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Parden v. Terminal Ry. of Ala. State Docks Dep't: The Passing of Sovereign Immunity

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NOTES

PARDEN v. TERMINAL RY. OF ALA. STATE DOCKS DEP'T: THE PASSING OF SOVEREIGN IMMUNITY

Undeterred by the doctrine of sovereign immunity, the United States Supreme Court by a 5-4 majority in *Parden v. Terminal Ry. of Ala. State Docks Dep't*,[1] held that a state that owns and operates a railroad in interstate commerce may not successfully plead sovereign immunity as a defense in a suit brought against the railroad by its employees under the Federal Employers' Liability Act.[2] The doctrine of sovereign immunity—the principal that a state may not be sued by an individual without its consent—is embodied in the eleventh amendment[3] with respect to federal court suits brought by a citizen of another state. It was extended to federal court suits brought by a state's own citizens in *Hans v. Louisiana*.[4]

Petitioners, citizens of Alabama,[5] brought suit against the Terminal Railway of the Alabama State Docks Department in a federal district court to recover damages under the FELA for personal injuries sustained while employed by the railway. The railway was engaged in interstate commerce at the time of the injury.[6] The railway has been operated since 1927, when the Alabama Legislature, pursuant to constitutional authority,[7] authorized its

1. 377 U.S. 184 (1964).

2. 35 Stat. 65 (1908), 45 U.S.C. § 51 (1958) provides in part:

> 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 carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

3. U.S. CONST. amend. XI:

> 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.

4. 134 U.S. 1 (1890).

5. The Court would have reached the same result even if the petitioners were citizens of another state and the suit came squarely within the language of the eleventh amendment.

6. Originally, in order for an employee to recover under the FELA the company had to be engaged in interstate commerce and the employee at the time of the injury must have been employed in such commerce. Lamphere v. Oregon R.R. & Navigation, 193 Fed. 248, 249-56 (C.C.E.D. Wash. 1911). Today, under a 1939 amendment, the FELA brings within its scope not only those employees whose work at the time of injury was in actual interstate commerce or a part of it, but any employee whose work furthered interstate commerce, or in any way affected such commerce directly, closely and substantially. Ermin v. Pennsylvania R.R., 36 F. Supp. 936, 940 (E.D.N.Y. 1941).

7. ALA. CONST. amend. 12, § 93 (1901); ALA. CONST. amend. 116 (1901).

State Docks Department to "acquire, . . . control and operate a line of terminal railways and carry passengers, goods, wares and merchandise . . . as though it were a common carrier."[8] Jurisdiction of the district court was based on the FELA which gives concurrent jurisdiction to both state and federal courts.[9] Alabama, appearing specially, moved for dismissal on the ground of sovereign immunity. This motion was granted and upheld by the court of appeals.[10] The Supreme Court reversed holding that Alabama had waived its immunity by operating the railway in interstate commerce.

In order to determine whether the Court has infringed upon the effectiveness of the defense of sovereign immunity, an excursus behind the historical development of the eleventh amendment and the *Hans* doctrine is necessary. The purpose of this Note is to examine whether Congress, in enacting the FELA, actually intended to subject a state to suit under these circumstances and if so, whether Congress has the power to do so.

Historical Development of Sovereign Immunity

Even before the ratification of the Constitution there was much concern over the suability of a state. As drafted at the Constitutional Convention, the judicial power of the United States extended "to controversies . . . between a State and citizens of another State."[11] Alexander Hamilton,[12] John Marshall[13] and James Madison,[14] in supporting the adoption of this provision,

