State Sovereignty Under the Burger Court -- How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of <i>Atascadero State Hospital v. Scanlon</i>

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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

GEORGE D. BROWN*

INTRODUCTION

The tenth amendment is dead! Long live the eleventh! So might run a summary of the status of state sovereignty doctrine after the Supreme Court’s 1984 term. The decision in Garcia v. San Antonio Metropolitan Transit Authority has attracted wide attention. Garcia not only directly overruled National League of Cities v. Usery but also appeared to eradicate with broad strokes any tenth amendment based doctrine of state sovereignty shielding states from the national government. However, at the end of the term the Court, in Atascadero State Hospital v. Scanlon, reaffirmed the validity of eleventh amendment jurisprudence, over the angry protests of four Justices who had been in the Garcia majority.

In this article, I examine the relationship between these two forms of state sovereignty. The analysis suggests that viewing the eleventh amendment as an embodiment of state sovereignty principles is the most satisfactory means of justifying the elaborate jurisprudence it has generated. In particular, I take issue with critics of the amendment who present it only as a form of the discredited doctrine of sovereign immunity. In a federal—as opposed to a unitary—system of government, this analogy is false and masks the eleventh amendment’s utility in harmonizing tensions between the two levels of government.

After Garcia, however, the question arises whether eleventh amendment doctrine can stand on its own without the broader foundation of National League of Cities. I consider the extent to which Garcia destroys this foundation and then present an analysis of Atascadero and its implications. In holding that a private individual could not sue a state for damages in federal court for an asserted violation of section 504 of the Rehabilitation Act of 1973, the Atascadero Court strengthened the eleventh amendment’s limitations on Congress’ ability to authorize such a suit, whether Congress acts pursuant to its powers under the four-


3. 105 S. Ct. 3142 (1985). The Court also decided another eleventh amendment case at the end of the term, Kentucky v. Graham, 105 S. Ct. 3099 (1985). The Court held unanimously that plaintiffs who successfully sued state officials in their personal capacity for violations of constitutional rights could not recover attorney’s fees from the state, since the latter was not liable on the merits and had been dismissed as a party. Id. at 3108. The decision in Kentucky v. Graham is particularly striking because it appears to accept as valid much of the eleventh amendment doctrine that was hotly contested in Atascadero. Apart from noting this particular aspect of the case, I do not discuss it in this article.
4. The Atascadero majority was composed of Chief Justice Burger and Justices O’Connor, Powell, Rehnquist, and White. All but Justice White had dissented in Garcia.
teenth amendment or under the spending clause.6 Under Atascadero, Congress may abrogate a state's immunity to suit in federal court "only by making its intention unmistakably clear in the language of the statute."7 Recourse to legislative history will not suffice, even in the fourteenth amendment context.

One might view Atascadero as contrary to the letter and spirit of Garcia.8 I examine at some length the arguments for irreconcilability,9 arguments that are strengthened by the fact that the Atascadero majority was composed essentially of the Garcia dissenters. Yet I offer an alternative thesis: that the two decisions are not only reconcilable, but also promote in the same way accommodation between the powers of the national government and the interests of the states.

Eleventh amendment doctrine has substantial real world significance. It places obstacles in the path of those who wish to sue states in federal court for monetary relief based on the violation of federal law. The major unanswered question is the extent to which it limits Congress' power to authorize such suits.

The prevailing academic view might be called the "congressional supremacist" position.10 Professor Tribe, for example, views the amendment as giving the states some protection from the national government. However, the protection is limited to "rights conferred against the federal judiciary [rather than] rights conferred against Congress."11 Under this theory, Congress can authorize damage suits against states in federal court as long as it speaks with sufficient specificity to ensure that the national legislature has considered the states' interests.12 Other commentators view the amendment as nothing more than confirmation that the states possess a somewhat nebulous common law sovereign immunity.13 Under this theory, Congress can override the states' immunity without having to meet any special rules of statutory construction.14 Despite the doctrinal differ-

7. Id. at 3147.
8. See id. at 3178-79 (Blackmun, J., dissenting).
9. See infra text accompanying notes 215 to 217.
12. Tribe, Intergovernmental Immunities, supra note 11, at 695.
14. Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States, 126 U. PA. L. REV. 1203, 1268-77 (1978) [hereinafter cited as Field, Congressional Imposition]. Although Professor Redish accepts the concept of a clear statement rule, he criticizes the current Court for applying it "with a vengeance." See M. REDISH, supra note 13, at 165, 167-68; see also Atascadero, 105 S. Ct. at 3153-54 (Brennan, J., dissenting) (requirement that Congress express its intention to abrogate states' eleventh amendment protection from suit in federal court in unmistakable language in statute itself unjustifiable; ordinary canons of statutory construction sufficient to determine Congress' intent).
ence, however, the commentators agree that Congress has the authority to remove whatever protection the states do receive under the eleventh amendment.\textsuperscript{15} The only practical difference among them is the possible applicability of a clear statement rule. For these commentators, Congress' authority should not depend on which enumerated power it exercises.\textsuperscript{16} Congressional supremacists may see \textit{Atascadero} as a tacit acceptance of their position, since the Court treated the issue before it as one of statutory construction. However, I view \textit{Atascadero} as a tacit rejection of this position. The Court apparently still endorses a sliding scale approach to evaluating Congress' ability to abrogate the states' eleventh amendment protection. Under this view, Congress has greater ability when exercising its powers under section five of the fourteenth amendment\textsuperscript{17} than in the context of other coercive powers. (In the context of exercises of the spending power, the Court has accepted the possibility that states may waive their eleventh amendment protection through accepting funds.)\textsuperscript{18} Up to now the Court has been able to finesse the issue of whether Congress intended to abrogate the states' sovereign immunity through statutory construction.\textsuperscript{19} Eventually, however, Congress will speak with the requisite degree of clarity. When the confrontation comes, I believe that the Court will back down, despite \textit{Atascadero}, and abandon the concept of limits generated by the eleventh amendment. Any attempt to find such limits would require the Court to differentiate among forms of regulated state activity to determine whether the state had "waived" its eleventh amendment protection. This inquiry inevitably leads to something like the distinction between "governmental" and "proprietary" activities, a distinction that was rejected in \textit{Garcia}.\textsuperscript{20} On a more fundamental level, I read \textit{Garcia} as rejecting any differentiation among Congress' powers when it regulates the states as states.

What is left of the eleventh amendment then is a form of process federalism. Yet it is process with a bite. One might view it as partial compensation for the states' loss of substantive protection under \textit{National League of Cities}. The heightened clear statement rule ensures thorough consideration of the states' interests at the congressional level. If a statute fails to meet this test, the issue of damages may be raised again in individual suits in state courts. If the state courts vigilantly attempt to vindicate federal norms while taking into account

\textsuperscript{15} A close reading of Professor Redish's book demonstrates the degree of agreement. He first describes Professor Field's analysis as differing "in subtle respects from that of Justice Brennan." M. REDISH, supra note 13, at 147. He then discusses the Nowak-Tribe view and states that "although their reasoning differs significantly, the ultimate conclusions of Professor Field and Professors Tribe and Nowak appear quite similar." \textit{Id.} at 150 n. 84. Professor Redish himself prefers "an approach similar to that of Justice Brennan." \textit{Id.} at 152.

\textsuperscript{16} But see \textit{id.} at 153, 162 (congressional power to abrogate may, under current precedents, be limited to exercise of power under fourteenth amendment). This represents Professor Redish's view of current law, as opposed to his own preference for plenary congressional authority under any of Congress' powers. \textit{See id.} at 152.

\textsuperscript{17} Section 5 provides: "The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIV, § 5.

\textsuperscript{18} \textit{See Edelman v. Jordan, 415 U.S. 651, 673 (1974) (states may waive eleventh amendment immunity by participating in federally funded social program if federal statute clearly puts state on notice of waiver).}


\textsuperscript{20} 105 S. Ct. at 1013-15.
effects on the state treasury, the eleventh amendment turns out to be neither lawless nor toothless.

I. THE ELEVENTH AMENDMENT AND STATE SOVEREIGNTY

A. ELEVENTH AMENDMENT JURISPRUDENCE—AN INTRODUCTION

One of the most frequent criticisms of eleventh amendment jurisprudence is that it is unduly confusing and complex.\(^2\) As a starting point, this seems surprising since the language of the amendment is clear: suits against a state “by citizens of another state, or by citizens or subjects of any foreign state” are not to be construed as within the judicial power of the United States, despite language to that effect in article III.\(^2\)\(^2\) The amendment might be seen as a narrowly drafted provision designed to overturn a specific Supreme Court decision, *Chisolm v. Georgia.*\(^2\)\(^3\) Nonetheless, in *Hans v. Louisiana,*\(^2\)\(^4\) the Court held that the amendment also applies to in-state plaintiffs when they attempt to sue their state in federal court on the basis of a federal question.\(^2\)\(^5\) Such a suit seems squarely within article III and untouched by the amendment. The Court, however, viewed the amendment—and its repudiation of *Chisolm*—as a return to a broader principle: the states are generally immune from the reach of the federal judicial power, regardless of the nature of the plaintiff or the source of law upon which the plaintiff bases the complaint.\(^2\)\(^6\)

Not surprisingly, things are not so simple. States can be sued by their citizens in federal court in at least two different ways. First, the rule of *Ex parte Young*\(^2\)\(^7\) permits a broad range of prospective relief against a state officer sued in his official capacity, even though the obvious effect of such relief runs directly against the state.\(^2\)\(^8\) The *Young* Court justified this result by reasoning that, having violated the Constitution, the officer was “stripped of his official or representative character,” leaving him personally liable for his actions.\(^2\)\(^9\) In *Edelman v. Jordan,*\(^2\)\(^0\) the Court reaffirmed *Young,* but emphasized that the plaintiff in an *Ex parte Young*-type suit against a state official cannot seek retroactive relief tantamount to money damages.\(^2\)\(^1\) However, private individuals can sue their own state in federal court for monetary relief including damages if Congress specifi-

\(^{22}\) U.S. Const. amend. XI. For a discussion of the historical relationship between article III and the eleventh amendment, see Nowak, supra note 11, at 1422-41.
\(^{23}\) 2 U.S. (2 Dall.) 419 (1793).
\(^{24}\) 134 U.S. 1 (1890).
\(^{25}\) Id. at 19-20.
\(^{26}\) Id. at 11-12, 16.
\(^{27}\) 209 U.S. 123 (1908).
\(^{28}\) *Young* involved a challenge to a Minnesota statute establishing railroad rates. A railroad company's shareholders sued the state railroad commission and attorney general in federal court and sought an injunction to prohibit them from enforcing the statute. Id. at 129-31. The attorney general challenged the federal court's jurisdiction, arguing that the suit was, in effect, against Minnesota and therefore barred by the eleventh amendment. Id. at 132.
\(^{29}\) Id. at 139-60.
\(^{31}\) Id. at 668-69.
cally authorizes such a suit. A series of cases beginning with *Parden v. Terminal Railway*\(^3\) has developed an elaborate set of rules governing when the Court will find that Congress has removed the states' eleventh amendment protection.

