State Sovereign Immunity After Pennsylvania v. Union Gas Co.: The Demise of the Eleventh Amendment

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STATE SOVEREIGN IMMUNITY AFTER PENNSYLVANIA V. UNION GAS CO.: THE DEMISE OF THE ELEVENTH AMENDMENT

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.¹

Since its ratification in 1798, the eleventh amendment has sheltered wrongful suits from citizen suits in federal court. Interpreted literally, the amendment denies federal court jurisdiction only in diversity suits, those suits “against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”² In Hans v. Louisiana,³ decided nearly a century after the ratification of the eleventh amendment, the United States Supreme Court extended eleventh amendment state immunity to citizen suits in federal court in which jurisdiction is premised upon the presence of a federal question.⁴ Rather than limit state immunity to suits clearly articulated in the amendment, the Court broadly interpreted the general principle of state sovereign immunity as reflected in the eleventh amendment to protect states from suits in federal court brought by citizens of any state.⁵

Although the Court in Hans recognized the principle of state sovereign immunity without exception, throughout the past century the Court has restricted the states’ ability to shield themselves behind the eleventh amendment.⁶ In so doing, the Court

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¹. U.S. CONST. amend. XI.
². Id.
³. 134 U.S. 1 (1890).
⁴. See id. at 15-18.
⁵. Justice Bradley ridiculed the proposition that the eleventh amendment’s extension of state immunity only from suits brought by noncitizens rendered a suit against a state brought by one of its own citizens constitutionally permissible: Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.
⁶. See infra notes 65-159 and accompanying text.
has created a perplexing state immunity doctrine heavily criticized by both scholars and the Supreme Court.\textsuperscript{7}

In its eleventh amendment decisions, the Court has attempted to balance individual rights against the autonomy of states within the federal system.\textsuperscript{8} Until 1989, the Court had approved congressional abrogation of state immunity through only the exercise of limited and well-defined legislative powers, such as the fourteenth amendment,\textsuperscript{9} or the exercise of broad commerce clause powers accompanied by implied state consent.\textsuperscript{10}

The Court developed a dual standard of review to evaluate congressional attempts to limit state immunity, which focused on the legislative power under which Congress acted. In cases involving transgressions upon individual rights protected by fourteenth amendment legislation,\textsuperscript{11} the Court recognized federal court jurisdiction only if clear statutory language conveyed congressional intent to override state immunity.\textsuperscript{12} Employing a stricter standard when the state's conduct allegedly violated commerce clause legislation, the Court recognized federal court jurisdiction only if the state impliedly waived its immunity by participating in a federally regulated activity under legislation clearly calling for consent to suit in federal court.\textsuperscript{13} This dual standard respected both the federal government's role as the guarantor of basic individual rights\textsuperscript{14} and eleventh amendment state sovereignty concerns.\textsuperscript{15}

\textsuperscript{7} See Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 519 (1987) (Brennan, J., dissenting) (eleventh amendment doctrine "lacks a textual anchor, an established historical foundation, or a clear rationale"); H. FINK & M. TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 137 (1984) (eleventh amendment case law is "replete with historical anomalies, internal inconsistencies, and senseless distinctions").

\textsuperscript{8} Note, Reconciling Federalism and Individual Rights: The Burger Court's Treatment of the Eleventh and Fourteenth Amendments, 68 VA. L. REV. 865, 865 (1982).


\textsuperscript{10} See, e.g., Parden v. Terminal Ry. of Ala. State Docks Dep't, 377 U.S. 184 (1964).

\textsuperscript{11} The fourteenth amendment provides that:

\[ \text{[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.} \]

U.S. CONST. amend. XIV, § 1.

\textsuperscript{12} See, e.g., Fitzpatrick, 427 U.S. at 453-56; see infra notes 95-120 and accompanying text.

\textsuperscript{13} See, e.g., Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973); see infra notes 79-94 and accompanying text.


\textsuperscript{15} See Note, supra note 8, at 867.
In the 1989 case of *Pennsylvania v. Union Gas Co.*, however, the Supreme Court significantly diminished its standard for inferring state consent to federal court jurisdiction under commerce clause legislation. The Court found state consent not through state participation in a federally regulated activity, but through the states' ratification of the commerce clause two hundred years ago. This decision opened the door for Congress to interfere with state autonomy in any area properly governed by commerce clause legislation. Although the Court still required a clear expression of congressional intent to override state immunity, the Court's elimination of its previous consent standard stripped the states of any power to control their appearances in federal court.

The Court's decision in *Union Gas* reduced state immunity under the eleventh amendment to a mere privilege, revocable at the will of Congress. Although this decision reconciles the Court's eleventh amendment jurisprudence with recent changes in the state sovereignty doctrine under the tenth amendment, the Court's refusal to look beyond the statutory language violates the principle of federalism embodied in the "letter and spirit of the constitution." This Note explores the concept of state immunity and the need for an expanded judicial standard of review to ensure the protection of the states' role in the federal system. First, this Note reviews briefly the development of state immunity through article III of the Constitution, the eleventh amendment, and the Court's decision in *Hans v. Louisiana*. Next, this Note discusses...
the limitation of state immunity through congressional abrogation and the Court's final reliance on the clear statement rule in Union Gas. Drawing from tenth amendment jurisprudence, this Note then concludes with an alternative perspective on the role of federalism in the limitation of congressional power to override state immunity.

STATE SOVEREIGN IMMUNITY: ITS ORIGIN AND DEVELOPMENT

The Origin of State Sovereign Immunity: Common Law

The principle of sovereign immunity is rooted deeply in the English common law. As early as the reign of King Henry III (1216-1272), English courts granted the king immunity from suits in his own courts. This immunity was not absolute, however, and numerous private remedies against the ruling sovereign developed from the reign of Edward I (1272-1307) through the late eighteenth century.

The American colonists understood well the doctrine of sovereign immunity. In crafting the delicate balance between state and federal power in the newly formed union, the Framers

21. See C. Jacobs, The Eleventh Amendment and Sovereign Immunity 5-8 (1972). In his Commentaries, Sir William Blackstone observed that despite the protection that the doctrine of sovereign immunity afforded the king, a subject could rely on the king to recognize and redress any wrong committed by the king or his ministers. Id. at 7-8 (citations omitted).

That the king can do no wrong, is a necessary and fundamental principle of the English constitution: meaning only . . . that, in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the king; nor is he, but his ministers, accountable for it to the people: and, secondly, that the prerogative of the crown extends not to do any injury; for, being created for the benefit of the people, it cannot be exerted to their prejudice. Whenever therefore it happens, that, by misinformation or inadvertence, the crown hath been induced to invade the private rights of any of it's [sic] subjects, though no action will lie against the sovereign, (for who shall command the king?) yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute: and, as it presumes that to know of an injury and to redress it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved.

22. See C. Jacobs, supra note 21, at 5.

23. See id. at 5-6.

24. See id. at 4-12.
grappled with the need for a strong federal judiciary and the fear that an overly powerful national government would quash the independent existence of the states.25

The Development of State Sovereign Immunity in the United States

The Constitution

Article III, section 2 of the Constitution defines the scope of the federal judicial power in the United States.26 This article grants federal court jurisdiction in suits brought by the United States, suits brought by other states, and controversies "between a State and Citizens of another State."27 Article III fails to differentiate between suits in which the state is a plaintiff and those in which the state is a defendant.28

The evolution of the language of article III prior to its adoption sheds no light on its implications for state sovereign immunity. At the Constitutional Convention in 1787, Edmund Randolph proposed a resolution for the establishment of a National Judiciary.29 Language extending the federal judicial power to suits between states and citizens of another state first appeared in a report submitted to the Constitutional Convention by the Com-

25. See id. at 9-26. George Mason expressed his fear that "the general government being paramount to, and in every respect more powerful than the state governments, the latter must give way to the former." Address in the Ratifying Convention of Virginia (June 4-12, 1788), reprinted in ANTI-FEDERALISTS VERSUS FEDERALISTS 208-09 (J. Lewis ed. 1967). James Madison feared that without national supremacy in the judicial branch, the national legislative power might be rendered "unavailing," in that those "expound[ing] and apply[ing] the laws [would be] connected by their oaths and interests wholly with the particular states and not with the Union." C. JACOBS, supra note 21, at 11.

26. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

27. Id.

28. See id.

Because the records of the Constitutional Convention contain no reference to debate on this passage, the debates that took place at state ratification conventions provide the only insight into the Framers' intentions.

James Wilson, a member of the Committee of Detail, argued at the Pennsylvania Ratification Convention that a federal judicial power extending to cases brought by a citizen of one state against another state was necessary to promote the constitutional concept of impartiality. At the Virginia Convention, James Madison, fearing that this provision would leave states open to suit in federal court for accumulated Revolutionary War debt, argued that the provision granted federal court jurisdiction only when the state was the plaintiff. John Marshall supported Madison's interpretation, contending that "[i]t is not rational to suppose that the sovereign power should be dragged before a court."

The history of the Constitution's ratification reflects a divergence of views over whether, and in what circumstances, the states would retain their sovereign immunity. As Justice Powell later noted, "At most . . . the historical materials show that—to the extent [the] question [of whether the Constitution would abrogate the sovereign immunity of the states] was debated—the intentions of the Framers and Ratifiers were ambiguous."

**Chisholm v. Georgia**

Soon after the ratification of article III, Alexander Chisholm called upon the Supreme Court to determine whether private citizens could subject states to suit in federal court. As the executor of the estate of South Carolinian Robert Farquar, Chisholm v. Georgia, 2 U.S. (2 Dall.) at 419 (1793).
holm filed an original action in the Court against the State of Georgia, seeking to recover a debt owed to Farquar for supplies that he furnished to Georgia during the Revolutionary War.37 Georgia refused to appear, claiming that the federal courts had no jurisdiction over such a suit.38 By a four-to-one vote, the Court held that article III, section 2 of the Constitution conferred jurisdiction upon the federal courts whenever a citizen of one state sued another state.39 The Court then entered judgment against Georgia.40

Chief Justice Jay and Justice Wilson in the majority relied upon the broad philosophical notion that complete sovereignty was inconsistent with democracy and determined that the Constitution could authorize federal court jurisdiction over states.41 Justices Blair and Cushing restricted their analysis to a literal interpretation of article III and concluded that the states surrendered their sovereignty when they ratified this article.42 Justice Iredell, the lone dissenter, determined that the federal courts lacked jurisdiction absent congressional authorization.43

The Eleventh Amendment and Express State Immunity in Diversity Cases

Political responses to Chisholm were swift. The day after the Court announced its decision, Representative Theodore Sedgwick introduced a resolution in the House for a constitutional amendment calling for complete state immunity.44 A second resolution

37. See id. at 420; Nowak, supra note 29, at 1430-31.
38. See Chisholm, 2 U.S. (2 Dall.) at 419.
39. See id. at 479.
40. See id. at 480.
41. See Nowak, supra note 29, at 1431-32.
42. See id.
43. Chisholm, 2 U.S. (2 Dall.) at 432-33 (Iredell, J., dissenting). Finding no congressional grant of federal jurisdiction over assumpsit actions, Iredell limited his decision to the narrow question of whether article III authorized the Court to hear such a suit. Iredell believed that congressional power should not extend to the ability to abrogate state immunity in federal courts: “So much, however, has been said on the constitution, that it may not be improper to intimate, that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a state for the recovery of money.” Id. at 449 (Iredell, J., dissenting). Later in his opinion, however, he expressed serious doubts concerning the judiciary’s role in determining such issues of policy. See id. at 450 (Iredell, J., dissenting); Nowak, supra note 29, at 1432-33.
44. That no state shall be liable to one made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons whether a citizen or citizens, or a foreigner or foreigners, of any body politic or corporate, whether within or without the United States.
Nowak, supra note 29, at 1496 (quoting Pennsylvania Journal, Feb. 20, 1793).
followed, and a third resolution addressing state immunity was introduced in the Senate on January 2, 1794:

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.

This third resolution became the eleventh amendment.

The drafters of the eleventh amendment failed to make their intentions clear. One theory suggests that the eleventh amendment reaffirmed the general understanding of state immunity at the time the Framers drafted the Constitution: states retained their sovereign immunity from suit by individuals, notwithstanding the fact that article III grants federal courts jurisdiction in all cases between a state and citizens of another state, regardless of whether the state is a plaintiff or a defendant. Another theory suggests that the states ratified the amendment out of fear that federal courts could otherwise compel them to pay accumulated debts owing to noncitizen creditors. The history behind the passage of the eleventh amendment does not clarify whether the drafters intended to prevent the federal judiciary from assuming jurisdiction over such suits or whether the drafters hoped to preclude any branch of the federal government, including Congress, from authorizing suits against states.

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45. "The Judicial power of the United States shall not extend to any suits 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." 3 ANNALS OF CONG. 651-52 (1793).

46. 4 ANNALS OF CONG. 26 (1794).

47. On January 14, 1794, the Senate passed the eleventh amendment by a vote of 23-to-2. Id. at 30. On March 4, 1794, the House of Representatives passed the amendment by a vote of 81-to-9. Id. at 476-78. Within one year, the requisite number of states ratified the eleventh amendment. See C. JACOBS, supra note 21, at 67.


49. Id. at 68.

50. Professor Nowak argues that the states ratified the eleventh amendment only to prevent the federal courts from imposing retroactive liabilities on them. He suggests that the states tacitly approved of Congress' ability to override state immunity: No evidence exists that the states had the same fear of congressional authorization of suits against states. Indeed, given the assumption of state debts by the Congress in the period following the Revolutionary War it is most likely that these representatives had implicit faith in the congressional ability to balance the interests of the state and federal governments. Nowak, supra note 29, at 1440-41.
The Eleventh Amendment and Implied State Immunity in Federal Question Cases

The Supreme Court had few occasions to interpret the eleventh amendment until nearly one hundred years after its ratification. In Hans v. Louisiana, decided in 1890, the Court extended eleventh amendment state immunity, holding that the eleventh amendment prohibited a citizen of a state from suing the state in federal court on the basis of federal question jurisdiction. The landmark decision in Hans ushered in a century of confusing analysis and distorted interpretation of the contours of the eleventh amendment.

In Hans, a Louisiana citizen sued Louisiana to recover unpaid interest on bonds upon which the state had defaulted. Hans filed suit in federal court, asserting that the state’s constitutional amendment disclaiming liability on the bonds violated the contracts clause of the Constitution. After stating that the eleventh amendment unquestionably denied federal court jurisdiction in suits against states by citizens of other states, whether premised upon a federal question or diversity of citizenship, the Court maintained that the principle that a state could not be sued without its consent was “inherent in the nature of sovereignty.”

Justice Bradley looked not to the letter of the eleventh amendment, but to “history and experience and the established order...
of things." He interpreted the eleventh amendment as a direct repudiation of Chisholm v. Georgia and returned to the construction of article III to ascertain whether the states surrendered their immunity by ratifying the Constitution. Bradley observed that, with a few explicit exceptions, the Framers had not intended to create new causes of action through the language of article III. He recognized further that "[t]he suability of a State without its consent was a thing unknown to the law." In holding that article III did not alter the doctrine of state immunity existing at the time of its ratification, Bradley relied substantially upon the remarks of those Federalists opposed to federal court jurisdiction over state defendants.

Although the Court in Hans based its decision upon only one side of the Framers' debate over the need to preserve state immunity, the Court expressed a principle that became well established over the course of the next century: "[T]hat the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away."

THE DECLINE OF STATE SOVEREIGN IMMUNITY

Preliminary Limitations

Prior to 1964, the federal question actions challenged under the eleventh amendment arose under the Constitution rather than under a congressional statute. Such suits thus came squarely within the holding of Hans v. Louisiana. During this period, the

58. Id. at 14.
59. 2 U.S. (2 Dall.) 419 (1793).
60. Hans, 134 U.S. at 11-15.
61. Id. at 15. "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States." Id. Article III made justiciable certain controversies unknown at common law, such as controversies between states as to boundary lines. Id.; see U.S. Const. art. III, § 2, cl. 1.
63. Id. at 12-14.
66. 134 U.S. 1. The petitioner in Hans alleged a violation of the contracts clause. Id. at 3; see supra notes 52-63 and accompanying text.
Supreme Court established some basic limitations to the protection afforded by the eleventh amendment.

