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William P. Marshall

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THE ELEVENTH AMENDMENT, PROCESS FEDERALISM AND THE CLEAR STATEMENT RULE

*William P. Marshall**

INTRODUCTION

For years, the United States Supreme Court has steadfastly avoided the issue of whether Congress may abrogate the states' eleventh amendment immunity[1] from suit for damages in federal court. The court devised a uniquely stringent mode of statutory construction as its escape device. In each case the Court avoided the constitutional issue by holding that Congress had not provided "clear and unmistakable" language in the governing statute which would indicate the states were intended to be subject to federal jurisdiction.[2]

The Court again faced the issue of constitutional abrogation in a number of cases decided during the 1988-1989 Supreme Court Term.[3] In one of those

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* Professor of Law, Case Western Reserve University. The author greatly appreciates the comments on earlier versions of this article provided by Melvyn Durchslag. Research assistance was provided by Tracey Burton.

1. The eleventh amendment provides that:

> 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 a Foreign State.

U.S. CONST. amend. XI.

2. Dellmuth v. Muth, 109 S. Ct. 2397, 2500 (1989) (Court required clear language in statute to abrogate state's eleventh amendment immunity); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 475-76 (1987) (Congress failed to state an "unmistakably clear expression" to abrogate the eleventh amendment) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)); Green v. Mansour, 474 U.S. 64, 68 (1985) ("states may not be sued in federal court . . . unless Congress . . . unequivocally expresses its intent to abrogate immunity"); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute"); Quern v. Jordan, 440 U.S. 332, 343 (1979) ("our cases consistently have required a clearer showing of congressional purpose to abrogate eleventh amendment immunity"); Edelman v. Jordan, 415 U.S. 651, 673 (1974) (waiver of state immunity found only "where stated 'by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction' ") (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)); Employees v. Missouri Dep't of Pub. Health & Welfare, 411 U.S. 279, 285 (1973) ("It would also be surprising in the present case to infer that Congress deprived Missouri of her constitutional immunity . . . [without] indicating in some way by clear language that the constitutional immunity was swept away").

3. Hoffman v. Connecticut Dep't of Income Maintenance, 109 S. Ct. 2818, 2819 (1989) (Court found that Congress had not clearly abrogated state's immunity under Bankruptcy code and so denied trustee's action against state); Missouri v. Jenkins by Agyei, 109 S. Ct. 2463, 2466-68 (1989) (Court awarded attorneys' fees to prevailing plaintiffs in school desegregation

cases, *Pennsylvania v. Union Gas Co.*,[4] the Court finally did not evade the abrogation issue on statutory construction grounds.[5] A five person majority found the statute at issue in *Union Gas* to be unmistakably clear;[6] under the statute states were to be subject to suits for damages in federal court.[7]

The Court presented its long-awaited answer to the constitutional question, however, as essentially a *fait accompli.* Arguing that its previous decisions "mark[ed] a trail unmistakably leading to the conclusion that Congress may permit suits against the States for money damages,"[8] the Court held that Congress did have the power to abrogate the states' eleventh amendment immunity.[9] Furthermore, the Court, taking its previous cases to heart, effectively constitutionalized its issue-avoidance mechanism. According to the Court, the constitutional limit on the congressional power to abrogate the states' eleventh amendment immunity was that Congress must do so by "clear and unmistakable language" in the text of the governing statute.[10] The Court, in short, adopted what has been referred to as the "clear statement rule."[11]

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case who brought action against state under 42 U.S.C. § 1988); Dellmuth v. Muth, 109 S. Ct. 2397, 2402 (1989) (Court found wording of Education of the Handicapped Act, 20 U.S.C. § 1400, did not clearly abrogate state's eleventh amendment immunity so did not find state liable to father of handicapped child who brought action against state's Department of Education challenging the individualized education program established for his son as well as the appropriateness of administrative relief); Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2278 (1989) (Court found wording of CERCLA, 42 U.S.C. §§ 9604-9606, clearly made state liable to plaintiff who sued state claiming that state was liable for environmental clean up of site under 1986 SARA amendments to CERCLA).

4. 109 S. Ct. 2273 (1989).

5. *Id.* at 2278-79.