The operation of these rules is not always easy to fathom. One might expect that it would be enough for Congress to pass a statute that, under a reasonable construction, authorized private suits by in-state plaintiffs against states for monetary relief. But the cases amount to a complex set of equations in which the variables include the congressional power used, the degree of clarity within the statute, the legislative history, and the state action that triggered the operation of the statute. These rules lead to some awkward linguistic formulations, perhaps reflecting the imprecise foundations of eleventh amendment doctrine itself. Thus the Court has inquired into "whether the state by its participation in the program authorized by Congress had in effect consented to the abrogation of . . . immunity."\(^3\) Such a requirement makes no sense. If Congress has the power to abrogate, then consent by the state is simply not relevant. Conversely, if the matter is one of consent, then abrogation is not an analytically helpful term. The Court has also stated the question as whether a congressional statute contains "an express waiver,"\(^3\) although again logic suggests that any waiving is done by the state rather than by Congress. Apart from its complexity and seeming inconsistencies, there is considerable disagreement over whether eleventh amendment doctrine can be fitted under a general label such as jurisdiction, sovereign immunity, or state sovereignty.\(^3\) The Court has used these terms, sometimes interchangeably, and all three can be found in the same opinion.\(^3\)

**B. THE ELEVENTH AMENDMENT AS A JURISDICTIONAL DOCTRINE**

Since the eleventh amendment parallels article III in its reference to "the judicial power of the United States," there is considerable justification for viewing it as just another subset of the complicated rules governing federal jurisdiction generally. The Court has held that the amendment is at least quasi-jurisdictional since it need not be raised as a defense in the trial court.\(^3\) Individual justices have elaborated on the jurisdictional analysis at greater length. Concurring in *Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare*,\(^3\) Justice Marshall agreed with the majority that private plaintiffs could not sue for monetary relief in federal court under the *Fair Labor Standards Act*.\(^3\) His reasoning was not that Congress had failed to authorize such suits,\(^3\) but that the eleventh amendment barred Congress from

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37. Edelman v. Jordan, 415 U.S. at 677-78. The Court stated that "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." *Id.* at 678.
39. *Id.* at 287 (Marshall, J., concurring).
40. Unlike the majority, Justice Marshall found that the language of the statute was clear in authorizing private damage suits against states. *Id.* at 289.
placing those suits in federal court. The plaintiff could have recourse to suit in state court.\textsuperscript{41} For Justice Marshall, it was “clear that the judicial power of the United States does not extend to suits such as this, absent consent by the State to the exercise of such power.”\textsuperscript{42} In his view, \textit{Hans v. Louisiana}\textsuperscript{43} essentially restored the original understanding of article III. Thus, the eleventh amendment did more than overturn \textit{Chisolm}, and the Court in following \textit{Hans} had been correct in furthering the spirit of the amendment.\textsuperscript{44} For Justice Marshall, this particular limitation on Congress arises from the nature of the federal system itself.

Justice Powell has gone even further and argued that the \textit{Hans} rule flows from an explicit jurisdictional limitation in the “plain language” of the amendment.\textsuperscript{45} Justice Powell reaches this conclusion by truncating the amendment in the following manner: “In language that could not be clearer, the Eleventh Amendment removes from the judicial power, as set forth in Article III, suits commenced or prosecuted against one of the United States.”\textsuperscript{46} He apparently justifies the omission of any reference to the person who brought the suit on the ground that the amendment is a broad statement about the jurisdiction of federal tribunals over states. In his majority opinion in \textit{Pennhurst State School and Hospital v. Halderman}\textsuperscript{47} (\textit{Pennhurst II}), Justice Powell went so far as to contrast “the explicit limitation on federal jurisdiction contained in the Eleventh Amendment” with the “judge-made” doctrine of pendent jurisdiction.\textsuperscript{48}

There are several problems with the jurisdictional approach to the eleventh amendment. First, it is hardly as explicit in the language of the amendment as Justice Powell would have us believe. Current eleventh amendment doctrine represents a highly elaborate, policy-oriented construction rooted in the principles of federalism that are thought to underlie the text.\textsuperscript{49} This objection retains considerable force even when one recognizes that the construction of article III itself cannot be treated as simple interpretation of clear language. Perhaps more to the point, the Court’s treatment of the amendment conflicts with general principles of article III federal court jurisdiction. A state can waive the amendment’s protection if it wishes to have the matter in question litigated, even though no such waiver would be possible, for example, with respect to the existence of a case or controversy.\textsuperscript{50} Moreover, the notion that Congress can over-
ride whatever limitations the amendment does impose is fundamentally at variance with the article III principle that Congress cannot expand the jurisdiction of the federal courts, a principle that can be traced to Marbury v. Madison.\textsuperscript{51} Attaching the jurisdictional label to the amendment is tempting, but it does not explain the elaborate structure that surrounds this seemingly narrow provision.

\section*{C. THE ELEVENTH AMENDMENT AS SOVEREIGN IMMUNITY}

The label most frequently attached to eleventh amendment doctrine is that of sovereign immunity. The Court's decisions and scholarly analyses are replete with references to the amendment as constitutionalizing the common law doctrine of sovereign immunity.\textsuperscript{52} Such an analysis is hardly surprising. Eleventh amendment jurisprudence does involve immunity from certain types of suits in federal courts. To the extent that states do possess such an immunity, it may be derived more from their somewhat sovereign nature than from anything in the language of the Constitution. The Framers of the Constitution and of the eleventh amendment certainly were familiar with the concept of sovereign immunity. Nonetheless, I believe that the sovereign immunity analogy is incorrect and can lead to grossly inaccurate and unfair analyses of eleventh amendment doctrine.

The concept of sovereign immunity arose in unitary systems. The question in any given country or state is the extent to which the sovereign entity may be sued by one of its citizens. This is a matter of suit \textit{vel non}. The sovereign itself is the body that decides. In our federal system, however, the problem involves the extent to which states may be subject to suit in tribunals of another sovereign, a sovereign that is more than coequal. The policy considerations that underlie the resolution of such questions are substantially different from those that arise in the unitary context. One cannot properly address eleventh amendment issues without considering the delicate relationship between the two "sovereigns" presented by any attempt to sue the states in federal court.\textsuperscript{53} The sovereign immunity analogy has proven to have particular appeal to those who hope to eliminate existing eleventh amendment doctrine. Sovereign immunity is a concept that sounds unfair—"the king can do no wrong"—and has been increasingly criticized.\textsuperscript{54} A powerful attack on the eleventh amendment can thus be mounted by arguing that it is merely sovereign immunity in a special form. Critics of the Court's continued adherence to Hans and its progeny, both on the Court itself and in academia, have decried the eleventh amendment as the source of a "lawless" doctrine on the ground that since it incorporates sovereign immunity, the result must be that private parties have no recourse against states that violate federal law.\textsuperscript{55} This description is not correct. The \textit{Ex parte Young} fiction per-

\begin{itemize}
\item \textsuperscript{51} 5 U.S. (1 Cranch) 137 (1803).
\item \textsuperscript{52} E.g., Pennhurst \textit{II}, 104 S. Ct. at 910-11; M. Redish, supra note 13, at 139-40; Tribe, Intergovernmental Immunities, supra note 11, at 683-85.
\item \textsuperscript{53} See Baker, supra note 35, at 165 (discussion of judicial role in balancing conflicting state and federal interests).
\item \textsuperscript{54} See Pennhurst \textit{II}, 104 S. Ct. at 942 n.48 (Stevens, J., dissenting).
\item \textsuperscript{55} The notion of lawlessness is a principal component of Justice Brennan's attack on eleventh amendment doctrine in his Atascadero dissent. 105 S. Ct. at 3150, 3154-56, 3178; see also Shapiro, Wrong Turns: The Eleventh Amendment and the Pennhurst Case, 96 Harv. L. Rev. 61, 71-76 (1984). According to Professor Shapiro, "a concept designed to protect an individual government official from personal liability has been transformed into a basis for total governmental immunity from suit." \textit{Id.} at 76 (emphasis added). Thus, in his opinion, the Court in Pennhurst \textit{II} "took one more step away from the ideal of govern-
\end{itemize}
mits a range of relief, so long as it can be labeled prospective. The United States is not barred by the amendment and thus may sue on behalf of individual plaintiffs. Moreover, there is the possibility of suit in state court, as Justice Marshall noted in his Employees concurrence. This possibility will be explored at greater length below. The point is that the invocation of sovereign immunity leads to a fundamentally false description of what existing eleventh amendment doctrine produces: no relief for deserving plaintiffs. The argument is emotionally appealing, but analytically flawed.

The sovereign immunity label can also trigger the application to federal-state conflicts of an extensive body of sovereign immunity "law" developed to deal with problems in unitary systems. This law itself is highly technical and confusing. In his long dissent in Pennhurst II, Justice Stevens treated the problem of pendent state law claims against state officials in Ex parte Young-type suits as one that the law of sovereign immunity could answer. Such an inquiry ignores the federalism issues presented by a complicated case like Pennhurst II. It may lead to wrong answers.

D. THE ELEVENTH AMENDMENT AS A STATE SOVEREIGNTY DOCTRINE

A more satisfactory approach to analyzing the barriers that the eleventh amendment imposes on potential plaintiffs is to view the body of eleventh amendment doctrine as a state sovereignty limitation on the national government. By "state sovereignty" I mean a form of protection, derived from the Constitution, from certain actions by organs of the national government, which can be enforced in the federal courts. Thus the amendment and the resultant doctrine may be seen as a limitation on the national government derived ultimately from the structure of the federal system. At times, the Court has used
the phrase "state sovereignty" in a way that appears to reflect such an understanding of the amendment.\textsuperscript{63} At other times, reference to sovereignty reflects a belief that what is at stake is sovereign immunity, as discussed in subsection C above.

