proceedings? We know from *Dole* that a five percent reduction in a grant is only "*mild* encouragement,"[239]

231. RESTATEMENT (SECOND) OF CONTRACTS § 176(2). For states retaining the traditional meaning, *see, e.g.,* Hovendick v. Presidential Fin. Corp., 497 S.E.2d 269, 272 (Ga. App. 1998); Holland v. High-Tech Colleries, Inc., 911 F. Supp. 1021, 1037 (N.D. W. Va. 1996); FDIC v. Meyer, 755 F. Supp. 10, 13 (D.D.C. 1991); Prod. Credit Ass'n of East Cent. Wisc. v. Farm Credit Bank of St. Paul, 781 F. Supp. 595, 604 n.7 (D. Minn. 1991).

232. § 175(1) and cmt. b.

233. *Id.* at § 175 cmt. b.

234. *Id.* However, illustration 7 finds duress when the victim urgently needs cash promised by a contract, in order to avoid a foreclosure, and is unable to borrow the money elsewhere.

235. Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989).

236. RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. a (1981).

237. *Alden,* 527 U.S. at 712, 735-40. In contrast, the Eleventh Amendment limits only the "Judicial power of the United States." U.S. CONST. amend. XI.

238. *Cf.* RALPH WALDO EMERSON, CONDUCT OF LIFE: WORSHIP ("The louder he talked of his honor, the faster we counted our spoons."), *quoted in* THE HOME BOOK OF QUOTATIONS 198 (1967 Dodd Mead & Co., Bruce Bohle, ed.).

239. 483 U.S. at 211.

suggesting that larger amounts providing "strong encouragement" also would be permissible. Actually, this uncertainty works in favor of conditional spending, since the party claiming duress is the party who must prove its existence.

d. Other problems with the coercion test

Whether constitutional or contractual, whether defined by the Founders in 1787, Justice Cardozo in 1937, or Chief Justice Rehnquist in 1987, three weaknesses lead to the conclusion that coercion has limited, if any, value as a test of conditional spending.

First, a state cannot show coercion merely by proving that a threat to cut off funds influenced its decision to waive immunity.[240] Instead, the Court assumes "freedom of the will as a working hypothesis . . . ,"[241] and this assumption is supported by examples of states that have successfully resisted the lure of federal money tied to conditions.[242]

Second, a successful claim of coercion might not give the state the remedy it wants, namely, the federal grant *sans* condition. In contract, the normal remedy is to let the victim invalidate the *entire* agreement, not merely the objectionable clause.[243] This would let Congress withdraw the entire funding offer, rather than giving the state what it wants.

Third, coercion simply does not make sense in the context of federal grants. What coercer or oppressor gives large sums of money to its alleged victim, which is what federal grants provide the states? What oppressor provides more financial support than its alleged victim for projects that will benefit the victim's constituents?[244] What

240. *Dole,* 483 U.S. 203, 211 (quoting *Steward Machine Co*, 301 U.S. at 589-90).

241. *Id.*

242. An example is the repeal of the statute that conditioned Medicaid grants upon a state waiver. *See* notes 165 *supra.* Indeed, the Boren Amendment, 42 U.S.C. § 1396a(a)(13) (1994), which created the private cause of action that nursing homes and hospitals had used to sue states for violating the Medicaid program's requirements, was repealed by the Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4711(a)(1), 111 Stat. 251, 507-08.

Another example is the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 672(f)-(g) (1994). Roderick M. Hills, Jr., *Federalism in Constitutional Context,* 22 HARV. J.L. & PUB. POL. 181, 184-85 n.12 (1998) (less than half of the states have implemented OSHA, despite heavy federal subsidization), *citing Current Status of State Approved Plans,* 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶¶ 5300-5840 (1996).

243. RESTATEMENT (SECOND) OF CONTRACTS § 383 and cmt. a (1981).

244. *See, e.g.,* Kansas v. United States, 214 F.3d 1196, 1198 (10th Cir. 2000), *cert. denied,* 531 U.S. 1035 (2000) (Federal government pays two-thirds of program operating

victims are so eager to be coerced that they have increased their own taxes to raise the funds needed to match their oppressor's largesse?[245] What coercion victims increase their own spending to increase the amount of money they receive from their alleged oppressor?[246] What coercer knows that its actions (withholding money from a state) will harm its constituents as much as the state's constituents? And, for heaven's sake, is any coercer except Congress comprised of people who are elected by the citizens of their alleged victims? As Justice Cardozo asked, is it safe to assume that a concept like coercion "can ever be applied with fitness to the relations between state and nation"?[247] The wisdom of Justice Cardozo's concern appears both in the reluctance of the lower federal courts to find a particular condition coercive and in their often-open hostility to coercion as a test.

3. The lower federal courts

The lower federal courts have had fifteen years since *Dole* to

costs and 80% of computer expenses); Unsigned Editorial, *Engineering Our Future Trust Is Best Route for Tobacco Funds*, THE DAILY OKLAHOMAN, Dec. 5, 1999, at editorial page ($42 million state expenditure on caring for indigent would attract $101 million in federal Medicaid funds); Christopher Lee, *Legislatures Seek to Insure Kids; Program Would Expand Health Coverage for Needy*, DALLLAS MORNING NEWS, March 5, 1999, at IA (every dollar state spent on children's health insurance would result in three dollars in federal matching funds).

245. *See, e.g.*, Amy Pyle, *California and the West: California Elections*, LOS ANGELES TIMES, Oct. 1, 1998, at A3 (efforts to raise cigarette taxes so as to increase federal matching funds); Gary J. Remal, *New Laws Focus on Children's Physical, Mental Health Issues*, KENNEBEC J., April 30, 1998, at 9 (Maine governor justifies $8 million tax increase as providing "many times that amount in federal matching funds.").

246. Unsigned Editorial, *Engineering Our Future Trust is Best Route for Tobacco Funds*, THE DAILY OKLAHOMAN, Dec. 5, 1999, at editorial page (Oklahoma's Republican governor wants $42 million increase in state spending for Medicaid beneficiaries to attract $101 million in matching federal funds); Chuck Ervin, *Higher Ed Package Pushed,* TULSA WORLD, Apr. 21, 1999, at 1 (Oklahoma Republican governor seeks $30 million bond issue to generate $60 million in federal matching funds); Holly A. Heysor, *Capitol Digest: More Funds for Substance Abuse Help in Jeopardy*, VIRGINIAN-PILOT, Dec. 5, 1999, at B2 (subcommittee of gubernatorial health care commission calls for sufficient state spending to obtain maximum federal matching funds); Jennifer Peter, *$40 Million Proposal Would Save Open Spaces*, VIRGINIAN-PILOT, Jan. 19, 2000, at B1 ($40 million in state conservation spending could produce same amount in federal matching funds); Lara Jakes, *Ads Target Pataki's Proposed Health Cuts,* ALBANY TIMES UNION, June 8, 1999 at B2 (critics of governor say Medicaid budget cuts would total $2.1 billion because of lost federal matching funds); Christopher Lee, *Legislatures Seek to Insure Kids; Program Would Expand health Coverage for Needy*, DALLAS MORNING NEWS, Mar. 5, 1999, at 1A (supporters of additional state appropriations for medical services say $150 million annual increase in appropriations would produce $450 million in federal funds).

247. *Steward Machine Co.*, 301 U.S. at 590.

define "coercion," and the results are cold comfort to conditional spending opponents. Of the fifty-nine post-*Dole* cases I identified that address the constitutionality of conditional spending, only one came close to using a state's claim of coercion to invalidate a conditional spending program.[248] In contrast, six cases invalidated programs because of *Dole's* unambiguous statement test[249] or other problems.[250]

In part, the lower federal courts' extreme reluctance to find coercion comes from *Steward Machine* and *Dole,* both of which expressly assumed that states have free will in choosing to accept federal funds. Many courts have said that states are free to reject federal grants: the choice between agreeing to the condition and losing the money may be difficult, but difficult choices still are choices.[251] The only case that came close to invalidating federal

248. In *Va. Dep't of Educ. v. Riley*, the court used *Dole's* unambiguous statement test to prevent the Secretary of Education from imposing conditions not expressly mandated by the statute. 106 F.3d 559, 561 (4th Cir. 1997). The court also said that the Secretary's threat to cut off all $60 million in federal funding for 128,000 students because Virginia refused to provide private education to 126 disabled students "resembles impermissible coercion." *Id.*

Clarke v. United States, 915 F.2d 699 (D.C. Cir. 1990), involved a federal statute that conditioned *all* funding for the District of Columbia on adoption of D.C. Appropriations Act of 1989, Pub. L. No. 100-462 (Oct. 1, 1988). The majority found the dispute moot, but one judge found it coercive. 915 F.2d at 708-9 (Buckley, J., concurring).

249. The most common reason was that a statute failed to clearly state the condition. *See* Doe v. Bd. of Educ. of Oak Park & River Forest High Sch., 115 F.3d 1273, 1277 (7th Cir. 1997); Tenn. Dep't of Human Serv. v. U.S. Dep't of Educ., 979 F.2d 1162, 1167-68 (6th Cir. 1992) (discussing Randolph-Shepard Act, 20 U.S.C. §§ 107 and 107f); *Riley*, 106 F.3d at 561, 566-67; *McNabb*, 862 F.2d at 686, 687.

250. *McGinty*, 251 F.3d at 95 (plaintiffs failed to identify federal statute under which state had waived immunity); Yorktown Med. Lab., Inc. v. Perales, 948 F.2d 84, 87-88 (2d Cir. 1991) (Congress had repealed statutes providing plaintiff's cause of action and requiring state to waive immunity).

251. Kansas v. United States, 214 F.3d, 1196, 1203 (10th Cir. 2000), *cert. denied,* 531 U.S. 1035 (2000) ("a difficult choice remains a choice"; state free to make hard choice of rejecting funding and conditions); Litman v. George Mason Univ., 186 F.3d 544, 552 (4th Cir. 1999), *cert. denied,* 528 U.S. 1181 (2000) (state may remain accountable to voters simply by declining federal funds); United States v. Regents of Univ. of Minn., 154 F.3d 870, 873 (8th Cir. 1998) (state may avoid conditions "simply by declining to apply" for federal funds); California v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997) (no coercion even though state has grown dependent on federal funds: state can make hard choice of raising taxes); Pavadan v. United States, 82 F.3d 23, 29 (2d Cir. 1996) (states free not to participate in Medicaid); Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) (state can raise taxes; federal conditions merely create "hard political choice"); Alabama v. Lyng, 811 F.2d 567, 569 (11th Cir. 1987) (state free to reject condition by rejecting funds and foregoing benefits to citizens); Planned Parenthood Ass'n of Utah v. Dandoy, 810 F.2d 984, 988 (10th Cir. 1987) (state can use own funds to replace federal funds); Gorrie v.

conditional spending on grounds of coercion involved a threat to cancel a state's *entire* grant for a minor violation of federal rules.[252] But other courts have found there was no coercion when between sixty-six and one hundred percent of a grant was at risk,[253] or even when a billion dollars was at stake.[254] Nor have they been concerned that losing the grant would be painful.[255]

Accompanying this strong presumption against coercion is the lower federal courts' often-open hostility toward coercion as a test. Some have complained the test is difficult to apply,[256] others have

Bowen, 809 F.2d 508, 519 (8th Cir. 1987) (state can avoid condition by avoiding money); Robinson v. Kansas, 117 F. Supp. 2d 1124, 1133 (D. Kan. 2000) (difficult choice still is a choice); Hatmaker v. Ga. Dep't of Transp., 973 F. Supp. 1047, 1053 (M.D. Ga. 1995) ("No one forced the state to seek federal funding, to accept federal participation, or to commence construction of a federal aid highway.") (quoting Named Individual Members of San Antonio Conservation Soc'y v. Tex. Highway Dep't, 446 F.2d 1013, 1028 (5th Cir. 1971)); Missouri v. United States, 918 F. Supp. 1320, 1330 (E.D. Mo. 1996), *vacated on other grounds*, 109 F.3d 440 (8th Cir. 1997) (state's citizens can decide whether to put more money into program); Milwaukee County Pavers Ass'n v. Fiedler, 710 F. Supp. 1532, 1546 (W.D. Wis. 1989) (state can choose to forgo federal highway funding).

252. *Riley*, 106 F.3d at 560 (Secretary of Education threatened to withhold all federal funding for 128,000 students because of Commonwealth's conduct regarding only 126 students). *See also* Clarke v. United States, 915 F.2d 699, 708-9 (D.C. Cir. 1990) (Buckley, J., concurring) (federal statute coercive because it conditioned *all* funding for District of Columbia).

253. Jim C. v. Arkansas, 235 F.3d 1079, 1081-82 (8th Cir. 2000) (en banc), *cert. denied*, 533 U.S. 945 (2001) (no coercion despite dissent's complaint that condition put at risk one hundred percent of $250 million federal funding to education); Kansas v. United States, 214 F.3d 1196, 1198, 1200-02 (10th Cir. 2000) (no coercion even though federal funds in question were 66% of state's program operating costs and 80% of expenses for specific part of program; no coercion even if removal of funding would "devastate state medical system") (citing Oklahoma v. Schweiker, 655 F.2d 401 (10th Cir. 1981); California v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997) (upholding Medicaid conditions despite state's claim that its participation in Medicaid is no longer voluntary, since medical system would collapse without federal funding); *Skinner*, 884 F.2d at 446, 454 (no coercion even though statute conditioned 95% of Nevada's highway funds on state reduction of speed limit); Milwaukee Co. Pavers Ass'n v. Fiedler, 710 F. Supp. 1532, 1535 (W.D. Wis. 1989) (Upholding conditions affecting $200 million of state's $300 million highway budget).

254. Virginia v. United States, 74 F.3d 517, 525 and 926 F. Supp. at 540, 542-43 (rejecting Commonwealth request to develop record re potential loss of $1 billion in federal highway funds).

255. Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000), *cert. denied*, 533 U.S. 945 (2001) (loss of twelve percent of state's education funds would be "painful" but not coercive); Jones v. Wake County Hosp. Sys., Inc., 786 F. Supp. 538, 546 (E.D. N.C. 1991) (no coercion even though federal Medicare funding "essential" to operation of many hospitals).