8. Ala. Code tit. 38, § 17 (1958).
9. 35 Stat. 66 (1908), 45 U.S.C. § 56 (1958).
10. 311 F.2d 727 (5th Cir. 1963).
11. U.S. Const. art. III, § 2(1) provides:
The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.
12. See The Federalist No. 81, at 450 (Smith ed. 1901) (Hamilton), wherein Hamilton said:
It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the Convention, it will remain with the States, and the danger intimated must be merely ideal. . . . The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretentions to a compulsive force. They confer no right of action independent of the sovereign's will.
13. John Marshall at the Virginia Convention said:
With respect to disputes between a state and the citizens of another state, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. . . . [H]ow

attempted to allay the fears that this clause would enable citizens of one state to sue another state. The issue was resolved in *Chisholm v. Georgia*,[15] where a divided Court held that a citizen of one state had the right to sue another state in assumpsit.[16] The decision evoked such objection that the eleventh amendment, whose effect would be to reverse Chisholm,[17] was proposed within a year and ratified in 1798. The amendment explicitly excluded suits against a state brought by citizens of another state.[18] There was no mention of suits brought against a state in a federal court by one of its own citizens. Actually the Constitution had never provided for such a suit.

The question, nonetheless, arose nearly a century later in the *Hans* case. The plaintiff, a citizen of Louisiana, sued Louisiana to recover the proceeds from state issued bonds, which were later repudiated by the Legislature. Plaintiff contended the repudiation of the bonds was in violation of the constitutional provision that "no state shall . . . pass any law . . . impairing the obligation of contracts."[19] Since the action arose under the Constitution, the plaintiff argued that the federal court had the power to adjudicate his claim. The Court held that the judicial power of the federal courts did not extend to such controversies[20] for the spirit of the eleventh amendment necessarily barred such suits.[21]

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could a state recover any claim from a citizen of another state, without the establishment of these tribunals?

III ELLIOT, DEBATES 555-56 (1836).

14. James Madison similarly met the objections of Patrick Henry and George Mason at the Virginia Convention, where he said:

> It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen [of another state], it must be brought before a federal court.

III, ELLIOT, DEBATES 553 (1836). In fact, the New York and Rhode Island ratification messages sent to Congress expressed their concern over the question of the suability of a state in a federal court. I ELLIOT, DEBATES 337-39 (1836).

15. 2 U.S. (2 Dall.) 419 (1793).

16. Justices Jay, Blair, Wilson, and Cushing based their conclusion that Georgia was suable on the constitutional grant of jurisdiction over controversies between a "State and a citizen of another State." Justice Wilson also rejected the sovereign immunity theory. Having debated Marshall and Madison at the Virginia convention, he took the position of nationalism: "As to the purpose of the Union, therefore, Georgia is not a sovereign." *Id.* at 457. Justice Ingrel, the lone dissenter, felt that Georgia was entitled to the immunity enjoyed by the English Crown. *Id.* at 429-50.

17. Although the amendment proposal was passed by an overwhelming vote, unsuccessful attempts were made on the floor of the Senate and the House to modify the effects of the amendment. See 3 ANNALS OF CONG. 30, 476 (1794).

18. Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 382 (1798).

19. U.S. CONST. art. I, § 10.

20. Hans v. Louisiana, 134 U.S. 1, 9-21 (1890). See also *Ex Parte* New York, 256 U.S. 490 (1921); Smith v. Reeves, 178 U.S. 436 (1900).

21. It has also been held that the eleventh amendment applies to cases of admiralty and maritime jurisdiction. *E.g.*, *Ex parte* New York, 256 U.S. 490, 497-99 (1920); *Ex parte* Madrazzo, 32 U.S. 627 (1883). Suits by one state against another state on behalf of its own citizens is necessarily barred by the eleventh amendment. *E.g.*, North

Thus, the eleventh amendment and *Hans* exemplify the doctrine of sovereign immunity, for as a sovereign a state is entitled to immunity not only in its own courts,[22] but also in federal court suits brought by any individual.

> It is clear, therefore, that a State has the same constitutional immunity from suit by its own citizens as it has in suits brought against it by citizens of other States, and the courts will apply the same tests in determining whether the State has waived its immunity against its own citizens as it would apply if the suits were by a citizen of another State.[23]

The doctrine of sovereign immunity seemingly rests upon the misapplication of the English maxim that "the King can do no wrong."[24] In other attempts at rationalization, the Court has rested the doctrine upon public policy[25] and upon the maxim that "there can be no legal right as against the authority that makes the law on which the right depends."[26] Suffice it to say that a state sovereignty[27] is immune from the suits of an individual to which it has not consented[28] or otherwise waived its right to immunity.[29] This im-

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Dakota v. Minnesota, 263 U.S. 365 (1923); New Hampshire v. Louisiana, 108 U.S. 76 (1833).

