COMMENTS

Are All Roads Tolled? State Sovereign Immunity and the Federal Supplemental Jurisdiction Tolling Provision

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INTRODUCTION

Lance Raygor believed that his employer, the University of Minnesota, had discriminated against him because of his age. He sued the University, an arm of the state, in federal court under the federal Age Discrimination in Employment Act[1] (ADEA) and the Minnesota Human Rights Act.[2] In its pleadings, the state asserted sovereign immunity from federal jurisdiction and the district court agreed, dismissing the plaintiff's claims under the Eleventh Amendment.[3] Raygor appealed, but withdrew his appeal for lack of a substantial federal question after the Supreme Court determined that the ADEA did not validly abrogate state sovereign immunity.[4] Raygor refiled his state law claim in state court, where it was dismissed on the ground that the statute of limitations had expired.[5] Raygor appealed, alleging that the federal supplemental jurisdiction statute's tolling provision[6] should have tolled the statute of limitations on his state law claim and thereby foreclosed the state's statute of limitations defense. The Min-

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1 29 USC § 621 (2000).

2 Minn Stat §§ 363.01–363.20 (1996).

3 See *Raygor v Regents of the University of Minnesota*, 604 NW2d 128, 130 (Minn App 2000).

4 See *Kimel v Florida Board of Regents*, 528 US 62, 91–92 (2000) (holding that the ADEA was not a valid exercise of congressional power under the Fourteenth Amendment, as Congress had little evidence of age discrimination by the states).

5 See *Regents of the University of Minnesota v Raygor*, 620 NW2d 680, 682 (Minn 2001).

6 28 USC § 1367(d) (2000):

> The period of limitations for any claim asserted under [federal supplemental jurisdiction], and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under [federal supplemental jurisdiction], shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

nesota Supreme Court[7] and then the United States Supreme Court[8] disagreed. The United States Supreme Court held that the state of Minnesota had timely raised an Eleventh Amendment defense in federal court and that the tolling provision did not manifest an attempt by Congress to abrogate state sovereign immunity.[9] Hence, the tolling provision did not apply and the statute of limitations had expired. Raygor never got the chance to litigate his case on the merits.

Raygor's story is unfortunate, but as the Supreme Court noted in his case, the state defendant had never consented to federal jurisdiction.[10] By broadly holding that the tolling provision does not abrogate the sovereign immunity of nonconsenting states, the Court seemed to make application of the provision to states contingent upon state consent. But the holding leaves an unanswered question: does the tolling provision apply to states that initially consent to federal jurisdiction over state law claims against them?[11]

This Comment argues that § 1367(d)'s tolling provision could be unconstitutional as applied if it precludes a state defendant from raising an otherwise valid statute of limitations defense to a state law claim, even if the state had previously consented to federal jurisdiction over that claim.

Consider the following counterfactual hypothetical: imagine that Raygor originally filed suit in state court, but this time the state *consented* to federal jurisdiction by removing the case to federal court. Later the federal court declined to exercise supplemental jurisdiction and dismissed the state law claim, but Raygor refiled in state court where the University moved for dismissal on the ground that the statute of limitations had expired. Faced with this defense, Raygor might advance three theories: First, that tolling of the state law claim is permissible as a matter of state law, either because the statute of limitations is a mere procedural limitation on liability subject to equitable tolling or because a state litigator enjoys the delegated power to consent to tolling. Second, in the alternative, that the federal tolling provi-

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7 See *Raygor*, 620 NW2d at 685 ("Because Congress cannot, absent valid abrogation of sovereign immunity, extend federal judicial power against unconsenting states, it follows that Congress cannot impose a penalty on a state defendant for being named, without its consent, as a defendant in federal court.").

8 See generally *Raygor v Regents of the University of Minnesota*, 534 US 533 (2002).

9 See id at 546 ("In sum, although § 1367(d) may not clearly exclude tolling for claims against nonconsenting States dismissed on Eleventh Amendment grounds, we are looking for a clear statement of what the rule *includes*, not a clear statement of what it *excludes*.").

10 Id at 547 ("[W]e cannot say that respondent 'unequivocally expressed' a consent to be sued in federal court."), citing *Pennhurst State School and Hospital v Halderman*, 465 US 89, 99 (1984).

11 See *Raygor*, 534 US at 547 ("We express no view on the application or constitutionality of § 1367(d) when a State consents to suit.").

sion preempts the state statute of limitations either (a) because a state litigator, pursuant to his power under federal law to waive the state's Eleventh Amendment immunity, could consent that the state be bound by the federal tolling provision, or (b) because Congress had acted independently to delegate him the power to consent to tolling. Finally, even if the foregoing arguments did not succeed, Raygor could argue that the University ought to be estopped from denying its consent to tolling.

This Comment considers all these arguments and outlines a scenario wherein a court might reject them all depending on the law of any particular state. The Comment proceeds in five parts. Part I is an overview of supplemental jurisdiction and the doctrine of state sovereign immunity. Part II addresses the state and federal law of state waiver of sovereign immunity. Part III discusses the applicability of the tolling provision as a matter of state law. Part IV argues that federal law does not preempt the state law statute of limitations if the state law does not allow for tolling. Part V contends that states should not be estopped from asserting an otherwise valid statute of limitations defense. This Comment then concludes with the suggestion that, in light of this uncertainty and the difficulty of determining ex ante whether a statute of limitations defense will be valid if a case is refiled in state court, plaintiffs should be wary of filing state law claims against state sovereigns in federal court. Federal judges should be wary of using their discretion to dismiss mandatory counterclaims against states and should remand, rather than dismiss, unwelcome state law claims where they have the discretion to do so.

I. SOVEREIGN IMMUNITY AND § 1367(D)

Because the law of sovereign immunity is unusually dependent upon historical context, it is appropriate to provide a general outline of the history of the immunity and its interaction with federal supplemental jurisdiction before wading into a detailed consideration of waiver doctrine.

A. Sovereign Immunity

1. History of sovereign immunity.

The Eleventh Amendment was ratified in 1798 to overturn the Supreme Court's decision in *Chisholm v Georgia*.[12] In that case, the Court determined that Article III of the U.S. Constitution authorized it to hear a common law contract claim brought by an out-of-state

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12 2 US (2 Dall) 419 (1793).

plaintiff against the state of Georgia.[13] Popular reaction was swift and unfavorable, leading to rapid passage of the Eleventh Amendment.[14] Although the language of the Amendment speaks only to suits against a state by citizens of another state or a foreign state, the Supreme Court has held that the Eleventh Amendment confirms that the states' traditional privilege of sovereign immunity was incorporated into the Constitution.[15] Despite criticism,[16] the Court has broadly held that states are immune from suit by their own citizens,[17] by foreign states,[18] by Indian tribes,[19] by federal corporations,[20] in admiralty,[21] in

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13 See id at 452 ("[W]hen a state, by adopting the constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty.").

14 "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." US Const Amend XI. See David P. Currie, *The Constitution in Congress: The Federalist Period 1789–1801* 195–98 (Chicago 1997); David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789–1888* 14–20 (Chicago 1985).

15 See *Blatchford v Native Village of Noatak*, 501 US 775, 779 (1991):

> Despite the narrowness of its terms . . . we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty.

Controversially, the Court has viewed this background understanding of sovereign immunity as a constitutional right reserved to the states by the Tenth Amendment (or the enumerated powers doctrine that it makes explicit), not subject to modification by routine practice as it would be under a mere common law understanding. See *Alden v Maine*, 527 US 706, 760–61 (1999) (Souter dissenting) ("[A] State's sovereign immunity from all individual suits is a 'fundamental aspect' of state sovereignty 'confirm[ed]' by the Tenth Amendment.").

16 The Supreme Court's interpretation of the doctrine has been substantially criticized not only by dissenting justices, see, for example, *College Savings Bank v Florida Prepaid Postsecondary Education Expense Board*, 527 US 666, 688 (1999) (complaining about 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"), but also by academics arguing that the Amendment should only function as a restriction on federal court jurisdiction in cases that would otherwise be appropriate in a federal forum solely on the basis of diversity jurisdiction. See, for example, James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 Cornell L Rev 1269, 1280 (1998):

> [O]nce the Court begins to conceptualize the problem of state suability in terms of a free-standing principle of "sovereign immunity," rather than as a technical problem in the parsing of the language of judicial power, it unleashes a dangerous and unwieldy restriction on the federal courts' power to enforce federal-law restrictions against the states.

Regardless of the merit of the criticisms leveled by these so-called diversity theorists, see id at 1353, the Court has adhered to a broader theory of sovereign immunity since at least 1890. It is beyond the scope of this Comment to address whether the current theory is in fact what the Framers had in mind in 1787 and 1798.