256. Kansas v. United States, 214 F.3d at 1202 (courts "not suited to evaluating" if state faces offer it cannot refuse or merely "hard choice"; other courts have refused to "enter this thicket") (quoting *Schweiker*, 655 F.2d at 414); Kansas v. United States, 24 F. Supp. 2d 1192, 1198 (D. Kan. 1998) (courts should avoid becoming entangled in coercion

bemoaned the Supreme Court's lack of guidance.[257] For example, while *Dole* did not explain why a threat of losing five percent of a grant was "mild encouragement,"[258] the Ninth Circuit bluntly listed a series of questions that *Dole* did not begin to address:

> Does the relevant inquiry turn on how high a percentage of the total programmatic funds is lost when federal aid is cut-off? Or does it turn, as Nevada claims in this case, on what percentage of the federal share is withheld? Or on what percentage of the state's total income would be required to replace those funds? Or on the extent to which alternative private, state, or federal sources of highway funding are available?[259]

Those questions provide a clue as to the depth of the lower courts' implicit hostility to coercion as a test. Twelve years have passed since the Ninth Circuit asked its questions, but I cannot find a single court that has tried to provide a legal framework in which to answer them. This implicit hostility to coercion also appears in the lower federal courts' attitudes toward developing the facts. Although coercion and duress are fact-intensive doctrines,[260] of the fifty-nine post-*Dole* spending cases I considered in researching this article, forty-one were decided without a trial,[261] and only sixteen said how

issues; coercion test "ill-conceived and probably unworkable . . . ."); *Skinner*, 884 F.2d at 448 ("The difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between the federal and state governments."); Virginia v. United States, 926 F. Supp. at 543 (E.D. Va. 1995) (difficulty of using coercion test creates "serious doubts" whether coercion test is "viable"); Missouri v. United States, 918 F. Supp. 1320, 1330 (E.D. Mo. 1996) (difficult for court to apply coercion test), *vacated on other grounds,* 109 F.3d 440 (8th Cir. 1997).

257. Kansas v. United States, 214 F.3d 1196, 1202 (10th Cir. 2000), *cert. denied,* 531 U.S. 1035 (2000) ("boundary between incentive and coercion has never been made clear"); *Skinner*, 884 F.2d at 448 (state unable to give "principled definition" of "coercion"); Robinson v. Kansas, 117 F. Supp. 2d 1124, 1131 n.6 (D. Kan. 2000) (coercion is just a "buzzword").

258. 483 U.S. at 211-12.

259. *Skinner*, 884 F.2d at 448.

260. *Schweiker*, 655 F.2d at 414; Kansas v. United States, 24 F. Supp. 2d 1192, 1198 (D. Kan. 1998), *aff'd*, 214 F.3d 1196 (10th Cir. 2000) (quoting *Schweiker*, 655 F.2d at 406).

The RESTATEMENT (SECOND) OF CONTRACTS § 176 (1981) asks the court to determine if the victim had a reasonable alternative, if the deal was fair, if the parties were experienced adversaries of relatively equal bargaining power, if the alleged victim had the subjective ability to resist, and if the contract was dictated by general economic forces.

261. Thirty-eight of these involved motions to dismiss or for summary judgment. Three involved reviews of administrative agency decisions, *e.g.*, California v. United States, 104 F.3d 1086, 1089 (9th Cir. 1997); Virginia v. United States, 74 F.3d 517, 519 (4th Cir. 1996); Hou. Auth. of Ft. Collins v. United States, 980 F.2d 624, 626 (10th Cir. 1992); Alabama v. Lyng, 811 F.2d 567, 568 (11th Cir. 1987); *Kansas,* 24 F. Supp. 2d at 1196; United Seniors Ass'n, Inc. v. Shalala, 2 F. Supp. 2d 39, 40 (D.D.C. 1998) *aff'd on other*

much money or what fraction of the federal grant was at stake. Indeed, four courts expressly refused to allow states to develop the factual record needed to establish coercion.[262]

There is, as mentioned above, one case that does come close to granting a state's request to invalidate a condition because of coercion. In *Virginia Department of Education v. Riley*, the U.S. Secretary of Education threatened to withhold $60 million in federal grants intended to educate 128,000 handicapped children, unless the Commonwealth spent $58,000 to privately educate 126 disabled students who had been expelled for behavior unconnected with their disability.[263] The main reason for the *en banc* ruling was *Dole's* clear statement requirement: the Secretary's request was based on a condition inferred from, rather than expressly stated in, the federal statute.[264] But the court also warned that withholding all funds for all disabled students "resembles impermissible coercion, if not forbidden regulation in the guise of Spending Clause condition."[265]

In striking down the condition, the *en banc* court adopted the panel's dissent, which contained a rare effort to define coercion. Judge Luttig said coercion occurs when the federal government "withholds the entirety of a substantial federal grant on the ground that the states refuse to fulfill their federal obligation in some

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grounds, 182 F.3d. 965 (D.C. Cir. 1999).

262. Virginia v. United States, 74 F.3d 517, 525 (4th Cir. 1996) (refusing Commonwealth's offer to "assemble a record" to show impact of conditions on its highway budget and the "macro-economic effect" of sanctions; "Analysis of state economies and state budgets and operations has not been thought necessary to the resolution of Spending Clause claims in the past.") (citing *Dole*, 483 U.S. at 203, 210-11); *Schweiker*, 655 F.2dat 414 ("We therefore follow the lead of other courts that have explicitly declined to enter this thicket when similar funding conditions have been at issue."); *Virginia*, 926 F. Supp. 537, 542 (E.D. Va. 1995) (rejecting Commonwealth's plea to develop factual record; assuming coercion still is viable test, proper forum for factual record is Congress); *Missouri*, 918 F. Supp. at 1328 (court's decision "would be essentially unaffected by further factual development").

263. 106 F.3d at 562. The Department of Education said at oral argument that this responsibility would extend even to a student expelled after being convicted of murder.

264. *Id.* at 561. The court could have avoided the constitutional issue by paying closer attention to the contractual aspect of the grant. The Secretary was trying to suspend performance of the grant/contract, and such suspension is appropriate only when the other side has materially breached. E. ALLEN FARNSWORTH, CONTRACTS 585 (Aspen Law and Business 3d ed.). Virginia had refused to serve 126 out of 128,000 students in the program, less than one-tenth of one percent of the whole, which is far from a material breach. In effect, the Secretary was demanding exact performance, and exact performance is unavailable unless the contract expressly provides for it. RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. d (1982).

265. *Riley*, 106 F.3d at 561.

insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign states."[266]

Obviously, this definition hardly will please opponents of conditional spending, especially spending used to induce immunity waivers. In 1977, Congress obtained the consent of 37 states by threatening a mere ten percent of Medicaid funding,[267] far short of Judge Luttig's "entirety of a substantial federal grant."

In short, after fourteen years of field testing, *Dole's* coercion test has not survived as a test when applied independently of the *Dole* Four. The lower federal courts have not used it to invalidate federal pressure; they have expressly criticized it as a test; they have deliberately refused to engage in the legal and factual analysis it requires. The only court that has tried has presented a definition that imposes almost no limit on Congress. That should tell us a great deal.

4. Conditional Spending and City of Boerne

In 1997, *City of Boerne v. Flores* limited Congressional authority to use the Fourteenth Amendment to abrogate state sovereign immunity.[268] Since then, the Court has used *Boerne* to invalidate other Congressional efforts to abrogate state sovereign immunity.[269] But *Boerne* poses no danger to conditional spending. *Boerne* concerns Congressional use of Section 5 of the Fourteenth Amendment, and twenty years ago, Justice Rehnquist and the Court expressly distinguished between section 5 legislation and legislation adopted under the Spending Power.[270]

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266. *Id.* at 570 (quoting Judge Luttig's dissent in *Riley*, 86 F.3d ay 1356).

267. *See* note 116, *supra.*

268. 521 U.S. 507, 530-32 (1997) (statute using § 5 must have "a congruence between the means used and the ends to be achieved"; legislative history must contain sufficient examples of state violations of rights Congress seeks to protect). In 1976, the Court had said that § 5 of the Fourteenth Amendment authorized Congress to override the Eleventh Amendment. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

269. *See* Bd. Of Trs. of the Univ. of Alabama v. Garrett, 531 U.S. 356, 363-74 (2001) (Americans with Disabilities Act of 1990, § 101 *et seq.*, 42 U.S.C. §12111-117 (2000)); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80-91 (2000) (Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621 *et seq.* (1994 & Supp. III 1997)); Fla. Prepaid Postsecondary Euc. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 645-648 (1999) (Patent and Plant Variety Protection Remedy Clarification Act of 1192, § 2, 35 U.S.C. §§271(h), 296 (2000)).

270. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 15-17 (1981). *See also* Bd. of Educ. of Oak Park v. Kelly E., 207 F.3d 931, 935 (7th Cir. 2000), *cert. denied,* Bd. of Educ. of Oak Park v. Ill. State Bd. of Educ., 531 U.S. 824 (2000).

E. The Older Workers' Rights Restoration Act

In 2001, Senators James M. Jeffords (Ind.-Vt.), Edward M. Kennedy (D-Wisc.), and Russell D. Feingold (D-Wisc.) introduced a bill to override *Kimel v. Florida Board of Regents*[271] by denying federal aid to states that fail to waive immunity to suits for specified violations of the Age Discrimination in Employment Act.[272] The bill has two major problems.

First, it uses the notion of constructive waiver. Instead of requiring a state to affirmatively issue a waiver *before* receiving funds, the bill construes a state's receipt of federal funds as a waiver.[273] The Court buried the remnants of constructive waiver back in 1999.[274] Second, the bill's application to all state workers will violate *Dole's* requirement that the condition be sufficiently related to "the federal interest in particular projects or programs"[275] "reasonably calculated to address [a] particular impediment to a purpose for which the funds" were awarded.[276] Congress bestows federal funds on states for many reasons: caring for the indigent and elderly, building safe highways, and providing education. But a state's discrimination against a sixty-year-old civil engineer on a federal-state highway project is not going to make the highway less safe. That sounds hard-hearted, but the Rehnquist Court is quite willing to uphold hard-hearted state decisions.[277]

The Conditional Spending power provides a powerful weapon for a Congress that wants to override state sovereign immunity regarding federal entitlement programs and education programs. That power provides the ability to protect both the beneficiaries of those programs and the businesses, such as nursing homes, that serve those beneficiaries. But Conditional Spending will not help Congress protect state employees, nor businesses harmed by state patent infringements, state hospital price fixing, or state extortion of preferential transfers from bankrupts trying to fend off private

271. 528 U.S. 62 (2000).

272. Older Workers' Rights Restoration Act of 2001, S. 928, 107th Cong. (2001).

273. *Id.* at § 4 (amending Section 7(g) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626.). *See also* §§ 2(8) and 3(2).

274. Coll. Sav. Bank v. Fla. Prepaid Post Secondary Educ. Expense Bd., 527 U.S. 666 (1999).

275. 483 U.S. at 208.

276. *Id.* at 208-09.

277. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 367-68 (2001) (existing caselaw lets states "quite hard headedly–and perhaps hardheartedly–hold to job discrimination requirements which do not make allowance for the disabled.").

creditors. To deal with those problems, corporate America must look to Justice Scalia's statement that Congress may condition non-monetary benefits on a state's waiver of immunity.[278] That idea is the subject of Part III of this Article.

III. Non-Monetary Benefits *vis-a-vis* State Waivers of Sovereign Immunity

Just as *College Savings Bank* said that the gratuitous nature of the Spending power lets Congress condition monetary grants to states upon waivers of immunity,[279] the gratuitous nature of at least five Article I enumerated powers should let Congress impose similar conditions on grants of non-monetary benefits. In 1959, *Petty v. Tenn.-Mo. Bridge Comm'n* found the Interstate Compact Clause gave Congress such authority.[280] Today, the Copyright and Patent Clauses provide more significant opportunities, and several commentators have urged Congress to similarly use the Bankruptcy Power.[281] Before discussing those, however, I must turn to the Commerce Clause. At first glance, that provision does not appear to contain any benefits that Congress might bestow on states, but it has produced at least two dozen published opinions in which the lower federal courts have assessed the authority of Congress to induce states to waive their immunity. In March 2001, the Supreme Court granted *certiorari* on this very question,[282] but later expressly declined to answer it.[283]

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

279. 527 U.S. 666, 686-87 (1999).

280. 359 U.S. 275, 276-82 (1959).

281. *See* Troy A. McKenzie, Note, *Eleventh Amendment Immunity in Bankruptcy: Breaking the Seminole Tribe Barrier,* 75 N.Y.U. L. REV. 199, 236-40 (2000); Laura B. Bartell, *Getting to Waiver – A Legislative Solution to State Sovereign Immunity in Bankruptcy After Seminole Tribe*, 17 BANKR. DEV. J. 17, 93-102 (2000); Kenneth N. Klee et al., *State Defiance of Bankruptcy Law,* 52 VAND. L. REV. 1527, 1584-91 (1999).

282. *See* Ill. Bell Tel. Co. v. WorldCom Tech., Inc., 179 F.3d 566 (7th Cir. 1999), *cert. granted sub nom.* Mathias v. WorldCom Tech., Inc., 532 U.S. 903 (2001) (certiorari was granted limited to the following questions, among others: "Whether a state commission's acceptance of Congress' invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity.").

The Court later consolidated *Mathias* with *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.,* 533 U.S. 928 (2001), and *United States v. Pub. Serv. Comm'n of Md.,* 533 U.S. 928 (2001). The latter two cases derived from Bell Atlantic Md. Inc. v. MCI WorldCom, 240 F.3d 279 (4th Cir. 2001), which involved the same basic facts and issues as did *Mathias.*

283. Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 2002 U.S. Lexis 3787, 122 S.Ct. 1753, 1760-61 (2002) (since *Ex parte Young,* 209 U.S. 123 (1908), permits plaintiffs to sue individual commissioners in federal court, it is unnecessary to decide if state waived its

Moreover, the Commerce Clause offers Congress the greatest opportunity to protect state employees from the perils of state sovereign immunity. So I shall begin there.

A. The Commerce Clause

1. The Telecommunication Act of 1996

a. Cooperative federalism[284] meets the Eleventh Amendment

What possible benefit can Congress give states under the Commerce Clause? The answer is simple: regulatory authority. I doubt Congress was thinking of state immunity when it adopted the Telecommunications Act of 1996,[285] but the lower federal courts overwhelmingly have recognized that the Act constitutionally offers states a slice of regulatory authority in return for waivers of immunity.

The 1996 Act sprang from decades of federal-state conflicts over telephone service. In 1934, Congress created the Federal Communications Commission (F.C.C.),[286] in part to regulate interstate telephone services,[287] leaving states in charge of *intra*state networks.[288] States gave an exclusive franchise in each local market to a single carrier, who owned the entire local network.[289] But in the 1990s, new technology made competition in local markets possible, and the 1996 Act moved some–though not all–authority over this competition from the states to the F.C.C.[290]

The Act requires local carriers to make their networks available

immunity under Telecommunications Act.).

