Cornell Law Review

Volume 59
Issue 4 *April 1974*

Article 8

Sovereign Immunity-Eleventh Amendment-State Employee Barred from Federal Court Suit Under Fair Labor Standards Act

Catherine J. Minuse

Sovereign Immunity—ELEVENTH AMENDMENT—STATE EMPLOYEE BARRED FROM FEDERAL COURT SUIT UNDER FAIR LABOR STANDARDS ACT

Employees of Department of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279 (1973)

> [The] pattern of citizen against state brings sharply into focus two conflicting policies which are deeply imbedded in our judicial system. One is the established practice of providing a federal forum for the vindication of federal rights; the other is the policy of shielding the sovereign from suit. The former has a basis in logic, the latter only in history.[1]

The recent United States Supreme Court case, *Employees of Department of Public Health and Welfare v. Department of Public Health and Welfare,*[2] highlights the above conflict and demonstrates the tension which results when a common law doctrine, a product of a unitary system, is applied to a federal form of government.

Employees of the Missouri Department of Public Health and Welfare brought suit against the Department under the Fair Labor Standards Act[3] demanding overtime compensation and a like amount of liquidated damages and legal fees. Their complaint was dismissed by the district court on the grounds that the court could not entertain a suit against an unconsenting state.[4] A three-judge panel of the Eighth Circuit reversed the ruling of the district court, but on rehearing en banc the Eighth Circuit set aside the panel's decision and affirmed the dismissal.[5] The case reached the United States Supreme Court on a writ of certiorari[6] and again the dismissal was affirmed.[7]

Department of Public Health represents the most recent attempt by the Supreme Court to resolve the inevitable dilemma resulting from the clash between federally guaranteed rights and the sovereignty of the states.

---

[1] 49 VA. L. REV. 604, 609 (1963).
[2] 411 U.S. 279 (1973).
[3] 29 U.S.C. §§ 201-19 (1970).
[4] The decision of the district court is unpublished.
[5] 452 F.2d 820 (8th Cir. 1972).
[6] 405 U.S. 1016 (1972).
[7] 411 U.S. 279 (1973).

I

SOVEREIGN IMMUNITY

Sovereign immunity has its common law origin in the notion that "the King can do no wrong."[8] Stated in a more authoritarian fashion,

> [a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but 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.[9]

Clearly, the concept is best understood when viewed as a bulwark of an absolutist state. Many writers have maintained that sovereign immunity is today an anachronism, totally incompatible with modern notions of justice and governmental responsibility.[10] On the state level the doctrine has eroded in recent years.[11]

---

[8] A great deal of historical material is available on the subject of sovereign immunity. *See, e.g.*, C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972). Almost any treatment of American constitutional history includes at least a general overview of the subject. *See generally* M. IRISH & J. PROTHRO, THE POLITICS OF AMERICAN DEMOCRACY 128-29 (1968); A. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 301-03 (1935); 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 91-102 (1922). Additionally, some shorter works give the doctrine a deeper examination. *See, e.g.*, Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 HOUSTON L. REV. 1 (1967); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207 (1968); Note, *The Sovereign Immunity of the States: The Doctrine and Some of its Recent Developments*, 40 MINN. L. REV. 234 (1956).

[9] Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

[10] Hardly a voice is raised in defense of sovereign immunity. Most commonly, the doctrine is assailed as a remnant of a now dead authoritarian past which produced results anathema to contemporary notions of justice and reason. One critic has stated: "[I]t is doubtful that the outdated and archaic concept of sovereign immunity contributes anything of value to the administration of justice between the states and their citizens in the twentieth century." Note, *supra* note 8, at 264. The concept is not seen as effectuating any valid policies; rather it is viewed as an obstruction. One writer speaks of the need for remedies to be available free from "entanglement in eleventh amendment technicalities." 17 VILL. L. REV. 713, 722 (1972).

In earlier days, governmental activity was limited. Today, however, various levels of government affect nearly every aspect of our daily lives. Therefore, it is suggested, governmental immunity no longer is justified. *See* Note, *Parden v. Terminal Ry. of Ala. State Docks Dep't: The Passing of Sovereign Immunity*, 69 DICK. L. REV. 270, 283 (1965).

A perceptible weakening of support for the defense of sovereign immunity can be traced in recent court decisions. *See* Mathis, *supra* note 8; Comment, *Private Suits Against States in the Federal Courts*, 33 U. CHI. L. REV. 331 (1966); Note, *The Present Status of the Eleventh Amendment*, 10 VAND. L. REV. 425 (1957); 45 IOWA L. REV. 621 (1960); 49 VA. L. REV. 604 (1963).

[11] Both state legislatures and courts have placed restrictions on the state's ability to evade suit. In the first instance, private bills in the legislature provided a loophole by granting an appropriation or allowing a court suit. *See* Note, *supra* note 8, at 239-40. More

Sovereign immunity was widely accepted by the "Founding Fathers";[12] their intent was that the doctrine would be read into article III of the Constitution. Although the language of article III provides in part that the judicial power of the United States shall extend "to Controversies . . . between a State and Citizens of another State . . . and between a State . . . and foreign States, Citizens or Subjects,"[13] Alexander Hamilton suggested the sentiment of the time in *The Federalist*:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.[14]

The doctrine of sovereign immunity as understood by the Founders, was a composite of two separate issues: (*1*) the rule of "domestic sovereign immunity," providing that a state could not be sued in its own courts without its consent; and (*2*) the rule of "foreign sovereign immunity," which held that a state could also not be sued in the courts of a foreign nation without its consent.[15] However, the engrafting of these traditional notions of sovereign immunity into a federal system created a dilemma not encountered by common law juries brought up in a unitary system.[16]

---

recently, states have enacted laws permitting actions for money judgments within certain limitations. *Id.* at 262-63.