17 See *Hans v Louisiana*, 134 US 1, 20–21 (1889).

18 See *Monaco v Mississippi*, 292 US 313, 330 (1934).

19 See *Blatchford*, 501 US at 781–82.

20 See *Smith v Reeves*, 178 US 436, 449 (1900).

21 See *Ex Parte New York*, 256 US 490, 500 (1921).

their own courts on federal causes of action,[22] and before administrative tribunals.[23]

Although it may seem strange that an immunity that limits "the judicial power of the United States" can be overcome by consent, traditionally, the Supreme Court did not classify Eleventh Amendment immunity as immunity from either subject matter or personal jurisdiction, but rather as a sort of hybrid jurisdictional immunity that did not fit neatly into either category.[24] The Court has clearly declared that states may voluntarily waive the immunity[25] and that it need not be raised sua sponte by courts,[26] propositions that are inconsistent with treating sovereign immunity as a class of subject matter jurisdiction. Yet courts also allow states to raise the sovereign immunity defense at any time,[27] a proposition more in accord with subject matter than personal jurisdiction.[28]

The current state of the jurisdictional bar is a matter of controversy for both courts[29] and commentators,[30] and the existence and importance of a possible change are discussed below.[31] From the perspective of history, the important insight is that while the Eleventh Amendment certainly confers jurisdictional immunity, the immunity

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22 See *Alden*, 527 US at 754.

23 See *Federal Maritime Commission v South Carolina State Ports Authority*, 535 US 743, 760 (2002).

24 See *Wisconsin Department of Corrections v Schacht*, 524 US 381, 394 (1998) (Kennedy concurring).

25 See *Clark v Barnard*, 108 US 436, 447 (1883) ("The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure.").

26 See *Patsy v Board of Regents of Florida*, 457 US 496, 516 n 19 (1982).

27 See, for example, *Bravo Perazza v Puerto Rico*, 218 F Supp 2d 176, 179 (D PR 2002) (permitting a state defendant to raise an immunity defense claim after it filed a motion for summary judgment). But see *Ku v Tennessee*, 322 F3d 431, 434–35 (6th Cir 2003) (holding that once a state has consented to federal jurisdiction it may not invoke its Eleventh Amendment immunity right).

28 See *Schacht*, 524 US at 394 (Kennedy concurring) ("Permitting the immunity to be raised at any stage of the proceedings . . . is more consistent with regarding the Eleventh Amendment as a limit on the federal courts' subject-matter jurisdiction."), citing *Insurance Corp of Ireland v Compagnie des Bauxites de Guinee*, 456 US 694, 702–04 (1982).

29 Compare *Maysonet-Robles v Cabrero*, 323 F3d 43, 50 n 5 (1st Cir 2003) (discussing *Lapides v Board of Regents of the University System of Georgia*, 535 US 613 (2002), and stating that *Lapides*'s "relatively narrow holding did not alter the hybrid nature of the Eleventh Amendment" to "track more closely . . . [to] personal jurisdiction"), with *Ku*, 322 F3d at 434–35 (stating that *Lapides* is consistent "only with the view that the immunity defense [of the Eleventh Amendment] . . . should be treated like the defense of lack of personal jurisdiction").

30 Compare Eric Porterfield, Comment, *Eleventh Amendment Immunity after* Lapides v. Board of Regents of the University System of Georgia*: Keeping States out of Federal Court*, 55 Baylor L Rev 1243, 1277 (2003) ("[T]he Eleventh Amendment has been transformed into a defense, such that it must be raised early in the trial on the merits or immunity is waived."), with Melvyn Durchslag, *State Sovereign Immunity* 96 (Praeger 2002) (discussing the hybrid nature of the Eleventh Amendment in the wake of *Lapides*).

31 See Part II.B.

traditionally has not quite matched with either of the two types of jurisdiction normally recognized as necessary for a suit to proceed.

2. Sovereign immunity in practice.

In light of the Court's current, expansive treatment of state sovereign immunity, there are only two ways that a suit against a state defendant may proceed: congressional abrogation or state waiver.

a) Congressional abrogation. Congress may abrogate a state's sovereign immunity when acting pursuant to its powers under § 5 of the Fourteenth Amendment,[32] but, with one exception unrelated to the subject matter of this Comment,[33] not when acting pursuant to antecedent constitutional provisions such as Article I.[34] Because the Supreme Court has determined that Congress did not attempt to abrogate sovereign immunity when it adopted § 1367(d), the hypothetical presented in the introduction focuses on the question that the Court has left unanswered: can the tolling provision apply to states anyway? In other words, although Congress has not abrogated state immunity from the tolling provision, do states relinquish that immunity by waiving their immunity from federal jurisdiction over a substantive state law claim?

b) State waiver. Waiver theory is discussed in greater depth in Part II, but here it is worth considering waiver in terms of the practical relevance of the hypothetical presented in the introduction. Although it might seem unusual for states to consent to supplemental jurisdiction in federal court, in fact they do so frequently. By doing relatively common things, such as filing a patent suit in federal court, states waive immunity from compulsory counterclaims filed by any defendants.[35] States also waive immunity when they consent to removal in cases where other litigants that do not enjoy sovereign immunity, such

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32 See *Fitzpatrick v Bitzer*, 427 US 445, 456 (1976) (noting that Congress has the power to create private causes of action against states to enforce the substantive guarantees of the Due Process and Equal Protection clauses of the Fourteenth Amendment).

33 States are deemed to have ceded their sovereign immunity in the plan of the union with respect to the federal bankruptcy power. See *Central Virginia Community College v Katz*, 126 S Ct 990, 1005 (2006).

34 See *College Savings Bank*, 527 US at 670 ("[W]e have recognized only two circumstances in which an individual may sue a State. First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment . . . . Second, a State may waive its sovereign immunity by consenting to suit."). See also *Seminole Tribe of Florida v Florida*, 517 US 44, 66 (1996) ("*Fitzpatrick* cannot be read to justify 'limitations of the principle of the Eleventh Amendment through appeal to antecedent provisions of the Constitution.'"), quoting *Pennsylvania v Union Gas Co* 491 US 1, 42 (1989) (Scalia dissenting).

35 See, for example, *In re Creative Goldsmiths of Washington, D.C., Inc*, 119 F3d 1140, 1148 (4th Cir 1997).

as individuals and municipalities,[36] are joined as defendants with the sovereign state.[37]

Although the district court enjoys the power to remand rather than dismiss a removed case,[38] this Comment considers the possibility of removal and discretionary dismissal for two reasons. First, it provides an easy comparator with decided cases like *Raygor v Regents of the University of Minnesota*.[39] Second, and more important, by removing a case to federal court, a litigating officer exercises his maximum authority to waive immunity from federal jurisdiction, so the reasoning in this Comment should also encompass arguably less comprehensive waivers, such as waivers with respect to certain types of counterclaims.[40] In any waiver where the statute of limitations on a state law claim might expire if the claim had to be refiled in state court, the analysis of the constitutionality of the tolling provision as applied to the hypothetical should be appropriate.

B. The Supplemental Jurisdiction Tolling Provision

Congress passed the federal supplemental jurisdiction statute, 28 USC § 1367, after the Supreme Court provoked legislative specification of when federal jurisdiction over nondiverse state law claims was appropriate.[41] Subsection (d) reads:

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36 State subdivisions do not enjoy sovereign immunity. *Monell v Department of Social Services of the City of New York*, 436 US 658 (1978).

37 See, for example, *Omosegbon v Wells*, 335 F3d 668, 673 (7th Cir 2003) (noting that Indiana waived its sovereign immunity when it consented to removal after being joined as a codefendant with university officials).

38 See *Hinson v Norwest Financial South Carolina Inc*, 239 F3d 611, 616 (4th Cir 2001) (noting that several removal statutes—28 USC §§ 1441(c), 1447(c), 1447(e), and 1452—authorize a federal district court to remand a case to state court). See also *Hyde Park Co v Santa Fe City Council*, 226 F3d 1207, 1209 (10th Cir 2000) (noting that the district court, pursuant to discretionary authority granted by § 1367(c)(3), remanded pendant state law claims after a dismissal of all federal claims). A remand, as opposed to a dismissal followed by refiling, avoids interdiction of the statute of limitations. See *Carnegie-Mellon University v Cohill*, 484 US 343, 352 (1988) (noting that "state statutes of limitations thus provide a potent reason for giving federal district courts discretion to remand, as well as to dismiss, removed pendent claims"). However, if a plaintiff attempted to avert the problem pointed out in this Comment and preempt removal by filing in both federal and state court, this would likely run afoul of most anti–claim-splitting rules, so the first-reached judgment would be res judicata against the second. See, for example, *Ellis v Gallatin Steel Co*, 390 F3d 461, 479 (6th Cir 2004), citing Restatement (Second) of Judgments § 24 (1982) ("[A] plaintiff must join all claims arising from the same set of facts in a single proceeding and cannot split them across multiple fora.").

39 534 US 533 (2002).

40 See, for example, *Creative Goldsmiths*, 119 F3d at 1148 (noting that a state waives Eleventh Amendment immunity "to the extent a defendant's assertions in a state-instituted federal action . . . amount to a *compulsory* counterclaim"). For more discussion of waivers of immunity from federal jurisdiction, see Part II.C.

