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Constitutional Law - Eleventh Amendment - No Waiver of Sovereign Immunity Implied from State's Entrance into a Federally Regulated Area unless There Exists an Express Private Right of Action against the State

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treatment of press claims since *Branzburg* indicates at least a reluctant acknowledgment of the need to accord preferential status to the press where there is no apparent compelling interest in excluding its representatives and even where the average citizen has no general right of access. Thus, the courts are beginning to recognize, on a case-by-case basis, a limited right for the press of special access to newsworthy information and events.

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CONSTITUTIONAL LAW — ELEVENTH AMENDMENT — NO WAIVER OF SOVEREIGN IMMUNITY IMPLIED FROM STATE'S ENTRANCE INTO A FEDERALLY REGULATED AREA UNLESS THERE EXISTS AN EXPRESS PRIVATE RIGHT OF ACTION AGAINST THE STATE.

Intracoastal Transportation, Inc. v. Decatur County (5th Cir. 1973)

A tugboat and barge, owned by Intracoastal Transportation, Inc. (Intracoastal), laden with heavy cargo, were unable to pass beneath a drawbridge on the Flint River in Georgia because heavy rains had caused the river to rise. The tug signaled for the bridge to open, but the bridge was unable to be raised because it had been paved over by the state.[1] Intracoastal brought suit against Decatur County and the Georgia Department of Transportation (Georgia)[2] in federal district court,[3] alleging that the delay in delivery of the cargo resulting from the negligent operation of the drawbridge had caused it considerable damage.[4] Georgia moved to dismiss the suit on the grounds that the state had not consented to be sued and, therefore, the suit was precluded by the sovereign immunity defense contained in the eleventh amendment to the United States Constitution.[5] On the basis of existing precedents, Intracoastal contended that since the bridge was built on a navigable waterway and was therefore subject to the

1. Intracoastal Transp., Inc. v. Decatur County, 482 F.2d 361, 363 n.2 (5th Cir. 1973). On oral argument it was revealed that the bridge had not been opened for perhaps 40 years. *Id.*

2. It was undisputed that the suit against the Department of Transportation was a suit against the state of Georgia. *Id.* at 362 n.1.

3. Since the incident occurred on a navigable waterway, the jurisdictional basis for the suit was 28 U.S.C. § 1333 (1970), which confers jurisdiction upon the federal courts over admiralty and maritime cases.

4. 482 F.2d at 363. The district court opinion is unreported.

5. The eleventh amendment provides:

> The Judicial power of the United States shall not extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

Bridge Act of 1906 (Bridge Act),[6] the state had waived the sovereign immunity defense by entering this federally regulated sphere of activity.[7] The district court agreed and denied the motion to dismiss.[8] The United States Court of Appeals for the Fifth Circuit reversed and dismissed the suit against Georgia, *holding* that state entrance into a federally regulated sphere did not constitute a waiver of sovereign immunity unless Congress had provided a private cause of action for violation of the applicable federal regulatory statute and had expressly provided that the private remedy was applicable to the states. *Intracoastal Transportation, Inc. v. Decatur County,* 482 F.2d 361 (5th Cir. 1973).

The doctrine of sovereign immunity developed from the English belief that the king could not be sued in his own courts without his consent.[9] A state's sovereign immunity from suit by individuals in federal court was formally granted by the eleventh amendment to the United States Constitution,[10] which was adopted in 1795 to overrule *Chisholm v. Georgia,*[11] in which the Supreme Court had announced that the Constitution granted federal judicial power over suits against a state by citizens of another state. *Chisholm* was severely criticized, because the states feared that vulnerability to actions on debt obligations would either bankrupt the states or greatly endanger their financial stability.[12]

Subsequently, in *Hans v. Louisiana,*[13] the Supreme Court held that the eleventh amendment precluded a nonconsensual suit in federal court against a state by one of its own citizens.[14] However, the Court further found that the amendment did not make a federal forum completely unavailable to one who wished to sue a state, because the state could expressly

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6. 33 U.S.C. §§ 491 *et seq.* (1970). Section 5 of the Bridge Act of 1906 (the Bridge Act) provides:

> It shall be the duty of all persons owning, operating, and tending . . . drawbridges . . . built across navigable rivers . . . to open . . . the draws . . . for the passage of vessels . . . . Every such person who shall wilfully fail or refuse to open . . . the draws after reasonable signal shall have been given . . . shall be punished by a fine of not more than $2,000 nor less than $1,000, or by imprisonment . . . not exceeding one year, or by both such fine and imprisonment, in the discretion of the court . . . .

Id. § 499.

