



CRYPTIC JUSTICE

Stephen R. McAllister

THE ELEVENTH AMENDMENT has proven to be a conundrum for the Supreme Court. Everyone acknowledges why the Amendment was proposed and ratified: it was a reaction to the perceived incorrectness of the Court's decision in *Chisholm v. Georgia*, which permitted a suit by a citizen of South Carolina against the State of Georgia to proceed in federal court.¹ And the Amendment's text is straightforward:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Nevertheless, we have had well more than a century of vigorous dispute among numerous Justices over the Amendment's meaning and significance. This article accompanies the *Green Bag's* recently issued card (reproduced on page 289) for use with the Justice Byron R. White bobblehead. It explains Justice White's role in an important Eleventh Amendment case — *Pennsylvania v. Union Gas Company*² — and the connection between that case and the *Green Bag's* card.

Steve McAllister is the E.S. & Tom W. Hampton Distinguished Professor of Law at the University of Kansas. For the October 1989 and 1990 terms he was a law clerk to Justice Byron R. White, immediately after Union Gas was decided, but he had no role in the case whatsoever.

¹ 2 Dall. 419 (1793).

² 491 U.S. 1 (1989).

To set up and explain the case, a few Eleventh Amendment principles are important to know. First, a majority of the Court long has interpreted the Amendment to have greater scope than its text barring suits by citizens of a state against that state, while a substantial minority always has disagreed. The case that established that principle, *Hans v. Louisiana*,³ has been a frequent and continuing target of attempts to overrule it. Second, in an effort to avoid unnecessary decisions regarding the power of Congress to abrogate the States' constitutional immunity from suit, the Court has adopted a "clear statement rule," which asks whether a statute clearly evinces Congress's intent to abrogate the States' immunity.⁴ Lastly, there have long been unsettled questions about how much constitutional power Congress actually had to abrogate the States' immunity from suit and what the sources of such constitutional power might be.⁵ The *Union Gas* case implicated all three principles.

BACKGROUND OF THE *UNION GAS* CASE

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980.⁶ Predecessors of Union Gas Company operated a coal gasification plant near Brodhead Creek in Stroudsburg, Pennsylvania, and the plant produced coal tar as a byproduct. Brodhead Creek appears to have been a point of pride and beauty for Stroudsburg, as evidenced by the early 20th-century postcards reproduced on the *Green Bag* card (see page 289). In 1980, Pennsylvania was undertaking flood control efforts on Brodhead Creek when the state dug into a large deposit of coal tar, which then began to seep into the creek. The Environmental Protection Agency deemed the tar a hazardous substance under

³ 134 U.S. 1 (1890) (citizen of Louisiana cannot sue the State of Louisiana).

⁴ *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (Congress must make its intent to subject the States to suit "unmistakably clear."); *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 478 (1987) ("unmistakably clear language").

⁵ And those questions continue to arise. See, e.g., *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482 (2021) (federal power of eminent domain abrogates the States' immunity in condemnation actions); *Torres v. Texas Dept. of Public Safety*, 597 U.S. 580 (2022) (Congress can use its war powers under Article I to abrogate the States' immunity from suit under the Uniformed Services Employment and Re-employment Rights Act (USERRA)).

⁶ 42 U.S.C. §§ 9601 *et seq.*

CERCLA and declared quiet, unassuming Brodhead Creek the Nation's first emergency Superfund environmental cleanup site.

The United States and Pennsylvania cleaned up the site. Pennsylvania then sued Union Gas seeking to recover cleanup costs. Union Gas in turn sued Pennsylvania, claiming the State was responsible for some of the costs. A federal district court dismissed the Union Gas suit against Pennsylvania on Eleventh Amendment grounds and the Third Circuit affirmed, finding no "clear statement" in CERCLA that Congress intended to subject the States to suit under that statute.⁷ In the meantime, Congress enacted the Superfund Amendments and Reauthorization Act (SARA),⁸ prompting the Supreme Court to grant Union Gas's petition for a writ of certiorari and remand the case to the Third Circuit for consideration of whether SARA had any impact on the case.⁹ The Third Circuit held that SARA authorized suits against the States and that Congress had the constitutional power to authorize such suits.¹⁰ Pennsylvania sought review in the Supreme Court.

THE CASE AT THE SUPREME COURT – CERTIORARI STAGE AND INITIAL MERITS VOTE

The Supreme Court granted certiorari to address the Eleventh Amendment questions.¹¹ Justice John Paul Stevens's conference notes (see Fig. 1) – which are open to the public in the Manuscript Reading Room at the Library of Congress – indicate that the cert vote in conference was four votes to grant (Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy), four votes to deny (Justices William J. Brennan, Thurgood Marshall, Harry A. Blackmun, and Stevens), and one vote to "J-3" (Justice White). A J-3 or "join 3" vote means a Justice will vote to grant cert if three other Justices do so, thus providing the necessary fourth vote to grant review. White's J-3, however, was unnecessary since four other Justices voted to grant review.