To some extent, the Court may be concerned with the symbolic effect of subjecting a state to suit in federal court.\textsuperscript{64} This symbolic view of the amendment would explain the otherwise curious analysis in \textit{Pennhurst II} that permitting \textit{Ex parte Young}-type relief based on state law grounds against state officials already properly in federal court violates the sovereign character of the state.\textsuperscript{65} Professor Nagel has noted the importance of symbolism in justifying a doctrine of state sovereignty.\textsuperscript{66} The principal concern, however, appears to be that of preserving the state treasury from substantial depletion by organs of the national government. This concern appears for the first time in recent cases in the majority opinion in \textit{Employees}.\textsuperscript{67} The Court noted that since the commerce clause was involved, federal authority over state employees would be extensive.\textsuperscript{68} The Court expressed apprehension about "how pervasive such a new federal scheme of regulation would be."\textsuperscript{69} To some extent, this language may reflect symbolic concerns. In the same paragraph, however, the Court expressed reluctance to find that Congress had placed "new or even enormous fiscal burdens on the State."\textsuperscript{70} This focus on protecting the state treasury became even clearer in \textit{Edelman v. Jordan}.\textsuperscript{71} The majority opinion drew a line between prospective and retroactive relief in order to protect state funds,\textsuperscript{72} and described the eleventh amendment in general terms as a rule barring "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury."\textsuperscript{73} Similar concerns have been expressed in subsequent cases.\textsuperscript{74} Viewing the protection that states enjoy under the eleventh amendment as a form of protection of their sovereignty makes sense. The states are shielded from the imposition of retroactive, damages-type relief by federal courts exercising authority under the general jurisdictional statutes and under section 1983.\textsuperscript{75} Although Congress can remove this protection, it is limited at least by the strict canons of construction that make a finding of abrogation exceedingly difficult. Beyond that, there is the question of whether additional judicially enforceable limits on Congress exist. If so, a statute that transgresses those limits will be struck down.

\textsuperscript{64} \textit{See} Cory v. White, 457 U.S. 85, 90-91 (1982) (eleventh amendment not limited to suits for money damages). Of course, the rule of \textit{Ex parte Young} runs counter to such symbolic considerations.
\textsuperscript{65} \textit{Pennhurst II}, 104 S. Ct. at 911.
\textsuperscript{66} \textit{Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective}, 1981 Sup. Cr. Rev. 81, 101-03.
\textsuperscript{68} \textit{Id.} at 285-87.
\textsuperscript{69} \textit{Id.} at 285.
\textsuperscript{70} \textit{Id.} at 284.
\textsuperscript{71} 415 U.S. 651 (1971).
\textsuperscript{72} \textit{Id.} at 665-69.
\textsuperscript{73} \textit{Id.} at 663.
\textsuperscript{74} \textit{E.g.}, Quern v. Jordan, 440 U.S. 332, 337 (1979).
\textsuperscript{75} 42 U.S.C. § 1983 (1982); \textit{see Quern}, 440 U.S. at 333-45 (section 1983's use of term "any person" does not include states).
The similarity between this form of state sovereignty protection and that elaborated in *National League of Cities* is obvious and has not escaped notice. Professors Fink and Tushnet suggest that any limitations on Congress purportedly found in the eleventh amendment or the principle of sovereign immunity may be viewed as "surrogates" for the limitation established in *National League of Cities.* Several commentators have linked the two doctrines in a way that suggests that eleventh amendment limitations, to the extent any exist, are at best a subset of tenth amendment limitations on the underlying power of Congress to pass the statute whose enforcement is challenged by the state on eleventh amendment grounds. *National League of Cities*—and its revitalization of the tenth amendment—plays an important role in recent analyses of the eleventh amendment. Yet that case is no longer with us. In *Garcia v. San Antonio Metropolitan Transit Authority,* the Court not only overruled *National League of Cities* in its specific context, but also cast grave doubt as to the validity of any doctrine of judicially enforceable state sovereignty limits on Congress. Therefore, the question arises whether eleventh amendment "immunity" can survive as a separate and independent manifestation of state sovereignty or whether principled constitutional interpretation requires that the eleventh be buried along with the tenth. To adequately address this question, it is necessary first to examine more closely the elaboration of a principle of state sovereignty in *National League of Cities* and the effects of *Garcia* upon that doctrine.

II. "TENTH AMENDMENT" STATE SOVEREIGNTY: R.I.P.?

A. NATIONAL LEAGUE OF CITIES AND STATE SOVEREIGNTY

The Supreme Court's best known and most controversial state sovereignty case is the five-to-four decision in *National League of Cities v. Usery.* In *National League of Cities,* the Court struck down a 1974 amendment to the Fair Labor Standards Act that extended the Act's wage and hour provisions to most employees of state and local governments. Justice Rehnquist's plurality opinion conceded that the legislation was a valid exercise of Congress' power to regulate commerce, but drew a distinction between congressional regulation of private individuals and regulation of "the States as States." The plurality opinion found in the Constitution "affirmative limitations" that protect the states against the exercise of even a plenary congressional power. The opinion cites the tenth amendment as one declaration of sovereignty-based limits on Congress. It is the only constitutional provision cited. The opinion suggests that the concept of state sovereignty is both explicitly "embodied" in the tenth amendment and im-

76. H. FINK & M. TUSHNET, supra note 10, at 152.
78. E.g., Field, Congressional Imposition, supra note 14, at 1218-22; Fletcher, supra note 59, at 1109-11.
81. Id. at 845.
82. Id. at 841.
83. Id. at 842.
plicit in the system established by the Constitution.\textsuperscript{84} In striking down the legislation, the Court focused not only on the cost the legislation would impose on subnational units of government but also upon the extent to which it altered determinations by these units on how to structure the provision of services. The opinion emphasizes the actions of state and local government in traditional governmental areas and summarizes its holding as follows: "[I]nsofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8 cl. 3."\textsuperscript{85} There is an obvious kinship between \textit{National League of Cities}, with its underlying premise of state sovereignty limits on the national government, and the evolution of eleventh amendment doctrine. In fact, both the plurality and the dissent discuss eleventh amendment decisions.\textsuperscript{86} Apart from the desire to preserve symbolic federalism, a concern for the well-being of the state treasury is central to both branches of state sovereignty doctrine. Without the fiscal ability to provide services, the states' role in the American dual system of government would be curtailed, if not eviscerated.\textsuperscript{87} There are both similarities and differences between the tenth and the eleventh amendment contexts. Examining the major criticisms of \textit{National League of Cities} will help to focus on the relationship between the two.

A principal criticism of \textit{National League of Cities} is the inherent weakness of the decision's textual basis, notably the heavy reliance on the tenth amendment. In his dissent, Justice Brennan stated the problem bluntly: "[T]here is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution."\textsuperscript{88} Supreme Court precedents in the period between the New Deal and \textit{National League of Cities} had, in fact, reduced the amendment to little more than a "truism."\textsuperscript{89} The amendment is clearly tautological; at best it emphasizes the importance of a restraining construction of the powers granted to the national government in order to preserve those "reserved" to the states. Moreover, critics have noted the paradox that the amendment reserves whatever it does encompass both "to the states respectively" and "to the people."\textsuperscript{90} Therefore, the \textit{National League of Cities} distinction between regulation of private commerce and regulation of states as states stands on shaky

\textsuperscript{84} Id. at 844. "The expressions in . . . recent cases trace back to earlier decisions of this Court recognizing the essential role of the States in our federal system of government." Id.

\textsuperscript{85} Id. at 852 (footnote omitted).

\textsuperscript{86} The majority cited \textit{Parden} in a footnote discussing the governmental/proprietary distinction. \textit{Id.} at 854 n.18. Justice Brennan's dissent distinguished cases under the eleventh amendment on the ground that congressional power to override that amendment's protection is plenary, unlike the tenth amendment limitations that the majority had established. \textit{Id.} at 858 n.2, 870 n.11.

\textsuperscript{87} See Tribe, \textit{Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services}, 90 HARV. L. REV. 1065, 1075-76 (1977) [hereinafter cited as Tribe, \textit{Unraveling National League of Cities}]. Professor Tribe develops a rights-based analysis of \textit{National League of Cities}. He views the decision not as protecting states and localities as such, but as protecting their ability "to meet their citizens' legitimate expectations of basic government services." \textit{Id.} (footnote omitted). The corollary of this protection is that citizens have a right to those services.

\textsuperscript{88} 426 U.S. at 858 (emphasis added).

\textsuperscript{89} E.g., United States v. Darby, 312 U.S. 100, 124 (1940) ("amendment states but a truism that all is retained which has not been surrendered").

\textsuperscript{90} "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people." U.S. CONST. amend. X.
ground. Nonetheless, the drafters of the tenth amendment, as well as those who ratified it, were trying to say something with a distinctly federalistic tone. But reading into the words a doctrine of sovereignty-based immunity from exercises of the national government's delegated powers may be stretching the language beyond any reasonable bounds.

On the other hand, the eleventh amendment is perhaps too specific. It deals not with generalities, but with the matter of suing states in federal court. It is true that only one type of suit is forbidden: that "commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." This narrowness need not be a fatal obstacle to the Hans construction, however. Suits against states by foreigners and other out-of-state plaintiffs were the ones most vehemently discussed during the ratification period, and Chisolm v. Georgia was an example of the phenomenon. Since these were the type of suits with which those who considered the matter were most familiar, it is not surprising that they are singled out by the eleventh amendment. Extrapolating from the narrow text of the amendment to a broader policy against suing states in federal court, regardless of the nature of the parties or of the cause, may be better justified by the text, its spirit, and its history than by any attempt to ground National League of Cities' sovereignty principles in the vague language of the tenth amendment.

A second major criticism of National League of Cities is its imprecise concept of state sovereignty. Critics have fastened on the Court's concession that the Constitution does not protect states in their role as law-giver, since Congress can preempt that role by acting within one of its powers. Critics also note that National League of Cities permits regulation of the states as states when they leave the area of "integral" functions and enter what is sometimes referred to as the "proprietary" area. The plurality opinion is also vague about whether the impairment of state sovereignty results from the cost of the federal regulation attempted in the statute or from some more generalized constriction of the state's ability to make choices. Once again, Justice Brennan placed a barb: "[M]y Brethren boldly assert that the decision as to wages and hours is an 'undoubted attribute of state sovereignty,' . . . and then never say why." It seems likely that Justice Rehnquist did not want to restrict the judicial enforceability of state sovereignty principles to cases in which a severe fiscal impact could be shown. For him, the significant fact was the intrusion on the process of resource allocation through structuring of services. Thus, the very imprecision of the National League of Cities concept of state sovereignty might have provided a broad building block for judicial decisions striking down all forms of congressional action within the enumerated powers.

