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The Eleventh Amendment: Implied Waiver of State Immunity Re-Examined

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THE ELEVENTH AMENDMENT: IMPLIED WAIVER OF STATE IMMUNITY RE-EXAMINED

Williamson Towing Co. v. Illinois, 534 F.2d 758 (7th Cir. 1976)

The eleventh amendment[1] grants the states immunity from any suit brought by private citizens in federal courts for money damages.[2] The leading United States Supreme Court cases have carved out the exception that Congress may enact statutes which condition the state's participation under a federally regulated program on a waiver of such state immunity.[3] Within this exception, however, a significant controversy exists as to whether the waiver of such state immunity must be express or whether it can be implied under the federal statute in question.

The dispute over implied waiver involves balancing vital state interests against the rights of the individual. The courts which are more conservative on this issue assert that the social benefits of preserving taxpayer revenues for the exclusive use of providing statewide governmental services outweighs the costs of making these funds available to pay money damages sustained by certain citizens due to the negligence of a government employee. In addition, these courts believe that constitutional amendments should not be waived merely by inference. For these reasons, the conservative courts advocate waiver only by strict statutory construction. The more liberal courts have grown intolerant of the manner in which this amendment has placed the states above the law. As a result, they have developed theories wherein a waiver could be implied based on a court's conception of the paramount purposes or federal policy objectives behind the statute in question.

This article will examine the test advanced by the Court of Appeals for the Seventh Circuit in *Williamson Towing Co. v. Illinois*[4] for construing a statutory waiver of the eleventh amendment. The court's test requires a showing of *express* statutory language which "provided that the [statute's] private remedy is applicable to the States."[5] An analysis of this test will

1. The eleventh amendment specifies that: "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 States." U.S. CONST. amend. XI.

2. In Hans v. Louisiana, 134 U.S. 1 (1890), the Supreme Court held that a state's immunity applied to such suits brought by its own citizens.

3. *See* notes 31-89 and accompanying text *infra*.

4. 534 F.2d 758 (7th Cir. 1976).

5. *Id.* at 762, (quoting from Intracoastal Transp., Inc. v. Decatur County, 482 F.2d 361, 365 (5th Cir. 1973)).

conclude that it is adequate to deal with only those statutes involving the issue of waiver which are already clear on their face. As a result, its test is inadequate to aid the courts in handling those federal statutes which expressly provide for private actions against a class of defendants but remain unclear as to whether Congress intended that the states be included as a member of that class. To this end it will be shown that the Court has set forth some general principles as guidelines for resolving such statutory dilemmas and that the Seventh Circuit may have failed to fully incorporate those principles in its test.

This article will further propose an alternative test which would deal more effectively with this statutory problem. In relevant part, the proposed test would require a showing of statutory language from which it could be reasonably inferred that the states could have been included as party of the statute's defendant-class. If, and only if, this premise is established, the court would then be justified in considering whether certain specified policy conditions exist which further warrant the conclusion that the statute provides for a waiver. This article will conclude that the proposed test more fully encompasses the Supreme Court's rulings than the Seventh Circuit's test does.

HISTORICAL BACKGROUND

The issue of sovereign immunity was the subject of significant debate during the drafting and ratification of the Constitution.[6] At the heart of this debate was the issue of whether article III, section 2,[7] provided that the federal judiciary could subject a state to its jurisdiction as a defendant and subsequently "adjudicate its rights and liabilities."[8] Proponents of article III were able to persuade delegates at both the Constitutional Convention and the various state ratification conventions that state sovereign immunity would survive under article III, section 2.[9] However, opponents argued that a literal

6. 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 91 (1922) [hereinafter cited as WARREN].

7. This jurisdictional article, in pertinent part, reads: "The judicial Power shall extend to all Cases In Law and Equity, arising under this Constitution, [and] the Laws of the United States . . . to Controversies between . . . a State and Citizens of another State. . . ." U.S. CONST., art. III, § 2.

8. WARREN, *supra* note 6, at 91.

9. Cullison, *Interpretation of the Eleventh Amendment*, 5 HOUSTON L. REV. 1, 7 (1967) [hereinafter cited as Cullison].

The argument advanced by those interpreting the Constitution as a bulwark of state immunity is summed up in this excerpt from THE FEDERALIST NO. 81, written by Alexander Hamilton:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent* . . . . [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith . . . . [T]o ascribe to the federal courts, *by mere implication*, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

THE FEDERALIST NO. 81, 487-88 (C. Rossiter ed., 1961) (emphasis added).

interpretation of article III, section 2 would permit federal courts to decide suits for money damages against a state by a nonresident.[10] In addition, they predicted that "if the purpose of these provisions . . . were to assure evenhandedness to foreigners, maybe their effect would be to permit such suits by foreigners . . . since the state could sue them in the federal courts."[11] By the time the Constitution had been ratified, however, most Americans were convinced that article III simply provided that the federal courts would serve as an impartial forum in suits involving diversity of citizenship. Popular opinion maintained that it stopped short of allowing private suits for money damages against the states.[12]

It was no surprise, however, when shortly after Congress approved the first panel of United States Supreme Court Justices, the new Court was confronted with the issue of whether the federal courts had jurisdiction over private actions against the states.[13] The Court attempted to resolve the question in *Chisholm v. Georgia*,[14] which involved an action brought by a foreigner to recover payment for supplies purchased by the State of Georgia during the Revolutionary period. By a vote of four to one, the Court boldly rejected Georgia's defense of sovereign immunity and decided that the Constitution empowered federal courts with jurisdiction over suits against the states by either foreigners or citizens of another state.[15]

10. Cullison, *supra* note 9, at 7.

11. *Id.* at 7.

12. *Id.* at 7; *See also* WARREN, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 83 (1923).

13. Vanstophorst v. Maryland, Oswald v. New York, 2 U.S. (2 Dall.) 401 (1791) (notations of motions). *See also* Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1430 (1975) [hereinafter cited as Nowak].

14. 2 U.S. (2 Dall.) 419 (1793).

15. Nowak, *supra* note 13, at 1431-32 n.109, summarizes by stating:

> The Chief Justice, after stating that the feudal notion of complete sovereignty was inconsistent with democracy, found that suits against states were not incompatible with their limited sovereignty. Relying on this theory of the proper role of sovereignty in a democracy, he determined that the Constitution authorized the federal courts to assume jurisdiction over suits against states. He found that the unequal treatment by individual states of citizens of other states and countries was 'among the evils against which it was proper for the nation, that is the people of all the United States, to provide by a national judiciary.' Without referring to the history of Article III, he found that his position must be the natural implication of the Article's language. Thus he concluded: 'This extension of power is remedial, because it is to settle controversies. It is, therefore, to be construed liberally. It is politic, wise, and good, that, not only the controversies in which a state is plaintiff, but also those in which a state is defendant, should be settled. . . . If the constitution really meant to extend these powers only to those controversies in which a state might be plaintiff, to the exclusion of those in which citizens had demands against a state, it is inconceivable, that it should have attempted to convey that meaning in words, not only so incompetent, but also so repugnant to it . . . .' (citations omitted.)

