SUPREME COURT OF THE UNITED STATES

No. 97–461

WISCONSIN DEPARTMENT OF CORRECTIONS, ET AL., PETITIONERS *v.* KEITH D. SCHACHT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June 22, 1998]

JUSTICE KENNEDY, concurring.

In joining the opinion of the Court, I write to observe we have neither reached nor considered the argument that, by giving its express consent to removal of the case from state court, Wisconsin waived its Eleventh Amendment immunity. Insofar as the record shows, this issue was not raised in the proceedings below; and it was not part of the briefs filed here or the arguments made to the Court. The question should be considered, however, in some later case.

Removal requires the consent of all of the defendants. See, *e.g., Chicago, R. I. & P. R. Co.* v. *Martin*, 178 U. S. 245, 248 (1900); 14A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §3731, p. 504 (2d ed. 1985). Here the State consented to removal but then registered a prompt objection to the jurisdiction of the United States District Court over the claim against it. By electing to remove, the State created the difficult problem confronted in the Court of Appeals and now here. This is the situation in which law usually says a party must accept the consequences of its own acts. It would seem simple enough to rule that once a State consents to removal, it may not turn around and say the Eleventh Amendment bars the jurisdiction of the federal court. Consent to re-

moval, it can be argued, is a waiver of the Eleventh Amendment immunity.

Given the latitude accorded the States in raising the immunity at a late stage, however, a rule of waiver may not be all that obvious. The Court has said the Eleventh Amendment bar may be asserted for the first time on appeal, so a State which is sued in federal court does not waive the Eleventh Amendment simply by appearing and defending on the merits. See *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670, 683, n. 18 (1982) (plurality opinion); see also *Calderon* v. *Ashmus*, 523 U. S. ___, ___, n. 2 (1998) (slip op., at 4, n. 2); *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 99, n. 8 (1984); *Edelman* v. *Jordan*, 415 U. S. 651, 678 (1974); *Ford Motor Co.* v. *Department of Treasury of Ind.*, 323 U. S. 459, 467 (1945).

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

This departure from the usual rules of waiver stems from the hybrid nature of the jurisdictional bar erected by the Eleventh Amendment. In certain respects, the immunity bears substantial similarity to personal jurisdiction requirements, since it can be waived and courts need not raise the issue *sua sponte*. See *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 516, n. 19 (1982). Permitting the immunity to be raised at any stage of the proceedings, in contrast, is more consistent with regarding the Eleventh Amendment as a limit on the federal courts' subject-matter jurisdiction. See *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702–704

(1982) (comparing personal jurisdiction with subject-matter jurisdiction). We have noted the inconsistency. Although the text is framed in terms of the extent of the "Judicial power of the United States," U. S. Const., Amdt. 11, our precedents have treated the Eleventh Amendment as "enact[ing] a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction." *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. ___, ___ (1997) (slip op., at 5); see also E. Chemerinsky, Federal Jurisdiction §7.6, p. 405 (2d ed. 1994) (noting that allowing waiver of the immunity "seems inconsistent with viewing the Eleventh Amendment as a restriction on the federal courts' subject matter jurisdiction").

The Court could eliminate the unfairness by modifying our Eleventh Amendment jurisprudence to make it more consistent with our practice regarding personal jurisdiction. Under a rule inferring waiver from the failure to raise the objection at the outset of the proceedings, States would be prevented from gaining an unfair advantage. See Fed. Rule Civ. Proc. 12(h)(1).

We would not need to make this substantial revision to find waiver in the circumstances here, however. Even if appearing in federal court and defending on the merits is not sufficient to constitute a waiver, a different case may be presented when a State under no compulsion to appear in federal court voluntarily invokes its jurisdiction. As the Court recognized in *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273, 284 (1906), "where a State voluntarily become a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment."