⁷ *United States v. Union Gas Co.*, 792 F.2d 372 (3d Cir. 1986).

⁸ Pub. L. 99-499, 100 Stat. 1613 (1986).

⁹ 479 U.S. 1025 (1987).

¹⁰ 832 F.2d 1343 (3d Cir. 1987).

¹¹ 485 U.S. 958 (1988).

Stephen R. McAllister

vs.

UNION GAS COMPANY

01/21/88 - Cert.

3/21/88 - Cert. Granted.
10/3/88 - 1st time of Pacific Legal Foundation to participate in oral arg.,
for divided arg. & for add'l time for oral arg.
is denied.

HOLD FOR	DEFER		CERT.			JURISDICTIONAL STATEMENT				MERITS		MOTION	
	RELIST	CVSG	G	D	G&R	N	POST	DIS	AFF	REV	AFF	G	D
Rehnquist, Ch. J.			✓							✓			
Brennan, J.				✓							✓		
White, J.			✓							✓			
Marshall, J.				✓							✓		
Blackmun, J.				✓							✓		
Stevens, J.				✓							✓		
O'Connor, J.			✓							✓			
Scalia, J.			✓							✓			
Kennedy, J.			✓							✓			
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19021-2-88

Fig. 1: Justice John Paul Stevens’s conference notes, showing the Justices’ votes in Pennsylvania v. Union Gas.

After the case was briefed and argued, the conference vote on the merits tracked the cert vote, with five Justices voting to reverse (i.e., concluding Pennsylvania was immune from Union Gas’s suit), and four Justices voting to affirm the Third Circuit. (Fig. 1) Notes in the papers of both Blackmun

(also in the Manuscript Reading Room at the Library of Congress) and Stevens provide some insight into all the Justices' reasons for, and thoughts behind, their votes.

Before discussing those notes, however, it is necessary to provide a short comment on the Court's Eleventh Amendment jurisprudence and Scalia's questioning of a key part of it. The jumping-off point for interpreting the Eleventh Amendment to reach beyond its plain text is *Hans v. Louisiana*, decided by the Court in 1890.¹² Although the Amendment's text refers only to suits between citizens of one State and another State, the Court in *Hans* held the Amendment precludes suits by citizens of one State against their *own* State. In other words, the Amendment is not simply a diversity jurisdiction limitation; it is more than its text.

Early in his tenure on the Court, Scalia (a strong textualist) expressed skepticism about whether *Hans* was correctly decided.¹³ His questioning of *Hans* played a significant role in *Union Gas* because the case presented the facts of *Hans*: Union Gas was a citizen of Pennsylvania suing Pennsylvania under CERCLA and SARA. If the Court decided to overrule *Hans*, Union Gas would win.

But the validity of *Hans* was not necessarily the only issue in the case. If a majority declined to overrule *Hans* then two other questions would have to be answered as well: (1) did Congress include a "clear statement" in CERCLA/SARA evincing an intent to abrogate the States' immunity from suit?; and (2) if so, did Congress have the constitutional power under the Commerce Clause (which was the constitutional basis for enacting CERCLA and SARA in the first place) to abrogate the States' immunity?

What happened after the case was briefed and argued is found in the notes Blackmun (Figs. 2a & 2b) and Stevens (Fig. 3) took during the conference in which the Justices discussed and tentatively voted on *Union Gas*.¹⁴

¹² 134 U.S. 1 (1890).

¹³ *Welch*, *supra*, 483 U.S. at 495-496 (Scalia, J., concurring in part and in the judgment) (questioning whether *Hans* was correct but acknowledging *stare decisis* considerations).

¹⁴ Interestingly but not surprisingly, Blackmun and Stevens used different formats for these notes pages. Blackmun's page shows the Justices in order of seniority going left-right and top-bottom in order of seniority. Thus, Rehnquist appears top left corner, Brennan top right, then White second row left, Marshall second row right, and so on. Stevens used a page that ran senior-to-junior from top left to bottom left, then top right to bottom right.

The Blackmun and Stevens notes, along with some of their other papers at the Library of Congress, are the sources for my discussion of the Justices' votes. The two Justices' notes are consistent, though Blackmun's are more extensive.

Both Justices indicate the following about the conference in which the Court discussed *Union Gas*:

Rehnquist voted to reverse. He thought that in CERCLA and SARA Congress did not evince a "clear statement" sufficient to override the States' immunity from suit and that *Hans* was correctly decided.

Brennan voted to affirm. He thought there was a clear statement and *Hans* should be overruled.

White did not think there was a clear statement and did not think *Hans* should be overruled, but seemed to indicate Congress had the power to abrogate States' immunity if the Court reached that question. His vote thus was to reverse.

Marshall viewed the case the same way as Brennan, voting to affirm.

Blackmun's notes indicate only that he voted to affirm (a "+" sign).

Stevens also voted to affirm. He viewed the clear statement question as close, but concluded the statute was clear enough. He was of the opinion *Hans* should be overruled, and that Congress had the power to abrogate the States' immunity under the Commerce Clause.