22. See Copeland & Screws, *Governmental Responsibility for Tort in Alabama*, 13 ALA. L. REV. 296, 301-09 (1961).

23. Parden v. Terminal Ry. of Ala. State Docks Dep't, 311 F.2d at 731.

24. This maxim is pointless where there is no king. Lansford v. United States, 101 U.S. 341, 343 (1879). For an exhaustive eight series survey of this legal maxim and its misapplication to the doctrine of sovereign immunity see Borchard, *Governmental Responsibility in Tort I-VIII*, 34 YALE L.J. 1 (1924); 34 YALE L.J. 129 (1924); 34 YALE L.J. 329 (1925); 36 YALE L.J. 1 (1926); 36 YALE L.J. 757 (1927); 36 YALE L.J. 1039 (1927); 28 COLUM. L. REV. 577 (1928); 28 COLUM. L. REV. 734 (1928).

25. The Siren, 74 U.S. (7 Wall.) 152 (1868):

> The doctrine rests upon public policy; the inconvenience and danger which would follow from any different rule. It is obvious that public service would be hindered, and public safety endangered. . . . The exemption from direct suit is therefore without exception.

Id. at 154. See also Gibbons v. United States, 75 U.S. 269, 275 (1868); Nichols v. United States, 74 U.S. 122, 126 (1868).

26. Kawananhoa v. Polybank, 205 U.S. 349, 353 (1907) (Holmes, J.).

27. For a general discussion on state sovereignty see the twelve series study by Professor Murphy which began with *State Sovereignty Prior to the Constitution*, 29 MISS. L.J. 115 (1958); continued with *State Sovereignty and the Fathers*, 30 MISS. L.J. 135 (1959); 30 MISS. L.J. 261 (1959); and 31 MISS. L.J. 50 (1959); continued with *State Sovereignty and the Drafting of the Constitution*, 31 MISS. L.J. 203 (1960); 32 MISS. L.J. 1 (1960); 32 MISS. L.J. 155 (1961); and 32 MISS. L.J. 227 (1961); and continued with *State Sovereignty and the Ratification of the Constitution*, 33 MISS. L.J. 29 (1961); 33 MISS. L.J. 164 (1962); and 33 MISS. L.J. 294 (1962); and concluded with *State Sovereignty and the Constitution—A Summary View*, 33 MISS. L.J. 353 (1962).

28. *E.g.*, Great No. Life Ins. Co. v. Read, 322 U.S. 47, 51 (1943); Duhne v. New Jersey, 251 U.S. 311, 314 (1920); Fitts v. McGhee, 172 U.S. 516, 524 (1899); Hans v. Louisiana, 134 U.S. 1, 11 (1890). *Cf.* Moraco v. Mississippi, 292 U.S. 313 (1933).

29. "Waiver" and "consent" are seemingly used interchangeably. See, e.g., Ford Motor Co. v. Department of Treasury of Ind., 323 U.S. 459 (1944). It would appear that "consent" would be used to indicate *expressed* permission, whereas "waiver" would apply to cases of implied consent.

munity is absolute and unqualified.[30] Mr. Justice Brennan, speaking for the majority in *Parden*, insists that "it remains the law that a state may not be sued by an individual *without its consent*. Our conclusion is simply that Alabama . . . consented."[31]

CONSENT TO SUIT: WAIVER OF SOVEREIGN IMMUNITY

How does a state consent to suit? Four states cannot be made defendants in any action by their constitutions;[32] five other states have established boards to consider these claims;[33] and the remaining states may consent to suit in their own courts by statute,[34] but such consent will not necessarily be consent to suit in a federal court.[35] Consent must be strictly construed[36] and may be predicated upon conditions or even withdrawn.[37] By its constitution Alabama may not be made a defendant in any action;[38] therefore, this precludes the majority from finding any express or implied consent by statute.