Nowak points out that while none of the five justices in *Chisholm* found that Congress had empowered the Court to decide this action against Georgia, Justice Iredell, in his dissenting opinion, concluded that the federal courts were enjoined from exercising this jurisdiction in the

The nationwide reaction to the outcome of the *Chisholm* case was extremely negative.[16] A resolution creating a new constitutional amendment to protect the states' sovereign immunity was introduced in Congress the day after the Court's ruling.[17] One year later, on March 4, 1793, Congress approved the final draft of the eleventh amendment by a vote of 81 to 9.[18]

There is still a considerable amount of controversy regarding the political machinations which led to the swift passage of the eleventh amendment.[19] Support for the eleventh amendment was justified primarily on the two following policy arguments. First, supporters of sovereign immunity feared that the Court's interpretation of article III in *Chisholm* would result in a substantial fiscal drain on state treasuries.[20] Specifically, it was felt that *Chisholm* permitted federal courts to require the states to pay debts owed by state legislatures to citizens of other states or foreign countries, especially those owed to refugees, Tories and British creditors.[21] This was particularly worrisome at a time when the possibility of another war with Great Britain appeared imminent.[22] Second, states' rights activists feared that *Chisholm* would upset the delicate federal-state balance by enabling the judiciary to assume the legislative power of granting itself jurisdiction over such private suits against the states.[23] They felt that the responsibility for balancing vital state interests against the waiver of state immunity should not be vested in the judicial branch.[24]

absence of Congressional authorization. Nowak, *supra* note 13, at 1432; *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) at 432-33. In doing so, he rejected the majority's theory that "the Court had inherent jurisdiction to decide such cases under Article III." Nowak, *supra* note 13, at 1432; *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) at 436-37.

16. An editorial appearing in a Federalist newspaper in Massachusetts characterized the overall reaction in the following way: "[T]he decision has excited great apprehension in some . . . . Many pieces have already appeared in the public papers on the subject, some of which at least are expressed more to the passions than to the reason." Salem Gazette, July 23, 1793, *quoted in* WARREN, *supra* note 6, at 98.

Typical of the widespread emotional reaction to *Chisholm* was this editorial:

> It must excite serious ideas in those who have from the beginning been inclined to suspect that the absorption of the State governments has long been a matter determined on by certain influential characters in this country who are aiming gradually at monarchy. Federal jurisprudence has aimed a blow at the sovereignty of the individual States, and the late decision of the Supreme tribunal of the Union has placed the ridgepole on the wide-extended fabrick of consolidation. The representatives of the free citizens of the independent States will, no doubt, cherish the spirit of investigation and remonstrate on this subject with wisdom and firmness.

National Gazette, June 1, 1793; Boston Gazette, Aug. 5, 1793, *quoted in* WARREN, *supra* note 6, at 97-98.

17. For a discussion and analysis of these resolutions and passage of the eleventh amendment, *see* Nowak, *supra* note 13, at 1433-41.

18. 3 ANNALS OF CONG. 651-52 (1793).

19. WARREN, *supra* note 6, at 91-105; *contra*, C. Jacobs, THE ELEVENTH AMENDMENT AND SOVEREIGNTY IMMUNITY 21-22 (1972).

20. Cullison, *supra* note 9, at 7.

21. Nowak, *supra* note 13, at 1437-38.

22. *Id.*

23. *Id.* at 1440.

24. Although the framers believed that the satisfaction of public debts was a sacred

Fear of both the *legislative* power to create and the *judicial* power to imply a private cause against a state seems to indicate that the drafters of the eleventh amendment intended to completely eliminate the possibility of a private suit being brought against the states. This inference, however, is incorrect. The ratification debates do not show that the drafters sought to reaffirm the prior interpretation of article III as preventing citizens from suing states in federal courts. Their intent was simply to *limit* the power of the judiciary "to construe" federal jurisdiction over the states in such cases.[25] In doing so, the Second and Third Congresses resolved the *Chisholm* controversy via the eleventh amendment and thereby implicitly vested the power of determining such federal court jurisdiction in the legislative branch of government.[26]

Close examination of the eleventh amendment reveals that in light of its historical development, it should not be interpreted in a literal sense.[27] For this reason, most judges[28] and commentators[29] have urged the courts to interpret this amendment in accordance with the drafters' intent and not in a dogmatic obeisance to the letter of the law. As Chief Justice Hughes said in *Monaco v. Mississippi*:

> Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are *postulates* which limit and control.[30]

Thus, the task of deciphering the postulates behind the literal text was imposed upon the courts.

obligation, they also believed that this state obligation should be exercised through good faith and not through the federal court system. *See* note 7 and quote by A. Hamilton in THE FEDERALIST No. 81.

25. Nowak, *supra* note 13, at 1440.

26. *Id.* at 1441-42. By choosing Congress as the lesser of two evils to determine such federal jurisdiction over the states, the drafters recognized that:

> Congress is the only governmental entity which shares a dual responsibility to the state and federal systems and is accountable at both levels. The federal judiciary, on the other hand, is insulated from the influence of the states. Neither the federal nor state government has any practical recourse from an adverse ruling by the Court limiting or expanding congressional power and affecting the delicate balance between federal and state powers. There is then a real danger that judicial precedents will erect rigid principles of federalism ill-suited to a changing society. The early Court opinions dealing with the Commerce Clause, for example, demonstrate the danger of judicial assumption of ultimate responsibility for determining the parameters of federal power in relation to state sovereignty.

Id. (Footnotes deleted.) *See also* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558-59 (1954).

27. Cullison, *supra* note 9, at 16.

28. Monaco v. Mississippi, 292 U.S. 313, 322 (1934).

29. Cullison, *supra* note 9, at 17.

30. 292 U.S. at 322.

THE SUPREME COURT CASES

Prior to the 1950s the Supreme Court exercised restraint in keeping with the drafters' intent that the eleventh amendment serve as a limitation on the judiciary's power to construe a waiver of state sovereignty. Specifically, the Court embraced two general postulates. First, the Court adhered to the postulate that the authority to enact statutes which waived state immunity should be vested in the *state* legislatures, not the Congress of the United States.[31] Second, the Court postulated a theory for the statutory construction of such waivers in *Murray v. Wilson Distilling Co.*[32] In that case, the Court held that a statutory interpretation of waiver was justified only "if exacted by the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction."[33]

After 1955, the Warren Court endeavored to step beyond the historical boundaries of its power as limited by the pre-1950 postulates. Specifically, the Court attempted to expand its role in determining when federal jurisdiction exists over the states by involving itself in the controversy over what constituted a statutory waiver of their sovereign immunity. In doing so, it became apparent that the Court considered the pre-1950 postulates as anything but axiomatic.