6. Justice White, joined by Chief Justice Rehnquist, and Justices O'Connor and Kennedy disagreed with the majority on the "clear language" issue. *Union Gas,* 109 S. Ct. at 2289-90 (White, J., concurring).

7. *Id.* at 2280. *Union Gas* concerned the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1982 & Supp. IV 1986) and the subsequent amendments found in the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613, which provides, *inter alia* for liability of responsible parties for clean-up costs of hazardous waste sites. Those who may be liable are "persons" and "owners or operators." 42 U.S.C. § 9607(a). "[S]tates" are included within the definition of "persons." 42 U.S.C. § 9601(21). Other parts of the statute, however, explicitly exclude states from liability. The majority consequently concluded that:

> [T]he express inclusion of states within the statute's definition of 'persons,' and the plain statement that states are to be considered 'owners or operators' in all but very narrow circumstances, together convey a message of unmistakable clarity: Congress intended that states be liable along with everyone else for clean-up costs recoverable under CERCLA.

Union Gas, 109 S. Ct. at 2278.

8. *Union Gas,* 109 S. Ct. at 2281.

9. Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2281 (1989); Dellmuth v. Muth, 109 S. Ct. 2397, 2400 (1989); Hoffman v. Connecticut Dep't of Income Maintenance, 109 S. Ct. 2818, 2822 (1989).

10. *Union Gas,* 109 S. Ct. at 2277.

11. *See, e.g.,* Chemerinsky, *Congress, The Supreme Court, and the Eleventh Amendment:*

I. A Review Of The Eleventh Amendment Cases Decided During The Supreme Court's 1988-89 Term

There are numerous unusual twists in the 1988-89 Term cases, especially in *Union Gas,* that even a cursory review reveals. First, as Professor Chemerinsky suggests, the Court's holding in *Union Gas* seems particularly tenuous because eight of the nine Justices on the Court have rejected the clear statement formulation.[12] Four of the Justices believe that eleventh amendment immunity only applies in diversity cases,[13] while four subscribe to the position that the eleventh amendment reflects a substantive state immunity from damages suits in federal court that cannot be overridden by Congress,[14] except when Congress has acted pursuant to section five of the fourteenth amendment.[15] The adoption of the clear statement rule, then, was clearly not a product of a commitment to a reasoned theoretical position.

Much of the cause of the Court's failure to come to grips with the constitutional issues involved stems from the nature of Justice White's critical swing vote concurrence in the *Union Gas* case.[16] Ever seeking to avoid the constitutional issue, Justice White vigorously argued that the statute in *Union Gas* was not clear enough to subject the state to federal jurisdiction.[17] However, having lost that battle he was at last forced to address the constitutional issue. Here his adherence in previous cases to the clear statement requirement took its toll. After having subscribed for so long that Congress needed to provide clear and unambiguous language in order to abrogate the states' immunity,[18] Justice White was seemingly forced to

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A Comment on the Decisions During the 1988-89 Term, 39 De Paul L. Rev. 321 (1989); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States,* 126 U. Pa. L. Rev. 1203, 1250 (1978).

12. Chemerinsky, *supra* note 11, at 333-34.

13. *See* Atascadero State Hospital v. Scanlon, 473 U.S. 234, 253-61 (1985) (Brennan, J., dissenting) (Justices Marshall, Blackmun and Stevens share diversity theory with Justice Brennan).

14. *See* Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2303 (1989) (Scalia, J., dissenting in part) (Chief Justice Rehnquist as well as Justices O'Connor and Kennedy joined Scalia's opinion that eleventh amendment reflects constitutionally-based state immunity).

15. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (Court found eleventh amendment did not bar petitioners class action suit under Title VII against state for discriminatory retirement plan because section five of fourteenth amendment overrides the state's eleventh amendment protections).

16. 109 S. Ct. at 2289-94.

17. Justice White did not "think that SARA's liability-limiting amendment to CERCLA contain[ed] an 'unmistakably clear' statement by Congress that it wanted to abrogate the States' solemn immunity to private suit under the Eleventh Amendment." *Id.* at 2294 (White, J., concurring) (quotations in text).