7. 482 F.2d at 363. A discussion of the basis for this contention appears in the text following note 21 *infra.*

8. *Id.*

9. Comment, *Private Suits Against States in the Federal Courts,* 33 U. CHI. L. REV. 331 (1966). *See* 69 DICK. L. REV. 270, 271–72 (1965).

10. *See* note 5 *supra.*

11. 2 U.S. (2 Dall.) 419 (1793).

12. *See* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity,* 77 HARV. L. REV. 1, 19–20 (1963).

13. 134 U.S. 1 (1889).

14. *Id.* at 12. This interpretation of the eleventh amendment disregards its clear language. The Court justified its holding by noting that a literal interpretation of the Constitution in *Chisholm* led the Court to a decision that provoked such a violent reaction that an amendment was adopted to overrule it. The Court thus reasoned that a literal interpretation of the amendment was undesirable. *Id.* at 12–15.

or impliedly consent to such a suit,[15] although consent was not to be readily inferred.[16] Furthermore, the Court later held that a state's intention to waive sovereign immunity did not constitute consent to be sued in *federal* court, absent a clear declaration by the state that it wished to submit to courts other than those of its own creation.[17]

Any analysis of the question of whether or not a state has waived its immunity from suit in federal court must begin with *Petty v. Tennessee-Missouri Bridge Commission.*[18] In *Petty,* the Court held that by entering into and acting under a congressionally approved agreement that contained a sue-and-be-sued clause, a state waived whatever immunity was provided by the eleventh amendment.[19] *Petty* indicated that Congress could expressly condition a state's entry into a federally regulated area upon waiver of the sovereign immunity defense.[20] It did not, however, answer the question of whether an implied waiver could be found if Congress had not expressly conditioned such entry upon the state's consent to be sued in federal court.

The issue of an implied waiver was present in *Parden v. Terminal Railway,*[21] although the Court did not squarely address the issue of an implied waiver upon *mere entry* into a federally regulated area. In that case, employees of an Alabama-owned railroad sued the railroad under the Federal Employers' Liability Act (FELA),[22] which permitted suits in federal court by employees against their common carrier employers.[23] The Court held that since the FELA applied to all interstate common carriers, Alabama, by owning and operating a common carrier that engaged in interstate commerce, had consented to the suit and had waived the sovereign immunity defense.[24]

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15. *Id.* at 16. *See* Missouri v. Fiske, 290 U.S. 18 (1933). The Court in *Fiske* stated that the eleventh amendment merely granted to the states a privilege which could be waived. *Id.* at 24. Note, however, that the language of the amendment does not require such an interpretation. The amendment modifies article III of the Constitution and can thus be read as part of that article. This interpretation would preclude the possibility of waiver, because by waiver the parties would be conferring subject-matter jurisdiction where it had not been granted by the Constitution. Although this issue has not been directly addressed by the Court, it apparently has been assumed that waiver of the eleventh amendment defense does not confer extraconstitutional jurisdiction. *See* Comment, *supra* note 9, at 334–36.

16. Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909).

17. Chandler v. Dix, 194 U.S. 590, 591 (1904).

18. 359 U.S. 275 (1959). In *Petty,* the plaintiff's husband was employed on a ferryboat by the defendant commission, which was formed by a congressionally approved compact between Missouri and Tennessee. He was killed when the ferryboat sank. The plaintiff sued claiming negligence. *Id.* at 278.

19. *Id.* at 281–82.

20. *Id.* at 282.

21. 377 U.S. 184 (1964).

22. 45 U.S.C. §§ 51–60 (1970).

23. *Id.* §§ 51, 56. For the text of these sections, *see* note 34 *infra.*

24. 377 U.S. at 187–88.

While *Parden* appeared to limit the effect of the eleventh amendment when a state engaged in activity regulated by federal statute,[25] *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*[26] revealed that the amendment retained broad applicability.[27] In *Employees,* state hospital workers sued the state for unpaid overtime wages and an equal amount in liquidated damages pursuant to the Fair Labor Standards Act of 1938 (FLSA).[28] The plaintiffs alleged that the 1966 amendments to the FLSA made the act applicable to state employers,[29] and that since Missouri had violated the act, plaintiffs could assert their rights in a federal forum.[30] The Court held that mere entrance by a state into a federally regulated sphere did not constitute waiver of the sovereign immunity defense.[31] *Parden* was distinguished on the grounds that it involved a proprietary activity, rather than a governmental one as in *Employees,*[32] and that it concerned a suit by a small class of plaintiffs which, unlike the suit in *Employees,* would not have a significant impact on the state treasury.[33] As a further ground of distinction, the Court noted that different statutes were involved in each situation.[34]

Despite these significant differences between *Parden* and *Employees,* the *Intracoastal* court attempted to synthesize them by declaring that

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25. *See* Comment, *supra* note 9, at 345.