By its terms, the eleventh amendment does not preclude suits brought against a state by the United States or by another state. In addition, the amendment does not prohibit either suits against local governments or, unless the state is the real party in interest, suits against state officials sued in their individual capacities in federal court for illegal actions. Finally, the eleventh amendment does not bar suits to enjoin state officials from enforcing state laws that violate federal law.

These initial limitations helped define areas excluded from eleventh amendment shelter, but were useless to measure the scope of eleventh amendment protection under the *Hans* principle. In the 1960's, when Congress began to enact legislation that arguably left states susceptible to citizen suits in federal court, the Court finally examined the *Hans* principle of state immunity and attempted to develop practical guidelines for its application.

**The Dual Standard of Review: Implied State Consent and the Clear Statement Rule**

Prior to *Pennsylvania v. Union Gas Co.*, the Court permitted congressional abrogation of state immunity only through the exercise of specific legislative powers alone, such as the fourteenth amendment, or through the exercise of broad legislative powers, such as the commerce power, if accompanied by implied state consent. Certain conditions, however, limited Congress' ability to remove state immunity. When legislating pursuant to the fourteenth amendment, Congress could override state immunity to suit in federal court only if "unmistakably clear" statutory language conveyed such congressional intent. When

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67. United States v. Mississippi, 380 U.S. 128, 140-41 (1965); U.S. CONST. amend. XI.
68. South Dakota v. North Carolina, 192 U.S. 286, 315-16 (1904); U.S. CONST. amend. XI.
69. Lincoln County v. Luning, 133 U.S. 529, 530 (1890).
73. See infra notes 74-159 and accompanying text.
legislating pursuant to the commerce clause, Congress could override state immunity only if Congress stated clearly its intent to do so and the state consented to federal jurisdiction by subsequently participating in a federally regulated activity.\textsuperscript{78}

In 1964, the Court addressed for the first time whether Congress could grant federal court jurisdiction over a private cause of action for damages against a state.\textsuperscript{79} In \textit{Parden v. Terminal Railway of Alabama State Docks Department},\textsuperscript{80} five employees of a railway owned and operated by Alabama sued the state in federal court under the Federal Employers' Liability Act (FELA) for injuries suffered while working for the railway.\textsuperscript{81} The Court upheld federal court jurisdiction in the employees' suit.\textsuperscript{82}

Using broad terms, Justice Brennan addressed the scope of congressional power under the commerce clause.\textsuperscript{83} Having first declared that "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce,"\textsuperscript{84} Brennan rested his decision upon the narrow grounds that, by operating a railway in interstate commerce, Alabama consented to the provisions of FELA, including federal court jurisdiction.\textsuperscript{85} In \textit{Parden}, Brennan recognized that, regardless of Congress' authority to declare states amenable to suit in federal court, state consent remained the key requirement:

\begin{quote}
Recognition of the congressional power to render a State suable under the 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 State's own citizens by the \textit{Hans} case, is here being overridden. It remains the law that a State may not be sued by an individual without its consent.\textsuperscript{86}
\end{quote}


\textsuperscript{79} \textit{Parden}, 377 U.S. at 187.

\textsuperscript{80} 377 U.S. 184.

\textsuperscript{81} Id. at 184-85. FELA provides that "[e]very 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" and that "[u]nder this chapter an action may be brought in a district court of the United States." 45 U.S.C. \S\S 51, 56 (1982).

\textsuperscript{82} \textit{Parden}, 377 U.S. at 192.

\textsuperscript{83} Id. at 190-91.

\textsuperscript{84} Id. at 191.

\textsuperscript{85} Id. at 192. "Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the [FELA]; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit." \textit{Id}.

\textsuperscript{86} Id. The Court suggested that it would infer state consent whenever a state
The clear statement rule evolved naturally from the principle of implied state consent that the Court relied upon in *Parden*. Because implied state consent to federal jurisdiction must necessarily rest upon some articulated congressional reference to such jurisdiction, the Court began to require a clear statement of Congress' intent to limit state immunity in the statutory language.\(^7\) In *Employees of Department of Public Health & Welfare v. Department of Public Health & Welfare*,\(^8\) employees of state hospitals and schools sued the state under the Fair Labor Standards Act (FLSA) for overtime compensation, liquidated damages, and attorneys' fees.\(^9\) Although the FLSA defined state hospitals and schools as employers and section 16(b) granted any covered employee a cause of action against his or her employer,\(^9\) the Court declined to infer that Congress intended to subject states to suit in federal court for damages under the remedial provisions of the FLSA.\(^9\) The Court distinguished *Parden*, noting that the operation of a railroad was a proprietary activity that private business interests normally controlled, whereas the management of schools and hospitals was traditionally a governmental activity.\(^9\) In this manner, the Court summarily dismissed *Parden* as involving only "a rather isolated state activity"\(^9\) and determined participated in federally regulated activities subject to federal court jurisdiction. "[W]hen a State leaves the sphere that is exclusively its own and 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.


\(^8\) *Id.*

\(^9\) *Id.* at 281. Although the original statute did not apply to government employees, the 1966 amendments extended its provisions regulating minimum wage and overtime pay to "employees of a State, or a political subdivision thereof, employed [] in a hospital, institution, or school." Pub. L. No. 89-601, § 102(b), 80 Stat. 830, 831 (1966), amended by 29 U.S.C. § 203(d), (r) (1974).

\(^90\) Any employer who violates . . . this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages . . . . An action to recover the liability . . . may be maintained . . . . in any Federal or State court of competent jurisdiction . . . .


\(^91\) See *Department of Pub. Health & Welfare*, 411 U.S. at 284-85. Because § 216(b) of the FLSA delegated jurisdiction over FLSA suits to "any court of competent jurisdiction," without specifying federal courts, the Court refrained from an expansive interpretation of congressional intent. *Id.* at 285.

\(^92\) See *id.*. The Court later rejected this distinction between proprietary and traditional government activities in the context of the tenth amendment. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 538-47 (1985); see infra notes 178-92 and accompanying text.

that when Congress intended to place new fiscal burdens on states through their involvement in traditional governmental activities, Congress could not do so silently.\textsuperscript{94}

Soon after \textit{Department of Public Health & Welfare}, the Court reaffirmed its adherence to the clear statement rule, this time in construing fourteenth amendment legislation in \textit{Edelman v. Jordan}.\textsuperscript{95} The Court held that, absent clear congressional authorization, the eleventh amendment precluded federal jurisdiction over suits against states in which the plaintiffs sought retrospective damages for alleged violations of fourteenth amendment legislation.\textsuperscript{96} The Court rejected the lower court's conclusion that the state's mere participation in the federally funded Aid to the Aged, Blind, or Disabled program constituted constructive consent to federal jurisdiction.\textsuperscript{97} Although the Court discussed at length the distinction between prospective and retrospective relief,\textsuperscript{98} it denied federal jurisdiction based upon the statute's failure to satisfy the clear statement rule.\textsuperscript{99}

In \textit{Fitzpatrick v. Bitzer},\textsuperscript{100} however, the Court determined that Congress satisfied the clear statement rule in the 1972 amendments to title VII of the Civil Rights Act of 1964.\textsuperscript{101} In \textit{Fitzpatrick}, the Court found that the eleventh amendment did not bar a federal court from granting a retroactive award of wrongfully withheld retirement benefits.\textsuperscript{102} The 1972 amendments, passed

\textsuperscript{94.} See \textit{id. at} 284-85. "It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution." \textit{id. at} 285.


\textsuperscript{96.} \textit{Id.} Although the plaintiff in \textit{Edelman} sued the nominal defendant, the Director of the Illinois Department of Public Aid, to enjoin him from future violations of the Social Security Act, the plaintiff also sought retrospective damages in the nature of equitable restitution of the wrongfully withheld statutory benefits. \textit{Id. at} 656. Justice Rehnquist noted that the injunctive relief sought fell within the ambit of \textit{Ex parte Young}, 209 U.S. 123 (1908), which upheld an individual's right to enjoin a state official from enforcing an unconstitutional statute, notwithstanding the eleventh amendment. \textit{Edelman}, 415 U.S. at 656. When Rehnquist considered the retrospective portion of the award, he observed that "[h]ese funds will obviously not be paid out of the pocket of petitioner Edelman." \textit{Id. at} 664. Because general state revenues inevitably would provide the funds to satisfy such an award, the Court held that this suit essentially sought damages against the state and was therefore barred by the eleventh amendment. \textit{Id. at} 668-69.

