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CONSTITUTIONAL LAW—CONGRESSIONAL ABROGATION OF THE
Eleventh Amendment—States Are Not Subject to Suits in
Federal Court Brought by Private Parties Pursuant to
the Comprehensive Environmental Response,
Compensation and Liability Act

United States v. Union Gas (1986)*

The eleventh amendment to the United States Constitution¹ has
been construed as granting sovereign immunity to the states in suits
brought against them in federal court by private parties.² This general

¹ This article was written solely from the materials available to the Third
Circuit at the time of its decision. Thus, it does not consider the impact of the
After adoption of these amendments, the United States Supreme Court granted
certiorari for this case. The Court vacated the Third Circuit's decision in light of
the amendments and remanded. United States v. Pennsylvania, 107 S. Ct. 865
(1987). The Third Circuit reversed, and found sufficient evidence in the
amendments to manifest Congress' intent to abrogate the eleventh amendment.
United States v. Union Gas, 832 F.2d 1343 (3d Cir. 1987). It is submitted that
the amendments and the court's new holding further support the interpretation
set forth in this article of Congress' intent in the CERCLA legislation.

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

The eleventh amendment was ratified shortly after the Supreme Court in
1793 had assumed original jurisdiction over a suit brought by a citizen of South
Carolina against the State of Georgia. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419
(1793). The Court believed it had jurisdiction over the suit because of Article
III, section 2 of the Constitution, which provides that the federal judicial power
extends, inter alia, to controversies between "a State and Citizens of another
State." Id. at 474-75 (citing U.S. Const. art. III, § 2). The eleventh amendment
overruled the particular result in Chisholm, since it clearly prohibits federal
courts from hearing a suit brought by the citizens of one state against a foreign
state. U.S. Const. amend. XI. This immunity has been extended to bar suits
brought against a state by its own citizens, although the amendment does not
explicitly provide for such extension. See Hans v. Louisiana, 134 U.S. 1 (1890)
(state cannot be sued in federal court, without its consent, by one of its own
citizens). The validity of Hans has been reinforced recently by the Supreme
Court in Welch v. State Department of Highways and Public Transportation,
107 S. Ct. 2941 (1987), even though, for the fourth time in little more than two
years, four members of the Court urged for the overruling of Hans. Id. at 2948.

(1984) (significance of eleventh amendment is its affirmation that sovereign
immunity limits grant of judicial authority in Article III); Edelman v. Jordan, 415
U.S. 651, 663 (1974) (unconsenting state is immune from suits brought in fed-
eral court by her own citizens as well as by citizens of another state). But see
Green v. Mansour, 474 U.S. 64, 78 (1985) (Brennan, J., dissenting) ("[T]he
rule, however, is not without exception. First, a state may waive its immunity and consent to suit in federal court without the action being barred by the eleventh amendment.\(^3\) Second, enforcement of an unconstitutional state statute by a state official can be enjoined by a federal court.\(^4\) Third, Congress may abrogate state immunity by statutorily providing for suits against states.\(^5\) In the third situation, courts have been

Amendment was intended simply to remove federal-court jurisdiction over suits against a State where the basis for jurisdiction was that the plaintiff was a citizen of another state or an alien."; Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247-80 (1985) (Brennan, J., dissenting) (providing in depth history of eleventh amendment jurisprudence in support of same conclusion); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 2004 (1983) ("It is time for the Supreme Court to acknowledge that the eleventh amendment applies only to cases in which the jurisdiction of the federal court depends solely upon party status.").

3. States can also waive their sovereign immunity by consenting to be sued in federal court. See, e.g., *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945) (state's immunity from suit may be waived). The United States Supreme Court summed up the methods by which a state can waive its immunity:

A State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program. In each of these situations, we require an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment.


4. In *Ex Parte Young*, 209 U.S. 123 (1908), the Supreme Court ruled that a suit against a state official to enjoin enforcement of an unconstitutional state statute is not a suit against the state, and hence is not barred by the eleventh amendment. *Id.* at 160. The Court reasoned that the state statute was void because it was unconstitutional, and therefore, it could not impart any state immunity to the individual state official. *Id.* at 159-60. The Court concluded that since the state could not authorize the official's action pursuant to an unconstitutional state statute, he was "stripped of his official or representative character" and thereby was "subjected in his person to the consequences of his individual conduct." *Id.* at 160.

According to one commentator, *Young* rests upon "the fiction that an injunction against officers in their representative capacities does not affect the state, even though the effect is to hinder the state's ability to enforce its laws." *Note, Confronting the Fictions of the Eleventh Amendment: Pennhurst State School and Hospital v. Halderman*, 60 WASH. L.R. 407, 414 (1985). Commenting on this fiction which underpins the *Young* case, one writer has observed:

When you sue the government ... you must falsely pretend ... that the suit is not against the government but that it is against an officer ... . The judges often will falsely pretend that they are not giving you relief against the sovereign, even though you know and they know, and they know that you know, that the relief is against the sovereign.


Even though the *Young* case does not constitute a true exception to the general rule articulated at note 2 of this article since the suit is not "truly" against the state, the commentators above concur that such a suit is, in effect, one against the state; thus, *Young* is an exception to the general rule.

5. See, e.g., Hutto v. Finney, 437 U.S. 678 (1978) (legislative history of stat-
faced with numerous types of statutes which do not expressly provide that "eleventh amendment immunity is abrogated." These courts, therefore, must decide whether such statutes can be construed as abro-

Congress derives its power to abrogate the eleventh amendment in a number of ways. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (eleventh amendment is limited by enforcement provision of fourteenth amendment); Parden v. Terminal Ry. Co., 377 U.S. 184 (1964) (Congress may abrogate state immunity under commerce clause of U.S. Constitution), overruled, 107 S. Ct. 2941 (1987); County of Monroe v. Florida, 678 F.2d 1124 (2d Cir. 1982) (Congress may abro-

Congress may not exercise [its power to regulate commerce] so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." National League of Cities v. Usery, 426 U.S. 833, 855 (1976). In a subsequent case, however, the same Court specifically overruled Usery and dispensed with the "integral/non-