The status of sovereign immunity in each of the 50 states is briefly outlined in Hamill, *The Changing Concept of Sovereign Immunity,* 13 DEFENSE L.J. 653, 664-76 (1964). The movement away from state government immunity in tort is discussed in Mosk, *The Many Problems of Sovereign Liability,* 3 SAN DIEGO L. REV. 7 (1966), while Hink & Schutter, *Some Thoughts on the American Law of Governmental Tort Liability,* 20 RUTGERS L. REV. 710, 728-47 (1966), examines the experience of selected states.

[12] *See generally* note 8 *supra.*

[13] U.S. CONST. art. III.

[14] THE FEDERALIST No. 81, at 511 (B. Wright ed. 1966) (A. Hamilton) (emphasis in original). *But cf.* C. JACOBS, *supra* note 8, at 36-37.

[15] *See* Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation,* 58 CORNELL L. REV. 1232, 1246-47 (1973).

[16] One commentator has remarked: "Why this English theory of sovereign immunity, an immunity originally personal to the King, came to be applied to the United States is one of the mysteries of legal evolution." H. STREET, GOVERNMENTAL LIABILITY 8 (1953).

There is a dearth of evidence on the question whether the common law jurists ever recognized the potential conflict between federalism and the notion of sovereign immunity. The standard work, W. HOLDSWORTH, A HISTORY OF ENGLISH LAW (1926), sheds no light on the subject. C. KINNANE, A FIRST BOOK ON ANGLO-AMERICAN LAW 467-519 (2d ed. 1952), discusses the impact of the common law on the structures of both the state and the federal court systems but never touches directly on this question. Similarly, R. JOHNSTON, THE EFFECT OF JUDICIAL REVIEW ON FEDERAL-STATE RELATIONS IN AUSTRALIA, CANADA, AND THE UNITED STATES (1969), although affording worthwhile comparisons of three systems based in the common law, provides no direct insights. It seems safe to infer from the scarcity of

Specifically, could individuals ever sue a state in federal court for rights guaranteed by the superior (federal) sovereign? Because a state defending an action in federal court would not be appearing before its own tribunals, the dilemma does not raise the issue of domestic sovereign immunity. Neither, however, is there a strict analogy to foreign sovereign immunity—the situation where an attempt was made to sue a foreign sovereign in the courts of another, *coequal* sovereign. The supremacy clause[17] clearly established the national government as the supreme sovereign. Therefore, the design of the Founding Fathers to extend sovereign immunity protection to the states left unresolved the problem of whether, absent consent, there would be any forum available for a citizen to sue a state to vindicate a *federally* created right.[18]

---

material that the problems attendant to the transplant of sovereign immunity into the federal organization of America were not anticipated by common law jurists.

[17] U.S. CONST. art. VI.

[18] Mr. Justice Douglas once stated: "It is not uncommon for federal courts to fashion federal law where federal rights are concerned. . . . There is no constitutional difficulty. Article III, § 2, extends the judicial power to cases "arising under . . . the Laws of the United States." Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957).

As the Justice would undoubtedly agree, the problem of providing a federal forum for federally created rights is not so easy to solve when a state is the defendant. One stratagem which has met with some success is a suit against a state officer. At common law, an aggrieved subject could sue the King's officers for the monarch's acts on the theory that they had given him bad advice. *See* Mathis, *supra* note 8, at 209. This approach was introduced into the United States by the case of Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 251 (1824), where Chief Justice Marshall ruled that a state officer was suable for official acts threatened or performed pursuant to an unconstitutional state statute. *See* C. JACOBS, *supra* note 8, at 97-103; Mathis, *supra* note 8, at 236.

In re Ayers, 123 U.S. 443 (1887), has sometimes been called the most significant eleventh amendment case to arise in the latter part of the last century. Involved in *Ayers* were coupons issued by Virginia on which that state reneged. Ayers, the Attorney General of Virginia, had begun litigation in his official capacity against persons who offered these coupons in payment of taxes, despite a federal circuit court injunction forbidding commencement of such an action. In finding the injunction invalid and acquitting Ayers of contempt, the Supreme Court held that a state's breach of contract did not create personal liability in a state official not a party to the contract. *Cf.* C. JACOBS, *supra* note 8, at 128-31.

While rights claimed by citizens under the contract clause did not always fare well in clashes with the eleventh amendment, individuals raising fourteenth amendment claims have been more successful. In *Ex parte* Young, 209 U.S. 123 (1908), stockholders of the Northern Pacific Railway obtained a federal circuit court order restraining Young, the Attorney General of Minnesota, from enforcing that state's purportedly confiscatory rate regulations. Young disobeyed the order, was cited for contempt, and given over to the custody of a United States marshall. He proceeded to petition the Supreme Court for a writ of habeas corpus, asserting that the injunction was invalid under the eleventh amendment. The writ was dismissed. *Cf.* C. JACOBS, *supra* note 8, at 138-42. The *Ex parte Young* doctrine has been used in reapportionment and desegregation cases. *See* Mathis, *supra* note 8, at 243. Efforts to raise an eleventh amendment defense in discrimination cases have been defeated on the authority of *Ex parte Young*. *See* Griffin v. School Bd. of Prince Edward County, 377 U.S. 218, 228 (1964).