284. Several courts have applied this term to the Telecommunications Act, *e.g.*, P.R. Tel. Co. v. Telecomm. Regulatory Bd. of P.R., 189 F.3d 1, 8 (1st Cir. 1999); Bellsouth Telecomm. Inc. v. MCImetro Access Transmission Serv., Inc., 97 F. Supp. 2d 1363, 1368 (N.D. Ga. 2000), *rev'd on other grounds,* 278 F.3d 1223 (11th Cir. 2002).

285. Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.A.). The 1996 Act amended the Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.A.).

286. Communications Act of 1934, ch. 652, § 601, 48 Stat. 1064, 1101, § 601 (1934).

287. *Id.* at § 1 (codified as amended at 47 U.S.C. § 151).

288. MCI Telecomm. Corp. v. Pub. Serv. Comm'n of Utah, 216 F.3d 929, 932, (10th Cir. 2000), *citing* the 1934 Act, § 2(b) (codified as amended at 47 U.S.C. § 152), *cert. denied,* Pub. Serv. Comm'n of Utah v. Qwest Communications Int'l Inc., 531 U.S. 1183 (2001).

289. AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 371 (1999).

290. *Id.* at 379 n.6. This ended what Justice Scalia called "the longstanding regime of state-sanctioned monopolies." *Id.* at 371.

to competitors for a fee, which they must negotiate in good faith.[291] If negotiations fail, either side can ask a state commission to arbitrate.[292] However, when the fee is set, by private negotiation or state arbitration, the state commission must then approve or reject the resulting fee agreement.[293] If the commission fails to act, the fee agreement is deemed approved,[294] but the commission loses jurisdiction to the F.C.C.[295] If the state commission acts, an aggrieved carrier may "bring an action in an appropriate Federal district court to determine whether the [fee] agreement... meets the [Act's] requirements."[296] In other words, state commission regulation is subject to federal court review, while a commission that does not regulate that agreement loses all authority over it. The price of state regulatory authority is federal court review.[297]

Unfortunately, the Act did not specify the requirements for aggrieved carriers filing suit in federal court,[298] and many carriers named the state commissions as defendants, implicating state sovereign immunity. But by this time, *Seminole Tribe* had said that the Commerce Clause (the basis for the Telecommunications Act) did not let Congress *abrogate* state sovereign immunity.[299] Aggrieved carriers had only one argument left: the Act had induced states to *waive* their immunity.

b. The pre-*College Savings Bank* decisions

Before *College Savings Bank*, ten federal courts published decisions on the inclusion of a waiver in the Telecommunications Act. Seven ruled against the states.[300] Only three trial judges ruled for a

291. 47 U.S.C. § 251(c)(1) (2000).

292. 47 U.S.C. § 252(b)(1) (2000).

293. 47 U.S.C. § 252(e)(1) (2000).

294. 47 U.S.C. § 252(e)(4) (2000).

295. 47 U.S.C. § 252(e)(5) (2000).

296. 47 U.S.C. § 252(e)(6) (2000).

297. AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 378 (1999).

298. BellSouth Telecomm., Inc. v. MCImetro Access Transmission Serv., Inc., 97 F. Supp. 2d 1363, 1373-74 (N.D. Ga. 2000), *rev'd on other grounds*, 278 F.3d 1223 (11th Cir. 2002); Bell Atlantic-Del., Inc. v. McMahon, 80 F. Supp. 2d 218, 228 n.5 (D. Del. 2000).

299. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

300. MCI Telecomms. v. Ill. Commerce Comm'n 183 F.3d 558, 564-67 (7th Cir. 1999), *vacated and set for rehearing*, 183 F.3d 568 (7th Cir. 1999); MCI Corp. v. Ill. Commerce Comm'n, 168 F.3d 315, 320-23 (7th Cir. 1999); AT&T Communications of Mich. v. Mich. Bell Tel., 60 F. Supp. 2d 636, 639-41 (E.D. Mich. 1998); US West Communications, Inc. v. TCG Or., 35 F. Supp. 2d 1237, 1245 (D. Or. 1998); Mich. Bell Tel. Co. v. MFS Intelenet of Mich., 16 F. Supp. 2d 817, 824-25 (W.D. Mich. 1998) (citing 14 unpublished opinions); US

State,[301] and one of those conceded that at least *eighteen* unpublished cases disagreed with her.[302]

Surprisingly, the pro-waiver courts relied on *Atascadero State Hospital v. Scanlon,*[303] which is usually read as restricting Congressional ability to abrogate Eleventh Amendment immunity.[304] *Atascadero* required Congress to make its intent clear in the statute's text,[305] and its opponents argued that it unfairly allowed States to violate federal law.[306] But the early Telecommunications Act cases used *Atascadero* to infer that Congress *can* abrogate sovereign immunity if it does so with sufficient clarity.[307] Perhaps Congress had

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West Communications v. Pub. Serv. Comm'n of Utah, 991 F. Supp. 2d 1299, 1301-02 (D. Utah 1998); US West Communications, Inc. v. TCG Seattle, 971 F. Supp. 1365, 1368-69 (W.D. Wash. 1997).

301. AT&T Communications of South Central States, Inc. v. BellSouth Telecomms. Inc., 43 F. Supp. 2d 593, 599-602 (M.D. La. 1999), *rev'd,* 238 F.3d 636 (5th Cir. 2001); Wis. Bell v. Pub. Serv. Comm'n of Wis., 27 F. Supp. 2d 1149, 1155-59 (W.D. Wis. 1998); MCI Telecomms. v. BellSouth Telecomms., 9 F. Supp. 2d 766, 770 (E.D. Ky. 1998).

Although the Court has recognized Congressional authority over interconnection agreements, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999), the three trial courts wrongly assumed that the Act infringed on State authority over telephone service. *AT&T Communications of South Central States, Inc.*, 43 F. Supp. 2d at 601-02, *rev'd,* 238 F.3d 636 (5th Cir. 2001); *Wis. Bell*, 27 F. Supp. at 1158; *MCI Telecomms.*, 9 F. Supp. 2d at 770. The Court in *MCI* conceded that Congress had authority to impose the Act's condition if it did so with sufficient clarity. *Id.*

302. *Wis. Bell*, 27 F. Supp. 2d at 1157.

303. 473 U.S. 234 (1985).

304. *E.g., id.* at 255 (Brennan, J., dissenting) (majority opinion "tightens the noose" by excluding use of legislative history); PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 850 (Univ. Casebook Series 1998) (*Atascadero* lifted "'clear statement' test to new heights").

305. *Atascadero*, 473 U.S. at 242 (Congress can abrogate Eleventh Amendment immunity only if it makes its intent to do so "unmistakably clear in the language of the statute . . . ."). Two earlier cases had suggested that it might be enough if Congress manifested its intent in the statute's legislative history. *See* Hutto v. Finney, 437 U.S. 678, 698 & n.31 (1978) (42 U.S.C. § 1988 abrogates Eleventh Amendment because of "history focusing directly on the question of state liability"); Quern v. Jordan, 440 U.S. 332, 345 (1979) (42 U.S.C. § 1983 does not abrogate the Eleventh Amendment because it "does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the State; nor does it have a history which focuses directly on the question of state liability.").

306. *Atascadero,* 473 U.S. at 255-57 (Brennan, J., dissenting) (clear statement requirement inconsistent with federal court duty to provide fair and impartial forum to enforce law).

307. MCI Telecomms. v. Ill. Commerce Comm'n, 183 F.3d 558, 565 (7th Cir. 1999), *vacated and set for rehearing*, 183 F.3d 568 (7th Cir. 1999), *aff'd,* MCI Telecomms. Corp. v. Ill. Bell Tel. Co., 222 F.3d 323, *cert. denied,* Pub. Serv. Com'n of Wis. v. Wis. Bell, Inc., 531 U.S. 1132 (2001), *cert. denied,* Ill. Commerce Comm'n v. MCI Telecomms. Corp., 531 U.S. 1132 (2002); MCI Corp. v. Ill. Commerce Comm'n, 168 F.3d 315, 321 (7th Cir. 1999);

found a way around State sovereign immunity. But how would *College Savings Bank* affect the situation?

c. The post-*College Savings Bank* cases

College Savings Bank's denunciation of constructive waivers[308] created major problems for carriers attacking State commission decisions, for the Telecommunication Act cases looked suspiciously like the objects of Justice Scalia's wrath. A State can waive its immunity only by a "clear declaration,"[309] such as a statute that expressly mentions immunity. But in the Telecommunication Act cases, State legislatures had not spoken. Instead, State commissions allegedly had waived immunity by *acting,* by exercising jurisdiction over a local exchange fee dispute. They had not clearly stated a waiver; at best, they had constructively waived immunity. And *College Savings Bank* obliterated the constitutionality of constructive waivers.[310]

The implications for the Telecommunications Act cases were obvious, if frustrating.[311] The Sixth Circuit reacted by sidestepping the issue, interpreting carrier appeals of State commission decisions as claims for injunctive relief, as permitted under *Ex parte Young*.[312] But

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AT&T Communications of Mich. v. Mich. Bell Tel., 60 F. Supp. 2d 636, 641 (E.D. Mich. 1998); US West Communications, Inc. v. TCG Or., 35 F. Supp. 2d 1237, 1245 (D. Or. 1998) (also relying on New York v. United States, 505 U.S. 144, 162, 167 (1992)); Mich. Bell Tel. Co. v. MFS Intelenet of Mich., 16 F. Supp. 2d 817, 825 (W.D. Mich. 1998); MCI Telecomms. v. BellSouth Telecomms., 9 F. Supp. 2d 766, 770 (E.D. Ky. 1998); US West Communications v. Pub. Serv. Comm'n of Utah, 991 F. Supp. 2d 1299, 1301 (D. Utah 1998).

Another case, US West Communications, Inc. v. TCG Seattle, 971 F. Supp. 1365, 1368-69 (W.D. Wash. 1997), cited a Ninth Circuit opinion, Premo v. Martin, 119 F.3d 764, 768 (9th Cir. 1997), which was based on *Atascadero*, 473 U.S. at 238.

308. 527 U.S. at 674-85.

309. Edelman v. Jordan, 415 U.S. 651, 673 (1974) (quoting Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944)). *See also* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984) (state must "unequivocally" express waiver).

310. 527 U.S. at 680-84, *overruling* Parden v. Terminal R.Y. Co. of Ala. Docks Dep't., 377 U.S. 184, 192 (1964).

311. A Seventh Circuit panel had decided *MCI Telecomms. v. Ill. Commerce Comm'n,* 183 F.3d 558 (7th Cir. 1999), considered a request for rehearing, 183 F.3d at 560 n.2, and amended its opinion, only to release it on the same day that *College Savings Bank* appeared.

312. GTE North, Inc., v. Strand, 209 F.3d 909, 922 n.6 (6th Cir. 2000), *cert. denied sub nom.* Strand v. Verizon North Inc., 531 U.S. 957 (2000); Mich. Bell Tel. v. Climax Tel., 202 F.3d 862, 867 n.2 (6th Cir. 2000), *cert. denied sub nom.* Strand v. Mich. Bell Tel. Co., 531 U.S. 816 (2000). *See also* Ohio Bell Tel. Co. v. ICG Telecom Group, Inc., 2000 WL 1469356 at *3 (S.D. Ohio. Sept. 29, 2000) (*Ex parte Young* permits federal suit, regardless

other courts read *all* of Justice Scalia's opinion and reached his distinction between gratuities and constructive waivers.[313] As I discussed earlier, Justice Scalia said Congress could condition gratuities upon a waiver of immunity, using the Interstate Compact and Spending Clauses as examples. And someone–I would dearly love to know who–realized that the Telecommunication Act could be read as bestowing a gratuity under the Commerce Clause: regulatory power. In the name of cooperative federalism, Congress had seized control of local telephone exchange competition and then offered the States a slice of that control–if the States would submit to federal judicial review. The Third,[314] Fifth,[315] Seventh,[316] and Tenth Circuits[317] and at least four district courts agreed and ruled against the States,[318] while the Eighth Circuit decided to let the trial courts confront the issue.[319] Only the Fourth Circuit[320] and two district judges[321] persisted

of waiver's validity and *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 112 F. Supp. 2d 1286, 1289 n.4 (N.D. Fla. 2000)).

313. 527 U.S. at 686-87.

314. MCI Telecomms. Corp. v. Bell Atlantic-Pa., 271 F.3d 491, 503-11 (3d Cir. 2001); Bell-Atlantic v. Penn. Pub. Util. Comm'n, 273 F.3d 337, 341 (3d Cir. 2001).

315. ATT Communications v. BellSouth Telecomms., Inc., 238 F.3d 636, 643-47 (5th Cir. 2001).

316. MCI Telecomms. Corps. v. Ill. Bell Tel. Co., 222 F.3d 323, 338-44 (7th Cir. 2000), *cert. denied sub nom.* Pub. Serv. Comm'n of Wis. v. Wis. Bell, Inc., 531 U.S. 1132 (2001), and Ill. Communications Comm'n v. MCI Telecomms. Corps., 531 U.S. 1132 (2001); Ill. Bell Tel. Co. v. Worldcom Tech., 179 F.3d 566, 571 (7th Cir. 1999), *aff'd on other grounds,* Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 2002 U.S. Lexis 3787, 122 S.Ct. 1753, 1760-61 (May 20, 2002).

317. MCI Telecomms. Corp. v. Pub. Serv. Comm'n of Utah, 216 F.3d 929, 935-39 (10th Cir. 2000), *cert. denied sub nom.* Pub. Serv. Comm'n of Utah v. Qwest Communications Int'l Inc., 531 U.S. 1183 (2001).

318. Bell Atlantic-Penn., Inc. v. Penn. Pub. Util. Comm'n, 107 F. Supp. 2d 653, 660-62 (E.D. Pa. 2000); AT&T Communications of the Southwest Inc., v. Southwestern Bell Tel., 86 F. Supp. 2d 932, 946-47 (W.D. Mo. 1999), *rev'd in part, vacated in part,* Southwestern Bell Co. v. Mo. Pub. Serv. Comm.'n, 236 F.3d 922 (8th Cir. 2000); Bell Atlantic-Del., Inc. v. McMahon, 80 F. Supp. 2d 218, 231-32 (D. Del. 2000); Bell-Atlantic-Del. v. Global NAPS South, 77 F. Supp. 2d 492, 499-500 (D. Del. 2000).

319. Southwestern Bell Tel. Co. v. Connect Communications Corp., 225 F.3d 942, 948-49 (8th Cir. 2000).

320. Bell Atlantic Md., Inc. v. MCI Worldcom, Inc., 240 F.3d 279, 287-94 (4th Cir. 2001), *rev'd on other grounds, sub nom.* Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 2002 U.S. Lexis 3787, 122 S.Ct. 1753 (May 20, 2002).

321. BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., 97 F. Supp. 2d 1363, 1368-75 (N.D. Ga. 2000), *rev'd on other grounds,* 278 F.3d 1223 (11th Cir. 2002); Wis. Bell v. Pub. Serv. Comm'n, 57 F. Supp. 2d 710, 715 (W.D. Wisc. 1999). Both courts declined to recognize that Congress legitimately had assumed all regulation of the interstate component of local exchange carriers and their competition. *See BellSouth*, 97 F. Supp. 2d at 1372 (Telecommunications Act coerces states by conditioning state

in ruling for the States.

The most important aspect of these cases is their near-unanimous recognition that if Congress speaks with sufficient clarity, it can trade some of its regulatory authority to States in return for a waiver. At the appellate level, only the Sixth Circuit has disagreed, using all of three sentences.[322] The Fourth Circuit did not address this issue; instead, it used Congress's failure to clearly state an intent to impose conditions.[323]

This summer, in *Verizon Maryland Inc., v. Public Service Commission of Maryland,* the Court expressly declined to decide whether Congress can trade some of its regulatory authority over commerce in return for a State's waiver of sovereign immunity.[324] Instead, the Court found that telecommunications companies who appealed a State commission decision to federal court were suing the individual state commissioners, rather than the commission itself.[325] Such suits against individual state officers, of course, are permitted under *Ex parte Young.*[326] *Verizon's* practical effect is to leave in place

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regulation of traditional state area); *Wis. Bell,* 57 F. Supp. 2d at 712, 715.

322. *GTE North, Inc.,* 209 F.3d at 922 n.6.

323. *Bell Atlantic Md.,* 240 F.3d at 292-93. Earlier, a trial judge had made the same argument. *See* AT&T Communications of the South Central States v. BellSouth Telecomms., Inc., 43 F. Supp. 2d 593, 599, 601 (M.D. La. 1999), *rev'd,* 238 F.3d 636 (5th Cir. 2001).

324. 2002 U.S. Lexis 3787, 122 S.Ct. 1753, 1760-61 (May 20, 2002). *Id.*

325. *Id.*

326. *Id.* at 1760, *citing Ex parte Young,* 209 U.S. 123 (1908).

Ex parte Young saved the Telecommunication Act from the difficult task of making Congressional intent to abrogate state sovereign immunity "unmistakably clear" in the text of the statute. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985). *See also AT&T Communications,* 238 F.3d at 644 (Congress must put state "on notice clearly and unambiguously by the federal statute") (citing *Coll. Sav. Bank,* 527 U.S. at 675-87); *MCI Telecomms.,* 222 F.3d at 340 (Congress must "speak with a clear voice" when asking State to waive sovereign immunity) (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)). *South Dakota v. Dole* imposes a similar requirement of clarity, when Congress conditions federal funds on a state taking certain action. 483 U.S. at 207 (1987).

The Telecommunication Act fails this clear notice requirement in two ways. Subsection 252(e)(4) says, "No State court shall have jurisdiction to review the action of a State commission;" subsection 252(e)(6) says that an appeal from a state commission's decision shall be by "an action in an appropriate Federal district court." Neither subsection requires an appealing carrier to name as defendants the state commission or commissioners who ruled on the fee disputes. *Bell Atlantic-Md.,* 240 F.3d 279, 290-91 (4th Cir. 2001), *aff'd on other grounds,* Verizon Md. Inc., v. Pub. Serv. Comm'n of Md., 2002 U.S. Lexis 3787, 122 S.Ct. 1753, 1760-61 (May 20, 2002); BellSouth Telecomms. v. MCIMetro Access Transmission Servs., Inc., 97 F. Supp. 2d 1363, 1373-75 (N.D. Ga. 2000) (Section 252(e) "remains altogether silent" as to whether state commissions are parties in federal litigation), *rev'd on other grounds,* 278 F.3d 1223 (11th Cir. 2002); Bell Atlantic-

the Telecommunication Act's system of trading federal regulatory authority in return for waivers of State immunity, and this result provides Congress with opportunities whose constitutionality will not hide behind *Young*.

2. Other uses of the Commerce Clause

The Telecommunication Act cases suggest that Congress can trade federal regulatory authority for State waivers of immunity in two other areas.

The first concerns employment discrimination, where the Court repeatedly has invalidated Congressional efforts to abrogate State sovereign immunity. Currently, federal law provides that an employee can not file discrimination charges with the federal Equal Employment Opportunity Commission without first giving a State administrative agency sixty days to resolve the dispute.[327] This gives a

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Del., Inc. v. McMahon, 80 F. Supp. 2d 218, 228 n.5 (D. Del. 2000).

A more significant problem is that neither subsection mentions sovereign immunity or the Eleventh Amendment. The Court has not always insisted that Congress use precisely the same ritual incantations to override state sovereign immunity. *Compare* Edelman v. Jordan, 415 U.S. 651, 673 (1974) (requiring "the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction") (quoting from Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (requiring Congress to make intention "clear in the language of the statute."); and *Seminole Tribe*, 517 U.S., at 56 ("unmistakably clear in the language of the statute") (quoting Dellmuth v. Muth, 491 U.S. 223, 227-28 (1989)). *See also* Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 474 (1987) ("unmistakable statutory language"). In *Seminole Tribe,* the Court stretched the "unmistakably clear in the language of the statute" requirement to include a statute that repeatedly referred to the States as if they were defendants in federal court. *See* 517 U.S. at 56-57 (analyzing the Indian Gaming Regulation Act, 25 U.S.C. § 2710(d)(7)(B)(ii)(II) (if Plaintiff Tribe meets its burden of proof, then "burden of proof shall be upon the State . . . ."), § 2710(d)(7)(B)(iii) (permitting federal court to "order the State"), and § 2710(d)(7)(B)(iv) & (v) (state must "submit" to mediator or federal court)).

But the Telecommunication Act identifies neither state commissions or commissioners as defendants. The Fourth Circuit relied heavily on this flaw in invalidating the Act. *Bell Atlantic-Md.,* 240 F.3d at 292-93 (4th Cir. 2001), *rev'd on other grounds,* Verizon Md. Inc., v. Pub. Serv. Comm'n of Md., 2002 U.S. Lexis 3787, 122 S.Ct. 1753, 1760-61 (May 20, 2002). The Seventh Circuit argued that § 252's *structure* made clear that Congress intended to provide for federal court review of state commission decisions, MCI Telecomms., 222 F.3d at 341, and the Fifth and Third Circuits agreed. *AT&T Communications,* 238 F.3d at 646-47; *MCI Telecomms.,* 271 F.3d at 512-13 (3rd Cir. 2001). The Tenth Circuit did not explain its conclusion that § 252 provided sufficiently clear notice. *MCI Telecomms.*, 216 F.3d at 938 (10th Cir. 2000).

Even if the Act does provide states with sufficient notice, there is the question as to whether a state commission on telecommunications has the authority to waive the state's immunity. *See AT&T Communications of South Central States, Inc.,* 43 F. Supp. 2d at 600.

327. 42 U.S.C. § 2000e-5(c) (1994). Congress intended to "screen from the federal

State some regulatory authority, just as the Telecommunication Act does. Congress could adopt this mechanism for other civil rights statutes, but States would get the opportunity to resolve an employment discrimination case only if it had waived its own immunity to suits regarding employment discrimination.

Environmental protection provides a similar opportunity. Currently, in some areas Congress gives States a choice. If a State adopts a regulatory program that meets federal guidelines, that State (and not the federal government) will have sole enforcement authority; in States without such a program, federal regulation and enforcement will preempt State law.[328] This seems to be a grant of regulatory authority similar to that provided by the Telecommunications Act. Indeed, such an argument has been made to the Fourth Circuit in the context of the Surface Mining Control and Reclamation Act of 1977,[329] under which the federal government offers States the choice between federal regulation of strip mines or exclusive State regulation, as long as the State adopts and enforces standards at least as strict as the federal government's.[330] The Fourth Circuit rejected the argument, but only because the relevant federal statute had not unequivocally and clearly warned States that submitting a program for federal approval would waive their immunity.[331]

The use of induced waivers in employment discrimination and environmental matters is significantly different from the

courts those problems of civil rights that could be settled to the satisfaction of the grievant in a 'voluntary and localized manner.'" *See* 110 CONG. REC. 12725 (1964) (remarks of Sen. Humphrey). The section is intended to give state agencies a limited opportunity to resolve problems of employment discrimination and thereby make it unnecessary to resort to federal relief by victims of the discrimination. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755 (1979). *See also* Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820, 825 (1990) ("The first hiatus is designed to give state administrative agencies an opportunity to invoke state rules of law.").

328. New York v. United States, 505 U.S. 144, 167-69 (1992) (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981)). Justice O'Connor pointed to the Clean Water Act, 86 Stat. 816, *as amended,* 33 U.S.C. § 1251, *et seq.*; the Resource Conservation and Recovery Act of 1976, 90 Stat. 2796, as amended 42 U.S.C. § 6901, *et seq.*; and the Alaska National Interest Lands Conservation Act, 94 Stat. 2374, 16 U.S.C. § 3101, *et seq. Id.* at 167-169.

329. 30 U.S.C. § 1201, *et seq.* (2000).

330. *See* Bragg v. West Virgina, 248 F.3d 275, 288-90, 293-95 (4th Cir. 2001) (describing statute's mechanics); *cert. denied,* 534 U.S. 1113 (2002).

331. *Id.* at 298-99. Instead, the act's citizen suit provision explicitly says it permits suits against states only to the extent permitted by the Eleventh Amendment. 30 U.S.C. § 1270(a)(2) (1982).

Telecommunications Act in one major way. An aggrieved carrier who names a State commission as a defendant does so only to enable the federal court to enjoin the State commission's order. If the federal court finds that a State commission wrongly approved or rejected an interconnection agreement, no State funds are at risk: the underlying dispute was between the two litigating carriers, one of whom may be liable for damages. But what if a State preserves the authority of its own equal employment commission by waiving its immunity in matters of employment discrimination? Some of the appeals from the commission to a federal court will involve disputes in which the State is the underlying defendant, and State funds will be at risk. That would create a classic conflict with the Eleventh Amendment.[332] Similarly, if Congress traded authority to regulate the environment in exchange for a State waiver of immunity in employment disputes, that State's treasury might also be at risk.[333] Unlike *Verizon, Ex parte Young's* tolerance of suits for injunctive relief against individual state officials will not provide an escape hatch.

B. The Copyright and Patent Clauses

1. The problem

Since we know that States can infringe intellectual property rights without fear of monetary liability,[334] the question arises whether

332. Ford Motor Co. v. Dep't. of Treasury of Ind., 323 U.S. 459, 464 (1945).

333. *See, e.g.,* Pennsylvania v. Union Gas Co., 491 U.S. 1, 5-6 (1989) (suit against Commonwealth, which had owned hazardous waste site, for monetary relief under Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601, *as amended* by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613).

334. *See* Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 634-38 (1999) (invalidating §§ 271(a) and 296(a), Patent and Plant Variety Protection Remedy Clarification Act); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666 (1999) (Trademark Remedy Clarification Act did not abrogate state immunity, nor did state's participation in interstate commerce waive such immunity).

The lower federal courts have split. Some ruled against the states. Mills Music, Inc. v. Arizona, 591 F.2d 1278, 1285 (9th Cir. 1979) (copyright statute, 17 U.S.C. § 101, abrogated state immunity), *disapproved by* BV Eng'g v. U.C.L.A., 858 F.2d 1394, 1397 n.1 (9th Cir. 1988); Genentech, Inc. v. Regents of the Univ. of Cal., 143 F.3d 1446, 1453 (Fed. Cir. 1998) (state's institution of patent infringement action against private defendant constructively waived state's immunity to counterclaim), *vacated and remanded,* 527 U.S. 1031 (1999); New Star Lasers v. Regents of Univ. of Cal., 63 F. Supp. 2d 1240, 1244 (E.D. Cal. 1999) (patent is gift or gratuity bestowed by federal government, so state waived immunity when applied for patent); and McGuire v. Univ. of Mich., No. 2:99CV1231, 2000 WL 1459435, at *3-5 (S.D. Ohio, Sept. 21, 2000) (university's application for trademark waived immunity).

copyrights, patents, and trademarks may be considered the type of gratuities described in *College Savings Bank*? The answer depends on whether an author or inventor has a property right to such protection. The text of Art. I, Section 8, Clause 8 gives a clear answer when it says Congress "shall have Power . . . To 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."[335] This language gives power but does not mandate its use by Congress. Nor does it indicate that an author or inventor has an inherent property right in her work.[336] Unlike Article IV, Section 2, Clause 1, which says "The Citizens of each State *shall be entitled to* all Privileges and Immunities of Citizens in the several States," the intellectual property clause does not recognize that any author or inventor is entitled to anything.[337]

The clause's history reinforces this point. According to Edward C. Walterscheid, English and American common law both said that an inventor had no right to protection,[338] and the Supreme Court agreed in 1834.[339] As Walterscheid describes, the issue of an author's right was more controversial. In 1769, the King's Bench had said the author had a common law right to protection,[340] but the House of Lords reached the opposite conclusion in 1774.[341] Some Founders considered copyright a matter of right;[342] but in 1834, the Supreme

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Others dismissed claims against the states. BV Eng'g v. U.C.L.A., 858 F.2d 1394, 1395, 1396-1400 (9th Cir. 1988) (state did not waive immunity to copyright suits, nor could Congress in Copyright Act of 1976 validly abrogate state immunity); Lane v. First Nat'l Bank of Boston, 871 F.2d 166, 168-72 (1st Cir. 1989) (Copyright Act of 1976 did not include language sufficiently clear to abrogate state immunity); Rodriquez v. Tex. Comm'n on the Arts, 199 F.3d 279, 281 (5th Cir. 2000) (*Fla. Prepaid* invalidation of Congressional protection of patents also applies to copyrights).

337. U.S. CONST. art. I, § 8, cl. 8.

336. EDWARD C. WALTERSHEID, TO PROMOTE THE PROGRESS OF USEFUL ARTS: AMERICAN PATENT LAW AND ADMINISTRATION, 1798-1836, 70 (Fred B. Rothman & Co., 1998).

337. U.S. CONST. art. IV, § 2, cl. 1.

338. *Id.* at xi. Chief Justice Marshall agreed. Evans v. Jordan, 2 F. Cas. 872, 873 (C.C.D. Va. 1813) (No. 4564), *quoted by* WALTERSHEID, *supra* note 335, at 74.

339. Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 658 (1834).

340. Miller v. Taylor, 4 Burr. 2303, 98 Eng. Rep. 201, *cited in Wheaton*, 33 U.S. (8 Pet.) at 665.

341. Donaldson v. Beckett, 4 Burr. 2408, 98 Eng. Rep. 257 (1774), *cited in Wheaton*, 33 U.S. (8 Pet.) at 655-56. For a discussion, *see* MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT, §§ 4.02[A] & [B], at 4-11 to 4-14.1 (Mathew Bender & Co., Inc. 2001).