41 See *Finley v United States*, 490 US 545, 556 (1989):

> The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.[42]

Although the Supreme Court has heard two challenges to the constitutionality of the tolling provision, it has never considered the constitutionality of the provision as applied to a state that has consented to federal court jurisdiction over an otherwise immune claim, but then had the federal court employ its discretion to decline to exercise jurisdiction. In *Jinks v Richland County*,[43] the Court held § 1367(d) facially constitutional as "necessary and proper" to Congress's Article I power "[t]o constitute Tribunals inferior to the Supreme Court,"[44] and to assure that those tribunals adequately exercise "[t]he judicial power of the United States,"[45] under Article III.[46] However, in *Raygor*, the Court avoided a constitutional question on congressional abrogation of sovereign immunity by construing § 1367(d) not to apply to a defendant state that had successfully moved for dismissal in federal court on Eleventh Amendment grounds.[47] Although *Jinks* refers only to powers antecedent to the Eleventh Amendment[48] rather than any congressional power to guarantee due process, and thus hints that Congress could not have abrogated the sovereign immunity of uncon-

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> Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.

42 See 28 USC § 1367(d). Section 1367(a) says that, subject to certain exceptions for diversity jurisdiction and the court's discretionary power to decline to hear supplemental claims,

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

43 538 US 456 (2003).

44 US Const Art I, § 8, cl 9.

45 US Const Art III, § 1.

46 *Jinks*, 538 US at 462.

47 534 US at 543–46 (applying a "clear statement" test to ensure that the Court would not infringe on a Constitutional scheme "with which Congress does not readily interfere"), quoting *Gregory v Ashcroft*, 501 US 452, 461 (2002).

48 Reliance on these powers also provides a clear distinction from the reasoning of *Katz*, 126 S Ct at 997. See note 33. Whatever may be the case with respect to the bankruptcy power, if Congress could abrogate state sovereign immunity when "necessary and proper" to its power to "establish Tribunals inferior to the Supreme Court," state immunity from federal jurisdiction would be a nullity.

senting states, it does not resolve whether the tolling provision may constitutionally apply to states that initially consent to federal jurisdiction. The answer to that question requires detailed consideration of Eleventh Amendment waiver doctrine.

II. WAIVERS OF SOVEREIGN IMMUNITY

This Part addresses the scope of waivers of sovereign immunity. Specifically, it outlines the different aspects of sovereign immunity that a state can waive and the combination of waivers necessary for a federal rule to apply to allow for tolling. It also addresses the allocation of authority among the branches of state government to effect a waiver or to modify its terms. Part II.A describes the multilayered nature of sovereign immunity. Part II.B addresses state waiver of immunity under state law. Part II.C discusses the federal law of state waiver of immunity from federal jurisdiction.

A. The Two-Tiered Nature of State Sovereign Immunity

The restriction on federal jurisdiction encoded in the Eleventh Amendment rests on an understanding that, a priori, states enjoy an underlying immunity from suit.[49] Sometimes this underlying immunity is phrased in jurisdictional terms and sometimes it manifests itself as a substantive immunity from liability.[50] Either way, state sovereign immunity is actually a two-tiered defense from private suit brought in federal court: (1) immunity from either jurisdiction or liability in state court, and (2) immunity from federal jurisdiction over claims against the state.[51]

Because of the two-tiered nature of the defense, two steps are required for a federal court to rule on the merits of a state law claim against a state: (1) a state must waive its underlying immunity, usually by creating a cause of action against itself, and (2) a state must consent to federal jurisdiction.

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[49] *Lapides v Board of Regents of the University System of Georgia*, 535 US 613, 617–18 (2002). See also *Stewart v North Carolina*, 393 F3d 484, 488 (4th Cir 2005) (discussing the difference between Eleventh Amendment immunity and the broader concept of sovereign immunity).

[50] Compare *LaRoche v Doe*, 134 NH 562, 594 A2d 1297, 1300 (1991) ("Sovereign immunity is a jurisdictional question."), with *Maryland v Sharafeldin*, 382 Md 129, 854 A2d 1208, 1219–20 (2004) (construing sovereign immunity as a defense from substantive liability in state court).

Although the dictum of *Kawananakoa v Polyblank*, 205 US 349, 353 (1907), that sovereign immunity is based "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends," is often cited, that case's seeming endorsement of the substantive immunity from liability theory has not prevailed everywhere.

[51] See *Stewart*, 393 F3d at 490 (describing the waiver of underlying immunity as well as immunity from federal jurisdiction as necessary for state waiver of sovereign immunity in federal court).

1. Waiving underlying immunity.

A state constitution or legislature usually waives the state's underlying sovereign immunity by creating a cause of action against the state. In a few states, however, state litigators also can waive underlying immunity from any cause of action that could be brought against private citizens.[52]

2. Consenting to federal jurisdiction.

Unless a constitutional or statutory waiver explicitly provides for federal jurisdiction,[53] a state litigating officer must act to waive the state's immunity from federal jurisdiction over that claim.[54] For example, in *Raygor* the mere existence of the Minnesota Human Rights Act did not create federal supplemental jurisdiction over Minnesota when the state was sued on both federal and state law claims; the state had to consent to jurisdiction. Section 1367(d) could only apply to a claim against a state as an element of consensual supplemental federal jurisdiction.[55]

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52 See *39th–40th Corp v Port of New York Authority*, 188 Misc 657, 65 NYS2d 712, 713 (1946) (permitting the state defendant to waive its sovereign immunity by entering an appearance). For discussion of how this could be so, see Part II.C.2.

53 See *Florida Dept of Health and Rehabilitative Services v Florida Nursing Home Assn*, 450 US 147, 149–50 (1981) (refusing to infer a waiver of federal court immunity from a legislative grant of authority to "sue and be sued"); *Kennecott Copper Corp v State Tax Commission*, 327 US 573, 578–79 (1946) (refusing to infer a waiver of federal immunity from a legislative statement authorizing suits against the state "in any court of competent jurisdiction"); *Smith v Reeves*, 178 US 436, 447–49 (1900) (refusing to infer from a state's consent to suit in its own courts a waiver of immunity from federal jurisdiction). See also *College Savings Bank v Florida Prepaid Postsecondary Education Expense Board*, 527 US 666, 676 (1999) ("Thus, a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation.").

54 On "waiver-in-litigation," see *Lapides*, 535 US at 622 ("This Court consistently has found a waiver when a State's attorney general, authorized (as here) to bring a case in federal court, has voluntarily invoked that court's jurisdiction."). On the necessity of waiving both underlying immunity and immunity from federal jurisdiction, see *Stewart*, 393 F3d at 490 & n 5:

> We therefore hold that North Carolina, having not already consented to suit in its own courts, did not waive sovereign immunity by voluntarily removing the action to federal court for resolution of the immunity question.
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> To be precise, by 'sovereign immunity' we are referring to the longstanding principle of state sovereign immunity implicit in constitutional order, not the more narrow principle of Eleventh Amendment immunity.

See also *Estes v Wyoming Department of Transportation*, 302 F3d 1200, 1204 (10th Cir 2002) (differentiating between sovereign immunity in federal courts granted by the Eleventh Amendment and sovereign immunity against contract claims in state court); *Watters v Washington Metro Area Transit Authority*, 295 F3d 36, 39–40 (DC Cir 2002) (noting that the two defendant states possessed sovereign immunity from federal suits under the Eleventh Amendment, as well as judicially created immunity from equitable liens in their own courts).

55 See Part I.A.1.

For the sake of clarity, this Comment refers to the two-tiered waiver system as consisting of horizontal waivers and vertical waivers. A horizontal waiver occurs when a state legislature waives sovereign immunity and allows for liability to be imposed on the state in a state court. A vertical waiver occurs when a state litigator allows for federal jurisdiction over a claim against the state. Part II.B discusses horizontal waivers of immunity. Part II.C addresses vertical waivers.

B. Horizontal Waiver

Although § 1367(d) supplemental jurisdiction can only apply after a vertical waiver of immunity, the tolling provision's constitutionality usually hinges on the terms of a prior horizontal waiver. The conditions on a horizontal waiver of sovereign immunity (usually a statute) delimit the matter over which a litigating officer may waive vertical immunity.[56] Accordingly, the manner in which state courts construe the statute of limitations on a horizontal waiver of sovereign immunity (as conditions on liability vel non) is critical to a determination of whether § 1367(d) may apply so as to expand those limits after vertical waiver. Part II.B.1 discusses who has power to enact a horizontal waiver. Part II.B.2 addresses the special role of the statute of limitations as a condition on horizontal waiver. Part II.B.3 describes how and when, in light of their status as potential conditions precedent to horizontal waivers, limitations periods may be tolled.

