

the effect of the decision may serve to encourage more effective union action to eliminate discrimination. Union leaders would likely decide that it was in their best interest to be a party to any negotiations, and they would attempt to take the lead in efforts to eliminate discrimination. This result would be more in keeping with the emphasis our national labor policy places on collective bargaining.

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Constitutional Law—Eleventh Amendment Bars Enforcement of Fair Labor Standards Act Against States in Federal Courts—*Employees of the Department of Public Health & Welfare, State of Missouri v. Department of Public Health & Welfare, State of Missouri*.¹—The petitioners, employees of Missouri state hospitals and training schools, brought an action under the Fair Labor Standards Act (FLSA)² in the United States District Court for the Western District of Missouri, seeking to recover back overtime wages, an equal amount of liquidated damages, and attorneys' fees. Sustaining the defendants' motion to dismiss based upon the Eleventh Amendment, the district court found that this was an action unconsented to by the State of Missouri, and thus was barred by the Eleventh Amendment to the United States Constitution.³

This decision was reversed by the United States Court of Appeals for the Eighth Circuit, sitting in a three-judge panel.⁴ Defendants petitioned for a rehearing, whereupon the court, sitting en banc, set aside the decision of the panel and affirmed the decision of the district court granting the motion to dismiss.⁵ In affirming the district court's decision, the Eighth Circuit stated that this suit was barred by the original Constitution as well as the Eleventh Amendment, unless the state consented to suit or waived its immunity.⁶ Refusing to recognize any congressional power under the commerce clause⁷ to expressly lift a state's Eleventh Amendment immunity, the court emphasized that the State of Missouri had not agreed to

¹ 411 U.S. 279 (1973).

² 29 U.S.C. §§ 201-19 (1970).

³ See 452 F.2d 820, 822 (8th Cir. 1971). The district court opinion is unreported. The Eleventh Amendment states:

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.

U.S. Const. amend. XI.

⁴ Civil No. 20,204 (8th Cir., April 2, 1971) (unreported).

⁵ 452 F.2d 820 (8th Cir. 1971).

⁶ Id. at 823, citing *Great Northern Life Ins. Co. v. Reid*, 322 U.S. 47 (1944); *Missouri v. Fiske*, 290 U.S. 18 (1933); *Ex parte New York*, 256 U.S. 490 (1921); *Hans v. Louisiana*, 134 U.S. 1 (1889).

⁷ U.S. Const. art. 1, § 8, cl. 3.

submit itself to resolution of this dispute in a federal forum, nor had it impliedly waived its immunity under the constructive waiver test set out in *Parden v. Terminal Railway of the Alabama State Docks Department*.⁸

Recognizing a conflict in the courts of appeals⁹ as to whether state employees can sue their own state employers in the federal courts under the 1966 amendments to the FLSA, the Supreme Court granted certiorari.¹⁰ Justice Douglas, writing for the majority, stated that the central issue was whether Missouri had impliedly waived its immunity by continuing to operate its hospitals after the 1966 amendments. Since the Court had previously upheld the constitutionality of the FLSA as extended to the states by the 1966 Amendments,¹¹ the only remaining question was whether there had been consent to suit in the federal forum. The Court, in an 8-1 decision, HELD: Missouri did not impliedly waive its immunity, and thus the Eleventh Amendment barred the employees' suit in federal court.¹²

This decision raises grave doubts about the ability of state employees to enforce their federally created rights in the federal courts. Moreover, it poses serious questions about the very power of Congress to create these rights when the activity sought to be regulated is one in which a state is engaged. The most significant aspects of the decision, however, are the Supreme Court's failure to explain the relationship between sovereign immunity and the Eleventh Amendment, and the failure to impart clarity to the concept of waiver.

This note will first examine the FLSA, its 1966 amendments and the Supreme Court decision which sustained the constitutionality of the amendments. Since sovereign immunity and the Eleventh Amendment are intertwined in the holding of *Employees*, the historical development of the two doctrines will be traced, and the effect which they should have had upon this decision will be evaluated. Then, this note will analyze the theory of implied waiver of immunity as pronounced in *Parden* and the attempts of the majority to distinguish that case from *Employees*. Because the concurring justices felt that the situation in *Employees* demanded an analysis far different from that given by the majority, the opinion of Justice Marshall will be dealt with in depth. The treatment urged by Justice Brennan in his dissent will then be compared to both the majority and concurring opinions. Finally, this note will seek to examine the

⁸ 377 U.S. 184 (1964). See 452 F.2d at 825.

⁹ Compare *Employees* with *Briggs v. Sagers*, 424 F.2d 130 (10th Cir.), cert. denied, 400 U.S. 829 (1970). In this case, the Tenth Circuit found that Utah had impliedly consented to suit in a federal forum under the test pronounced in *Parden*. The *Briggs* case was based upon the identical statute and a parallel fact situation to that in *Parden*.

¹⁰ 405 U.S. 1016 (1972).

¹¹ See *Maryland v. Wirtz*, 392 U.S. 183 (1968).

¹² 411 U.S. 279 (1973). Justice Marshall, joined by Justice Stewart, concurred in the result. See *id.* at 287. The lone dissenter was Justice Brennan. See *id.* at 298.

practical ramifications of *Employees* upon the enforcement of federally created rights.

THE FLSA AMENDMENTS OF 1966

The Fair Labor Standards Act of 1938¹³ was aimed primarily at improving the lot of America's working class by protecting them from the debilitating effects of long working hours at excessively low rates of compensation.¹⁴ By prescribing a minimum wage¹⁵ and limiting the hours of work allowable at the minimum rate,¹⁶ Congress felt that this goal could be achieved. However, it became increasingly apparent to Congress that too many industries were outside the scope of the statute, and, as a result, too many workers were left unprotected.¹⁷

Consequently, in 1966 Congress passed certain amendments which extended the definition of "employer" to include a state, when that state is operating a hospital, institution or school.¹⁸ Thus, employees of state-run hospitals, institutions and schools were extended the benefits of the minimum wage and overtime compensation. Under the remedial provision of the original Act,¹⁹ a suit to recover unpaid overtime compensation may be brought in "any court of competent jurisdiction."²⁰

As Justice Douglas acknowledged in his majority opinion in the *Employees* case,²¹ the State of Missouri is constitutionally within the scope of the 1966 amendments. This conclusion is based upon the Supreme Court's decision in *Maryland v. Wirtz*,²² wherein Maryland, along with twenty-seven other states, sought to enjoin the Secretary of Labor from enforcing the FLSA as it extended to the states. The states' major contention was that state-run institutions were beyond the reach of the commerce clause and that the amendments were a disguised attempt to invade state sovereignty. Rejecting this argument, the *Wirtz* Court explained that the amendments merely sought to place the states on the same footing as private employers engaged in similar activities.²³ The federal government, it said, was acting within a delegated power and was therefore capable of overriding the countervailing state interest, whether that

¹³ Ch. 676, 52 Stat. 1060 (1938), codified at 29 U.S.C. §§ 201-19 (1970).

¹⁴ Ch. 676, § 2, 52 Stat. 1060 (1938), codified at 29 U.S.C. § 202 (1970).

¹⁵ Ch. 676, § 6, 52 Stat. 1062 (1938), codified at 29 U.S.C. § 206 (1970).

¹⁶ Ch. 676, § 7, 52 Stat. 1063 (1938), codified at 29 U.S.C. § 207 (1970).

¹⁷ For the testimony of former Secretary of Labor Wirtz before the Senate Subcommittee on Labor, see S. Rep. No. 1487, 89th Cong., 2d Sess. 8 (1966), reprinted in U.S. Code Cong. & Ad. News 3003 (1966).

¹⁸ 29 U.S.C. § 203(d) (1970).