Arguably, less uncertainty surrounds eleventh amendment state sovereignty doctrine: the amendment prohibits citizen plaintiffs from bringing suits against

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92. U.S. CONST. amend. XI.
93. For a discussion of Chisolm, see Gibbons, supra note 21, at 1920-26.
95. Id. at 1171-72.
states in federal court to establish retroactive monetary liability. Of course, the real world operation of this seemingly clear rule does not always protect the public purse to the extent the doctrine intends. As Justice Rehnquist himself has admitted, relief that fits under the "prospective" as opposed to the "retroactive" heading may also have a substantial adverse effect on the state treasury.97 Furthermore, the line between the two forms of relief is not always clear.98 Congress' ability to abrogate the amendment is also uncertain. In sum, imprecision is generated by efforts to give broad content to either amendment.

Justice Brennan99 and other critics of National League of Cities were most alarmed by its notion of a judicially enforceable state sovereignty limit on national power. This criticism is based primarily on Professor Wechsler's seminal article on the role of the national political processes in protecting the states.100 According to Wechsler, the states are sufficiently represented through the structure and orientation of the national legislature that they can rely on the political process, rather than the judiciary, to protect their interests. As Justice Brennan put it in his National League of Cities dissent, "[d]ecisions upon the extent of federal intervention under the Commerce Clause . . . are in that sense decisions of the States themselves."101 Professor Wechsler's thesis is not without its critics. His article appeared in 1954. Since then, argues Professor Kaden, changes in the national political process have weakened any leverage that the states might have had.102 For example, Senators and Congressmen increasingly have come to view themselves as national political officials, responsive to national concerns and values. Professor Kaden's critique also has recently been buttressed by substantial empirical evidence from the Advisory Commission on Intergovernmental Relations.103 According to the Commission, the last two decades have witnessed "a dramatic shift in the way in which the federal government deals with states and localities."104 The shift is away from cooperation and toward coercion. The Commission categorizes the various techniques of intergovernmental regulation as "direct orders . . . crosscutting requirements, crossover sanctions, and partial preemption."105 All four techniques permit such a substantial degree of federal control over the activities of state and local governments that the Commission has noted the risk of serious erosion of state and local independence.106 A Wechslerian critique of state sovereignty as articulated in National League of Cities would seem equally applicable to eleventh amendment doctrine. If states do not need protection from Congress, then they do not need it from federal courts enforcing federal norms enacted by Congress. To the extent that the Court in Garcia utilized Wechsler's thesis to repudiate both Na-
tional League of Cities and its broader underpinnings, there are substantial implications for any vestige of state sovereignty under the eleventh amendment. Therefore, it is essential to appreciate just how far Garcia goes.

B. GARCIA AND THE END OF STATE SOVEREIGNTY

Despite its apparently broad reach, National League of Cities proved to be a decision of little generative force. In subsequent cases, the Court refined its standards for determining the presence of a state sovereignty limit on national power into a four-part test that the states could rarely satisfy. In fact, the states lost every post-National League of Cities case in the Supreme Court and fared unevenly at best in the lower courts. Still, the decision remained on the books, and advocates for the state and local side of federalism debates could point to it as a source of hope. Speculation about a continuing role for National League of Cities seems futile after the decision in Garcia v. San Antonio Metropolitan Transit Authority. Garcia involved application of the same federal statute (the Fair Labor Standards Act) to a municipally owned mass-transit system. The narrow issue was whether such a system should be viewed as within the protected realm of “traditional” governmental functions identified in National League of Cities. In reversing a judgment in favor of the authority, the Court, by a five-to-four margin, overruled National League of Cities in exceptionally broad terms. Writing for the majority, Justice Blackmun proffered four arguments for this sweeping doctrinal shift. First, he contended that National League of Cities had proven unworkable because of the impossibility of drawing any line between those governmental functions that should benefit from an immunity and those that should not. He rejected formulations such as “traditional,” “governmental v. proprietary,” “purely historical,” or “uniquely” governmental functions. He cited substantial evidence from the lower courts

107. In order to succeed, a claim that commerce power legislation is invalid under the reasoning of National League of Cities must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the “States as States.” Second, the federal regulations must address matters that are indisputably “attributes of state sovereignty.” Third, it must be apparent that the states’ compliance with the federal law would directly impair their ability “to structure integral operations in the area of traditional governmental function.” Hodel v. Virginia State Surface Mining & Reclamation Ass’n, 452 U.S. 264, 287-88 (1980). To this three-part test, the Court added an implied balancing of a state’s sovereign interest against the federal interest the congressional action seeks to promote, cautioning that a tenth amendment challenge might fail, even if it met all three requirements in “situations in which the nature of the federal interest advanced may be such that it justifies state submission.” 452 U.S. at 288 n.29. See generally Note, National League of Cities v. Usery to EEOC v. Wyoming: Evolution of a Balancing Approach to Tenth Amendment Analysis, 1984 DUKE L.J. 601.


109. REGULATORY FEDERALISM, supra note 103, at 51. But see Schwartz, National League of Cities v. Usery Revisited—Is the Quondam Constitutional Mountain Turning Out to be Only a Judicial Molehill?, 52 FORDHAM L. REV. 329 (1983) (predicting that National League of Cities will continue to have little generative force). Although the Regulatory Federalism Report contains repeated references to the tenth amendment as a source of state protection, there is only brief discussion of the eleventh. However, the authors do characterize it as “designed to protect the sovereignty retained by the states.” REGULATORY FEDERALISM, supra note 103, at 33.

110. 105 S. Ct. at 1007.

111. Id. at 1011-16.

112. Id. at 1012-15.
to prove that such labeling attempts were bound to be an exercise in futility.\textsuperscript{113} Beyond questions of workability, Justice Blackmun found that permitting the federal judiciary to make line-drawing judgments would itself impair the autonomy and freedom of states to make choices about activities that they would pursue.\textsuperscript{114} Justice Blackmun then singled out "a more fundamental reason" for abandoning \textit{National League of Cities}: "the sovereignty of the States is limited by the Constitution itself."\textsuperscript{115} He turned the 1976 formulation of state sovereignty on its head by focusing on the powers of the \textit{national} government. For Justice Blackmun, the issue of whether or not a state possesses sovereignty within a given area is determined by whether or not the Constitution has transferred power over that area to the federal government.\textsuperscript{116} Thus, any judicial role would seem to be limited to determining whether the national government had acted within its sphere. Finally, Justice Blackmun reverted to the Wechsler argument discussed by Justice Brennan in his \textit{National League of Cities} dissent: since the structure of the national government adequately protects the interests of the states, there is no need for any judicial policing of the national government in the name of state sovereignty.\textsuperscript{117} As far as federal action under the commerce power is concerned, Justice Blackmun stated his conclusion in terms that underscored the extent to which \textit{National League of Cities} was overruled: "the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action."\textsuperscript{118} Each of these arguments and its possible implications for eleventh amendment doctrine will be considered briefly at this point.

The problem of distinguishing between protected and unprotected governmental functions need not have been fatal to the principles of \textit{National League of Cities}. The Court might have refined the analysis beyond the crude "governmental v. proprietary" distinction. One circuit court of appeals had already formulated such a refinement.\textsuperscript{119} Another approach, articulated by two \textit{Garcia} dissenters, would balance competing federal and state interests in each case.\textsuperscript{120} Under such an analysis, a given activity would be protected from federal regulation under some statutes but properly within the reach of others. This approach is thus inconsistent with the concept of zones of state autonomy, a concept the majority rejects altogether.\textsuperscript{121}

\textsuperscript{113} Id. at 1011.
\textsuperscript{114} Id. at 1015.
\textsuperscript{115} Id. at 1017.
\textsuperscript{116} Id.
\textsuperscript{117} Id. at 1017-20.
\textsuperscript{118} Id. at 1020.
\textsuperscript{119} Amersbach v. City of Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979). The court found four elements to be characteristic of a protected function: it benefits the community as a whole with little or no direct expense; it is undertaken for public service rather than for profit; the government is the principal provider; and community-wide need makes the government particularly suited to providing the service or performing the activity. The lower court in \textit{Garcia} had utilized the \textit{Amersbach} formulation. San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445, 453-54 (W.D. Tex. 1983).
\textsuperscript{120} "A balance designed to protect our fundamental liberties." 105 S. Ct. at 1029 (Powell, J., dissenting). "Weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States." Id. at 1037 (O'Connor, J., dissenting).
\textsuperscript{121} Justice Rehnquist's dissent appears to accept the notion that \textit{National League of Cities} rests on a zone approach. See 105 S. Ct. at 1033 (Rehnquist, J., dissenting).
ernmental-proprietary distinction, plays an important role in the eleventh amendment doctrine concerning Congress' ability to abrogate the amendment in the exercise of its article I powers. Courts have suggested that this ability is greater with respect to proprietary activities than with respect to governmental ones. Thus, the shadow that Garcia casts over eleventh amendment doctrine is immediately apparent.

Justice Blackmun's second argument—that federal judicial involvement in state sovereignty controversies undermines subnational independence—is somewhat hard to follow. Presumably the states are better off with some judicial limits on the federal legislation that regulates them than with no limits at all. Perhaps Justice Blackmun was laying a predicate for his more fundamental point about the absence of any need for a judicial role in such federalism disputes. The relevance, for eleventh amendment purposes, of this second argument may simply be limited to its repetition of his prior criticism of any line-drawing of the governmental-proprietary sort.

Justice Blackmun's third and fourth arguments have significant bearing on the continued existence of both eleventh amendment doctrine and any vestiges of *National League of Cities*. The concept that states retain their sovereignty only to the extent that Congress is not exercising one of its enumerated powers destroys the conceptual underpinning of that decision: that regulation of "states as states" is fundamentally different from regulation of private individuals. Justice O'Connor argued forcefully that the greatly expanded reach of the federal commerce power to a wide range of state activities calls for a concomitant judicial willingness to "enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power." Unfortunately, from the state and local perspective, Justice O'Connor was in dissent. For eleventh amendment purposes, Justice Blackmun's analysis of the limited powers of the national government as a major source of protection of the states' sovereignty may do away with any distinction between congressional authority under the commerce power and other article I powers on one hand and congressional authority to enforce the fourteenth amendment on the other. The Court had previously indicated that Congress' ability to subject states to damages actions may be greater when Congress acts pursuant to its powers under section five of the fourteenth amendment than in other contexts. This analysis appeared to rely on the limits that *National League of Cities* imposed on reaching the states through the commerce power. Garcia wipes out these limits.

Finally, there is the majority's wholehearted acceptance of Wechsler's thesis.