A state may also waive its right to immunity in a federal court by a voluntary submission to the court's jurisdiction. In *Clark v. Barnard*,[39] Rhode Island, by appearing in a federal court and prosecuting a claim for the funds in controversy, became a party to the litigation and was therefore subject to the opposing parties' claims to the fund.[40] Since Alabama appeared specially to contest federal court jurisdiction,[41] the majority in *Parden* could not have found that sovereign immunity was waived by submission to jurisdiction.

State courts have held that a state may waive its immunity under *state law* from tort liability when it enters into proprietary activities.[42] Where a

30. Pennoyer v. McConnaughy, 101 U.S. 1 (1891).

31. 377 U.S. at 192.

32. *E.g.*, ALA. CONST. art I, § 14. See generally Comment, *Administration of Claims Against the Sovereign*, 68 HARV. L. REV. 506, 507 (1955).

33. *Ibid.*

34. *E.g.*, Petty v. Tennessee-Mo. Bridge Comm'n, 359 U.S. 275 (1959); Gunter v. Atlantic Coast Line R.R., 200 U.S. 273, 284 (1905); Beers v. Arkansas, 61 U.S. (20 How.) 527, 531 (1857).

35. State statutes permitting individuals to sue the state in "any court of competent jurisdiction" have been held not to confer jurisdiction on federal courts. Kennecott Copper Co. v. Utah Tax Comm'n, 327 U.S. 573, 579 (1946); Ford Motor Co. v. Department of Treasury of Ind., 323 U.S. 459, 465-66 (1944); Great No. Ins. Co. v. Read, 322 U.S. 47, 54-56 (1943); Chandler v. Dix, 194 U.S. 590, 591-92 (1904).

36. Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1908).

37. Beers v. Arkansas, 61 U.S. (20 How.) 527, 530 (1857).

38. ALA. CONST. art. I, § 14.

39. 108 U.S. 18 (1933).

40. *Id.* at 445. See also Missouri v. Fiske, 290 U.S. 18 (1933).

41. Under Rule 12 of the Federal Rules of Civil Procedure there is no longer a need for appearing specially to protect the jurisdiction of the court. See generally 1A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 343 (1960).

42. See Pianka v. State, 46 Cal. App. 2d 208, 293 P.2d 458 (1956); Holmes v. Erie County, 266 App. Div. 220, 42 N.Y.S.2d 243, *aff'd*, 291 N.Y. 798, 53 N.E.2d 369 (1943). *Contra*, Hayes v. Cedar Grove, 126 W. Va. 828, 30 S.E.2d 726 (1944); Holzworth v. State, 238 Wis. 63, 298 N.W. 163 (1941).

state engages in a private business it divests itself of its sovereign character and takes that of a private citizen. Instead of retaining its privileges and immunities, it descends to the level of a private citizen and hence, cannot claim the privileges or immunities of a sovereign.[43] This principle was clearly established in *Western & Atlantic RR v. Carlton*,[44] where the court said:

> When a State embarks in an enterprise which is usually carried on by individual persons or companies, it voluntarily *waives its sovereign character* and is subject to like regulation with persons engaged in the same calling. . . . [T]he State engaging in the carrying business, assumes the obligations and liabilities incident to that business when carried on by individuals.[45]

The proprietary-governmental distinction has been applied to determine whether a state has waived its immunity from suit brought under state law by an individual in its *own* courts.[46] No decision has indicated whether this distinction would permit a suit in a federal court. It would seem that the proprietary nature of the activity *alone* would not be sufficient to give the federal courts jurisdiction in view of the constitutional immunity embodied in the eleventh amendment and the *Hans* doctrine. This can be assumed from the policy announced in *United States v. California*:[47]

> [W]e think it unimportant to say whether the state conducts its railroad in its "sovereign" or in its "private" capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. . . . The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government.[48]

Therefore, it cannot be said in the *Parden* case that Alabama waived its immunity from suit in a federal court simply because it engaged in a proprietary function. It is immaterial whether Alabama's operation of an interstate railroad is classified as proprietary or governmental; even if the operation of the railroad was held to be a governmental function, Alabama would still be answerable to actions brought under the FELA.