\textsuperscript{97.} \textit{Id. at} 673.

\textsuperscript{98.} \textit{Id. at} 664-68.

\textsuperscript{99.} See \textit{id. at} 673.

\textsuperscript{100.} 427 U.S. 445 (1976).


\textsuperscript{102.} \textit{Fitzpatrick}, 427 U.S. at 451-56.
pursuant to section five of the fourteenth amendment, authorized federal courts to award money damages to a private individual whenever a court found that a state government had subjected that person to employment discrimination. The Court of Appeals for the Second Circuit upheld the district court’s grant of prospective injunctive relief against the wrongful state officials, but denied petitioners’ request for retrospective money damages.

Writing for the Court, Justice Rehnquist remarked that the enforcement provision of the fourteenth amendment, which grants Congress authority to enforce the substantive provisions of the amendment “by appropriate legislation,” limits the eleventh amendment and the principle of state sovereignty that it embodies. The Court found that the 1972 amendments, which made title VII of the Civil Rights Act of 1964 applicable to state and local governments, authorized employees to sue the state as an employer in federal court. This clear expression of congressional intent to subject states to the same standards as private employers allowed the imposition of both prospective and retrospective relief upon a state.

In Fitzpatrick, Rehnquist intimated that the Court would not grant Congress the same free rein to abrogate state immunity when legislating pursuant to powers other than the fourteenth amendment. Rehnquist asserted, “We think that Congress may, in determining what is `appropriate legislation’ for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.” The dual standard that Rehnquist implicitly supported ensured adequate protection of civil rights without infringing upon the well-established concept of state immunity.

103. See id. at 447.
105. U.S. Const. amend. XIV, § 5.
108. Fitzpatrick, 427 U.S. at 452.
109. Id. at 451-56.
110. See id. at 456.
111. Id. (emphasis added).
112. See Note, supra note 8, at 881-91 (arguing that the “paramount importance” of civil rights justifies “a less precise articulation of congressional intent” to override state immunity).
The Court’s clear statement standard endured. In *Atascadero State Hospital v. Scanlon*, the plaintiff claimed that California violated the Rehabilitation Act of 1973 by denying him employment because of physical disabilities. The Act prohibited employment discrimination against otherwise qualified handicapped persons by any recipient of federal assistance. California received such federal assistance.

Although the legislative history suggested that Congress intended for the Act’s remedies to apply to the states, the Court found no clear statement of this intention in the statute: “A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically.” In response to the court of appeals’ holding that the state had consented to suit in federal court by accepting funds under the Rehabilitation Act, the Court in *Atascadero* found no clear statement of congressional intent to condition the acceptance of federal funds on waiver of state immunity.

When the question of congressional authority to abrogate state immunity under the commerce clause surfaced again in *Welch v. Texas Department of Highways and Public Transportation*, Congress’ failure to satisfy the clear statement requirement prevented the Court from finding congressional power to abrogate state immunity absent a state’s consent. In *Welch*, an employee of the state highway department sued the state under the Jones Act to recover for injuries she received while working. The

115. *Atascadero*, 473 U.S. at 236.
117. *Atascadero*, 473 U.S. at 236.
118. Id. at 246.
120. “The Act likewise falls far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State’s consent to waive its constitutional immunity.” *Atascadero*, 473 U.S. at 247.
122. The Court assumed, for the purpose of analyzing Jean Welch’s case, that Congress had the authority to subject unconsenting states to suit in federal court under its commerce clause powers, but found that the legislation at issue failed to clearly express congressional intent to abrogate state immunity. *See id.* at 475 (plurality opinion). The Court thus had no occasion to examine the validity of its initial assumption.
Court overruled *Parden*, insofar as it allowed the Court to infer congressional intent to abrogate state immunity absent express statutory language, and upheld *Atascadero*’s requirement of unequivocal statutory language in order to override state immunity.

In *Welch*, an evenly divided Court argued over the continuing validity of *Hans v. Louisiana*. Both factions discussed extensively the history of state sovereign immunity and the eleventh amendment. The split, however, prevented the Court from overruling *Hans*.

Justice Brennan, in a dissenting opinion, continued his attack on the validity of state sovereign immunity that he began in *Atascadero*. Noting the complexity of the rules developed under the state immunity doctrine, Brennan maintained his disdain for continued reliance on *Hans*:

> The doctrine that has thus been created is pernicious. In an era when sovereign immunity has been generally recognized by courts and legislatures as an anachronistic and unnecessary remnant of a feudal legal system, . . . the Court has aggressively expanded its scope. . . . [T]he current doctrine intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct. And the decision obstructs the sound operation of our federal system by limiting the ability of Congress to take steps it deems necessary and proper to achieve national goals within its constitutional authority.

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See id. § 688(a). Jean Welch sustained injuries while working on a ferry dock. *Welch*, 483 U.S. at 471 (plurality opinion).


127. Justices Powell, White, O’Connor, and the Chief Justice argued for the continuing validity of *Hans v. Louisiana*. *Welch*, 483 U.S. at 486 (plurality opinion). Justices Brennan, Marshall, Blackmun, and Stevens urged the Court to overrule *Hans*. *Id.* at 519-21. Justice Scalia was unwilling to address the matter:

> I find both the correctness of *Hans* as an original matter, and the feasibility, if it was wrong, of correcting it without distorting what we have done in tacit reliance upon it, complex enough questions that I am unwilling to address them in a case whose presentation focused on other matters.

*Id.* at 496 (Scalia, J., concurring).

128. See *id.* at 478-88 (plurality opinion); *id.* at 509-21 (Brennan, J., dissenting).

129. See *Atascadero*, 473 U.S. at 247-302 (Brennan, J., dissenting).

130. *Welch*, 483 U.S. at 520-21 (Brennan, J., dissenting) (quoting *Atascadero*, 473 U.S. at 302 (Brennan, J., dissenting)).
Justice Powell, however, defended the continuing vitality of *Hans* by noting that the structure of the federal system required state sovereign immunity. Justice Powell also noted that the principle of state immunity embodied in *Hans* "has been among the most stable in our constitutional jurisprudence." This stability, in combination with the doctrine of *stare decisis*, convinced Powell that the dissenters' arguments fell "far short of justifying such a drastic repudiation of this Court's prior decisions."

*Pennsylvania v. Union Gas Co.*: **The Demise of State Immunity**

The Supreme Court's evisceration of eleventh amendment state immunity under *Hans* culminated in its decision in *Pennsylvania v. Union Gas Co.* In *Union Gas*, the Court held that Congress can create private causes of action against states when legislating pursuant to the commerce clause and can grant federal courts jurisdiction to hear such suits merely by satisfying the clear statement rule. The Court purportedly still required state consent, but found that state approval of the commerce power indicated blanket consent to federal jurisdiction in any suit against them based upon congressionally created causes of action.

The dispute in *Union Gas* centered on the cleanup of the Nation's first emergency Superfund site. The predecessors of Union Gas Company operated a coal gasification plant along a creek in Pennsylvania for about fifty years. After acquiring an easement to the property along the creek in 1980, the Commonwealth of Pennsylvania conducted excavations, during which it struck a large coal tar deposit, releasing coal tar into the creek.

Pennsylvania and the federal government cleaned the site together, and the federal government reimbursed Pennsylvania
for its cleanup costs. The United States then sued Union Gas Company for recovery of the cleanup costs under sections 104 and 106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), alleging that Union Gas Company and its predecessors had deposited coal tar in the ground near the creek. Union Gas Company filed a third-party complaint against Pennsylvania, claiming that the state was responsible for a portion of the costs as an "owner or operator" of the site because its flood control efforts had negligently caused or contributed to the coal tar contamination of the creek. The district court dismissed the third-party claim, but while the dismissal was on appeal, Congress amended CERCLA with the Superfund Amendments and Reauthorization Act of 1986 (SARA), which included states among those potentially liable for monetary damages under CERCLA. On remand, the court of appeals upheld Union Gas Company's right to sue Pennsylvania.

