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The Eleventh Amendment Yields

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Recent court decisions upholding congressional authority to regulate certain state activities under the commerce clause,[1] even to the avoidance of the constitutional protection of the eleventh amendment,[2] open new horizons for federal control over the states. The eleventh amendment confers upon the states the right to invoke the defense of governmental immunity in suits against them by citizens of another state or citizens of a foreign country. This article will discuss a number of decisions which have led to the subrogation of the states' eleventh amendment immunity and the effect of these decisions on proposed federal legislation.

It has only been in recent years that state immunity to suit in federal courts has received a serious challenge.[3] Recently our states have entered new areas of activity previously confined to private enterprise. Simultaneously, the scope

1. The commerce clause reads: "The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST., art. 1, § 8, cl. 3.

2. The eleventh amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

3. The rule that "the king can do no wrong," or as more precisely stated, "The king cannot be sued in his own courts unless he first consents," was well established in England and was adopted into the American system of law with the rest of the English Common Law. The states claimed that the doctrine of sovereign immunity was necessary for the effective administration of their laws. Mr. Justice Holmes explained the doctrine by stating that "there can be no legal right as against the authority that makes the law on which the right depends." Kawanankoa v. Polyblank, 205 U.S. 349, 353 (1907). The most satisfactory justification for state sovereign immunity appears to be the protection provided state revenues, as expounded in 1 E. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 91-102 (1922). Over the years, however, what was once a general immunity doctrine has been systematically reduced by courts and legislatures, *See, e.g.*, Colorado Racing Comm'n v. Brush Racing Ass'n, 136 Colo. 279, 316 P.2d 582 (1957); Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957); Molitor v. Kaneland Community Dist. No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959). "Only the vestigial remains of such governmental immunity have survived; its requiem has long been foreshadowed. For years the process of erosion of governmental immunity has gone on unabated. The Legislature has contributed mightly to that erosion. The courts, by distinction and extension, have removed much of the force of the rule." Muskopf v. Corning Hosp. Dist., 55 Cal.2d 211, 221, 359 P.2d 457, 463, 11 Cal. Rptr. 89, 95 (1961). The late Supreme Court Justice Frankfurter, noting the "chilly feeling against sovereign immunity," observed for the court that "even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment." Nat'l Bank v. Republic of China, 348 U.S. 356, 359 (1955). Only in suits by individuals against a state in federal court has the immunity doctrine retained any of its former effect. That vitality is eroding with greater difficulty because of its constitutional basis.

of federal regulations has increased in these same areas. It was inevitable that at some time these two converging forces would conflict. Where these state-federal conflicts have occurred, infringement upon state sovereignty has resulted. The courts have slowly eroded one of the obstacles to this increased federal control by avoiding the state immunity provided by the eleventh amendment.[4] The wording of the eleventh amendment explicitly protects states from being sued in federal courts by citizens of other states or by citizens of foreign countries; it does not expressly exempt them from suits by their own citizens, but it has been interpreted to extend to such situations.[5] Throughout this article the authors will consider the eleventh amendment as including this extension. The discussion *infra* as to the courts' subrogation of the eleventh amendment could alternatively be directed toward a *sub silentio* overruling of this same extension.

The commerce clause is the vehicle used by the courts to avoid the states' eleventh amendment immunity. Ever since the first case involving the commerce clause, *Gibbons v. Ogden*,[6] the Supreme Court and Congress have used that clause to exert increasing control over activities previously regulated by the states. In *Gibbons* Chief Justice Marshall, in discussing the limits of the commerce clause, said that the power of Congress over interstate commerce "is complete in itself . . . . [It] may be exercised to its utmost extent and acknowledges no limitations other than those proscribed in the Constitution."[7] Using this language as the foundation of its power, Congress has expanded its involvement into many areas, including navigation,[8] railroads,[9] labor,[10]

4. The eleventh amendment was quickly proposed and ratified in 1793 to legislatively overrule the action of the Supreme Court in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). In *Chisholm*, the Court held that its own jurisdiction extended to a suit against the state of Georgia by two South Carolina citizens. The eleventh amendment was adopted to ensure that the states retained their protection from suit in federal courts. *See* Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207 (1968).