26. 411 U.S. 279 (1973).

27. *See* 17 VILL. L. REV. 713, 727 (1972).

28. 29 U.S.C. §§ 201 *et seq.* (1970).

29. The term "employer" was at first defined to exclude any state or subdivision thereof. Act of June 25, 1938, ch. 676, § 3, 52 Stat. 1060. However by the 1966 amendment, Congress made the Fair Labor Standards Act (FLSA) applicable to "employees of a State or a political subdivision thereof, employed . . . in a hospital, institution, or school . . . ." 29 U.S.C. § 203(d) (1970).

30. 411 U.S. at 281.

31. *Id.* at 285.

32. *Id.* at 284–85.

33. *Id.* at 279. *See* note 68 *infra.*

34. 411 U.S. at 283. Section 1 of the FELA, which was involved in *Parden,* provided that:

> 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 . . . .

45 U.S.C. § 51 (1970). Section 6 of the FELA further provides that "an action may be brought in a district court of the United States . . . ." *Id.* § 56.

In *Employees,* the relevant FLSA provision provided that:

> Any employer who violates . . . [the Act] shall be liable to the employee or employees affected in the amount of their unpaid overtime compensation, . . . and in an additional equal amount of liquidated damages . . . .

29 U.S.C. § 216(b) (1970). Justice Brennan, dissenting in *Employees,* argued that the differences between the FELA and the FLSA did not render *Employees* distinguishable from *Parden.* He continued:

> But the lawsuits have in common that each is an action for damages in federal court brought against a State by citizens of the State in its employ under the authority of a regulatory statute founded on the Commerce Clause. *Parden* held that a federal court determination of such suits cannot be precluded by the doctrine of sovereign immunity because the States surrendered their sovereignty to that extent when they granted Congress the power to regulate commerce. 411 U.S. at 299.

together the two cases required that three factors be present before a court could imply a state's consent to a suit in federal court by a private party: First, the state must have entered a field regulated by federal statutes.[35] Second, Congress, through the regulation, must have "specifically created a remedy in private parties for violation of the applicable federal regulatory statute."[36] Third, the private party litigant "must show that Congress expressly provided that the private remedy [was] applicable to the States."[37]

When considered seriatim, the *Intracoastal* court's interpretations of what *Parden* and *Employees* each required before a waiver of the sovereign immunity defense may be implied was a reasonable interpretation of those cases. Such an implied waiver was found in *Parden* because the state had entered into a federally regulated sphere of activity and the federal regulation specifically created a private right of action under the statute.[38] In *Employees,* too, the state had entered into a federally regulated sphere of activity and the federal regulation specifically created a private right of action under the statute. However, no implied waiver was found in *Employees* because the Supreme Court determined that Congress had not expressly provided that the private remedy was applicable to the states.[39]

The *Intracoastal* court recognized that *Parden* and *Employees* involved different factual situations.[40] However, instead of making a determination as to which of these cases should be regarded as controlling in the instant case, the court assumed that all three of the above-mentioned requirements had to be met before an implied waiver of sovereign immunity could be found. The court held that the first *Parden* requirement had been satisfied because by building a bridge over a navigable waterway, Georgia had entered a sphere of activity that was regulated by a federal statute.[41] However, the court found that the Bridge Act did not specifically provide a private right of action, and, therefore, Georgia could not be held to have waived its defense of sovereign immunity — the second *Parden* requirement had not been satisfied.[42] While the Fifth Circuit did

35. 482 F.2d at 364.

36. *Id.* Use of the word "specifically" led to confusion when the court applied the second requirement to the *Intracoastal* facts. *See* notes 58–61 and accompanying text *infra.*

37. 482 F.2d at 365. The first two requirements were derived from *Parden,* while the third is the court's interpretation of the holding of *Employees.*

38. These two requirements are herein referred to respectively as the first and second *Parden* requirements.

39. The requirement that the private remedy be found to be expressly applicable to the states is herein referred to as the *Employees* requirement.

40. 482 F.2d at 365.