The first case to transcend these postulates was *Petty v. Tennessee-Missouri Bridge Commission.*[34] That case involved a "sue-and-be-sued" clause contained in an interstate compact between Tennessee[35] and Missouri[36] which created a bi-state commission to build and operate a bridge across the Mississippi River. Subsequently, the plaintiff's decedent brought a wrongful death action against the bi-state commission under the Jones Act.[37] In rejecting the states' eleventh amendment defense of immunity, the Warren Court declared for the first time that this question should be resolved by "federal not state law."[38] This ruling completely contradicted the pre-1950 postulate which extended the power of waiver to state legislatures and not the United States Congress. Justice Douglas reasoned that since Congress was required to approve this interstate compact (containing a "sue-and-be-sued" clause) pursuant to the compact clause of the Constitution,[39] both states "clearly consented" to such private suits in federal courts.[40] Specifically, the

31. Cullison, *supra* note 9, at 30.
32. 213 U.S. 151 (1909).
33. 213 U.S. at 171 [hereinafter cited as the *Murray* Postulate].
34. 359 U.S. 275 (1955).
35. 1949 Tenn. Pub. Acts, chs. 167-168.
36. 1949 Mo. Legis. Serv. (Vernon), tit. 14, § 234.60.
37. 359 U.S. at 278.
38. *Id.* at 280.
39. U.S. CONST. art. 1, § 10, cl. 3: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ."
40. Congress gave its consent in the Act of Oct. 26, 1949, P.L. No. 81-411, 63 Stat. 930.

majority stated that Congress "approved the sue-and-be-sued clause . . . under conditions that make it clear that the states accepting it [through their act of participation in the compact] waived any immunity from suit which they otherwise might have had."[41]

Justice Frankfurter (joined by Justices Harlan and Whittaker) sharply attacked Douglas' reasoning in his dissenting opinion. He criticized the majority for creating the distinction between the applicability of federal versus state law in order to create a waiver of the eleventh amendment.[42] Recognizing that, in the eyes of the majority, governmental immunity had fallen into disfavor, the dissent reasoned that this was a poor excuse for construing a waiver of the amendment which Congress had not even considered.[43] In support of this contention the dissent pointed out that over the past hundred years neither state had ever construed the "sue-and-be-sued" clause as rendering a public corporation liable in private suits.[44] Since such suits have been historically limited to actions involving only signatories of the compact,[45] the dissent concluded that even if the case did pose a "federal" question, it "does not require a federal answer by way of a blanket, nationwide substantive doctrine where essentially local interests are at stake."[46]

The Court's decision in *Petty* is significant for two reasons. First, it was the first decision to recognize that the United States Congress (in addition to state legislatures) may condition a state's entry into a federally regulated activity on waiver of the eleventh amendment. Second, *Petty* marks a pragmatic departure from the pre-1950 *Murray* Postulate concerning the statutory interpretation of waiver. Therefore, this decision reflects a willingness on the Court's part to loosely construe statutory language in order to achieve a desired result (in this case, waiver) as opposed to construing the provision according to what Congress intended it to accomplish.

The Warren Court further exceeded the earlier "postulates" by introducing a very liberal theory of "implied" waiver in *Parden v. Terminal Railroad of the Alabama State Docks Department*.[47] In this case, five railroad employees brought suit against the sole owner and operator of their railroad, the State of Alabama, under the Federal Employer's Liability Act[48] for injuries sustained while working for the railway. The majority rejected Alabama's defense of sovereign immunity for two reasons.

41. 359 U.S. at 280.
42. *Id.* at 285.
43. *Id.*
44. *Id.* at 288.
45. *See* Dyer v. Sims, 341 U.S. 22 (1951).
46. 359 U.S. at 285.
47. 377 U.S. 184 (1964).
48. 45 U.S.C. §§ 51-60 (1970) (originally enacted as Act of April 22, 1908, ch. 149, § 1 Stat. 65) [hereinafter referred to in the text as the FELA].

First, the Court concluded that the FELA, which authorized private actions against employers in federal courts, applied to state as well as private employers.[49] Justice Brennan pointed out that the Act's language defined the appropriate class of potential defendants (or employers) in terms of "every." Therefore, it could be implied that Congress intended to include the states as part of that class. Notably, the Court adopted this interpretation even though the Act's legislative history made no mention of whether Congress intended the states to be a part of that class of "employers."[50]

Second, the Court expanded upon Justice Douglas' "federal law" concept in *Petty* and developed a new, constitutional theory of waiver. This theory asserted that when the states "empower[ed] Congress to regulate commerce [by ratifying the Constitution], then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation."[51] In declaring this new theory of waiver though, the Court realized that this statement seemed to waive a state's eleventh amendment protection upon mere participation in a federal program.[52] Thus, the Court qualified this exceedingly broad language by adding that "[r]ecognition 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 . . . is here being overridden."[53]

Justice White, in his dissenting opinion, criticized the majority for irresponsibly neglecting settled rules of statutory construction contrary to the conventional *Murray* Postulate. In doing so, he noted that since no state was operating a common carrier railroad when the FELA was enacted, it was therefore impossible to determine whether Congress contemplated potential state liability.[54] Although the FELA's legislative history does indicate that Congress intended to remove certain common law defenses available to private railroad employers at that time, he noted that the states' sovereign immunity was not one of them.[55] In conclusion, he asserted that the majority's implied waiver theory proposes that the "waiver of a constitutional privilege need be neither knowing nor intelligent."[56]

49. The FELA provision in question reads as follows: "*Every* common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such common carrier . . . ." (Emphasis added.) 45 U.S.C. § 51 (1970).

50. *See* notes 54-56 and accompanying text *infra*.

51. 377 U.S. at 192. Justice White, in his dissenting opinion, argued that "it should *not* be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect an automatic and compulsory waiver of rights arising under another." *Id.* at 198 (emphasis added).

52. Cullison, *supra* note 9, at 33.

53. 377 U.S. at 192.

54. *Id.* at 199.

55. *Id.*

56. *Id.* at 200.

Thus, the majority set forth a two-part test in *Parden* for determining whether a waiver of sovereign immunity can be implied. To satisfy the test it had to be shown that: (1) the state was participating in the federally regulated activity in question; and (2) the activity's enabling act contained language creating a private cause of action against a class from which it could be implied that the state was part of that class.

In *Parden*, as in *Petty*, the Court ignored the *Murray* Postulate which requires stricter and clearer statutory construction. *Parden* demonstrated that the Court was willing to imply a waiver in order to achieve uniform application of the FELA even in the absence of enabling language in the legislative history of the FELA. The Court justified this action on the policy argument that "exemption from suit for state-owned railroads [under this federal act] would leave the railroads' employees with a right to a recovery for their injuries but no method for enforcing this right."[57] *Parden* marks the first time that public policy considerations were utilized, albeit in a limited sense, to add credibility to implying a waiver.