1. Who can enact a horizontal waiver?

Whether a particular branch of government has the authority to enact a horizontal waiver depends on whether state courts treat sovereign immunity as a jurisdictional or a substantive matter. If a state treats sovereign immunity as a substantive matter, then only a statute or the state constitution can waive it.[57] If a state treats sovereign immunity as a jurisdictional matter, then its constitution may delegate to the legislature the power to waive immunity.[58] In a few of these states,

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[56] Else state litigators could enact open-ended waivers of all of a state's immunity by removing a case involving a single state statute to federal court. The author is aware of no state that has adopted this policy. For further discussion of the ramifications of this limiting principle, see Part III.

[57] See *University of Maryland v Maas*, 173 Md 554, 197 A 123, 125 (1938) (noting that in Maryland, which adheres to the theory of immunity from substantive liability, a state agency is suable only if authorized by legislative action).

[58] See *Beers v Arkansas*, 61 US (20 How) 527, 529 (1857) (noting that when a state constitution delegates to the state legislature the power to waive jurisdictional immunity in state court, the legislature retains a sovereign right to "prescribe the terms and conditions on which it consents to be sued").

such as New York, however, courts have ruled that sovereign immunity is closely analogous to a defense against personal jurisdiction, and they allow litigators to waive the underlying immunity by appearing on behalf of the state in state court.[59]

The analysis in this Comment is unlikely to apply to the subgroup of states that take the New York (jurisdictional/waiver-by-litigator) approach.[60] In New York, it is theoretically possible that a state litigator could make a vertical waiver without making a horizontal waiver.[61] But if a state litigator made a limited appearance in state court to remove a case to federal court, the issue upon returning to state court would probably not be the statute of limitations, but rather whether the state had reserved sovereign immunity in its own court. It would be obvious that the state litigator had full authority to waive sovereign immunity in both state and federal court and that he should have been aware of the existence of the tolling provision for claims adjudicated under federal supplemental jurisdiction, so the tolling provision would likely apply in that situation without raising any constitutional difficulties. Hence, the remainder of this Part focuses primarily on statutory horizontal waivers,[62] as opposed to horizontal waivers based on conduct by state litigators.

2. Statutes of limitations: Interpretive presumptions and conditions of waiver.

Statutes of limitations on statutory waivers of sovereign immunity can, but do not always, serve as conditions on the existence of a horizontal waiver. Where they are conditions, they are as much a predicate of liability as, say, the commission of tortious conduct. It follows that a litigating officer may no more waive them than he might unilaterally declare, with respect to a waiver of state immunity in tort, that the state shall pay damages for an injury where no tort on the state's part is alleged.[63] Thus it is extraordinarily important, when considering whether a statute of limitations may be tolled, to determine

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59 See, for example, *39th–40th Corp*, 65 NYS2d at 713.

60 The Supreme Court of New Hampshire identified New York, Missouri, and Tennessee as states adhering to this doctrine. See *LaRoche v Doe*, 134 NH 562, 594 A2d 1297, 1301 (1991).

61 See *Stewart*, 393 F3d at 490–91 n 5 (distinguishing this issue and refusing to decide the question).

62 For the sake of simplicity, except where they are explicitly distinguished, this Comment treats statutory and constitutional waivers of immunity as equivalent. The essential distinction is between waivers that are written down before litigation begins and waivers that occur during litigation.

63 See *Sharafeldin*, 854 A2d at 1219 ("The sovereign immunity that the State enjoyed remained in effect; it could not be waived by subordinate agencies or their attorneys, and thus the agencies were required by law to raise the defense.").

whether the statute waiving immunity conditioned that waiver on the claim being filed within the limitations period.

Although this Comment concerns state sovereign immunity, the interpretation in federal court of waivers of sovereign immunity by the federal government serves as a good example of horizontal waiver interpretation. Federal waivers have a well-developed body of case law and a number of states follow the general federal jurisdictional/waiver-by-legislature approach.[64] In the federal system, because the federal government can only be sued for money damages in federal court,[65] Congress almost exclusively enacts horizontal waivers. These waivers are subject to two presumptive judicial constructions. First, unlike normal statutes of limitations, statutes of limitations in federal waivers of sovereign immunity are presumptively deemed to be express conditions of the waiver; if the conditions are not satisfied, federal courts lack jurisdiction.[66] More controversially, under *Irwin v Department of Veterans Affairs*,[67] the statutes of limitations are also subject to the rebuttable presumption that equitable tolling applies to them.[68]

One way to conceive of the idea of statutes of limitations as conditions of waiver is to consider the common law distinction between statutes of limitations that limit a right and those that bar a remedy.[69] At common law, most statutes of limitations were deemed procedural because they were held merely to bar a remedy; the underlying right against, say, tortious conduct, was still intact, but the plaintiff could no longer obtain judicial redress for the violation of that right.[70] However, for certain claims, including claims against the sovereign, the passage

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64 See, for example, *Henderson v Department of Correctional Services*, 256 Neb 314, 589 NW2d 520, 522 (1999); *LaRoche* 594 A2d at 1301 (1991); *Greenfield Construction Co, Inc v Michigan Department of State Highways*, 402 Mich 172, 261 NW2d 718, 723 (1978).

65 See 28 USC § 1346(b)(1) (2000) (providing that "the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, *for money damages*") (emphasis added).

66 *United States v Mottaz*, 476 US 834, 841 (1986) ("When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction. In particular, '[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity.'") (internal citation omitted), quoting *Block v North Dakota*, 461 US 273, 287 (1983).

67 498 US 89 (1990).

68 Id at 95–96 (noting that "Congress, of course, may provide otherwise if it wishes to do so").

69 This distinction is still sometimes seen in choice-of-law cases. See William Richman and William L. Reynolds, *Understanding Conflict of Laws* 293–94 (Lexis 2002):

> The procedural classification depends on the notion that the running of the limitations period affects only the remedy and not the right. If the foreign right and limitations period are found to be closely linked, however, then the limitations period will be styled "substantive," and foreign law will be applied to determine if the claim is time-barred.

70 See *Graves v Graves Executors*, 5 Ky 207, 208 (1810) ("The statute of limitations . . . does not destroy the right but withholds the remedy.").

of the limitations period extinguishes not the remedy, but the right itself.[71] The combination of presumptions that applies to federal waivers of sovereign immunity thus means two things. It means that courts assume that Congress intended to condition the very existence of a right against the federal government on that right being asserted in court within a given time period following its violation. But courts also assume that Congress intended that the time period might sometimes be extended by equitable tolling.[72] Hence there is a subtle but extremely important difference between the application of statutes of limitations in the sovereign immunity context and their application to other causes of action.

3. Determining when statutes of limitations on waivers of sovereign immunity may be tolled.

Despite the existence of the general interpretive presumptions described above, determination of whether a limitations period is a condition precedent to a horizontal waiver of immunity and thus not subject to tolling is often a matter of particularized statutory interpretation. The *Irwin* presumption that statutes of limitation on waivers of sovereign immunity are subject to equitable tolling has been held not to apply when a statute "uses language that is not simple" and "sets forth its limitations in a highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions."[73] One may think of this as the "complex language" rule: if Congress sets forth enough details in its waiver of sovereign immunity, but says nothing explicitly about tolling, courts will apply the expressio unius canon of construction to determine that equitable tolling is not authorized. If the waiver is not detailed, courts presume that the statute of limitations contains an implicit exception for circumstances that give rise to equitable tolling.

Lower courts have further complicated matters by requiring that a particular statute of limitations be jurisdictional in nature before they

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71 See *Mottaz*, 476 US at 843 (internal citations omitted):

> [T]he Act provides the United States' consent to suit concerning its claim to these lands, provided, of course, that the plaintiff challenging the Government's title meets the conditions attached to the United States' waiver of immunity.
>
> The limitations period is a central condition of the consent given by the Act.

72 "Equitable tolling" is the postponement of an action's accrual because of circumstances under which "a plaintiff has been 'prevented in some extraordinary way from exercising his rights.'" *Johnson v Nyack Hospital*, 86 F3d 8, 12 (2d Cir 1996), quoting *Miller v International Telegraph & Telephone Corp*, 755 F2d 20, 24 (2d Cir 1985).

73 *United States v Brockamp*, 519 US 347, 350 (1997).

move on to the complex language determination.[74] This extra step stems from an attempt to reconcile *Irwin* with *Soriano v United States*,[75] an earlier case that held that deadlines defining the courts' jurisdiction are not subject to equitable tolling.

Although Justice White and some lower courts believed that *Irwin* overruled *Soriano*,[76] this does not seem to be the consensus in the wake of later Supreme Court decisions.[77] The current doctrine appears to be that Congress has the right to use a statute of limitations as a jurisdictional limitation in a waiver of sovereign immunity, but courts must refer to the text of the statute to ensure that this was Congress's intent.[78] If Congress did intend a "jurisdictional" time limit, then *Soriano* precludes application of equitable tolling. If not, then *Irwin*'s presumption of equitable tolling applies unless it is rebutted by the complex language rule.[79]

This process of determining when the statute of limitations at issue is jurisdictional, however, handicaps the simplicity and loyalty to congressional intent that the *Irwin* majority hoped would result from the decision.[80] Instead, *Irwin* has led to both internal and external circuit splits regarding the interpretation of several statutes,[81] and has

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74 See, for example, *Chung v United States Department of Justice*, 333 F3d 273, 277 (DC Cir 2003) (asking the initial question of "whether the injury to be redressed is of a type familiar to private litigation" before reaching the issue of equitable tolling); *Boos v Runyon*, 201 F3d 178, 183 (2d Cir 2000) (finding that because federal sovereign immunity is jurisdictional in nature, a limitations period that does not speak to jurisdiction cannot be a condition of waiver).

