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CONGRESSIONAL POWER TO GRANT FEDERAL COURTS JURISDICTION OVER STATES: THE IMPACT OF PENNSYLVANIA V. UNION GAS

by

DONALD L. BOREN

INTRODUCTION

The eleventh amendment, today, is perhaps the most litigated and least understood provision of the U.S. Constitution. During the past two decades, the U.S. Supreme Court has heard in excess of sixty-six cases involving challenges under the amendment. Unfortunately this proliferation of cases has resulted in neither unanimity as to its meaning; nor a bright line as to its interpretation. Recent eleventh amendment litigation falls into two broad categories: first, the extent the amendment limits congressional power to subject states to federal law; and secondly, the appropriate standard for finding a waiver or abrogation of a state’s immunity.

The U.S. Supreme Court’s decision, last term in Pennsylvania v. Union Gas addresses both of these questions. Union Gas is noteworthy in that it is the first time the Court has recognized congressional power to abolish a state’s immunity from suit for monetary damages in federal court under the commerce clause. Equally noteworthy is that the case may signify the adoption of a less demanding standard for finding congressional intent to abrogate a state’s eleventh amendment immunity.

But Union Gas left many questions unanswered. Suing a state in federal court still remains what one federal judge described as “a wonderland of judicially created and perpetuated fiction and paradox.” The purpose of this article is to examine the impact of Union Gas on states sued in federal court. Part one presents an overview of eleventh amendment jurisprudence. Part two analyzes congressional power to create a cause of action against the states for monetary damages in federal court and examines the impact of Union Gas on the standard for finding congressional intent to abolish states’ immunity.

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1 U.S. Const. amend. XI states: “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.”
2 For discussion of the difficulties faced by the federal courts in applying the eleventh amendment, see Lichtenstein, Retroactive Relief in Federal Courts Since Edelman v. Jordan: A Trip Through the Twilight Zone, 32 Case W. Res. 364-418 (1982).
4 U.S. Const. art. I, sec. 8.
An Overview Of The Eleventh Amendment

The eleventh amendment was enacted in 1798 as a result of the U.S. Supreme Court’s interpretation of article III, section 2, of the U.S. Constitution, in *Chisholm v. Georgia.* Article III section 2 grants the federal courts jurisdiction over two types of cases, identified either by subject matter or parties. Subject matter jurisdiction includes federal questions (“all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made”). Party based jurisdiction is based on diversity of citizenship. It includes three types of diversity, ordinary diversity (“Controversies... between Citizens of different States”), state-citizen diversity (“between a State and Citizens of another State”), and state-alien diversity (“between a state... and foreign... Citizens”). There was much confusion in the state and federal ratification conventions over whether article III, section 2 granted federal courts jurisdiction over the states. The question of federal court jurisdiction received little attention at the Federal Convention. The debate, at the Federal Convention, centered on the method of selecting and tenure of federal judges. This was not the case at the state conventions. The question of whether article III, section 2 would give the federal courts jurisdiction over states was debated in at least six state conventions and at least four of these states considered amendments that would have prohibited federal courts from hearing cases when a state was being sued by a citizen of another state or nation. But none of these amendments were adopted.

The Court, in *Chisholm,* held that the federal courts had jurisdiction under article III, section 2 to hear private claims against states. The eleventh amendment was clearly enacted to abolish federal court jurisdiction over states in diversity cases, like *Chisholm.* It is not clear whether the amendment intended to abolished federal court jurisdiction over states in federal question cases. At the time of its enactment,
federal courts did not have federal question jurisdiction.\textsuperscript{14} It was not until 1875, that Congress granted the federal courts general federal question jurisdiction,\textsuperscript{15} and not until 1890, nearly 100 years after the enactment of the amendment, that the Court first addressed this issue. The Court in \textit{Hans v. Louisiana}\textsuperscript{16} held that the amendment barred a state from being sued by a citizen of the state in federal court. \textit{Hans} was not based on a literal reading of the eleventh amendment, but on the doctrine of state sovereignty. In Justice Bradley’s majority opinion, states are sovereign and cannot be sued without their consent.\textsuperscript{17}