¹⁹ Ch. 676, § 16, 52 Stat. 1069 (1938), codified at 29 U.S.C. § 216 (1970).

²⁰ Ch. 676, § 16(b), 52 Stat. 1069 (1938), codified at 29 U.S.C. § 216(b) (1970).

²¹ 411 U.S. at 283.

²² 392 U.S. 183 (1968).

²³ See *id.* at 193-95.

interest be "governmental" or "proprietary."²⁴ "If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."²⁵

THE DOCTRINE OF SOVEREIGN IMMUNITY AND THE ELEVENTH AMENDMENT

Since the states have been held to be regulated by the FLSA, one might easily conclude that state employees would be able to enforce their rights in a federal court. However, the doctrines of Eleventh Amendment and sovereign immunity serve to complicate what would otherwise be a simple matter. Since the Supreme Court did not clearly differentiate these two distinct theories in *Employees*,²⁶ a preliminary examination of the two doctrines is appropriate.

Sovereign immunity is a remnant of the feudal law of Europe; it has commonly and somewhat mistakenly been characterized by the phrase "the King can do no wrong."²⁷ In effect, it did not block a suit against the crown; rather, it dictated the procedural form of the legal action available to the wronged subject.²⁸ It has been suggested that Madison and some of the other framers of the Constitution never considered the problem at all.²⁹ On the other hand, Hamilton believed that the common law doctrine was left undisturbed by the framing of the Constitution.³⁰ However, it appears that the prevailing mood at that time favored national unity, and,

²⁴ Id. at 195, citing *Sanitary District v. United States*, 266 U.S. 405 (1925).

²⁵ 392 U.S. at 196-97.

²⁶ See text following note 12 *supra*.

²⁷ See, e.g., *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (Holmes, J.). What this concept originally denoted was that the king, as origin of the law, must not and is not entitled to do any wrong. See Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 4-8 (1963). It is suggested that the distortion was a result of the refusal of the King to be held liable through the doctrine of respondeat superior. Id. at 8.

²⁸ Jacobs, *The Eleventh Amendment and Sovereign Immunity* 6 (1972). "The immunity doctrine by this time [1700] was largely a legal conception, which determined the forms of procedure . . . but did not seriously impair the subject's right to recovery in accordance with the substantive law." Id. Professor Jaffe points out:

Perhaps the question has been not whether the doctrine of sovereign immunity was "right" but whether as a practical matter it ever has existed. From time immemorial many claims affecting the Crown could be pursued in the regular courts if they did not take the form of a suit against the Crown . . . Long before 1789 it was true that sovereign immunity was not a bar to relief. Where the doctrine was in form applicable the subject had to proceed by petition of right, a cumbersome, dilatory remedy . . . , but nevertheless a remedy.

Jaffe, *supra* note 27, at 1.

The concept is further confused by attempting to superimpose it upon the American state-federal scheme. Removed from its monarchist context, it is difficult to locate the ultimate source of the law. Thus, the doctrine has indeed lost meaning.

²⁹ Jacobs, *supra* note 28, at 12. Cf. 3 J. Elliot, *Debates on the Federal Constitution* 533 (2d ed. 1901).

³⁰ See, e.g., *The Federalist* No. 81 (A. Hamilton).

therefore, the autonomy of the individual states was not a consideration of overriding importance.³¹ The main objective of the Constitutional Convention was to insure domestic harmony between the states, and the realization of that goal required the availability of an impartial federal tribunal to resolve claims between a citizen of one state and another state.³² Therefore it would seem that the framers would not have contemplated that federal jurisdiction could be defeated by invoking this common law doctrine.³³ There are several factors which would tend to support the hypothesis that the First Congress deemed the states to be amenable to suit in the federal forum.³⁴ These factors include the previously stated objective of domestic tranquility among the several states, a concern for the fidelity of the states to their financial obligations, and the necessity of a forum in which one state could sue another.³⁵ On the other hand, it has been argued that "it was evidently the consensus of the participants that the sovereign immunity *should* survive the new Constitution, and . . . also . . . that the immunity *would* survive."³⁶

Amidst an atmosphere of debtor states fearing constant suit in the federal courts to enforce fulfillment of their financial obligations arising out of the Revolutionary War, *Chisholm v. Georgia*³⁷ was decided. In that case, the Supreme Court refused to recognize the defense of sovereign immunity as precluding a suit by a resident of South Carolina against the State of Georgia in the federal courts. Chief Justice Jay reasoned that since sovereignty resides in the people, Georgia should not be granted an immunity that is denied a private person.³⁸

Immediately there arose a clamor for a constitutional amendment; debtor states feared that they would become endlessly submerged in suits in foreign federal forums. The Eleventh Amendment was passed with minimal opposition, but its ratification did not clearly indicate whether the states were merely affirming an original understanding ignored by the *Chisholm* court (i.e., that the doctrine of sovereign immunity already existed and protected a state from suit without that state's consent) or whether it was simply an expedient to avert crushing financial demands upon the states.³⁹ Evi-

³¹ Jacobs, *supra* note 28, at 13.

³² See *id.* at 15-18.

³³ *Id.* at 12-13. See also Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 83 (1923). Cf. Cullison, *Interpretation of the Eleventh Amendment*, 5 Houston L. Rev. 1, 7-8 (1967).

³⁴ Jacobs, *supra* note 28, at 42.

³⁵ *Id.* at 22-23.

³⁶ Cullison, *supra* note 33, at 9 (emphasis added). See also C. Warren, *The Supreme Court in United States History* 91 (rev. ed. 1947).

³⁷ 2 U.S. (2 Dall.) 419 (1793).

³⁸ *Id.* at 470-73.

³⁹ This might be characterized as a matter of federalism. In other words, the Supreme Court and the Congress were not willing to invoke the federal judicial power in a situation wherein to do so would practically insure the financial destruction of a state.

dence of the former interpretation appears on the face of the Eleventh Amendment: "The Judicial power . . . shall not be construed to extend . . ." ⁴⁰ This language would seem to indicate that the Amendment merely corrects a misinterpretation by the Court in *Chisholm*. On the other hand, "[t]he ratification debates . . . do not indicate any general understanding that the states were to retain their sovereign immunity . . ." ⁴¹ Neither Article III nor arguably the Amendment itself speaks in terms of sovereign immunity; rather, they speak of federal "judicial power." Moreover, the amendment is framed in absolute terms. While sovereign immunity was capable of being waived at the option of the sovereign, the Eleventh Amendment apparently goes beyond the common law doctrine, since the possibility of waiver is not mentioned. Thus, the Eleventh Amendment might justifiably be characterized as a simple ad hoc expedient rather than a reaffirmation of sovereign immunity. In other words, it was merely a decision that no state would be made bankrupt with the aid of the federal judicial power.

Disregarding the motivations behind ratification of the Eleventh Amendment, it appears that the Amendment would have no effect upon the present suit. Upon a literal construction of the Eleventh Amendment, the suit in *Employees* would not be barred, for in this instance the citizens were suing their own state in a federal court, not another state. However, as the majority opinion properly indicates, *Hans v. Louisiana*, ⁴² decided in 1890, extended the Eleventh Amendment bar to cover this situation as well. The *Hans* Court reasoned that logic demanded this result, ⁴³ otherwise an anomalous situation would have existed: although the federal courts were closed to a suit by a citizen of state A against state B, that same citizen could sue state A in the federal courts. This conclusion is probably correct in light of the Eleventh Amendment bar. ⁴⁴ It must be noted, however, that the decision in *Hans* was based upon the premise that sovereign immunity had been contemplated at the time of the ratification of the Constitution and had intentionally been incorporated into it. The opinion speaks not in terms of con-

⁴⁰ U.S. Const. amend. XI (emphasis added). For the full text of the Amendment, see note 3 supra.

