In a few cases, the Court has found a waiver by implication, but the vitality of these cases is questionable. In *Parden v. Terminal Railway*,[80] the Court ruled that employees of a state-owned railroad could sue the state for damages under the Federal Employers' Liability Act. One of the two primary grounds for finding lack of immunity was that by taking control of a railroad which was subject to the FELA, enacted some 20 years previously, the state had effectively accepted the imposition of the Act and consented to suit.[81] Distinguishing *Parden* as involving a proprietary activity,[82] the Court later refused to find any implied consent to suit by states participating in federal spending programs; participation was insufficient, and only when waiver has been "stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction," will it be found.[83]. Further, even if a state becomes amenable to suit under a statutory condition on accepting federal funds, remedies, especially monetary damages, may be limited, absent express language to the contrary.[84]

A state may waive its immunity by initiating or participating in litigation. In *Clark v. Barnard*,[85] the state had filed a claim for disputed money deposited in a federal court, and the Court held that the state could not thereafter complain when the court awarded the money to another claimant. However, the Court is loath to find a waiver simply because of the decision of an official or an attorney representing the state to litigate the merits of a suit, so that a state may at any point in litigation raise a claim of immunity based on

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[80] 377 U.S. 184 (1964). The alternative but interwoven ground had to do with Congress's power to withdraw immunity. *See also* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959).

[81] The implied waiver issue aside, *Parden* subsequently was overruled, a plurality of the Court emphasizing that Congress had failed to abrogate state immunity unmistakably. Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468 (1987). Justice Powell's plurality opinion was joined by Chief Justice Rehnquist and by Justices White and O'Connor. Justice Scalia, concurring, thought *Parden* should be overruled because it must be assumed that Congress enacted the FELA and other statutes with the understanding that Hans v. Louisiana shielded states from immunity. Id. at 495.

[82] Edelman v. Jordan, 415 U.S. 651, 671–72 (1974). For the same distinction in the Tenth Amendment context, see National League of Cities v. Usery, 426 U.S. 833, 854 n.18 (1976).

[83] Edelman v. Jordan, 415 U.S. 651 (1974) (quoting id. at 673, Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)); Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981). Of the four *Edelman* dissenters, Justices Marshall and Blackmun found waiver through knowing participation, 415 U.S. at 688. In *Florida Dep't*, Justice Stevens noted he would have agreed with them had he been on the Court at the time but that he would now adhere to *Edelman*. Id. at 151.

[84] Sossamon v. Texas, 563 U.S. ___, No. 08–1438, slip op. (2011).

[85] 108 U.S. 436 (1883).