The wholesale transplanting of sovereign immunity doctrine into the United States judicial system was not without turmoil. To the dismay of many, the Supreme Court in *Chisholm v. Georgia*[19] ignored Hamilton's view and permitted a state to be sued by a citizen of another state in the federal courts. Chisholm sued the state of Georgia under the contract clause of the United States Constitution for a debt contracted during the Revolution. When the state refused to appear, the Supreme Court ordered judgment to be entered against it.[20] An outcry followed[21] and the eleventh amendment was shortly thereafter adopted. It read:

Ex parte Young is frequently attacked on two grounds. The procedure of suing an official rather than the government itself is called a "false pretense" or "empty fiction." *See* Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine,* 59 HARV. L. REV. 1060 (1946); Davis, *Suing the Government by Falsely Pretending To Sue an Officer,* 29 U. CHI. L. REV. 435 (1962). Also questioned is the obvious contradiction in finding the officer's acts chargeable to him personally and thus not violative of the eleventh amendment while holding those same acts to be state action for purposes of the fourteenth amendment. *See* Mathis, *supra* note 8, at 242; Note, *Sovereign Immunity in Suits To Enjoin the Enforcement of Unconstitutional Legislation,* 50 HARV. L. REV. 956 (1937). One commentator decried the decision as "illogical" and "rest[ing] on purest fiction" but yet states, "the doctrine of Ex parte Young seems indispensable to the establishment of constitutional government and the rule of law." C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 186 (2d ed. 1970). This conclusion is satisfactory only if one accepts the premise that the fourteenth amendment should not simply be held to be a limitation upon eleventh amendment sovereign immunity.

In the instant case it has been suggested that a suit solely against the officials of the Missouri Department of Public Health and Welfare would fail:

> The district court would be without jurisdiction in this situation under the holding of *Smith v. Reeves.* [178 U.S. 436 (1900)]. In this case the plaintiff, in attempting to recover money paid to the Treasurer of the State, sued the Treasurer. The state was not made a party to the suit. The issue was whether or not this was in actuality a suit against the state. The Supreme Court said that although the state was not a formal party to the suit, a judgment rendered against a state officer in his official capacity, is in effect a judgment against the state since the judgment must be satisfied from public funds.

Comment, *Section 216 Fair Labor Standards Act—A Right Without a Remedy,* 43 TEMP. L.Q. 269, 271-72 (1970). The author of this comment very perceptively foresaw the fact situation of *Department of Public Health.* However, his analysis of the potential failure of a suit against the officials of the Department relies upon a pre-*Ex parte Young* case. Had *Department of Public Health* been grounded upon a fourteenth amendment right rather than on a congressionally created statute, perhaps *Ex parte Young* would have justified barring the defense of sovereign immunity.

[19] 2 U.S. (2 Dall.) 16 (1793).

Chisholm has been called "the most celebrated case of the pre-Marshall period." C. JACOBS, *supra* note 8, at 46. The plaintiff, Chisholm, was executor of the estate of one Farquhar, and sued to collect on a contract between the latter and the State of Georgia for war materiel bought during the Revolution. The action was dismissed by the United States Circuit Court for the Georgia District. But, Chisholm, undaunted, went to the Supreme Court to press his suit. Georgia refused to appear and judgment was entered against it. *See id.* at 46-55.

[20] 2 U.S. (2 Dall.) at 69.

[21] This opposition is commonly ascribed to state fears of suits by creditors. *See* M. IRISH & J. PROTHRO, *supra* note 8, at 129; C. WARREN, *supra* note 8, at 99; Mathis, *supra* note 8, at 212. *Contra,* C. JACOBS, *supra* note 8, at 69-70.

> 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.[22]

After the passage of the eleventh amendment the question arose whether it worked an absolute jurisdictional bar to suits like *Chisholm,* as a literal reading would seem to indicate, or whether it was meant to provide immunity to states from suits by citizens of sister states only if a state would not consent to suit in federal court. In 1883, the Supreme Court in *Clark v. Barnard,*[23] held for the latter position indicating that the state's immunity was a privilege it could waive. In that instance, the state had voluntarily appeared in the suit and was thus held to have consented to abandoning its immunity.[24] Six years later, the Supreme Court in *Hans v. Louisiana,*[25] was again called upon to decide a question not expressly covered by the eleventh amendment—whether a federal court could hear a federal question case brought against a state by one of its *own* citizens. Hans, a Louisiana resident, sued that state in a United States circuit court to recover the value of coupons annexed to bonds issued by the state legislature. The Supreme Court concluded that to permit such a suit by a state's citizen while forbidding it to residents of another state would be an anomaly.[26] Rhetorically, the Justices inquired:

---

[22] U.S. CONST. amend. XI.

[23] 108 U.S. 436 (1883).

[24] *Id.* at 447-48. The Supreme Court has left no doubt that, unlike some other jurisdictional bars, sovereign immunity may be waived by the state. "Immunity from suit under the Eleventh Amendment is a personal privilege which may be waived." Missouri v. Fiske, 290 U.S. 18, 24 (1933). In Reagan v. Farmers' Loan and Trust Co., 154 U.S. 362, 392 (1894), the restrictions imposed by the eleventh amendment were said to produce merely a "personal privilege." The Court has found waiver by statute. *See* Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 468 (1945). However, the case of Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909), has been cited for the proposition that "[t]he conclusion that there has been a waiver of immunity will not be lightly inferred." Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276 (1959).

[25] 134 U.S. I (1890).

[26] The Court stated:

> [A]nd then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts.

Id. at 10.