The Supreme Court searched the language of CERCLA, as amended by SARA, for a clear expression of congressional intent to hold states liable in damages for conduct described in the statute. Justice Brennan found "a message of unmistakable clarity" that Congress intended states to be liable for hazardous waste site cleanup costs along with other responsible parties.

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140. Id.


142. Union Gas, 109 S. Ct. at 2277.

143. 42 U.S.C. § 9607(a).

144. Union Gas, 109 S. Ct. at 2277.


149. Id. CERCLA describes both "persons" and "owners or operators" as parties potentially responsible for cleanup costs. 42 U.S.C. § 9607(a) (1988). In addition, the statute explicitly includes "states" in the category of "persons" and defines "owners or operators" as "persons" undertaking certain activities. Id. §§ 9601(21), (20)(A). SARA, however, excludes states from the category of "owners or operators" in certain narrow circumstances. Id. § 9601(20)(D). States are not owners or operators if they "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." Id. Otherwise, SARA provides that states will be subject to liability to the same extent as a private person. Id.
Having found that CERCLA and SARA clearly permitted suits for money damages against states in federal court, the Court turned to the question of Congress' ability to abrogate state immunity under the commerce clause. Brennan analogized the commerce clause to the fourteenth amendment and found sufficient similarities to justify treating alike congressional abrogation of state immunity under either provision. Brennan noted that "[l]ike the Fourteenth Amendment, the Commerce Clause . . . gives power to Congress . . . while it takes power away from the States." The reasoning of Fitzpatrick v. Bitzer, which explained congressional abrogation of state immunity under the fourteenth amendment, applied equally to abrogation under the commerce clause:

Such enforcement [of the prohibitions of the fourteenth amendment] is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact . . . . [I]n exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.

The Court thus found state consent in Pennsylvania's ratification of the commerce clause power in the Constitution two hundred years ago. Curiously, Brennan authored both the majority opinion in Parden and the plurality opinion in Union Gas. In Parden, the Court premised state consent on post-federal-legislation participation in a federally regulated activity, rather than

150. See Union Gas, 109 S. Ct. at 2281-86 (plurality opinion).
151. Id. at 2282-83.
152. Id. at 2282.
on the state's ratification of the commerce clause. In \textit{Union Gas}, however, the Court inferred state consent through the ratification of Congress' commerce powers.\textsuperscript{167} The adoption of the state consent rationale of \textit{Parden} would have denied federal jurisdiction in \textit{Union Gas}, for Pennsylvania's actions that gave rise to liability under CERCLA occurred six years before SARA extended CERCLA's definition of potentially responsible parties to the states.\textsuperscript{183}

Congressional ability to abrogate state immunity retroactively poses a serious dilemma to states. \textit{Parden} implied that states can control their amenability to suit in federal courts under commerce clause legislation by choosing either to participate or to refrain from participating in federally regulated activities.\textsuperscript{159} \textit{Union Gas}, however, destroyed this ability of states to control their own destinies. After \textit{Union Gas}, a state's actions may render it liable to third parties should Congress choose to create such a cause of action at some future time.

\textbf{THE EMERGENCE OF PROCESS FEDERALISM IN TENTH AMENDMENT JURISPRUDENCE}

The Court's clear statement rule is essentially the crudest form of process federalism, the doctrine under which the Court accepts the validity of legislation so long as it results from a properly functioning political process.\textsuperscript{160} The rocky evolution of process federalism can be traced through several Supreme Court decisions that have addressed the issue of state consent to federal jurisdiction under the commerce clause. In \textit{Union Gas}, the Court considered Pennsylvania's actions that gave rise to liability under CERCLA and concluded that the state's consent to federal jurisdiction was implied through the ratification of Congress' commerce powers. However, the adoption of the state consent rationale of \textit{Parden} would have denied federal jurisdiction in \textit{Union Gas}, as Pennsylvania's actions that gave rise to liability under CERCLA occurred six years before SARA extended CERCLA's definition of potentially responsible parties to the states.

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\begin{itemize}
  \item \textit{Parden}, 377 U.S. at 192.
  \item \textit{Union Gas}, 109 S. Ct. 2273, 2284 (1989) (plurality opinion). "By empowering Congress to regulate commerce, . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." Id. at 2281 (quoting \textit{Parden}, 377 U.S. at 192).
  \item \textit{Parden}, 377 U.S. at 192.
  \item See generally Rapaczynski, \textit{From Sovereignty to Process: The Jurisprudence of Federalism After Garcia}, 1985 Sup. Ct. Rev. 341, 359-80 (exploring the potential scope of the process-oriented standard of review). Professor Rapaczynski's simple version of the process theory is as follows:
    \begin{itemize}
      \item The Constitution is a democratic document, which means that the decisions of the majority of the representatives freely elected by the majority of the people should not be upset, and judicial intervention—which always raises a prima facie presumption of countermajoritarianism—should be limited to cases in which something in the process suggests that the decision deviates from the majority's will.
    \end{itemize}
    \textit{Id.} at 369. The Court's scrutiny of the functioning of the political process under the clear statement rule is minimal; the Court presumes the adequate functioning of the representative process whenever Congress clearly expresses its intent in the statutory language.
\end{itemize}
federalism began with the Court's attempts to apply sovereignty-based limitations to federal legislative powers in *National League of Cities v. Usery*. From 1937 to the 1970's, the Court retreated from judicially enforced substantive guarantees of state sovereignty. In the 1976 landmark decision of *National League of Cities*, however, the Court resumed an active role in defending state autonomy from federal intrusion. In that decision, the Court found that the tenth amendment embodied a principle of sovereignty-based limitations on congressional power.

The renewed concern for state sovereignty ended abruptly nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*. After several unsuccessful attempts to define the precise contours of state sovereignty under the tenth amendment, the Court in *Garcia* renounced the decisions in *National League of Cities* and its progeny and endorsed instead the theory that the Framers structured the federal government in a manner that adequately protected the states from congressional overreaching.

This abandonment of a sovereignty-based standard of review in tenth amendment jurisprudence was an important precursor to the rejection of an immutable sphere of state sovereign immunity under the eleventh amendment in *Pennsylvania v. Union Gas Co.*


164. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

165. See *National League of Cities*, 426 U.S. at 842-43.

While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.


167. See *id.* at 550-52, 556-57. "State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552.

The State Sovereignty Approach

In *National League of Cities*, the Court struck down the 1974 amendment to the FLSA, which applied the minimum wage and overtime pay provisions of the FLSA to state employees. Justice Rehnquist recognized that "there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce." Emphasizing "the essential role of the States in our federal system of government," the Court interpreted the tenth amendment to stand for "the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Five Justices found that the constitutional principle of federalism forbids federal regulations that "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."

In decisions subsequent to *National League of Cities*, lower courts attempted to adhere to the principle that state sovereignty protects traditional governmental functions from federal interference; however, the ensuing classifications of state functions defied any logical consistency. In *Hodel v. Virginia Surface Mining & Reclamation Association*, the Court identified four conditions that a state must satisfy to be immune from federal encroachment. In practice, however, no state ever convinced

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170. Id. at 842.
171. Id. at 844.
172. Id. at 843 (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)).
173. Id. at 852. Justice Rehnquist authored the majority opinion, joined by Chief Justice Burger and Justices Stewart, Blackmun, and Powell. The Court found that applying the minimum wage and overtime pay provisions of the Act to state employees would "significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation." Id. at 851.
174. Lower courts defined regulating ambulance services, licensing automobile drivers, operating a municipal airport, performing solid waste disposal, and operating a highway authority as protected functions under *National League of Cities*. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 538 (1985), and cases cited therein. Courts denied protection to the issuance of industrial development bonds, regulation of intrastate natural gas sales, regulation of traffic on public roads, regulation of air transportation, operation of a telephone system, leasing and sale of natural gas, operation of a mental health facility, and provision of in-house domestic services for the aged and handicapped. See id. at 538-39 and cases cited therein.
176. To prevail, a state would have to prove each of the following requirements. First,
the Court that any federal regulation satisfied the *Hodel* test.\textsuperscript{177}

**The Process-Oriented Approach**

After reviewing the long, unsuccessful struggle of federal and state courts to identify traditional state functions,\textsuperscript{178} the Court in *Garcia* rejected the state sovereignty approach entirely and adopted a process-oriented standard of review over congressional exercise of commerce clause powers.\textsuperscript{179} In *Garcia*, the Court found the state sovereignty approach not only unworkable, as evidenced by the inconsistent results in lower court decisions, but also unsound in principle and violative of federalism.\textsuperscript{180}

The *Garcia* controversy focused on the identification of "traditional governmental functions."\textsuperscript{181} Chief Justice Burger had observed previously that \"[t]he determination of whether a federal law impairs a state's authority with respect to 'areas of

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\textsuperscript{177} See, e.g., EEOC v. Wyoming, 460 U.S. 226, 236-39 (1983) (interpreting the Age Discrimination in Employment Act as extending the definition of "employer" to state and local governments); FERC v. Mississippi, 456 U.S. 742, 770 n.33 (1982) (Congress' control of state regulatory authorities under the Public Utility Regulatory Policies Act of 1978 was a valid use of its power under the commerce clause).