122. See, e.g., Sullivan v. Georgia Dep't of Natural Resources, 724 F.2d 1478, 1482 (11th Cir. 1984) (reconciling cases involving suits under Jones Act arising out of state ownership of vessels based on whether or not vessels operated in proprietary capacity). At the Supreme Court level, use of the distinction in the recent eleventh amendment cases can be traced to *Employees*, 411 U.S. at 284-85.
123. See *Garcia*, 105 S. Ct. at 1027 n.13 (Powell, J., dissenting) (majority "does not explain how leaving the States virtually at the mercy of the federal government, without recourse to judicial review, will enhance their opportunities to experiment and serve as laboratories").
124. Id. at 1037 (O'Connor, J., dissenting).
126. See id. at 456.
Although Justice Blackmun's opinion hints at judicially enforceable limits, although the central thrust of his fourth argument—that state sovereign interests find their ultimate protection in the political process and its "procedural safeguards"—leaves little room for a judicial role. This logic would also seem to apply in the eleventh amendment context. However, requiring Congress to state clearly its intent to override state "immunity" from damages suits in federal court might be a way for the judiciary to ensure that the national political process has protected the states. This argument would preserve at least a remnant of eleventh amendment jurisprudence. Four months after Garcia, the Court did that and more.

III. ATASCADERO—THE ELEVENTH AMENDMENT LIVES!

A. ATASCADERO, ANOTHER FIVE-TO-FOUR DECISION

Atascadero State Hospital v. Scanlon involved the availability of a private right of action for damages against a state under section 504 of the Rehabilitation Act of 1973. This "cross cutting" provision, applicable to all federal grant statutes, prohibits recipients of federal assistance from discriminating on the basis of handicapped status. The plaintiff alleged that a California state hospital had denied him employment because he had a visual handicap. Since the hospital received federal funds, he invoked section 504, seeking compensatory, injunctive, and declaratory relief. The eleventh amendment issue arose because a compensatory award would come from the state treasury. The Ninth Circuit resolved this issue in the plaintiff's favor. In a somewhat ambiguous opinion, the court of appeals appeared to hold that Congress enacted section 504 pursuant to the fourteenth amendment, thus abrogating any immunity California might have, and, alternatively, that the state had waived its eleventh amendment protection by participating in programs funded under the Rehabilitation Act. The Ninth Circuit based the waiver argument on the ground that the Act contained not only a prohibition against discrimination, but also that the state could foresee private suits to enforce the prohibition against any recipient.

In a five-to-four decision, the Supreme Court reversed the Ninth Circuit, hold-

128. Id. at 1018.
129. See infra text accompanying notes 223 to 226.
132. Section 504 applies not only to receipt of funds under the Rehabilitation Act itself, but also to any program of federal financial assistance. For a discussion of cross cutting provisions, see Regulatory Federalism, supra note 103, at 8.
133. Scanlon v. Atascadero State Hosp., 735 F.2d 359 (9th Cir. 1984), rev'd, 105 S. Ct. 3142 (1985). The Ninth Circuit had previously decided the case in the defendants' favor, holding that § 504 was inapplicable unless the primary purpose of the federal financial assistance in question was to provide employment. Scanlon v. Atascadero State Hosp., 677 F.2d 1271, 1272 (9th Cir. 1982). The Supreme Court vacated this judgment, 104 S. Ct. 1583 (1984), in light of Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984). Darrone rejected a primary objective limit on § 504. Id. at 1253-55.
134. 735 F.2d at 361.
135. Id. at 361-62.
136. Id. at 360.
137. Id. at 362.
ing that the eleventh amendment bar had not been removed. Justice Powell, writing for the majority, began by noting the general importance of the eleventh amendment, which “implicates the fundamental constitutional balance between the Federal government and the States.” In fact, he cited Garcia as authority for the need to recognize the importance of states in the American constitutional system. Nonetheless, his opinion treats the issues presented by Atascadero as requiring nothing more than the routine application of previously established requirements that Congress speak clearly if states are to be sued in federal court for “retroactive monetary relief.” Justice Powell directed the bulk of his analysis at whether section 504, as amended, would authorize such suits if Congress had enacted it pursuant to section five of the fourteenth amendment. He never reached the question of whether fourteenth amendment legislation was actually involved, apparently on the theory that even if it were, the relevant clear statement requirements had not been met. He first noted that, under eleventh amendment doctrine, “in certain circumstances the usual constitutional balance between the States and Federal Government does not obtain.” He repeatedly referred to the need for Congress to express clearly its intention to alter this balance and stated that the expression of this intention must be found “in unmistakable language in the statute itself.” The statute involved did impose a general standard that handicapped people not be discriminated against in federally funded programs. As amended, it also authorized the handicapped to utilize the remedies provided in Title VI of the Civil Rights Act of 1964 and authorized the award of attorney’s fees to any prevailing party other than the United States, “in any action or proceeding to enforce or charge a violation of a provision of this sub-chapter.” This language, even if it could be read to constitute a general authorization of suits in federal court to enforce the Act, was not enough for Justice Powell when the eleventh amendment was at stake. The key to his abrogation analysis is that the statutory language itself did not contain an explicit reference to states, a requirement he found established in several precedents. Since the clear statement rule had not been satisfied, Congress had not properly attempted to abrogate the state’s eleventh amendment immunity. Using a similar rationale, Justice Powell then dismissed the contention that the state had waived its immunity by accepting funds under the Act. He purported to apply a different analytical framework, one relevant to enactments under the spending clause. The spending power cases had established that “mere receipt of federal funds,” presumably with knowledge of the attendant obligations, does not

139. Id. at 3145-46.
140. Id. at 347.
141. Id. at 3144.
142. Id. at 3147-49.
143. Id. at 3149 n.4. Thus, Justice Powell avoided the difficult question of how a court determines whether the fourteenth amendment was, in fact, utilized. The importance of this inquiry will disappear if the Court ends up holding that Congress’ ability to abrogate the eleventh amendment is the same regardless of the coercive power utilized.
144. Id. at 3148.
145. Id. Although the phrasing differs, the same requirement is found in id. at 3146, 3147, 3149.
149. Id. at 3149-50 n.5.
constitute consent to private suit for damages in federal court. Congress must also give the state "notice" in the statute that the receipt of federal funds will subject it to damage actions in federal court. According to Justice Powell, Congress failed to satisfy this requirement, for whatever obligations the Rehabilitation Act imposes on states accepting funds under it, "[t]he Act . . . falls far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." Justice Powell's opinion suggests that the Court will use the same approach to determine whether Congress has attempted to abrogate a state's eleventh amendment protection and, in the spending power context, whether it has conditioned a state's receipt of federal funds on its consent to be sued in federal court.

Justice Brennan devoted his long dissent primarily to a criticism of current eleventh amendment law. Before reaching this larger issue, he argued that the language and legislative history of section 504 did manifest Congress' intent to abrogate any immunity the states might possess under existing doctrine. He then reiterated his view that eleventh amendment doctrine itself is seriously flawed because it is not "grounded on principles essential to the structure of our federal system or necessary to protect the cherished constitutional liberties of our people." Moreover, according to Justice Brennan, eleventh amendment doctrine obstructs the will of Congress and frustrates the federal courts in their essential function of enforcing and developing a uniform body of federal law. In addition to creating an unfathomable set of rules, the amendment, as perpetuated by the current Court, flouts, in the name of federalism, "the principle of state accountability to the rule of law." One might have expected Justice Brennan to rely heavily on Garcia and its underlying premises. After firing these opening salvos, however, he retreated to an extensive review of recent scholarship as conclusive proof that the Court's post-Hans doctrine rests on a serious misreading of the history surrounding the adoption of the Constitution and the ratification of the eleventh amendment. False history, according to Justice Brennan, had led to false doctrine.

Justice Blackmun, while joining in Justice Brennan's dissent, noted an important link between Atascadero and Garcia. He viewed both eleventh amendment doctrine and the tenth amendment jurisprudence of National League of Cities as springing from overly broad constructions of constitutional language based on incorrect premises as to the nature and principles of the federal system. The majority and dissenting opinions in Atascadero indicate that an important constitutional debate is taking place, even if the relationship of that debate to the arguments raised in Garcia is little noticed. The full importance of the decision

150. Id. at 3150.
151. Id.
152. Id.
153. Id. at 3151-53 (Brennan, J., dissenting).
154. Id. at 3150. Justice Brennan used virtually the same language again at 3156.
155. Id. at 3154.
156. Id. at 3154-55.
157. Id. at 3155.
158. Id. at 3156-57. Justice Brennan also discusses postratification cases decided prior to Hans. Id. at 3167-72. For a list of the scholarly authorities relied on by the dissent, see id. at 3156 n.11.
159. Id. at 3179 (Blackmun, J., dissenting).
becomes even clearer when Atascadero is compared with existing eleventh amendment precedents.

B. ATASCADERO AND THE FOURTEENTH AMENDMENT—CHANGING THE RULES

In requiring that the authorization to sue states for damages in federal court appear on the face of the statute, Justice Powell changed the standard governing the clarity with which Congress must address the issue of abrogation of eleventh amendment protection in the fourteenth amendment context. In the initial case establishing that Congress does possess such authority, Fitzpatrick v. Bitzer, the statute was relatively clear on its face as to the amenability of states to damage suits. The relevant precedent, however, is Hutto v. Finney. Hutto authorized the award of attorney's fees, which would be paid out of the state's funds, under the Civil Rights Attorney's Fees Awards Act of 1976. The Court viewed the Act as passed pursuant to the fourteenth amendment. But how much clarity the Court expected of Congress was itself less than clear. The majority seemed to rely on the breadth of the Act—which did not mention states by name—and on the specific legislative history addressing awards against states. The Court specifically rejected the argument that "Congress must enact express statutory language making the States liable if it wishes to abrogate their immunity." In his dissent, Justice Powell also viewed the decision as allowing legislative history to substitute for clear statutory language. Nonetheless, the Court's analysis raises questions about how far Hutto permits the search for abrogation to stray from the language of the relevant statute. The majority noted that the case before it did not "concern retroactive liability for prelitigation conduct rather than expenses incurred in litigation seeking only prospective relief." This distinction suggested that the fee award fell within the Ex parte Young doctrine permitting prospective, as opposed to retroactive, relief. While the Hutto majority indicated that the eleventh amendment may not even be relevant to awards of attorney's fees, it also noted that a fee award would not impose substantial fiscal burdens on the state involved. Justice Stevens' majority opinion even suggested that the Court would have used a different standard to judge the statutory language if Congress had sought to impose such