Such an "anomalous result" could have occurred in the instant case, absent *Hans.* That is, Missouri citizens could have sued their state under the FLSA while residents of another state, who were employed by the Department, would have been barred from suit. This fact

> Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled?[27]

Though a state may consent to suit, if it refuses to do so, the question remained as to whether the federal government had the power by legislative fiat to compel it to submit to suit at the behest of individual citizens. It is this issue which highlights the inherent conflict between the policies shielding the state from suit and those providing a federal forum for the vindication of federally created rights. In both *Maryland v. Wirtz*,[28] which upheld the extension of the Fair Labor Standards Act[29] to cover certain state workers, and *California v. Taylor*,[30] where the Court ruled that a state owned and operated carrier was subject to the Railway Labor Act, the question was avoided by reserving to future decisions the issue of state liability to suit by individuals under the respective statutes.[31] While the Court was willing to decide the validity of the federal legislation, it hesitated to enter further into the thicket by determining whether the citizen was to have access to a federal forum to enforce the rights provided by those statutes against a noncomplying state.

---

situation could quite possibly arise if the facility were located near a state border. *See* Comment, *supra* note 18, at 271 n.16.

[27] 134 U.S. at 15. Much controversy surrounds the basis for the Court's holding. Some would ground it in the eleventh amendment, others in article III, § 2 of the Constitution, while still others argue forcefully that its theoretical justification is simply the common law. *See* Comment, *supra* note 10, 33 U. CHI. L. REV. at 334; 17 VILL. L. REV. 713, 716 (1972). The *Hans* Court itself said:

> It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence.

134 U.S. at 21.

The distinction between a common law basis and a constitutional foundation is not simply one of scholarly interest. "If the immunity is based on the common law it may be directly limited or even abrogated by judicial decision. If the immunity is constitutional, however, judicial efforts to limit its application must be much more cautious." Comment, *supra* note 10, 33 U. CHI. L. REV. at 334; *see* 411 U.S. at 312-15.

[28] 392 U.S. 183 (1968). Petitioners included 28 states and a school district.

[29] Justices Douglas and Stewart dissented in the *Maryland* case. Mr. Justice Douglas forcefully stated that "[i]n this case the State as a sovereign power is being seriously tampered with, potentially crippled." *Id.* at 205.

[30] 353 U.S. 553 (1957). The Railway Labor Act is codified at 45 U.S.C. §§ 151-64 (1970).

[31] 392 U.S. at 200; 353 U.S. at 568 n. 16. The *Maryland* Court stated that "questions of state immunity are . . . reserved for appropriate future cases." 392 U.S. at 200.

II

IMPLIED WAIVER AND CONSENT

The devices chosen to circumvent *Hans* and the eleventh amendment were the "fictions" of implied waiver and consent.[32] The first case involving the use of these devices was *Petty v. Tennessee-Missouri Bridge Commission.*[33] In *Petty,* an interstate compact was the object of controversy rather than a federal law. In consenting to the compact, Congress had attached a condition that nothing therein would be construed to effect the power of the federal courts over commerce.[34] The compact also included a sue-and-be-sued clause. Thus, the Court opined, "[Congress] approved a sue-and-be-sued clause in a compact under conditions that made it clear that the States accepting it waived any immunity from suit which they otherwise might have."[35]

The only other Supreme Court case using the fiction of implied consent and the case most closely in point with the *Department of Public Health* is *Parden v. Terminal Railway of the Alabama State Docks Department.*[36] In *Parden,* an injured worker brought suit under the Federal Employers Liability Act[37] against his employer, a state owned and operated railroad. The statute made *every* interstate railroad liable to compensate workers for certain job-related injuries.[38] The Supreme Court posed two questions: "(1) Did Congress in enacting the FELA intend to subject a State to suit in these circumstances? (2) Did it have the power to do so, as against the State's claim of immunity?"[39] Although the Court answered both queries in the affirmative, it left the exact parameters of the decision in some doubt. As to intent, the Court reasoned that to

---

[32] 17 VILL. L. REV. 713, 721 (1972). For a discussion of the judicial use of these devices, see Cullison, *supra* note 8; Note, *supra* note 10, 69 DICK. L. REV. at 270; Comment, *Sovereign Immunity and the Fair Labor Standards Act,* 21 J. PUB. L. 415, 420-26 (1972); Comment, *supra* note 10, 33 U. CHI. L. REV. at 331.

[33] 359 U.S. 275 (1959). The plaintiff was the widow of an employee of the agency created by the compact who was killed while working on an agency-owned ferryboat.

The case is examined in depth in 45 IOWA L. REV. 621 (1960) and 6 WAYNE L. REV. 253 (1960).

[34] 359 U.S. at 277-78.

[35] *Id.* at 280.

[36] 377 U.S. 184 (1964); *see* Note, *supra* note 10, 69 DICK. L. REV. at 270. Another treatment of the case, at the United States court of appeals level in a decision later reversed by the Supreme Court, may be found at 49 VA. L. REV. 604 (1963).

[37] 45 U.S.C. §§ 51-60 (1970) [hereinafter referred to as FELA].

[38] The statute extends coverage to "[e]very common carrier by railroad" engaged in interstate and therefore congressionally regulated commerce. *Id.* § 51.