The *Parden* decision remained undisturbed until the Burger Court, almost ten years later, considered the *Parden* test in *Employees of the Department of Public Health & Welfare v. Missouri Department of Public Health & Welfare*.[58] That case involved an action brought against the State of Missouri by various employees of state schools and hospitals under the Fair Labor Standards Act.[59] Specifically, these state employees sought payment for overtime compensation due to them pursuant to the 1966 FLSA amendments[60] which subsequently brought state schools and hospitals under the FLSA. In *Employees*, the Court upheld Missouri's eleventh amendment defense, concluding that the FLSA did not specifically provide for private suits against the states.[61] While the majority conceded that the 1966 amendments brought these state-operated schools and hospitals under the FLSA, it maintained that the particular statutory language[62] and intent[63] which authorized private suits against employers did not apply to the states.

57. *Id.* at 197.

58. 411 U.S. 279 (1973).

59. 29 U.S.C. §§ 201-19 (1970) (originally enacted as Act of June 25, 1948, ch. 676 § 1-19, 52 Stat. 1060) [hereinafter referred to in the text as the FLSA].

60. 29 U.S.C. § 203 (1948), *as amended by* FLSA Amendments of 1966, Pub. L. No. 89-601, § 102, 80 Stat. 830.

61. 411 U.S. at 281-87.

62. 29 U.S.C. § 203(d) (1948) originally defined "employer" as to *exclude* "the United States or any State or political subdivision of a State." However, the 1966 amendments added the language: "except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section . . . ." Section 203(r) was amended at the same time to include such schools and hospitals. *See* note 60 *supra*.

63. The legislative intent of the Act's penalty provision (which remained unchanged both before and after 1966) was expressed accordingly:

The Court arrived at this decision by distinguishing *Employees* from both parts of the *Parden* test. First, the Burger Court rejected the *Parden* test's proposition that it can be *implied* that Congress intended the states to be part of that class which could be sued as "employers"[64] under section 16(b) simply because the 1966 amendments included these state entities under the FLSA. The majority asserted that if Congress had intended to include the states under the specific provision which authorized private actions in federal courts, it should have amended that particular provision directly.[65] Further, the Court noted that the FLSA provided an alternate legal avenue[66] for such state employees through the office of the Secretary of Labor under section 17(c). Thus, "[s]ections 16 and 17 suggest that since private enforcement of the Act was not a paramount objective, disallowance of suits by state employees and remitting them to relief through the Secretary of Labor may explain why Congress was silent as to waiver of sovereign immunity of the States."[67]

The Court disregarded the other *Parden* test assumption that by participating in a federally regulated program a state consents to private suits in federal courts for ensuing violations.[68] The majority pointed out that this conclusion failed to distinguish between the two significantly different policy considerations at stake in *Employees* and *Parden*. Namely, the Court distinguished between the financial capability of a state treasury to pay damages owed to many plaintiffs under a *governmental* service program like

> Any employer who violates the provisions of section 6 or section 7 of this Act 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. . . .

S. REP. NO. 1487, 89th Cong., 2d Sess. 8, 22-23 (1970); H.R. REP. NO. 1366, 89th Cong., 2d Sess. 3, 11-12, 15-18 (1970).

64. 29 U.S.C. § 216(b) (1970) [hereinafter referred to in the text as 16(b)] allows employees to sue their employers in federal court for FLSA violations. Justice Marshall, in his concurring opinion, vehemently criticized the majority's statutory interpretation here. In doing so, he asserted:

> 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. It is true . . . that . . . Congress did not amend § [2]16(b) [to clarify whether 'state' and 'employer' were to be synonymous under this provision]. . . . [T]he alteration of the definition of employer in § [20]3(d) clearly sufficed to achieve Congress' purpose . . . . [The majority's interpretation] ignores the basic canon of statutory construction that different provisions of the same statute should be construed consistently with one another.

411 U.S. at 289-90.

65. 411 U.S. at 285.

66. 29 U.S.C. § 217(c) (1970) [hereinafter cited as 17(c)] "gives the Secretary [of Labor] power to seek to enjoin violations of the Act and to obtain restitution in behalf of employees" for unpaid wages and overtime compensation. 411 U.S. at 286.

67. 411 U.S. at 286. This reasoning is inconsistent. If, as Justice Douglas argues, Congress must state whether 16(b) specifically applies to the states as "employers," then it is only logical that Congress must also specify that 17(c) applies to actions brought by the Secretary on behalf of *state* employees as "employees" under 17(c).

68. 411 U.S. at 285.

a state hospital as opposed to covering the damages of only a few while operating a *proprietary*, revenue-producing enterprise like a state-owned railway.[69] In addition, the majority noted that while the FELA in *Parden* provided that only restitutionary relief be paid, the FLSA in *Employees* permitted recovery for not only the amount of unpaid wages but liquidated damages and attorneys' fees as well.[70]

The Burger Court failed to set forth a specific test for construing a statutory waiver. In distinguishing *Parden*, however, the Court demonstrated that when a statute was unclear as to whether the defendant-class included the states, it would not be as willing as the Warren Court to construe a waiver based upon loose statutory construction and participation in the federally regulated activity. In the absence of a clear congressional mandate, the Burger Court demonstrated that it would consider the prevailing policy implications in an effort to achieve credibility in its statutory construction of such vague statutes. Specifically, the policy considerations examined by the Court involved the distinctions between: (1) A state's financial ability to cover damages emanating from governmental versus proprietary programs; (2) forcing states to pay restitutionary relief versus restitutionary relief plus liquidated damages and attorneys' fees; and (3) the availability of legal recourse through a federal agency versus the availability of no legal recourse at all. It is important to note that in response to the Supreme Court's decision in *Employees*, Congress amended 16(b) of the FLSA to clarify that it *did intend* this subsection to constitute a waiver of state immunity; thus making the states amenable to private actions in federal courts for violations under the FLSA.[71]

The Burger Court considered the issue again in *Edelman v. Jordan*.[72] In that case, an eligible welfare recipient brought an action against the State of Illinois for failure to process his application and issue payments under the Aid to the Aged, Blind and Disabled program.[73] The AABD is a joint, federal-state program wherein the federal government provides funding assistance to the states to conduct such programs under the Social Security Act.[74] At the time of the suit, the federal regulations for AABD programs provided that decisions on applications for assistance were to be made within 30 days for the aged and blind and 45 days for the disabled and required that payments to

69. *Id.* at 284. Justice Marshall, in his concurring opinion, urged the Court to take further notice of the fact that, in *Parden*, Alabama entered into its proprietary endeavor about twenty years *after* the FELA had been enacted; whereas, in *Employees*, Missouri was operating various state schools and hospitals (a compelling governmental service) well *before* the 1966 amendments. 411 U.S. at 296.

70. 411 U.S. at 286.

71. 29 U.S.C. § 216(b) (Supp. 1975).

72. 415 U.S. 651 (1974).