O'Connor voted to reverse. She thought there was not a clear statement in the statutes and that *Hans* was "structurally correct" and should not be overruled.

Then came Scalia, who had questioned *Hans*. He said Congress had made a clear statement, so the constitutional issues had to be reached. With respect to *Hans*, he opined that it was wrongly decided, but he would accept it for *stare decisis* reasons. The Blackmun and Stevens notes are not clear about his views on congressional power to override the immunity, but he must have believed Congress lacked the power, given his vote to reverse and his view that there was a clear statement.

Finally, Kennedy, the junior Justice, believed *Hans* was correct and Congress lacked power under the Commerce Clause to override the States' immunity. But he saw no clear statement of intent by Congress. He voted to reverse, suggesting the Court could rely on the lack of a clear statement and avoid constitutional questions.

Cryptic Justice

No. 87-1241, Pennsylvania v. Union Gas Co. 11-2-88	
The Chief Justice — clear statement necessary for standards this is going to be good goes into deal to US, Congress no intent + only to deal it by private PS did not reach other issues, but if I did, what is OK plans	Brennan, J. + Sto has a relief on plans in any concrete way we OK plans if n, still + Sto may be forced to clean up
White, J. — as any matter, Congress intends to include Sto to + to handle in St. L. try make an election No to Congress has 11 Com in mind — on other side no reach Court issue no OK plans how do Congress set it aside? so the plan	Marshall, J. + we OK OK OK plans to plan stuff
	Blackmun, J. +

Fig. 2a: Justice Blackmun's conference notes, showing the comments of Chief Justice Rehnquist and Justices Brennan, White, and Marshall in Pennsylvania v. Union Gas.

Stephen R. McAllister

Stevens, J. + close on clear stent propos that anyf there, but do n get in home CCE n anyf for me me what OR <u>Hans</u>. Look it laterally don 11 don yourpound a mess	O'Connor, J. — 2 stuts n suff clear for gene best. St to jumble pe per <u>stutterers</u> Hans is structurally, correct Emf reliance on it n + OR
Scalia, J. — sty grad n clear anyf for me wash I ed go along on it + end run around <u>Hans</u> If <u>Hans</u> valid, an even for clear stent approach <u>Hans</u> wrong but suff reliance on it + <u>Desseada</u> me OR it 17 don (but it v Sons) — but on what bases? 5-4 to —	Kennedy, J. — If <u>Hans</u> is OK. Conf comm OR it on CCE Reluctant to OR it do want on hold to it Can say no clear stent here In a valid rule no clear stent

Fig. 2b: Justice Blackmun's conference notes, showing the comments of Justices Stevens, O'Connor, Scalia, and Kennedy in *Pennsylvania v. Union Gas*.

Cryptic Justice

① Close R on clean sent - not want Union Association [of Am over] CHIEF JUSTICE ③ not over HVL a	STEVENS, J. 11/11 Clen. 11/11
BRENNAN, J. ① over rule HANS - 11 ② NO REASON - 11/11 ③ SENT CLEAN SENT - ④ REASON - OK to Rely on Conf. P. 8 CUT REASON ON 11/11	O'CONNOR, J. ① NOT CLEAN SENT - ② HANS IS STRUCTURALLY RIGHT - ESTABLISH SOV 11/11 ③ REASON 11/11
WHITE, J. ① Conf. intent to make State law - BUT MUST MENTION 11/11: NOT A CLEAN SENT 11/11 on State grounds [NOT NOT RISK on Conf. P. 8]	SCALIA, J. CAN'T USE SENT TO END - RUL GROUND HANS [THAT'S SENT CLEAN SENT] HANS - WRONGLY DECIDED, BUT SENT GROUND UP AGAIN IT - CF 17 11/11 HANS - NOT SURE 11/11 [11/11]
MARSHALL, J. 11/11 11/11 SENT SENT	KENNEDY, J. IF HANS IS RIGHT, CAN'T CUT BACK THAT COM CI - THAT'S ON REASON HANS - THOUGHT SENT CLEAR, BUT 11/11 GIVEN ALONG WITH THIS RISK
BLACKMUN, J. Clen - 11/11 HANS	MEMO:

Fig. 3: Justice Stevens's conference notes, showing the comments of Chief Justice Rehnquist and Justices Brennan, White, Marshall, Blackmun, O'Connor, Scalia, and Kennedy in *Pennsylvania v. Union Gas*.

THE CASE AT THE SUPREME COURT – DRAFTING THE OPINIONS

Based on the Blackmun and Stevens notes, the conference vote was 5 to 4 to reverse the Third Circuit and conclude Pennsylvania was immune from suit, though reasons for that result differed. Rehnquist, being the Chief Justice and in the majority, assigned the opinion to Scalia. Brennan, being the senior Justice in dissent, assigned the dissent to himself. That all occurred in November 1988.