Since \textit{Hans}, the Court has consistently held that the amendment protects a state from being sued in federal court under federal question jurisdiction.\textsuperscript{18} However, the Court minimized the effect of the amendment in a series of cases that limited its scope. The amendment does not apply to a suit brought against a state\textsuperscript{19} by the United

\begin{enumerate}
\item \textit{14} Judiciary Act of 1789, 1 Stat. 73 (1789); The Judiciary Act of 1801, 2 Stat. 132, 156 (1802) did grant general federal question jurisdiction to the federal circuit courts, but that grant was repealed one year later. \textit{See} Atascadero State Hospital v. Scanlon 473 U.S. 234 (1985).
\item \textit{15} Judiciary Act of 1875, 18 Stat. 470 (1875).
\item \textit{16} 134 U.S. 1 (1890). Hans, a citizen of Louisiana, sued the state to recover the amount owed on certain bonds issued by the state. The Court held that the eleventh amendment barred such suits.
\item \textit{17} \textit{Id.} at 13.
\item \textit{19} United States v. Mississippi, 380 U.S. 128, 140-141 (1965).
\end{enumerate}
States or another state.\textsuperscript{20} It does not prohibit local government entities or state officials from suit as long as the state is not the real party in interest.\textsuperscript{21} It does not prohibit the federal courts from hearing equity actions against states.\textsuperscript{22} A state can also waive its immunity or Congress could abrogate it.\textsuperscript{23}

The resurrection of the amendment began in the early 1970’s. In a series of cases, the Court expanded the situations where a state will be considered a real party in interest; limited equity awards to prospective relief, and increased the standard for finding a waiver or abrogation or a state’s immunity.

1. The Real Party in Interest Requirement

Suing a state official rather than the state for equitable relief has traditionally been an effective means of avoiding the eleventh amendment bar. In 1908, in \textit{Ex parte Young},\textsuperscript{24} the Court held that a suit against a state official to enjoin him from violating a federal law was not a suit against the state and as such not barred by the eleventh amendment. \textit{Young} created a convenient fiction. Instead of suing the state one simply sues the state official for injunctive relief. \textit{Young} did not indicate whether a federal court may award monetary benefits improperly denied by the state before the court’s injunction. However, after \textit{Young} the federal courts frequently, though not uniformly, awarded retroactive benefits.\textsuperscript{25}

The impact of \textit{Young} was limited in 1974 in \textit{Edelman v. Jordan}.\textsuperscript{26} \textit{Edelman}

\textsuperscript{21} Lincoln County v. Luning, 133 U.S. 529, 530 (1890).
\textsuperscript{22} \textit{Ex parte Young}, 209 U.S. 123 (1908), for a discussion of \textit{Young} see infra note 24.
\textsuperscript{23} \textit{Ex parte Young}, 209 U.S. 123 (1908) for a discussion of \textit{Young} see infra note 24.
\textsuperscript{24} 209 U.S. 123 (1908). \textit{Ex parte Young} is perhaps the most noteworthy interpretation of the amendment. In \textit{Young}, stockholders of the Northern Pacific Railway sued Young, the Attorney General for Minnesota, to enjoin the enforcement of certain railroad and warehouse commission rates which the plaintiff contended were unconstitutional. Young ignored a federal court injunction and sought to enforce the rate structure in state court. He was subsequently found in contempt and petitioned the U.S. Supreme Court for a writ of habeas corpus. He argued that the eleventh amendment barred federal court jurisdiction. \textit{Id.} at 159-60 The Court stated:

If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

For a discussion of the use of the \textit{Young} principle, see Lichtenstein, \textit{supra} note 2, at 366.
\textsuperscript{26} 415 U.S. 651 (1974). The eleventh amendment barred a class action filed against two former directors of the Illinois Department of Public Aid, for violating a federal regulation which required a determination of
held that: "(W)hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."27 Although the eleventh amendment does not apply to suits against local governmental entities,28 courts have used this analogy and examined the relationship between the state and the local government to determine if the state is the real party in interest.29 Critical factors are whether the local government exercised its own revenue raising power, whether the local government has the primary responsibility for providing public assistance, and whether the state is responsible to reimburse the local government for court judgments.30