73. ILL. REV. STAT. ch. 23, §§ 3-1—3-12 (1973) [hereinafter referred to in the text as AABD].

74. 42 U.S.C. §§ 1381-1385 (1970).

eligible recipients were to begin within those time limits.[75] Illinois failed to approve Jordan's application for almost four months after the submission of his application. The plaintiff brought a class action in the district court alleging jurisdiction under section 1983 of the Social Security Act.[76] In doing so, the plaintiff petitioned the court for two forms of relief: (1) an injunction requiring the state to process applications and expedite payments in accordance with the HEW regulations; and (2) "equitable restitution"—or payment of all prior aid checks not paid during that period in which a recipient would have received assistance had his application been processed on time.[77] Notably, "equitable restitution" was distinguished from retroactive damages. It was asserted that since the payments in question would have been available had the applications been filed properly, "the nature of the impact on the state treasury is precisely the same."[78] The Court of Appeals for the Seventh Circuit affirmed the judgment of the district court which granted both forms of relief.[79] While the United States Supreme Court upheld the validity of the injunction, it reversed the lower court's grant of "equitable restitution."[80]

In support of its decision, the Court relied on *Ex parte Young*.[81] That case established that the federal courts are empowered to issue injunctions which order state public officials to comply "prospectively" with a federal law in the future.[82] By denying the petition for "equitable restitution," the Court rejected the theory adopted by the court of appeals which asserted that *Ex parte Young* allowed *all* actions against the states which are "equitable" in nature.[83] In doing so, the Court noted that:

> [t]his argument neglects the fact that where the State has a definable allocation to be used in the payment of public aid benefits, and pursues a certain course of action such as the processing of applications within certain time periods as did Illinois here, the subsequent ordering by a federal court of retroactive payments to correct delays in such processing will invariably mean there is less money available for payments for the continuing obligations of the public aid system.[84]

Thus, the Court concluded that a judgment in favor of "equitable restitution"—or retroactive relief—would be contrary to the purpose of the eleventh amendment which is to protect the states against the disruption of their treasuries.[85] The Court then noted that such retroactive relief would only

75. 45 C.F.R. § 206.10(a)(3) (1972).
76. 42 U.S.C. § 1983 (1970).
77. Jordan v. Weaver, 472 F.2d 985, 987 n.3 (7th Cir. 1973).
78. 415 U.S. at 682.
79. 472 F.2d at 999.
80. 415 U.S. at 669.
81. 209 U.S. 123 (1908).
82. *Id.* at 155-56.
83. 415 U.S. at 666.
84. *Id.* at n.11.
85. *Id.* at 668. *See*, Nowak, *supra* note 13, at 1420-21.

be warranted if it could be established that there was a statutory waiver of Illinois' eleventh amendment protection. In concluding that there was no waiver of state immunity, the majority once again distinguished the dual *Parden* test.

First, the Court noted that unlike *Parden* and *Employees*, *Edelman* involved a statute which provided for *no* private actions against a class of defendants from which it could be inferred as including the states.[86] Justice Rehnquist, writing for the majority, explained that while the applicable statute did impose federal sanctions upon a state for noncompliance, such sanctions were limited to the termination of future allocations of federal matching funds. He also distinguished *Petty*, *Parden* and *Employees* by observing that "the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent"[87] in *Edelman*.

Second, the Burger Court rejected the applicability of the *Parden* test's theory of consent to waiver through participation—referred to in *Edelman* as "constructive consent."[88] In denouncing this theory, Justice Rehnquist argued:

> Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. . . . The mere fact that a State participates in a program through which the Federal Government provides assistance . . . is not sufficient to establish consent on the part of the State to be sued in the federal courts.[89]

Thus, it is clear that the Burger Court in *Employees* and *Edelman* smothered the trend toward the liberal interpretation of waiver advanced by the Warren Court in *Petty* and *Parden*. The Burger Court's purpose for doing so was evident. It viewed the purpose of the eleventh amendment as designed to prevent the courts from disrupting state treasuries. To reinstate this purpose, however, the Burger Court whittled away at the *Parden* test instead of carving out a new doctrine of waiver. Indeed, the policy considerations introduced in *Employees* and *Edelman* are relevant but the Court failed to mold them into a workable formula. Thus, it has become the lower courts' task to reformulate a new test along the lines of the Burger Court's criticism of the *Parden* test.

THE SEVENTH CIRCUIT TEST FOR DETERMINING STATUTORY WAIVER

Williamson Towing Co. v. Illinois[90] was the first case regarding the

86. *Id.* at 671-74.
87. *Id.* at 672.
88. *Id.* at 673.
89. *Id.*
90. 534 F.2d 758 (7th Cir. 1976).

statutory waiver of state immunity that the Court of Appeals for the Seventh Circuit considered after the Burger Court handed down its decision in *Edelman*. In that case, the plaintiff sought restitutionary relief for damages sustained by certain barges being towed by its tugboat resulting from a nighttime collision with a pier of the Upper Cairo Highway Bridge on the Mississippi River.[91] The facts showed that Illinois negligently failed to maintain proper lights and signals on the bridge at the time of the collision. While the bridge was owned and operated by Missouri and Illinois jointly, the collision took place on the Illinois side of the bridge.

Both the district court and the court of appeals upheld Illinois' eleventh amendment defense, thus barring recovery.[92] In doing so, the court rejected the plaintiff's contention that the Cairo Bridge Act Amendments of 1938[93] and the Bridge Act of 1906[94] contained language providing for a waiver of Illinois' eleventh amendment protection. The court considered the following theories of statutory construction in reaching its decision.

The opinion pointed out that the Cairo Bridge Act Amendments authorized the Cairo Bridge Commission[95] to purchase and maintain the bridge involved in this case.[96] Those amendments further authorized the Commission to convey the respective portions of the new bridge to the states of Illinois and Missouri after suitable financial arrangements had been made. In 1954, the Commission conveyed to Illinois that part of the bridge adjacent to the State of Illinois by warranty deed. The plaintiff argued that the enabling act contained a sue-and-be-sued clause similar to the one contained in the Tennessee-Missouri bridge compact in *Petty*. However, the court concluded that a careful reading of the Cairo Bridge Act revealed that the sue-and-be-sued clause referred "only to the Commission and not to its successors and assigns."[97]

The Bridge Act of 1906 prohibits the construction or operation of a

91. Judge Tone noted in his opinion that procedurally:
Williamson [Towing Co.] filed . . . [its original] action in admiralty in the United States District Court for the Northern District of Mississippi pursuant to the Limitation of Vessel Owner's Liability Act, 46 U.S.C. § 181, *et seq.*, seeking exoneration from, or limitation of, liability for all claims arising out of the collision. Shortly thereafter, the Alter Company, owner of the barges and bailee of the cargo, filed a claim against Williamson to recover for damage suffered by the barges and the cargo. On Williamson's motion, the case was transferred under 28 U.S.C. § 1404(a) to the Eastern District of Illinois so the State of Illinois could be impleaded. Williamson then filed a third-party complaint against the state, alleging negligence in failing to have the bridge's navigation lights turned on. From the District Court's dismissal of the third-party complaint on the ground of lack of jurisdiction under the Eleventh Amendment, Williamson took this appeal.
534 F.2d at 759.