⁴¹ Jacobs, supra note 28, at 68. See also Cullison, supra note 33, at 14. It is there proposed that fear of numerous suits in federal forums motivated ratification of the amendment.

⁴² 134 U.S. 1 (1890).

⁴³ Id. at 15. Upon analysis of the underlying rationale for the use of the federal court system in diversity cases, the Court's reasoning in *Hans* appears cogent. A major purpose for the availability of the federal forum is to allow a claim by a citizen of a foreign state to be heard by an arguably more impartial tribunal than would be the case if the suit was entertained in the court of the defendant's home state. If this concern was considered to be less weighty than the rationale underlying the Eleventh Amendment, what reason would there be for allowing a citizen to sue his own state in federal court when the dangers of a hostile state court are considerably less?

⁴⁴ See Jacobs, supra note 28, at 110.

straint upon the judicial power, but in terms of the common law immunity. The Court relied upon Hamilton's *Federalist Papers*: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its [the state's] consent."⁴⁵ The Court went on to say: "The suability of a State without its consent was a thing unknown to the law."⁴⁶ The *Hans* Court thus ascribed to the framers of the Constitution an intent to incorporate sovereign immunity. This conclusion, however, is not clearly ascertainable from either judicial pronouncement or historical inquiry.

Although the majority in *Employees* did not find it necessary to distinguish between the two doctrines of Eleventh Amendment immunity and sovereign immunity, Justice Marshall points out in his concurring opinion⁴⁷ that there are two separate doctrines. More important, a final adjudication of the petitioners' claim depends upon a clear indication of whether their suit was barred in federal court because of the Eleventh Amendment or because of sovereign immunity. If the Court has said that sovereign immunity bars this suit, then the same doctrine will serve to block this action in the state courts of Missouri. If, on the other hand, this action was dismissed upon the basis of the jurisdictional requirements of the Eleventh Amendment (and the practical considerations required to protect the delicate balance inherent in a federalist system), then the state court might still be available for enforcement of this claim. If the former approach was used, then the Supreme Court may have invoked the common law doctrine of dubious historical origins which will render unenforceable certain rights which it had previously recognized as constitutionally sound.

WAIVER OF IMMUNITY: *Parden v. Terminal Railway of the Alabama State Docks Department*

Accompanying the doctrine of sovereign immunity is the concept, first pronounced in *Cohens v. Virginia*,⁴⁸ that immunity can be waived upon the consent of the sovereign. It is difficult to square that doctrine with the absolute prohibition in the language of the Eleventh Amendment.⁴⁹ Constitutional history has confronted us

⁴⁵ The *Federalist* No. 81 (A. Hamilton), as quoted in *Hans*, 134 U.S. at 13.

⁴⁶ 134 U.S. at 15-16. Justice Brennan suggests in *Employees* that although the suit in *Hans* was defended on Eleventh Amendment grounds, the *Hans* opinion should not have been addressed to that amendment, but solely to the concept of immunity, and therefore the Eleventh Amendment is not applicable to the facts in *Employees*. 411 U.S. at 313-15. See text following note 116 infra.

⁴⁷ 411 U.S. at 287.

⁴⁸ 19 U.S. (6 Wheat.) 264 (1821).

⁴⁹ In *Minnesota v. Hitchcock*, 185 U.S. 373 (1902), the Court inquired into the existence of jurisdiction to hear a suit instituted by the State of Minnesota, even though both parties urged the Court to proceed on the merits of the case. The Court said: "[T]he express consent of the parties [would not] give to this court a jurisdiction which was not warranted by the Constitution and laws." *Id.* at 382. Although not a case arising under the Eleventh Amend-

with a curious situation: although the federal courts do not have the jurisdiction to hear a suit of this nature, the jurisdictional bar is removed upon the granting of consent by the state. This peculiar result seems to violate the basic legal premise that a court without the jurisdiction to hear a certain type of suit is prohibited from entertaining the suit even if the litigants are willing to waive those jurisdictional defects. This apparent contradiction can only be explained by the mixture of the Eleventh Amendment bar and the feudal remnants of common law immunity. Despite this lack of sound historical or constitutional underpinnings, the doctrine of waiver of Eleventh Amendment immunity has persisted since the decision in *Cohens*.

The Court viewed the crucial question in *Employees* as being whether there has been a waiver of Eleventh Amendment immunity by Missouri.⁵⁰ Originally, waiver was required to be "an intentional relinquishment or abandonment of a known right or privilege."⁵¹ The Court will indulge every reasonable presumption against a finding that constitutional rights have been waived.⁵² This strict reading of waiver was, however, considerably watered down in the case of *Parden v. Terminal Railway of the Alabama State Docks Department*.⁵³ In that case, the state of Alabama answered an action instituted by employees of its state-owned railroad under the Federal Employers' Liability Act (FELA)⁵⁴ by setting up the defense of sovereign immunity based upon the Eleventh Amendment. Rejecting that argument, the Court held that

it remains the law that a State may not be sued . . . 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. By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in

ment, this case stands for the general proposition that a jurisdictional bar cannot be waived as to the subject matter even if both parties agree.

⁵⁰ The Court does not clearly delineate whether its opinion is based upon the Eleventh Amendment or upon sovereign immunity. However, since the appellee's motion to dismiss was based upon the Eleventh Amendment, it seems that the Court found that doctrine to be of crucial importance.

⁵¹ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), concerning the Sixth Amendment right to counsel.

⁵² *Id.*

⁵³ 377 U.S. 184 (1964).

⁵⁴ 45 U.S.C. §§ 51-60 (1970).

interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.⁵⁵

In other words, Congress, when acting within its delegated powers such as the commerce power, may offer the state this alternative: either consent to the jurisdiction of the federal courts in actions arising out of the regulated activity or else you may not engage in that activity at all. This is because the states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.⁵⁶ As can be seen in *Parden*, the state need not make any express statement that it has agreed to be sued in the federal forum; rather, by engaging in the regulated activity, the state is assumed to have made its choice to submit to the federal jurisdiction. Congress will offer the state the option, and if the state chooses to operate within that regulated enterprise, the courts will infer the waiver. Although the dissent in *Parden* required a clearer expression of legislative intent to create such a choice than was found in the FELA, it agreed that Congress might, in certain situations, "condition a State's permit to engage in the interstate transportation business on a waiver of the State's sovereign immunity from suits arising out of such business . . ."⁵⁷ However, "the decision to impose such a condition is for Congress and not for the courts."⁵⁸ This doctrine is a clear departure from previous Supreme Court pronouncements as to the necessity of *voluntary* and *knowing* waiver of constitutional rights. If Congress can condition the participation of the state upon amenability to suit in the federal forum, then by no stretch of the imagination might one call that waiver truly voluntary.

For analytical purposes, the majority opinion in *Employees* can be viewed as posing two questions with regard to the waiver concept. The first question is whether there can be found in the 1966 amendments to the FLSA an expression of congressional intent to confront the states with a *Parden*-type choice of either ceasing the activity or consenting to suit in federal court. The second question is whether Congress has the power to create a *Parden*-type "take it or leave it" choice in the *Employees* situation. Although the Court never expressly speaks in terms of legislative power, this consideration seems implicitly to permeate its decision.⁵⁹ In light of *Wirtz*, the

⁵⁵ 377 U.S. at 192 (emphasis added).

⁵⁶ *Id.*

⁵⁷ *Id.* at 198 (dissenting opinion).

⁵⁸ *Id.* (dissenting opinion).