For a discussion of the relationship between the recent Supreme Court's tenth and eleventh amendment jurisprudence, see Brown, State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon, 74 GEO. L.J. 363 (1985).
gating the eleventh amendment without an express statement.\(^7\) In *United States v. Union Gas*,\(^8\) the United States Court of Appeals for the Third Circuit was faced with this issue where the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) extended a private right of action in the liability portion of the statute against specified “persons” without stating in that section whether a state may be sued under the statute.\(^9\) The definitional section of CERCLA, however, defines the term “persons” to include “states,” thereby creating ambiguity as to whether immunity was abrogated.\(^10\) In setting forth guidelines for determining how specific Congress must be in order to abrogate a state’s immunity, the Third Circuit held that a plaintiff’s claim under the liability section in CERCLA was barred by the eleventh amendment because CERCLA does not evidence the necessary congressional intent to abrogate the immunity.\(^11\)

Union Gas Company owned land proximate to Brodhead Creek in Stroudsburg, Pennsylvania, and sold part of this land in 1953 and 1970 to Pennsylvania Power and Light which in turn granted easements over


[A]ny person who at the time of disposal of any hazardous substance owned or operated any facility at which such substances were disposed of . . . shall be liable for any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . .


\(^10\) The definitional section provides that a “person” means:

an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a state, or any interstate body.


\(^11\) 792 F.2d at 383.
the land to the Borough of Stroudsburg. In early 1980, the borough
assigned its easements to the state of Pennsylvania. On October 7,
1980, the state was excavating on its easements when it struck a large
deposit of coal tar which had been deposited there three years earlier by
a former owner of the property. The coal tar seeped into the creek,
and the Environmental Protection Agency (EPA) ordered the site to be
cleaned. The state, jointly with the federal government, cleaned the
creek. The federal government reimbursed the state $720,000 for its
costs.

The United States then sued Union Gas in federal court under
CERCLA for recoupment of its clean-up costs, which included the
$720,000 it paid to the state. Union Gas filed a third-party complaint
pursuant to the Federal Rules of Civil Procedure naming Pennsylvania
a third-party defendant, alleging that the state had negligently con-
tributed to the discharge of coal tar. The district court granted the state's
motion to dismiss the third-party claim on the ground that the eleventh
amendment barred the claim. After resolution of the suit, Union

12. Id. at 374.
13. Id.
14. Id. Predecessors of Union Gas owned and operated a water gas plant
near Brodhead Creek between 1890 and 1948, after which the plant was disman-
tled. Id.
15. Id. The EPA derives its power to order hazardous waste sites to be cle-
16. Union Gas, 792 F.2d at 374. The President of the United States can
make agreements with the affected state to help clean the waste site, pursuant to
CERCLA. 42 U.S.C. §§ 9604(c), (d). In Union Gas, Pennsylvania jointly with the
federal government undertook clean-up of the waste site. 792 F.2d at 374.
17. Id.
18. Id. at 374-75. The United States claimed that the coal tar had been
deposited into the ground as a by-product of Union Gas' and its predecessors'
carburetted water gas processing, and therefore that Union Gas was liable as an
"owner" for clean-up costs. Id. at 375.
19. Federal Rule of Civil Procedure 14(a) provides:
At any time after commencement of the action a defending party, as a
third-party plaintiff, may cause a summons and complaint to be served
upon a person not a party to the action who is or may be liable to the
third party plaintiff for all or part of the plaintiff's claim against the
third party plaintiff . . .
FED. R. CIV. P. 14(a).
20. Union Gas, 792 F.2d at 375. Union Gas alleged that the State of Penn-
sylvania's recent excavation at Brodhead Creek and earlier construction of dikes
and levees by the State and the Borough of Stroudsburg—work that was made
necessary due to flooding—had negligently caused or contributed to the dis-
charge of coal tar into the creek. Id.
cert. granted and vacated, 107 S. Ct. 865 (1987)). The district court granted the
state's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1)
and 12(b)(6). Id.
22. On the understanding that Union Gas and the United States reached a
settlement, the District Court of Pennsylvania dismissed the federal govern-
Gas appealed to the Third Circuit, citing as error the court's denial of its third-party claim against the state.23

Judge Becker, writing for the majority, began his analysis with a general discussion of the abrogation of eleventh amendment immunity. Judge Becker stated that the United States Supreme Court has noted the eleventh amendment's importance in maintaining the balance of power between state and federal interests; and that because of this importance, the Supreme Court has been reluctant to infer abrogation of the eleventh amendment by federal statute.24 In order to illustrate this point, Judge Becker analyzed several Supreme Court cases which have addressed this issue.

The first case, Employees of Department of Public Health & Welfare v. Missouri Department of Public Health & Welfare,25 involved employees of a state hospital who sued for overtime pay that they claimed they were entitled to under the Fair Labor Standards Act (FLSA).26 One section of the FLSA gives employees whose employer is covered by the FLSA a right of action against the employer to enforce the FLSA's terms.27 The definitional section, which has specifically excluded states from the scope of the FLSA, was amended in 1966 to include state hospitals in the class of employers regulated by the FLSA.28 The Supreme Court held that the eleventh amendment barred the action.29 According to Judge Becker, the Court reached this conclusion because it had not found evidence of congressional intent on the specific issue of sovereign immunity.30

23. Id.
24. Id. at 376.
25. 411 U.S. 279 (1973). For a more detailed discussion of this case, see infra notes 82-97 and accompanying text.
27. At the time that Employees was decided, section 16(b) of the FLSA provided that "[a]ny employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee. . . . affected in the amount of their unpaid minimum wages . . . . An action to recover such liability may be maintained . . . in any court of competent jurisdiction . . . ." 29 U.S.C. § 216(b) (1961) (amended 1974). For the text of the 1974 amended version of this provision, see infra note 98.
28. In 1966, the definition of "employer" was expanded to include a state or a "political subdivision thereof" with respect to employees in "a hospital, institution, or school." 29 U.S.C. § 203(d) (1966) (amending 29 U.S.C. § 203(d) (1938)).
29. 411 U.S. at 285.
30. Union Gas, 792 F.2d at 377. It is suggested that the Supreme Court did not reach its conclusion on this basis alone. The Third Circuit noted one other factor which did influence the Court's decision—the fact that the Secretary of Labor was empowered to sue the state on the employee's behalf. Id. (citing Employees, 411 U.S. at 285-86).
Judge Becker used a second case, Atascadero State Hospital v. Scanlon, 31 to emphasize the Supreme Court’s statement that Congress must express its intention to abrogate the eleventh amendment in unmistakable language in the statute itself. 32 Atascadero involved the Rehabilitation Act of 1973, which confers a right of action upon handicapped people who have been discriminated against by “any recipient of Federal assistance.” 33 In that case, a plaintiff sought damages from a state hospital that received federal assistance, but the Supreme Court held that the eleventh amendment barred the suit, since abrogation could not be effected by statutory language which merely granted “general authorization” for suit in federal court. 34