18. Justice White has consistently joined the Supreme Court decisions which have suggested that abrogation of states eleventh amendment immunity may occur only where clear and unmistakable language, or "unequivocal expression" of congressional intent exists within the statute. *See* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 495 (1987); Green v. Mansour, 474 U.S. 64, 65-66 (1985); Atascadero State Hosp. v. Scanlon, 473 U.S.

conclude that Congress, in fact, had that power. His opinion, however, left the rationale behind the constitutional issue adrift. Justice White simply wrote: "I agree . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the states, although I do not agree with much of [Justice Brennan's] reasoning."[19]

Justice Brennan's plurality opinion, although commanding four votes, also did not provide what could fairly be considered a commanding rationale.[20] Justice Brennan based his conclusion that Congress could abrogate states' immunity on the contention that the states waived their sovereign immunity when they agreed to enter into the federal union.[21] Implied in this contention, however, is that states are not immune to *any* suits based on federal law; including those brought directly under the constitution without statutory authority. As such, Justice Brennan's opinion marks a clear repudiation of *Hans v. Louisiana,*[22] which held that the states are immune to direct actions under the Constitution.[23] In contrast, Justice White, the critical fifth vote, explicitly rejected the overruling of *Hans.*[24] The only common ground between Justice Brennan's opinion and Justice White's concurrence, in short, was the apparent reliance on the dicta in previous cases which held that a clear statement was necessary to abrogate state immunity.[25]

A second difficulty arising from the Court's resolution of the congressional abrogation issue is the rather meager role it ascribes to the eleventh amendment. The conclusion that the states' only protection from Congress is that the latter must act with a "clear statement" essentially relegates the eleventh amendment to a legislative draftsmanship provision. Normally, however, one would think that constitutional amendments, particularly ones which overturn unpopular Supreme Court decisions,[26] are of greater consequence than statutory drafting guidelines.

A third problem is that the combination of the result in *Union Gas* with the Court's apparent reaffirmation of *Hans v. Louisiana*[27] creates, at least

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234, 242-45 (1985); Oneida v. Oneida Indian Nation, 470 U.S. 226, 252 (1985) (White, J., concurring in part); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 97-106 (1979); Quern v. Jordan, 440 U.S. 332, 343-49 (1979); Edelman v. Jordan, 415 U.S. 651, 675-76 (1974); Employees v. Missouri Dep't of Pub. Health & Welfare, 411 U.S. 279, 280-84 (1973).

19. *Union Gas* 109 S. Ct. at 2295 (White, J., concurring).

20. Justices Blackmun, Marshall and Stevens joined in Brennan's decision. *Id.* at 2275-86.

21. *Id.* at 2283-86. Justice Brennan also presented a doctrinal argument that Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), dictated the result in *Union Gas. Id.* at 2282. The *Fitzpatrick* Court held that Congress might override states' eleventh amendment immunity under section five of the fourteenth amendment. Fitzpatrick v. Bitzer, 429 U.S. at 456.

22. 134 U.S. 1 (1890).

23. *Id.* at 10.

24. *Union Gas,* 109 S. Ct. at 2295 (White, J., concurring).

25. Justice White did not explicitly cite to this dicta in his brief discussion of the constitutional issue.

26. The eleventh amendment was enacted in response to the Supreme Court's decision in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

27. 134 U.S. 1 (1890). As Professor Chemerinsky notes, there were five votes in Union Gas to affirm the *Hans* decision. *See* Chemerinsky, *supra* note 11, at 331.

with respect to the eleventh amendment, a new hierarchy in the rights of individuals to proceed against states for damages. Under the Court's approach, plaintiffs may pursue rights granted by Congress in federal court against the states while rights granted directly under the Constitution may be frustrated. The Court's approach, in short, entitles statutory rights to more federal judicial enforcement than constitutional rights.[28]

The most disturbing aspect of the 1988-89 cases, however, is that the Court, in failing to provide a majority rationale and, instead, relying heavily on dicta from previous cases, clearly did not grapple with the significance of its prior decisions. As Professor Chemerinsky notes, the policies underlying the eleventh amendment debate involve "the major themes of constitutional law."[29] It is for that reason that the debate surrounding this interpretation has been so vigorous. One would therefore expect important decisions in this area to seriously address these policies. The cases decided during the 1988-89 Term, however, have not satisfied this expectation.