75 352 US 270 (1957).

76 See *Irwin*, 498 US at 99–100 (White concurring); *Oropallo v United States*, 994 F2d 25, 29 n 4 (1st Cir 1993) (articulating that "[the Court] would seem to have overruled or made irrelevant prior case law which sought to determine whether a particular limitations period could be tolled by determining whether the time limit was jurisdictional or not").

77 See, for example, *Neverson v Farquharson*, 366 F3d 32, 40 n 8 (1st Cir 2004) (reasoning that *Soriano* could be reconciled with *Irwin*).

78 See *Boos*, 201 F3d at 183 (using the statutory provision allowing employees of federal agencies to sue in district court to discern whether Congress meant to deprive district courts of jurisdiction).

79 See id (concluding that Congress did not mean to deprive the district court of jurisdiction and, furthermore, "there is no indication in [the statute] . . . that Congress intended to treat the [ ] requirement [at issue] any differently than it treated the timeliness requirement before the Court in *Irwin*").

80 See *Irwin*, 498 US at 95:

> [A] continuing effort on our part to decide each case on an ad hoc basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government.

81 See, for example, *Sharafeldin*, 854 A2d at 1217 n 6 (cataloguing the internal and external circuit splits in the federal courts).

been sharply criticized for creating further discord in an already inconsistent area of the law.[82]

Moreover, in light of the confusion surrounding the interpretation of statutes of limitations on horizontal waivers in only one (federal) jurisdiction, the *Raygor* Court expressed skepticism that any general presumptions would be appropriate in the state context where fifty different jurisdictions apply their own interpretive rules to horizontal waivers.[83] As the Court surmised in *Raygor*, state courts' interpretations of their own legislatures' consents to suit are inconsistent. Some state courts have ruled that their states generally lack sovereign immunity.[84] Others engage in an analysis of legislative intent, treating jurisdiction roughly like the federal process outlined above does.[85] And some, which view the underlying sovereign immunity as a substantive immunity from liability, do not treat the statute of limitations as a jurisdictional condition, but rather as a condition of waiver protected from judicial tolling because of the separation of powers doctrine.[86]

In sum, two considerations are relevant for a federal court adjudicating a horizontal waiver of state immunity. First, the limitation periods on some horizontal waivers are conditions precedent to the waivers and are not subject to judicial tolling, at least as a matter of state law. Second, it can require Byzantine analysis and intimate familiarity with a state's sovereign immunity jurisprudence to predict exactly which waivers are so conditioned. As is discussed in greater depth below, these individual state law considerations can have drastic effects on litigants after a federal court discretionarily dismisses a claim. As a result, courts may want to keep these horizontal waiver considerations in mind when deciding how to dispose of vexing state law claims after vertical waiver.

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82 See *Mallard Automotive Group, Ltd v United States*, 343 F Supp 2d 949, 953 (D Nev 2004) (noting that although "it 'intended to create uniformity in this area, *Irwin* has appeared to sow more confusion and disuniformity than existed earlier'"), quoting *Sharafeldin*, 854 A2d at 1216.

83 *Raygor*, 534 US at 543 ("[T]his Court has never held that waivers of a State's immunity presumptively include all federal tolling rules, nor is it obvious that such a presumption would be 'a realistic assessment of legislative intent.'"), quoting *Irwin*, 498 US at 95.

84 See, for example, *Pritchard v State*, 163 Ariz 427, 788 P2d 1178, 1181–82 (1990).

85 See, for example, *Bryant v Duval County Hospital Authority*, 502 S2d 459, 462 (Fla App 1986).

86 See *Sharafeldin*, 854 A2d at 1217–18 (refusing to apply Maryland's tolling provision after dismissal from federal court because the statute of limitations was a condition precedent to the waiver of substantive immunity).

C. Vertical Waiver

Although statutory or constitutional provisions may express vertical waivers of immunity,[87] most vertical waivers are effected by state litigators representing their states in court.

1. Written waivers.

A written provision must be extraordinarily explicit about vertical waiver. The Supreme Court has refused to infer a vertical waiver from a state statute that created a horizontal waiver by declaring the state's intent to be available for suit in "courts of competent jurisdiction."[88] Most statutory waivers are too general to meet the Supreme Court's criteria. Presumably the waiver would have to declare the state's willingness to be sued specifically in federal court (rather than in any "court of competent jurisdiction") for all claims arising under the statute, making the possibility of vertical waiver by statute more theoretical than real.[89] Accordingly, a state typically waives vertical immunity through its litigation conduct.[90]

2. Waivers through litigation conduct.

Waiver-in-litigation is restrictive. Federal courts will infer waiver with respect to a particular claim based only on actions that are un-

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87 See *Atascadero State Hospital v Scanlon*, 473 US 234, 238 n 1 (1985) (noting that "[a] State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program"). States are also deemed to have waived their sovereign immunity in suits by the United States, *United States v Texas*, 143 US 621, 646 (1892) (finding that Texas consented to suit by the United States when the state was admitted into the Union), and by other states, *Kansas v Colorado*, 206 US 46, 80–82 (1907) (asserting jurisdiction over controversies between the States by virtue of Article III powers). Finally, the Supreme Court has appellate jurisdiction to review matters of federal law raised in state court even when a state is a defendant. *Cohens v Virginia*, 19 US (1 Wheat) 264, 264 (1821) (acknowledging that the Court has appellate jurisdiction from the final judgment of a state's highest court, even when the decision was rendered against the United States). None of these latter three limitations on sovereign immunity is particularly important to the subject of this Comment. Additionally, though the Court once espoused the idea, a state does not constructively waive sovereign immunity by participating in an activity subject to congressional regulation. See *College Savings Bank*, 527 US at 678–83, overruling *Parden v Terminal Railway of the Alabama State Docks Dept*, 377 US 184 (1964).

88 *Kennecott Copper*, 327 US at 579.

89 See Erwin Chemerinsky, *Federal Jurisdiction* § 7.6 at 440 (Aspen 4th ed 2003) ("[T]he Supreme Court's test is so stringent that it is quite unlikely that very many explicit [statutory] state waivers of Eleventh Amendment immunity will be found.").

90 See, for example, *Clark v Barnard*, 108 US 436, 447–48 (1883) (finding that because the State of Rhode Island appeared in the cause, it voluntarily submitted to the courts' jurisdiction). See also *Department of Transportation of the State of Illinois v American Commercial Lines, Inc*, 350 F Supp 835, 837 (ND Ill 1972) (finding a voluntary submission to the court's jurisdiction).

dertaken by an officer of the state who has been vested with the appropriate authority.

Many different kinds of litigation conduct suffice to waive immunity. For example, states may waive immunity in litigation by participating in tax collection litigation[91] or by appearing as a claimant in an interpleader proceeding.[92] The Supreme Court has indicated that consent occurs when, "a State voluntarily invoke[s] federal court jurisdiction or otherwise 'makes a "clear declaration" that it intends to submit itself to our jurisdiction.'"[93]

One clear way to waive an Eleventh Amendment defense through litigation conduct is to consent to removal to federal court. In *Lapides v Board of Regents of University System of Georgia*,[94] Georgia, which had been sued under the Georgia Tort Claims Act,[95] removed the case to federal court for the purpose of providing its fellow defendants, who did not enjoy the protection of sovereign immunity, the benefit of more favorable interlocutory appeal procedures.[96] Despite the state's objection that mere litigation conduct did not express the required "'clear' indication of the State's intent to waive its immunity,"[97] the Supreme Court held that Georgia's consent to remove the case to federal court constituted a waiver of its Eleventh Amendment privilege.[98] The Court noted that "whether a particular set of state laws, rules, or activities amounts to a waiver of the State's Eleventh Amendment immunity is a question of federal law."[99]

Federal law, as a result of *Lapides*, puts vertical waiver power squarely in the hands of state litigators. The case overruled a prior rule requiring specific authorization for a state litigator to enact a waiver[100] and instead found a waiver simply through removal by an officer exercising the delegated power "to represent the state in all civil actions tried in any court."[101]

This background knowledge of history and waiver theory in hand, we proceed to an analysis of the introductory hypothetical.

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91 See *Gunter v Atlantic Coast Line Railroad Co*, 200 US 273, 284–85 (1906).

92 See *Clark*, 108 US at 448 (explaining that the state "became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader").

93 *Raygor*, 534 US at 547, quoting *College Savings Bank*, 527 US at 676.

94 535 US 613 (2002).

95 38 Ga Code Ann § 50-21-23 (LexisNexis 1994).