An early decision of this Court applied this principle in holding that a State's voluntary intervention in a federal court action to assert its own claim constituted a waiver of

the Eleventh Amendment. *Clark* v. *Barnard*, 108 U. S. 436, 447–448 (1883); see also *Employees of Dept. of Public Health and Welfare of Mo.* v. *Department of Public Health and Welfare of Mo.*, 411 U. S. 279, 294, n. 10 (1973) (Marshall, J., concurring in result) (citing *Clark* v. *Barnard* with approval); *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 276 (1959) (same); *Missouri* v. *Fiske*, 290 U. S. 18, 24–25 (1933) (same). The Court also found a waiver of the Eleventh Amendment when a State voluntarily appeared in bankruptcy court to file a claim against a common fund. *Gardner* v. *New Jersey*, 329 U. S. 565, 574 (1947). Since a State which is made a defendant to a state court action is under no compulsion to appear in federal court and, like any other defendant, has the unilateral right to block removal of the case, any appearance the State makes in federal court may well be regarded as voluntary in the same manner as the appearances which gave rise to the waivers in *Clark* and *Gardner*.

Some Courts of Appeals, following this reasoning, have recognized that consent to removal may constitute a waiver. *Newfield House, Inc.* v. *Massachusetts Dept. of Pub. Welfare*, 651 F. 2d 32, 36, n. 3 (CA1), cert. denied, 454 U. S. 1114 (1981); see also *Estate of Porter* v. *Illinois*, 36 F. 3d 684, 691 (CA7 1994); *Silver* v. *Baggiano*, 804 F. 2d 1211, 1214 (CA11 1986); *Gwinn Area Community Schools* v. *Michigan*, 741 F. 2d 840, 847 (CA6 1984). These cases have first inquired, however, whether state law authorized the attorneys representing the State to waive the Eleventh Amendment on its behalf. Petitioners cited this qualification when we raised the issue at oral argument in the instant case. This was also the Court's apparent concern in *Ford Motor Co.*, in which it held:

> "It is conceded by the respondents that if it is within the power of the administrative and executive officers of Indiana to waive the state's immunity, they have done so in this proceeding. The issue thus becomes

> one of their power under state law to do so. As this issue has not been determined by state courts, this Court must resort to the general policy of the state as expressed in its Constitution, statutes and decisions. Article 4, §24 of the Indiana Constitution provides:
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> "'Provision may be made, by general law, for bringing suit against the State, as to all liabilities originating after the adoption of this Constitution; but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed.'
>
> "We interpret this provision as indicating a policy prohibiting state consent to suit in one particular case in the absence of a general consent to suit in all similar causes of action. Since the state legislature may waive state immunity only by general law, it is not to be presumed in the absence of clear language to the contrary, that they conferred on administrative or executive officers discretionary power to grant or withhold consent in individual cases. . . . It would seem, therefore, that no properly authorized executive or administrative officer of the state has waived the state's immunity to suit in the federal courts." 323 U. S., at 467–469 (footnotes omitted).

See also *Sosna* v. *Iowa*, 419 U. S. 393, 396, n. 2 (1975).

Notwithstanding the quoted language from *Ford Motor Co.*, the absence of specific authorization, it seems to me, is not an insuperable obstacle to 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. 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 authorized to represent the State can bind it to the jurisdiction of the federal court (for Eleventh Amendment purposes) by the consent to removal.

It is true as well that the Court's recent cases have dis-

favored constructive waivers of the Eleventh Amendment and have required the State's consent to suit be unequivocal. *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 246–247 (1985); *Edelman* v. *Jordan*, 415 U. S., at 673. The conduct which may give rise to the waiver in the instance of removal is far less equivocal than the conduct at issue in those cases, however. Here the State's consent amounted to a direct invocation of the jurisdiction of the federal courts, an act considerably more specific than the general participation in a federal program found insufficient in *Atascadero* and *Edelman*.

These questions should be explored. If it were demonstrated that a federal rule finding waiver of the Eleventh Amendment when the State consents to removal would put States at some unfair tactical disadvantage, perhaps the waiver rule ought not to be embraced. I tend to doubt such consequences, however. Since the issue was not addressed either by the parties or the Court of Appeals, the proper course is for us to defer addressing the question until it is presented for our consideration, supported by full briefing and argument, in some later case.