⁵⁹ It merits notice that Justice Douglas dissented in *Wirtz*, arguing that the 1966 FLSA amendments contravened the language of the Tenth Amendment. Implied in his dissenting opinion in *Wirtz* is the notion that the standard to be applied in testing the validity of a federal regulation affecting interstate commerce is the financial burden which is to be imposed upon the state. 392 U.S. at 203-05 (dissenting opinion). There can thus be seen a predisposition of Douglas against the federal legislation involved in the principal case. However, it appears questionable that a distinction should be drawn between federal regulations which are "cheaply" complied with and those which involve greater expenditures of state funds. Yet

majority could not very well rule that Congress lacked the power to regulate a state activity under the FLSA; instead they seem to speak of congressional power to force the state to appear in federal court.

The *Employees* case does not represent the first instance of state employees seeking recovery from their own state-employer under the 1966 amendments to the FLSA. In *Briggs v. Sagers*,⁶⁰ Utah citizens, who were employees of a state-owned institution, brought suit in federal district court in Utah in order to enforce the Act's minimum wage requirements. The district court found that Utah had not waived its immunity, and therefore it had no jurisdiction and dismissed the action.

Upon appeal, the Tenth Circuit characterized the issue as being a confrontation between congressional regulation of commerce and the state's rights under the Eleventh Amendment.⁶¹ The plaintiffs based their case upon the theory of implied consent set forth in *Parden*. The defendants sought to distinguish this case from *Parden* on two grounds: first, that the regulated activity involved in this instance was governmental rather than proprietary, and second, that Utah cannot be said to have waived its immunity because it was operating the institution prior to the enactment of the amendments.

The Tenth Circuit rejected the first argument by pointing to language in *Wirtz* which held insignificant the governmental proprietary distinction.⁶² Although acknowledging that the defendants' second argument might be somewhat convincing, the Tenth Circuit refused to be influenced by it, since in *Parden* the State of Alabama contended that it did not intend to waive its immunity, nor had it known that such a waiver would result. The crucial fact in *Parden* was that Alabama decided to operate a railroad in a field-regulated by Congress, and that fact determined that it had impliedly waived its immunity.⁶³ The extent of the voluntariness in a *Parden* waiver is that the state may cease the activity if it wishes to maintain its immunity from suit in the federal courts.

THE MAJORITY OPINION: *Parden* AND *Employees* DISTINGUISHED

Faced with this inconsistency in circuit court decisions, the Supreme Court confronted the problem in the *Employees* case. Justice Douglas seemingly characterized the problem as being twofold. First, has Congress actually intended that a *Parden*-type

this fear of financial burden based upon a cost-computation test pervades the majority opinion in *Employees*.

⁶⁰ 301 F. Supp. 1023 (D. Utah 1969), rev'd, 424 F.2d 130 (10th Cir.), cert. denied, 400 U.S. 829 (1970).

⁶¹ 424 F.2d at 131.

⁶² Id. at 133.

⁶³ Id. at 134, citing *Parden*, 392 U.S. at 195.

decision be offered to the state?⁶⁴ Second, does Congress have the power to confront the state with this choice in this type of situation? He answered the first question in the negative on grounds which appear dubious when compared with the factors which elicited the opposite answer from the Court in the *Parden* case. Douglas relied upon the language of section 16(b) of the Act, which states that an action under the FLSA "may be maintained in any court of competent jurisdiction,"⁶⁵ and emphasized that this original language was retained in the statute's post-1966 form. He reasoned that since a federal court is not competent to render a judgment against a non-consenting state, Congress would have changed the language of the Act to specifically include the federal courts as a forum in which to maintain such an action if it had indeed intended that the federal courts would be accessible for this type of suit. Douglas searched for some "clear language that the constitutional immunity was swept away,"⁶⁶ but he found none.⁶⁷ This view implies that the majority found a clearer pronouncement of this legislative intent in the language of the FELA, upon which the *Parden* action was based. However, that language is seemingly much less explicit than the language expressing the congressional intent in the 1966 amendments to the FLSA. The wording of the FELA reflects that it was not particularly directed toward the states. Rather, the relevant portions are framed in quite general terms: "[E]very common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable . . ."⁶⁸ From this apparently general directive, the *Parden* Court concluded: "Congress, in making the FELA applicable to 'every' common carrier by railroad in interstate commerce, meant what it said."⁶⁹

If the Supreme Court found a sufficient congressional intent in this language to justify the *Parden* decision, then it is difficult to accept the argument that Congress did not intend to construct the same choice when it enacted the 1966 FLSA amendments. The FLSA language, is expressly directed toward the states. The amendments state that the word "employer . . . shall not include . . . any State or political subdivision of a State (*except* with respect to employees of a State . . . employed (1) in a hospital, institution, or school . . .)."⁷⁰ As Justice Marshall pointed out in his concurring opinion, "[i]n the face of such clear language, I find it impossible to believe that Congress did not intend to extend the *full benefit* of the provisions of the FLSA to these state employees."⁷¹ The "full

⁶⁴ 411 U.S. at 283.

⁶⁵ 29 U.S.C. § 216(b) (1970).

⁶⁶ 411 U.S. at 285.

⁶⁷ *Id.*

⁶⁸ 45 U.S.C. § 51 (1970).

⁶⁹ 377 U.S. at 187.

⁷⁰ 29 U.S.C. § 203(d) (1970).

⁷¹ 411 U.S. at 289 (concurring opinion) (emphasis in the original).

benefit" includes, seemingly, the right to bring on FLSA action in a federal forum, since an employee of a private institution was entitled to do so. Justice Brennan, in his dissenting opinion, reacted to the majority opinion by saying that "it is only the sheerest sort of ritualism to suggest that Congress excluded the States from § 16(b) suits [private suits instituted by individual employees] by not expressly referring to the States in 16(b)."⁷² In light of the Court's holding in *Parden*, it does appear strange that the *Employees* Court would emphasize this minor point in order to justify their finding that Congress, in enacting the 1966 FLSA amendments, did not intend to confront the states with a *Parden*-type choice.

Moreover, if by continuing to operate within the regulated activity, the state has waived its immunity to suit in federal court, then the federal court *does become* a "court of competent jurisdiction." In addition, the search for a clear congressional intent is not even required by *Parden*. For the *Parden* majority, it is only necessary that the state activity sought to be regulated is validly accessible through a delegated power in order that the states be confronted with a choice of consenting to federal suit or else forgoing the activity.⁷³

In answering the question of whether Congress intended that the states be confronted with a *Parden*-type choice, the majority also pointed out that section 16(c)⁷⁴ empowers the Secretary of Labor to institute suits on behalf of state employees who have been wronged by their employers under the statute. Justice Douglas surmised that this is *prima facie* evidence that "private enforcement of the Act was not a paramount objective."⁷⁵ Justice Douglas also viewed section 16(c) as the primary basis for the majority's rebuttal

⁷² Id. at 303 (dissenting opinion).

⁷³ The dissent in *Parden* argued that "far from manifesting such an unequivocal determination, the legislative history of the [FELA] indicates that Congress did not even consider the possible impact of its legislation upon state immunity from suit." *Parden v. Terminal Ry. of Alabama State Docks Dep't*, 377 U.S. 184, 199 (1964). By comparison, the express statutory language and accompanying legislative history of the 1966 amendments to the FLSA do "manifest an unequivocal determination," and they reflect that Congress did "consider its impact" upon the immunity of the states. The explicit language of the amendments and the history might even be characterized as a premeditated response to the reservations of the dissenting justices in *Parden*.

It is quite possible that the Court was merely seeking in *Employees* to limit the effect of the previous decision in *Parden*. However, to limit *Parden* on the basis of an absence of congressional intent appears dubious. It is submitted that if *Parden* is to be limited, the line drawn by Justice Marshall in his concurring opinion—i.e., "at least legal notice"—appears to be much more compelling. See text following note 104 *infra*.