\textsuperscript{178} "[T]he history of the American idea of state sovereignty turns out . . . to be the story of a succession of vain attempts to define some substantive domain over which exclusive and ultimate state authority could be confidently asserted." Rapacynski, supra note 160, at 351.

\textsuperscript{179} Id. at 531. Significantly, the same five Justices who upheld the principle of process federalism in *Garcia* also advocated the simple statutory construction standard of review in *Union Gas*. Justices Blackmun, Brennan, Marshall, Stevens, and White all fully endorsed a restrictive standard of judicial review over both tenth and eleventh amendment controversies. See Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989); *Garcia*, 469 U.S. 528. Justice Souter's replacement of Justice Brennan, however, may create a void in this majority.

By contrast, the dissenting Justices in these two opinions have followed changes in the Court's membership. In *Garcia*, Justice Powell, joined by Chief Justice Burger and Justices Rehnquist and O'Connor, urged the Court to uphold some substantive realm of state sovereignty whereas in *Union Gas*, Justices Scalia and Kennedy succeeded Burger and Powell in standing behind the principle of state immunity. *Garcia*, 469 U.S. at 579 (Powell, J., dissenting); *Union Gas*, 109 S. Ct. at 2303 (Scalia, J., concurring and dissenting).

\textsuperscript{180} *Garcia*, 469 U.S. at 530 (quoting National League of Cities v. Usery, 426 U.S. 833, 832 (1976)).
traditional [state] functions' may at times be a difficult one."\textsuperscript{182} Cases subsequent to \textit{National League of Cities} revealed the understated truth of the Chief Justice's comment.\textsuperscript{183} The Court explored various approaches to this difficult task, examining the state activity in terms of its historical foundation as a state function, classifying state activities as either "essential" or "nonessential," and distinguishing between "governmental" and "proprietary" functions.\textsuperscript{184} In \textit{Garcia}, Justice Blackmun found that any judicially created distinctions would disturb the principle of federalism upon which the United States was founded.\textsuperscript{185}

The Court in \textit{Garcia} doubted the ability of the judicial branch to identify "principled constitutional limitations on the scope of Congress’ Commerce Clause powers over the States merely by relying on a priori definitions of state sovereignty."\textsuperscript{186} Aside from this problem, however, Blackmun asserted "a more fundamental reason" for abandoning the Court’s \textit{National League of Cities} role as protector of state sovereignty: "The sovereignty of the States is limited by the Constitution itself."\textsuperscript{187} The Constitution limits state sovereignty through the powers delegated to Congress under article I.\textsuperscript{188} Article III precludes the states from making "authoritative determinations of law."\textsuperscript{189} More specifically, the application of the greater part of the Bill of Rights to the states through the fourteenth amendment limits significantly the sovereign authority of the states “to legislate with respect to their citizens and to conduct their own affairs.”\textsuperscript{190}

The divestiture of state sovereignty throughout the Constitution points to a limited area of state sovereignty, protected, according to \textit{Garcia}, only "by procedural safeguards inherent in the structure of the federal system."\textsuperscript{191} Only a finding of failure in the national political process will justify judicially imposed

\textsuperscript{183. See supra note 174.}
\textsuperscript{184. See, e.g., Long Island R.R., 455 U.S. at 686.}
\textsuperscript{185. "The problem is that neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society." \textit{Garcia}, 469 U.S. at 545-46.}
\textsuperscript{186. Id. at 548.}
\textsuperscript{187. Id.}
\textsuperscript{188. Id.}
\textsuperscript{189. Id. at 549.}
\textsuperscript{190. Id.}
\textsuperscript{191. Id. at 552.}
The Court thus retains a circumscribed ability to intervene when federal legislation results from such a process failure. The Garcia decision failed to elaborate on the specifics of the Court's new process-oriented standard of judicial review. In eleventh amendment jurisprudence, the Court has limited its process review to a simplistic examination of statutory language. A functional theory of process-oriented judicial review need not result in such a limited power:

[Process jurisprudence does not limit the scope of judicial intervention to explicitly procedural remedies or to the enforcement of specifically procedural principles. It aims rather at an elaboration of judicial standards, the justification of which does not rely on the desirability of specific substantive results but rests instead on the identification of some defects in the political process that prevent it from operating in accordance with the function assigned to it in the Constitution.]

Professor Rapaczynski suggests that a court, suspicious of legislation that inhibits individual rights, could "attempt to identify some distortions in [the democratic] process that account for [the] presumably abnormal results." In the context of the eleventh amendment, a court could surpass limited review of statutory language within the confines of a process-oriented approach and examine the extent of state participation in the representative political process. A court could uphold state immunity upon discovering that the political process essentially denied states the ability to function as part of the federal system. Rather

192. See id. at 554. The justification for the restraint on powers derived from the commerce clause stems from "the procedural nature of this basic limitation." Id.
193. "Garcia's importance lies, above all, in revealing the absence of anything approaching a well elaborated theory of federalism that would provide a solid intellectual framework for an articulation of the Justices' divergent views on state-national relations." Rapaczynski, supra note 160, at 341-42.
194. See Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989) (in which the Court announced its application of the clear statement rule to all congressional attempts to abrogate state immunity).
196. Id.
197. Professor Rapaczynski's tenth amendment example aptly illustrates the potential breadth of the process review approach:

Should it turn out . . . on the basis of a well-grounded analysis of the significance of local politics for the proper functioning of the national political process, that certain systemic characteristics of the national government
than expand on the process-oriented review approach of *Garcia*, however, the Court in *Union Gas* limited it to the mere review of statutory language.198

**CONGRESSIONAL POWER TO ABRIGATE STATE IMMUNITY UNDER THE COMMERCE CLAUSE: THE NEED FOR AN EXPANDED STANDARD OF JUDICIAL REVIEW**

In both tenth and eleventh amendment jurisprudence, the Supreme Court has reluctantly relinquished any notion of state sovereignty inherent in the Constitution.199 The principle of eleventh amendment state immunity as reflected in *Hans v. Louisiana*200 is not, however, an "antidemocratic anachronism."201 State sovereignty under both the tenth and eleventh amendments continues to receive the support of several members of the Court.202

The decisions in *Garcia v. San Antonio Metropolitan Transit Authority*203 and *Pennsylvania v. Union Gas Co.*204 each attracted only five members of the Court. Justice Brennan’s recent departure from the Court, as a member of the majority in *Garcia* and the author of the Court’s opinion in *Union Gas*, leaves an even split among the remaining Justices over the issue of both tenth and eleventh amendment state sovereignty.205 New Supreme Court

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198. See *Union Gas*, 109 S. Ct. 2273 *passim*.
199. The single exception is the eleventh amendment’s explicit recognition that states retain sovereign immunity from suit in federal court when controversies arise with citizens of other states. In such cases, Congress has no authority to abrogate state immunity. As Justice Stevens succinctly stated, “A statute cannot amend the Constitution.” *Id.* at 2286 (Stevens, J., concurring).
200. 134 U.S. 1 (1890).
201. Note, supra note 8, at 865 (footnotes omitted).
202. See *infra* note 205.
204. 109 S. Ct. 2273 (1989). See *supra* note 180 for a discussion of the Justices’ alignment in *Garcia* and *Union Gas*.
205. Four dissenting Justices in *Garcia* stated explicitly that they stand prepared to overrule *Garcia*. “[T]he principle [of tenth amendment state sovereignty] will, I am confident, in time again command the support of a majority of this Court.” *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting); see *id.* at 557 (Powell, J., dissenting); *id.* at 580.
Justice Souter could conceivably affect the resurrection of state sovereignty as an integral part of the federal system.\textsuperscript{206}

In \textit{Union Gas}, the Court adhered to the doctrine of process federalism without refining its contours. The doctrine of process federalism itself does not limit the Court's review to a simplistic clear statement analysis.\textsuperscript{207} The judiciary's ability to look beyond the statutory language and allow states some control over their exposure in federal court without transgressing process federalism should resurrect the Court's dual standard of review.