Indeed, *Union Gas* and its companion cases did not even seriously address the open eleventh amendment issues that they supposedly resolved.[30] Implicit in the clear statement rule are the following conclusions about the eleventh amendment:

> (1) despite the wording of its text, the eleventh amendment is not jurisdictional. If the eleventh amendment were jurisdictional, Congress could not alter it by legislative fiat;[31]
> (2) the eleventh amendment is not limited to only diversity cases — as four of the Court's current members espouse;[32]
> (3) the amendment is not a manifestation of a constitutionally-based doctrine of state sovereign immunity — as four other members of the Court maintain;[33] and,
> (4) the eleventh amendment is not an expression of a common-law based sovereign immunity.[34]

These conclusions may or may not be correct, but there is little doubt that they are highly controversial. Each conclusion resolves what has been a deeply divided debate in academic circles, as well as within the Court itself.[35] It is unsettling enough that the Court answered this debate by resort

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28. For an attack on the principle that constitutional rights may deserve more judicial protection than statutory rights, see Webster v. Doe, 108 S. Ct. 2047, 2059-60 (1988) (Scalia, J., dissenting).

29. *See* Chemerinsky, *supra* note 11, at 339.

30. *See supra* note 3 and accompanying text.

31. *See, e.g.*, Employees v. Missouri Dep't of Pub. Health & Welfare, 411 U.S. 279, 297-98 (1973) (Marshall, J., concurring).

32. *See supra* note 2 and accompanying text.

33. *See supra* note 11 and accompanying text.

34. *See* Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 544 (1977); Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 6 (1988).

35. For a list of some of the leading academic commentaries, see Chemerinsky, *supra* note 11, at 321 n.1.

to little more than citing dicta from its previous decisions. When one considers, however, that the dicta relied upon was simply part of the Court's previous issue-avoidance strategy, the transformation of that dicta to constitutional principle becomes even more disquieting.

Obviously, then, there is much that could be said in response to the 1988-89 Term decisions. At the very least, a theoretical debate concerning the underlying meaning of the eleventh amendment needs to be further explored. Nevertheless, rather than offering a broad theoretical critique, I have a more modest goal in mind for the remainder of this Essay. Specifically, I will examine whether the Court's conclusion that Congress has the power to abrogate a state's eleventh amendment immunity is consistent with its imposition of a constitutionally required clear statement rule.

II. A Justification For the Court's Decision: Process Federalism

A. *Process Federalism - the Court's Apparent Rationale*

No matter how vociferously the Supreme Court's 1988-89 eleventh amendment decisions are attacked, it cannot be said that the holding that Congress may abrogate a state's eleventh amendment immunity is without support. This conclusion has been strongly defended and probably represented at one time "the prevailing academic view."[36] Actually, two distinct theories exist which support the "congressional supremacist" position.[37]

The first and earlier theory posits that the eleventh amendment was intended only as a limitation on federal judicial power.[38] Under this interpretation, the eleventh amendment does not bar congressional action because the eleventh amendment is irrelevant to the exercise of congressional power.

More recently, a second theory has been advanced which posits that a state's eleventh amendment protection is akin to the protection accorded states under the tenth amendment.[39] According to this theory, both amend-

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36. 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, 364 (1985). The diversity theory has since probably become the dominant academic position. *See* Amar, *Of Sovereignty and Federalism,* 96 Yale L.J. 1425 (1987); Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction,* 35 Stan. L. Rev. 1033 (1983); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation,* 83 Colum. L. Rev. 1889 (1983). *But see* Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation,* 102 Harv. L. Rev. 1372 (1989).

37. Brown, *supra* note 36, at 364.

38. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments,* 75 Colum. L. Rev. 1413, 1441-42 (1975); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism,* 89 Harv. L. Rev. 682, 693 (1976).

39. Brown, *supra* note 36, at 389-91.

ments are concerned with the protection of state sovereignty. Unlike the earlier congressional abrogation thesis, this theory posits that the eleventh amendment does address congressional power, but that the protection it provides to the states is similar to that accorded to the states under the tenth amendment.[40]

The congressional supremacist position, as taken by the Court in the 1988-89 Term decisions, appears to be most in accord with the second view. The Court did not treat the eleventh amendment as irrelevant to the exercise of congressional power as the first school would maintain.[41] Rather, the Court followed an analysis similar to that applied in recent tenth amendment cases. The Court recognized that the states presented a cognizable constitutional interest but held that interest could be overridden by congressional action.[42] In short, the *Union Gas* Court's holding that Congress may, under its commerce power, subject the states to federal jurisdiction parallels the Court's tenth amendment decision in *Garcia v. Metropolitan Transit Authority*[43] which held that Congress had the power to subject the states to substantive federal regulation.