2. Prospective Relief in Federal Courts

Edelman also held that the eleventh amendment bars a federal court from using its equity power to order retroactive relief, such as for welfare payments wrongfully withheld. The Court reasoned that the purpose of the eleventh amendment is to prohibit federal courts from imposing liability in a suit by a private party that must be paid from state public funds. The Court succinctly states the standard "(A) federal court’s remedial power, consistent with the eleventh amendment; is necessarily limited to prospective injunctive relief, and may not include a retroactive award which requires the payment of funds from the state treasury."31 Edelman overturned a number of cases that interpreted Young as allowing the federal courts to order states to pay retroactive benefits, from federally funded programs, which had been wrongfully withheld.32

Edelman was followed, in 1984, by Pennhurst State School & Hospital v. Halderman33 Pennhurst held that if the federal court is barred from hearing actions based on federal law against the state, the federal court is also barred from hearing state law claims brought in federal court under pendent jurisdiction. Pennhurst was followed, the next year, by Green v. Mansour, which held that a state could change its law to comply with federal law and thus bar federal court jurisdiction, since the need for prospective injunctive relief would be moot.34 The primary difficulty with the prospective relief requirement is that it is time based. One’s rights are not
dependent upon the merits of the claim, but rather, on when the suit was filed. Under *Green* the state, by subsequent unilateral action, can defeat the plaintiff's claim and have pendent state claims dismissed.\(^{35}\)

3. Waiver and Abrogation of a State's Eleventh Amendment Immunity

Federal courts have jurisdiction over a state if the state has waived its eleventh amendment immunity. A waiver is a voluntary action by the state. A state may waive its immunity through state statute,\(^{36}\) by voluntarily participating in a federally funded program which requires consent to suit in federal court as a condition of participation,\(^{37}\) or by participating in a lawsuit.\(^{38}\)

There has been a gradual tightening of the requirements for finding a waiver of a state's eleventh amendment immunity. In the 1960's the Court used the doctrine

\(^{35}\) For an analysis of federal cases allowing retroactive benefits, see Lichenstein, *supra* note 2, at 368.

\(^{36}\) The Court has established a very stringent requirement for finding a waiver of a state's eleventh amendment immunity through a state statute or constitution. In *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), the Court held that Art. III. \(\S\) 5 of the California Constitution, which provides: "Suits may be brought against the State in such manner and in such courts as shall be directed by law," was insufficient to waive eleventh amendment immunity. The Court held that "in order for a state statute or constitutional provision to constitute a waiver of eleventh amendment immunity, it must specify the State's intention to subject itself to suit in federal court." *See also* Florida Dept. of Health v. Florida Nursing Home Ass'n, 450 U.S. 147, 150 (1981) (Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984) ("[a] State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued.").

\(^{37}\) *Atascadero* held that \(\S\) 505 of the Rehabilitation Act of 1973, 87 Stat. 394 as amended, 29 U.S.C. \(\S\) 794, which provides remedies "to any person aggrieved by any act or failure to act by recipient of federal assistance or federal provider of such assistance" was insufficient to constitute a waiver as a condition of participating in a federal funded program. *See also* Florida Dept. of Health v. Florida Nursing Home Ass'n., 450 U.S. 147, 150 (1981), which held that an agreement under the Medicaid Act (42 U.S.C. \(\S\) 1396) in which the department "agrees to recognize and abide by all State and Federal Laws, Regulations, and Guidelines . . . " was insufficient to constitute a waiver.