Scalia circulated his first draft of the opinion for the Court in early February 1989. In that draft, he described the case as presenting essentially a single question: “whether the Eleventh Amendment bars suits against States in federal court for monetary damages under [CERCLA and SARA].” He concluded it did. (At this time, the Court had not yet held that the Eleventh Amendment applied in State courts, a position it would take ten years later in *Alden v. Maine*.¹⁵) Rather than resolving the “clear statement” question (which he did discuss), Scalia explained that (a) while *Hans* was wrongly decided, the Court would not overrule it, and (b) Congress did not have power under the Commerce Clause to abrogate States’ immunity from suit.

On March 23, Brennan circulated a draft dissent. He took the majority to task for not resolving the statutory question first: “That question has only two possible answers: Congress either did or did not intend to abrogate the States’ immunity.” He declared that if Congress “did not, then the Court’s resolution of the Commerce Clause question is gratuitous; but if it did, then the Court has ... invalidated part of an important federal statute.” In Brennan’s view, “[e]ither way, today’s decision is extraordinary.” (Fig. 4)

¹⁵ 527 U.S. 706 (1999) (Fair Labor Standards Act suit brought by state employees against the state in state court is barred by the Eleventh Amendment).

Cryptic Justice

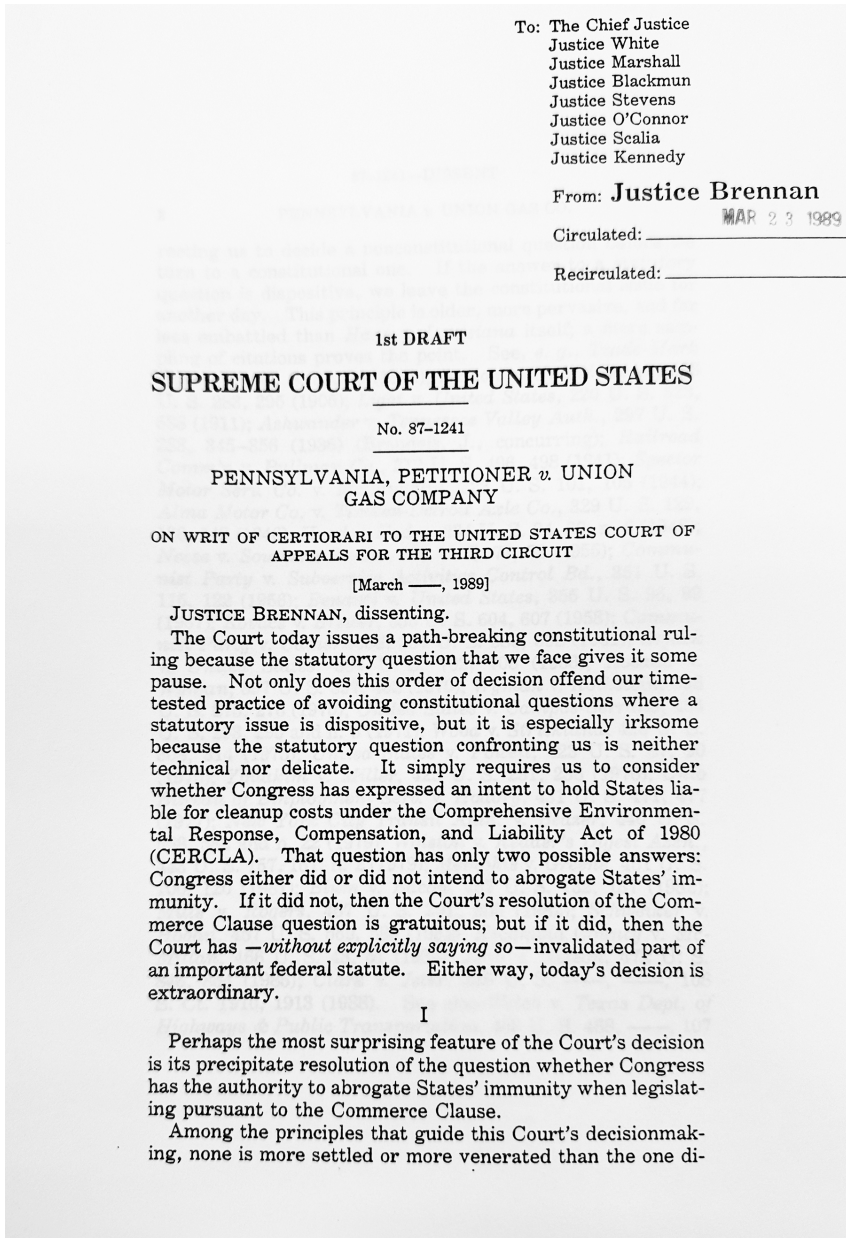


Fig. 4: Page 1 of the first draft of Justice Brennan's dissent in Union Gas.