A standard of review that distinguishes between congressional abrogation of state immunity under limited powers, such as the fourteenth amendment, and broader powers, such as the commerce clause, would preserve state autonomy in areas in which the states stand most vulnerable to federal intrusion\textsuperscript{208} and still provide full federal protection of individual rights. Using explicit language, the fourteenth amendment "clearly contemplates limitations on [state] authority"\textsuperscript{209} and grants Congress the power to enforce its provisions.\textsuperscript{210} This specific grant of power, along with the "paramount importance of individual rights,"\textsuperscript{211} should lead the Court to defer to Congress' broad authority to legislate pursuant to that amendment and to judge abrogation of state immunity under the well-established clear statement rule.

\textsuperscript{206} The three Reagan era Supreme Court Justices, Sandra Day O'Connor, Antonin Scalia, and Anthony M. Kennedy, along with Chief Justice Rehnquist, all endorse the continuing validity of the \textit{Hans} state immunity principle. See \textit{Union Gas}, 109 S. Ct. at 2296-303 (Scalia, J., concurring and dissenting). Assuming that Professor Chemerinsky is correct in that "[t]he Reagan legacy of a conservative Court seems secure for many years to come," Chemerinsky, supra note 160, at 45, a new conservative Justice will likely join his conservative colleagues in reaffirming the Court's holding in \textit{Hans}.

\textsuperscript{207} See supra note 197.

\textsuperscript{208} Although the Court has approved Congress' broad authority to regulate states under the commerce clause, this interpretation of congressional power should not extend to the power to abrogate state immunity without state consent. Permitting Congress to confer federal jurisdiction over states poses a greater threat to the federal-state balance of powers than do congressional regulatory powers. Note, supra note 65, at 1040 n.114.


\textsuperscript{210} U.S. CONST. amend. XIV, § 5.

\textsuperscript{211} See Note, supra note 8, at 891 (suggesting that the Court has required less precise articulations of congressional intent to abrogate state immunity in the context of the fourteenth amendment because of the "paramount importance of individual rights").
Other congressional powers such as the commerce power, however, only impliedly remove states' control while granting control to the federal government; thus, the Court ought to examine with more care congressional abrogation of state immunity pursuant to these powers. This approach does not imply that the Court should carve out any range of absolutely protected state activity of the sort refuted in Garcia. Rather, the Court should require both firm evidence of a full consideration of states' interests in Congress and a clear indication of consent to suit from the state involved.

The Judiciary as the Protectorate of Constitutional Values

The Court has consistently refused to subject states to private suits in federal court unless the federal statute involved expressly includes states as potential defendants. Justice Brennan argued that because both Houses of the federal legislature fully represent the states,

\[\text{[d]ecisions upon the extent of federal intervention under the Commerce Clause into the affairs of the States are in that sense decisions of the States themselves. . . . Any realistic assessment of our federal political system, dominated as it is by representatives of the people elected from the States, yields the conclusion that it is highly unlikely that those representatives will ever be motivated to disregard totally the concerns of these States.}\]

The clear statement rule inherently assumes that federal legislators might overlook subtle implications of new legislation and

212. In Parden v. Terminal Railway of Alabama State Docks Department, 377 U.S. 184, 190-97 (1964), the Court, per Justice Brennan, upheld congressional abrogation of state immunity under the FELA, even though the Act did not expressly articulate a congressional intent to subject states to suit on the same terms as any other railroad employer. The dissenters in Parden disagreed on this point: "A decent respect for the normally preferred position of constitutional rights dictates that if Congress decides to exercise its power to condition privileges within its control on the forfeiture of constitutional rights its intention to do so should appear with unmistakable clarity." Id. at 199 (White, J., dissenting). The dissenters' view prevailed. In subsequent decisions, the Court upheld state immunity, even in cases in which Congress apparently intended statutes to apply to the states, because Congress failed to explicitly include states in the class of defendants liable for violations of the statutes. See, e.g., Quern v. Jordan, 440 U.S. 332, 345 (1979); Edelman v. Jordan, 415 U.S. 651, 672 (1974); Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 285 (1973).

fail to perceive the enormous consequences of state liability to private citizens when legislation impliedly abrogates state immunity. The Court's insistence on unequivocal language in the legislation itself diminishes somewhat the possibility of such a failure in the political process, whereby state interests may be inadvertently sacrificed in favor of federal policies.\textsuperscript{214}

By itself, however, the clear statement standard cannot adequately protect the states' essential role in the federal system. The mere existence of clear statutory language subjecting states to suit in federal court does not ensure that federal legislators recognized the impact of such legislation on the states. As noted by dissenting Justice Powell in \textit{Garcia}:

\begin{quote}
Federal legislation is drafted primarily by the staffs of the congressional committees. In view of the hundreds of bills introduced at each session of Congress and the complexity of many of them, it is virtually impossible for even the most conscientious legislators to be truly familiar with many of the statutes enacted.\textsuperscript{215}
\end{quote}

Even assuming that federal legislators are in fact intimately familiar with the legislation upon which they vote, the representative process, absent the safeguards of substantive judicial review, will not necessarily afford a result consistent with constitutional values.\textsuperscript{216} The Court's deference to the majoritarian political process misconstrues judicial review as antidemocratic when it fails to reinforce majority rule.\textsuperscript{217} Majority rule is not the end prescribed by the Constitution, however, but rather the means, along with judicial review, to achieve constitutional goals.\textsuperscript{218} The Constitution explicitly shields certain values from the volatility of the political arena, thus requiring the judiciary to identify those values and ensure their protection through adequate judicial review.\textsuperscript{219}

\textsuperscript{214} See \textit{Quern}, 440 U.S. at 345. Justice Rehnquist looked to the legislative history behind the Civil Rights Act of 1871, 42 U.S.C. \$ 1983, and found that "[section] 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which . . . shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States." \textit{Quern}, 448 U.S. at 345.


\textsuperscript{216} Chemerinsky, \textit{supra} note 160, at 74-77.

\textsuperscript{217} Id. at 76.

\textsuperscript{218} Id. at 75-76.

\textsuperscript{219} Id. at 77.
Certain fundamental constitutional values, such as those freedoms encompassed in the Bill of Rights, deserve the full protection of substantive judicial review. The Court should not, however, relegate the protection of other constitutional values, such as eleventh amendment state immunity, to the whims of the majoritarian political process. Professor Wechsler’s argument that the national political process safeguards the states’ role in our dual state-federal government fails to account for the infirmities of that process. In the past thirty years, the United States has witnessed not only a dramatic shift in the kind of federal regulation applicable to the states, but also “a variety of structural and political changes . . . [that combine] to make Congress particularly insensitive to state and local values.” The weakening of political parties on the local level, the rise of the national media, and the adoption of the seventeenth amendment, which provides for direct election of senators, have shifted congressional attention away from state and local interests and toward various national constituencies.

The legislative process—although modelled on the democratic fiction that representative decisionmaking reflects the majority view—is ill-suited to the preservation of a proper constitutional balance in federal-state relations. The increasing role of the federal government in regulating state activity, through direct commands or the conditional granting of federal funding, and the increasing dominance of national interests over state and local interests in the federal legislature imply that the processes behind the composition and selection of federal representatives cannot sufficiently protect the states’ interests.