[39] 377 U.S. at 187.

interpret the law as permitting the state to take advantage of governmental immunity would leave the injured employee with a hollow right, lacking a remedy—a result that Congress could not possibly have intended.[40] The Court also emphasized the proprietary nature of the state's activity and pointed to the fact that the conduct—interstate commerce—was subject to federal government regulation. The Court concluded that

> [t]o preclude this form of regulation in all cases of state activity would remove an important weapon from the congressional arsenal with respect to a substantial volume of regulable conduct. Where, as here, Congress by the terms and purposes of its enactment has given no indication that it desires to be thus hindered in the exercise of its constitutional power, we see nothing in the Constitution to obstruct its will.[41]

Thus, the Court indicated that Congress must affirmatively state a disinclination to subject the states to suit, or they will be so subjected. That is, silence will be interpreted as intent to strip the states of their sovereign immunity.

After finding congressional intent, the five-four majority stated:

> By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity.[42]

---

[40] The Court stated:

> To read a "sovereign immunity exception" into the Act would result, moreover, in a right without a remedy; it would mean that Congress made "every" interstate railroad liable in damages to injured employees but left one class of such employees—those whose employers happen to be state owned—without any effective means of enforcing that liability. We are unwilling to conclude that Congress intended so pointless and frustrating a result. We therefore read the FELA as authorizing suit in a Federal District Court against state-owned as well as privately owned common carriers by railroad in interstate commerce.

Id. at 190.

[41] *Id.* at 198.

[42] *Id.* at 192. It has been suggested that the Court is exaggerating the scope of the commerce power.

> The Court fails . . . to reconcile this power of Congress to regulate interstate commerce with a state's constitutional immunity from suit by an individual in a federal court. Although Congress' power to regulate commerce is complete and plenary, it is not absolute. It is subject to the limitations and guarantees of the Constitution. Among these limitations are those providing that the people shall be secure against unreasonable searches and seizures, that private property may not be taken without just compensation. . . . It is submitted that the eleventh amendment, as supplemented by *Hans,* is another limitation guaranteed by the Constitution.

Note, *supra* note 10, 69 DICK. L. REV. at 280.

Additionally, however, the Court argued that the state had consented to suit by entering the business of operating the carrier *after* Congress had enacted the FELA. Perhaps seeking to allay the fears of staunch states rightists, Mr. Justice Brennan stated reassuringly:

> Recognition of the congressional power to render a State suable under the FELA does not mean that the immunity doctrine, as embodied in the Eleventh Amendment with respect to citizens of other States and as extended to the State's own citizens by the *Hans* case, is here being overridden. It remains the law that a State may not be sued by an individual without its consent. Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act.[43]

This emphasis on the state's waiver through entrance into the regulated activity seems to conflict with the contention that, in entering the Union, the states surrendered some portion of their immunity through the commerce clause. This seemingly superfluous double waiver created some uncertainty as to the scope of Congress' power to deny the sovereign immunity defense. Under one view the state waived its immunity in the interstate commerce area upon entering the Union. Under the majority's second statement, however, it would appear that the waiver occurred when the state entered into an area of commerce previously regulated by the Congress. Under the latter view the question of the immunity of a state which first entered into an unregulated area which later became regulated would be open. On the issue of intent, however, the dissent split with the Court, declaring: "Only when Congress has clearly considered the problem and expressly declared that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense."[44] The dissenting Justices were loath to construe the word "every" in the applicability portion of the statute as having the broad implications of congressional intent their brethren discerned.

[43] 377 U.S. at 192. If this statement was an effort to pacify defenders of state sovereignty it may have been more of a concession than Mr. Justice Brennan realized. It places an emphasis on the time element, the moment at which the state entered the business in relation to the point at which the statute went into effect. For, if the state is to be held to have consented to suit, it must have had legal notice that the regulation existed or consent becomes meaningless. This implication seems to limit the other statement in the opinion; that in granting Congress regulatory powers in the commerce clause, the states "surrendered any portion of their sovereignty that would stand in the way of such regulation." *Id.*

[44] *Id.* at 198-99 (Douglas, J., dissenting).

III

THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act[45] was enacted in 1938 in the hope that it would ensure a decent minimum standard of living for those American workers who could be reached by Congress' power to regulate interstate commerce.[46] As originally promulgated, the Act exempted state government employers from coverage. In 1966, the statute was broadened.[47] Congress amended the Act to include the enterprise concept of coverage and to extend wage and hour protection to employees of hospitals and related facilities *whether or not such institutions were publicly or privately operated.*[48] The FLSA provides for recovery in event of breach in the amount of unpaid compensation plus liquidated damages, authorizing private suit by the aggrieved employee against his employer in any court of competent jurisdiction.[49] In *Wirtz,* the validity of these

---

[45] Fair Labor Standards Act of 1938, ch. 676, § 1, 52 Stat. 1060.

[46] As expressed in 1965 by then Secretary of Labor W. Willard Wirtz:

> The Fair Labor Standards Act of 1938 was a commitment to improve living standards by eliminating substandard working conditions in employment subject to Federal authority over interstate commerce. That commitment, incomplete when it was made, has become less complete with the passage of time. The law has not been kept in line with the advancing economy; and some of its guarantees mean less, comparatively, than they did 27 years ago.

1966 U.S.C.C. & A.N. 3003.

[47] 29 U.S.C. §§ 201-19 (1970).

The amendments are discussed and analyzed in Stetthacher, *Analysis of 1966 Amendments to the Fair Labor Standards Act,* 46 MICH. ST. B.J. 21 (April 1967).

[48] The statutory provision which extended coverage to state workers provides:

> . . . "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—
>
> . . . .
>
> . . . is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, an elementary or secondary school, or an institution of higher education (*regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit*).