\(^{38}\) In *Atascadero*, the Court required an unequivocal indication that the State intends to consent to federal jurisdiction before finding a waiver of its eleventh amendment immunity. 473 U.S. 234, 239-41 (1985); Barnes v. Bosley, 625 F. Supp. 81, 86 (E.D. Mo. 1985) ("The State's neglect in asserting the eleventh amendment does not constitute an 'unequivocal indication' of its consent to suit."); Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 467 (1945) (eleventh amendment may be raised for the first time in the Supreme Court). Since a federal court can enjoin future violation of federal law (Green v. Mansour, 474 U.S. 64 (1985)), action by a state official which delays prospective injunctive relief will constitute a waiver. *See Toll v. Moreno*, 458 U.S. 1 (1982) (a state university waived the eleventh amendment immunity by promising that if the trial court stayed its order pending appeal, it would make appropriate refunds of tuition if it lost the appeal); Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974) (a state official's promise, that the state would pay benefits wrongfully withheld if the court would not issue an injunction pending appeal, was sufficient to constitute a waiver of the eleventh amendment); Barnes v. Bosley, 625 F. Supp. 81 (E.D. Mo. 1985) (the state waived a portion of its eleventh amendment immunity by filing an answer in a wrongful discharge action seeking reinstatement and back pay.); W.J.M. Inc. v. Massachusetts Dep't of Pub Welfare, 840 F.2d 996 (1st Cir. 1988) (the state waived its eleventh amendment immunity by filing a bankruptcy proof of claim). The state only waives its immunity for prospective benefits. *See Buckhanon v. Percy*, 708 F.2d 1209, 1216 (7th Cir. 1983) (payment of state benefits prior to court's order retroactive); Nevels v. Hanlon, 656 F.2d 372, 377 (8th Cir. 1981) (payment of benefits from date of order allowed); Kimble v. Solomon, 599 F.2d 599, 605 (4th Cir. 1979) (state required to pay benefits after court's decree entered on remand); Townsend v. Edelman, 518 F.2d 116, 120 (7th Cir. 1975) (payment prior to entry of injunctive relief barred).
of constructive consent to allow federal courts to hear some federal question cases against the states. In the lead case of *Parden v. Terminal Railway Co.*, the Court held that an employee of a state-owned railroad could sue the state in federal court under the Federal Employers Liability Act (FELA) even though state-owned railroads were not expressly mentioned in the statute.

The swing away from the constructive consent doctrine began in 1973, in *Employees v. Missouri Public Health Department.* The Court held, in *Employees*, that Congress must make its intention "clear" if it sought to make a waiver of the state's sovereign immunity a condition of participation in a federal program. *Employees* was followed the next term by *Edelman v. Jordan* in which the Court set a still higher standard by stating that "we will find waiver only where stated by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction." *Edelman* was followed by *Welch v. State Department of Highways and Public Transportation* in which the Court affirmed the standard in *Edelman* and overturned the doctrine of constructive consent.

Abrogation is distinguishable from waiver in that it is based upon congressional power and not on state consent. Before *Union Gas*, the Court carefully avoided the question of congressional power to abrogate a state's eleventh amendment immunity under the commerce clause. In *Fitzpatrick v. Bitzer* the Court recognized congressional power to abrogate a state's eleventh amendment immunity under the enforcement provision of the fourteenth amendment. But the fourteenth amendment differed from the commerce clause in that the fourteenth amendment was enacted after the eleventh amendment. *Fitzpatrick* was in part an application of the general rule of construction that if two legal instruments of equal authority conflict, the more recently enacted prevails.

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39 377 U.S. 184 (1964) (a "common carrier by railroad . . ." was held to include state-owned railroads). *Parden* was overturned by *Welch*. See infra text accompanying note 42.
42 415 U.S. 651, 673 (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)).
44 See Justice Stevens' concurring opinion in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 459 (1976), in which he states that Congress has power under the commerce clause to abrogate the states' eleventh amendment immunity. Justice Stevens believed that the Court should have addressed the question of whether Congress has power to abrogate the states' eleventh amendment immunity in cases involving Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970) under the commerce clause rather than the fourteenth amendment. See also *Welch v. State Dept. of Highways & Pub. Transp.*, 483 U.S. 468, 107 S. Ct. 2941, 2946 (1987) in which Justice Powell writing for the majority stated: "We assume, without deciding or intimating a view of the question, that the authority of Congress to subject unconsenting States to suit in federal court is not confined to § 5 of the Fourteenth Amendment."
45 427 U.S. 445 (1976). The eleventh amendment does not prohibit states from being sued under the 1972 amendments of Title VII of the Civil Rights Act.
46 U.S. Const. amend. XIV § 5, provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."
Fitzpatrick was followed by a gradual tightening of the standards for finding an abrogation. In 1984, in *Pennhurst State School & Hospital v. Halderman* the Court required "an unequivocal expression of congressional intent." *Pennhurst* was followed one year later by *Atascadero State Hospital v. Scanlon* in which the Court held that Congress may abrogate the states' constitutionally secured immunity from suits in federal court only by making its intention unmistakably clear in the language of the statute.