342. WALTERSHEID, *supra* note 335, at 71 (quoting Annals of Congress (2d Cong., 2d

Court firmly said that neither author nor inventor had a common law right to protection,[343] and that copyrights and patents were rights which Congress could create, if it chose.[344] The Court left no doubt where patents and copyrights would later fall under Justice Scalia's test:

> This right, as has been shown, does not exist at common law–it originated, if at all, under the acts of Congress. No one can deny that when the legislature are about to vest an exclusive right in an author or inventor, *they have the power to prescribe the conditions on which such right shall be enjoyed* . . . . This principle is familiar, as it regards patent rights; and it is the same in relation to the copyright of a book.[345]

2. The legislative solution

Now pending before both houses of Congress is the Intellectual Property Protection Restoration Act of 2001.[346] The bill would bar States from obtaining remedies on patents, copyrights, and trademarks issued after Jan. 1, 2002, unless the State proved that before the infringement began, it had waived its immunity to similar suits and that the waiver has continued in effect since then.[347] States would have until Jan. 1, 2004 to adopt their waivers.[348] The bill would apply to any patent that a State or State instrumentality had ever owned, thereby preventing the States from evading the law by selling the patent to a private party.[349] The bill also would allow intellectual property holders to sue State officials for monetary relief in cases where a State's infringement of intellectual property rights amounted to a denial of due process or to a taking of private property.[350]

The proposal has several strengths. It requires a State to affirmatively declare that it is waiving its immunity, and that requirement should eliminate the constructive waiver problem of *College Savings Bank.* It gives States the burden of proving whether or not they have waived immunity, eliminating the need for the lower

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Sess.) 855 (1793) (Remarks of Rep. William Murray) (patents are matter of right)).

343. *Wheaton,* 33 U.S. (8 Pet.) at 654-661.

344. *Id.* at 654-662.

345. *Id.* at 663-64 (emphasis added).

346. H.R. 3204, 107th Cong. (1st Sess. 2001); S. 1611, 107th Cong. (1st Sess. 2001). A similar bill was introduced in 1999. *See* S. 1835, 106th Cong. (1st Sess. 1999).

347. H.R. 3204, 107th Cong. § 3(a)-(c) (2001).

348. *Id.*

349. *Id.* (there is an exception, however, for *bona fide* patent purchasers who neither knew nor had reason to know that a State had once owned the patent).

350. *Id.* at § 5(a),(b).

federal courts to inform the U.S. Justice Department every time a State invokes immunity regarding intellectual property. It limits a waiver's scope to federal intellectual property matters, making its condition far more germane than the condition involved in *South Dakota v. Dole.* It expressly discusses sovereign immunity, satisfying *Atascadero's* requirement of an "unambiguously clear" statute. And it gives a State that invokes immunity an opportunity to change its mind.[351] The bill may face strong political opposition, but if Congress adopts it, I cannot foresee it would encounter any State sovereign immunity problems.

C. The Bankruptcy Clause

1. The power and the problem

The Bankruptcy Clause gives Congress the power "[t]o establish. . .uniform Laws on the subject of Bankruptcies throughout the United States."[352] Congressional power in this area is "unrestricted and paramount."[353] But State sovereign immunity has created major problems for the nation's bankruptcy system. In general, a State's immunity enables it to seize and retain the debtor's property at the expense of even secured creditors.[354] If a State pressures a bankrupt to pay his taxes before the bankruptcy court can distribute his assets, sovereign immunity will prevent his creditors or the bankruptcy trustee from reclaiming such a preferential transfer,[355] because reclamation would require taking money from the State treasury.[356] If a bankruptcy petition has been filed, so that an automatic stay protects the debtor's property, and a State still seizes that property,[357] sovereign immunity will prevent the bankruptcy court

351. *Id.* at § 112(b)(2).

352. U.S. CONST., art. I, § 8, cl. 4.

353. Or at least it was in 1929. *Compare* Int'l Shoe Co. v. Pinkus, 278 U.S. 261, 265 (1929) and New York v. Irving Trust Co., 288 U.S. 329, 333 (1933) (congressional power is "supreme") with *Seminole Tribe,* 517 U.S. at 73 n.16 ("[n]o established tradition" of federal court enforcement of bankruptcy statutes against states).

354. For a list of state conflicts with the bankruptcy system, *see* Laura B. Bartell, *Getting to Waiver–A Legislative Solution to State Sovereign Immunity in Bankruptcy after* Seminole Tribe, 17 BANKR. DEV. J. 17, 39 n.134 (2000); and cases cited.

355. The Bankruptcy Code permits a trustee to "avoid" and recover any preferential transfer a bankrupt (or near bankrupt) makes to any creditor, 11 U.S.C. § 547(b) (2000).

356. Ford Motor Co. v. Dep't of Treasury of Ind., 323 U.S. 459, 464 (1945).

357. 11 U.S.C. § 362 (2002) (creating automatic stay).

from acting.[358] Indeed, even if a bankruptcy court distributes a bankrupt's assets and discharges her debts, it is not clear what action the bankrupt can take to force a State to honor that order.

The Bankruptcy Act of 1978[359] attempted to address these problems. It said that a State waived its immunity when it filed a proof of claim against a bankrupt's estate:[360] in effect, that provision offered a State access to the federal bankruptcy proceedings in return for a waiver of its immunity. The Act also abrogated the sovereign immunity of "any governmental unit,"[361] albeit without any *quid pro quo*. That general abrogation clause fell in 1989 because it did not clearly declare Congress' intent to abrogate State immunity.[362]

In response, the Bankruptcy Reform Act of 1994 replaced the 1978 Act's insufficiently clear clause with Section 106(a), which said that "sovereign immunity is abrogated as to a governmental unit" in regard to sixty sections of the Code.[363] But three years later, *Seminole Tribe of Fla. v. Fla.* held that Congress lacked authority under the Indian Commerce Clause to abrogate State immunity,[364] and that case's *dicta* on the Bankruptcy Clause[365] persuaded some lower courts to invalidate the new Section 106(a).[366] And in 1999, *College Savings Bank's* denunciation of constructive waivers[367] may have killed

358. *Ford Motor Co.*, 323 U.S. at 464.

359. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended in scattered sections of 11 U.S.C.).

360. 11 U.S.C. § 106(a) (1998) (amended 1994). If the state owed the bankrupt any money, § 106(b) of the Act let the trustee setoff that amount against any taxes the bankrupt owed the state.

361. 11 U.S.C. § 106(c) (1998) (amended 1994).

362. Hoffman v. Conn. Dep't. of Income Maint., 492 U.S. 96, 101-04 (1989).

363. Pub. L. No. 103-394, 108 Stat. 4106, § 113(a) (1994), 11 U.S.C. § 101(27) included states in the meaning of "governmental unit."

364. 517 U.S. 44, 47 (1997).

365. *Id.* at 72 n.16 ("it has not been widely thought" that the Bankruptcy Code abrogated the states' sovereign immunity, nor is there an "established tradition" of enforcing Bankruptcy Code provisions against the states.).

366. Sacred Heart Hosp. of Norristown v. Penn. Dep't of Pub. Welfare (*In re* Sacred Heart Hosp. of Norristown), 133 F.3d 237, 242-45 (3rd Cir. 1998); Schlossberg v. Maryland (*In re* Creative Goldsmiths of Washington, D.C., Inc.), 119 F.3d 1140, 1144-47 (4th Cir. 1997), *cert. denied sub nom.* Schlossburg v. Md. Comptroller of Treasury, 523 U.S. 1015 (1998); La. Dep't of Transp. & Dev. v. PNL Asset Mgmt. Co. (*In re* Fernandez), 123 F.3d 241, 243-44, 246 (5th Cir. 1997), *amended on denial of rehearing*, 130 F.3d 1138 (1997); Mueller v. Idaho (*In re* Mueller), 211 B.R. 737, 740-41 (Bankr. D. Mont. 1997); 2 COLLIER, WILLIAM MOORE, COLLIER ON BANKRUPTCY, § 106.02[1]106-6 (Alan N. Resnick & Henry J. Summer eds., 15th ed rev. 2001).

367. 527 U.S. at 676-86.

Section 106(b), which says that a government's filing of a proof of claim in a bankruptcy case "is deemed to have waived" immunity regarding any claims against it that arose from the same transaction.[368]

In short, the law has changed since 1912, when the Supreme Court said federal bankruptcy laws took "into consideration, we think, the whole range of indebtedness of the bankrupt, national, state, and individual, and assigns the order of payment."[369] A leading bankruptcy treatise observes "the consequences of *Seminole Tribe* seem to overwhelm the established balance among creditors by placing state taxing authorities outside the jurisdiction of bankruptcy court. . . ."[370] While the treatise does suggest that bankruptcy courts can enter discharge orders,[371] the heading to that chapter is quite revealing: "Discharge Orders and Confirmation Orders Continue to Be Effective But Are Not Enforceable Against States."[372] Meanwhile, federal courts have ruled that States are immune from liability for violating the Bankruptcy Code's automatic stay and discriminatory treatment provisions.[373]

368. 2 COLLIER, WILLIAM MOORE, COLLIER ON BANKRUPTCY, § 106.02[3] at 106-12; Terence K. Goebel, Comment, *Obtaining Jurisdiction Over States in Bankruptcy Proceedings After Seminole Tribe,* 65 U.CHI. L. REV. 911, 919 (1998) (citing *In re Creative Goldsmiths of Washington, D.C., Inc.,* 119 F.3d 1140, 1147-48 (4th Cir. 1998) (holding unconstitutional Congressional attempt to make State conduct a waiver.); *AER-Aerotron, Inc. v. Tex. Dep't of Transp.,* 104 F.3d 677, 681 (4th Cir. 1997) ("[p]ower to define waiver" can be "functional equivalent of the power to abrogate.").

369. Guarantee Title & Trust Co. v. Title Guar. & Sur. Co., 224 U.S. 152, 160 (1912).

370. 2 COLLIER, WILLIAM MOORE, COLLIER ON BANKRUPTCY, § 106.03[1][a] at 106-17 (Alan N. Resnick & Henry J. Summer eds., 15th ed rev. 2001).

371. 2 COLLIER, WILLIAM MOORE, COLLIER ON BANKRUPTCY, § 106.03[1][b] at 106-17 (Alan N. Resnick & Henry J. Summer eds., 15th ed rev. 2001), *citing* Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777, 786-87 (4th Cir. 1997) (confirmation order bound state taxing authorities because it was not part of suit against a state); Texas v. Walker, 142 F.3d 813, 822 (5th Cir. 1998), *cert. denied,* 525 U.S. 1102 (1999) (discharge order may be raised as affirmative defense in action brought by state against debtor).

372. 2 COLLIER, WILLIAM MOORE, COLLIER ON BANKRUPTCY, 106.03[1][b], at 106-17. The treatise also warns that legislation under the 14th Amendment to abrogate state sovereign immunity "may become necessary" if states refuse to recognize bankruptcy actions. Section 106.03[4], at 106-22, 23.

373. *In re Straight,* 248 B.R. 403 (Bankr. 10th Cir. 2000) (dismissing action by debtor for profits lost after state revoked certificate for company doing business withstate); *In re* Burkhardt, 220 B.R. 837, 841-44 (Bankr. D. N.J. 1998) (bankruptcy court could not hear debtor's suit against state for revoking his driver's license because of judgments and fines bankruptcy court had discharged.); *In re* Christensen, 167 B.R. 213, 217-18 (Bankr. D. Or. 1994) (state immune from damages even for deliberate violation of discharge order).

2. A judicial solution

Drawing on the work of attorney Leonard Gerson,[374] the Sixth Circuit's Bankruptcy Appeals Panel determined in 2001 that States ceded their sovereignty when they agreed to the Constitution's Bankruptcy Clause.[375] *In re Hood* argues:

(1) the first Bankruptcy Act was prompted by a desire to override State use of imprisonment for debt and the uncertainty caused by debtors' relief statutes of various States;[376]

(2) the Bankruptcy Clause's provision for national uniformity is identical to that of the Naturalization Clause, which Hamilton said overrode State sovereignty;[377]

(3) the Bankruptcy Clause lets Congress impair the obligation of contracts, while Art. I, §10 prohibits States from taking similar action;[378]

(4) a dozen Supreme Court opinions recognize the authority of federal bankruptcy courts over States;[379] and

(5) *Seminole Tribe's dicta* on bankruptcy failed to consider the incompatibility of State sovereign immunity with the bankruptcy process.[380]

But Justices O'Connor and Scalia already have said Congress may not use the Bankruptcy Clause to abrogate State sovereign immunity,[381] and *Seminole Tribe's* author still sits as Chief Justice. The States need only two more votes to convert *Seminole Tribe's* hasty *dicta* into a holding that will have profound affects on secured creditors.

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374. *A Bankruptcy Exception to Eleventh Amendment Immunity: Limiting the* Seminole Tribe *Doctrine,* 74 AM. BANKR. L.J. 1 (2000).

375. Hood v. Tenn. Student Assistance Corp., (*In re* Hood) 262 B.R. 412 (Bankr. 6th Cir. 2001).

376. *Id.* at 416-418.

377. *Id.* at 418-19 (quoting THE FEDERALIST NO. 32, at 152-53--- (Alexander Hamilton)) (explaining that state sovereignty overridden when Constitution gives federal government authority "to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*," such as power of Congress to provide uniform naturalization rules).

378. *Id.* at 419 (quoting Bliemeister v. Indus. Comm'n of Ariz. (*In re* Bliemeister), 251 B.R. 383, 389 (Bankr. D. Ariz. 2000)), *aff'd on other grounds*, Case No. 00-1557-PHX (D. Ariz. Mar. 28, 2001).

379. *Hood,* 262 B.R. at 419-23.

380. *Id.* at 423-26.

381. Hoffman v. Conn. Dep't Income Maint., 492 U.S. 96, 105, (1989) (O'Connor, J., concurring) (Scalia, J., concurring).

3. The legislative solution: the limitations of induced waiver

At first glance, the Bankruptcy Clause seems to feature just the type of gratuity that Justice Scalia discussed in *College Savings Bank.* Congress noted in 1799 that it has no duty to adopt a bankruptcy law,[382] and for much of the nineteenth century, the United States did *not* have such a law.[383] Nor must the Bankruptcy Act cover all debtors or creditors. Early Americans believed bankruptcy covered only merchants and could *not* include farmers or mechanics.[384]

Accordingly, several commentators have suggested that Congress can use its Bankruptcy Clause powers to favor States in return for State waivers of immunity regarding bankruptcy proceedings.[385] This approach has several problems. First, it merely

382. 9 ANNALS OF CONGRESS 2670-71 (statement of Rep. Abraham Baldwin) (Jan. 15, 1799), *quoted in* 2 PHILIP B. KURLAND & RALPH LERNER, 2 THE FOUNDERS' CONSTITUTION 621 (1987).