29 U.S.C. § 203(s)(4) (Supp. II 1972) (emphasis added).

The enterprise concept of coverage is codified at 29 U.S.C. § 203(s) (1970). As explained by Stettbacher:

> Congress sought to minimize the fragmentation of coverage resulting from individual involvement in commerce by introducing the "enterprise" concept of coverage. Under the enterprise concept the employee is covered, if in any given work-week, he is engaged in commerce or in production of goods for commerce or in an enterprise engaged in commerce or in production of goods for commerce.

Stettbacher, *supra* note 47, at 22.

[49] Any employer who violates the provisions of section 206 or section 207

modifications was upheld as a proper exercise by Congress of its regulatory powers under the commerce clause, although as in *Taylor*, the Court left open the question of state liability to suit.[50]

In terms of congressional intent and power, the FLSA presented a problem similar to that of the FELA in *Parden*. Although the legislators did not make absolutely explicit their desire to render the states amenable to suit, their intent seemed clearer than that which the Supreme Court held sufficient in *Parden*. The FELA simply made *every* interstate railroad liable; this was held to include state owned carriers.[51] However, in section 203 of the FLSA Congress amended the statutory definition of employer to explicitly include certain categories of state management.[52] In section 216b, the portion of the law covering liability and damages was not altered; it continued to read that "[a]ny employer . . . shall be liable."[53] However, since "employer" had been amended in the definitional section to include state management, it is questionable that any change was necessary. Further, in light of *Parden*, silence was to be interpreted as intent to bar sovereign immunity protection.[54]

Parden was thought to be controlling by the Tenth Circuit when it decided the case of *Briggs v. Sagers*,[55] the facts of which closely resemble those of *Department of Public Health*. In *Briggs*, Utah citizens employed at a state owned facility for the mentally deficient brought an action under the FLSA. The court recognized that "[t]he inevitable confrontation squares the power of Congress to regulate interstate commerce under the commerce clause against the Eleventh Amendment right of the states to be free from federal court suit, absent consent."[56] However, the tribunal concluded that by continuing to maintain the institution after the federal statutory amendments were effective, the state waived its immunity and

---

of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees.

29 U.S.C. § 216(b) (1970).

[50] *See* notes 28-31 and accompanying text *supra*.

[51] 353 U.S. 553 (1957).

[52] 29 U.S.C. § 203 (1970).

[53] *Id.* § 216(b).

[54] *See* note 41 and accompanying text *supra*.

[55] 424 F.2d 130 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970). *Briggs* is discussed and compared with *Department of Public Health* at the court of appeals level in Comment, *supra* note 32, 21 J. PUB. L. at 424-31.

[56] 424 F.2d at 131-32.

consented to suit.[57] In answer to the argument that *Parden* did not apply because the state had entered the activity prior to the amendments and mere continuation could not be read as consent, the court responded:

> [W]e think the express intent of Congress and the language of Parden must control the matter. The regulatory power of Congress, although limited to constitutionally defined matters, *e.g.*, interstate commerce, is plenary as to those matters. Since the FLSA was enacted through the authority of the Commerce Clause, and inasmuch as the right of action imposed by the FLSA is fully within the congressional regulatory power, it would be incongruous to deny Congress the power to name a prompt, effective date for such amendments.[58]

Thus, the Tenth Circuit found both congressional intent to subject the states to suit as well as the power to do so.

IV

Department of Public Health

Like their Utah counterparts, the employees of the Missouri Department of Public Health and Welfare sought relief under the Fair Labor Standards Act. The Eighth Circuit came out strongly in support of the doctrine of sovereign immunity, asserting that the eleventh amendment, as a more recent enactment, took precedence over the commerce clause.[59] Recognizing the necessity to distinguish *Parden,* it pointed to the time factor, emphasizing that there, the state had entered the activity after enactment of the statute while in the instant case the amendments followed the state's entrance.[60] The tribunal also stressed the nature of the operation, stating that running a railroad is proprietary while maintaining a hospital is a governmental function.[61]

Mr. Justice Douglas, author of the Supreme Court opinion, stressed the question of congressional intent, declaring that "[t]he question is whether Congress has brought the States to heel, in the sense of lifting their immunity from suit in a federal court."[62] Noting the governmental-proprietary distinction, he observed that although *Parden* involved a fairly unique situation, the Missouri

[57] The court did not regard the time element as crucial. *Id.* at 134.
[58] *Id.* at 133.
[59] 452 F.2d at 825.
[60] *Id.* at 827.
[61] *Id.*
[62] 411 U.S. at 283.

case represented a common practice, and its ramifications would affect numerous employees in state health facilities throughout the nation.[63] In addition, recovery under the FLSA could include double damages which would drain a state treasury. Mr. Justice Douglas asserted that Congress would not have intended the imposition of such a burden merely by implication.[64] The wronged employees, he concluded, were left to rely upon the Secretary of Labor or upon a possible suit in state court.[65] The crux of the Court's argument was an interpretation of the FLSA; it could find no indication in the enactment that Congress, in amending it, planned to deprive the states of their immunity. Although in 1966 the definition of employer had been altered, the remedial portion of the statute had been left untouched, with no explicit provision made for suits against governmental employers. Concluding that the statute was silent on the crucial issue of intent, the Court decided that the state could take refuge in the protection of sovereign immunity.[66] This construction essentially ignores the closing lines of *Parden,* which inferred intent from silence, and instead adopts the *Parden* dissent.[67] In so doing, the Court effectively limited *Parden* to cases where Congress has explicitly expressed its desire to bar the defense.