Through *Employees, Edelman, Pennhurst, Fitzpatrick, Atascadero, Green,* and *Welch,* the Court established a very formidable eleventh amendment defense. If a state did not waive its immunity it could not be sued in federal court except in cases coming under section 5 of the fourteenth amendment, and even in section 5 cases congressional intent to subject states to federal jurisdiction would have to be shown "by unmistakably clear language in the statute itself." State officials are protected by the amendment if the state is the real party in interest. The amendment does not prohibit federal courts from enjoining future conduct, but retroactive awards which requires the payment from the state treasury is prohibited. While the Court thought these cases continued to strengthen the eleventh amendment defense the precedent, established by these cases, is by no means secure. Most of these cases were five to four decisions.

An Analysis Of Union Gas

*Union Gas* involved a suit by the Environmental Protection Agency (EPA) against the Union Gas Company for reimbursement of clean up costs. Union Gas' predecessor operated a coal gasification plant near Brodhead Creek in western Pennsylvania. The plant was dismantled around 1950. Coal tar began to seep in the creek, in 1980, shortly after the state of Pennsylvania struck a large deposit of the tar while excavating the creek. The EPA determined that the coal tar was a hazardous substance, cleaned up the site, and sued Union Gas to recoup its costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. (CERCLA). Union Gas filed a third party complaint against the State asserting that it was liable as an "owner and operator" of the site under CERCLA.

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49 473 U.S. 234 (1985). The Court refused, under the eleventh amendment, to allow a federal suit against a California state hospital brought by a diabetic person who was denied employment, allegedly due to his hardship, in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1973). The Court stated: "As we have recognized, the significance of this Amendment 'lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Article III of the Constitution.'" Id. at 238. Justice Brennan wrote a lengthy dissent which was joined by Justices Marshall, Blackmun, and Stevens.
51 See infra note 60.
53 42 U.S.C. § 9607 (d)(2) (1982 Supp. IV) provides: "No State or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another..."
The District Court dismissed the complaint since the state could not be sued under the eleventh amendment to the U.S. Constitution. The U.S. Third Circuit Court of Appeals affirmed, finding no clear expression of intent to hold states liable for monetary damages under CERCLA. The Supreme Court vacated and remanded the decision for reconsideration considering the amendment of CERCLA made by the Superfund Amendments and Reauthorization Act of 1986 (SARA). On remand the Court of Appeals held that SARA made the states liable for monetary damages and that Congress had the power to do so under the commerce clause. The Supreme Court affirmed the decision by a five to four majority.

Two questions were presented to the Court in Union Gas. First, whether Congress had the power under the commerce clause to create a cause of action against the states and second, whether SARA was intended to create such a cause of action.

1. Congressional Power Under the Commerce Clause to Create a Cause of Action Against the States

Before Union Gas, the Court had carefully avoided the question of whether the eleventh amendment prohibited Congress from subjecting states to federal jurisdiction under the commerce clause. As discussed earlier, the Court in Fitzpatrick held that the eleventh amendment did not prohibit Congress from granting jurisdiction over the states under the fourteenth amendment. But, in Fitzpatrick, the Court was careful to limit its holding to the fourteenth amendment, which was enacted, unlike the commerce clause, subsequent to the eleventh amendment. In recent cases such as Welch, the Court had expressly reserved judgment on this issue.

The primary precedent for holding that Congress did not have this power was Hans. Hans was based on the premise that when the Constitution was enacted, it was implied that a state as a sovereign was not subject to suit in federal court, except in those cases expressly provided for in the Constitution. That when Chisholm held otherwise, the eleventh amendment was enacted to restore state sovereignty. According to Justice Bradley's majority opinion in Hans, states are sovereign and person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government.  


59 Supra note 44.
Justice Brennan has been the most frequent and long-standing critic of this comprehensive interpretation of the eleventh amendment. In Justice Brennan’s view “‘(t)here simply is no constitutional principle of state sovereign immunity, and no constitutionally mandated policy of excluding suits against States from federal court.’”

Justice Brennan believes that the eleventh amendment was enacted to protect states from being sued by out-of-state creditors. In Atascadero, he wrote a lengthy dissenting opinion, referring to historical evidence that supports this position. Brennan points out that at the time the eleventh amendment was enacted, there was a very strong anti-British sentiment in the country, states were heavily indebted for Revolutionary War debts, and were afraid that Chisholm would force the payment of these debts to out-of-state Tories and British creditors. Brennan believes that this accounts for the very narrow wording of the amendment and the rejection, by Congress, of proposals abolishing federal question as well as diversity jurisdiction. In his view the eleventh amendment “bars federal court suits against States only by citizens of other States.”