96 535 US at 621 (noting that even benign motives still indicate an intent to waive immunity).

97 Id at 620.

98 Id at 620–22.

99 Id at 623.

100 See *Ford Motor Co v Dept of Treasury of Indiana*, 323 US 459, 468–69 (1945) (noting that the state could not waive its immunity in the absence of a proper, strictly construed delegation of authority to the state attorney general).

101 *Lapides*, 535 US at 621–22, quoting Ga Code Ann § 45-15-3(6) (1990).

III. DOES STATE LAW AUTHORIZE TOLLING?

The most straightforward way for our plaintiff from the introductory hypothetical to avoid the time bar would be to establish that the statute of limitations on his state law claim was not a condition precedent to the state's waiver of immunity from that cause of action. The limitations period would then presumably be subject to equitable tolling[102] and the plaintiff could proceed on the merits. If, however, the plaintiff were not so lucky and, instead, the court determined that the limitations period was a condition of waiver, he might nevertheless argue that the state litigator, as a result of his delegated power to litigate on behalf of the state, enjoyed the authority to consent on the state's behalf pursuant to his discretion to pursue a given litigation strategy. This Part considers the merits of such an argument and concludes that they are not great.

A. Section 1367(d) at the Intersection of Horizontal and Vertical Waivers of Immunity

Section 1367(d)'s tolling provision is at the crossroads between horizontal and vertical waivers of sovereign immunity. If it applies as a result of a vertical waiver, then the terms of the horizontal waiver may be changed as well. The state might be made liable on a claim where liability had been conditioned on the claim being filed (actually refiled in our hypothetical) before it actually was. As discussed above, conditions precedent not only eliminate the remedy, they extinguish the underlying substantive right.[103] If a condition precedent exists, when a state attorney general waives vertical immunity by consenting to jurisdiction in federal court he enlarges the scope of a substantive right against the state. He is bringing the right into existence under conditions where the terms of the legislative waiver would otherwise have extinguished the right.

In states where waiver power resides with the legislature, legislative authority or a delegation thereof is required to accomplish this.[104] The relevant question then is: in light of *Lapides*'s broad interpretation of an attorney general's delegated power to litigate and thereby waive vertical immunity, may a state legislature also be deemed to

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102 See, for example, *Maryland v Sharafeldin*, 382 Md 129, 854 A2d 1208, 1219–20 (2004) (limitations periods that are not conditions precedent are subject to tolling).

103 See Part II.B.2.

104 See, for example, *Sharafeldin*, 854 A2d at 1218 (discussing separation of powers with respect to who can waive immunity). See also *LaRoche v Doe*, 134 NH 562, 594 A2d 1297, 1301 (1991) ("Because the State's sovereign immunity may be waived only by the legislature, *a fortiori* the State's actions in failing to swiftly seek dismissal of this case . . . had no effect as a waiver of the State's basic immunity from suit.").

have delegated, with the litigating power, the power to modify conditions on a horizontal waiver of immunity?

B. The Limits of Delegated Litigating Power

The answer to the above question is probably not. Our hypothetical state court, after the case was refiled, would quite possibly determine that the litigating officer's "consent" to the tolling provision was an invalid attempt by an executive officer to exercise legislative power by consenting to the modification of the terms of a state statute.

Although the existence of a vertical waiver is, according to *Lapides*, a matter of federal law,[105] the existence of a horizontal waiver of state sovereign immunity is a matter of state law.[106] Absent preemption, the state court is thus free to construe an attorney general's consent to modification of a condition precedent to the existence of a claim against the state as ultra vires and therefore invalid, and no federal court below the Supreme Court would have occasion to rule on whether federal law preempted the state court's decision because the tolling provision would only be at issue if the statute of limitations had run after the case had been dismissed from federal district court.

Many states probably would consider the modification invalid. It is one thing for a court to hold, as the Supreme Court has, that the delegated power to litigate on behalf of the state in "any court" carries with it the power to choose one's court even if the choice constitutes a waiver of objection to its jurisdiction.[107] It is quite another to construe the power to represent the state in any court to include the power to consent to the rewriting of fundamental conditions of the claims at issue in litigation.

The difference can be subtle, but it is critical. If the legislature waives immunity subject to certain conditions, then empowers the attorney general to litigate to determine whether those conditions are met in a given instance, bad litigation strategy will, no doubt, expose the state to damages in situations where, objectively, the relevant conditions are not met. Incompetent litigation concerning the fulfillment of the conditions, however, presents a different problem from allowing the attorney general to alter one of the fundamental conditions by

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105 535 US at 622 ("[T]his case involves a State that *voluntarily* invoked the jurisdiction of the federal court.").

106 See *Sharafeldin*, 854 A2d at 1218 (pointing out that the Maryland Supreme Court was not bound by federal decisions when construing its own legislature's waiver of immunity in contract).

107 *Lapides*, 535 US at 620 ("And unless we are to abandon the general principle [that when a state voluntarily agrees to remove a case to federal court it invokes federal court jurisdiction], or unless there is something special about removal . . . the general legal principle requiring waiver ought to apply.").

consenting to an extension of the statute of limitations. In the former scenario, the attorney general is not doing a good job performing his duty to advocate to the court that the actions alleged do not violate an existing right that gives rise to a cause of action against the state. In the latter, he is altering one of the conditions that delimits the right and thus expanding it beyond the scope defined by the legislature.

It is particularly unlikely that a state court would find a delegation of power to the attorney general to consent to tolling in light of some courts' preference for reading alleged legislative delegations of waiver authority narrowly.[108] Moreover, if a state legislature has written a waiver of sovereign immunity with conditions precedent,[109] that action itself seems to evince an intent not to delegate waiver power with respect to those conditions. If the legislature were indifferent to the tolling of the statute of limitations, it could have abstained from rendering the limitations period a condition precedent to the existence of the claim. In sum, a state court might very reasonably determine that a state litigator's consent to the application of § 1367(d) was ultra vires and thus void. Because the existence and terms of a horizontal waiver are matters of state rather than federal law, the state court determination would be final.

IV. DOES FEDERAL JURISDICTIONAL DOCTRINE INDEPENDENTLY REQUIRE TOLLING?

Even if he were thwarted on his state law theory, our hypothetical plaintiff could still argue that federal law preempts the state law and requires tolling. He might advance two theories. First, the plaintiff might argue that Congress's statutory scheme, allowing for removal and tolling, does not directly abrogate state sovereign immunity but rather vests power to waive the immunity in state litigators and conditions removal on consent to tolling. Second, the plaintiff might argue that Eleventh Amendment immunity has been transformed into an analog of a defense against personal jurisdiction,[110] which, like immunity from

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[108] See, for example, *Sharafeldin*, 854 A2d at 1219 ("The sovereign immunity that the State enjoyed remained in effect; it could not be waived by subordinate agencies or their attorneys, and thus the agencies were required by law to raise the defense."); *LaRoche*, 594 A2d at 1300 ("Our decisions have found express or implied consent only in the acts of our legislature.").

[109] See, for example, Maryland Code Ann § 12-201 (2002) (conditionally waiving the Maryland's sovereign immunity in actions filed in Maryland appellate courts if certain requirements are met); *Sharafeldin*, 854 A2d at 1219–20 (holding that Maryland's statute providing that an action against the state for breach of contract is barred unless filed within a one year period is not just a statute of limitations, but a condition precedent to the waiver of sovereign immunity and the action itself).

[110] Justice Kennedy, who has advocated a shift towards treating Eleventh Amendment immunity as similar to a defense against personal jurisdiction, has not said that it would actually

personal jurisdiction, may be waived by the litigant's representative. Against the background of such a principle, a state legislature's delegation of vertical waiver power might be read as the removal of the limitations period as a condition on the state's waiver of its (federal constitutional) right of sovereign immunity in its own courts. Since the existence of a waiver of the state's constitutional right would be a matter of federal law,[111] it would preempt directly conflicting state law.[112]

Unlike the state law of horizontal waivers where state court determination is final, our hypothetical plaintiff would be able to petition for certiorari from the Supreme Court to adjudicate these federal questions, but neither the Supreme Court nor the state courts would likely be persuaded by these arguments. Part IV.A considers and rejects the idea that Congress has delegated (or could delegate) waiver authority from a state legislature to a state litigator. It also rejects the idea that Congress could condition state access to federal court on waiver of immunity in state court. Part IV.B addresses the contention that state sovereign immunity has been transformed into an immunity analogous to a defense against personal jurisdiction.