The concurring Justices, Marshall and Stewart, adopted a different approach. Modifying the *Parden* queries, they first questioned Congress' intent and then inquired not as to Congress' power, but as to that of the federal courts to hear such a suit:

> [D]id Congress, in extending the protection of the FLSA to state employees such as these petitioners, effectively lift the State's protective veil of sovereign immunity; and . . . even if Congress did lift the State's general immunity, is the exercise of federal judicial power barred in the context of this case in light of Art. III and the Eleventh Amendment?[68]

The concurring Justices ignored the majority's strained statutory

---

[63] *Id.* at 284-85.

The governmental-proprietary distinction has been used by other courts to settle questions of sovereign immunity. Basically, it holds the state liable to suit if the cause of action arises from activities traditionally engaged in by private individuals while it allows the defense of immunity when the state is performing governmental functions. The distinction is mentioned in Note, *supra* note 10, 69 DICK. L. REV. at 282-83.

[64] 411 U.S. at 286.

[65] *Id.* Mr. Justice Douglas does not deal with the probable immunity bar the plaintiffs would encounter in attempting to bring their suit in state court.

[66] *Id.* at 285.

[67] *See* notes 41 & 44 and accompanying text *supra.*

[68] 411 U.S. at 287-88.

interpretation and answered yes to their first question, deciding that undoubtedly Congress did plan to bar the immunity defense.[69] As to the problem of congressional power, they pointed to the *Parden* statement that in entering the Union and conferring regulatory powers upon the Congress under the commerce clause, the states surrendered a part of their immunity.[70] However, they decided that the time factor in *Parden* justified the court in using the device of implied consent. In their view the eleventh amendment created a jurisdictional bar; therefore, the federal courts lacked the power to hear the instant case, absent the state's consent. Instead, the disgruntled employees would be relegated to suit in a Missouri state court which would be bound to hear the case because Congress had stripped the states of their immunity from suits in their own courts.[71]

Echoing the Eighth Circuit, Mr. Justice Marshall distinguished *Parden* on essentially a single ground; the state in that case entered the railroad business after the enactment of the FELA while here Missouri had been operating its hospitals and homes for years prior to the FLSA amendments. Thus, consent could not be inferred in the latter instance as it would be absurd to suggest that the state abandon its facilities or become subject to suit.[72] Justice Marshall announced:

> For me at least, the concept of implied consent or waiver relied upon in *Parden* approaches, on the facts of that case, the outer limits of the sort of voluntary choice which we generally associate with the concept of constitutional waiver.[73]

Pointing to article III of the Constitution, the concurrence notes that

> [b]ecause of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered to be appropriate in a case such as this.[74]

Owing to this jurisdictional limitation, the state court was the appropriate forum. Although recognizing that it might well appear a "hypertechnicality" to insist that the petitioners could enforce federal rights against their state in a state forum but not a federal

[69] *Id.* at 289-90.
[70] *Id.*
[71] *Id.* at 297-98.
[72] *Id.*
[73] *Id.* at 296.
[74] *Id.* at 294.

court, Mr. Justice Marshall still asserted, "I think it is a hypertechnicality that has long been understood to be a part of the tension inherent in our system of federalism."[75]

The lone dissenter, Mr. Justice Brennan, who had written the Court's opinion in *Parden,* believed that case to be dispositive as to both intent and power.[76] He also rejected the Court's claim that Congress did not plainly intend to subject the states to suit in federal court under the FLSA.[77] He denied the significance of the distinction between an enterprise commonly government operated and one ordinarily run by private firms and pointed out the ineffectiveness of leaving the workers to any other remedy.[78] He agreed with the *Briggs* court that Congress believed the value of the FLSA exceeded any possible fiscal disadvantage to the states: "[T]he overall purpose of the FLSA tacitly suggests that the imposition of such strain is outweighed by the underlying policy of the Act."[79]

In discussing the *Parden* holding which he admitted was, "perhaps not unambiguously phrased,"[80] Mr. Justice Brennan stressed the portion of that decision which asserted that the states, in granting the commerce power to Congress, surrendered a part of their sovereign immunity.[81] He did not give weight to the distinction between *Parden* and the case at hand as to the time of entrance into the regulated activity.[82] Much of the dissent is a vigorous attack upon the concurrence's use of sovereign immunity buttressed by the eleventh amendment to constitutionally preclude federal court suit against a state by its citizens. Mr. Justice Brennan admonished his bretheren for halting "the trend toward limitation of the defense of governmental immunity,"[83] and expressed con-

---

[75] *Id.* at 298. This phrase is particularly insightful. The case is filled with a sense of "the tension inherent in our system of federalism," since it represents a recurring and complex conflict.

[76] Mr. Justice Brennan said: "[T]he lawsuits have in common that each is an action for damages in federal court brought against a State by citizens of the State in its employ under the authority of a regulatory statute founded on the Commerce Clause." *Id.* at 299.

[77] *Id.*

[78] *Id.* at 303-08. Mr. Justice Brennan had strong support for his contention that other remedies were inadequate in the amicus curiae brief of the Solicitor General. *Id.* at 305.

[79] 424 F.2d at 134. The *Briggs* court purports to rely upon the legislative history of the FLSA but essentially draws its own conclusions from what is basically a blank slate.

[80] 411 U.S. at 301.

[81] *Id.*

[82] *Id.* at 301-02. Here, Mr. Justice Brennan encounters problems created by his own phrasing in the *Parden* opinion. *See* note 43 *supra.*

[83] 411 U.S. at 323. It was this trend which led many commentators to believe that sovereign immunity was no longer a viable doctrine. It was apparently expected, after the

cern that, even if Congress' intent had been plainly stated, the Court would have barred the suit.