In the third case relied upon by Judge Becker, Hutto v. Finney, 35 the Supreme Court held that the Civil Rights Attorney’s Fees Awards Act did abrogate state immunity. 36 The Court based its holding on the extensive legislative history of the Act which the Court reasoned had evidenced Congress’ intent to abrogate state immunity. 37 According to

31. 473 U.S. 234 (1985). The Court was split on this decision, 5-4.
32. Union Gas, 792 F.2d at 376 (quoting Atascadero, 473 U.S. at 245-46). It is likely that the Court’s requirement that language of Congress’ intent appear in the statute itself was induced by the fact that plaintiffs based their argument on language contained in regulations implemented pursuant to the Act in question. See Scanlon v. Atascadero State Hosp., 735 F.2d 359 (9th Cir. 1984).
34. Atascadero, 473 U.S. at 245-46. The Court stated:
The statute thus provides remedies for violations of § 504 [of the Rehabilitation Act] by “any recipient of Federal assistance.” [Emphasis added by the Court.] There is no claim here that the State of California is not a recipient of federal aid under the statute. But given their constitutional role, the States are not like any other class of recipients of federal aid. 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.
Id.
37. Hutto, 437 U.S. at 694-95. The relevant statutory language involved in Hutto was quite general, as it referred to neither the eleventh amendment nor suits against states. Id. at 693-94. The statute provided only for the awarding of attorney’s fees to the prevailing party in a Civil Rights action. Id. Yet, the Court held that states were not immune from suit in this case because of both the purpose of the Act, and its extensive legislative history. Id. at 694. The legislative history included House and Senate Reports which explicitly endorsed the payment of Attorney’s fees by the states. Id. The Senate Report said that “it is intended that the attorneys’ fees, like other items of costs, will be collected either directly from the official, . . . or from the State.” Id. (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976)). The House Report states, “Of course, the eleventh amendment is not a bar to the awarding of counsel fees against state governments.” Id. (quoting H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 n.14 (1976)). In addition to this history, the Court also found that the Act was enacted by the legislature specifically to restrain unlawful state action. Id. If the
Judge Becker, *Atascadero*, although decided after *Hutto*, did not overrule *Hutto*. Judge Becker concluded that *Hutto* demonstrates that "although a court may interpret a statute to abrogate states' eleventh amendment immunity even in the absence of explicit statutory language to that effect, the evidence in favor of such an interpretation must be virtually overwhelming."  

Judge Becker, having reviewed the background concerning abrogation of the eleventh amendment, turned to address the specific arguments set forth by Union Gas in support of reading CERCLA as abrogating the eleventh amendment. The first and most significant argument set forth by Union Gas is that sections 107 and 101 of CERCLA jointly abrogate a state's immunity. Under section 107 of CERCLA, 

eleventh amendment barred the suit, according to the Court, the Act would in effect create a right without a remedy. *Id.*  

38. *Union Gas*, 792 F.2d at 378. 

39. *Id.* The Third Circuit noted that the Supreme Court had not always insisted on the evidence of Congress' intent to abrogate the eleventh amendment to be so explicit. *Id.* The majority notes as an example of the Supreme Court's former view on this matter the case of *Parden v. Terminal Railway Co.*, 377 U.S. 184 (1964), *overruled*, 107 S. Ct. 2941 (1987). In *Parden*, the Supreme Court held that the eleventh amendment did not bar a suit brought by employees against their employer, a state run railroad, under the Federal Employer's Liability Act. *Id.* at 184-90. The Court held so, even though the Act did not specifically mention "states" as potential defendants; rather, the Act imposes liability only on a general class. *Id.* at 184. The Act provides that "[e]very common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable . . ." 45 US.C. § 51 (1939). The Court did not make a distinction between private-owned and state-owned railroads for the purposes of liability. 377 U.S. at 188. 

As the Third Circuit noted in *Union Gas*, however, the holding in *Parden* was subsequently limited to instances in which the state is engaged in a for-profit enterprise. 792 F.2d at 378, n.9 (citing *Employees*, 411 U.S. at 285). The Third Circuit has also noted that one commentator has observed the shift in the Supreme Court's stance on the eleventh amendment. *Id.* He has said that:  

*Parden* would make states amenable to suit in federal court whenever they undertake an activity for which a private person could potentially be held liable under a valid federal law. The *Parden* majority thus posited no distinction between the states and other entities that might be regulated by federal legislation. *Employees* . . ., on the other hand, understand[s] states to be distinguished from other entities by federalism considerations. For this reason, the amenability of states to suit must be specifically addressed by federal legislation, and Congress must make its intention to treat states like private parties unmistakably clear. This policy of clear statement had been rejected by the *Parden* majority, but . . . eventually prevailed.  

*Id.* (quoting *Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation; Separation of Powers Issues in Controversies About Federalism*, 89 HAV. L. REV. 682, 695 (1976)). 

The Supreme Court has recently overruled *Parden* in *Welch v. Department of Highways & Public Transportation*, 107 S. Ct. 2941 (1987), thereby eliminating the need to find an analytical basis upon which *Parden* and *Employees* can peacefully coexist.  