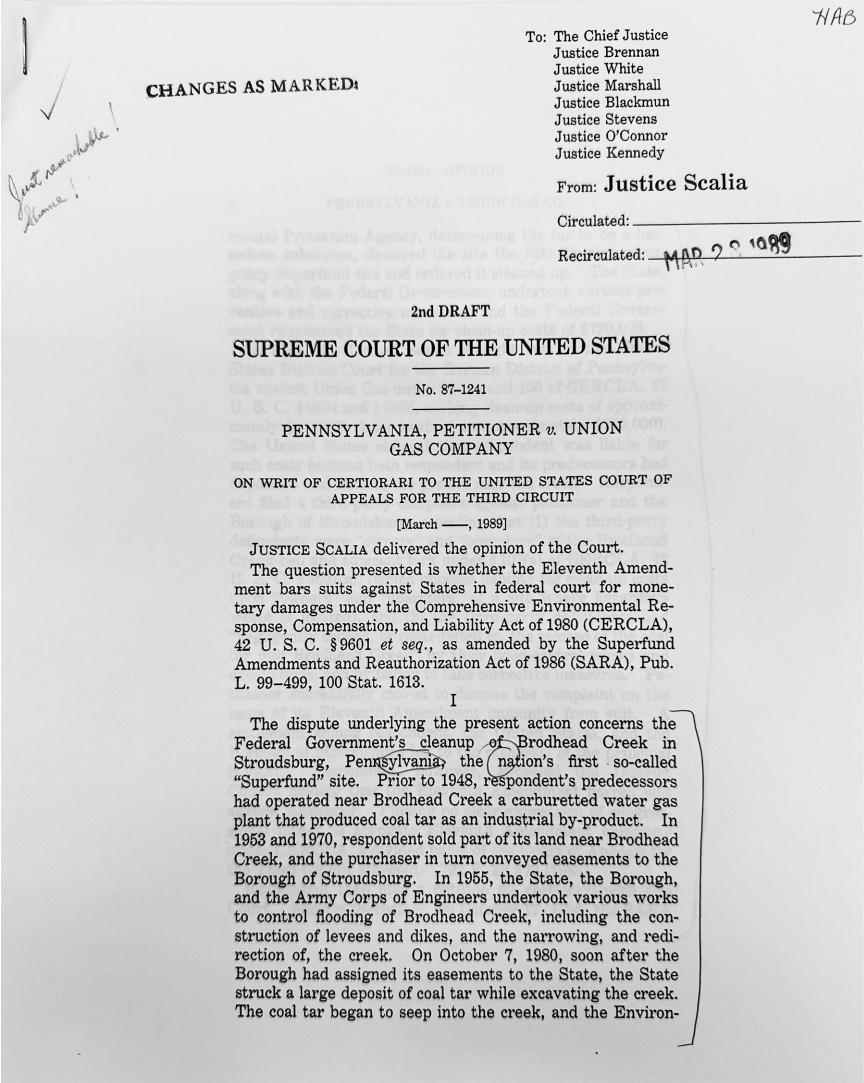


Fig. 5: Page 1 of Justice Blackmun's copy (with marginal notes) of the second draft of Justice Scalia's opinion for the Court in Union Gas.

Scalia then revised his draft majority opinion and recirculated it within a week, but he did not make substantial changes. He did not, for example, purport to resolve the “clear statement” issue. When his new draft circulated to the Justices, Blackmun had some terse and harsh private commentary, which he noted on the upper left corner of the first page of his copy of Scalia’s new draft: “Just remarkable! Shame!” (Fig. 5) That is where things stood at the end of March. Then White weighed in.

JUSTICE WHITE’S CONCURRING OPINION¹⁶

White initially was with Scalia in the majority to reverse. But on April 11, after Brennan circulated his dissent and Scalia responded with his second draft, White sent a note to Scalia. He informed “Nino” that he agreed “with Bill Brennan that the statutory issue presented by this case should be addressed first.” That said, “[u]nlike Bill, I would answer that question in the negative” — *i.e.*, the statute does not include a clear statement of congressional intent to abrogate States’ immunity — and thus White would have avoided the constitutional question whether Congress had the power to abrogate. He also said, however, that if a majority concluded the statute contained a clear statement of intent to abrogate, then he would not join Scalia on the congressional power question; instead, White would be “in dissent on the Constitutional issue.” (Fig. 6)

Scalia responded the next day that he “had written the opinion as I did because I thought it was the best shot (though a long one) at getting a single opinion for the Court.” But, since a majority of the Court would be addressing the “plain statement issue, I may as well take that course myself.” He also offered that “[t]hose who have already joined me on the [constitutional power issue] may prefer to go with you on the plain statement ground instead.” (Fig. 7) (The end result would have been the same, reversal of the Third Circuit.)

After more drafts of the Scalia and Brennan opinions circulated, White issued a draft opinion on May 11 concurring in the judgment. In that draft, he opined that the statutory question “should be resolved first” (Fig. 8a), and argued there was no clear statement from Congress, a point on which he ended up in dissent. (The five votes for finding a clear statement were

¹⁶ White’s opinion concurring in the judgment is the basis for the *Green Bag* card.