41. The court found that the Bridge Act regulated the construction of the drawbridge. *Id.* at 363, 365.

42. The court determined that the Bridge Act did not specifically provide a private right of action, because it was "penal in nature and enforcement of its provisions [was] vested in the Attorney General." *Id.* at 366. Since it held that the second requirement had not been met, the court found it unnecessary to discuss the third requirement. *Id.*

not directly discuss the *Employees* requirement that the private party must show that Congress expressly made the private remedy available against a state, it did tacitly apply this requirement to distinguish cases which tended to indicate that the second *Parden* requirement had been met. It found cases which suggested that a private right of action did exist under the Bridge Act to be inapposite because they had not involved suits against a state in federal court.[43]

The court first discussed *Neches Coal Co. v. Miller & Vidor Lumber Co.*[44] In that case the plaintiff brought suit to enjoin the construction of a dam to preserve a city's drinking water supply, which construction interfered with its water rights, claiming that the defendants had violated the Rivers and Harbors Appropriation Act of 1899 (Rivers Act).[45] The court therein had held that a private party could utilize the remedy given by the Rivers Act and permitted the suit to proceed.[46]

Although *Neches* involved a suit under the Rivers Act, it was relevant to *Intracoastal* because, while the Rivers and Bridges Acts regulate different matters,[47] their enforcement clauses are similar.[48] This close similarity in the language of the respective enforcement clauses suggests that if a private right of action exists under the Rivers Act, one should also be found to exist under the Bridge Act.

The *Intracoastal* court, however, limited *Neches* to its facts because of the "constitutional complexion" of the instant case.[49] The court stated that *Neches* could not apply to *Intracoastal* because the former case arose under the Rivers Act, because it involved a suit between private parties whereas *Intracoastal* involved a suit by a private party against a state,

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43. *Id.* at 366–67 & n.14. *See* notes 44–50, 52–55 and accompanying text *infra.*

44. 24 F.2d 763 (5th Cir. 1928).

45. 33 U.S.C. §§ 401 *et seq.* (1970).

46. 24 F.2d at 765.

47. The Rivers and Harbors Appropriations Act of 1899 (Rivers Act) protects navigable waters and river improvements generally. 33 U.S.C. §§ 401 *et seq.* (1970). The Bridge Act deals specifically with the construction, maintenance, and operation of bridges. 33 U.S.C. §§ 491 *et seq.* (1970).

48. Section 12 of the Rivers Act provides:

> Every person and every corporation that shall violate any provisions . . . of this title . . . shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment . . . not exceeding one year, or by both such punishments, in the discretion of the court. . . .

33 U.S.C. § 406 (1970). For the text of the relevant provisions of the Bridge Act, *see* note 6 *supra.*

49. 482 F.2d at 366 n.14. How the "constitutional complexion" of *Intracoastal* — the single additional fact that it involved the eleventh amendment — affected the applicability of *Neches* was never explained by the court. The issue before the court was whether the Bridge Act provided a private right of action. Since *Neches* held that the Rivers Act provided such a right, the court should have decided whether the virtual identity of the enforcement clauses of the two acts compelled a conclusion that such a right also existed under the Bridge Act. The "constitutional complexion" of the case was therefore irrelevant.

and because the many equitable considerations present in *Neches* were absent in *Intracoastal*.[50]

A close analysis, however, reveals that these distinctions are not valid. In discussing *Neches*, the *Intracoastal* court was considering whether or not the second *Parden* requirement had been met. *Parden* did not require that the private right of action under the statute be applicable to the states; it merely required that there exist a private right under the statute. By distinguishing *Neches* on the basis that it did not involve a suit against a state, the instant court was, in reality, erroneously applying the third requirement created by *Employees*.[51]

The instant court expressly rejected the result of the second of the three cases suggesting the existence of a private right of action under the Bridge Act, *Chesapeake Bay Bridge & Tunnel Dist. v. Lauritzen*,[52] wherein the Fourth Circuit held that the Rivers Act created a cause of action in private parties.[53] The *Intracoastal* court disputed the conclusion of the *Lauritzen* court on the basis that the result was not supported by the cases

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50. *Id.* The court did not make clear what the "equitable considerations" in *Neches* were. Since one of the defendants in that case was being enjoined from building a dam that was designed to protect the city's drinking water supply, 24 F.2d at 764, it would appear that the equities would have been *against* implying a private right of action under the Rivers Act.

The *Intracoastal* court stated that there were no "equitable considerations in the instant case." 482 F.2d at 366 n.14. Indeed, the fact that the plaintiffs should have known that the drawbridge could not be raised, as it had been paved over for 40 years (*see* note 1 *supra*), arguably would have been a factor in support of the court's ultimate conclusion had it remained consistent in its analysis.