The *Parden* court concluded that:

[1.] By adopting and ratifying the Commerce clause, the States em-

43. *Cf.* South Carolina v. United States, 199 U.S. 437 (1905), wherein the rule was established that the state's immunity from taxation is "limited to those [activities] which are of a strictly governmental character and does not extend to those which are used by the state in the carrying on of an ordinary private business." *Id.* at 461.

44. 28 Ga. 180 (1859).

45. *Id.* at 182-83. (Emphasis added.)

46. See cases cited note 42 *supra*.

47. 297 U.S. 175 (1936).

48. *Id.* at 186.

powered Congress to create such a right of action [as the FELA] against interstate railroad;

[2.] [B]y 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;

[3.] [B]y thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.[49]

There can be no denying that Congress has the power "to regulate commerce . . . among the several states,"[50] and that this power is complete[51] and plenary.[52] Mr. Chief Justice Marshall, in examining the term "to regulate commerce" in *Gibbon v. Ogden*,[53] said:

> What is this power? It is the power to regulate; that is, to prescribe the rules by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, *and acknowledges no limitations, other than are prescribed in the Constitution.*[54]

In accord with this power Congress enacted the FELA. Although the first attempt at such legislation was declared unconstitutional,[55] the validity of the second measure was upheld in *Mondou v. New York, N.H. & H. R.R.*,[56] where the Court announced that "Congress has not exceeded its powers by prescribing the regulations embodied in the present act."[57]

Did Congress Intend to Subject a State to Suit Under the FELA

One of the conditions embodied in the FELA is the amenability of an interstate railroad to suit in a federal court.[58] A further analysis of this second postulate on which the majority rests its opinion reveals the question of whether Congress, in enacting the FELA, actually *intended* to condition a state's operation of an interstate railroad on its waiver of sovereign immunity. Both the legislative history of the FELA and the language of the act are susceptible to conflicting interpretations.

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49. 377 U.S. at 192.
50. U.S. Const. art. I, § 8.
51. See North Am. Co. v. Securities & Exch. Comm'n, 327 U.S. 686, 704-06 (1945).
52. See Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434-37 (1945).
53. 22 U.S. (9 Wheat.) 1 (1824).
54. *Id.* at 196. (Emphasis added.)
55. Howard v. Illinois R.R., 207 U.S. 463 (1907).
56. 223 U.S. 1 (1911). This was an action by a citizen of Connecticut against a railroad corporation of that state to recover damages for personal injuries suffered by the plaintiff while in the defendent's service.
57. *Id.* at 53.
58. 35 Stat. 66 (1908), 45 U.S.C. § 56 (1958).

A perusal of the legislative history shows that Congress never contemplated the applicability of the act to a state.[59] Its primary purpose was to eliminate the common law defenses of contributory negligence, assumption of risk, contract not to sue, and the fellow servant rule.[60] Since the act was described as only having "changed four rules of the common law,"[61] it necessarily follows that sovereign immunity, not being one of the four defenses explicitly removed, remains as a defense to actions brought under the FELA against a state owned and operated railroad.

Moreover, it must be noted that consent by a state will not be lightly inferred,[62] but only found where a state has consented in clear and precise language.[63] By analogy it is submitted that the Court should not permit Congress to foist a waiver on a state unless Congress has indicated its intention by clear and precise language. If Congress desired to condition a state's operation of an interstate railroad on its waiver of sovereign immunity, it should have done so expressly so that the states would have been apprised of the option in the FELA. Since a "waiver is the *intentional relinquishment* of a known right or privilege,"[64] it follows that a state must know of the condition before it can accept. The language of the FELA does not suggest any such condition to a state. Therefore, Alabama should not be said to have consented to suit.

Finally, the language in *United States v. United Mine Workers of America*,[65] indicates that "there is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect."[66] The dissent in *Parden* said:

> It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect on automatic and compulsory waiver of rights arising under another. Only when Congress has clearly declared that any State which undertakes given

59. See H.R. REP. No. 1386, 60th Cong., 1st Sess. 1 (1908); 42 CONG. REC. 4427 (1908).

60. See Rogers v. Missouri Pac. R.R., 352 U.S. 500 (1957); Slaughter v. Atlantic Coast Line R.R., 302 F.2d 912 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 827 (1962).