Stephen R. McAllister

CHAMBERS OF
JUSTICE BYRON R. WHITE

Supreme Court of the United States
Washington, D. C. 20543

April 11, 1989

Pennsylvania v. Union Gas Co., No. 87-1241

Dear Nino:

I agree with Bill Brennan that the statutory issue presented by this case should be addressed first. That issue is whether the language of the statute is sufficiently clear and specific (under our Atascadero test) to evidence a Congressional intent to abrogate the State's Eleventh Amendment immunity from suit in the Federal courts. Unlike Bill, I would answer that question in the negative. Hence, under my approach, I would not reach the constitutional issue of whether the Commerce Clause empowers Congress to remove the Eleventh Amendment's bar.

If, however, your draft commands a Court in its present form, or if five Justices conclude that the statute effectively removes the State's immunity from suit in Federal court but ultimately rule for petitioner because they accept your view of the Commerce Clause/Eleventh Amendment question, I shall be in dissent on the Constitutional issue.

Sincerely yours,



Justice Scalia

Copies to the Conference

Fig. 6: Note from Justice White to Justice Scalia (April 11, 1989).

Cryptic Justice

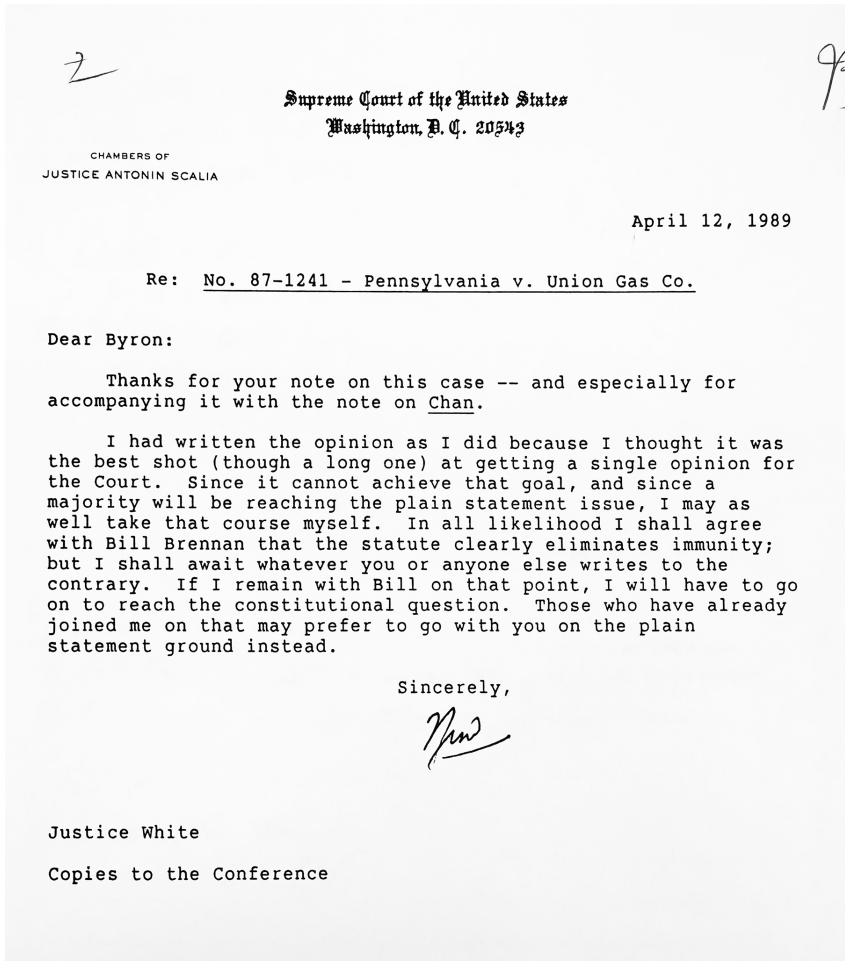


Fig. 7: Note from Justice Scalia to Justice White (April 12, 1989).

Brennan, Marshall, Blackmun, Stevens, and Scalia.) On the congressional power issue, he concluded, "I agree with Justice Brennan ... that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with *much* of his reasoning."¹⁷ (Fig. 8b) Period. That is it. White never explains his own reasoning.

¹⁷ Emphasis added.

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Scalia
Justice Kennedy

From: Justice White

Circulated: MAY 11 1989

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 87-1241

PENNSYLVANIA, PETITIONER *v.* UNION
GAS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

[May —, 1989]

JUSTICE WHITE, concurring in the judgment.

Like JUSTICE BRENNAN, I believe that the statutory question before us should be resolved first. Contrary to JUSTICE BRENNAN, however, I find no “unmistakably clear language,” *Welch v. Department of Highways and Public Transportation*, 483 U. S. 468, — (1987), in either CERCLA or SARA that expresses Congress’ intent to abrogate the States’ Eleventh Amendment immunity, and thus conclude that Pennsylvania is immune from respondent’s suit. Accordingly, I concur in the Court’s judgment for petitioner.