51. 482 F.2d at 366 n.14. The error of this reasoning becomes apparent if it is assumed, for illustration, that no court has ever implied a private right of action against a state under a federal regulatory statute, but that several courts have implied the right against private parties. It would be impossible to show by judicial decision that the second *Parden* requirement was met by implication, because whenever a case implying the right of action against a private party was offered to show that such a right existed, the court could distinguish it because it did not involve a suit against a state. This would appear to merge the second *Parden* requirement and the *Employees* test. Yet, the *Intracoastal* court declared that they were separate requirements. 482 F.2d at 365. The second *Parden* requirement is that there be Congressional provision of a private right of action. If the *Employees* requirement that the right of action be made expressly applicable against a state differs from the second *Parden* requirement, the fact that the state is a defendant would be important only to an analysis of whether the *Employees* requirement were met. As to the issue of whether a private right of action existed under the Bridge Act, the question of against whom the action is brought was irrelevant. Such an application of the second *Parden* requirement would appear to demand that the private right of action be *expressly* provided by the statute, because if judicial decision cannot imply a private right of action, the only way a state could be sued under a federal statute would be by express statutory provision. Such an interpretation is a drastic alteration of the second *Parden* requirement. *See* notes 57–61 and accompanying text *infra*.

52. 404 F.2d 1001 (4th Cir. 1968).

53. *Id.* at 1004. In *Lauritzen*, a Danish ship had suffered hull damage when it was snagged by a submerged obstruction at the bridge-tunnel spanning the Chesapeake Bay. *Id.* at 1002. *See also* Adams v. Harris County, 316 F. Supp. 938, 947–49 (S.D. Tex. 1970). *But see* Red Star Towing & Transp. Co. v. Department of Transp., 423 F.2d 104 (3d Cir. 1970); Mobile Towing Co. v. M/V Weatherly, 343 F. Supp. 276, 278 (S.D. Ala. 1971).

relied upon, particularly *Morania Barge No. 140, Inc. v. M & T Tracy, Inc.*[54] The *Intracoastal* court found *Morania* unsupportive of the conclusion that a private right of action existed under the Rivers Act because it read *Morania* merely to stand for the proposition "that the standards established in the Rivers Act may be used in a suit where independent jurisdiction already exists."[55]

This distinction, however, is not persuasive, because the presence or absence of a private right of action under a regulatory statute depends upon the language of the statute, not upon whether independent jurisdiction of a federal court exists. The proper focus should be upon whether the plaintiff can sue under the act. In any event, the *Intracoastal* court never explained the relationship between a regulatory statute's provision of a private right of action and the existence of jurisdiction. Moreover, the validity of the court's distinction is further called into question when one considers the fact that *Intracoastal* involved a suit in admiralty which was the basis of jurisdiction in *Morania.*[56] The fact that the state, rather than a private party, was the defendant in *Intracoastal* should have had no bearing upon the issue of whether the Bridge Act provided a private right of action. That factor relates only to the question of whether the defense of sovereign immunity is available. *Morania,* therefore, is not distinguishable on the basis set forth by the *Intracoastal* court, and if *Morania* is valid, *Lauritzen* is valid as well. The court in the instant case should have concluded that the Bridge Act fulfilled the second *Parden* requirement, and then proceeded to discuss whether the third requirement imposed by *Employees* had been met.

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54. 312 F.2d 78 (2d Cir. 1962). In *Morania,* a barge was damaged when it struck a second, sunken barge owned by the defendant. The sunken barge was unmarked in violation of section 15 of the Rivers Act, 33 U.S.C. § 409 (1970), and the owner of the damaged barge sued claiming dereliction of the statutory duty imposed by the act. 312 F.2d at 80–81. The court applied the standard of care supplied by the Rivers Act. *Id.* at 80.

The district court in *Lauritzen* also cited United States v. Perma Paving Co., 332 F.2d 754 (2d Cir. 1964), for the proposition that the Rivers Act, although penal in nature, implied a private right of action. Chesapeake Bay Bridge & Tunnel Dist. v. Lauritzen, 259 F. Supp. 633, 638 (E.D. Va. 1966). In *Perma Paving,* the United States sued a riparian landowner for the cost of dredging a portion of a navigable channel obstructed by the landowner in violation of the Rivers Act. 332 F.2d at 756. The *Intracoastal* court determined that the *Perma Paving* court, by construing the Rivers Act to give the United States a cause of action against a state for violation of the act, did not hold that the act provides a cause of action for private parties. 482 F.2d at 367 n.16. This analysis is persuasive, because the regulatory effect of the Rivers Act depends in great measure upon the ability of the United States to enforce it against a state; therefore, to have held otherwise would have rendered the act ineffectual.

55. 482 F.2d at 367 n.16. In *Morania,* there was independent jurisdiction because it was a suit in admiralty (*see* note 3 *supra*). 312 F.2d at 79. The Fifth Circuit, however, offered no support for its view that this factor was critical to the holding in that case.