A. Forced Delegation by Congress and Unconstitutional Conditions on State Access to Federal Court

If his arguments under state law failed, our plaintiff might still emphasize that federal law nevertheless provides state litigators with broad waiver authority. It should be frankly admitted that the Court in *Lapides* demonstrated little interest in parsing the niceties of state delegations of power and described state delegation statutes as only one element in the determination of the federal law of waiver author-

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be an immunity from "personal" jurisdiction over the state. See *Wisconsin Department of Corrections v Schacht*, 524 US 381, 395 (1998) (Kennedy concurring) ("The Court could eliminate the unfairness by modifying our Eleventh Amendment jurisprudence to make it more consistent with our practice regarding personal jurisdiction."). Professor Caleb Nelson, who also advocates treating sovereign immunity, in many instances at least, as a doctrine of personal jurisdiction, suggests that state sovereign immunity does not actually implicate jurisdiction in personam but rather, in the understanding of the Framers, forecloses the existence of a case or controversy within the meaning of Article III by destroying one party's amenability to suit. See Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv L Rev 1559, 1585–87 (2002). It would seem incongruous with the Due Process clauses, in which the doctrine of personal jurisdiction is constitutionally grounded, to treat sovereign immunity as a defense against personal jurisdiction because states are not persons within the meaning of those clauses.

111 *Lapides*, 535 US at 622–23. ("As in analogous contexts, in which such matters are questions of federal law, whether a particular set of state laws, rules, or activities amounts to a waiver of the State's Eleventh Amendment immunity is a question of federal law.") (internal citations omitted).

112 See US Const Art VI, cl 2. ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.").

ity.[113] In light of this broad application of removal power, our hypothetical plaintiff might contend that the statutory scheme that Congress has enacted in order to allow states to remove cases to federal courts effects a delegation of waiver power, as a matter of federal statutory law, from state legislatures to state litigators. Moreover, *Lapides* emphasized fairness and it would be senseless and unfair to create a federal rule that allowed for a state to waive immunity from federal jurisdiction over a cause of action, then claim immunity piece by piece from every federal rule. It is unlikely that a state could waive immunity from jurisdiction by removal, then claim it was immune from the Federal Rules of Evidence. Hence, our plaintiff might say, *Lapides* not only outlines a broad power for state litigators to waive immunity but also establishes a federal policy that forbids piecemeal waiver. When a litigator removes a case to federal court, he waives all relevant immunities and the state is bound by this waiver. This argument would likely fail.

1. Forced delegations of state power by Congress.

If Congress wishes to alter the balance of functions among the sovereign authorities of a state government, it must first make its intention to do so clear.[114] However, neither § 1367(d) nor the primary removal statute[115] mention sovereign states as litigants. As a result, a court would likely never reach the question of whether Congress could authorize a state officer to waive a state's underlying sovereign immunity. If a court did consider the question, this sort of forced delegation would look a lot like constitutionally impermissible commandeering. The Supreme Court has determined that Congress may not force a state to open its courts to hear claims against itself in derogation of its sovereign immunity.[116] If Congress may not abrogate the power of a state legislature to limit state court jurisdiction over claims against the state and endow the state court with authority to determine whether the state shall be liable, it follows that Congress may not seize waiver authority from the state legislature and vest that authority in state litigators. Even if such forced delegation might be "neces-

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113 535 US at 623.

114 See *Will v Michigan Department of State Police*, 491 US 58, 65 (1989), quoting *Rice v Santa Fe Elevator Corp*, 331 US 218, 230 (1947) ("Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States.").

115 28 USC § 1441 (2000).

116 See generally *Alden v Maine*, 527 US 706 (1999).

sary . . . for carrying into Execution"[117] Congress's power to "constitute Tribunals inferior to the supreme Court,"[118] it would not be proper. The Supreme Court has stated in an analogous context:

> When a "La[w] . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions . . . it is not a "La[w] . . . *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such."[119]

Accordingly, not only does the statutory scheme in question not contain a clear enough statement to manifest congressional intent to effect a federal delegation of waiver authority from one branch of state government to another, Congress lacks power under the Constitution to effect such a delegation at all.

2. Section 1367(d) as a condition of waiver.

Even if Congress could delegate to a state litigator the power to waive the state's horizontal immunity, § 1367(d) would operate as an unconstitutional condition on state access to federal jurisdiction. Unlike, say, the Federal Rules of Evidence, the tolling provision creates a waiver of liability from individual suit during the period in which the statute of limitations is tolled.[120] Demanding consent to tolling as a condition on state access to federal supplemental jurisdiction runs afoul of the rule that Congress may not "exact constructive waivers of sovereign immunity through the exercise of Article I powers" when it allows states to participate in a federal program.[121] Congress may restrict state access to federal court, but it may not condition such access on a waiver of sovereign immunity from private suit.

While it might seem strange to say that Congress may not condition a waiver of immunity on a waiver of immunity, one must remember that both vertical and horizontal immunity are constitutional rights, the

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117 US Const Art I, § 8, cl 18. See also *McCulloch v Maryland*, 17 US (1 Wheat) 316, 414–15 (1819) (stating that "necessary" does not mean "absolutely necessary" in all contexts, but can be used in various senses).

118 US Const Art I, § 8, cl 9.

119 *Printz v United States*, 521 US 898, 923–24 (1997), quoting US Const Art I, § 8, cl 18, and Federalist 33 (Hamilton), in *The Federalist* 203, 207 (Wesleyan 1961) (Jacob E. Cook, ed).

120 It is a waiver when the suit would not otherwise be allowed, that is, where the statute of limitations is a condition precedent to existence of the right of action against the state. If the limitations period is not a condition precedent, then, as noted above in Part III.A, tolling presents no constitutional problem.

121 *College Savings Bank*, 527 US at 683, overruling *Parden v Terminal Railway of the Alabama State Docks Department*, 377 US 184 (1964).

former represented by the Eleventh Amendment and the latter "implicit in [the] constitutional order."[122] Insofar as "constructive consent is not a doctrine commonly associated with the surrender of constitutional rights,"[123] the exercise of one right, such as the right to waive Eleventh Amendment immunity, may not be conditioned on the waiver of another, such as the right to retain underlying immunity. The same principle that prevents Congress from conditioning the receipt of a patent on the waiver of the right to be free from cruel and unusual punishment prevents the application of the tolling provision in this case.

B. Why *Lapides* Did Not Represent a Shift to the Jurisprudence of Personal Jurisdiction

Disappointed by the failure of his argument that federal statutory law empowered the state litigator to waive the state's horizontal immunity, our hypothetical plaintiff might nevertheless argue that *Lapides* represented a sea change in the treatment of Eleventh Amendment immunity—that is, into an analog of an immunity against personal jurisdiction. If enacted against a background principle of sovereign immunity as a facsimile of a defense against personal jurisdiction, a state legislature's delegation of litigating authority might be deemed, as a matter of federal law, to supersede the legislature's earlier condition on horizontal waiver.[124] This would allow for tolling if the litigator consented to federal jurisdiction and ironically short circuit the unconstitutional condition argument in any particular case.

Unfortunately for our hypothetical plaintiff, *Lapides* addressed only the scope of an attorney general's delegated power; it did not alter the nature of Eleventh Amendment federal jurisdictional immunity. A possible source of confusion, however, is the Supreme Court's statement in *Lapides* that it overruled *Ford Motor Co v Department of Treasury of Indiana*[125] "insofar as it would otherwise apply."[126] *Ford* involved an ultra

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122 *Stewart v North Carolina*, 393 F3d 484, 490 n 5 (4th Cir 2005). See also *Alden*, 527 US at 754 ("In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suits in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.").

123 *College Savings Bank v Florida Prepaid Postsecondary Education Expense Board*, 527 US 666, 681 (1999), quoting *Edelman v Jordan*, 415 US 651, 673 (1974).

124 This result is not mandated. Although personal jurisdiction gives rise to broad judicial power over a litigant, it is not clear that mere awareness of this fact should change the specificity with which a state legislature must condition a waiver of immunity. Nevertheless, the argument warrants caution. On the broad consequences of waiver of personal jurisdiction, see Gil Seinfeld, *Waiver-in-Litigation: Eleventh Amendment Immunity and the Voluntariness Question*, 63 Ohio St L J 871, 927 (2002).

125 323 US 459 (1945).

126 535 US at 623.

vires waiver that was classified as such by the state only after the case had been appealed. The Court distinguished *Lapides* from *Ford* on the grounds that, in the latter, the state had been sued in federal court, whereas in *Lapides*, the state had voluntarily invoked the federal court's jurisdiction by consenting to removal.[127] This distinction is important because the precise issue at stake in *Ford* was not whether sovereign immunity could be raised for the first time on appeal, but rather whether the Attorney General could waive it at all.[128] In fact, the Court only later established that sovereign immunity could be raised as a defense for the first time on appeal.[129] Thus, one decision addressed the separation of powers and the extent to which waiver authority had been delegated, while the other decision concerned the nature of the jurisdictional immunity enshrined in the Eleventh Amendment. Since *Lapides* overruled only the decision specifically concerning the separation of powers, it follows that the nature of Eleventh Amendment jurisdictional immunity remained untouched.[130]

This conclusion is reinforced by an examination of *Lapides*'s treatment of other cases addressing the nature of the jurisdictional immunity. For example, prior to *Lapides*, Justice Kennedy suggested that the Court should consider making Eleventh Amendment immunity analogous to a lack of personal jurisdiction defense—one that would have to be raised in the defendant's answer or would otherwise be waived.[131] However, he also explicitly proposed a less drastic alternative—that state attorneys general waive their jurisdictional "defense" if they affirmatively invoke federal court jurisdiction by consenting to removal from state court.[132] The Court in *Lapides* opted for the less

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127 Id at 622 (emphasizing the distinction between voluntary and involuntary appearance in federal court).