I

Our cases make it plain that only the most direct expression of Congress’ intent to make the States subject to suit will suffice to abrogate their sovereign immunity as recognized in the Eleventh Amendment. Thus, we have said that Congress must “explicitly and by clear language indicate on [the] face [of an enactment] an intent to sweep away the immunity of the States;” and that any such a law must “have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States.” *Quern v. Jordan*, 440 U. S. 332, 345 (1979). As we put it more recently: “Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in

Fig. 8a: Page 1 of the first draft of Justice White’s concurrence in *Union Gas*.

87-1241—CONCUR

PENNSYLVANIA *v.* UNION GAS CO.

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should not be overruled. Consequently, the Eleventh Amendment is applicable to this lawsuit.

III

Because I believe that Congress has not abrogated the States' immunity in CERCLA, I ordinarily would not reach the question whether, acting under the Commerce Clause, Congress possesses the power to do so.

However, the Court is evenly divided on this question, cf. *Ante*, at 9–15; *Post*, at 6–22, and if, after our decision today, Congress wishes to amend CERCLA (as it did with the Rehabilitation Act, see n. 6, *supra*) to include an unmistakably clear abrogation of the Eleventh Amendment, it will be left with a quandry: Does it have the Constitutional authority to do so? Rather than leave our co-equal branch in the dark on this matter, I will state my view (albeit dicta) that Congress does have such authority under Article I. Thus, I find myself in agreement with the conclusion reached by JUSTICE BRENNAN in Part II of his dissent, though I do not agree with much of his reasoning.

Accordingly, I concur in the Court's judgment for the Commonwealth.

Fig. 8b: Page 13 of the first draft of Justice White's concurrence.

But then, at the end of May 1989, White arguably took a different position in a second draft, altering one word in his conclusion, declaring that he did not agree with “all” of Brennan’s reasoning, rather than “much” of it. (Fig. 9) Again, period. No explanation. At the same time, White added the following sentence to the end of the introductory paragraph of his opinion draft: “I concur in JUSTICE BRENNAN’s conclusion, but not his reasoning.” (Fig. 10)! Which is it – “All”? “Much”? “Not”?

The same day, White also sent a note to the conference (*i.e.*, an internal note to all the Justices). It stated simply: “Like others, I am changing my position to some extent.”¹⁸ (Fig. 11)

¹⁸ Emphasis added.

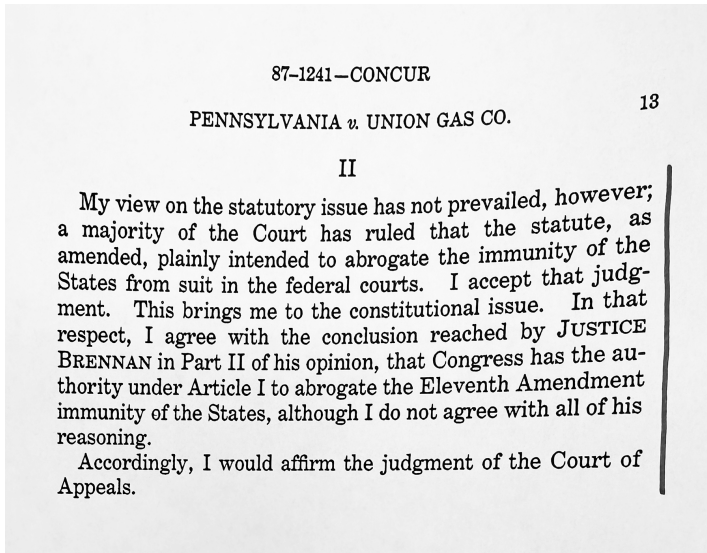


Fig. 9: Page 13 of the second draft of Justice White's concurrence.

Yet, in his subsequent draft circulations and his final published opinion in June, White reverted to not agreeing with “much” of Brennan’s reasoning. Is there any significant difference between not agreeing with “much” versus “all” of Brennan’s reasoning? Dictionaries are not much help because both words have a lot of meanings and are not precise in many circumstances. One possibility is that White’s use of “all” suggested significant agreement with Brennan with perhaps differences only on nuances of the argument. “Much,” however, seems more likely to indicate general disagreement with Brennan’s rationale for the plurality. Thus, it is impossible to know whether White agreed with 90% or only 10% of Brennan’s reasoning (or something in between). White’s ultimate choice of “much” however seems to indicate White was no more than 50% with Brennan and maybe a lot less. That question – which inspired the *Green Bag* card – is of only academic interest because the Court overruled *Union Gas* in 1996 in *Seminole Tribe of Florida v. Florida*.¹⁹ White did not get to chime in and explain his cryptic qualifications in *Union Gas*. He had retired from the Court in 1993.

¹⁹ 517 U.S. 44 (1996).