5. Hans v. Louisiana, 134 U.S. 1 (1890). *Hans* held that federal courts do not have jurisdiction over a suit against an unconsenting state brought by that state's own citizen. The Supreme Court did not expressly state its decision was based on the eleventh amendment. *Id.* at 15. However, subsequent cases have consistently considered *Hans* as an extension of the eleventh amendment. *See* United States v. Mississippi, 308 U.S. 128, 140 (1965); Parden v. Terminal RR., 377 U.S. 184, 192 (1964); Duhne v. New Jersey, 251 U.S. 311 (1920); *Ex parte* Young, 209 U.S. 123, 150 (1908); North Carolina v. Temple, 134 U.S. 22 (1890).

6. 22 U.S. (9 Wheat.) 1 (1824). For a recent reaffirmance of congressional power under the commerce clause and a review of past decisions *see* Perez v. United States, 402 U.S. 146 (1971).

7. 22 U.S. (9 Wheat.) at 21.

8. United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1865).

9. Interstate Commerce Act, 12 Stat. 489 (1866).

10. National Labor Relations Act, 29 U.S.C. § 151 (1964); Fair-Labor Standards Act, 29 U.S.C. § 201 (1964). NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1936).

utilities,[11] economy,[12] welfare,[13] and civil rights.[14] In *Petty v. Tennessee-Missouri Commission*,[15] *Parden v. Terminal R.R.*,[16] and *Maryland v. Wirtz*,[17] the commerce clause was held to allow federal intrusion into activities conducted by the states themselves.

In *Petty v. Tennessee-Missouri Commission*[18] the Supreme Court resolved a challenge to state sovereignty. Tennessee and Missouri had agreed to build a bridge over and operate ferries across the Mississippi River. The suit arose under the Jones Act[19] when plaintiff, a widow, sought compensation for the death of her husband who was killed while operating the defendant's ferry, part of a state owned transportation facility. The compact between Tennessee and Missouri required congressional approval and in granting their approval, Congress attached a proviso that the terms of the compact would not be interpreted "to affect, impair, or diminish any right, power, or jurisdiction of . . . any court . . . of the United States over or in regard to any navigable waters or any commerce between the States . . . ."[20] In *Petty* the Supreme Court held that the two states had waived their immunity to suit. Mr. Justice Douglas stated:

> The States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached. So if there be doubt as to the meaning of the sue-and-be-sued clause . . . , the doubt dissipates when the condition attached by Congress is accepted and acted upon by the two States.[21]

The *Petty* decision represents a departure from previous Supreme Court decisions[22] and is the leading case recognizing the waiver of states immunity to suit in federal court through congressional approval or regulation of activities by the states.[23]

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11. Public Utilities Comm'n v. Attleboro Co., 273 U.S. 83 (1927).
12. 15 U.S.C. § 2 (Supp. V, 1970).
13. Social Security Act, 42 U.S.C. § 7 (1964).
14. 42 U.S.C. 2000a (1964).
15. 359 U.S. 275 (1959).
16. 377 U.S. 184 (1964).
17. 392 U.S. 183 (1968).
18. 359 U.S. 275 (1959).
19. 46 U.S.C. § 688 (1964).
20. 359 U.S. at 281.
21. *Id.*
22. The traditional approach to waiver of immunity to suit had been restrictive. Consent to suit "could only be warranted 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." Murray v. Wilson Distilling Co., 213 U.S. 151, 172 (1909).
23. Other recent examples of cases involving waiver of state immunity to suit under the Jones Act include: Chesapeake Bay Bridge and Tunnel Dist. v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968); Huckins v. Bd. of Regents, 263 F. Supp. 622 (E.D. Mich. 1967); Cocherl v. Alaska, 246 F. Supp. 328 (D. Alas. 1965).