383. The first Bankruptcy Act was not adopted until 1800, Act of Feb. 21, 1800, ch. 19, 2 Stat. 19, and was repealed in 1803, Act of Dec. 19, 1803, ch. 6, 2 Stat. 248. The next was introduced in Congress in 1820, CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 27 (Da Capo Press 1972) (1935), but did not become law for two decades. Act of Aug. 19, 1841, ch. 9, 5 Stat. 440. It was repealed that same year. Act of March 3, 1843, ch. 82, 5 Stat. 614. A replacement appeared after the Civil War, Bankrupt Act of March 2, 1867, ch. 176, 14 Stat. 517, and was repealed a decade later, June 7, 1878, 20 Stat. 99. The fourth Act did not appear for another twenty years. Act of July 1, 1898, ch. 541, 30 Stat. 544, and only since then has a Bankruptcy Act continually been in place. HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF BANKRUPTCY 1 (1914).

384. WARREN, *supra* note 381, at 24, 27. Warren quotes three presidents who agreed. *See id.* at 172 n.51, (quoting Jefferson letter to James Pleasants (Dec. 16, 1821), X WRITING OF THOMAS JEFFERSON 198) (bankruptcy law should bind only town residents, "leaving the agriculturalists" alone.); *id.* at 56 (quoting Martin Van Buren, Presidential Special Message of Sept. 4, 1837) (urging that Congress confine scope of Bankruptcy Act to banks); *id.* at 31 *(quoting* James Buchanan (no footnote provided)) (bankrupt law for farmers would be "monster.").

Several members of the court shared those beliefs. *See* Adams v. Storey, 1 Fed. Cas. 141, 142, 1 Paine 79 (C.C.D.N.Y. 1817) (Livingston, Circuit Justice) (bankruptcy laws operate only on traders; broader bankruptcy law might be unconstitutional), *quoted in* Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 184 (1902); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 195 (1819) (stating that bankruptcy law applies only to "traders," but unclear who that includes.) (Marshall, C.J.).

385. Troy A. McKenzie, Note, *Eleventh Amendment Immunity in Bankruptcy: Breaking the* Seminole Tribe *Barrier,* 75 N.Y.U. L. REV. 199, 236-39 (2000), and Laura B. Bartell, *Getting to Waiver–A Legislative Solution to State Sovereign Immunity in Bankruptcy After* Seminole Tribe, 17 BANKR. DEV. J. 17, 93-102 (2000).

Kenneth N. Klee et al. propose a variety of solutions, such as authorizing U.S. trustees to sue on behalf of creditors wronged by a State's violation of bankruptcy rules, while admitting these solutions would distort principles of federalism. *State Defiance of Bankruptcy Law,* 52 VAND. L. REV. 1527, 1584-91 (1999) (citing U.S. *ex rel* Foulds v. Tex. Tech, 171 F.3d 279, 294 (5th Cir. 1999)). They also suggest allowing a state's claim against a bankrupt's assets only if the state has waived immunity regarding that claim and

transfers the cost of sovereign immunity from some creditors to others. For example, to protect secured creditors from States who would otherwise pressure debtors into making preferential transfers, Congress might encourage States to participate in bankruptcy proceedings by giving State tax claims priority over all unsecured creditors. This would protect secured creditors, but at the expense of unsecured creditors.

Second, the suggested incentives give States little value. Longer deadlines than private creditors receive[386] and slightly advantageous priorities over unsecured creditors pale in comparison to the tremendous toll the Bankruptcy Code exacts on states. Even though state tax departments are involuntary creditors, their priority in bankruptcy ranks below *all* secured, voluntary creditors and *seven* classes of unsecured creditors.[387] Other than respect for federal law, it is hard to see why a state should give up the many advantages of immunity in return for an advantage over unsecured creditors. Quite frankly, states already have far more incentive to bypass the bankruptcy system than to participate in it. Conditioning their participation in bankruptcy proceedings on a waiver of immunity would give them even more incentive to stay outside the system.

In short, while Congressional power to condition various benefits–regulatory authority, copyrights, patents, and trademarks–can be used to encourage states to waive their immunity, the Bankruptcy Clause does not offer the same opportunity. If the Court rejects *In re Hood's* analysis of the Bankruptcy Clause, what can Congress do to protect the secured creditors who finance corporate America? That answer comes in the next section.

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compulsory counterclaims. *Klee*, *supra*, at 1589-90.

386. States have 180 days longer than private creditors to file a proof of claim. 11 U.S.C. § 502(b)(9) (2002). State tax claims that arise *after* bankruptcy proceedings begin are treated as arising *before* they begun (thereby improving the state's priority). 11 U.S.C. § 502(i) (2002). State tax claims also have some priority over general unsecured debts. 11 U.S.C. § 507(a)(8) & (9) (2002).

387. Claims for taxes owed to any government rank below the claims of secured creditors and below seven classes of unsecured debt, including administrative expenses and unsecured claims arising after the bankruptcy commenced, employee claims for wages and contributions to benefit plans, and certain claims by farmers, bank depositors, and recipients of alimony or child support. 11 U.S.C. § 507a (2002).

IV. Congressional Authority Over Federal Court Jurisdiction *vis-a-vis* State Sovereign Immunity

A. The Problem and the Proposal

I now come to the most radical part of this Article. Congress' power to condition monetary and non-monetary benefits can prevent many–but not all–state abuses of sovereign immunity. From a business perspective, the most serious remaining abuse is state disruption of the bankruptcy system. From the perspective of most citizens, the main problem is how sovereign immunity puts states above the law and makes them unaccountable to their own citizens.

Concern about this aspect of state sovereign immunity is not new. At the beginning of Federalist No. 45, fears of how the states might abuse Americans caused James Madison to condemn State sovereign immunity in the strongest terms.[388] To Madison, the doctrine was more than unwise, it was an offense against God:

> Was then the American revolution effected, was the American confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety; but that the governments of the individual states, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty? We have heard of the impious[389] doctrine in the old world, that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the new, in another shape, that the solid happiness of the people is to be sacrificed to the views of political institutions of a different form? . . . [A]s far as the sovereignty of the states cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter.[390]

Fortunately, the lessons of *Dole* and *College Savings Bank* offer Congress an opportunity to effectively eliminate state use of the doctrine. My final proposition is that Congress should use its Article I and Article III powers over the jurisdiction of the lower federal

386. THE FEDERALIST NO. 45 (James Madison) (Jacob E. Cooke ed., 1961).

389. Samuel Johnson defined "impious" as "Irrelligious [sic]; wicked; profane; without reverence of religion." JOHNSON'S DICTIONARY OF THE ENGLISH LANGUAGE (1755). Noah Webster's definition was similar: "Irreverent towards the Supreme Being; wanting in veneration for God and his authority; irreligious, profane . . . ." NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 106 (1828).

390. THE FEDERALIST NO. 45, at 309 (James Madison) (Jacob E. Cooke ed., 1961).

courts to condition a plaintiff state's access to *all* federal courts upon its blanket waiver of sovereign immunity to *all* federal lawsuits. This condition should be an element of subject matter jurisdiction, and Congress should require U.S. District Courts to notify the U.S. Attorney's office or the U.S. Attorney General if a state invokes sovereign immunity.[391] When that happened, all federal courts would have to dismiss, with prejudice, all cases which that state or its agents had filed.

B. Congressional Authority to Condition Access to Federal Court[392]

1. Introduction

Article I gives Congress the power to "constitute Tribunals inferior to the Supreme Court," and Article III, Section 1 requires Congress to vest the federal judicial power in a Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish." Congress possesses "the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of judicial power, and of investing them with jurisdiction, either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good."[393] This includes the authority to restrict the jurisdiction of those lower federal courts.[394]

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391. *Cf.* 28 U.S.C. § 2403 (2000) (requiring federal district court to inform U.S. Attorney or U.S. Attorney General of any challenge to constitutionality of federal statute).

392. I originally hoped that the federal judiciary itself could do this by combining abstention and equity's clean hands doctrine, but that hope will not come to pass.

The Supreme Court has used its equitable powers to create the abstention doctrines that sometimes require federal courts to dismiss cases over which they have jurisdiction based on diversity, Burford v. Sun Oil, 319 U.S. 315 (1943), the United States and tribes as plaintiffs, Colo. River Conservation Dist. v. United States, 424 U.S. 800 (1976), or federal constitutional issues, Younger v. Harris, 401 U.S. 37 (1971). Meanwhile, equity long has required those who seek it to come to court with clean hands. JOHN NORTON POMEROY, 2 A TREATISE ON EQUITY, § 397, at 90-91 (5th ed. 1941). How could a state which refuses to follow federal law come into a federal court with clean hands? Unfortunately, the clean hands doctrine is limited to wrongful conduct by a plaintiff in the *same* lawsuit or transaction. *Id.* § 398, at 93, § 399, at 95, 97-98. It does not prevent a court from providing equity "to a bad or faithless man or a criminal," unless he acted wrongly in the dispute immediately before the court. *Id.* at 97.

393. Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845).

394. *See* Kenne Co. v. United States, 508 U.S. 200, 207 (1993) (Congress can define jurisdiction of lower federal courts); Palmore v. United States, 411 U.S. 389, 401 (1973) (Congress need not create lower federal courts nor vest them with all Article III jurisdiction); Greenwood v. Peacock, 384 U.S. 803, 833 (1966) (Congress may assign

2. Excluding plaintiffs from federal courts on the basis of their identities

My proposal would restrict the federal court's jurisdiction on the basis of a plaintiff's identity. Many statutes already use a party's identity to *grant* jurisdiction,[395] and at least four use it to *restrict* jurisdiction.[396] The Court itself restricted jurisdiction of the lower federal courts in 1806, when it required complete diversity between all plaintiffs and all defendants.[397]

3. Excluding sovereign plaintiffs from federal court

Surprisingly, there is precedent for my proposal to exclude plaintiff sovereigns (such as states) who, in other cases, have rejected the authority of the federal courts.[398]

The closest precedent comes from Chief Justice William

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federal issues to federal courts, state courts, or both); Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922) (lower federal courts derive their jurisdiction wholly from Congress); Carlyle Towers Condo. Ass'n. v. FDIC, 170 F.3d 301, 306 (2d Cir. 1999) (Congress may deprive federal courts of jurisdiction over certain cases).

For example, the Judiciary Act of 1789 did not allow the lower federal courts to hear federal question cases. *See* Act of Sept. 24, 1789, 1 Stat. 73. Congress finally granted that jurisdiction in 1875, Act of March 3, 1975, 18 Stat. 470, but until 1980, Congress prevented federal questions involving less than a certain amount of money, a restriction removed by the Act of Dec. 1, 1980, Pub. L. 96-486, 94 Stat. 2369, amending 28 U.S.C. § 1331.

395. 28 U.S.C. § 1330 (2002) (Foreign state defendants); 28 U.S.C. § 1332 (2002) (Diversity); 28 U.S.C. §§ 1344, 1345 (2002) (United States or its officials); 28 U.S.C. § 1348 (2002) (Banking associations); 28 U.S.C. § 1351 (2002) (Diplomats), and 28 U.S.C. § 1362 (2002) (Tribes).

396. The Tax Injunction Act, 28 U.S.C. § 1341 (2002), bars federal lawsuits against State tax departments regarding tax collections. The Johnson Act, 28 U.S.C. § 1342 (2002), prohibits federal lawsuits against state administrative agencies that set utility rates. Imprisoned inmates may not sue the United States or its officers for mental or emotional injury suffered while in custody, unless they can show a physical injury. 28 U.S.C. § 1346(b)(2) (2002). Finally, 28 U.S.C. § 1360(a) (2002) transfers jurisdiction over certain cases involving Indians in some States from the federal to state courts.

397. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

398. I was tempted to include the Trading With the Enemy Act of 1917, which bars an enemy nation from suing in any American court. Section 7(b), ch. 106, 40 Stat. 411 (codified at 50 U.S.C. App. § 1) (1999). *See Ex parte* Colonna, 314 U.S. 510, 511 (1942) (refusing to hear claim of Italian government). The prohibition does not apply to citizens of enemy nations unless they give aid and comfort to the other side. *Ex parte* Kumezo Kawato, 317 U.S. 69, 75 & n.7, 76 (1942).

But to be fair, state defiance of federal court authority has not come close to armed conflict since Governor Faubus' opposition to the Supreme Court's desegregation decisions caused President Eisenhower to send troops to Little Rock Central High School. BERNARD SCHWARTZ, SUPER CHIEF 289-290 (N.Y. Univ. Press, 1983). And states which have invoked their immunity to bar lawsuits against themselves still have recognized the authority of federal courts to enjoin various state officials to take actions that will cost significant sums of money.

Rehnquist. In *Three Affiliated Tribes of Ft. Berthold v. Wold Eng'g,*[399] several tribes attacked a North Dakota statute which prevented them from suing in North Dakota courts until they waived their tribal immunity to all other civil disputes in those courts.[400] The Court's majority invalidated the statute for reasons my proposal avoids. The statute left unconsenting tribes no other forum to present their claims,[401] while my idea would let a state sue in the courts of other states.[402] The challenged statute also required tribes to give up tribal law in favor of state law, even in subjects which "clearly encompass areas of traditional tribal control."[403] Moreover, the law violated a federal statute barring any state from abandoning jurisdiction over tribal land.[404]

But an unusual trio of justices understood the underlying fairness of the North Dakota scheme. Justice Rehnquist, joined by Justices Brennan and Stevens, wrote:

> North Dakota law provides that in order for an Indian tribe such as petitioner to avail itself of the jurisdiction of North Dakota courts as a plaintiff, it must also accept the jurisdiction of those courts when it is properly named as a defendant in them .... [S]uch a rule ... would commend itself to most people as eminently fair .... The requirement that a tribe consent to the general civil jurisdiction of state courts as a *quid pro quo* for access to those courts as a plaintiff seems entirely fair and even-handed to me.[405]

This *quid pro quo* theme, this idea of sovereigns trading benefits, would appear again, of course, in *South Dakota v. Dole*, when Justice

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399. 476 U.S. 877 (1986). I am indebted to Prof. Dennis Arrow for telling me of this case.

400. *Id.* at 878, 880-81 (quoting and construing N.D. Century Code § 27-19.

401. *Id.* at 883, 889.