This fear seems unfounded. Mr. Justice Douglas strongly suggests the opposite in stating that

> [w]e decline to extend *Parden* to cover every exercise by Congress of its commerce power, where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear.[84]

The majority seems convinced that Congress *does* possess the power to "[bring] the States to heel."[85] However, as intent is the focus of the Court's discussion, it is difficult to draw this conclusion with certainty. What the Court will do when faced with a statute where the legislature's intent is explicit and unambiguous is an open question.

CONCLUSION

Surely the Court has given new life to the concept of state sovereign immunity. Perhaps in the case at bar it has also rendered meaningless rights guaranteed working people by Congress.

As Mr. Justice Douglas correctly observed, the pivotal issue of the case is whether *Parden* can be distinguished.[86] His effort to do so is not wholly satisfactory.[87] Congress' intent to bar the

---

holding in *Parden*, that the doctrine might soon be disclaimed entirely. This thought was expressed in one examination of *Department of Public Health* at the Eighth Circuit level. The writer apparently did not anticipate that the Supreme Court might affirm the decision below, when he said:

> Whatever method is eventually used by the Supreme Court to shed the traditional sovereign immunity doctrine, developed in earlier days when state sovereign immunity was not a tremendous inconvenience, it appears that the needs of our times require that it be done. However valid sovereign immunity once was, and however disciplined the Eighth Circuit's refusal to accept a fictional waiver theory may be, the instant case is but a temporary halt to the continued erosion of state sovereign immunity.

17 VILL. L. REV. 713, 722 (1972).

[84] 411 U.S. at 286-87.

[85] *Id.* at 283.

[86] *Id.* at 281.

[87] *Id.* at 282-87. Mr. Justice Douglas suggests that the employees look to the Secretary of Labor for vindication of their rights. Yet the Secretary cannot annually investigate more than four percent of the enterprises covered by the FLSA. *See* Hodgson v. Ricky Fashions, Inc., 434 F.2d 1261, 1263 n.2 (5th Cir. 1970).

Additionally, the spectre of double damages is essentially a fantasy since under the statute a showing of good faith obviates their imposition, and in any case, the matter is within the discretion of the judge. In all likelihood, a state would be afforded escape. The following is the applicable FLSA provision:

sovereign immunity defense under the FELA is less clearly indicated than its desire to do so under the FLSA.[88] It has been suggested that while Congress definitely wanted to extend coverage to state employees, the procedural problems attendant to state sovereignty never entered into their thinking.[89] Earlier in this century, the Court, referring to the presumption that a sovereign is not bound by its own law unless expressly mentioned therein, stated:

> We can perceive no reason for extending [the presumption] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action.[90]

By emphasizing the question of intent and then finding it lacking, the Court has side-stepped some significant issues. It is as yet not clear whether *Parden* held that in enacting a regulatory statute Congress lifted the immunity defense or whether the time factor of entrance into the controlled activity is the crucial element. As matters now stand, it appears that were congressional intent clear, the Court would hold a state amenable to suit. We shall have

---

> In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216(b) of this title.

29 U.S.C. § 260 (1970); *see* 17 VILL. L. REV. 713, 719 & n.48 (1972).

Most strikingly, the Court's comment that the case's ramifications would touch countless state employees is counterproductive; it is precisely this large mass of persons who need the full protection of such social welfare legislation. *Id.* at 720-21.

[88] As Mr. Justice Brennan points out, the statutory wording in the FELA is even more vague since it makes no express provision covering state railroad employees. 411 U.S. at 302. The FELA statute is quoted in part at note 38 *supra.*

[89] Comment, *supra* note 18, at 274.

The author of the above Comment suggests that the problem presented by this case could be solved through unionization of state workers who could then bargain with their employer on an equal footing.

[90] United States v. California, 297 U.S. 175, 186 (1936). The Court was called upon to decide whether or not the Federal Safety Appliance Act (45 U.S.C. § 286 (1970)) applied to the State Belt Railroad which was owned and operated by the State of California. It concluded that it did, stating:

> The suggestion that it should be assumed that Congress did not intend to subject a sovereign state to the inconvenience and loss of dignity involved in a trial in a district court is not persuasive when weighed against the complete appropriateness of the court and venue selected for the trial of issues growing out of the particular activity in which the state has chosen to engage.

297 U.S. at 188-89.

to wait for a later case which does not present the Court with an intent loophole before we can discover sovereign immunity's next fate.[91]

Catherine J. Minuse

[91] The decision in the instant case involved the commerce clause. What is its potential impact on other provisions of the Constitution? Referring to the notion that in granting the commerce power the states waived that part of their immunity which conflicted with the conferred authority, one commentator has stated:

> [U]nder this analysis there is no sound basis for distinguishing the commerce power from any of the other enumerated powers [which he lists as taxing, postal, bankruptcy, and certain military powers]. Because of the expansive reading given to the commerce clause, however, conflicts involving this particular power are likely to be more frequent. Moreover, where the commerce power is involved, it will also be easier for the courts to imply an intent on the part of Congress to subject the states to suit since courts have traditionally given federal commerce legislation the broadest construction.

Note, *Waiver of State Immunity: Private Damage Actions Against the States Arising Under Federal Law*, 50 B.U.L. REV. 590, 603 (1970). As *Department of Public Health* indicates, tradition is not an unfailing guide to the future behavior of the Court.