61. 42 CONG. REC. 4427 (1908) (remarks of Representative Henry of Texas).

62. See Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1908).

63. See Ford Motor Co. v. Department of Treasury of Ind., 323 U.S. 459, 468-70 (1944).

64. Johnson v. Zerbst, 304 U.S. 458, 464 (1937).

65. 330 U.S. 258 (1946).

66. *Id.* at 272. It has also been held that a sovereign is not bound by the general language of a statute which tends to restrain or diminish the powers, rights or interests of the sovereign, unless the sovereign is expressly mentioned in the statute. Guarantee Title & Trust Co. v. Title Guar. & Sur. Co., 224 U.S. 152, 155 (1912); United States v. Herron, 87 U.S. (20 Wall.) 251, 263 (1873).

> regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense [of sovereign immunity].[67]

On the other hand, however, the Court has applied the Federal Safety Appliance Act[68] and the Railway Labor Act[69] to state owned and operated railroads. The FSAA applicable by its terms to "any common carrier engaged in interstate commerce by railroad," was unanimously held to apply to California's state owned railroad in *United States v. California.*[70] Here, the United States sued California to recover the statutory penalty of $100 for a violation of the FSAA. After dismissing California's contention that it was engaged in a "governmental" function as being immaterial, the Court held that the danger sought to be corrected by the FSAA existed in a state owned railroad as much as in a privately owned railroad. The Court dismissed the contention that the FSAA was inapplicable to state owned railroad because the act didn't specifically mention them, saying:

> We can perceive no reason for extending it so as to exempt a business carried on by the state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by states as by individual action. Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial.[71]

The *California* case and the *Parden* case are distinguishable. The *California* case involved a suit prosecuted by the United States. Such suits are within the judicial power of the federal government.[72] In essence the Court merely had to decide whether Congress intended to subject a state to suit by the United States. In *Parden,* however, one of the issues before the Court was whether Congress intended that a state could be subjected to suit *by an individual* in a federal court if it operated a railroad in interstate commerce. Such suits are not cognizable in a federal court without the consent of the state, for the *Hans* case specifically prohibits suits brought against a state by its own citizens, and the eleventh amendment bars suits brought by citizens of other states. Therefore, before Alabama is divested of this right, resort should be made to the rule of construction as applied in the *United Mineworkers* case.

The majority also relied on *California v. Taylor,*[73] where it was held that

67. 377 U.S. at 198-99 (dissenting opinion).
68. 27 Stat. 531 (1896), 45 U.S.C. §§ 1-46 (1958).
69. 44 Stat. 577 (1926), 45 U.S.C. §§ 151-181 (1958).
70. 297 U.S. 175 (1936).
71. *Id.* at 186-87.
72. U.S. CONST. art. 1, § 10.
73. 353 U.S. 533 (1957).

the Railway Labor Act, which extends to "any carrier by railroad", was applicable to California's state owned railroad. Employees of the railroad brought an action against the National Railroad Adjustment Board to compel them to take jurisdiction over plaintiff's claim against the railroad for violation of a collective bargaining agreement under the Railway Labor Act. The United States answered supporting the complaint. California, intervening as a party defendant, opposed the complaint. This was, therefore, a suit prosecuted by the United States against the State of California and within the judicial power of the federal courts. Even if the United States had not entered into the action and the case involved only the employees and the State of California, the federal court would still have had jurisdiction over the action. As in the *Barnard* case, California would have been held to have waived its immunity from suit by its voluntary intervention in the action as a party defendant and its submission to that court's jurisdiction. Both cases involving the California state owned railroad are inapposite. Because Congress intended that all railroads should be subject to the commerce power and amenable to suit in a federal court by the United States, as in the FSAA and the Railway Labor Act, it does not necessarily follow that Congress intended to condition a state's constitutional right on its operation of a railroad in interstate commerce.