The Supreme Court struck another blow at state sovereignty in *Parden v. Terminal R.R.*[24] The Court held that when the State of Alabama began operation of a railroad, which directly and substantially affected interstate commerce, 20 years after the enactment of the Federal Employees Liability Act (FELA),[25] it necessarily consented to such suits as were authorized by that Act. An employee of a railroad owned by Alabama sought damages for personal injuries under FELA. Here, for the first time in the Supreme Court, a state's claim of immunity against suit by an individual met a suit brought upon a cause of action expressly created by Congress.[26] This raised two questions: (1) did Congress intend to subject the state to suit? (2) did it have the power to do so in light of the state's claim of sovereign immunity? Mr. Justice Brennan answered both questions in the affirmative:

> By adopting and ratifying the Commerce Clause, the states empowered Congress to create such a right of Action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have consented to suit. [B]y engaging in interstate commerce by rail, [the state] has subjected itself to the commerce power, and is liable for a violation of the . . . Act, as are other carriers . . . .[27]

Parden reiterated the principle that state sovereignty must yield to congressional action founded upon constitutional powers.[28] The Court further stated: "By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation."[29] The Court recognized that: "States have entered and are entering numerous forms of activity which, if carried on by a private person or corporation, would be subject to federal regulation."[30] Applying the immunity provided by the eleventh amendment to these federal regulations would lead to the natural result that where states are employers, the states' employees would find themselves with "a right without a remedy."[31]

The majority in *Parden* was careful to explain that it was not overriding

24. 377 U.S. 184 (1964).
25. 45 U.S.C. §§ 51-60 (1964).
26. 377 U.S. at 187.
27. *Id.* at 192-193.
28. *E.g.*, New York v. United States, 326 U.S. 572 (1945); Wickard v. Filburn, 317 U.S. 111 (1942); Bd. of Trustees v. United States, 289 U.S. 48 (1933); Sanitary Dist. of Chicago v. United States, 266 U.S. 405 (1925).
29. 377 U.S. at 192.
30. *Id.* at 197.
31. *Id.* at 190.

the eleventh amendment by virtue of any superiority of the commerce power. On this point the court stated:

> Recognition of the Congressional power to render a state sueable under FELA does not mean that the immunity doctrine, as embodied in the eleventh amendment with respect to citizens of other states and as extended to the states' own citizens by the *Hans* case, is here being overridden. It remains the law that a state may not be sued by an individual without its consent. Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that act.[32]

Thus, the commerce power could be exercised in harmony with the eleventh amendment, while at the same time subjecting the states to federal court suit.

The power of Congress to act under the commerce clause was given one of its broadest interpretations in *Maryland v. Wirtz*.[33] In that case, 27 states as plaintiffs sought to enjoin enforcement of the 1966 amendments to the Fair Labor Standards Act(FLSA).[34] The plaintiffs contended that their inclusion in the definition of employer exceeded the bounds of congressional power under the commerce clause. Congress in 1961 had extended the coverage of FLSA to any employee who "engaged in commerce or in the production of goods for commerce."[35] The "enterprise concept" expanded the Act to cover any fellow employee of an employee who was covered under the original Act. The 1966 amendments to the Act removed the states' exemptions as employers, and subjected them to suit under the Act's remedial provisions.[36] In *Wirtz* the Court held that these amendments were not an unconstitutional extension of congressional commerce power and noted that since states are major importers of goods, a labor dispute might have a serious effect on interstate commerce.

An additional issue addressed in *Maryland v. Wirtz* was whether the com-

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32. *Id.* at 192.

33. 392 U.S. 183 (1968).

34. 29 U.S.C. § 203 (Supp. V, 1970). The constitutionality of FLSA was upheld in United States v. Darby, 312 U.S. 100, 115 (1941). The court in upholding the Act said:

> [T]o make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows.

The Congress in expanding the Act in 1971 was attempting to implement this national policy.