40. *Union Gas*, 792 F.2d at 379.
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regarding liability, any "person" who owns or operates a hazardous waste site is liable for clean-up costs.\footnote{41} Section 101 defines the term "person" in a manner that includes a "state."\footnote{42} Union Gas argued that these sections, read together, abrogate Pennsylvania's eleventh amendment immunity.\footnote{43}

The Third Circuit countered this reasoning first by noting that section 107 of CERCLA, which creates the cause of action, is separate from section 101, the definitional section which says that a "state" is a "person."\footnote{44} The Third Circuit then said it must use the reasoning in \textit{Employees} to decide the issue in \textit{Union Gas} because the United States Supreme Court in that case interpreted a statutory arrangement similar to that of CERCLA.\footnote{45} Judge Becker stated that the Supreme Court holding in \textit{Employees} was that the mere inclusion of "states" within a class of potential defendants in a statutory provision that is separate from the statutory provision creating the liability is insufficient, in the absence of any clearer indication of congressional intent, to show that Congress intended to abrogate the states' eleventh amendment immunity.\footnote{46} The Third Circuit in \textit{Union Gas} held that it was bound to follow the holding in \textit{Employees}.\footnote{47}

\footnote{41}{42 U.S.C. § 9607(a) (1982). For the text of this provision, see supra note 9.}
\footnote{42}{42 U.S.C. § 9601(21) (1982). For the text of this provision, see supra note 10.}
\footnote{43}{\textit{Union Gas}, 792 F.2d at 379.}
\footnote{44}{\textit{Id.} The court found this arrangement of statutory provisions "insufficient to satisfy the burden of abrogation." \textit{Id.}}
\footnote{45}{\textit{Id.} (citing \textit{Employees}, 411 U.S. 279). For a discussion of the facts and holding in \textit{Employees}, see supra notes 25-30 and accompanying text.}
\footnote{46}{\textit{Union Gas}, 792 F.2d at 379.}
\footnote{47}{\textit{Id.} In order to further justify its reading of sections 101 and 107 as not abrogating the state's immunity, the court noted that section 107 performs a meaningful function even when it is not construed as an abrogation of a state's immunity. \textit{Id.} at 380. This function consists of its enabling the United States to sue states more easily for recoupment of its clean-up costs. \textit{Id.} Under the statutory scheme, the United States Government does most of the initial clean-up. \textit{Id.} In order to sue for recoupment of its costs under the generous provisions of CERCLA, the United States needs a cause of action. \textit{Id.} CERCLA creates this right. \textit{Id.} (construing 42 U.S.C. § 9607(a)). Without this provision, the United States would have to sue each state under its own tort law. \textit{Id.} at 379 n.14. For an argument parallel to this one made by the Supreme Court in \textit{Employees}, see supra note 30. For a discussion of how these arguments differ, see infra note 93.}
\footnote{The court also noted that it did not have to rely upon \textit{Employees} to reach its decision, but could instead rely solely on CERCLA itself. \textit{Union Gas}, 792 F.2d at 379. The court stated that the United States is included in the definition of "person" in section 101(21). \textit{Id.} Thus, if section 107(a) waived the states' immunity, it would also waive the United States' immunity. \textit{Id.} The court noted, however, that there is a separate CERCLA provision—107(g)—which explicitly waives federal sovereign immunity. \textit{Id.} This implies that section 107(a) does not waive states' immunity. \textit{Id.} The dissent disagreed with this interpretation, noting that no legislative history backs up this argument and that Congress was merely being redundant by its inclusion of the waiver. \textit{Id.} at 384 n.1.}
In addition to its primary argument based on an interpretation of sections 101 and 107 of CERCLA, Union Gas also argued that other environmental laws specifically limit suits against states "to the extent permitted by the eleventh amendment." Since CERCLA does not contain such a provision, Union Gas argued that the absence of such a limitation is evidence that Congress intended to abrogate the eleventh amendment. The court rejected this argument, and held that no court has read a statute to abrogate the eleventh amendment on the basis of what the statute did not say.

A third argument put forth by Union Gas states that section 107(e)(2) of CERCLA, a subrogation provision, allowed Union Gas to subrogate to the rights of the United States against Pennsylvania once the United States settled its case against Union Gas. Since the United States could sue Pennsylvania without the eleventh amendment barring the suit, Union Gas argued that it too could sue Pennsylvania in federal court through the device of subrogation. Judge Becker also dismissed this argument because neither section 107(e)(2) nor its legislative history contain evidence of Congress' intent to allow private parties "to inherit all of the rights of the United States including the right to over-ride the states' right not to be sued by private citizens in federal court[.]

Union Gas' fourth and final argument focused upon the broad policy underlying the CERCLA legislation as expressed in its legislative history. Union Gas argued that since Congress intended CERCLA to

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48. Union Gas, 792 F.2d at 381. The court found that in other environmental statutes the legislature specifically provided that citizens' suits under the statutes were specifically limited by the eleventh amendment. Id.; see, e.g., 42 U.S.C. § 7604(a)(1) (1982) (Clean Air Act); 42 U.S.C. § 6972(a)(1) (1982) (Resource Conservation and Recovery Act); 33 U.S.C. § 1365(a)(1) (1982) (Federal Water Pollution Control Act). CERCLA does not contain a similar provision for citizens' suits, but there are bills currently in Congress that would amend CERCLA to allow for citizens' suits limited by the eleventh amendment. Union Gas, 792 F.2d at 381-82.

49. Union Gas, 792 F.2d at 381.

50. Id. at 382.

51. Section 107(e)(2) of CERCLA provides that "[n]othing in this title . . . shall bar a cause of action that . . . any . . . person subject to liability under this section . . . has or would have, by reason of subrogation." 42 U.S.C. § 9607(e)(2) (1982).

52. Union Gas, 792 F.2d at 380.

53. Id. Suits brought by the United States against a state are not barred by the eleventh amendment. United States v. Mississippi, 380 U.S. 128 (1965).

54. Union Gas, 792 F.2d at 380.

55. Id. The House Report relied upon by Union Gas says that CERCLA was intended "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with . . . hazardous waste disposal sites." Id. (quoting from H.R. REP. No. 1016, 96th Cong., 2d Sess. 22 (1980)).

The Senate Report relied upon by Union Gas says CERCLA "is designed to help address many of the problems faced by society as a result of chemical con-
establish a comprehensive response and financing mechanism for dealing with problems associated with hazardous waste sites, it must also have intended to abrogate states' immunity, or else CERCLA would be less than "comprehensive." Judge Becker viewed this as the least effective argument since it relies solely on legislative history, and not the statute itself. Unlike the statute in *Hutto*, CERCLA's legislative history nowhere mentions the eleventh amendment or suits against states. Judge Becker stated that the existence of the word "comprehensive" in the legislative history "is commonplace and may be little more than political hyperbole;" and concluded, therefore, that this language cannot bear the evidentiary burden necessary to abrogate the eleventh amendment.