That there might be a relationship between a state's tenth amendment and eleventh amendment protections had been raised prior to the 1988-89 Term. In dissent, Justice Blackmun alluded to such a relationship in *Atascadero State Hospital v. Scanlon.*[44] It was Professor George Brown, however, who constructed the theoretical bridge between the two amendments.[45] Relying on the Court's rejection of the state's tenth amendment defense in *Garcia,* Professor Brown accurately predicted that the Court would ultimately hold that Congress had the constitutional authority to override the states' eleventh amendment immunity.[46]

The critical component in *Garcia* and Professor Brown's hypothesis is the theory of process federalism.[47] Process federalism assumes that the states do

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40. *Id.* at 372-79. For criticism of the position, see Jablonski, *The Eleventh Amendment: An Affirmative Limitation on the Commerce Clause Power of Congress - A Doctrinal Foundation,* 37 DE PAUL L. REV. 547, 555 (1988); Jablonski, *Does* Garcia *Preclude an Eleventh Amendment Affirmative Limitation on the Congress's Commerce Clause Power,* 23 U. RICH. L. REV. 1, 4 (1988).

41. Justice Brennan alluded to this theory but he primarily focused on Congress's power to abrogate state immunity, thus suggesting that he viewed the eleventh amendment as relevant to the abrogation issue. Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2283-84 (1989).

42. *Union Gas,* 109 S. Ct. at 2280-84.

43. 469 U.S. 528 (1985).

44. 473 U.S. 234, 303 (1985) (Blackmun, J., dissenting) (suggesting that "Court's Eleventh Amendment cases spring from the same soil as the Tenth amendment jurisprudence abandoned in Garcia v. San Antonio Metropolitan Transit Authority").

45. *See* Brown, *supra* note 36, at 393; *see also* H. FINK & M. TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 152 (1984).

46. *See* Brown, *supra* note 36, at 393.

47. The theory of process federalism has been most often associated with the writings of Dean Jesse Choper and Professor Herbert Wechsler. *See* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 172-74 (1980); Wechsler, *The Political Safeguards of Feder-*

not need judicial protection from purported encroachment by the federal government because Congress, the legislative arm of the federal government, is comprised of representatives from the various states themselves. As the Court explained in *Garcia*:

> [T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. . . . [T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'[48]

If one accepts Professor Brown's conclusion that the eleventh amendment is a "narrow exemplification"[49] of state sovereignty, the application of a process federalism understanding to eleventh amendment issues easily follows. The conclusion that tenth amendment state sovereignty interests are protected in the workings of the political process would necessarily mean that the political process would also serve to protect the states' eleventh amendment interests.[50] Moreover, as Professor Brown argues, if Congress is not barred from placing substantive regulations upon the states under the tenth amendment, then it would seem that this general power "ought reasonably to include the lesser power of determining how and where the regulation is to be enforced."[51]

All of this, of course, may not be quite so simple. Process federalism itself has increasingly become the subject of attack on the dual grounds that it unrealistically describes the extent that state interests are safeguarded in the national political process and also that it fails to adequately protect the values of federalism.[52] Professor Brown's greater-subsumes-the-lesser argu-

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alism, in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 49-82 (1961); Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1567-68 (1977); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544 (1954).

48. Garcia v. Metro. Transit Auth., 469 U.S. at 551-54 (citing J. CHOPER, *supra* note 47, at 175-84; La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U.L.Q. 779, 787 (1982); and, Wechsler, *supra* note 47, at 558).

49. Brown, *supra* note 36, at 389.

50. *Id.*

51. *Id.* [hereinafter this theory is referred to as the "greater-subsumes-the-lesser argument"].