92. *Id.* at 758.

93. Act of June 14, 1938, P.L. No. 75-601, 52 Stat. 679.

94. 33 U.S.C. §§ 491-497 (1970).

95. Hereinafter referred to in the text as the Commission.

96. Act of Apr. 13, 1934, P.L. No. 73-156, 48 Stat. 577, § 8.

97. 534 F.2d at 761.

bridge in such a manner as would unreasonably obstruct "the free navigation of the waters over which it is constructed."[98] In relevant part, the Act requires the owner of a bridge to maintain "such lights and other signals thereon as the Commandant of the Coast Guard shall prescribe."[99] If the owner fails to comply, the Secretary of the Army is authorized to either initiate an action under the direction of the Attorney General to enjoin non-conforming behavior or to remove the bridge and sue its owner for the cost of removal.[100] Under these penalty provisions the court emphasized that the "Act . . . 'is penal in nature and enforcement of its provisions is vested in the Attorney General.' "[101] In other words, the court concluded that the Act does not go so far as to create a private action against the states. In reaching this conclusion, Judge Tone reasoned that:

> There is no doubt that the state, as owner and operator of the bridge, is under a duty to operate and maintain it properly. To say this is not, however, to answer the question of whether the state has waived its immunity from private suit. There is no more reason to *infer* a waiver of immunity or an intent to create a private right of action against the state from the 1938 Cairo Bridge Act than from the Bridge Act of 1906.[102]

The statutory construction of the Bridge Act adopted by the Seventh Circuit concurs with the Fifth Circuit's interpretation of the same statute in *Intracoastal Transportation, Inc. v. Decatur County*.[103] Thus, the Seventh Circuit rejected sub silencio the more liberal construction advanced by the dissent in *Intracoastal*. Specifically, the dissent's more liberal reading asserted that:

> The *paramount purposes* behind the Act demand that the states, who typically own the bridges involved, be made amenable to suits for enforcement of the statutory standards. This is true regardless [of] whether the plaintiff is the United States or a private party injured by the violation of a statutory provision designed to protect him. Thus, there is no reason to presume that Congress did not intend to lift the states' immunity in all cases [arising under the Bridge Act].[104]

In essence, this liberal theory would construe a waiver based upon an "implied purpose" which is read into the statute. This liberal theory,

98. 33 U.S.C. § 494 (1970).
99. *Id.*
100. 33 U.S.C. § 495 (1970).
101. 534 F.2d at 762, (quoting from 482 F.2d at 366).
102. *Id.* at 762 n.4 (emphasis added).
103. 482 F.2d 361 (5th Cir. 1973); *cf.* Red Star Towing & Transp. Co. v. Department of Transp. of N.J., 432 F.2d 104 (3d Cir. 1970), and Bass Angler Sportsman Soc. v. United States Steel Corp., 324 F. Supp. 412 (M.D. Ala. 1971) (consolidated), *aff'd per curiam*, 447 F.2d 1304 (5th Cir. 1971) (Both the above mentioned cases hold that the penalty provision under the Rivers & Harbors Appropriation Act of 1899, 33 U.S.C. § 406, is penal in nature and does not grant enforcement powers to private parties.)
104. 482 F.2d at 370.

however, constitutes an incorrect reading of the statutory language in question and the Seventh Circuit's interpretation represents the more accurate view.

In *Williamson*, Judge Tone's use of the word "infer,"[105] in concluding that neither act contains a statutory basis on which waiver can be *implied,* would appear to suggest that the Seventh Circuit still acknowledges the existence of a theory of implied waiver. Yet, the majority opinion's interpretation of the relevant Supreme Court cases appears to sound the death knell for implied waiver. This was evidenced by the court's adoption of the statutory waiver test developed by the Fifth Circuit in *Intracoastal*.[106] Specifically, *Intracoastal* concluded that *Employees* added an additional requirement to the *Parden* test when it asserted that:

> It is no longer sufficient merely to show that a State has entered a federally regulated sphere of activity and that a private cause of action is created for violating the applicable federal provision, but in addition the private litigant must show that Congress expressly provided that the private remedy is applicable to the States.[107]

In adopting the Fifth Circuit's test, the Seventh Circuit acknowledged that "it would be arbitrary to infer a waiver by consent 'to civil liability that could not be anticipated by reading the relevant statute.' "[108] The court further asserted that since the Bridge Act "created no new remedy other than penal sanctions, . . . it is illogical to imply that Congress intended that a violation by the State should give rise to a civil claim for damages."[109] In doing so, the court distinguished the similar statutory circumstances in *Petty, Parden*, and *Employees*, and noted that the Bridge Act in *Williamson* (like the Social Security Act in *Edelman*) did not involve a "congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which *literally* included States."[110]

It should be further noted that neither the Seventh Circuit in *Williamson* nor the Fifth Circuit in *Intracoastal* made any attempt to incorporate the policy considerations enunciated in *Employees* into their waiver test. The Fifth Circuit simply mentioned some of the policies in an historical context. The Seventh Circuit, in a footnote, singled out the governmental service versus proprietary distinction and noted that the operation of a non-toll bridge in *Williamson* would fall into the non-proprietary category.[111] However, like

105. *See* note 102 and accompanying text *supra*.
106. 534 F.2d at 762.
107. 482 F.2d at 365.
108. 534 F.2d at 761-62, (quoting from Red Star Towing & Transp. Co. v. Department of Transp. of N.J., 432 F.2d 104, 106 (3d Cir. 1970)). It should be noted that this argument had been raised by Justice White in his dissenting opinion in *Parden*; however, the majority chose to ignore it. *See* notes 54-56 and accompanying text *supra*.
109. 423 F.2d at 106.
110. 534 F.2d at 762, (quoting from 415 U.S. at 672) (emphasis added).
111. *Id*. at 761 n.3.

the Fifth Circuit, the Seventh Circuit ignored referring to the policy considerations when setting forth its test.

ANALYSIS OF THE SEVENTH CIRCUIT TEST

The Seventh Circuit test provides the courts with no more a workable formula to construe statutory waivers than the pre-1950 *Murray* Postulate.[112] Like the *Murray* Postulate, the Seventh Circuit's test ignores the fact that Congress has enacted and will probably continue to enact legislation which contains provisions that result in unresolved conflicts with the eleventh amendment. Specifically, the test does not address itself to the existence of federal enactments which provide for suits against a class which happen to include a state but remain unclear as to whether Congress intended that the states be included as parties of that class. For example, the FELA in *Parden*[113] and the FLSA in *Employees*[114] contained express statutory language which left the Court sharply divided over whether these enactments "literally" created a private cause of action which applied to the states. *Petty, Parden*, and *Employees* demonstrated that when the test for interpreting a statutory waiver required a clear expression of applicability, the liberal Warren Court and the conservative Burger Court tended to construe statutory language either loosely or strictly in order to achieve desired results consistent with their respective views of the eleventh amendment. Not all statutes are like section 1983 of the Social Security Act in *Edelman* or the Bridge Act of 1906 in *Williamson*. These statutes contain *no* statutory language which provides for private actions against any class.