Judge Higginbotham, in his dissenting opinion in *Union Gas*, argued that the definitional section of CERCLA, which declares unequivocally that "person" includes "state," read together with the liability section imposing liability on "persons," is sufficient evidence to show that the legislature intended to abrogate the states' eleventh amendment immunity. Judge Higginbotham emphasized that such an abrogation does not require the legislature to specifically say that "the eleventh amendment's prohibition on suits against states does not apply."

Judge Higginbotham spent most of his dissent showing how the majority misinterpreted the Supreme Court's holdings in *Employees* and *Atascadero*. Judge Higginbotham first argued that the Supreme Court's holding in *Employees* does not decide the issue in *Union Gas* because the majority noted that "[t]he issue of states' immunity was never squarely addressed by either house of Congress in the CERCLA debates. The eleventh amendment was mentioned not once in any document or discussion pertaining to CERCLA." *Id.* at 381 n.16.

Id. at 381.  
60. *Id.* at 381.  
58. For a discussion of *Hutto*, see *supra* notes 35-39 and accompanying text.  
59. *Union Gas*, 792 F.2d at 381. The majority noted that "[t]he issue of states' immunity was never squarely addressed by either house of Congress in the CERCLA debates. The eleventh amendment was mentioned not once in any document or discussion pertaining to CERCLA." *Id.* at 381 n.16.  
61. *Id.* at 383 (Higginbotham, J., dissenting).  
62. *Id.* (Higginbotham, J., dissenting) (citing 42 U.S.C. § 9601(21)).  
63. *Id.* (Higginbotham, J., dissenting). Judge Higginbotham in his dissent observed that:  
[i]n the future, to comply with the rationale of the majority, in definitional sections of similar statutes where remedies are provided for damages citizens or corporations have suffered, Congress must use language similar to the following: 'The term person includes a state, and we really mean the state, and furthermore the eleventh amendment's prohibition against the states does not apply.' In matters of statutory construction of legislation that is as explicit as the statute in issue, no other court has imposed as broad a reading of eleventh amendment prohibitions.  
*Id.*
facts in it are “patently distinguishable” from those in *Union Gas*. Judge Higginbotham argued that the Fair Labor Standards Act (FLSA) interpreted in *Employees*, which provides a cause of action for employees against employers for overtime pay due, differs from CERCLA because the FLSA is ambiguous on the issue of state’s immunity while CERCLA is not. According to the dissent, this ambiguity was spawned by the amendments made to the FLSA in 1966. Prior to the 1966 amendments, “state” was not mentioned in the liability section, which dealt with the liability of “any employer.” Judge Higginbotham noted that at this same time, the definitional section of the statute defined “employer” and specifically mentioned the fact that states were not included within the definition. Judge Higginbotham further noted that when amendments to the FLSA were made in 1966, the definition of “employer” was expanded to specifically include states, while the liability section of the statute remained unchanged. Although it may be argued that the amendment to the definitional section abrogated the eleventh amendment, the Supreme Court in *Employees* held that no such abrogation was effected by the amendments. The dissent disagreed with the majority’s conclusion that the holding in *Employees* was based simply on “the absence of any clear indication of congressional intent to abrogate states’ eleventh amendment immunity.” According to Judge Higginbotham, the Supreme Court held as it did because there was an ambiguity created by the legislature’s amending the definitional provision of FLSA without amending the liability provision. The dissent reasoned that, given these contradictory sections, the Supreme Court could not find a clear intention of Congress in the FLSA to abrogate the eleventh amendment since these sections could be construed to either deny or allow states to be subject to suit in federal court.

64. *Id.* at 384 (Higginbotham, J., dissenting). For a discussion of *Employees*, see supra notes 25-30 and accompanying text.

65. *Union Gas*, 792 F.2d at 385 (Higginbotham, J., dissenting).

66. *Id.* (Higginbotham, J., dissenting). For the text of these provisions, see supra notes 27 and 28.


68. *Union Gas*, 792 F.2d at 385 (Higginbotham, J., dissenting) (citing 29 U.S.C. § 203(d) (1938)).


70. *Id.* (Higginbotham, J., dissenting).

71. *Id.* (Higginbotham, J., dissenting) (citing *Employees* v. Missouri Public Health Dept., 411 U.S. 279, 285 (1973)).

72. *Id.* (Higginbotham, J., dissenting).

73. *Id.* (Higginbotham, J., dissenting).

74. *Id.* (Higginbotham, J., dissenting); see also *Welch v. State Dep’t of Highways and Public Transp.*, 780 F.2d 1268, 1284 (5th Cir. 1986) (“In *Employees*, the Court’s reluctance to find the necessary intention to include the states within the FLSA was influenced by Congress’ confusing amendments.”) (Brown, J., dissenting), cert. granted, 107 S. Ct. 58 (1986), aff’d, 107 S. Ct. 1941 (1987).
concluded from this analysis that since CERCLA does not have a history of amendments which spawns such ambiguity, Employees can be distinguished from Union Gas. Thus, he concludes, the mere inclusion of “states” as “persons” in CERCLA is sufficient evidence of Congress’ intent to abrogate states’ eleventh amendment immunity.

The dissent also criticized the majority’s use of Atascadero in reaching its holding in Union Gas. Judge Higginbotham noted that the statute involved in Atascadero, the Rehabilitation Act of 1973, defined the class of potential defendants as “any recipient of federal assistance,” and did not include specific statutory language identifying the types of recipients of federal aid. CERCLA, on the other hand, specifically identifies the class of potential defendants who may be liable under its provisions, and a “state” is included. After drawing this distinction, Judge Higginbotham concluded that, unlike the statute in Atascadero, “CERCLA allows states to be subjected to suit by private persons,” and that such a conclusion is supported “in ‘unmistakable language in the statute itself,’ ” thereby meeting the rule of construction articulated by Atascadero.

As the dissent pointed out, the majority in Union Gas misapplied the two United States Supreme Court cases—Employees and Atascadero—which it relied upon in reaching its decision. But there are additional shortcomings in the Third Circuit’s opinion in Union Gas which the dissent failed to illuminate, particularly in the court’s use of Employees to dispose of the case.