56. *See* notes 3 & 55 *supra.*

As the dissent in *Intracoastal* noted, "[p]rivate civil remedies have been implied from federal statutes beginning in 1916."[57] In a similar vein, it has never been held that the penal nature of a statute necessarily precludes the finding of an implied right of action under that statute. The majority, however, stated that "Congress must have *expressly* created a remedy in private parties for violation of the applicable federal regulatory statute."[58] Such an interpretation would be a severe limitation upon what the court declared to be the second requirement for an implied waiver of the sovereign immunity defense, *i.e.* that "Congress has *specifically* created a remedy in private parties for the violation of the applicable federal regulatory statute."[59] If it be conceded arguendo that "expressly" and "specifically" are synonymous,[60] the court should have determined whether there were reasons to imply a private right of action when a private citizen sued another private citizen that would not justify such an interpretation when a private citizen sued a state in federal court. The court did not address this issue. Yet, conceptually, it would seem correct to conclude that if a statute provides either an express or implied right of action, the right of action exists regardless of the identity of the defendant.[61] It is submitted, therefore, that the court should have found that an implied private right of action did exist under the Bridge Act, and, according to its stated analytical approach, determined whether the *Employees* requirement had been satisfied. Had this been done, the suit would have been

57. 482 F.2d at 371 (Wisdom, J., dissenting), *citing* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Texas & Pacific Ry. v. Rigsby, 241 U.S. 33 (1916); Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

The Supreme Court in the recent case of Edelman v. Jordan, 415 U.S. 651 (1974), noted that while it had authorized private suits "in order to effectuate a statutory purpose," it had never done so in an eleventh amendment context wherein the state was the defendant. *Id.* at 673–74. *Edelman* involved a fact situation clearly distinguishable from that presented by the instant case. In *Edelman,* the state had merely participated in a federally assisted aid program and had failed to comply with the regulations promulgated by the Department of Health, Education and Welfare, an administrative agency. Thus, in *Edelman,* no statutory regulation comparable to the Bridge Act was involved and even the first *Parden* requirement for waiver could not have been met. The *Edelman* Court refused to imply a waiver of the sovereign immunity defense and discussed *Parden* and *Employees* only in passing. *Id.* at 671–72.

58. 482 F.2d at 366 n.14 (emphasis added).

59. *Id.* at 364 (emphasis added).

60. The words "expressly" and "specifically" are conceptually distinct. "Expressly" refers to articulation and communication. *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY 899 (2d ed. 1946). "Specifically" refers to the scope of the communication. *Id.* at 2415. There can be specific expressions and specific implications. Thus, it is not clear whether the court's conclusion is that the Bridge Act did not specifically imply a private right of action or whether it is that the act did not expressly so provide. It is clear, however, that the act does not expressly provide a private right of action, and if the *Parden* criterion is that an *express* provision is required, the instant court's conclusion that the second *Parden* requirement was not met is correct.

61. *See* note 51 and accompanying text *supra*.

dismissed because the Bridge Act does not *expressly* provide that a private right of action against a state defendant exists for violations of its provisions.

However, this does not mean that the *Intracoastal* court reached the correct result for the wrong reason. The preceding analysis presumed the propriety of the court's analytical approach in reading *Parden* and *Employees* as containing separate requirements to be applied to the same factual situation.[62] It is submitted that such an approach is improper as it ignores significant distinctions that exist between *Parden* and *Employees*.[63]

The first significant distinction is one which may be labelled the proprietary-governmental distinction. In *Parden,* the state activity, operation of a railroad for profit, was proprietary;[64] the state was acting not as sovereign, but as a private party. Since no sovereign immunity defense is available to a private party, the state, by entering into an area regulated by a federal statute under which a right of action existed, could be held to have implicitly consented to suit in federal court. *Employees,* on the other hand, involved the operation of state mental hospitals, a fundamentally

62. 482 F.2d at 365. The *Intracoastal* court apparently applied both *Parden* and *Employees*. But an analysis of *Employees* reveals that the *Parden* criteria are implicit within those applied in *Employees*. In *Employees,* there was state activity in an area over which Congress had exercised regulatory control, and a private right of action under a federal regulatory statute existed. Thus, *Intracoastal* may have been merely applying the *Employees* criteria.

63. Two distinctions suggested by the Eighth Circuit in the *Employees* case and affirmed by the Supreme Court without discussion, may be dismissed. First, the court attempted to distinguish *Parden* on the basis that in the latter, a failure to imply state consent to be sued would have left the plaintiffs, employees of state owned railroads, without a remedy. In *Employees,* on the other hand, the plaintiffs had at least two other avenues of relief. Employees of the Dep't of Public Health & Welfare v. Department of Public Health & Welfare, 452 F.2d 820, 826 (8th Cir. 1971), *aff'd,* 411 U.S. 279 (1973).

