whether that official has the authority under state law to make a valid waiver.[86] However, this argument is only available when the state is brought into federal court involuntarily. If a state voluntarily agrees to removal of a state action to federal court, the Court has held it may not then invoke a defense of sovereign immunity and thereby gain an unfair tactical advantage.[87]

Congressional Withdrawal of Immunity.—The Constitution grants Congress power to regulate state action by legislation. At least in some instances when Congress does so, it may subject the states themselves to suit by individuals to implement the legislation. The clearest example arises from the Civil War Amendments, which directly restrict state powers and expressly authorize Congress to enforce these restrictions through appropriate legislation.[88] Thus, "the Eleventh Amendment and the principle of state sovereignty which it embodies . . . are necessarily limited, by the enforcement provisions of § 5 of the Fourteenth Amendment."[89] The power to enforce the Civil War Amendments is substantive, however, not being limited to remedying judicially cognizable violations of the amendments, but extending as well to measures that in Congress's judgment will promote compliance.[90] The principal judicial brake on this power to abrogate state immunity in legislation enforcing the Civil War Amendments is the rule requiring that congressional intent to subject states to suit be clearly stated.[91]

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[86] Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 466–467 (1945); Edelman v. Jordan, 415 U.S. 651, 677–678 (1974).

[87] Lapides v. Board of Regents, 535 U.S. 613 (2002).

[88] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Hutto v. Finney, 437 U.S. 678 (1978); City of Rome v. United States, 446 U.S. 156 (1980). More recent cases affirming Congress's § 5 powers include Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985); and Dellmuth v. Muth, 491 U.S. 223, 227 (1989).

[89] Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (under the Fourteenth Amendment, Congress may "provide for private suits against States or state officials which are constitutionally impermissible in other contexts.").

[90] In Maher v. Gagne, 448 U.S. 122 (1980), the Court found that Congress could validly authorize imposition of attorneys' fees on the state following settlement of a suit based on both constitutional and statutory grounds, even though settlement had prevented determination that there had been a constitutional violation. Maine v. Thiboutot, 448 U.S. 1 (1980), held that § 1983 suits could be premised on federal statutory as well as constitutional grounds. Other cases in which attorneys' fees were awarded against states are Hutto v. Finney, 437 U.S. 678 (1978); and New York Gaslight Club v. Carey, 447 U.S. 54 (1980). *See also* Frew v. Hawkins, 540 U.S. 431 (2004) (upholding enforcement of consent decree).

[91] Even prior to the tightening of the clear statement rule over the past several decades to require express legislative language (*see* note and accompanying text, *infra*), application of the rule curbed congressional enforcement. Fitzpatrick v. Bitzer, 427 U.S. 445 451–53 (1976); Hutto v. Finney, 437 U.S. 678, 693–98 (1978). Because of its rule of clear statement, the Court in Quern v. Jordan, 440 U.S. 332 (1979), held that in enacting 42 U.S.C. § 1983, Congress had not intended to include states within