75. 792 F.2d at 385 (Higginbotham, J., dissenting). The dissent stated that in the case at bar “we are not confronted with a statute which at one time declared that a person ‘shall not include the United States or any State or political subdivision of a State.’ But to the contrary, here, we have the original statute, never amended for purposes relevant to this case, that has always declared that the state was a person for liability purposes.” Id. (Higginbotham, J., dissenting).
76. Id. (Higginbotham, J., dissenting). In reaching the conclusion, Judge Higginbotham said that:

Judge Cardozo . . . so wisely observed that: [i]n countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful.” In this case, from my view the majority has failed to look at the landscape and appreciate the clear statutory language of Congress. Id. at 386 (Higginbotham, J., dissenting) (footnotes omitted).

77. Id. at 385-86 (Higginbotham, J., dissenting).
78. Id. at 385 (Higginbotham, J., dissenting). For a discussion of Atascadero, see supra notes 31-34 and accompanying text.
79. Union Gas, 792 F.2d at 386 (Higginbotham, J., dissenting) (citing 42 U.S.C. § 9601(21) (1982)).
80. Id. (Higginbotham, J., dissenting) (quoting from Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985)).
81. This article focuses only upon the Third Circuit’s use and interpretation of Supreme Court case law in its own opinion. The statutory argument made by the court based solely on its interpretation of CERCLA, is not the focus.
It is crucial to recognize that *Employees* does not stand for the proposition imputed to it by the *Union Gas* court, that "the inclusion of 'states' within the class of potential defendants is insufficient to abrogate" a state's immunity.\footnote{792 F.2d at 379 (citing *Employees*, 411 U.S. 279 (1973)). Although the court states that *Employees* stands for such a proposition, the Supreme Court's opinion nowhere enunciates such a rule.} *Employees* neither states nor stands for such a proposition. Rather, in *Employees* the Supreme Court held that in that particular factual situation the eleventh amendment was not abrogated. Although *Employees* may be cited as standing for the proposition that Congress, if it wishes to do so, must manifest its intent to abrogate the eleventh amendment clearly,\footnote{411 U.S. 279 (1973). *Employees* will not have to be used as often for this proposition, now that the Court has more explicitly announced this rule in *Atascadero*. For a discussion of *Atascadero*, see supra notes 31-34 and accompanying text.} there is no authority for citing it as standing for the proposition attributed to it by the Third Circuit.

*Employees* is one of numerous cases decided by the Supreme Court which, taken together, create a special set of rules of statutory construction of which Congress must be aware if it wants to make manifest its intention to abrogate the states' eleventh amendment immunity.\footnote{See *Employees*, 411 U.S. 279 (1973) (Congress must make its intention "clear" if it sought to lift states' eleventh amendment immunity); Edelman v. Jordan, 415 U.S. 651 (1974) (waiver by state of state's immunity will be found only where stated by the most express language or by such overwhelming implications from text as will leave no room for any other reasonable construction); Pennhurst State School & Hospital v. Halderman, 465 U.S. 651 (1984) (to abrogate states' immunity an unequivocal expression of congressional intent is required); Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) (Congress must express its intention to abrogate eleventh amendment in unmistakable language in statute itself).} In *Atascadero*, the most recent of these cases, Justice Brennan noted in his dissent that such "special rules of statutory drafting" were "designed as hurdles to keep the disfavored suits out of federal court."\footnote{*Atascadero*, 473 U.S. 234, 254 (1985) (Brennan, J., dissenting). Justice Brennan has been consistently on the side of the court which favors subjecting the states to suit in federal court. See, e.g., *Employees*, 411 U.S. 279 (1973) (Brennan, J., dissenting); Parden v. Terminal Ry. Co., 377 U.S. 184 (1964), overruled, 107 S. Ct. 2941 (1987) (Brennan, J., dissenting).} It is suggested that Justice Brennan's view is only partially correct. The Court does indeed mean to design "hurdles" which one must overcome before suing a state in federal court, but not for the dubious purpose of keeping "disfavored suits" out of federal court. Rather, the Court is concerned about maintaining "the usual constitutional balance between the states and Federal Government."\footnote{See, e.g., *Atascadero*, 473 U.S. 234, 242 (1985) (eleventh amendment serves to maintain balance of power between states and federal government);} This concern manifests itself most of this analysis, even though the court's holding may be able to rest independently on that basis alone. For a discussion of the statutory argument, see supra note 47.
poignantly in *Employees*. The Third Circuit, however, overlooks the Court's concern with the "constitutional balance between the states and Federal Government," and consequently it misinterprets the rationale behind the Supreme Court's conclusion in *Employees*.

The dissent in *Union Gas* disagreed with the majority's reading of *Employees*, but the dissent only focused on the differences between the statutory language involved in each case. The Supreme Court's decision in *Employees* was influenced not only by the ambiguous amendments to the FLSA but also by its concern for the delicate "constitutional balance" between states and the Federal Government.

The Supreme Court in *Employees* was reluctant to find that Congress abrogated the states' immunity in the FLSA for two reasons: the "enormous fiscal burden" that such legislation would put on the states, and the pervasive effect that such a federal scheme of regulation would have on the states. Since abrogation of the states' immunity would lead to these consequences, the Court was reluctant to infer that Congress desired to abrogate the eleventh amendment. Thus, it seems that in order to avoid placing an enormous fiscal burden on the states and to prevent a pervasive effect on the states, the Court in *Employees* did not find that Congress abrogated the states' immunity.

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Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 572 (1985) (Powell, J., dissenting) ("constitutionally mandated balance of power" between the states and Federal Government was adopted by Framers to ensure protection of "our fundamental liberties"); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) (Court is reluctant to infer that state's immunity has been neglected because of "the vital role of the doctrine of sovereign immunity in our federal system.").

87. *Employees*, 411 U.S. at 286. The Court was concerned with the effect that the interpretation of FLSA would have on the delicate federal-state relationship. Id.

88. *Union Gas*, 792 F.2d at 379. The Third Circuit in *Union Gas* used *Employees* to support its finding that when a suggestion that states might be sued is found in a provision of a statute separate from the provision that creates the cause of action, the statutory arrangement is insufficient to satisfy the burden of abrogation. Id. The court, however, never considered the delicate federal-state relationship in making its finding. Id.