⁷⁴ 29 U.S.C. § 216(c) (1970). This section authorizes "the Secretary of Labor . . . to supervise the payment of the . . . unpaid overtime compensation owing to any employee under . . . section 207"

⁷⁵ 411 U.S. at 286. As has been discussed above, see text at notes 67-69 *supra*, given the premise that Congress was not silent to the waiver of sovereign immunity in the FELA legislation which gave rise to the ruling in *Parden*, it is submitted that it is truly elusive reasoning which leads the majority to conclude that Congress was silent as to waiver of immunity in their 1966 amendments to the FLSA.

to the allegation that this has created "a right without any remedy."⁷⁶ The Secretary of Labor, suing in the name of the United States, would not be blocked by the Eleventh Amendment, and thus the Court concluded that Congress was not primarily concerned with allowing private citizens to sue their state employers in the federal courts.

However, if one examines the logistics of the FLSA suits instituted by the Secretary of Labor under section 16(c), it would be difficult to understand how Justice Douglas could conclude that private enforcement was not a paramount objective. If the Secretary of Labor were the sole means for getting a state hospital employee's suit into the court, most, if not all, of those similarly situated would, in actuality, be faced with a right without a remedy. In examining the basic numbers involved in having the Secretary of Labor as champion of all such claims in the federal courts, the Solicitor General pointed out in his amicus brief that "[i]n 1971 . . . , less than 4 per cent of these [state-run] establishments [could] be investigated by the Secretary each year."⁷⁷ In the light of these statistics, it seems that private enforcement, presuming it was constitutionally acceptable, was the paramount objective of the Act. It would be more reasonable to surmise from these figures that section 16(c) was intended to be available as a last resort for those who cannot otherwise gain access to the courts because of financial obstacles.

Closer scrutiny of section 16(c) reveals that once the Secretary of Labor acts under the power assigned to him by the statute, the petitioners waive the right to seek any other remedy under section 16(b).⁷⁸ Moreover, it should be noted that this section was not aimed specifically at those employees who were brought within the purview of the Act for the first time in 1966; rather, it is available to "any employee or employees . . . under this title."⁷⁹ Section 16(c) predated the 1966 amendments. It is therefore difficult to conclude that it was a remedy aimed specially to avoid the problems of sovereign immunity inherent in a suit against a state-employer. There is no language in either the statutes or the amendments which either suggests that any remedy is limited to a certain class of plaintiffs or that any class is prohibited from pursuing any remedy.

The Third Circuit has pointed out in *Hodgson v. Wheaton Glass Co.*⁸⁰ that the only situation in which the Secretary would

⁷⁶ Id. at 287. Of course, the possibility exists that the right could be enforced by suit in the state courts. However, the Court stated: "[T]hat is a question we need not reach." Id.

⁷⁷ Brief for the United States as Amicus Curiae at 22-23, *Employees of the Dep't of Public Health & Welfare, State of Missouri v. Dep't of Public Health & Welfare, State of Missouri*, 411 U.S. 279 (1973).

⁷⁸ "[T]he consent of any employee to the bringing of any such action . . . shall constitute a waiver by such employee of any right of action he may have under subsection (b)." 29 U.S.C. § 216(c) (1970).

⁷⁹ 29 U.S.C. § 216(c) (1970).

⁸⁰ 446 F.2d 527 (3d Cir. 1971), a suit by the Secretary of Labor under 29 U.S.C. § 216(c) (1970). See also *Wirtz v. Marino*, 405 F.2d 938 (1st Cir. 1969).

invoke section 16(c) jurisdiction is the case of a suit requested by a single employee. If this is indeed the case, then the section 16(c) remedy would be unavailable to the petitioners in *Employees*, as they sought enforcement of the Act through a class action. Moreover, the Secretary is precluded from bringing suit on behalf of employees when there is involved "an issue of law not yet finally settled."⁸¹ Hypothetically, the *Employees* suit could be rejected by the Secretary on this basis, for it might be that the question of overtime work in the hospital situation demands special treatment, and the judiciary has never dealt with that question before. The important point is that this proviso further limits the instances in which the Secretary of Labor might bring the suit. In the language of the statute, when a written request is filed with the Secretary to enforce minimum wage or overtime requirements, "the Secretary may bring an action."⁸² As the dissent in the en banc decision of the Eighth Circuit in *Employees* pointed out, "[t]he Secretary's interest may not be identical to the personal interests of an individual employee."⁸³ It might therefore be submitted that "[a] suit under 16(b) [the private suit] represents the only remedial provision of the Act which assures him of having his claim presented to a court."⁸⁴ Thus, to answer the charge that the Court's decision in *Employees* has in effect recognized a right without a remedy by pointing to the availability of a section 16(c) suit is clearly a tenuous argument.

In answering the second question, *i.e.*, whether in this instance Congress has the power to force the states to make a *Parden*-type choice, it appears that the Court must choose either to overrule *Parden*—thereby invalidating congressional power to force this choice in any situation—or to sufficiently distinguish the two factual situations to show that in *Employees* there was no power to force the choice, while in *Parden* there was.

It would seem that once the decision has been made that Congress did not *intend* to force the choice, there would be no need to discuss whether there was *power* to do so. However, the majority opinion does seem to conclude that in the *Employees* fact situation, Congress would not have the power to create this "take it or leave it" choice. There are several factors which led them to this conclusion. First, they attached weight to the fact that while the state activity in *Parden* was proprietary in nature, the state activity in *Employees* was essential and governmental. It should be noted that

⁸¹ 29 U.S.C. § 216(c) (1970). For an example of such issues, see *Wirtz v. Marino*, 405 F.2d 938 (1st Cir. 1969). In that case, the issue of whether an employee was entitled to overtime pay when he carried equipment in his car because no car was available to his employer was held to be a controlling question of law and thus precluded the Secretary's § 216(c) suit. See also *Schultz v. Jack Smith's Automatic Transmission Serv., Inc.*, 422 F.2d 104 (4th Cir. 1970).

⁸² 29 U.S.C. § 216(c) (1970) (emphasis added).

⁸³ 452 F.2d 820, 833 (8th Cir. 1971) (dissenting opinion).

⁸⁴ *Id.* (dissenting opinion).

Congress aimed this legislation at both governmental and proprietary state activities.⁸⁵ Moreover, when the Supreme Court was first compelled to deal with the constitutionality of this legislation in *Wirtz*, it stated that "[i]t is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character."⁸⁶ Perhaps it is possible that Congress, while possessing the power to regulate within this sphere of activity (as established in *Wirtz*), might nevertheless lack the power to regulate the forum for enforcement of these rights by means of a *Parden*-type choice when the regulated activity is of a governmental rather than a proprietary nature. But the *Parden* Court established that when Congress acts within a delegated power such as its power to regulate interstate commerce, it may condition participation in that activity upon amenability to suit in the federal courts. Thus, this governmental-proprietary dichotomy appears to be a somewhat tenuous basis for distinguishing *Parden* from *Employees* in light of the previous Supreme Court decisions: *Wirtz* holds that the 1966 Amendments to FLSA are constitutionally permitted under the commerce clause, and *Parden* holds that if constitutionally sound, the existence of regulations will force a state to forgo the activity or else be subject to suit in federal court.

Secondly, the majority opinion sought to distinguish the two cases on the basis of the relative costs involved in state compliance with the respective congressional mandates. The Court appears to have attached a high degree of significance to the "enormous fiscal burdens on the States."⁸⁷ But the Tenth Circuit, in *Briggs*, surmised from the Act's legislative history⁸⁸ that "the overall purpose of the FLSA tacitly suggests that the imposition of such strain is outweighed by the underlying policy of the Act."⁸⁹ Again, the Court could find this congressional intent irrelevant in determining whether Congress has the power to force the *Parden* choice, but it is nevertheless somewhat disturbing that the Court found controlling significance in the projected financial burden of complying with an otherwise valid congressional regulation.