The Seventh Circuit's extreme emphasis on a showing of express statutory waiver is misplaced. While the Burger Court failed to compose a comprehensible test, the Court's opinion in *Employees* indicated that when there exists a legitimate, statutory dispute over whether Congress included the states as part of an act's defendant class, the process of construing a waiver should not terminate at the statutory construction stage. The Court demonstrated that a waiver should not be granted until serious consideration has been given to the policy implications as well as the statutory expressions.

The Seventh Circuit did not specify that the application of its test should be limited in any way. Thus, it must be concluded that the court intended its test to be applied to *all* statutory situations involving the problem of construing a waiver. This means that, if confronted with a statute which expressly provides for private remedies against a class but remains ambiguous as to whether states were included as part of that class, the Seventh Circuit test

112. *See* note 33 and accompanying text *supra*.
113. *See* notes 47-57 and accompanying text *supra*.
114. *See* notes 58-70 and accompanying text *supra*.

would require that waiver be determined primarily upon a court's semantical interpretation of the statutory language without regard to the policy implications of its decision.

The Seventh Circuit in *Williamson* failed to explain why it did not incorporate policy into its test. In the absence of such an explanation, the court: (1) erred in failing to distinguish the applicability of its test to those federal statutes which *do not* authorize ensuing private actions in federal courts from those that *do*, but remain unclear as to whether they apply to the states; and (2) overlooked the importance that the Supreme Court cases placed on the role which policy should play in determining whether a waiver should be construed under the latter kind of statute.

PROPOSALS: CONGRESSIONAL ACTION AND A COMPREHENSIVE TEST FOR IMPLIED WAIVER

When a statute either explicitly authorizes or flatly denies private suits against the states, the supremacy clause[115] requires that the courts enforce the act in accordance with Congress' will as manifested in the language of the enactment. However, to remedy the problem of determining whether a waiver exists under statutes which remain ambiguous, the following recommendations are offered as possible solutions. The most effective approach, in the long term, would be for Congress to pass a concurrent resolution that would require all its enactments which create private actions in federal courts to contain a State Immunity Impact Statement. Such a statement would require Congress to specify (briefly) whether or not it intended the states to be part of the statute's defendant class.

The impact statement approach has several advantages. It would immediately and unambiguously alert all states as to whether their participation in a federal activity is to be conditioned upon a waiver of their eleventh amendment protection. In addition, courts and litigants would realize significant savings in time and money which are normally wasted throughout the process of statutory construction during trial and appeal. Moreover, it would ensure the uniform application of waiver under all statutes containing the statement.

The impact statement approach is not without problems however. Even if Congress were to adopt such a legislative requirement, it would affect only those statutues enacted, extended or reauthorized in the future. Thus, many existing statutes containing unresolved conflicts with the eleventh amendment would remain without such congressional clarification.

115. The supremacy clause specifies that: "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." U.S. CONST. art. VI.

In the absence of congressional clarification, the following test is offered as a tool designed to aid the courts in determining whether an implied waiver should be granted under ambiguous statutes.[116] Specifically, the proposed test would require the courts to proceed in their statutory determinations according to the following two-step analysis.

First, the plainitff would be entitled to seek an implied waiver under an ambiguous statute *only if* he could initially show convincing proof that: (a) the statute in question contains language which literally authorizes that designated plaintiffs, such as the plaintiff at bar, may institute private actions against a class; and (b) the relevant statutory language can be reasonably read as to include the states as members of that provision's defendant-class. Relevant legislative history and federal court interpretation could be considered to aid the courts in its statutory construction.

Second, if this reasonable inference is established, the court would then be justified in granting an implied waiver *only after* a showing that judgments in favor of *all* reasonably foreseeable plaintiffs under the statute would have a minimal fiscal impact on state treasuries.

To determine the extent of fiscal impact, the courts would have to look beyond the injury of the plaintiff in the case at bar to all reasonably foreseeable designated plaintiffs under the ambiguous statute. In doing so, the courts must consider the following interdependent factors.

First, larger programs involving pervasive, state-wide governmental activities must be distinguished from non-pervasive or local ones. Specifically, the courts must consider whether the reasonably foreseeable class of designated plaintiffs under the statute is affordably small or unaffordably large relative to the nature of potential injuries and the frequency with which they may occur.

Second, and most importantly, the courts must make a responsible fiscal impact analysis of all potential remedies applicable to the states. *Edelman* demonstrated that prospective remedies, which are used to enforce valid federal statutes are consistent with the history and purpose of the eleventh amendment. Moreover, while *Employees* demonstrated that the courts should exercise *extreme* caution before imposing retroactive penalties on the states, it remains unclear whether the foreclosure of retroactive relief in *Edelman* applied to *ambiguous* statutes. Pursuant to these cases, the courts should adhere to the following general rules: (a) the closer a federally regulated, state entity comes to being a purely governmental service activity, the more a court should refrain from imposing a fiscal burden upon the state; and (b) the courts should further refrain from imposing retroactive damages when a state has not

116. Other implied waiver tests have been proposed in Intracoastal Transp., Inc. v. Decatur County, 482 F.2d at 369-70 (Wisdom, J., dissenting); Nowak, *supra* note 13, at 1446-50.

made appropriate financial arrangements to cover itself against such liabilities. In other words, the courts should give careful consideration as to whether a decision in favor of a waiver would force the state "to appropriate additional funds to pay for liabilities incurred in prior fiscal years when it was unaware of the need for such an allocation."[117] In doing so, revenue spending, governmental service programs like the Missouri Department of Health, Education and Welfare in *Employees* must be distinguished from revenue-producing enterprises like the state-operated railroad in *Parden*. The courts should note whether a state enterprise had previously entered into financial arrangements, such as insurance coverage, either voluntarily or in response to the statute in order to compensate such injured plaintiffs. However, the courts must also take into account whether such state enterprises maintained sufficient enough financial arrangements to compensate without the aid of unanticipated appropriations or excessive cross subsidies resulting in a more than minimal fiscal drain. Similarly, the courts should consider whether the revenue-spending service program was such that it maintained coverage sufficient to compensate.

The primary function of the fiscal impact requirement is to serve as a check against the improper construction of waivers under ambiguous statutes. In addition to considering fiscal impact factors, the courts are encouraged to consider the underlying federal policy factors (involved in subjecting the states to federal causes of action under regulatory statutes) as reflected in the statute's legislative history. However, the fiscal impact requirement should not be interpreted as empowering the courts to balance such federal policy considerations against the fiscal interests of the states.[118] To do so would allow the courts to read their own conceptions of public policy into the statute. As a result, the courts could conceivably construe statutes in light of their own view of federal policy instead of in accordance with the purpose of the eleventh amendment.