89. Id. at 384-86 (Higginbotham, J., dissenting). For a discussion of the dissent's reading of *Employees*, see supra notes 47-56 and accompanying text.

90. See 411 U.S. at 286. The Supreme Court in *Employees* does not speak of "constitutional balance"—which is language from *Atascadero*—but rather of "the delicate federal-state relationship." Id. at 286.

91. Id. at 284. The Court stated: "[W]hen Congress does [enact legislation that regulates state activity], it may place new or even enormous fiscal burdens on the States. Congress, acting responsibly, would not be presumed to take such action silently." Id. at 284-85.

92. Id. at 285. The Court stated: "We deal here with problems that may well implicate elevator operators, janitors, charwomen, security guards, secretaries, and the like in every office building in a State's governmental hierarchy." Id.

93. Id. The Court stated: "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." Id.

Besides considering the vast implications that FLSA would have for states if it were to apply to them, the Court in *Employees* was also influenced by the fact that the Secretary of Labor is empowered by FLSA to enforce the Act. Id. at
der to determine whether Congress had abrogated the eleventh amendment when it enacted the FLSA, the Court speculated as to what the potential consequences to the states would be if they were subjected to suit in federal courts under the FLSA.94

The Third Circuit in Union Gas overlooked the Supreme Court's concern in Employees with the vast implications that FLSA would have for the states. As a consequence, the court mistakenly turned the specific holding in Employees into a general proposition, and mechanically applied it to the facts in Union Gas.95 In essence, the Supreme Court in Employees said that the inclusion of "states" within the class of potential defendants is insufficient, in this particular situation, to abrogate the state's immunity.96 The Third Circuit's interpretation of this holding would leave out the phrase "in this particular situation."97

In addition to these problems with applying Employees to the facts in

285-86. The Secretary of Labor can sue states in federal court because suits by the United States in federal court are not barred by the eleventh amendment. Id. at 286 (citing United States v. Mississippi, 380 U.S. 128, 140-41 (1965)). Since state employees could be protected under FLSA by the Secretary of Labor's ability to sue the states, the Court concluded that “[t]he policy of the Act so far as the States are concerned is wholly served by allowing the delicate federal-state relationship to be managed through the Secretary of Labor.” Id. With this reasoning, the Court was able to make meaningful the legislature's extension of FLSA to include state employees under its umbrella in the 1966 amendments. Id. at 285.

The Third Circuit tried in Union Gas to make an argument analogous to the one from Employees, when it said that section 107 of CERCLA performs a "meaningful function" even when it is not construed as an abrogation of state immunity. 792 F.2d at 380. This function, the court concluded, was to provide a right of action for the United States against the states for re-coupment of its clean-up costs. Id. But this argument differs significantly from the one in Employees. In Employees, the Supreme Court noted that the private parties could still be protected by FLSA, even though they work for the State. 411 U.S. at 279. In Union Gas, the court still has not found a way for CERCLA to protect private parties' rights when these are infringed upon by a state.

94. Employees, 411 U.S. at 284-86. The Court has never explicitly acknowledged that it was performing a "balancing test" of state and federal interests before determining whether the statute abrogated the state's immunity. Id. One author has pointed out that this balancing test is often masked by the Court's apparent concern with statutory interpretation. See Baker, Federalism and the Eleventh Amendment, 48 U. Colo. L. Rev. 139, 167-69 (1977).

95. 792 F.2d at 379. This occurred when the Third Circuit said: "[W]e are bound by Employees to find that the inclusion of 'States' within the class of potential defendants is insufficient to abrogate Pennsylvania's immunity. Id. The Supreme Court did not set forth such a proposition in Employees; rather, the Third Circuit derived this proposition from the specific facts and holding of Employees. The Third Circuit then decided Union Gas by analogy to Employees. Id.

96. Employees, 411 U.S. at 284-85. The particular situation in Employees involved the possibility of placing an enormous fiscal burden on the states with a federal statutory scheme that would have a pervasive regulatory effect on state activity if the scheme were to be applied to the states. Id.

97. Union Gas, 792 F.2d at 379. The Third Circuit only considered the fact that the inclusion of states as potential defendants was in a provision separate from the one creating the plaintiff's cause of action. Id. Since the statutory ar-
Union Gas, there is also the fact that the decision in Employees was specifically overruled by Congress. The subsequent amendments made to the FLSA by Congress in 1974, making Congress' intention unmistakably clear with respect to the amenability of states to suit in Federal Court, sheds doubt on the validity of Employees as a reliable guide to general problems of statutory interpretation. Congress' swift response to Employees clearly indicates that, contrary to what the Supreme Court held, Congress did intend to abrogate the eleventh amendment when it made amendments in 1966. As a guide for interpretation interpreted in Employees was similar in this respect to that in Union Gas, the Third Circuit felt obligated to follow Employees. 

98. The Third Circuit recognized this fact in a 1975 decision, stating that "[t]he legislative history of the 1974 amendments to the FLSA makes clear the fact that the amendment to this section was expressly designed to overcome the ruling in Employees." Dunlop v. New Jersey, 522 F.2d 504, 515 n.20 (3d Cir. 1975), vacated, 427 U.S. 909 (1976) (citing 2 U.S. CODE CONG. & ADMIN. NEWS 2850, 2853 (1974)).

The amendments made to the FLSA in 1974 changed the two provisions interpreted by the Supreme Court in Employees. For the text of these provisions as they existed in 1973, see supra notes 27-28.

Congress amended Section 16(b), the liability provision of FLSA, by changing it from the ambiguous "[a]ction to recover such liability may be maintained in any court of competent jurisdiction," to the clearer language of "[a]n action to recover the liability prescribed . . . may be maintained against any employer (including a public agency) in any Federal or State Court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b) (1974) (amending 29 U.S.C. § 216(b) (1961)).

99. It did not take long, however, for the Supreme Court to strike down the 1974 amendments to FLSA as being unconstitutional. In National League of Cities v. Usery, 426 U.S. 833 (1976), the Court held that Congress, though not overreaching its power pursuant to the Commerce Clause to regulate such activity, did violate states' sovereignty protections afforded by the tenth amendment. Id. at 852. The Court drew a distinction between traditional and non-traditional governmental functions, and stated that Congress cannot enact legislation which "operate[s] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." Id.