161. Although the statute did not include states by name, its definition of "person" included "governments, government agencies, and political subdivisions." Id. at 449 n.2. In addition, Congress had deleted the previous exclusion of states. Id.
164. 437 U.S. at 693-94.
165. Id. at 694.
166. Id. (emphasis added).
167. Id. at 706 (Powell, J., dissenting).
168. Id. at 695.
169. Id. at 695 n.24.
170. See id. at 695-96 (Act imposes attorney's fees "as part of the costs"); costs traditionally awarded without regard for states' eleventh amendment immunity because federal courts' interest in administration of justice justifies treating state like other litigants).
171. See id. at 697 n.27 ("award of costs—limited as it is to partially compensating a successful litigant for the expense of his suit—could hardly create any such hardship [enormous fiscal burden] for a State").
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burdens.\(^{172}\) Despite its ambiguities, *Hutto*’s authorization for courts to go beyond the text of statutes passed pursuant to the fourteenth amendment in order to find abrogation was approved the following term in *Quern v. Jordan*.\(^{173}\) According to *Quern*, the *Hutto* majority had correctly found congressional intent to override the states’ eleventh amendment protection in the Civil Rights Attorney’s Fees Awards Act, despite the absence of specific statutory language. “The statute had a history focusing directly on the question of state liability; Congress considered and firmly rejected the suggestion that states should be immune from fee awards.”\(^{174}\) While *Quern* perpetuated the notion that statutes imposing substantial fiscal liabilities on states “might require a formal intention of Congress’ intent to abrogate,”\(^{175}\) the case seemed to reaffirm the basic principle of *Hutto*: either statutory language or legislative history can suffice when the question is abrogation in the fourteenth amendment context. Commentators have viewed this as a correct approach.\(^{176}\) Against this background, it is clear that *Atascadero* changed the rules for abrogation. In his majority opinion, Justice Powell repeatedly stressed the need for “unmistakable language in the statute itself.”\(^{177}\) Although the case might have come out the same way under previous standards,\(^{178}\) this does not diminish the importance of the change.

An initial question is whether it was improper—as Justice Brennan argued in dissent\(^{179}\)—for Justice Powell to apply a changed canon of construction to legislation passed in 1973 and amended in 1978. As a general proposition, the methods for construing statutes are not cast in stone. The best known recent example of a dramatic change in the Court’s practice is its substantial alteration of the standards for finding an implied right of action in federal statutes providing only for administrative enforcement.\(^{180}\) The entire Court apparently recognizes the need for the change, although individual justices have disagreed on how to apply the new standards.\(^{181}\) As for the Rehabilitation Act, in his argument for upholding the Ninth Circuit’s *Atascadero* decision, Justice Brennan relied heavily on the 1978 amendments concerning the availability of remedies and attorney’s fees.\(^{182}\) Yet these amendments were passed after the Court had decided several of its major clear statement rule cases, including *Fitzpatrick v. Bitzer*.\(^{183}\)

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172. See id. at 696-97 & n.27 (while “it would be absurd to require an express reference to state litigants whenever . . . a new item . . . is added to the category of taxable costs,” . . . “we do not suggest that our analysis would be the same if Congress were to expand the concept of costs beyond the traditional category of litigation expenses.”)
174. Id. at 344-45.
175. Id. at 345 n.16.
176. Note, Reconciling Federalism and Individual Rights: The Burger Court’s Treatment of the Eleventh and Fourteenth Amendments, 68 VA. L. REV. 865, 886-87 (1982); see also M. REDISH, supra note 13, at 167 (discussing use of legislative history after *Hutto*).
177. *Atascadero*, 105 S. Ct. at 3148 (footnote omitted); see id. at 3146, 3147, 3149.
178. See infra text accompanying notes 203 to 215.
179. *Atascadero*, 105 S. Ct. at 3154 n.7 (Brennan, J, dissenting).
181. See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 25 (1979) (White, J., dissenting) (accepting Court’s focus on legislative intent as standard for finding implied rights of action, but criticizing majority’s application of that standard).
Although Justice Powell may have "tightened the noose"—as Justice Brennan contended—4—he hardly introduced an unknown element into eleventh amendment doctrine concerning the construction of federal statutes.

Somewhat more serious is the question of whether such a strict clear statement rule is appropriate in fourteenth amendment cases. One must first consider why Congress might have greater freedom to override the eleventh amendment's protection when it acts pursuant to section five of the fourteenth amendment than in the context of other powers.

One view, suggested by Fitzpatrick, is that the fourteenth amendment is unique in terms of the relations of Congress and the states. The Fitzpatrick Court noted that the amendment's "provisions are by express terms directed at the states,"185 and quoted the famous statement from Ex parte Virginia186 that enforcement of the fourteenth amendment "is no invasion of State sovereignty."187 Thus, the underlying principles of the federal system, which generated eleventh amendment doctrine in the first place, call for an important exception when another amendment that itself speaks broadly to federalism issues is involved.

Alternatively, one might argue that eleventh amendment doctrine is an attempt to balance respect for the role of states with the need to vindicate federal rights. The fact that statutes enacted pursuant to the fourteenth amendment are likely to vindicate particularly important rights justifies less eleventh amendment protection.188 This argument seems less persuasive than the view suggested by Fitzpatrick because Congress and the statute's beneficiaries may view as equally important rights created under article I statutes.

Under either argument, Congress possesses special power when acting pursuant to section five of the fourteenth amendment. Since no question of waiver by the state is involved, the only relevant intent is that of Congress itself. The clear statement rule ensures that Congress knew what it was doing to the states,189 but legislative history such as committee reports—as opposed to scattered floor statements and manufactured colloquies—may be adequate to perform this task.

Justice Powell might reply that, given the nature of the legislative process, the only sure evidence of what representatives or senators meant to vote on is the actual bill before them.190 Thus, for Justice Powell, "authorization grounded in statutory language sufficiently clear to alert every voting Member of Congress of

184. Atascadero, 105 S. Ct. at 3154 (Brennan, J., dissenting).
185. 427 U.S. at 453.
186. 100 U.S. 339 (1880).
187. 427 U.S. at 454 (quoting Ex parte Virginia, 100 U.S. at 346).
188. See Note, supra note 176, at 891 (Supreme Court has required less precise articulation of congressional intent in fourteenth amendment context because of "paramount importance" of individual rights). It is also possible to argue that the fourteenth amendment supersedes the eleventh since it was enacted at a later date. See HART & WECHSLER SUPPLEMENT, supra note 11, at 231.
189. See Tribe, supra note 11, at 695 (clear statement rule would ensure that attempts to limit state power are unmistakable).
190. Justice Powell expressed his view of the federal legislative process in his Garcia dissent:

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

Garcia, 105 S. Ct. at 1031 (Powell, J., dissenting).
the constitutional implications of particular legislation"\textsuperscript{191} is required to trigger abrogation of the eleventh amendment. One could go even further and argue that the very breadth of fourteenth amendment power over states requires such clarity to protect the states from excesses of congressional zeal. Perhaps then the real question is whether there should be \textit{any} clear statement rule, instead of judicial utilization of the normal canons of statutory construction. As I demonstrate in my attempt to reconcile \textit{Garcia} and \textit{Atascadero}, the answer is emphatically yes.\textsuperscript{192} For present purposes, it is enough to note that \textit{Atascadero} helps focus the inquiry by establishing that there is one clear statement rule to guide the eleventh amendment inquiry, regardless of the power under which Congress acts.

C. \textit{ATAASCADERO} AND THE SPENDING POWER—MERGING THE ABROGATION AND WAIVER STANDARDS

Justice Powell treated the spending power analysis of the \textit{Atascadero} facts as an equally routine matter of applying existing precedents. On this point he may be closer to the mark, although the statute presented questions not previously addressed by the Court in any spending power case. Perhaps the most important aspect of his analysis is the apparent conclusion that the degree of clarity needed in a federal spending power statute to find a waiver by the state of its eleventh amendment protection is precisely the same as that needed to find intent on the part of Congress to abrogate that protection in the context of the fourteenth amendment.

The starting point for spending power analysis of eleventh amendment issues is \textit{Edelman v. Jordan}.\textsuperscript{193} In \textit{Edelman}, the plaintiffs sought relief for violation of a federal welfare statute by the State of Illinois. The Court allowed prospective relief, using an \textit{Ex parte Young} rationale, but viewed the eleventh amendment as barring any retroactive relief that would resemble the payment of damages from the state treasury. The plaintiffs' cause of action might have come either from the underlying welfare statute itself, under an implied right of action theory, or from the express authorization to sue public officials provided by section 1983.\textsuperscript{194} The Court focused on the former possibility and on cases construing statutes that, by their terms, authorized suit by designated plaintiffs against a general "class of defendants which literally included States or state instrumentalities."\textsuperscript{195} The underlying statute in \textit{Edelman} did not specifically authorize private suits. Thus, the Court concluded that the mere fact of Illinois' participation in the program, with knowledge of the attendant obligations, could not constitute a waiver of its eleventh amendment protection. The Court reasoned that the statute must clearly inform the state that participation would subject it to private suits for retroactive liability. Congress could only induce a waiver "by the most

\begin{itemize}
\item \textsuperscript{191} \textit{Hutto}, 437 U.S. at 705 (Powell, J., dissenting).
\item \textsuperscript{192} See \textit{infra} text accompanying notes 223 to 226.
\item \textsuperscript{193} 415 U.S. 651 (1974).
\item \textsuperscript{194} 42 U.S.C. § 1983 (1982) provides:
\begin{quotation}
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
\end{quotation}
\item \textsuperscript{195} 415 U.S. at 672.
\end{itemize}
express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."196 (In this respect, Edelman foreshadows the approach Justice Powell used for both the spending power and fourteenth amendment issues in Atascadero).

Even under this stringent standard, one might have expected the Court to treat the section 1983 arguments more seriously. That statute is clear, both in its creation of a right to sue and in its authorization of a damages remedy.197 The Court essentially brushed aside any section 1983 analysis by reading the statute as being limited by the Ex parte Young doctrine. For the Edelman Court, Young stood for the proposition that in suits against state officials the eleventh amendment operates to "prospective injunctive relief."198

Quern v. Jordan,199 a successor case to Edelman, shed further light on section 1983. The Court rejected the contention that section 1983's reference to "persons" includes states, thus permitting all forms of relief against them. Justice Rehnquist found neither the language of section 1983 nor its legislative history sufficient to support an abrogation. Unlike the statute in Fitzpatrick, the statute in Quern did not explicitly refer to private suits against states. And unlike Hutto, there was no "history focusing directly on the question of state liability."200 The Court shifted the section 1983 inquiry away from the grantee's knowledge of the statute and its consequences to an examination of congressional intent.201 Justice Powell's Atascadero opinion did not mention a possible section 1983 argument. Instead, he focused on Edelman and on its reaffirmation in Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association.202 From these cases, he drew the twofold proposition that mere receipt of federal funds is not enough to constitute a waiver and that the grant statute itself must clearly identify consent to waive as a condition precedent to receipt.