The history of the eleventh amendment has shown that the courts are competent to make responsible determinations of fiscal impact on the states.[119] It is unlikely that the courts will come across many ambiguous statutes which would result in a substantial dispute as to whether the economic arrangements are such that the state could retroactively afford *all* reasonably foreseeable claims. This is not to say, however, that such a dispute could arise depending upon the economic assumptions considered under certain statutes. In such cases, it would be up to the United States Supreme Court, on appeal, to advance that determination of fiscal impact or waiver which is most

117. Nowak, note 13 *supra*, at 1444.
118. *Contra, id.* at 1447.
119. *See* notes 31-89 and accompanying text *supra*.

consistent with the eleventh amendment until Congress should see fit to clarify.

The *modus operandi* of the proposed test would be as follows. The plaintiff could seek an implied waiver under an ambiguous statute by proving up the specific statutory inference set forth in the first part of the test. Proof of the necessary statutory inference must be established as a condition precedent before the court could then evaluate whether such an implied waiver of the statute would result in a more than minimal fiscal impact on the states. If the court determines, after a thorough examination, that a waiver of the statute as a whole would in fact result in only a minimal fiscal impact on the states, then, and only then, would the court be justified in implying a waiver.

Applying the proposed test to *Williamson*, the Bridge Act of 1906 contains *no* statutory language which authorizes private actions to be brought in federal courts against *any* class. On its face, the statute does not grant a waiver. If the plaintiff were to attempt to challenge the statute by showing the requisite statutory inference of the first part of the test, he would fail because the statute does not contain language providing for private actions against a class which could realistically be interpreted as including the states—or any party for that matter. Failure to satisfy the statutory inference requirement afforded the plaintiff no basis upon which to claim eligibility for a court determination of fiscal impact and thus an implied waiver. Since the Bridge Act provided no basis on which to grant either an express or an implied waiver, Illinois' defense of sovereign immunity prevails.

The Seventh Circuit's test and the proposal test can be distinguished according to their respective capabilities to ensure *uniform determinations* of waiver which are *consistent with the purpose* of the eleventh amendment. The Seventh Circuit's test requires a showing of statutory language which "expressly provided that the private remedy is applicable to the States."[120] The problem remains, however, that most ambiguous statutes usually contain express language that seemingly creates a private remedy "applicable" to the states. And the history of federal court decisions has shown that what may constitute a clear expression of applicability to a liberal court may be read as a clear expression of non-applicability to a more conservative court.[121] Without more, a test which requires only a showing of express applicability is inadequate to insure uniformity. In addition, the Seventh Circuit's test turns solely on statutory construction without regard to the fiscal impact on the

120. 534 F.2d at 762, (quoting from 482 F.2d at 365).

121. *Cf.* Chesapeake Bay Bridge and Tunnel Dist. v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968), and Red Star Towing & Transp. Co. v. Department of Transp. of N.J., 432 F.2d 104 (3d Cir. 1970) (The Fourth and Third Circuits arrive at different statutory determinations as to whether the penalty provision under the Rivers and Harbors Appropriations Act, 33 U.S.C. § 406 (1899), should be read as waiving the states' eleventh amendment protection.)

states. Thus, there is always the possibility that waivers granted on statutory construction alone could impose enormous fiscal burdens on the states which would be inconsistent with the purpose of the eleventh amendment.

The proposed test is better equipped to ensure uniformity and consistency. It requires a court to make certain that a waiver would not disrupt state treasuries before it could justify construing a waiver based on ambiguous statutory language. As a result, requiring the courts to make comprehensive fiscal impact determinations in addition to considering statutory construction and legislative history should facilitate more uniform determinations of waiver under the same statute. Also, this requirement would compel a court to consider its statutory construction in terms of whether it is consistent with the purpose of the eleventh amendment.

It is to be expected that some critics may find this proposed test too literal while others may assail it as a mechanism which would faciliate judicial encroachment upon the Congress' legislative authority. It should be noted, however, that "the supreme function of the judge [and the courts] is to recognize that there must be limits, both ways, avoiding undue literalism on the one hand, and too wide a freedom of action on the other."[122]

It is submitted that the proposed test offers a workable balance between literalism and excessive judicial freedom. The test contains a check against judicial excess by requiring a showing that, under ambiguous statutes, a legitimate statutory basis exists first, before the court could consider (or manipulate) the fiscal policy implications to imply a waiver. Where no statutory basis can be realistically established, as in *Williamson*, the courts must respect the supremacy of the federal law over ensuing policy considerations. If, on the other hand, the requisite statutory basis exists, consideration of the fiscal policy factors as well as the statute's legislative history prior to implying a waiver has two advantages. First, it demands consideration of vital state interests as well as the interests of the injured individual. This exercise will ensure carefully considered determinations of waiver as opposed to those based purely on semantics. Second, congressional response to the Court's interepretation of the FLSA in *Employees* shows that federal court consideration of the policies underlying such vague statutes can generate publicity substantial enough to attract the scrutiny of the Congress, thus encouraging *specific* congressional clarification when necessary.[123]

CONCLUSION

The Seventh and Fifth Circuits advanced a test for the statutory waiver of state immunity which requires an *express* showing that Congress literally

122. Griswold, *The Judicial Process*, 31 FED. B.J. 309, 319 (1972) (footnote omitted).
123. *See* note 71 and accompanying text *supra*.

provided for private actions to be brought against the states in federal courts. In setting forth this test, the Seventh Circuit reasoned that it embodied the rulings in *Employees* and *Edelman*. However, the Seventh Circuit did not fully incorporate the rulings of those decisions in its test and, for that reason, its test is defective. Specifically, the Seventh Circuit limited the scope of its test to apply to only those statutes where the existence of a waiver is clear on its face. Thus, it is inadequate to treat those ambiguous statutes which create private actions against a class yet remain unclear as to whether they apply to the states. In failing to make this distinction, it can only be inferred that the Seventh Circuit intended that its test (requiring only strict construction) to apply to both types of statutes. However, the Burger Court demonstrated in *Employees* that when a court is confronted with an ambiguous statutory situation, the process of construing a waiver should not be concluded upon semantical interpretation alone. The Court emphasized that policy as well as statutory construction should be considered.

This article proposes a test for the courts to employ when construing a waiver under statutes which remain unclear as to whether they apply to the states. The proposed test requires the injured plaintiff to show convincing proof that the ambiguous statute in question provides for private suits against a class from which it could be reasonably inferred as to include the states. Upon establishing this premise, the court would then be justified in determining that the statute intended a waiver provided that judgments in favor of all reasonably foreseeable plaintiffs under the statute would have a minimal fiscal impact on state treasuries. It is submitted that the proposed test of implied waiver would facilitate just determinations of waiver on behalf of both individuals and the states. The step-by-step approach built into the test eases up the extent to which the courts must become preoccupied with statutory semantics while limiting the court's ability to read its private notions of social policy into such ambiguous congressional enactments. In doing so, the test would faciliate uniform determinations of waiver which are consistent with the purpose of the eleventh amendment as enunciated by the Burger Court in *Edelman* and *Employees*.

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