35. 29 U.S.C. § 203(s)(4) (Supp. IV, 1966). Prior to 1966 the FLSA, like the federal statutes in the cases discussed *supra*, applied only to activities engaged in by the private sector. The 1966 amendments mark the first time that legislation was directed toward what is primarily a state activity, *i.e.*, education and hospital facilities. These amendments could be read as a direct congressional attempt to undermine state sovereignty.

36. 29 U.S.C. § 216(b) (Supp. IV, 1969).

merce clause gave Congress the right to impose regulations on pre-existing state functions; that is, activities undertaken by the states before there were any federal regulations governing them. Discussing this issue the Court said:

> If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.[37]

The Court also indicated it would continue to examine congressional enactments to ensure that there was a "rational basis" for including such regulations under the commerce clause. However, businesses carried on by the state for the "benefit of their citizens" if undistinguished from private business would still be subject to congressional action.[38]

The question of sovereign immunity was also raised in *Maryland v. Wirtz*. The states objected to the creation of a remedy imposed upon them as a condition of continued operation in an essential service area. In refusing to pass upon the immunity question Mr. Justice Harlan said:

> [W]e decline to be drawn into an abstract discussion of the numerous complex issues that might arise in connection with the Act's various remedial provisions. They are almost impossible and most unnecessary to resolve in advance of *particular facts, stated claims, and identified plaintiffs and defendants.* Questions of state immunity are therefore reserved for appropriate future cases.[39]

The particular facts, stated claims, and identified plaintiffs and defendants that Mr. Justice Harlan found absent in *Wirtz* were presented to the Supreme Court in *Briggs v. Saggers*.[40] The Court, however, denied certiorari.[41]

In *Briggs*, employees of a State of Utah-owned mental institution brought suit in federal district court to recover unpaid overtime compensation and an equal amount of liquidated damages. The basis for their suit was "the 1966 amendments to the Fair Labor Standards Act (FLSA) which effectively extended the minimum wage and maximum hours provisions to the complaining workers . . . ."[42] Prior to the 1966 amendments, states as "employers" had been specifically exempted from FLSA. The remedies

37. 392 U.S. at 197.

38. *Id.* at 200.

39. *Id.* (emphasis added).

40. 424 F.2d 130 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970).

41. 400 U.S. 829 (1970). This question may yet be presented to the Supreme Court. Employees of the State of Missouri v. Missouri, ___ F.2d ___ (8th Cir. 1971) contained virtually identical facts and issues as *Briggs*. The Eighth Circuit relied on *Parden* and *Briggs* in holding, two to one, for the employees. An application for an appellate court en banc hearing has been made. See page 172.

42. 424 F.2d at 131 (10th Cir. 1970).

provided by FLSA include the right to sue in federal courts. The state defended on two grounds: first, that the district court lacked jurisdiction due to Utah's sovereign immunity under the eleventh amendment; and secondly, that the principle of a state's implied consent to suit as found in *Parden* was not applicable. The United States District Court for the Central District of Utah dismissed the suit for lack of jurisdiction.[43] In a short opinion the court accepted both of the states contentions. On appeal, the Tenth Circuit reversed.[44] The appellate court held that Utah had waived its eleventh amendment immunity to suit by continuing to operate the training school after the effective date of the 1966 FLSA amendments. The court, relying on *Parden*, stated "that with regard to sovereign immunity, waiver of a constitutional privilege need be neither knowing nor intelligent."[45] The defendant state attempted to distinguish *Parden* on its facts, *i.e.*, the Utah-owned training school was a pre-existing state activity when the 1966 amendments to the FLSA became effective, whereas in *Parden*, the state activity had commenced 20 years after passage of the applicable legislation. The court clearly rejected Utah's attempt to distinguish *Parden*.

While finding that the *Parden* decision was applicable to the factual situation in *Briggs*, the court's holding went beyond that of *Parden*. *Parden* and *Briggs* each arose under a congressionally created cause of action founded upon the commerce clause.[46] In *Briggs* the Tenth Circuit faced "[t]he inevitable confrontation [which] squares the power of Congress to regulate interstate commerce under the commerce clause against the Eleventh Amendment right of the states to be free from federal court suit, absent consent."[47] Although not expressly stated, the court's holding indicated that this confrontation was resolved in favor of the power of Congress to regulate commerce.

