State Immunity from Federal Suit -- When Can Congress Alter the Balance?

Gene R. Shreve
Indiana University Maurer School of Law, shreve@indiana.edu

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**State Immunity from Federal Suit—When Can Congress Alter the Balance?**

by Gene R. Shreve

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**Pennsylvania v. Union Gas Co.**

(Docket No. 87-1241)

*Argument Date: Oct. 31, 1988*

The Supreme Court will decide this term whether a private party can claim damages against a state in federal Superfund litigation. At the center of the case is the 11th Amendment, one of the most confused and controversial parts of the Constitution. Doctrine under the amendment determines the extent to which unconsenting states may be sued in federal court. At the least, *Pennsylvania v. Union Gas Co.* should shed light on the authority Congress has to strip states of the 11th Amendment's protection. At most, the case could serve as a vehicle for fundamental change in the interpretation of the 11th Amendment.

### ISSUES

The Court could rule on the following issues: (1) whether the 11th Amendment should ever apply when states are sued by their own citizens; (2) if so, whether Congress has authority under the Commerce Clause of Article I to suspend the amendment; (3) if so, whether Congress did that in CERCLA.

### FACTS

The sudden release of coal tar into Brodhead Creek in Stroudsburg, Pa., in October 1980 caused the United States to declare the site the nation's first emergency Superfund site. Adjacent to the stream from 1890 to 1948 had been a plant which produced coal gas as well as its by-product, coal tar. The plant was dismantled in 1948. The company operating the plant changed ownership several times before being merged into the Union Gas Company in 1978.

Between 1960 and 1962 the state rechanneled, narrowed and deepened Brodhead Creek and erected a dike on its side. The state later obtained a permanent easement or fee title to much of the site. Union Gas' brief asserts that the rechanneling of the fast flowing stream started a process of downcutting of the stream bed and erosion of the toe of the dike that led to the release of coal tar.

In May of 1983, the United States sued Union Gas in the U.S. District Court for the Eastern District of Pennsylvania to recover its initial cleanup cost of nearly $1 million. Union Gas filed a third-party complaint naming Pennsylvania as a third-party defendant, alleging that it was an owner and operator of a facility at the site within the meaning of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund Act). Pennsylvania argued unsuccessfully before the district court and the Court of Appeals for the Third Circuit that the 11th Amendment barred Union Gas' claim. The Supreme Court granted Pennsylvania's petition for *certiorari*.

### BACKGROUND AND SIGNIFICANCE

In *Chisholm v. Georgia*, U.S. (2 Dall.) 419 (1793), the Supreme Court ruled that Article III of the Constitution authorized a private damage action against the state of Georgia. The Court's conclusion that sovereign immunity enjoyed by states in their own courts must yield to the federal judicial power was not obvious from the text of the Constitution or the ratification debates. Quite unpopular, *Chisholm* was squarely overruled by the 11th Amendment five years later. The amendment states: "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."

The Supreme Court's decisions make clear that both the 11th Amendment and Article III of the Constitution must be read to limit the subject matter jurisdiction of federal courts. However, the limitations of the 11th Amendment are in certain ways less stringent. While parties cannot confer subject matter jurisdiction lacking under Article III through consent, a defendant state can consent to federal jurisdiction in a suit otherwise barred by the 11th Amendment. And (of more bearing on the *Union Gas* case), while Congress may not create federal jurisdiction exceeding limits set in Article III, it may in at least some cases relax the 11th Amendment's restrictions on federal jurisdiction.

The position taken by Union Gas in its brief is that Congress has denied Pennsylvania the protection of the 11th Amendment by enacting CERCLA. Pennsylvania counters by arguing that (1) Congress has not made its intent to suspend the 11th Amendment sufficiently clear in CERCLA, and (2) Congress would in any event lack the power to do so, since it draws authority for creating CERCLA from the commerce clause of the Constitution rather than from the 14th
Amendment.

Pennsylvania relies in its first argument on a line of recent cases where the Court refused to find abrogation of the 11th Amendment in statutes it regarded to be inexplicit. The present standard is that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute" (Atascadero State Hospital v. Scanlon, 475 U.S. 234 (1985); 1984-85 Preview 341). Union Gas argued in its brief that Section 107(a) of CERCLA expressly includes states in a list of defendants suable under the Act.