It is noteworthy that Justice Brennan in this plurality opinion did not rely on the points presented in his earlier dissents. Instead of overturning Hans, Justice Brennan chose to distinguish it. Missing from the opinion was the historical analysis found in Atascadero and the policy arguments found in Green.

The precedent Justice Brennan cites for his position is quite sparse. He relies on Parden and Employees for the position that the Court had earlier recognized this legislative power. But in both of these cases the quotes relied upon are dictum. Parden was based on a waiver of eleventh amendment immunity not on congressional power under the commerce clause. Justice Brennan is correct that Parden was incorrectly based on an implied waiver but this was recognized by the Court when

60 134 U.S. 1, 13 (1890).
64 On the question of whether Congress has the authority to create a cause of action when legislating pursuant to the commerce clause, Justice Brennan delivered the opinion of the Court with Justices Marshall, Blackmun, Stevens, and White concurring. Justice Scalia filed a dissenting opinion, joined by Chief Justice Rehnquist and Justices O’Connor and Kennedy. On the question of whether CERLA as amended by SARA permits a suit for monetary damages against a state in federal court, Justice Brennan delivered the opinion of the Court with Justice Brennan delivered the opinion of the Court with Justices Marshall, Blackmun, Stevens, and Scalia concurring. Justice White filed a dissenting opinion, joined by Chief Justice Rehnquist and Justices O’Connor and Kennedy.
Parden was overturned in Welch. In Employees it was not necessary for the Court to address whether Congress could abrogate a state's immunity, because it held that Congress had not chosen to do so.

Justice Scalia's dissent notes the lack of case support for Justice Brennan's opinion, but offers little precedent and few policy arguments to support his position. In Justice Scalia's view, Hans should not be overturned because both state and federal governments have relied on it for over 100 years in enacting legislation. This concern appears to be unwarranted. Union Gas will not automatically make states subject to federal legislation. Before a state will be liable in federal court under federal law, congressional intent will still have to be shown by "unmistakably clear language of the statute." 65

2. The Evolving Standard for Finding Congressional Intent to Abrogate a State's Eleventh Amendment Immunity

As noted earlier, there has been a gradual tightening of the requirements for finding an abrogation of a state's eleventh amendment immunity. 66 The current standard which was adopted in Atascadero, requires that congressional intent must be "unmistakably clear in the language of the statute" itself. 67 One of the more perplexing eleventh amendment problems is applying this standard. 68 The problem centers on whether Atascadero requires the statutory language must be so clear that it would preclude all other possible statutory interpretations and whether legislative history can be used to decide congressional intent. Regretably, Union Gas offers little guidance on either of these questions.

Union Gas was originally filed under CERCLA. CERCLA allows those who have incurred clean-up costs to sue "any person." 69 The definitional section of CERCLA included a state within the definition of a person. 70 The Court of Appeals held that the state should be dismissed as a defendant since the clear language

66 See supra, text accompanying notes 44-49.
requirement was not met. The Court of Appeals relied on Employees which held that a similar provision was insufficient to find congressional intent to include states since the language could be interpreted as only allowing states to be sued by the federal government. The U.S. Supreme Court vacated the judgment and remanded for reconsideration in light of the subsequent amendments to CERCLA made by SARA. Section 101 of the SARA adds a new provision to the definition of "owner or operator" in CERCLA. The new provision specifies situations where a state would not be considered an owner or operator and provides that the exclusion would not apply to a state which "cause or contributed to the release or threatened release of a hazardous substance from the facility." The Court of Appeals found this provision to meet the clear language requirement.

The confusion over the use of legislative history to find an abrogation is a product of the standard set forth in Quern v. Jordan and modified in Atascadero. Quern required an unequivocal expression of congressional intent before finding an abrogation of a state's eleventh amendment immunity. Under Quern the Court considered legislative history in determining congressional intent. The Court, in Atascadero, appeared to set a higher standard than Quern, by holding that Congress' intent must be unmistakably clear in the language of the statute itself. A literal reading of this standard would appear to preclude the use of legislative history in determining congressional intent. This conclusion is buttressed by the fact that in Atascadero there appeared to be ample evidence in the legislative history to indicate that Congress intended states to be liable under § 504 of the Rehabilitation Act.