The third factor by which the majority sought to distinguish *Employees* from *Parden* similarly examines the relative cost to the states. While in *Parden* the petitioners merely sought compensation under the FELA for actual damage, the employees of Missouri were seeking an equal amount of liquidated damages.⁹⁰ The Court

⁸⁵ See S. Rep. No. 1487, 89th Cong., 2d Sess. 8 (1966), reprinted in U.S. Code Cong. & Ad. News 3002 (1966) [hereinafter cited as S. Rep. No. 1487].

⁸⁶ *Maryland v. Wirtz*, 392 U.S. 183, 195 (1968).

⁸⁷ 411 U.S. at 284.

⁸⁸ See S. Rep. No. 1487, *supra* note 85, at 3004.

⁸⁹ *Briggs*, 424 F.2d at 134.

⁹⁰ This is in reference to 29 U.S.C. § 216(b) (1970): "Any employer who violates . . . section 206 or section 207 . . . shall be liable . . . in the amount of their unpaid minimum

reasoned that although liquidated damages are available as a deterrent against private violation, the federalist system does not allow Congress to treat the states in such a manner.⁹¹ The Court could be quite justified in saying that it is one thing to force a *Parden*-type choice when the measure of damages which flows from submitting to the federal jurisdiction is purely compensatory, while it is quite different to force a state to waive its immunity when it faces the possibility of being assessed punitive damages. However, the Court set out in *Brooklyn Savings Bank v. O'Neil*⁹² that the liquidated damages clause of the remedial statute is compensatory and not punitive. The Court reasoned there that it is difficult to assess the exact amount of compensation beyond merely repaying the back wages; since repayment alone will not suffice to enable the employee to reach that minimum standard of living, an equal amount of liquidated damages will be allowed.⁹³

Further, although there is case law on both sides of the question, some courts have held that the assessment of liquidated damages against a noncomplying employer lies within the discretion of the court.⁹⁴ The majority opinion seems to have disregarded these previous judicial pronouncements when formulating this aspect of their argument.

To summarize, the majority has stated first that Congress did not intend to confront the states with the *Parden*-type choice. Secondly, since Missouri's activity is governmental rather than proprietary since it potentially involves a large expenditure of state money in order to comply, and since the statute in question involves the possible assessment of liquidated damages against a state, the present operation of state schools and hospitals is not an activity as to which the Congress has the power to force the states to confront the two options.

wages, or their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages." [Emphasis added.]

⁹¹ See 411 U.S. at 286.

⁹² 324 U.S. 697 (1945). See also *Idaho Potato Growers v. NLRB*, 144 F.2d 295 (9th Cir.), cert. denied, 323 U.S. 769 (1944); *Atlantic Co. v. Broughton*, 146 F.2d 480 (5th Cir. 1944), cert. denied, 324 U.S. 883 (1945).

⁹³ Note, 17 Vill. L. Rev. 713, 720-21 (1972), suggests that

[s]ince the Supreme Court [in *Parden*] was willing to find constructive waiver of immunity in order to give protection to a relatively small number of people . . . even where Congress had not made clear its desire that such protection be given, then a fortiori constructive waiver is applicable where Congress has specifically applied legislation to the states as employers, where the class of persons meant to be protected is much greater, and where the purpose and need of regulation is a more fundamental and pressing expression of congressional regulation of commerce.

⁹⁴ See, e.g., *Brown v. Dunbar & Sullivan Dredging Co.*, 189 F.2d 871 (2d Cir. 1951); *Landaas v. Canister Co.*, 188 F.2d 768 (3d Cir. 1951). Contra, *Atlantic Co. v. Broughton*, 146 F.2d 480 (5th Cir. 1944). This factor apparently cuts both ways. On the one hand, if assessment of liquidated damages is discretionary, then perhaps the issue of culpability does in fact play a role. On the other hand, if liquidated damages might not even be assessed in *Employees*, then it appears that this is totally superfluous as a grounds for distinguishing it

JUSTICE MARSHALL'S CONCURRING OPINION: AN ATTEMPT TO CLARIFY

The concurring opinion of Justice Marshall⁹⁵ attempts to answer the potential question of whether there will be any forum available for the resolution of the petitioners' claim against the State of Missouri, and it tries to differentiate between the separate concepts inherent in the Eleventh Amendment and common law governmental immunity.⁹⁶ Instead of searching for congressional intent to create a *Parden*-type waiver of immunity, Justice Marshall looked for voluntary action on the part of the state which would indicate the state's consent to federal jurisdiction.⁹⁷ For purposes of analysis, Justice Marshall's opinion might be characterized as seeking to answer four rather than two questions. First, did Congress intend to lift the states' sovereign immunity with which they might otherwise seek to defend against an FLSA suit in a state proceeding? Second, assuming this intent, were they constitutionally empowered to do so? Third, did Congress intend to make the states amenable to suit in the federal courts under the 1966 amendments? Fourth, were they constitutionally endowed with the power to bring about this result as well?

The first two questions are answered affirmatively. Although sovereign immunity was an absolute bar to any suit prior to the ratification of the Constitution, this common law insulation was modified to the extent that it conflicted with the supreme powers delegated to Congress, including the power to regulate commerce under the commerce clause. Marshall portrayed *Parden* as a reaffirmation of this concept.⁹⁸ Therefore, Congress has the power to lift a state's sovereign immunity when it is acting under its mandate to regulate commerce. This would indicate that the common law doctrine would not be available to the state in a state court proceeding; as far as the federal courts are concerned, the Eleventh Amendment bar must still be dealt with.

Thus, Justice Marshall perceived a separate problem of locating the proper forum for resolving this dispute. Although there is no common law immunity remaining, the proper forum question remains, "[b]ecause of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other."⁹⁹ Justice Marshall concluded that the federal courts will not be available. His reasoning assumes that the root of the jurisdictional bar is in Article III, clause 2; he claimed that federal jurisdiction for

from *Parden*. The answer probably lies in the financial condition of the wronged employee rather than the degree of guilt of the employer—if discretion is a factor.

⁹⁵ 411 U.S. at 287 (concurring opinion).

⁹⁶ *Id.* (concurring opinion).

⁹⁷ *Id.* at 296 (concurring opinion).

⁹⁸ *Id.* at 288 (concurring opinion).

⁹⁹ *Id.* at 294 (concurring opinion).

"controversies between a state and citizens of another state"¹⁰⁰ was never intended to "provide a mechanism for making states unwilling defendants in federal court."¹⁰¹ Therefore, he characterized *Chis olm v. Georgia*¹⁰² as a judicial error and the Eleventh Amendment as an expedient for correcting it. Thus, the states had no general common law immunity, but retained the jurisdictional immunity from suit in federal court, absent consent, as extended to this situation by *Hans v. Louisiana*.¹⁰³

Justice Marshall reluctantly recognized that there are some instances wherein Congress may confront the states with a *Parden*-type choice. However, he contended that Congress cannot do this in every instance; *Parden* reaches the "outer limit of the sort of voluntary choice which we generally associate with the concept of constitutional waiver."¹⁰⁴ Since the FELA was already operative when Alabama chose to engage in the railroad business, it can be held to have consented somewhat voluntarily to the jurisdiction of the federal court; it had "legal notice."¹⁰⁵ On the other hand, Missouri had been engaged in the operation of state schools and hospitals for many years before the enactment of the 1966 amendments, and therefore, it had no choice at all. For Justice Marshall the difference was that of choosing to enter a regulated field as in *Parden*, and having to give up already functioning state activities upon passage of certain legislation as in *Employees*. Apparently unhappy with the implied waiver theory pronounced in *Parden*, he refused to dilute "voluntariness" any further. Since in *Employees* there was not even "legal" notice given to Missouri, it will not be held to have waived its immunity. He therefore concluded that even though Congress did intend to confront the states with a *Parden* type choice, here it is not empowered to do so.¹⁰⁶

By proposing to answer these four questions instead of the two with which the majority dealt, Justice Marshall seemingly discovered the solution to the potential problem of a right without a remedy. Since the Eleventh Amendment is merely a jurisdictional bar regulating the forum into which a state may be brought as a defendant, the state courts will be "courts of competent jurisdiction." Because the federal law stands as the supreme law of the land, the state courts have an independent constitutional obligation to enforce it, even if it conflicts with state policy. And since the

¹⁰⁰ For the text of the Eleventh Amendment, see note 3 *supra*. See also U.S. Const. art. III, § 2.