128 323 US at 466 ("It remains to be considered whether the attorney general for the State of Indiana in his conduct of the present proceeding has waived the state's immunity from suit.").

129 See *Edelman*, 415 US at 677–78 (reasoning that because the Eleventh Amendment defense was jurisdictional in nature, it need not be raised in the trial court).

130 See *Maysonet-Robles v Cabrero*, 323 F3d 43, 51 (1st Cir 2003) (citing *Lapides* for the single proposition that a state may waive its immunity by voluntarily invoking federal jurisdiction through affirmative litigation conduct). See also Eric S. Johnson, Note, *Unsheathing Alexander's Sword:* Lapides v. Board of Regents of the University System of Georgia, 51 Am U L Rev 1051, 1062–63 (2002) (reaffirming that "the holding in *Lapides* did not depend on resolving the inconsistent nature of the Eleventh Amendment's jurisdictional bar"). But see Porterfield, Comment, 55 Baylor L Rev at 1277 (cited in note 30) (encouraging a broader reading of *Lapides* to clarify the jurisdictional nature of Eleventh Amendment immunity); Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 Duke L J 1167, 1217–18 (2003) (arguing for a broad rule of waiver following the "spirit" of the *Lapides* decision).

131 See note 110.

132 See *Schacht*, 524 US at 397 (Kennedy concurring) ("If the States know or have reason to expect that removal will constitute a waiver, then it is easy enough to presume that an attorney

drastic of Justice Kennedy's two options and framed the issue before it as whether "a state waive[s] its Eleventh Amendment immunity by its affirmative litigation conduct when it removes a case to federal court."[133] In order to answer that question, the Court did not engage in an abstract discussion about the nature of jurisdiction. Instead, it looked to the broad power to litigate conferred on the state attorney general by a Georgia statute, and determined that it would promote fairness to establish a rule that broad power under state law to represent the state "in any court" renders a state attorney general competent to waive state immunity from federal jurisdiction.[134]

As even some of the most ardent advocates of an expansion in waiver doctrine acknowledge, it is implausible that a unanimous Court overruled hundreds of years of precedent establishing the hybrid nature of Eleventh Amendment immunity without either using the words "personal jurisdiction" or citing any prior case in which the nature of the jurisdictional immunity was at issue.[135] Courts that treat state immunity from federal jurisdiction as analogous to a defense against personal jurisdiction do so in error. They should instead look to an attorney general's authority to litigate to determine if his waiver of immunity was valid.

V. ESTOPPEL

In the alternative, if all of his other legal arguments are determined to be meritless, our hypothetical plaintiff might still argue that the state, having consented to federal jurisdiction, ought to be estopped, as a matter of federal law, from denying that it consented to individual elements of that jurisdiction like the tolling provision. This estoppel could occur regardless of whether the state legislature had explicitly or impliedly authorized the state litigator to waive horizontal immunity. One commentator, Gil Seinfeld, points out that many parties in litigation are bound by the conduct of their attorneys, regardless of whether the parties authorized this conduct themselves or whether it may lead to the waiver of constitutionally rooted rights.[136] For example, if a private litigant instructs his lawyer to object to the

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authorized to represent the State can bind it to the jurisdiction of the federal court (for Eleventh Amendment purposes) by the consent to removal.").

133 *Lapides*, 535 US at 617 (internal citations omitted).

134 Id at 624.

135 See Hien Ngoc Nguyen, Comment, *Under Construction: Fairness, Waiver, and Hypothetical Eleventh Amendment Jurisdiction*, 93 Cal L Rev 587, 621 (2005) (asserting that "[t]he Supreme Court is unlikely to enact a sweeping change in jurisdictional characterization suddenly").

136 See Seinfeld, 63 Ohio St L J at 927 (cited in note 124).

court's exercise of personal jurisdiction over him, and the lawyer fails to do so, the litigant is nonetheless bound by the court's jurisdiction.[137]

With respect to the tolling provision, however, such estoppel is unlikely to occur. As Seinfeld notes, the two cases of *Office of Personnel Management v Richmond*[138]—which held that the representations of government agents do not subject the government to collateral estoppel[139]—and *Monell v Department of Social Services of the City of New York*[140]—which held that respondeat superior liability does not apply to states as it does to individuals in principal-agent relationships[141]—indicate that the Supreme Court hesitates to apply common law doctrines such as estoppel to the government.[142] Seinfeld asserts that these cases are inapplicable to the waiver-in-litigation context because they were applied in areas where it would have been much more difficult for the government to monitor all of its agents.[143] In contrast, "demanding that state attorneys keep apprised of state policy regarding waiver of immunity would seem to be a very basic element of internal management within a state Attorney General's office."[144]

This would be a good policy indeed, but it argues, at most, for creating a presumption that litigating officers enjoy some delegated power to waive jurisdictional immunity. This was exactly the more limited position previously advocated by Justice Kennedy[145] and adopted by the Court in *Lapides*.[146] However, neither position calls into question the legislature's ability to rebut the presumption by passing a statute that explicitly denies litigating officers the power to waive sovereign immunity, at least where a state constitution vests the power to waive immunity in the legislative branch.[147] Likewise, a state law making the statute of limitations a condition precedent on a waiver of immunity

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137 Id.

138 496 US 414 (1990).

139 Id at 419, 434 (acknowledging that "equitable estoppel will not lie against the Government as it lies against private litigants," and concluding that the respondent had no authority to advance the monetary claim seeking public funds).

140 436 US 658 (1978).

141 Id at 694 (stating that a local government can only be sued under 28 USC § 1983 for an injury inflicted as a result of government policy or custom).

142 See Seinfeld, 63 Ohio St L J at 927 n 293 (cited in note 124).

143 Id.

144 Id.

145 See *Wisconsin Department of Corrections v Schacht*, 524 US 381, 397 (1998) (Kennedy concurring) (advocating "adopting a rule of waiver in every case where the State, through its attorneys, consents to removal from the state court to the federal court").

146 535 US at 623 ("A rule of federal law that finds waiver through a state attorney general's invocation of federal-court jurisdiction avoids inconsistency and unfairness.").

147 See, for example, Ga Const Art I, § II, ¶ 9 (vesting the power to waive the state's sovereign immunity in the General Assembly).

contradicts a presumption of waiver power and no doctrine of estoppel should save such a claim from being thrown out.

Estoppel is particularly unlikely to apply to the defendant state in our hypothetical case. First, as the framers of the Eleventh Amendment,[148] the Court in *Richmond*,[149] and the Court in *Monell*[150] each articulated, the depletion of government treasuries as a result of the misbehavior of state officers should not be permitted. More importantly, however, the Court in *New York v United States*[151] made clear that regardless of practical considerations, such a violation of state sovereignty could not stand.[152] Congress does not have the authority under Articles I and III to delegate full waiver power from a state legislature to an attorney general, and "[t]he constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States."[153] Thus, a consenting state should not be estopped from arguing that any waiver-in-litigation of the tolling provision was ultra vires and therefore invalid.

CONCLUSION

When litigation commences, the issues considered in this Comment are unlikely to be at the forefront of anyone's mind. However, in a case where the tolling provision of the supplemental jurisdiction statute conflicts with a state statute of limitations that conditions state liability, the consequences to the plaintiff of a miscalculation would be severe: an otherwise meritorious claim against a defendant state might be foreclosed on the basis of what would certainly seem to the plaintiff to be an arcane technicality.

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148 See Currie, *Constitution in Congress* at 196 (cited in note 14) (discussing the public outcry after *Chisholm* against "prospective raids on state treasuries" and the resulting legislative response, the Eleventh Amendment).

149 496 US at 433 ("To open the door to estoppel claims would only invite endless litigation over both real and imagined claims of misinformation by disgruntled citizens, imposing an unpredictable drain on the public fisc.").

150 436 US at 691 ("[W]e conclude that a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory.") (emphasis omitted).

151 505 US 144 (1992).

152 See id at 157, quoting *United States v Butler*, 297 US 1, 63 (1936):

> Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution. "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people."

153 *New York*, 505 US at 182.

If a lawsuit is filed in, or is removed to, federal court, that court should be aware that if it chooses to exercise supplemental jurisdiction over a state law claim against a state, it may later be confronted by the unpleasant options of reluctantly retaining jurisdiction over a vexing but possibly meritorious state law claim, or as a practical matter, ending the lawsuit by dismissing the case and forcing the plaintiff to refile in state court. The choice is hard, but the Supreme Court's recent federalism jurisprudence does not brook exceptions on the basis of convenience. The apparent trifle of civil procedure addressed by this Comment may be worth considering at the beginning of litigation rather than at its potentially abrupt end.