However, section 504 of the Rehabilitation Act is substantially different from the statutes at issue in Edelman and Florida Department of Rehabilitative Services. In addition to the underlying prohibition against handicapped-based discrimination, it speaks to the issue of private enforcement in the following terms:

(A)(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assist-

196. Id. at 673.
197. There is debate over whether the reference to "laws" in § 1983 should be read as encompassing all federal laws—the position taken in Maine v. Thiboutot, 448 U.S. 1 (1980)—or whether it should be limited to laws relating to civil rights and equality. I have argued for the latter position. Brown, Whither Thiboutot? Section 1983, Private Enforcement and the Damages Dilemma, 33 DePaul L. Rev. 31, 36-40 (1983). The point here is that if statutory language is the key to eleventh amendment analysis, the § 1983 argument in Edelman had considerable force.
198. 415 U.S. at 677.
200. Id. at 345.
201. Thus the Court engaged in fourteenth amendment abrogation analysis rather than focusing on the question of waiver discussed in Edelman. The fact that § 1983 is fourteenth amendment legislation may justify this approach. Nonetheless, the language of § 1983 remains relevant to waiver analysis. See infra text accompanying note 214.
ance or Federal provider of such assistance under Section 794 of this title.

(B) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.203

Thus, the statute alerts the grantee to the possibility of private enforcement, including actions in court given the reference to attorney's fees.

One might view the statutory context in *Atascadero* as analogous to that in *Parden v. Terminal Railway*,204 a case involving a different article I power. *Parden* was a private suit for damages against a state-owned railroad under a federal statute authorizing suit against "every common carrier by railroad" when engaged in interstate commerce. The Court allowed a suit in federal court.205 The broad remedies provided for in section 504, which refers to "any recipient," are similar to those in the statute regulating railroads. Moreover, the *Parden* Court noted that Alabama had consented to come within the statute's ambit by operating the railroad.206 Here, by analogy, the state may have consented by accepting the funds.

*Parden*, however, is a weak leg to stand on.207 In *Employees*, a later case involving almost identical statutory language, the Court found the eleventh amendment to be a barrier to a private suit for damages, casting serious doubt on the precedential vitality of *Parden*.208 Even if *Parden* can be justified as resting on a governmental-proprietary distinction, that distinction would not help the *Atascadero* plaintiffs. The state hospital seems clearly to fall on the governmental side of that elusive line.

More to the point, section 504 and the statute involved in *Parden* are substantially different in terms of what they tell the "participating" state. Section 504 does mention private remedies, but one must refer to Title VI to find out what they are. On its face, Title VI seems to contemplate administrative enforcement only, although it does refer obliquely to "other means authorized by law."209 Thus, a state grantee might view the remedies component of section 504 as primarily giving beneficiaries a right to trigger administrative mechanisms similar to those in Title VI. The reference to attorney's fees can be read as applying to suits brought by the United States, since it singles out the United States as a party who cannot receive fees. The point is that, on its face, the remedies provision of section 504 does not put the state grantee on notice that it is consenting to any form of private suit.

However, private enforcement of Title VI is possible under an implied right of

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204. 377 U.S. 184 (1964).
205. Id. at 190.
206. Id. at 192.
207. See Faust v. South Carolina State Highway Dep't, 721 F.2d 934, 940-41 (4th Cir. 1983) (sweeping language of *Parden* "sharply curtailed" by *Edelman* and *Employees*; court overrules earlier eleventh amendment decision because it embodied reading of *Parden* that later Supreme Court decisions have shown to be untenable).
action theory.210 It might be assumed that similar suits would be available to enforce section 504, and the Court has apparently so held.211 But should the state grantee be expected to enter into a federal program with detailed knowledge of implied rights of action? Even if the answer were yes, the availability of damages is an unsettled matter in Title VI suits generally, regardless of the nature of the defendant.212 It is fair, in my view, to hold the state only to those conditions deducible from the face of the statutes relevant to the grant in question. This principle, enunciated by the Court in the first Pennhurst case,213 ought to extend to remedial obligations imposed on a state, as well as to its substantive duties with respect to the funds.214 Thus, had Justice Powell engaged in a more detailed examination of the rehabilitation statute, he would have reached the same conclusion as a matter of existing eleventh amendment doctrine, and would have been correct in doing so. Reconsider the operation of section 1983 in the grant context. The Court has held that section 1983 can be the basis for private suits to enforce grant conditions.215 The finding of an express cause of action is a more plausible reading of that statute than is any discovery of a private right of action in the text of section 504. As long as the Court adheres to its section 1983 holdings in Quern and Edelman barring monetary awards against states, the result in Atascadero seems to follow a fortiori.

In the context of existing eleventh amendment doctrine, the Atascadero decision is significant for two reasons. First, it tightens the clear statement requirement when Congress has exercised its fourteenth amendment power: intent to abrogate must be found of the face of the statute. Second, it reaffirms the rule of prior decisions requiring the same degree of clarity in a spending power statute, which triggers inquiry into whether the state waived its eleventh amendment protection, as would be required by an abrogation statute. The two inquiries are now the same. In the former instance, the clear statement rule ensures that Congress knew what it was doing; in the latter situation it provides the additional assurance that the state knows what it is getting into. Atascadero, however, has broader significance. The Court chose to perpetuate eleventh amendment doctrine despite the total repudiation of state sovereignty in Garcia.

IV. Garcia and Eleventh Amendment Doctrine

A. The Inconsistencies

Justice Blackmun may have been right that Atascadero's reaffirmation of elev-

211. Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984). In Darrone, Justice Powell said that the Court did not reach the issue of a private right of action under § 504. Id. at 1252 n.7. However, the Court proceeded on the basis that, at the very least, private equitable actions to enforce § 504 are available. See id. at 1252.
212. See Guardians, 463 U.S. at 595-97 (rejecting availability of compensatory damages for unintentional violation of Title VI, but leaving question open with respect to intentional violations).
214. See Brown, supra note 197, at 70-72 (discussing Pennhurst as possible foundation for rule against awarding damages for violations of federal grant conditions). The Court's jurisprudence with respect to principles of clear statement in the grant context is in a state of flux. See Bennett v. Kentucky Dep't of Educ., 105 S. Ct. 1544, 1552 (1985) (ambiguities in grant program requirements should not "invariably be resolved against the Federal Government as the drafter of the grant agreement") (dictum).
enth amendment doctrine is totally irreconcilable with Garcia. The case for irreconcilability can be summarized as follows. Both eleventh amendment doctrine and the tenth amendment limitations on Congress enunciated in National League of Cities are state sovereignty principles which flow more from structural assumptions about the American federal system than from specific constitutional provisions. Far from having a life of its own, the eleventh amendment is best understood as a narrow exemplification of the broad state sovereignty principle set forth in National League of Cities. Since Garcia repudiated the theoretical underpinnings of this broad principle, the subset must fall as well.

The basic premise of Garcia is that to the extent the states need protection from the national government, such protection is amply afforded by the legislative processes of Congress. States are represented in Congress; they enjoy no such representation in the federal judiciary. Thus, there is no room for any approach that calls for different treatment of the “states as states” when laws affecting them are otherwise within the powers of Congress. Yet under eleventh amendment doctrine the federal judiciary may enforce limits on Congress. At the very least, such a doctrine makes it substantially harder for the national legislature to treat the states like everyone else in deciding when private damage suits in federal court are appropriate for the enforcement of federal law. It may even impose substantive limits. Therefore, the arguments at the core of Garcia call, almost as an afterthought, for the repudiation of eleventh amendment doctrine, rather than for its reaffirmation in Atascadero.

Two other points are worth mentioning in this respect. First, Garcia involved Congress' authority over the states in its exercise of the commerce power. Post-National League of Cities cases had suggested that the Court would make a distinction between the fourteenth amendment and other grants of power when considering both Congress' ability to regulate states and the narrower eleventh amendment issue of its ability to subject them to suit in federal court. As noted, Garcia eliminated any sliding scale of congressional authority over the states that depends upon the power used. Since eleventh amendment doctrine relies in part on such a distinction, this aspect of Garcia is merely one more nail in the coffin.

Finally, although Garcia is a case about the power to regulate vel non, that general power ought reasonably to include the lesser power of determining how and where the regulation is to be enforced. If Congress can tell the states how much to pay their workers, its authority “to make all laws which shall be necessary and proper for carrying into execution,” its powers should include giving the workers the right to seek monetary redress for violations in federal court. Again, the tension between eleventh amendment doctrine and the thrust of Garcia is immediately apparent.

B. A POSSIBLE RECONCILIATION

One might stop here, noting with a shrug that inconsistent 5-4 decisions are

216. 105 S. Ct. at 3179 (Blackmun, J., dissenting).
hardly unique these days and that Justice White's swing vote made the
difference. Otherwise, the same Justices were on the same sides in both cases. In the
analysis that follows, I will argue that Garcia and Atascadero are, in fact, in
harmony with one another. The continued existence of eleventh amendment
document is not just an untidy by-product of a federal system, but is instead a
means of preserving a necessary balance between the two levels of govern-
ment.219 At the outset, I disclaim any substantial reliance on differences be-
tween the two textual provisions involved. The eleventh amendment may be the
stronger provision, because it is specifically directed at the issue of suits against
states in federal court. It is hardly strong enough, however, to carry on its back
the entire weight of post-Hans doctrine. What justifies this doctrine is first, the
duty it imposes on Congress, and second, the introduction of a new set of actors:
the state courts.
Let us begin with Garcia. Justice Blackmun suggested provocatively that
there might be “affirmative limits [that] the constitutional structure . . . imposes
on federal action affecting the States under the Commerce Clause.”220 He left
open the question of whether such limits would be judicially enforceable.221 Re-
quiring courts to consider whether “failings in the national political process”222
have occurred would seem to implicate the political question doctrine. The
heightened clear statement rule enunciated in Atascadero, however, performs
precisely the function Justice Blackmun envisioned: it permits judicial
oversight of the legislative process to ensure that Congress has considered the states'
interests.
That a clear statement rule can be consistent with the Wechslerian view of the
national political process as the source of the states' protection hardly seems
novel.223 Yet Justice Brennan attacks the Court's position that this statement
must be found in the language of the statute itself; Professor Field apparently
agrees, viewing a strict clear statement rule as a generally impermissible form of
judicial veto.224 Both assume that the rule makes it harder for Congress to act
because the Court is opposed to what Congress is doing.225 After Garcia, how-
ever, the rule counterbalances the states' loss of any substantive judicially
enforceable limitations on congressional regulation. If 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. The Court does so not because it is implacably hostile to
damages suits against states in federal court, but because its role has been trans-
formed essentially into enforcing process guarantees. As I demonstrate below,
process guarantees are probably all that the states have left under the eleventh
amendment.226