Cryptic Justice

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To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Scalia
Justice Kennedy

From: **Justice White**

STAGNANT CHANGES THROUGHOUT.
SEE PAGES 1, 12-13

Circulated: _____
Recirculated: MAY. 31 1989

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 87-1241

PENNSYLVANIA, PETITIONER *v.* UNION
GAS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

[June —, 1989]

Opinion of JUSTICE WHITE.

Like JUSTICE BRENNAN, I believe that the statutory question before us should be resolved first. Contrary to JUSTICE BRENNAN, though, I find no “unmistakably clear language,” *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U. S. 468, — (1987), in either CERCLA or SARA that expresses Congress’ intent to abrogate the States’ Eleventh Amendment immunity. However, a majority of the Court concludes otherwise, and therefore I reach the constitutional issue presented here. On that question, I concur in JUSTICE BRENNAN’s conclusion, but not his reasoning.

I

Our cases make it plain that only the most direct expression of Congress’ intent to make the States subject to suit will suffice to abrogate their sovereign immunity as recognized in the Eleventh Amendment. Thus, we have said that Congress must “explicitly and by clear language indicate on [the] face [of an enactment] an intent to sweep away the immunity of the States”; and that any such a law must “have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States.” *Quern v. Jordan*, 440 U. S. 332, 345 (1979). As we put it more recently: “Congress must express its intention to abro-

Fig. 10: Page 1 of the third draft of Justice White’s concurrence.

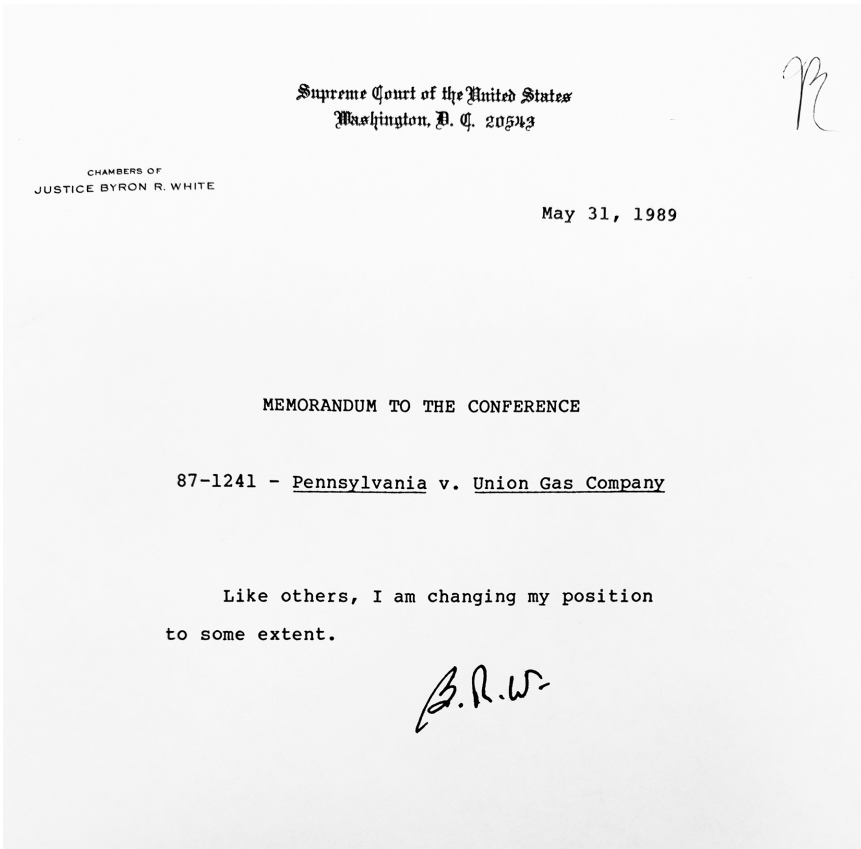


Fig. 11: Memorandum from Justice White to the Conference (May 31, 1989).

Piecing together the various opinions, we can see that White agreed with four others that the statutory issue should be addressed first. And he agreed with four (a different four) that *Hans* should not be overruled. He dissented, however, on whether Congress had provided a clear statement of intent to abrogate the States' immunity. Because five disagreed with that position, he went on to provide the critical fifth vote for Brennan's "result" that Congress had the power to abrogate the States' immunity under the Commerce Clause, albeit without ever explaining why.

Based on my two terms clerking for him, this was classic Justice White. Sometimes he did not explain himself: he got the job done; he voted; and

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the case was resolved. Although we will never know his reasons for his vote that Congress had the constitutional power under the Commerce Clause to abrogate States' immunity from suit, a vote in favor of congressional power was a regular theme in his jurisprudence. He was a Kennedy Democrat at heart.

CONCLUSION

Enjoy the *Green Bag* card. I plan to visit Stroudsburg, Pennsylvania and see Brodhead Creek – an unlikely but beautiful source for an important Supreme Court decision – when the opportunity arises. I hope this article provides additional meaning to and enjoyment of the card that accompanies the Justice White bobblehead.

GB