In *Briggs* the question was not whether Congress, under its commerce power, can regulate state owned facilities. The Supreme Court in *Maryland v. Wirtz* clearly decided it could. Rather the question was whether Congress can nullify the states' sovereign immunity protection under the eleventh amendment by creating a private cause of action, and do so with respect to a pre-existing and necessary state activity.

Deciding *Briggs* as it did, the Tenth Circuit has indicated that claims of invasion of state sovereignty are no longer an obstacle to federal legislation. Congress, acting under the commerce power may regulate activities considered

43. 301 F. Supp. 1023 (D. Utah 1969).
44. 424 F.2d 130 (10th Cir. 1970).
45. *Id.* at 134.
46. *Parden* involved the Federal Employees Liability Act (FELA), 45 U.S.C. § 51 (1964), and *Briggs* the Fair Labor Standards Act, 29 U.S.C. § 201 (1964).
47. 424 F.2d at 131-32.

essential by the states and federal regulations may be imposed on areas of state activity presently in existence, as well as future fields of state activities.

In the Ninety-second Congress legislation[48] has been introduced to create a public employee counterpart to the National Labor Relations Act.[49] The bills, founded upon the power of Congress to regulate commerce, would create in public employees "the rights to which all employees working in a free, democratic society are entitled."[50] Rights specified in the proposed bill include the right to organize and bargain collectively. Except for a few appointed or elected officials, the provisions of the act would extend to all persons working for a state, county, city or any political subdivision thereof. For example, this far reaching legislation would include: state fish and game commission employees, county road crews, and city sanitation workers. Like the Jones Act and the FLSA, relief under the proposed act is to be provided by federal courts.

This proposed legislation is unique. Previously, states were subjected to federal regulation when engaging in "activity, which if carried on by a private person or corporation, would be subject to federal regulation."[51] This legislation would effect state government on all levels, not just regulation of business-like "activities," but into the heart of state government itself, could only have been proposed after the series of court precedents discussed *supra*. The relief granted would not be available without the court's subrogation of the states' eleventh amendment protection to the power of the federal government.

How far can Congress go in the regulation of state activities on the basis of the commerce clause? Today there is virtually no area of activity which is not touched in some way by interstate commerce.[52] Exceptionally broad authority has been permitted Congress through court decision, and state immunity previously considered protected by the eleventh amendment has yielded to congressional action. Congress may be expected to continue to legislate under the authority of its commerce power. However, the broad powers given to the federal government by the decisions in *Petty, Parden, Wirtz*, and *Briggs* must ultimately be balanced against the current concept of "federal-

48. H.R. 7684, 92d Cong., 1st Sess. (1971). This bill was introduced with over 50 sponsors.

49. 29 U.S.C. § 151 *et seq.* (1964). Among other things, the National Labor Relations Act gives employees the right to organize and bargain collectively and to be free from court injunction against strikes.

50. H.R. 7684, 92d Cong., 1st Sess. § ___ (1971); H.R. 19226, 92d Cong., 1st Sess. § ___ (1971).

51. Parden v. Terminal R.R., 377 U.S. 184, 197 (1964). For other cases that a state, when engaged in activities affecting interstate commerce may be held subject to federal regulation see: Maryland v. Wirtz, 392 U.S. 183 (1968); California v. United States, 320 U.S. 577 (1944); United States v. California, 297 U.S. 175 (1936); Bd. of Trustees v. United States, 289 U.S. 48 (1933).

52. *See* notes 6-13 *supra*. Wickard v. Filburn, 317 U.S. 111 (1942).

ism." The Supreme Court discussed the "federalism" issue in *Wirtz*;[53] however, the presently constituted Court may have a more traditional view of that concept.[54]

Observations and Conclusions

In a constitutional context, state sovereignty, as embodied in the eleventh amendment, cannot be considered a limitation on the commerce clause. Immunity comes from the eleventh amendment. Waiver of that immunity may be express, or may result from necessary implication through the exercise of commerce power. As *Parden* indicated, the two constitutional provisions are capable of being read and applied in a harmonious fashion.