52. *See* Jackson, *supra* note 34, at 43; Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 849 (1979); Lee, *The Political Safeguards of Federalism? Congressional Response to Supreme Court Decisions on State and Local Liability*, 20 URB. LAW. 301 (1988); McConnell, *Federalism: The Founder's Design*, 54 U. CHI. L. REV. 1484,

ment also presupposes that there are no peculiar problems associated with subjecting the states to federal judicial power, as opposed to federal legislative power. This in itself is a controversial assumption.[53] For our purposes, however, the question is whether, even if process federalism's underlying assumptions are accepted, the theory can be squared with a "clear statement rule" applicable only to congressional action in derogation of state immunity under the eleventh amendment.

B. Process Federalism and the Clear Statement Rule

To Professor Brown, the clear statement rule is "process [federalism] with a bite."[54] Noting that *Garcia* did not wholly abandon the role of judicial oversight in protecting the states, Brown argues that a "clear statement rule" properly falls within the judicial role that Justice Blackmun alluded to in *Garcia.* Judicial review under a clear statement formulation, for Brown, is not substantive. It simply assures that Congress has focused upon the implications of subjecting a state to federal jurisdiction. As Professor Brown explains, "[i]f Congress is the only source of protection of the states' interests, it does not seem unfair for the Court to force Congress to do its job."[55]

Yet there are anomalies and inconsistencies inherent in adopting a clear statement rule, particularly as that rule manifests itself in the cases of the 1988-89 Term. First, the notion that Congress needs to be prodded to consider states' interests seems fundamentally at odds with the notion of process federalism itself. It essentially suggests that the legislators' allegiance and duties to the interests of the states as states may not even rise to a level of consciousness. Quite simply, it is at least incongruous to assume that Congress, as a body comprised of representatives from the various states, au-

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1485 (1987); Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 346-80. Justice Powell has also been a leading critic of the Choper/Wechsler hypothesis. *See* Garcia v. Metro. Transit Auth., 469 U.S. 528, 565-77 (1985) (Powell, J., dissenting).

53. Jablonski, *Does* Garcia *Preclude an Eleventh Amendment Affirmative Limitation on the Congress's Commerce Clause Power*, *supra* note 40, at 9 (arguing that states need greater protection from federal judiciary because states are not represented in the federal courts as they are in Congress).

54. Brown, *supra* note 36, at 365.

55. Brown, *supra* note 36, at 390. Professors Fink and Tushnet also make this point:

> The Wechslerian political safeguards of federal approach justifies the imposition of a clear statement requirement: if national legislators are to consider states' interests effectively before overriding them in the service of a greater national interest, they must be aware of the degree to which states' interests are at stake. The Court can promise such awareness by forcing the process of drafting legislation to produce proposals that signal their impact.

H. FINK & M. TUSHNET, *supra* note 45, at 142. *Accord* Jackson, *supra* note 34, at 110-111 (arguing a clear statement requirement may be advisable even if state immunity has no constitutional component).

tomatically protects states' interests if it is also assumed that Congress is likely to ignore or overlook states' interests.

Second, the process federalism argument does not explain why there is a clear statement rule for the eleventh amendment which is unique in its stringently or, as Justice Brennan describes it, "more robust [in] its requirement for clarity [than] in any other situation."[56] Why, for example, is there a clear statement requirement for the eleventh amendment but not for the tenth? Interestingly, Professor Brown's greater-subsumes-the-lesser argument would suggest the reverse. If substantive regulation is a greater infringement on state sovereignty than is merely subjecting the states to a federal forum, this would suggest that more stringent procedural safeguards should accompany the former, more intrusive, type of regulation. It is then the states' tenth amendment interests, if any, which should require the most robust "clear statement" protection. Yet, the Court has imposed no such requirement.[57]

Of course, an argument can be made that the states should receive greater protection in the eleventh amendment context because the states do not have the direct representation in the federal judiciary that they do in Congress. However, even this argument does not support a clear statement rule in congressional abrogation cases. Although the federal courts are the ostensible "beneficiaries" of the jurisdictional grant, it is still congressional action that is at issue. Congress both provides the jurisdictional grant and retains the power to remove it. The fact that states do not have representatives on the federal judiciary is irrelevant to congressional allocation of federal jurisdiction.[58]

Third, a clear statement rule has been effectively criticized as a mechanism that denies rather than advances congressional purpose.[59] A clear statement rule, of course, negates normal rules of statutory inference. Indeed, it even negates explicit indicia of legislative intent if that indicia is expressed in general as opposed to specific language. As such, Professor Martha Field has argued, "[w]hile the rule appears to be one of judicial restraint, it effectively gives courts a veto . . . [they] can exercise when congressional intent is clear but the legislation is not absolutely explicit."[60] If Professor

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56. Will v. Michigan State Police, 109 S. Ct. 2304, 2314 (1989) (Brennan, J., dissenting).