There is, however, some evidence on which the majority could substantiate its holding that Congress did intend to so condition a state's operation of a railroad. The all embracing language of the FELA makes the Act applicable to "every common carrier by railroad." The House Report gives further evidence that Congress intended to subject all railroads to suit. It is stated that "the bill relates to common carriers by railroad engaged in interstate commerce. . . . It is intended in its scope to cover *all commerce to which the regulative power of Congress extends.*"[74] The House Report further states that "it is thought that the adoption of the rule, as provided in this section, will be conducive to greater care in the operation of railroads."[75] It would be unusual for Congress to have excluded state owned railroads from exercising the same care and responsibility as is imposed on privately owned railroads. In debate on the House floor, Representative Henry exclaimed that "these changes are in obedience to the demands of humanity, justice, and the sacred rights of millions of American citizens engaged in hazardous employment."[76] Should the demands of humanity be less for a state owned and operated railroad? Could Congress have intended so pointless a result as creating a right without a remedy? A sovereign immunity exception would give every privately owned interstate railroad employee an action for damages

74. H.R. REP. No. 1386, 60th Cong., 1st Sess. 1 (1908). (Emphasis added.)
75. H.R. REP. No. 1386, 60th Cong., 1st Sess. 1 (1908).
76. 42 CONG. REC. 4427 (1908).

but would leave state owned railroad employees without any effective means of enforcing that liability.[77]

Does Congress Have the Power to Subject a State to Suit Under the FELA?

In the *California* and *Taylor* cases the Court held that Congress has the power to regulate state owned railroads. It is also well established that a state has constitutional immunity from suit by an individual in a federal court without its consent and that Congress cannot deprive a state of this immunity guaranteed by the eleventh amendment. Therefore, does Congress, in exercising its power to regulate state owned railroads, have the power to require a state to relinquish its defense of sovereign immunity guaranteed by the eleventh amendment as a condition to operation of an interstate railroad?

Relying again on the *California* case, wherein it was said that "the sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution,"[78] the *Parden* court held that Alabama had necessarily surrendered a portion of its sovereignty when it granted Congress the power to regulate interstate commerce. Having surrendered that portion of its sovereignty which would have prevented a regulation like the FELA, Alabama is precluded from employing the defense of sovereign immunity.[79]

The Court fails, however, to reconcile this power of Congress to regulate interstate commerce with a state's constitutional immunity from suit by an individual in a federal court. Although Congress' power to regulate commerce is complete and plenary, it is not absolute.[80] It is subject to the limitations and guarantees of the Constitution.[81] Among these limitations are those providing that the people shall be secure against unreasonable searches and seizures,[82] that private property may not be taken without just compensation,[83] and that no person shall be deprived of life, liberty or property without due process of law.[84] It is submitted that the eleventh amendment, as supplemented by *Hans,* is another limitation guaranteed by the Constitution.

An example of those cases where Congress' power to regulate interstate commerce has been limited by constitutional guarantees is *FTC v. American Tobacco Co.*[85] The Federal Trade Commission petitioned for writ of mandamus

77. 377 U.S. at 190.
78. United States v. California, 297 U.S. at 184.
79. 377 U.S. at 192.
80. United States v. Carolene Prod. Co., 304 U.S. 144, 147 (1937).
81. United States v. Joint Traffic Ass'n, 171 U.S. 505, 570-72 (1898).
82. FTC v. American Tobacco Co., 264 U.S. 298 (1923).
83. United States v. Chicago, M. & St. P.R.R., 282 U.S. 311 (1930).
84. Secretary of Agriculture v. Central Ref. Co., 338 U.S. 604 (1949).
85. FTC v. American Tobacco Co., 264 U.S. at 306.

against the American Tobacco Company to require production of records, contracts, memoranda, and correspondence for inspection. The FTC was allegedly acting in accordance with a federal statute,[86] directing the Commission to prevent the use of unfair methods of competition in interstate commerce. The Court concluded that the act violated the letter and spirit of the fourth amendment. In *Monongahela Nav. Co. v. United States*,[87] a large amount of money was expended by a company to provide locks and dams along the Monongahela river under express authority from Pennsylvania. Congress, in exercise of its power to regulate interstate commerce, condemned the property and appropriated it to its own use. The Court said:

> Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitation imposed by the 5th amendment, and can take only on payment of just compensation.[88]

Congress is, therefore, limited in exercising its grant of power to regulate interstate commerce by the other provisions in the Constitution. One such provision in the Constitution is the eleventh amendment and it necessarily bars Congress from subjecting a state to suit by an individual in a federal court.