The *Briggs* case presented a direct confrontation between the eleventh amendment and the power of Congress to regulate commerce. From that decision we can infer that the commerce power may be said to prevail because it is superior in nature to the sovereign immunity principle.[55] States must be deemed subordinate in terms of their susceptibility to federal regulation and to federal court suit when necessary to implement such regulation. When a state receives the benefit of a federal statute, it must accept any burden that the law may impose. As the Supreme Court said in *Parden*, the states necessarily "surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce."[56]

"When Congress constitutionally hinges the right of a state to engage in interstate commerce [*sic*] upon its amenability to a federal court suit by private parties, the States must decide *eo instante* whether to continue or withdraw."[57]

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53. 392 U.S. at 201.

54. *See* Younger v. Harris, 401 U.S. 37 (1971). There the defendant sought in federal court to enjoin the state district attorney from prosecution under the California Criminal Syndicalism Act. In a context different from that presented in the series of cases leading to *Briggs*, the court (per Black, J.) stated:

> [A]n even more vital consideration [is] the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States in their institutions are left free to perform their separate functions in their separate ways . . . . [A]nd one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism!"

401 U.S. at 44.

55. Alternative arguments for placing the commerce clause in a superior position to the eleventh amendment in the *Briggs* case might be that the commerce power must prevail in any such federal-state confrontation, and, that the eleventh amendment is the weaker of the two provisions, relying as it does upon court extension (Hans v. Louisiana, 134 U.S. 1 (1890)) to make it applicable to suits against a state by its own citizens.

56. 377 U.S. at 191.

57. Briggs v. Sagers, 424 F.2d 130, 134 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970).

Any activity conducted after the effective date of the legislation in question subjects the state to the remedial provisions of the enactment. If withdrawal from the regulated state activity is precluded by the state's own constitution, it appears that the state would have no choice but to "consent" to suit.[58]

As *Briggs* implied, states must rely on Congress to consider their interests. In contemplating legislation founded upon the commerce power the Congress must balance the states' interests against national priorities. It is for Congress to determine that the scope of proposed legislation has a "rational basis" under the commerce clause and that the need for federal regulation is of greater importance than any resultant hardship imposed upon the states. States, like private employers, must accept any financial burden resulting under the remedial provisions of federal legislation.

Petty, Parden, Wirtz, and *Briggs* indicate that states can be subjected to private causes of action. Waiver of state's constitutional immunity need not be affirmatively made, but may be implied from state operation of activities in an area of federal regulation. The commerce clause has provided the basis for increasing federal domination. Taking into account current federal-state relationships, the courts have, *sub silentio,* placed the commerce clause in a position superior to the eleventh amendment.*

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58. The involved and timely procedures of amending a state constitution and disentanglement from pre-existing activity would often make impossible the state's withdrawal prior to the effective date of a federal statute.

* The Eighth Circuit, sitting en banc, recently reversed its earlier decision. *State of Missouri v. Missouri*, No. 20,204 (8th Cir., Nov. 11, 1971). The *Missouri* case and *Briggs* now present a conflict between the Eighth and Tenth Circuits on identical issues. An application for certiorari is planned. The five to four majority of the Eighth Circuit distinguished the case before it from *Parden* on four grounds, all of which have been discussed herein. The majority failed to mention *Briggs*. The only new reasoning given for the full panels decision was that the eleventh amendment should prevail over the commerce clause "as the most recent expression of the will of the people." The court's application of this rule of construction is misplaced. The rule has use in construing statutes or international legal doctrines which are created subsequent to a constitution. But a constitution and its amendments are an integrated whole with no one provision having more force than any other. Where two constitutional provisions conflict, as in the *Briggs* and *Missouri* cases, a court must select one as controlling on the basis of the factual and legal issues presented in light of the policy and goals sought to be furthered by the provisions.