¹⁰¹ 411 U.S. at 292 (concurring opinion).

¹⁰² 2 U.S. (2 Dall.) 419 (1793).

¹⁰³ 134 U.S. 1 (1890).

¹⁰⁴ 411 U.S. at 296 (concurring opinion).

¹⁰⁵ *Id.* (concurring opinion).

¹⁰⁶ Assuming that the Court felt it necessary to limit the *Parden* holding, it is submitted that Justice Marshall's delineation is more reasonable than the majority's basis, which appears to turn on congressional intent. See note 73 *supra*.

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states have already surrendered their sovereign immunity to the extent that they granted Congress the power to regulate commerce, the common law doctrine will be no defense if a FLSA suit is brought against a state in its own state courts. Thus, Marshall believed that the Supreme Court's decision merely regulates the forum in which a FLSA suit may be brought. There are two types of immunity, and there is a necessity for finding a waiver of each before the federal courts will be accessible for suits against a state. Sovereign immunity has been waived by ratification of the commerce clause; however, any action less voluntary than the activity in *Parden* will not serve to waive the Eleventh Amendment immunity. This view reflects Justice Marshall's concern for the preservation of the federal scheme.

As a practical matter, he has delineated the course of conduct which would probably enable the petitioners to recover: the suit should first be brought in the state courts; since the Eleventh Amendment is merely jurisdictional and is totally silent to claims against a state in its own court, the suit would have to be entertained in the state forum. If the state court were to accept a state defense of sovereign immunity, then supposedly the suit could be brought on appeal to the Supreme Court of the United States.

There are several questions raised by Marshall's concurring opinion. First, was voluntary waiver even a consideration in *Parden*?¹⁰⁷ *Parden* does not hold that there must be an express indication given to the states by Congress that they have been given the choice of either forgoing the regulated activity or submitting to the jurisdiction of the federal courts. That was the argument advanced by the minority in that case, and the majority rejected it. Rather, *Parden* seems to indicate that it is the state's duty to discover whether the field which it seeks to enter has been subject to congressional regulation. As has been seen, the FELA legislation did not speak directly to the states; it merely held that "any common carrier in interstate commerce would be liable."¹⁰⁸ If an express congressional directive had been found to be necessary by the *Parden* Court, it would be extremely doubtful that the claimants in that case would have succeeded. *Parden* holds that "by thereafter operating a railroad, Alabama must be taken to have accepted that condition and thus have consented to suit."¹⁰⁹ There is no language which implies that a state must be notified as to the fact that it must make a choice; the conscious choice was already made when the

¹⁰⁷ Although Justice Marshall began by discussing "legal notice," he then talked in terms of "voluntary choice," which is generally associated with constitutional waiver. Since constitutional waiver usually involves a "knowing and intelligent" waiver, it connotes a far greater degree of voluntariness than is embodied in the term "legal notice," which arises by mere operation of law. Therefore, Justice Marshall was actually requiring voluntary choice, not legal notice, when he sought to distinguish *Employees* from *Parden*.

¹⁰⁸ See text following note 68 *supra*.

¹⁰⁹ 377 U.S. at 192.

states ratified the Constitution. By ratification, the states empowered Congress to override certain state interests, including, as *Parden* teaches, the state interest of immunity from suit in a federal forum. Voluntary choice is not required by *Parden*; as the *Parden* dissent properly recognized, the majority held in that case that "waiver of a constitutional privilege [immunity] need be neither knowing nor intelligent."¹¹⁰ Thus, Justice Marshall's search for "the sort of voluntary choice which we generally associate with the concept of constitutional waiver"¹¹¹ is not grounded in the apparent holding of *Parden*, and it can only be taken as an expression of his distaste for the concept of implied waiver.

Secondly, assuming that voluntariness is indeed the test for determining implied waiver, was there anything in the facts of *Parden* which indicates a degree of voluntariness which was lacking in *Employees*? While the FELA never even addressed itself to the states, the 1966 FLSA amendments were enacted for the primary purpose of bringing the states within the purview of the Act. Therefore, it cannot be said that Alabama was warned by the Congress that it would have to consciously choose between forgoing the activity or being amenable to suit. Moreover, in *Parden* the State of Alabama argued that it was totally unconscious of its having made a choice to submit to federal jurisdiction under the FELA. As the Tenth Circuit pointed out in *Briggs*, Alabama contended in *Parden* that "the State did not intend to waive its immunity or know that such a waiver would result."¹¹² Thus, although Alabama had legal notice of its being confronted by Congress with the choice of submitting to federal jurisdiction or forgoing the activity, while in *Employees* Missouri received no such notice, there was nothing that Alabama did that made its waiver of immunity any more voluntary than the actions of Missouri upon which the appellants' case was based.

While Justice Marshall's attempt to associate legal notice with voluntariness appears tenuous on the facts of *Parden*, his argument that "legal notice" is required is valid and somewhat compelling. He perceived legal notice as being the difference between the choice of initiating an activity in the face of amenability to a federal suit (*Parden*) and dismantling a state enterprise to avoid suit in a federal forum (*Employees*). This distinction did not have to be dealt with by the *Parden* court, but it would have supplied a rational basis for the majority decision in *Employees*. Regrettably, the majority chose to ignore it.¹¹³

¹¹⁰ Id. at 200 (dissenting opinion).

¹¹¹ 411 U.S. at 296 (concurring opinion).

¹¹² *Briggs*, 424 F.2d at 134.

¹¹³ While Justice Marshall would apparently limit *Parden* to situations where there was at least legal notice, the majority would do so on the basis of congressional intent. See notes 73 and 106 supra.

JUSTICE BRENNAN'S DISSENT

In his dissent¹¹⁴ Justice Brennan expressed his total inability to comprehend the majority's reading of *Parden*. He viewed that case as dealing solely with sovereign immunity; thus *Parden* holds that a state, by ratifying the commerce clause, has surrendered its sovereign immunity, and Congress can therefore compel the state to appear as a defendant in a federal tribunal.¹¹⁵ He argued that only the dissent in *Parden* would require a clear congressional directive that the state be amenable to suit; to him, the majority was saying that there was no immunity left to be lifted, and therefore Congress could remain silent on that issue if it so desired. Further, even assuming that congressional intent is of controlling importance, he cogently underscored the fact that the intent is eminently clearer in the 1966 amendments than in the FELA.