The issue raised by Pennsylvania's second argument is unsettled. In its last case to consider the 11th Amendment, a plurality of the Court noted that it had "no occasion" to decide whether "Congress has the power to abrogate the States' 11th Amendment immunity simply on diversity." (Welch v. Texas Department of Highways and Public Transportation (107 S.Ct. 2941, 2948 n.8 (1987); 1986-87 Preview 289). If the Court addresses this question in Union Gas, it must decide how much of Congress' authority to suspend the 11th Amendment it owes to Section 5 of the 14th Amendment, or whether that authority must at least be confined to parts of the Constitution which came into being after the ratification of the 11th Amendment. Favoring Pennsylvania, the abrogation principle has been recognized perhaps exclusively for statutes based on the 14th Amendment and, in Fitzpatrick and thereafter, the Court has linked abrogation with Section 5. However, whether a majority will go so far as to rule out abrogation for an Article I statute remains to be seen.

Union Gas need not win on the abrogation issue to obtain subject matter jurisdiction over Pennsylvania. The utility argues in its brief that the 11th Amendment simply should not apply to cases like Union Gas where citizens sue their own states. Based on the text of the amendment, Union Gas' argument is simple on its face. The amendment makes no provision for citizen suits in federal court, barring only suits brought by "Citizens of another State, or by Citizens or Subjects of any Foreign State." The problem with the argument is that, in Hans v. Louisiana, 134 U.S. 1 (1890), and often since, the Supreme Court has ruled that the amendment also protects states from federal suits by their own citizens. Doubtless Union Gas was encouraged to challenge such longstanding precedent by division on the Court over the desirability of Hans. Most recently in Welch, Justices Brennan, Marshall, Blackmun and Stevens expressed their view that Hans should be overruled. Justices Powell, White, O'Connor and the chief justice gave solid support to Hans in the same case. Justice Scalia refused to take a position in Welch, feeling the question had not been adequately developed in argument. The views of Justice Kennedy (Justice Powell's replacement) are unknown.

Favoring Union Gas is the fact that Hans is based on a reading of the 11th Amendment which is at best strained. As a result, many regard Hans to be unconvincing legal authority for denying citizen plaintiffs (often federal civil rights claimants) a federal trial forum. Favoring Pennsylvania is the possibility that overruling Hans might produce too much of a swing in the other direction, creating a great disparity between the sovereign immunity states enjoy in their own courts and their exposure to suit in federal court.

By overruling Hans, the Supreme Court would confine the reach of the 11th Amendment largely to federal diversity cases. This would radically diminish the amendment's importance. The 11th Amendment now derives most of its significance from the manner in which (via Hans) it restricts jurisdiction over federal claims (constitutional and statutory) brought by private parties against their own states. These are limitations on federal question (rather than diversity) jurisdiction. Since Chisombi, there have been relatively few noncitizen suits against states in federal court. To confine the 11th Amendment to these would consign it to relative obscurity.

ARGUMENTS

For the Commonwealth of Pennsylvania (Counsel of Record, Chief Deputy Attorney General John G. Knorr III, Office of the Attorney General, 15th Floor, Strawberry Square, Harrisburg, PA 17120; telephone (717) 783-1471)
1. Congress did not intend in CERCLA to eliminate the states' immunity under the 11th Amendment.
2. Congress, acting under the Commerce Clause, may not unilaterally abrogate the 11th Amendment.
3. Pennsylvania has not waived its immunity under the 11th Amendment.
4. Hans v. Louisiana was correctly decided and should not be overruled.

For Union Gas Co. (Counsel of Record, Robert A. Swift, 2400 One Reading Center, 1101 Market Street, Philadelphia, PA 19107; telephone (215) 238-1700)
1. The 11th Amendment precludes federal court jurisdiction only in actions brought by individuals against states based on diversity of citizenship.
2. Article I of the Constitution empowers Congress to abrogate state immunity to private lawsuits.
3. CERCLA's language unmistakably expresses Congress' intention to abrogate immunity under the 11th Amendment.

AMICUS ARGUMENTS

In Support of Pennsylvania

New York, California, Connecticut, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Utah, Vermont, West Virginia, and Wisconsin.

In Support of Union Gas Co.