U.S. 279, 298 (Marshall, J., concurring) (limitations on state's susceptibility to damage action in federal
court "part of tension inherent in our system of federalism").
221. Id.
222. Id. at 1019-20.
223. See H. FINK & M. TUSHNET, supra note 10, at 142.
224. Atascadero, 105 S.Ct. at 3153-54 (Brennan, J., dissenting); Field, Congressional Imposition, supra
note 14, at 1273.
225. Atascadero, 105 S. Ct. at 3154 (Brennan, J., dissenting); Field, Congressional Imposition, supra
note 14, at 1273-74.
226. See infra text accompanying notes 244 to 250.
Suppose that a statute does not satisfy the clear statement rule. That does not mean it will not be enforced, as would have been the result under National League of Cities. Enforcement in the form of damages actions will come in the state courts, a second forum for the consideration of state interests. State courts will probably be more familiar with the effect damage awards would have on the state treasury, and will be more inclined to balance the competing interests. Although such balancing might seem the province of equitable relief, it reflects one of the underlying goals of the eleventh amendment: concern for the fiscal well-being on the states. In this sense, the argument for state court enforcement of federal norms that operate against the states parallels the arguments advanced in the context of statutes withdrawing federal jurisdiction over certain classes of cases. As Professor Bator has suggested in that context, "in interpreting the constitutional provisions which restrict state power, it may be wise [and] . . . politically healthy to give the state courts the opportunity in the first instance to enforce federal constitutional restrictions on state power." 227 The goal of uniform interpretation of federal law is preserved not only through the vehicle of ultimate Supreme Court review, but also by the fact that the lower federal courts will entertain damages suits against nonstate defendants.

The question arises whether state courts will entertain damages actions against states based on federal law. 228 State courts hear a wide variety of suits to vindicate federal rights. 229 Whether state courts must entertain all federally based suits remains an open question. They must at least entertain federal claims analogous to judicably enforceable state law claims, 230 and it has been strongly argued that they must enforce any valid federal law. 231 The question seems posed most acutely in the context of claims under section 1983. In 1980, the Supreme Court offered the following ambiguous analysis in Martinez v. California: 232 "We have never considered . . . the question whether a State must entertain a claim under § 1983. We note that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim." 233 The Supreme Court's recent per curiam affirmance of the South Carolina Supreme Court's decision in Spencer v. South Carolina Tax Commission 234 muddies the waters even further.

228. Cf. M. Redish, supra note 13, at 146-47 (questioning whether permitting damage actions in state courts is consistent with purposes of eleventh amendment).
230. The leading case is Testa v. Katt, 330 U.S. 386 (1947). The Court held that Rhode Island state courts could not refuse to entertain treble damage actions under a federal price control act. The fact that the same type of claims arising under Rhode Island law were enforceable may have played a role in the Court's analysis. See C. Wright, Law of Federal Courts 270-71 (4th ed. 1985).
233. Id. at 283-84 n.7.
The *Spencer* plaintiffs were nonresident taxpayers who asserted that South Carolina's administration of certain deductions discriminated against them in violation of the federal Constitution. They sued pursuant to both section 1983 and South Carolina statutes permitting the assertion of such taxpayer claims. The South Carolina courts agreed with the plaintiffs' contention under the privileges and immunities clause and ordered a refund. The trial court did not address the issue of the availability of section 1983, a matter of considerable importance to the plaintiffs since the use of section 1983 would trigger the Civil Rights Attorney's Fees Awards Act. The lower court treated the action as one brought pursuant to state statutes, which authorized the claim but denied costs such as attorney's fees. The South Carolina Supreme Court devoted one paragraph to this issue, holding that section 1983 is remedial only and that resort to it in this case would circumvent state remedies for asserting federal rights. A divided United States Supreme Court affirmed without opinion. The significance and status of *Spencer* are unclear. Many state courts view themselves as bound to hear suits brought pursuant to section 1983. However, the South Carolina court read *Martinez v. California* as permitting state courts to refuse to entertain section 1983 claims. This result can perhaps be justified if one reasons that the *Spencer* plaintiffs did not win a "state law" victory, but instead received full vindication of their federal law claim under an alternative remedy. The problem with justifying *Spencer* on these grounds lies in language found in *Monroe v. Pape*, the bedrock case of section 1983 jurisprudence. In *Monroe*, the Court said that "it is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." The *Monroe* court clearly envisioned the presence of state law claims against public law officials, rejecting the notion that they must somehow be exhausted. At the same time, the reference to remedies casts doubt on the South Carolina court's rejection of the availability of section 1983. The important element in *Spencer* is the availability of fees, an issue that, strictly speaking, is distinct from the obligation to entertain federal claims. *Spencer* hardly is the last word on this matter, especially given the nature of its affirmation. Even read broadly, however, the case does not stand for any general disavowal of the obligation of state courts to enforce federal law. An important premise of Justice Powell's *Atascadero* opinion is that the state courts were open to hear the very claims presented. In sum, I would argue, the eleventh amendment is neither inconsistent with the landmark decision in *Garcia* nor the enemy of the rule of law as charged by Justice Brennan. Admittedly, the extent to which one accepts

235. 281 S.C. at 496, 316 S.E.2d at 388.
236. 281 S.C. at 497, 316 S.E.2d at 388-89.
239. 281 S.C. at 497, 316 S.E.2d at 388-89.
241. Id. at 183.
the view offered here may depend on precisely how the eleventh amendment affects Congress. Does it impose limits, depending on which power is used, or does it impose simply a process? That process would be the refined clear statement rule, now applicable across the board. Since Congress can satisfy the rule, it may permit private damages suits against states regardless of the power utilized.

C. THE BURGER COURT AND THE CONGRESSIONAL SUPREMACIST POSITION

The congressional supremacist position reflects the latter reading of the relevant eleventh amendment cases. It is true that the Court has never struck down a statute authorizing such suits. Any victories for the states have been won on the field of statutory construction. At the same time, the Court has never explicitly accepted the supremacist position and has suggested that it will reject it if directly faced with the question.244 These inferences are reinforced by the majority opinion in *Atascadero*. Read in the broader context of eleventh amendment doctrine, Justice Powell's analysis appears to rest on the proposition that there are only two ways around the amendment—waiver and abrogation—and abrogation can be accomplished only when Congress acts pursuant to the fourteenth amendment.245 The emphasis on the fourteenth amendment as the prerequisite to abrogation is consistent with the opinion in *Fitzpatrick v. Bitzer*, in which Justice Rehnquist stated that Congress may, under the fourteenth amendment, "provide for private suits against States or state officials which are constitutionally impermissible in other contexts."246 If the confrontation does occur, I believe that the Court will back down, notwithstanding its insistence on the constitutional dimension of the states’ eleventh amendment protection.247 Otherwise, *Atascadero* and *Garcia* will indeed be in conflict. The issue would most likely arise in a federal suit for damages against a state under a statute passed pursuant to the commerce power. *Garcia* vitiates any notion of a different status for commerce clause enactments. Justice Blackmun emphasized this point when he stated that "the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action."248 This by itself may be enough to prevent the Court from holding that Congress cannot provide for enforcement of a commerce power enactment in this manner.

An equally persuasive argument for the Court's treating a commerce clause statute in the same way as a fourteenth amendment statute is based on another part of *Garcia*. Any concept of eleventh amendment limits on the commerce power seems to require an inquiry into the nature of the state activity Congress

244. See Brown, Beyond Pennhurst—Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court, 71 VA. L. REV. 343, 392-93 n.290 (1985). In this article, I took the position that the supremacists had read too broadly the cases involving congressional authority under the fourteenth amendment as extending to all congressional powers, and, further, that a distinction between the fourteenth amendment and other powers made sense. I adhere to that criticism. As for the distinction, although it has appeal, see supra text accompanying notes 185 to 189, it is no longer tenable after *Atascadero*.

245. *Atascadero*, 105 S. Ct. at 3145.


247. E.g., *Atascadero*, 105 S. Ct. at 3145-46; *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (question is one of waiver by the state of "its constitutional protection under the Eleventh Amendment").

has regulated. The reason for this inquiry is that Congress, in exercising its coercive power over commerce, must at least be able to do what it can do in the exercise of the noncoercive spending power: induce states to waive their eleventh amendment protection. Thus, one must examine the state activity covered by a given statute to see if a waiver has taken place. For example, could the state be deemed to have "consented" to the regulation, as was found in *Parden*? Such inquiries inevitably lead to the drawing of lines based on the degree of choice the state had, and, one suspects, to the rehabilitation of the governmental-proprietory distinction. Yet *Garcia* rejects this distinction as a means of drawing lines to protect the states from congressional action. Unless the Court wishes to fight that battle again—a fight that some justices may welcome—it seems unlikely that the discredited governmental-proprietory dichotomy will continue to play a role in the eleventh amendment context.

**CONCLUSION**

The eleventh amendment stands, despite the demise of the tenth. The states may feel that they have been given a choice in the question of where to be hanged, but denied any choice over the question of whether they shall be. If the Court accepts the supremacist position, the eleventh amendment becomes process federalism only, as opposed to the "substantive federalism" reflected by *National League of Cities*. Yet it is process federalism that grants the states meaningful protection. The clear statement rule assures them at least one bite at the apple—in the sense of full consideration of their interests at the congressional level. If the statute does not meet this stringent test—and many congressional enactments, like that involved in *Atascadero*, will not—then the states at least get to have their fiscal interests considered by a body that will be sensitive to them: their own courts. A balance is struck, a form of equilibrium attained. Others might strike the balance differently, but I view the end state described here as faithful to the principles of federalism and to the rule of law.

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249. In *Parden*, the Court concluded that Alabama had accepted the conditions of the Federal Employers’ Liability Act by entering into the operation of an interstate railroad 20 years after passage of the Act. 377 U.S. at 192.

250. See *Garcia*, 105 S. Ct. at 1033 (Rehnquist, J., dissenting); id. at 1038 (O’Connor, J., dissenting). Both Justices expressed an intention to fight for a restoration of *National League of Cities*. It is not clear, however, whether Justice O’Connor’s advocacy of a balancing test that weighs state autonomy as a factor would reinstitute a zone approach. See id. at 1037.


252. The term is Stewart Baker’s. Baker, supra note 26, at 178. He views the tenth amendment as protecting substantive federalism, while the eleventh protects only a "formal federalism." *Id.* at 178-80.