402. States could file disputes over interstate boundaries, water allocation, and pollution in the courts of the defendant state. While this may seem unfair, the Supreme Court has not hesitated to force other plaintiffs out of neutral federal courts into the courts of a hostile sovereign. *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) (dismissing federal action by the United States and tribes to preempt water rights of white citizens and requiring them to proceed before state judge elected by same white citizens); *Burford,* 319 U.S. at 315. (dismissing diversity action by out-of-state resident and requiring him to contest, in Texas state court, Texas administrative agency decision in favor of Texan).

403. *Three Affiliated Tribes of Ft. Berthold,* 476 U.S. at 889.

404. *Id.* at 885-87.

405. *Id.* at 893-94, 896-97 (Rehnquist, J., dissenting). Just as the constitutionality of my proposal turns on Congress' discretionary authority over the creation and jurisdiction of the lower federal courts, Justice Rehnquist based his arguments on the fact that Congress has allowed, but not required, states to take jurisdiction over tribal country.

Rehnquist held that Congress constitutionally could ask a state to give up some control over alcohol in exchange for federal highway funds.[406]

Justice Rehnquist is not the only American judge, or legislator, to recognize that a sovereign may place conditions on another sovereign plaintiff's access to its courts. Long ago, the strongest advocates of states' rights recognized the absurdity of expecting a court to hear the complaints of a government which refused to recognize that court's authority in other situations. A month before Ft. Sumter, the legislature of the Confederate States of America suspended all civil suits in which the United States were plaintiffs,[407] and Confederate states later banned suits filed by the federal government or by Northern citizens,[408] causing huge losses to Northern merchants and banks.[409]

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406. 483 U.S. 203, 211-12 (1987).

407. The Act to Establish the Judicial Courts of the Confederate States of America, Act of Mar. 16, 1861, Stat. PC, I Sess., ch. 61, § 44, *quoted in* WILLIAM M. ROBINSON, JR., JUSTICE IN GREY: A HISTORY OF THE JUDICIAL SYSTEM OF THE CONFEDERATE STATES OF AMERICA 51 1968 (1941).

408. Robinson, *supra* note 404, at 84. The author cites a Florida statute of Feb. 14, 1861, barring state courts from hearing actions brought by citizens of non-slave holding states, directing them to dismiss pending suits by Northern plaintiffs, and ordering them to quash existing judgements held by Northerners. Other states' courts acted without legislation. In April 1861, a trial court in northern Georgia dismissed sixteen suits filed by Northerners. *Id.* at 84 n.38. *See also id.* at 625 (stating that district courts of the Confederation itself recognized war terminated rights "of other U.S. citizens to judicial aid or comfort" until North recognized the Confederacy). The ban on suits filed by Northern *citizens*, not just those filed by the federal government or Northern States, went beyond my proposal, which would not affect a recalcitrant state's citizens.

I do not know if Northern courts responded similarly. A WESTLAW search, ti(Alabama Arkansas Florida Georgia Kentucky Mississippi "North Carolina" "South Carolina" Tennessee Texas) & da(aft 1860 & bef 1868), produced only four cases with Confederate states as named plaintiffs, and all of those cases reached judgment after the war. The North's Confiscation Acts said nothing about closing courts. *See* Act to Confiscate Property Used for Insurrectionary Purposes, ch. 60, 12 Stat. 319 § 1 (Aug. 6, 1861); An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes, ch. 195, 12 Stat. 589, 589-91, §§ 5, 7, 9 (July 17, 1862); An Act to Provide for the Collection of Abandoned Property and For the Prevention of Frauds in Insurrectionary Districts Within the United States, ch. 120, 12 Stat. 820, § 3 (Mar. 3, 1863) (permitting any person to present claims to property seized by federal forces during the war within two years after "suppression of rebellion").

409. President Abraham Lincoln charged, "There are no Courts or officers to whom the citizens of other States may apply for the enforcement of their lawful claims against the citizens of the insurgent States," and he referred to estimates of $200 million in lost debts. Pres. Lincoln, Message of Dec. 3, 1861, *quoted in* CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 180 n.4 1972 (1935). Warren also quoted the NEW YORK TRIBUNE as claiming that New York merchants lost the same amount in a

C. The First Obstacle: Is Access to a Federal Court Enough of a Bargaining Chip?

How will states respond if Congress conditions access to federal courts on a waiver of sovereign immunity? That depends on how a state values its ability to sue in federal court, and that depends on the number and importance of the federal cases states file. Obviously, a state files most of its cases in its own courts: criminal prosecutions, administrative agency efforts to enforce statutes and regulations, ordinary contract, property, and tort actions, and, thanks to today's long-arm jurisdiction statutes, actions against out-of-state corporations. That leaves few federal cases: disputes involving exclusive federal jurisdiction, challenges to federal statutes and regulations, and actions against other states.

Unfortunately, the federal courts do not keep separate statistics for cases filed by states,[410] and computerized searches only find published opinions.[411] A search for California, Oklahoma, and North Carolina (states diverse in size, population, and location) for 1998 and 1999 produced only twenty published federal court opinions in which those states were named plaintiffs.[412]

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single night. NEW YORK TRIBUNE, Sept. 18, 1862, *quoted in* WARREN, at 180 n.4.

410. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP. 105-466 (1989) (detailed statistical tables).

411. WESTLAW's description of the scope of its ALLFEDS database says this database includes "documents released for publication in West Federal Reporters and other publications . . . and also includes 'quick opinions' (cases available online prior to West advance sheets . . . and opinions that are not scheduled to be reported by West Group.)"

412. A June 12, 2000, WESTLAW search for the names of California, Oklahoma, and North Carolina in the titles of cases produced 1307 hits. Most were criminal prosecutions, habeas corpus petitions, actions against companies incorporated in the relevant states, or actions in which States or their agencies were defendants.

Eighteen cases had been filed in federal court by states or state agencies. They were:

CFTC & Comm'r of Cal. v. Topworth Int'l, Ltd., 205 F.3d 1107, 1109 (9th Cir. 1999) (joint federal/state action to enforce federal and state commodity futures trading statutes); Hyatt (N.C. Dep't. of Human Res.) v. Apfel, 195 F.3d 188, 189 (4th Cir. 1999) (suit to require U.S. Social Security Director to follow circuit precedent in social security cases); Kaiser Found. Health Plan, Inc. (& Cal. Dep't. of Health Serv.) v. Biomedical Patent Mgmt. Co., 194 F.3d 1327 (table) (Fed. Cir. 1998) (dismissed per stipulation); Nat'l Ass'n. of State Credit Union Supervisors v. Nat'l Credit Union Admin., 188 F.3d 228, 229 (4th Cir. 1999) (challenge by N.C. and Kan. to federal regulations); Tex. Office of Pub. Util. Counsel (PUC of Cal.) v. F.C.C., 183 F.3d 393, 393 (5th Cir. 1999) (state utility commission challenged federal agency order); *In re* Dep't. of Energy Stripper Well Litigation (Cal. and thirteen other states), 206 F.3d 1345 (10th Cir. 2000) (which identifies several states as plaintiffs, 206 F.3d at 1347 n.1); Cedars-Sinai Med. Ctr. v. Shalala, 177 F.3d 1126, 1128 (9th Cir. 1999) (challenge by two state university medical centers to policy of U.S. Dep't. of Health and Human Services); Cal. Dep't. of Social Serv. v. Shalala, 166 F.3d 1019, 1019-20 (9th Cir. 1999) (appeal of Secretary of Health and Human Service's disapproval of state

This suggests that continued access to federal courts does not give Congress much bargaining leverage, although that should weaken any State claim of coercion.

On the other hand, States have used federal litigation to protect important state interests.[413] And without access to a federal court, a State would have to bring actions regarding interstate boundaries, water allocation, or pollution in its opponent's home courts.

I cannot predict how States would choose between immunity and access to federal court. But giving them the opportunity would provide an interesting test. The Rehnquist Court has carefully listed

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program); Okla. *ex rel* Dep't. of Pub. Safety v. U.S, 161 F.3d 1266, 1267-68 (10th Cir. 1998) (attack on Driver's Privacy Protection Act, Pub. L. No. 103-322, 108 Stat. 2099, codified at 18 U.S.C. § 2721-25); Long Beach (Cal.) v. Exxon Corp., 155 F.3d 570, 1998 WL 382739, at 2 (Fed. Cir. 1998) (state and city attack on federal charges made under Economic Stabilization Act of 1970, 12 U.S.C. § 1904); Pub. Util. Comm'n of Cal. v. Fed. Energy Regulatory Comm'n, 143 F.3d 610, 612-14 (D.C. Cir. 1998) (tariff dispute *re* natural gas);

California *ex rel* Cal. Dep't. of Health Serv. v. Besone, 141 F.3d 1179, 1998 WL 105670 (9th Cir. 1998) (action to *re* release of hazardous substances); North Carolina *ex rel* James E. Long, Comm'r of Ins. v. Cooper, 1998 WL 178374, at *5 (4th Cir. 1998) (suit for refund of federal taxes paid on behalf of insolvent insurance company); California *ex rel* Cal. Dep't. of Toxic Substance Control v. Campbell, 138 F.3d 784, 784 (9th Cir. 1998) (action to recover cleanup costs); California v. Randtron, 69 F. Supp. 2d 1264, 1266 (E.D. Cal. 1999) (environmental action against polluter); Cal. Dep't. of Health Serv. v. Babbitt, 46 F. Supp. 2d 13, 15, 20 (D.D.C. 1999) (environmental dispute against U.S. Secretary of Interior);

California *ex rel* Sacramento Metro Air Quality Dist. v. U.S., 29 F. Supp. 652, 653 (E.D. Cal. 1998) (action against U.S. Air Force base for violating federal environmental statutes); Cal. Coastal Comm'n v. United States, 5 F. Supp. 2d 1106, 1108-10 (S.D. Cal. 1998) (action under Coastal Management Zone Act, 16 U.S.C. § 1451, 1456(c)(1)).

Two others were filed by states in their own courts and then removed by the defendants:

State Ins. Fund v. Ace Transp., 195 F.3d 561, 563-64 (10th Cir. 1999) (action by state workers compensation insurance fund against employers for unpaid premiums); Oklahoma v. Stifel, Nicolaus & Co., Inc., 156 F.3d 1244, 1244 (10th Cir. 1998) (action against bond company for violation of federal and state organized crime statutes).

413. Obviously, state universities that hold patents or copyrights can protect them only in federal court. *See, e.g.,* Goldie Blumenstyk, *Patent Ruling Gives U. of Colorado a Shot at Millions in Damages,* CHRONICLE OF HIGHER EDUCATION (July 28, 2000) at 49. (Colorado Health Sciences Center seeking $200 million in damages for private firms' alleged violation of Center's patent).

Landmark federal cases filed by States include *Nat'l League of Cities v. Usery*, 426 U.S. 833, 833, 836 n.7 (consolidated with California v. Usery, case No. 74-879) (invalidating Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. § 201, *et seq*); *South Carolina v. Regan*, 465 U.S. 367 (1984) (attacking constitutionality of federal tax on state bonds); *New York v. United States.*, 502 U.S. 144, 154 (1992) (invalidating federal statute requiring states not participating in interstate compacts to take title to all nuclear waste produced within their boundaries); *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 498 (1988) (at states' request, enjoining construction of $3.2 billion coal slurry pipeline); *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 133 (1947) (challenging constitutionality of Hatch Act, § 12(a), 53 Stat. 1147, 54 Stat. 767).

the ways plaintiffs can work around State sovereign immunity,[414] as if to minimize the damage that doctrine inflicts on Americans. If that suggestion is correct, and state sovereign immunity does not prevent Americans from obtaining justice, then states should see little advantage in keeping it. Instead, they will prefer to waive their immunity and retain access to federal courts. But if few states waive immunity, then we will have solid evidence that the Court's lists of limitations on state immunity are more for show than for real.[415]

D. The Second Obstacle: Removal

The removal process[416] requires a small exception to my proposal. Congress is "constitutionally fully free" to determine what cases may be removed from federal to state courts.[417] But if Congress conditioned a plaintiff state's access to federal court, what should happen when a state sues in its own court and the private defendant removes the case? Remanding the case to state court because the state is the plaintiff would deprive the private defendant of *its* access to federal court. So we need to let private defendants remove cases filed by states. That poses no problem, since the right to remove depends on the will of Congress.[418]

E. The Third Obstacle: the Original Jurisdiction Clause

So far, I have discussed only Congressional authority to cut off plaintiff States' access to the lower federal courts. That is because Article III, Section 1 gives Congress discretion to create lower federal courts, while it mandates the creation of a Supreme Court. Furthermore, Article III, Section 2, Clause 2 (the "Original Jurisdiction" clause) says "In all Cases affecting Ambassadors, other

414. *E.g.*, Alden v. Maine, 527 U.S. 706, 754-57 (listing limits on and exceptions to state immunity); *Seminole Tribe,* 517 U.S. at 71 n.14 (listing ways to enforce federal law despite state immunity).

415. To their credit, when the Court declared that states were immune from litigation under Title I of the Americans with Disability Act, several states began efforts to waive their immunity. *Board of Trs. of Univ. of Ala. v. Garrett,* 531 U.S. 356 (2001). *See Several States Respond to* Garrett *Decision, Consider Waiving Immunity to ADA Lawsuits,* 70 U.S.L.W. 2003-04 (2001) (describing waiver by Minnesota and similar efforts by New York and California).

416. 28 U.S.C. § 1441 (2002).

417. Wainwright v. Sykes, 433 U.S. 72, 107 (1977) (quoting Greenwood v. Peacock, 384 U.S. 808, 833 (1966)).

418. CHARLES ALLEN WRIGHT, LAW OF FEDERAL COURTS, § 38, at 223 (1994) (citing Gold-Washing & Water Co. v. Keyes, 96 U.S. 199 (1877)); 14A WRIGHT, MILLER, AND COOPER, § 3721 n.2.

public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original jurisdiction." The clause is self-executing,[419] although Congress also has provided for statutory implementation.[420] Now, my problem is obvious. Cutting off state access to the inferior federal courts merely would cause states to overwhelm the high Court,[421] and a pro-state Court might assign the flood of state-initiated litigation to special masters who were sympathetic to state interests.[422] So, would Congress be able to limit the Court's original jurisdiction over states?

On some occasions, the Court has said "probably not."[423] But on other occasions, Congress and the Court have recognized that the Original Jurisdiction clause's apparently absolute grant of jurisdiction is far from absolute. Congress has split the Court's original jurisdiction in two, giving the Court exclusive jurisdiction over disputes between two or more states[424] and concurrent jurisdiction with the lower federal courts over controversies regarding ambassadors, between the United States and a state, and by a state against a citizen of another state.[425]

The Court has upheld this division[426] and created several

419. California v. Arizona, 440 U.S. 59, 65 (1979) (citing Kentucky v. Dennison, 65 U.S. (24 How.) 66, 96 (1860)); Florida v. Georgia, 58 U.S. (17 How.) 478, 492 (1854); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 332 (1816).