Since Congress does not have the power to subject a state to suit, it reasonably follows that Congress should not be permitted to impose a condition on a state which would, if accepted, accomplish indirectly what could not be accomplished directly. It would seem that Congress does not have the power to condition a company's engagement in interstate commerce on a relinquishment of the guarantees under the fourth amendment, namely, protection against unreasonable searches and seizures. Nor could Congress impose as a condition a company's waiver of just compensation arising under the fifth amendment. It must, therefore, be equally unconstitutional for Congress to deprive a state of its constitutional immunity from suit as a prerequisite to the operation of an interstate railroad.

In analogous situations the Court has held that a state may not impose conditions on a company's operation within the state that would require abandonment of a constitutional right secured by the Constitution.[89] This principle was announced in *Frost v. Railroad Comm'n*,[90] wherein it was said:

86. 38 Stat. 717 (1914), 15 U.S.C. § 41 (1958).
87. 148 U.S. 312 (1892).
88. *Id.* at 336.
89. Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1925); Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445 (1873).
90. 271 U.S. 583 (1925).

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. . . . But the power of the state . . . is not unlimited: and one of the limitations is that *it may not impose conditions which require the relinquishment of constitutional rights.* If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.[91]

The language used by the Court in *Frost* is applicable to the *Frost* case. Since the Court has recognized that a state legislative body does not have the power to impose conditions which require the relinquishment of constitutional rights, neither should such a power exist in Congress.

CONCLUSION

Although the legislative history and the language of the eleventh amendment clearly indicate the intention to deprive the federal courts of jurisdiction over all cases involving suits by an individual against a state, the rule is not such an absolute one. A state may consent to suit in a federal court. It may waive its immunity by voluntarily submitting itself to the jurisdiction of the court. Furthermore, the amendment does not bar suits brought in federal courts to enjoin a state official from undertaking to enforce a state statute which is allegedly unconstitutional, even though the action is recognized as clearly one against a state.[92] And, in *Parden*, the Court has held that a state waives its immunity from suit by engaging in an activity, whether governmental or proprietary, which is within the regulative power of Congress. This line of judicial interpretation has narrowed the applicability of sovereign immunity to an extent that the eleventh amendment and the *Hans* doctrine are no longer effective as defenses to most suits.

While the Court fails to reconcile the power of Congress to regulate interstate commerce with the immunity given states by the eleventh amendment and the *Hans* doctrine, the *Parden* majority offers a practical and tolerable solution to the problem. The Court very aptly points out:

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91. *Id.* at 592.

92. For a detailed survey concerning suits against a state officer, see Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); see also Note, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963).

> To read a "sovereign immunity exception" into the Act would result, moreover, in a right without a remedy; it would mean that Congress made "every" interstate railroad liable in damages to injured employees but left one class of such employees—those whose employers happen to be state-owned—without any effective means of enforcing that liability. We are unwilling to conclude that Congress intended so pointless and frustrating a result.[93]

The constant chipping away at the eleventh amendment and the *Hans* doctrine indicates the non-feasibility of such an immunity today where more and more activities, once reserved for private enterprise, have become dominated by state agencies. The concept of "governmental immunity" evolved from an era where the state was limited in its activity. Although the Court seemingly does not rely on the governmental-proprietary distinction as a basis for imposing liability, it is submitted that this was an underlying consideration of the *Parden* majority. Once a state undertakes an activity, heretofore private in nature, it should be subjected to the same restrictions and regulations as any individual. The governmental-proprietary distinction, however, should not be the sole or determining factor. If an activity comes within the regulative power of the state or federal government, it matters not whether the actor be a state or an individual. Coming within the realm of regulation subjects the actor to suit.

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93. 377 U.S. at 190.