This distinction bears no logical relationship to the implied waiver issue because waiver depends upon the nature of the state's activities and intent of Congress. Even if it is assumed that this distinction is valid, it would indicate that *Employees* should have been controlling in *Intracoastal* since the court noted that other remedies were available. 482 F.2d at 362-63 n.1.

The other distinction suggested by the court of appeals in *Employees* is predicated upon a resolution of the issue of whether the state had entered a sphere of federal activity at a time when Congress had enacted legislation in the area. 452 F.2d at 827. In *Parden,* Alabama began operating the railroad 20 years after the FELA was passed, whereas in *Employees* the state activity was being conducted long before the FLSA was amended to control it. The force of this distinction is diminished when one considers that if the area in which the state activity is conducted is currently subject to federal regulation, it was always, at least potentially, subject to such regulation and a state can be said to have consented to the *in futuro* federal regulation when it entered. Therefore, to bring this notion to bear upon the instant case, since Congress has always had the power to control admiralty matters and to regulate interstate commerce, upon entering such areas the state subjected itself to federal regulation, despite the fact that there had been no specific exercise of federal powers at the time. Such entrance into a field subject to federal regulation should be construed to imply consent to be subject to federal regulation when and if it is exercised. Consequently, the particular chronology of events in a particular case should be irrelvant to its decision. Secondly, continuation of an activity after federal regulation has been exercised in the area may itself imply consent to be governed by such regulation. *See* 17 VILL. L. REV. 713, 720 (1972).

64. 377 U.S. at 185.

governmental activity.[65] When acting in a governmental capacity, the state acts as sovereign and merely engaging in the activity cannot operate as implied consent to a suit in federal court. A second ground for distinguishing the two cases arises from the fact that in *Parden* five employees sought compensation for individual personal injuries.[66] As such, it involved individual suits with individual factual circumstances, not subject to a class action. Therefore, such actions under the FELA could not have had a far-reaching impact upon the subject state's treasury. The very reason for the adoption of the eleventh amendment — to protect state financial stability[67] — underscores the importance of this factor. In contrast, the *Employees* suit was brought by a large class of state employees seeking overtime compensation and an equal amount as liquidated damages and attorneys' fees.[68]

Close analysis of these distinctions between *Parden* and *Employees* reveals that *Intracoastal* does not fit fully within either of those cases. By constructing and maintaining a bridge over the Flint River, Georgia was merely performing the same governmental function it performed when it constructed and maintained state roads and highways. To this extent, *Employees* would appear to be controlling. Instead of being a case involving a suit for double damages which would have had serious fiscal ramifications, however, the suit in *Intracoastal* was brought by a single plaintiff seeking compensatory damages for an injury caused by Georgia's allegedly negligent violation of a federal statute.[69] Consequently, the court should have determined which of these cases was controlling in the factual situation presented in *Intracoastal* rather than taking the approach that it did.[70]

It is submitted that a proper resolution of the instant controversy required a balancing of the distinguishing aspects of those cases in order to determine their relative importance in an *Intracoastal*-type situation. It is therefore further submitted that through such an approach the court would have reached the conclusion that, since the state had entered a sphere of activity that was regulated by a federal statute which provided for a private right of action, the defense of sovereign immunity had been waived.

The *Intracoastal* court should have determined that *Parden,* rather than *Employees,* was controlling in the following manner. The basis of the governmental-proprietary activity factor is that when a state acts as a

65. *See* 411 U.S. at 281.

66. 377 U.S. at 184. Four suits involving five injured parties were consolidated in *Parden.* Parden v. Terminal Ry., 311 F.2d 727, 728 n.2 (5th Cir. 1963), *rev'd,* 377 U.S. 184 (1964).

67. *See* text accompanying note 12 *supra.*

68. 411 U.S. at 281. The *Employees* Court noted that 2.7 million state employees would be affected by the suit. *Id.* at 287.

69. 482 F.2d at 363.

70. Had the *Intracoastal* court properly determined that *Employees* and not *Parden* was controlling precedent and applied the same analytical technique, it would indeed have reached the right result for the wrong reason.

sovereign, it cannot be sued without its consent. Since this basis is purely theoretical, it is submitted that it should not be given controlling force; the eleventh amendment was adopted not to protect the inherent rights of a sovereign, but to achieve the very practical objective of securing state financial stability by precluding suit against a state on debt obligations.[71] Moreover, the governmental-proprietary distinction is not functional in terms of the purposes of the eleventh amendment.[72] The fiscal impact distinction, on the other hand, has both practical and historical significance. It reflects a concern for governmental solvency that lies at the very foundation of the eleventh amendment.[73] Therefore, it would appear that when the theoretical governmental-proprietary distinction runs counter to the practical fiscal impact factor, it must give way to practicality in order that injured parties might be compensated.