See also 17 WRIGHT, COOPER & MILLER, FEDERAL PRACTICE & PROCEDURE § 4043, at 182-83 (1988 & Supp. 2001); JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 402.02[2][b], at 402-24 (2001).

420. The first statute to do so was the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 73, 80. Codified as amended 28 U.S.C. § 1251 (2001).

421. Since 1961, the court has handled about three original jurisdiction cases a year. Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961,* 45 ME. L. REV. 185, 207-215 (1993).

422. FED. R. CIV. P. 53(a).

423. California v. Arizona, 440 U.S. at 66 ("extremely doubtful" that Congress can limit Court's original jurisdiction); 17 WRIGHT, *supra* note 416, § 4043, at 182, 185 (citing *dicta* from Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 300 (1888) and South Carolina v. Regan, 465 U.S. 367, 398 (1984) (O'Connor, Rehnquist, and Powell, JJ., concurring); 22 MOORE, *supra* note 416, ¶ 402.02[2][b], at 402-24.

This is reinforced by Article III's structure. Section 2's grant of appellate jurisdiction to the Supreme Court includes "with such Exceptions, and under such Regulations, as the Congress shall make." But Section 2's grant of original jurisdiction mentions no exceptions.

424. 28 U.S.C. § 1251(a).

425. 28 U.S.C. § 1251(b).

426. Mississippi v. Louisiana, 506 U.S. 73, 78 & n.1 (1992) (noting that the Court has never questioned the constitutionality of the division); California v. Arizona, 440 U.S. at 65; Ames v. Kansas *ex rel* Johnston, 111 U.S. 449, 464-69 (1884); Bors v. Preston, 111 U.S.

exceptions of its own. It will not accept a case in which a citizen of a plaintiff state is a defendant,[427] nor a suit in which a state sues its own citizens.[428] More broadly, the Court routinely has used discretion in deciding whether to hear actions between states.[429] That discretion has been based on several factors: the seriousness of the dispute,[430] the presence of clear and convincing evidence,[431] and the lack of an alternative forum.[432] The Court's reluctance to hear state cases has

252, 258-59 (1884); Rhode Island v. Massachusetts., 37 U.S. (12 Pet.) 657, 722 (1838).

Prof. Pfander notes that the first Congress adopted this division and the Court approved it. James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases,* 82 CAL. L. REV. 555, 564 (1994) (citing the Judiciary Act of 1789, ch. 20, 1 Stat. 73, sections 13 and 9); *id.* at 564 (citing United States v. Ravara, 2 U.S. (2 Dall.) 297 (C.C.D. Pa. 1793) and other cases). He also points out that *Bors v. Preston*, 111 U.S. 252, 258-59 (1884), found that the Framers did not intend to prevent Congress from developing the concurrent jurisdiction exception. Pfander, 82 CAL. L. REV. at 620-21.

427. 22 MOORE, *supra* note 416, ¶ 402.02[2][a], at 402-24, *citing* California v. S. Pac. Co., 157 U.S. 229, 261-62 (1895).

428. 17 WRIGHT, *supra* note 416, § 4046, at 214, *citing* Pennsylvania v. Quicksilver Co., 77 U.S. (10 Wall.) 553 (1870).

The Court also has excluded cases in which the state is a named party, but not the real party in interest, such as suits involving the governor. Vincent L. McKusick, *Discretionary Gatekeeping: the Supreme Court's Management of Its Original Jurisdiction Docket Since 1961,* 45 MAINE L. REV. 185, 194 (1993) (*citing* Puerto Rico v. Iowa, 464 U.S. 1034 (1984)). It also has refused to hear cases that include a state but lack a federal question, diversity, or other justification for federal jurisdiction. California v. S. Pac. Co., 157 U.S. 229, 257-58 (1895); 17 WRIGHT, *supra* note 416, § 4043, at 176, and cases cited therein; 22 MOORE, *supra* note 416, ¶¶ 402.02[1][c], 402-10 and 402-12.

429. *E.g.*, Mississippi v. Louisiana, 506 U.S. 77 (1992) (court has discretion to decline jurisdiction even in actions between states, depending on seriousness of issue and availability of other forum); Wyoming v. Oklahoma, 502 U.S. 437, 450-54 (1992) (court must use original jurisdiction "sparingly," even in disputes between states); South Carolina v. Regan, 465 U.S. 396, 401 (1984) (court must use "sound discretion" to protect self from flood of original jurisdiction litigation); Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 499 (1971); United States v. Nevada, 412 U.S. 534, 538 (1973) (court will use original jurisdiction "sparingly.").

A major concern behind the use of this discretion is the fear that original jurisdiction cases would prevent the Court from attending to its appellate responsibilities. Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 498-99 (1971); Massachusetts v. Missouri., 308 U.S. 1, 19 (1939); Illinois v. City of Milwaukee, 406 U.S. 91, 93-94 (1972).

430. Mississippi v. Louisiana, 506 U.S. 73, 77 (1992); Wyoming v. Oklahoma, 502 U.S. 437, 450-54 (1992); South Carolina v. Regan, 465 U.S. 396, 400-01 (1984); Illnois v. City of Milwaukee, 406 U.S. 91, 93-94 (1972); North Dakota v. Minnesota, 263 U.S. 365, 374 (1921).

431. North Dakota v. Minnesota., 263 U.S. at 374.

432. Mississippi v. Louisiana, 506 U.S. at 77; Wyoming v. Oklahoma, 502 U.S. at 450-54; South Carolina v. Regan, 465 U.S. at 400-01; Illinois. v. City of Milwaukee, 406 U.S. at 93-94; Massachusetts v. Missouri, 308 U.S. 1, 19 (1939); North Dakota v. Minnesota, 263 U.S. at 374.

been so strong that it has used the alternative forum factor to decline jurisdiction when a similar dispute between *private* parties has been pending elsewhere.[433]

In addition, Professors Ahkil Reed Amar and James Pfander have argued that Congress can limit or eliminate the Court's original jurisdiction in cases involving states. Prof. Amar uses the structure of Article III's second section to reach that conclusion. He argues that Section 2's description of the federal judicial power repeatedly says the high Court has original jurisdiction over "all Cases" involving ambassadors, federal questions, and admiralty cases, while it does *not* use that phrase in conjunction with cases in which the state is a party.[434] He concludes that the necessary and proper clause permits the court to limit or eliminate the Court's original jurisdiction over cases in which a state is a party.[435] Prof. Pfander takes a different approach to reach the same conclusion. He contends that the Framers intended the original jurisdiction clause to permit the federal government to enforce its law against the states in federal court,[436] so that the clause creates a "relatively unambiguous waiver of sovereign immunity."[437]

So whether we look at what Congress has done, what the Court has said, or what the Founders intended, the Original Jurisdiction clause would not prevent Congress from restricting plaintiff state access to federal courts. I have no illusions about what today's Court would do if Congress placed a condition on state access to the Court's original jurisdiction. At the same time, however, the Court's own precedents suggest another answer.

While the Court probably will not let Congress limit the Court's original jurisdiction, Congress can change the Court's rules of procedure. In 1796, the Court recognized that its authority to set its rules of procedure was subject to Congressional control.[438] In 1854, Chief Justice Taney agreed, saying that Congress "had undoubtedly

433. McKusick, *supra* note 418, at 201 (citing Louisiana v. Mississippi, 488 U.S. 990, 990 (1988) (White, J., dissenting)) (describing how Court denied original jurisdiction when Louisiana had intervened in Louisiana state court litigation between private parties over Louisiana state boundaries); Arizona v. New Mexico, 425 U.S. 794, 797 (1976) (denying original jurisdiction in favor of pending litigation involving Arizona utility companies *re* same federal constitutional questions in New Mexico state court).

434. Ahkil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court,* 56 U. CHI. L. REV. 443, 478-82 (1989).

435. *Id.* at 482.

436. Pfander, *supra* note 417, at 558-61, 581, 592-94.

437. *Id.* at 581.

438. Grayson v. Virginia, 3 U.S. (3 Dall.) 320, 320 (1796).

the right to prescribe the process and mode of proceeding" in original jurisdiction cases.[439] Furthermore, the Court itself has raised standards of proof for plaintiff States in original jurisdiction cases. A plaintiff State can invoke the Court's original jurisdiction only if it produces "clear and convincing evidence" that it has suffered a serious injury.[440] Other cases have imposed this "clear and convincing evidence" requirement to resolve the merits of original jurisdiction suits before the Court.[441]

In short, to discourage a State from trying to use the Court's original jurisdiction to evade a statute limiting access to lower federal courts, Congress should follow the Court's own lead and impose a very high burden of proof on States involved in original jurisdiction cases. Again, that will not completely block plaintiff States from access to federal courts, but it may sufficiently discourage State use of the original jurisdiction clause so to make a blanket waiver of immunity sufficiently attractive to a State's government.

V. ". . . .the more efficient Government of the Rebel States."

My proposal to limit State access to federal courts may sound

439. Florida v. Georgia, 58 U.S. (17 How.) 478, 491-92 (1854).

440. Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 501 & n.4 (1971) (to reduce number of interstate pollution original jurisdiction cases, Court should "saddle the party seeking relief with an unusually high standard of proof . . .");

Colorado v. Kansas, 320 U.S. 383, 393 (1944) (court will not intervene on behalf of complaining state unless state's case has been "fully and clearly proved");

Alabama v. Arizona, 291 U.S. 286, 291-92 (1934) (state may sue another in Supreme Court only if it alleges "facts that are clearly sufficient to call for a decree in its favor"; state has burden to "fully and clearly establish all essential elements of its case . . .").

Connecticut v. Massachusetts, 282 U.S. 660, 669 (1931) (state burden is one of "clear and convincing evidence . . . [and] much greater than that generally required to be borne by one seeking an injunction in a suit between private parties");

North Dakota v. Minnesota, 263 U.S. 365, 374 (1923) (Same);

New York v. New Jersey, 256 U.S. 296, 309 (1921) (Same);

Missouri v. Illinois, 200 U.S. 496, 520-22 (1906).

See also South Carolina v. Regan, 465 U.S. 396, 400 (1984) (O'Connor, J., concurring); 17 WRIGHT, *supra* note 416, § 4054, at 281 ("[T]he Court frequently responds to the difficult nature of original jurisdiction cases by requiring that claims be proved by a high standard of evidence.").

441. *See, e.g.*, Nebraska v. Wyoming, 507 U.S. 584, 591 (1993) ("Clear and convincing evidence"); Colorado v. New Mexico, 467 U.S. 316, 316 (1984); Idaho *ex rel* Evans v. Oregon, 462 U.S. 1017, 1027 (1983) (dismissing claim by Idaho for failing to show clear and convincing need for apportionment of fishing rights); Colorado v. New Mexico, 459 U.S. 176, 187, 188 n.3 (1982) (court will divert water between states only if state shows "clear and convincing evidence" that benefits of diversion will outweigh harm).

radical, but the Court already has approved a similar action Congress took some time ago.

In the 1976 case of *Fitzpatrick v. Bitzer*, the Court held that Section 5 of the 14th Amendment gave Congress authority to override Eleventh Amendment immunity.[442] Justice Rehnquist's opinion drew on cases dating back to 1880, which upheld "intrusions by Congress, acting under the Civil War amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States."[443] Since *Fitzpatrick*, the Court repeatedly has listed Section 5 as a limitation on State sovereign immunity.[444] For my purposes, this is important because it means that when the States ratified the Fourteenth Amendment and gave Congress authority to override their immunity, in effect, they waived their immunity, subject to Congressional action.

And what prompted *all* of the former Confederate States to waive their immunity by ratifying the Fourteenth Amendment? The answer appears in "[a]n Act to provide for the more efficient Government of the Rebel States," especially sections 5 and 6:

> WHEREAS no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas; and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be legally established: Therefore,
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That said rebel States shall be divided into military districts and made subject to the military authority of the United States as hereinafter prescribed . . . .
>
> SEC. 2, *And be it further enacted*, That it shall be the duty of the President to assign to the command of each of said districts an officer of the army, not below the rank of brigadier-general, and to detail a sufficient military force to enable such officer to perform his duties . . . .
>
> SEC. 5. *And be it further enacted*, That when the people of any one of said rebel States shall have formed a constitution of government in conformity with the Constitution of the United

442. 427 U.S. 445, 453-56 (1976).

443. *Id.* at 455.

444. *Alden*, 527 U.S. at 756 (adoption of Fourteenth Amendment "required the States to surrender a portion of [their] sovereignty."); *Seminole Tribe*, 517 U.S. at 59 (Fourteenth Amendment "fundamentally altered the balance of state and federal power struck by the Constitution.").

> States in all respects, framed by a convention of delegates elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition . . . and when such constitution shall be ratified by a majority of the persons voting on the question of ratification who are qualified as electors for delegates, and Congress shall have approved the same, and when said State, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States, proposed by the Thirty-ninth Congress, and known as article fourteen, and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom on their taking the oath prescribed by law . . . .
>
> SEC. 6. *And be it further enacted*, That, until the people of said rebel States shall be by law admitted to representation in the Congress of the United States, any civil governments which may exist therein shall be deemed provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same . . . .[445]

In other words, Congress imposed a *de facto* waiver of immunity as a condition to the Southern States' representation in Congress–and, indeed, their very existence as states. And *Fitzpatrick v. Bitzer*, written by then-Associate Justice Rehnquist, upheld the results of that condition. *Fitzpatrick* does not complain of coercion; it does not suggest that the ratification votes of the Confederate States, then occupied by federal troops, were in any way involuntary.

When I read the Rehnquist Court's decisions on state sovereign immunity, on the abstention doctrines, and on Congressional authority under the Fourteenth Amendment, I sometimes wonder who surrendered at Appomattox Courthouse. Again and again, the Court has ignored Madison's warnings and placed the interests of states above the interests of the American people. But when Congress unites Chief Justice Rehnquist's opinions in *Fitzpatrick v. Bitzer* and *South Dakota v. Dole* with Justice Scalia's clarifications in *College Savings Bank*, then State sovereign immunity will finally assume its proper role in the American legal system.

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445. Act of March 2, 1867, ch. 153, §§ 1, 2, 5 and 6, 14 Stat. 428, 428-29.

The ten named states approved the Fourteenth Amendment. *E.g.*, Act of June 22, 1868, ch. 69, 15 Stat. 72 (admitting State of Arkansas to representation in Congress); Act of June 25, 1868, ch. 70, 15 Stat. 73 (admitting States of North Carolina, South Carolina, Georgia, Alabama, and Florida to representation in Congress).