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72 Id. at 377.
74 42 U.S.C. 9601(20)(D) (1986) provides in full:

(D) The term "owner and operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

77 Id. 440 U.S. 332, 342 (1979).
80 See Kelly v. Metro County Bd. of Educ. 773 F.2d 677, 687 (6th Cir. 1985) (Award of Attorney's Fees under the Civil Rights Attorney Fees Act (42 U.S.C. § 1988) not barred by the 11th amend., Judge Kennedy dissented on the grounds that the 11th Amend. barred awards); see also Matter of McVey Trucking, Inc., 812 F.2d 311, 326 (7th Cir. 1987) cert. denied 484 U.S. 895 (1987) (dictum in the decision indicates that Atascadero was not intended to overturn Hutto).
The Court of Appeals, in *Union Gas*, wrestled with this problem. *Union Gas* was originally filed under CERCLA. At the first hearing, the Court of Appeals noted the ambiguity as to whether legislative history could be used in finding congressional intent, but held that the issue was moot since such intent was not shown from the legislative history. The U.S. Supreme Court vacated the judgment and remanded for reconsideration in light of the subsequent amendment to CERCLA made by SARA. The Court of Appeals found that the legislative history of SARA supported the finding that Congress intended to make states liable for private causes of action.

Justice Brennan wrote a lengthy dissent in *Atascadero*. He pointed out the Court's adoption of new and unwarranted requirements. In his view, complex rulemaking which would be applied retroactively was unwarranted. Regretably, Justice Brennan chose to decide *Union Gas* under the clear language standard rather than clarify its requirements or break new ground. Justice Brennan distinguished *Union Gas* from *Employees* based upon different statutory language. This distinction was weak-ended in that only three justices agreed with Brennan on this point. Justice Brennan did not mention the legislative history which was relied on by the Court of Appeals and did not address whether legislative history could be used under *Atascadero*. Justice Scalia, who concurred with the majority on this point, relied on the legislative history to find congressional intent.

Ironically, *Union Gas* illustrates rather than solves the problem in applying the clear language standard. Although Congress amended CERCLA to make it applicable to the states, four of the justices believed that the clear language requirement had not been met and Justice Scalia found sufficient congressional intent by not limiting his examination to the "language of the statute itself."

**Conclusion**

With the revitalization of the eleventh amendment following *Edelman*, the Court began expanding the limits of the amendment's bar. While vague notions of federalism have often been invoked to provide support for the Court's interpretation, closer analysis, considering the history and purpose of the amendment, suggests that the Court has unduly restricted the power of the federal courts.

*Union Gas* represents a workable solution to the eleventh amendment problems. State activities have increased in types and complexity from those at the time the amendment was enacted. Today, states are involved in many proprietary functions which are regulated by federal law. Recently states have been named as

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86 Supra note 63.
defendants in cases involving copyrights, bankruptcy, securities, and anti-trust law. A waiver may be an effective mechanism for holding states responsible under entitlement programs but it is ineffective in regulating proprietary functions.

The author urges the Supreme Court to reexamine the line of cases which hold that the federal courts will not have jurisdiction over the states unless congressional intent is "unmistakably clear in the language of the statute." Such a requirement may be appropriate when federal jurisdiction is based on states' waiver of their eleventh amendment immunity as a condition of participating in a federally funded program, but when congressional action is based on its plenary powers, waiver is not a requirement. In these cases, the Court should apply standard rules of construction to determine congressional intent, but not require that this intent be "unmistakably clear in the language of the statute." Since most of the statutes in question were enacted before Atascadero, this standard appears to thwart, not follow, congressional intent.

The author believes that the standard set in Pennhurst is the appropriate one to determine congressional intent. Requiring "an unequivocal expression of congressional intent" to find an abrogation would protect the states from federal courts assuming jurisdiction when not clearly specified by Congress, but would not be as restrictive as Atascadero.

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87 B. V. Engineering v. University of Cal., 657 F. Supp. 1246 (C.D. Cal. 1987) (Congress has not abrogated a state's eleventh amendment immunity under the Copyright Act).
90 Charley's Taxi Radio Dispatch v. SIDA, 810 F.2d 869 (9th Cir. 1987) (the Hawaii Dept. of Transp. was immune from suit under section one of the Sherman Act for granting an exclusive contract for taxi service from the Honolulu International Airport).