To understand Justice Brennan's view of the proper disposition of this case, one must first realize that Brennan viewed the Eleventh Amendment as being explicit in its limitation upon the federal judicial power. Therefore, the Eleventh Amendment has no application whatsoever in cases such as *Parden* and *Employees* where the state is sued in federal court by its own citizens. Contrary to the *Hans* court which assumed that the Eleventh Amendment was intended to incorporate the doctrine of sovereign immunity, Justice Brennan believed that the framers of the amendment did not aim to "ensconce" this concept.¹¹⁶ According to this view, the Eleventh Amendment was an express limitation upon the federal judiciary enacted to meet the contingencies resulting from *Chisholm*—i.e., the danger of making a state an unwilling defendant in a *foreign* federal forum. This danger did not exist when the state was sued by one of its citizens. By relying on the view that the Eleventh Amendment was based on sovereign immunity, the *Hans* Court used the concept of sovereign immunity to extend the Eleventh Amendment bar to situations where the citizens of a state sue their own state in federal court. However, because the *Hans* Court should not have been extending the amendment to this situation, the case can be viewed only as a sovereign immunity case, separate and apart from the Eleventh Amendment. By characterizing *Hans* in this manner and by reading *Parden* to hold that sovereign immunity has been surrendered by the states upon ratification of the commerce clause, Justice Brennan concluded that there is nothing to impede the federal courts in the exercise of their jurisdiction.

By adopting this view, Justice Brennan also found it impossible to accept Justice Marshall's view that the Eleventh Amendment will serve only to regulate the forum in which the action is brought. If

¹¹⁴ 411 U.S. at 298 (dissenting opinion).

¹¹⁵ Id. at 300-01 (dissenting opinion).

¹¹⁶ Id. at 309 (dissenting opinion).

this suit is characterized as being concerned merely with sovereign immunity, then this suit can either be brought in both state and federal court or else it can be brought in neither. If sovereign immunity has been waived, then both the state courts and the federal courts will be courts of competent jurisdiction for purposes of this action; if, on the other hand, immunity has not been waived—as the majority opinion appears to state—neither the state courts nor the federal courts will be accessible to the plaintiffs.

There is one basic flaw in Justice Brennan's simple solution to the problems raised by this case, and it is the mirror image of the weakness of the majority view. That is, while the majority has perpetuated the confusion surrounding the two doctrines in order to justify their conclusion, Justice Brennan ignored the long line of case law which has viewed *Hans* to be an extension of the Eleventh Amendment bar to the *Parden* and *Employees* situations as well. Moreover, *Parden* cannot be dismissed as a pure sovereign immunity case. Closer scrutiny of that case reveals that the Court there considered the question of "the [sovereign] immunity doctrine, as embodied in the Eleventh Amendment."¹¹⁷ Thus, the two concepts were not clearly distinguished there; the *Parden* Court did not feel that it was dealing with a pure sovereign immunity case. If it were such a case, then there would be no need for the implied waiver theory; sovereign immunity was surrendered by the states having ratified the commerce clause. Justice Brennan can arrive at his dissenting view only by refusing to recognize the manner in which the Court has dealt with the two concepts over the course of constitutional history.

CONCLUSION

It appears from the majority opinion that the Court was somewhat uncomfortable with the implications of the doctrine of implied waiver as pronounced in *Parden*. *Employees*, therefore, can be viewed as an attempt to circumvent the holding of the *Parden* case without overruling it. The Court has chosen to distinguish it from *Employees* on what are submitted to be tenuous grounds. If the majority is viewed as seeking to answer only one question—whether Congress intended to confront the states with a *Parden*-type choice (as Justice Brennan sees it)—then all that remains for Congress to do is expressly to direct that the defense of governmental immunity cannot be invoked. However, it is submitted that Justice Douglas was saying more: when the state activity is governmental rather than proprietary and when compliance with the congressional enactment involves expenditures of large amounts of state revenues, then the Supreme Court will not be ready to recognize a *Parden*-type implied waiver of immunity.

¹¹⁷ 377 U.S. at 192.

Justice Marshall, on the other hand, was not concerned with the cost of compliance or the governmental-proprietary distinction. He was more concerned with the requirement that there be some semblance of voluntariness in a court-found waiver. As long as the state could have known of the congressional regulation *before* it decided to engage in the activity, he will be ready to find waiver. On the other hand, if the state is already engaged in the activity before the enactment of the legislation, he would presumably require the state to submit expressly to the jurisdiction of the federal courts.

Either of these two views will serve to restrict the power of Congress to regulate state activity in relation to private citizens. In *Wirtz* the Court rejected attempts to overturn the 1966 amendments to the FLSA. It held that Congress had acted within its delegated powers under the commerce clause, and it could therefore override countervailing state interests. In *Employees*, however, the Court refused to open a federal forum for enforcement of those constitutionally-created rights; it arrived at this conclusion by accepting the very same arguments which it had previously dismissed in *Wirtz*. Without a remedy, the rights created by the 1966 amendments and the Supreme Court decision recognizing their constitutionality are both effectively emasculated. Thus, the question remains unanswered as to whether Congress can in any way bring employer-states into federal court when the activity in which they are engaged is more than a small, state-owned railroad operated for a profit. According to Justice Marshall's view, the federal courts cannot be made accessible to wronged employees as long as their employer-state had already initiated the activity before the enactment of the federal legislation. Thus, any state now engaged in a certain employment activity is beyond the reach of any new congressional statutory regulation which seeks to make them subject to suit in federal court.

Although the majority's rationale is somewhat dubious, the most distressing aspect of this decision is that the majority has not really dealt with the fact that they might have created a right without a remedy. The section 16(c) suit will be of negligible benefit to state employees. It is, of course, possible that the 1966 amendments and the *Wirtz* decision will not be rendered nugatory if the state courts are accessible for enforcement of the rights which they created and recognized as valid. Although the Court claims that "arguably this permits suits in the Missouri courts,"¹¹⁸ such a result is almost impossible to predict because of the manner in which the majority refused to disentangle the two doctrines of sovereign immunity and the Eleventh Amendment. Justice Douglas concludes that "[t]he history and tradition of the Eleventh Amendment indicate that by reason of that barrier, a federal court is not competent

¹¹⁸ 411 U.S. at 288 (concurring opinion).

to render judgment against a non-consenting state."¹¹⁹ But the history and tradition of the Eleventh Amendment have become hopelessly intertwined with the history and tradition of sovereign immunity. Needless to say, the blame for that confusion cannot be placed on the shoulders of the *Employees* Court. Nevertheless, little was done to alleviate that confusion, and what is more crucial is that the Court's failure to hold explicitly that this suit was blocked either by a jurisdictional characterization of the Eleventh Amendment or by sovereign immunity makes it difficult to determine whether the state courts have an independent duty to entertain this suit. If the majority opinion is read, as it very well might be, to hold that there has been no waiver of sovereign immunity in accordance with the *Parden* decision, then one might conclude that states will never successfully be forced to comply with the 1966 amendments to the FLSA, because the question of waiver of sovereign immunity "is one of federal law . . . whenever the waiver is asserted to arise from an act done by the State within the realm of Congressional regulation"¹²⁰ Thus, if this holding is based upon a finding of no waiver of sovereign immunity, then the petitioners, when seeking redress in the state courts, would be effectively blocked by the Supreme Court's finding. Without the benefit of any Supreme Court directive (through dictum or otherwise), the state courts might feel free to similarly accept the defense of state immunity and to deny the employees recovery in that forum as well. If this were the result, the petitioners would have to rest their hopes for recovery upon a state legislative enactment which would independently lift the protective veil of sovereign immunity. That would be expecting too much, for that state legislature is, in reality, the very same employer who was not willing to pay the petitioners time-and-a-half for overtime in the first place. There would be little compulsion for the states to reassess that policy, especially in light of their knowledge that the federal courts are inaccessible for enforcement of the employees' claim. The majority opinion could be read to hold that there is indeed a valid congressionally created right without any remedy—except for that fortunate minority which succeeds in having the Secretary of Labor try their cases. Because of the lack of clarity in the majority opinion, it remains to be seen whether the state courts will be responsive to employee suits under the 1966 amendments to the FLSA.

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¹¹⁹ *Id.* at 284.

¹²⁰ *Parden*, 1377 U.S. at 196.