57. *See* Garcia v. Metropolitan Transit Authority, 469 U.S. 528 (1985).

58. One may argue that the eleventh amendment requires greater protection because the effects of imposing jurisdiction on the states may not be as clear as the effect of imposing substantive regulation. For example, in *Garcia*, the impact of subjecting the states to the Fair Labor Standards Act could have been predicted when Congress passed the Act. On the other hand, the effect of a general grant of jurisdiction against the states might not be as easy ascertained. Note, that this argument at best only applies to general grants of jurisdiction and not narrow statutorily confined grants of jurisdiction like that in *Union Gas*. When federal jurisdiction is provided as a part of a specific program, its impact upon the states should be no different than the program's substantive effect.

59. Chemerinsky, *supra* note 11 at 336-38.

60. *See* Field, *supra* note 11, at 1273.

Field is right, then, it suggests yet another anomaly. If Congress has the power to abrogate state immunity, why should the courts have the ability to nullify that power by utilizing artificially stringent rules of statutory construction?

Finally, the application of a clear statement rule to legislation passed by Congress pursuant to its powers under the commerce clause seems, at the very least, incongruous with the absence of clear statement requirements on legislation passed pursuant to section five of the fourteenth amendment.[61] Prior to *Union Gas,* of course, the Court had held that Congress could override state immunity under section five of the fourteenth amendment.[62] The question left open at that time was whether Congress also had such power under the commerce clause. Because the fourteenth amendment was explicitly directed at the states,[63] it might make sense to distinguish between section five of the fourteenth amendment and the commerce clause as to whether Congress has *the power* to override state immunity. However, there is no basis for a distinction once the commerce power has been interpreted as also allowing congressional abrogation. Moreover, it seems odd that a distinction between section five and the commerce clause would take the form of a clear statement rule. After all, if the clear statement requirement is to assure that Congress does not overlook its responsibility to protect the states, why should Congress have the constitutional power to act sloppily pursuant to section five of the fourteenth amendment, but not to have that right under the commerce clause? There is, of course, no sense to this distinction.

III. CONCLUSION

In the cases during its 1988-89 Term, the Supreme Court finally resolved one of the most important questions left open in current eleventh amendment jurisprudence—whether Congress, under the commerce clause, had the power to abrogate a state's eleventh amendment immunity from suit for damages in federal court. The Court answered that question in the affirmative. However, the Court qualified that power by requiring Congress to articulate its intent to subject the states to suit in federal court through "clear and unmistakable language" in the text of the statute. Unfortunately, the Court, perhaps because it was badly fragmented, did not present an adequate rationale for its decisions.

The Court's decisions, however, are not merely deficient because of their failure to provide a tidy opinion. Rather, the Court's conclusions that: (1) Congress can abrogate state immunity; but, (2) it needs a clear statement in order to do so, do not blend easily with other aspects of state immunity

61. *See* Hutto v. Finney, 437 U.S. 678, 693-95 (1978).

62. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1979).

63. The amendment, in part, prohibits a state from making or enforcing "any law which shall abridge the privilege of citizens." U.S. CONST. amend. XIV, § 1.

doctrine, or even with each other. If the states do not require substantive protection from Congress because the states' own congressional representatives stand guard over their interests, then there seems little reason why the Court should require Congress to provide clear statements that it is doing its job. Conversely, if a clear statement rule is necessary to force Congress to perform its duties and protect the states, why does such a rule not also apply to congressional actions taken under section five of the fourteenth amendment? Indeed, why should the clear statement rule not apply to all congressional actions affecting the states, including those arguably implicating the tenth amendment?

The Court has not provided satisfactory answers to these questions. Unfortunately, this is nothing new. Actually, the eleventh amendment cases of the 1988-89 Term were simply "business as usual." The Court's eleventh amendment jurisprudence remains "relentlessly ambiguous."[64]

64. Marshall, *supra* note 36, at 1373 n.5.