The Supreme Court has indicated agreement with this view. In *Maryland v. Wirtz,*[74] which established the constitutionality of the FLSA amendments involved in *Employees,* the Court stated that "the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character."[75] The *Employees* opinion itself supports this interpretation. The Court indicated that Congress can act to regulate state governmental activities and that when Congress so acts, enormous fiscal burdens may be placed upon the states.[76] The Court declared that "Congress acting responsibly would not be presumed to take such action silently."[77] In other words, when the activity is governmental in nature *and* an implied waiver of sovereign immunity will have a severe impact on state treasuries, waiver of the eleventh amendment defense will be implied only if Congress has expressly indicated that such an implication is proper. In *Intracoastal,* only the governmental activity aspect was present, as the impact of the plaintiff's recovery upon the state's coffers would have been de minimis. Therefore, *Parden* should have controlled; thus, if there had been state entrance into a federally regulated area and a private right of action existed under the statute, the sovereign immunity defense would have been deemed to have been waived.[78]

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71. *See* text accompanying note 12 *supra.*

72. In another area where the governmental-proprietary distinction has been significant — determining whether there should be compensation by the state for the taking of local government property — one commentator has expressed dissatisfaction with this distinction primarily because of the difficulty in classifying government functions as governmental or proprietary. Dau, *Problems in Condemnation of Property Devoted to Public Use,* 44 TEXAS L. REV. 1517, 1527–30 (1966).

73. *See* note 12 and accompanying text *supra.*

74. 392 U.S. 183 (1968).

75. *Id.* at 195.

76. 411 U.S. at 284–85.

77. *Id.*

78. According to the *Parden* Court, "By empowering Congress to regulate commerce, then, [by ratification of the Constitution] the states necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." 377 U.S. at 192. Thus, "when a State leaves the sphere that is exclusively its own and

Arguably, as a result of the instant case *Parden* and *Employees* can be harmonized. The suggested analysis of those cases, however, reveals that they apply to different factual situations. When an action against a state under a federal regulatory statute will not have a substantial impact upon the state treasury, there is no reason to insulate the state from liability for its acts. The party alleging the injury should be presented the opportunity to try his claim in a federal forum. Waiver of the sovereign immunity defense should be implied if the statute under which the action is brought provides a private right of action, whether express or implied. However, when the action brought will have a material, deleterious effect upon the state treasury, the purpose of the eleventh amendment and the policy of promoting harmonious federalism dictate that no waiver of sovereign immunity be implied unless Congress has clearly manifested the intent that a state's entrance into a federally regulated area is conditioned upon the state's consent to be sued in federal court.[79]

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enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." *Id.* at 196. The dissent in *Employees* stated that the role of the doctrine of sovereign immunity in a democracy is suspect. In the words of Justice Brennan:

> In a nation whose ultimate sovereign is the people and not government, a doctrine premised upon kingship — or, as has been suggested, "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends," — is indefensible.

411 U.S. at 311 (Brennan, J., dissenting), *quoting* Kawanankoa v. Polybank, 205 U.S. 349, 353 (1907). Recently, New Jersey's Attorney General echoed this idea: "The growing recognition that the basic unfairness of the State's refusal to permit itself to be sued when its actions result in injury to innocent third parties has become an impelling force for change." REP. OF THE ATT'Y GEN. TASK FORCE ON SOVEREIGN IMMUNITY at 7 (May 1972).

This same view was articulated by the dissent in Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949), when it was stated that "governmental Immunity runs counter to prevailing notions of reason and justice." *Id.* at 709 (Frankfurter, J., dissenting). In light of these sound policy considerations, the *Intracoastal* court should have construed the waiver theory more broadly than it did, and limited the availability of the defense of sovereign immunity.

79. Objection to this approach might be raised upon equal protection grounds, the argument being that to allow only one of two similarly situated parties to sue, such decision being based wholly upon the dollar amount of the respective claims, would constitute an invidious discrimination made for patently arbitrary reasons. It is beyond the scope of this note to explore the complexities of and possible results which might flow from such objections. However, it is appropriate to note that classifications based wholly upon dollar amounts are not unknown. Indeed, in Swarb v. Lennox, 405 U.S. 191 (1972), the Supreme Court of the United States approved a lower court's scheme whereby Pennsylvania cognovit provisions were presumed invalid as to people with incomes less than $10,000, but not as to those with incomes greater than $10,000.