221. See Wechsler, supra note 18, at 558.
224. Id. at 50.
225. See id. at 50-51. Representatives of both Houses of Congress have developed independent constituencies among groups that support national initiatives, such as farmers, environmentalists, and the poor. Id. Other factors, such as single issue voters, a legislator’s own ideology, the influences of political parties, and reduced electoral participation, raise doubts about the representativeness of the political process. Chemerinsky, supra note 160, at 78-79.
226. Professor Rapaczynski compares process jurisprudence as applied to federalism...
A Strict State Consent Standard

*Garcia* suggests that when the national political process functions smoothly without impairing the states' role in either choosing national representatives or in voicing their interests to those representatives, the Court need not interfere. This concept ignores the true extent of state participation in the political process. States do not merely influence the selection of federal legislators and lobby for or against pending legislation. Rather, states *choose* to submit themselves to federal regulation by participating in federally regulated activities.

Even though the clear statement rule would theoretically alert Congress to the potential consequences to states of proposed legislation, the Court should not blindly assume that Congress considered fully the constitutional implications of overriding state immunity. Instead, the Court should once more insist on state consent as a prerequisite to suits in federal court. In cases involving commerce clause legislation, a strict state consent standard would preserve state autonomy and prevent the imposition of burdensome retrospective damage awards upon unconsenting states.

The Court could infer state consent from either postlegislation participation in a federally regulated activity or postlegislation

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228. Despite the truth of Justice Brennan's statement that "the States surrendered a *portion* of their sovereignty when they granted Congress the power to regulate commerce," *Parden v. Terminal Ry. of Ala. State Docks Dep't.*, 377 U.S. 184, 191 (1964) (emphasis added), the retained portion of sovereignty should preserve for states some control over their liabilities.

229. In his dissent in *Garcia*, Justice Powell chastised the Court for its blind faith in Congress: "This Court has never before abdicated responsibility for assessing the constitutionality of challenged action on the ground that affected parties theoretically are able to look out for their own interests through the electoral process." *Garcia*, 469 U.S. at 567 n.12 (Powell, J., dissenting).

230. See *Parden*, 377 U.S. at 186.
acceptance of federal funds.\textsuperscript{231} This approach would preserve a central theme of eleventh amendment jurisprudence: “states should have the opportunity to participate in the determination of the burdens they will bear.”\textsuperscript{222} Although the federally regulated activity might be essential to a state’s functioning, or the state’s need for the federal funds might be acute, the state would have the option, in principle, to withdraw from the activity or refuse funds, thus preserving its sovereign immunity.\textsuperscript{233} Granting states the power to retain immunity by refusing to participate in certain activities recognizes the full extent of state participation in the political process.

In \textit{Union Gas}, Justice Scalia criticized Congress’ ability to condition state action on waiver of eleventh amendment immunity, finding “obvious and fatal difficulties in acknowledging such a power.”\textsuperscript{234} Noting that all prospective applications of federal prescriptions may be characterized as invitations to states to waive their immunity, Scalia concluded that the power to regulate states conditioned upon consent to federal jurisdiction was substantially the same as the power to override state immunity without their consent.\textsuperscript{235} The consent standard, however, excludes potential retroactive imposition of liabilities, which poses the most significant threat to states’ autonomy and fiscal integrity.\textsuperscript{236} Furthermore, the consent standard recognizes “the idea of informed consent as a basis of democratic legitimation.”\textsuperscript{237} Congressional enactments may induce states to waive their sovereign immunity, but so long as they do not compel unconsenting states to appear as defendants in federal court, they will not violate the principle of federalism.\textsuperscript{238}

\textsuperscript{231} Although “mere receipt of federal funds cannot establish that a State has consented to suit in federal court,” clear statutory language that gives a state notice that the receipt of federal funds will subject it to damage actions in federal court will render a state’s acceptance of funds under the statute a valid waiver of its immunity. \textit{Atascadero State Hosp. v. Scanlon}, 473 U.S. 234, 246-47 (1985).

\textsuperscript{232} Nowak, \textit{supra} note 29, at 1449.

\textsuperscript{233} The Court took this approach in \textit{Parden}. See \textit{Parden}, 377 U.S. at 196-97. Because “the state had voluntarily become the operator of a business for which federal regulations created liabilities, it could not claim that it was denied a meaningful role in the determination of the burdens which it would bear.” Nowak, \textit{supra} note 29, at 1450.


\textsuperscript{235} \textit{Id.}

\textsuperscript{236} Scalia dismissed as “rare” the possibility that commerce clause legislation would subject states to retroactive liability. \textit{Id.} at 2303 n.2.

\textsuperscript{237} See Rapaczynski, \textit{supra} note 160, at 365.

\textsuperscript{238} See \textit{Kaden}, \textit{supra} note 162, at 893-94. Justice Cardozo once suggested that achieving
Scalia condemned the consent standard as an exaltation of form over substance:

There is little more than a verbal distinction between saying that Congress can make the Commonwealth of Pennsylvania liable to private parties for hazardous-waste clean-up costs on sites that the Commonwealth owns and operates, and saying the same thing but adding at the end "if the Commonwealth chooses to own and operate them."^{239}

The irony of this observation is that the jurisprudence of process federalism itself permits judicial inquiry as to form, but not substance. Federalism concerns, however, require closer judicial scrutiny of the political process than the Court has been willing to give to challenges of eleventh amendment state immunity.

CONCLUSION

The principle of eleventh amendment state immunity, along with its tenth amendment state sovereignty sibling, has suffered from the terminal malady of lack of definition. The Supreme Court's failure to spell out adequately the breadth of state sovereign immunity mandated by the "letter and spirit of the Constitution"^{240} left the tenth and eleventh amendments open to attack. Neither amendment survived the battle.^{241}

The Court has retreated from Hans v. Louisiana^{242} in part because the maxim that "the king can do no wrong"^{243} is perceived as unjust and incompatible with a democratic system of government.^{244} This reasoning, however, ignores two important consid-

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239. Union Gas, 109 S. Ct. at 2303 (Scalia, J., concurring and dissenting).
242. 134 U.S. 1 (1890).
243. See supra note 21.
244. "We the People" formed the governments of the several States. Under our constitutional system, therefore, a State is not the sovereign of its people. Rather, its people are sovereign. Our discomfort with sovereign immunity, born of systems of divine right that the Framers abhorred, is thus entirely natural. . . . For none can gainsay that a State may grievously hurt one of its citizens. Our expanding concepts of public morality are thus offended when a State may escape legal redress for its wrongs.

erations: first, that even medieval Englishmen recognized “that the king was not only capable of but disposed toward doing wrong,” which necessitated the development of procedures to secure the king’s consent to suit; and second, that a consent standard promotes democratic decisionmaking in that it involves both Congress and the states in the determination of state liabilities.

Although the Court’s decision in Pennsylvania v. Union Gas Co. clearly reconciled modern tenth and eleventh amendment jurisprudence, the Court could have reserved a more meaningful standard of review in eleventh amendment controversies without departing from the process federalism approach advocated in Garcia v. San Antonio Metropolitan Transit Authority. Instead, the Court in Union Gas endorsed a severely restricted judicial role, in which the Court will mechanically examine a statute’s construction to determine a state’s amenability to suit in federal court.

Even though the clear statement rule “assures [states] at least one bite at the apple” representing protection of their interests, it is an unsavory nibble of a bruised piece of fruit. Union Gas relegated state immunity to “merely a default disposition that can be altered by action of Congress.” A strict state consent standard in cases in which Congress has sought to abrogate state immunity under the commerce clause may raise problematic questions about the governmental-proprietary distinction that Garcia discredited. Such a standard, however, more faithfully adheres to the principles of federalism and stare decisis than the Court’s clear statement rule. Process federalism has emerged as the modern guardian of states’ interests. In both tenth and eleventh amendment jurisprudence, the Supreme Court has ab-

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249. Union Gas, 109 S. Ct. at 2300 (Scalia, J., concurring and dissenting).
250. Professors Brown and Nowak both recognize that the governmental-proprietary distinction must necessarily reappear should courts seek to determine whether a state made a truly voluntary election to forgo eleventh amendment protection for other benefits. Professor Brown doubts the likelihood of a resurrection of the governmental-proprietary dichotomy, whereas Professor Nowak sees its usefulness in at least those cases in which the Court seeks to infer congressional abrogation of state immunity. See Brown, supra note 248, at 393-94; Nowak, supra note 29, at 1449.
dicated responsibility for carving its rough concept into a serviceable principle.

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