The Supreme Court in National League was deeply divided in its 5-4 plurality decision, and was again divided by 5-4 when it overruled this case in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). In Garcia, the Court did away with the "traditional governmental functions" protection afforded by the Court in National League. Id. at 539-43.

It is interesting to note that all the dissenters in Garcia accounted for four of the five Justices in the majority for Atascadero. This is hardly surprising, since Atascadero offers protection to states from having to litigate in Federal Courts, while Garcia, in effect, limits such protection. For a discussion of how these apparently conflicting cases can be seen as consistent when viewed in light of the policies underlying the tenth and eleventh amendments, see Brown, State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications, 74 GEO. L.J. 363 (1985).

The issue of whether Congress would have the power to regulate state activity with the CERCLA legislation was not addressed by the Court in Union Gas, but if the plaintiffs were able to surpass the eleventh amendment defense, this issue would surely be the next one to address.
interpreting statutes and determining Congress' intent, therefore, *Employees* is not reliable. This is not to say, however, that the decision in *Employees* itself was wrong. Rather, *Employees* serves to further emphasize that the Supreme Court is unlikely to infer abrogation of the eleventh amendment in circumstances where the evidence for abrogation is not unmistakably clear, and the potential adverse consequences to the states of abrogating the eleventh amendment are extremely great.

It seems, then, that in order for the Third Circuit to truly "follow" the reasoning in *Employees*, it is suggested that the court would have to determine what the potential consequences to the states would be if they were subjected to suit in federal court under CERCLA before it determined what amount of evidence would be necessary to appear in CERCLA in order to make manifest Congress' intent to abrogate the states' eleventh amendment immunity. This analysis would include consideration of a number of factors. These would include: whether subjecting states to suit in federal court under CERCLA would place "enormous fiscal burdens" on the states; whether the CERCLA legislation would have a "pervasive regulatory effect" on state activity; whether the interests protected by CERCLA are of such a national character that state interests are secondary to it; and whether the state

100. For a discussion of this procedure as used by the Supreme Court in *Employees*, see supra notes 90-94 and accompanying text.

101. See *Employees*, 411 U.S. at 284.

102. See id. at 285. The Supreme Court in *Employees* implied that not all federal legislation would have a "pervasive regulatory effect" on the states if it were to apply to them. *Id.* For instance, the Court distinguished *Parden v. Terminal Railway Co.*, 377 U.S. 184 (1964), overruled, 107 S. Ct. 2941 (1987), from *Employees* on this basis. The statute involved in *Parden*—the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 et seq.—provided a right of action against "everyone who operates a railroad." 45 U.S.C. § 51 (1908). The Court in *Parden* did not require the statute to mention "states" in order to make the statute apply to states. *Parden*, 377 U.S. at 188. The eleventh amendment was held as not barring the suit brought by a state employee against the state in federal court. *Id.* at 196 (specific holding from *Parden* was overruled in Welch v. Department of Highways & Pub. Transp., 107 S. Ct. 2941, 2968 (1987)). The Court in *Employees*, however, said that the "rather isolated state activity [involved in *Parden*] can be put to one side. We deal here with problems that may well implicate elevator operators, janitors, . . . secretaries, . . . in every office building in a State's governmental hierarchy." 411 U.S. at 285. Obviously, CERCLA would not have such a pervasive effect on the states. It would only affect state activity which related to hazardous waste sites. CERCLA's effect on states, therefore, would not be as pervasive as FLSA is.

103. There are circumstances in which federal interests have been held to be paramount to state interests. For instance, the eleventh amendment does not apply when suit is brought against a state employee against the state in federal court. *Ex Parte Young*, 209 U.S. 123 (1908). *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) ("[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the U.S.'").

In his concurrence to *National League of Cities v. Usery*, 426 U.S. 833
activity which gave rise to the cause of action was "proprietary," as opposed to "exclusively governmental."104

The problems associated with determining the extent of states’ immunity to suit brought by private parties in federal court, even in light of the seemingly clear rules set out by recent Supreme Court decisions concerning congressional abrogation of the immunity,105 remain extremely complex.106 The Third Circuit’s opinion in *Union Gas*, in its mechanical application of select language from *Employees* and *Atascadero*, conceals the difficult policy issues which underlie the law in this area.

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(1976). Justice Blackmun, addressing the related issue of whether Congress has the power to regulate certain state activities, said that "'[the Court] adopts a balancing approach [for deciding not to extend Congress's regulatory power to the setting of minimum wage requirements for state employees], and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.' Id. at 856 (1976) (Blackmun, J., concurring).

104. The distinction between "proprietary" and "governmental" activity was drawn by the Supreme Court in *Employees* to distinguish *Parden v. Terminal Railway Co.*, 377 U.S. 184 (1964), overruled, 107 S. Ct. 2941 (1987), from the situation involved in *Employees*. The Court said: "*Parden* involved the railroad business which Alabama operated 'for profit.' *Parden* was in the area where private persons and corporations normally ran the enterprise. State mental hospitals, state cancer hospitals, and training schools for delinquent girls which are not operated for profit are not proprietary." 411 U.S. at 284 (footnotes omitted).

The Supreme Court in *Parden* said that "when 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." *Parden*, 377 U.S. at 196. *Employees* modified the holding in *Parden* by not treating states as private persons in all situations in which it performs an activity that would make a private person subject to congressional regulation. Instead, the Court upheld the states' immunity when the state was engaged in a non-proprietary activity. In such a situation, the Court required a more explicit showing of congressional intent to abrogate the state's immunity. *Employees*, 411 U.S. at 285. Such a distinction is probably less relevant today with the Court's opinion in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which expressly disposed of such a distinction when dealing with state activity. For a discussion of *Garcia*, see supra note 94. It is unclear, however, whether the *Garcia* analysis could be applied to this issue in eleventh amendment jurisprudence since it deals with the tenth amendment.

In any event, the Supreme Court will no longer feel obliged to account for the decision in *Parden* when making decisions based on the eleventh amendment since *Parden* has recently been overruled. See *Welch v. Dept. of Highways & Pub. Transp.*, 107 S. Ct. 2941 (1987).

105. For a discussion of the instability of the Supreme Court's decisions in this area, see supra note 99.

106. For a discussion of various views and continuing disputes in the area of eleventh amendment jurisprudence, see supra notes 1-2.