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The Eleventh Amendment's Clear Statement Test After *Dellmuth v. Muth* and *Pennsylvania v. Union Gas Co.*

I. INTRODUCTION

Once a barely "dusted" area of the law,[1] the meaning of the eleventh amendment has grown into a "vigorous debate"[2] which divides liberal and conservative views of modern federalism and the scope of federal judicial power. This debate was evident in the United States Supreme Court's October 1988 term in which it decided *Dellmuth v. Muth*[3] and *Pennsylvania v. Union Gas Co.*,[4] both cases construing the parameters of Congress' abrogation powers over the eleventh amendment.[5] These cases are particularly significant because they took contrasting approaches to the standard of statutory clarity required to abrogate the eleventh amendment under the clear statement test.

Although legislative abrogation of a constitutional amendment seems to violate traditional concepts of constitutional law,[6]

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1. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 682 (1976).

2. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 61 (1989).

3. 109 S. Ct. 2397 (1989).

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

5. Hoffman v. Connecticut Dep't of Income Maintenance, 109 S. Ct. 2818 (1989), is another case the Court decided during the October 1988 term which construed the eleventh amendment. The Court also decided two other cases in which the eleventh amendment was not directly applicable, but nevertheless significantly influenced the Court's analysis. *See* Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989) (holding that neither states nor state officials acting in their official capacities are "persons" within the meaning of 42 U.S.C. § 1983 (1988)); Missouri v. Jenkins, 109 S. Ct. 2463 (1989) (finding that the eleventh amendment does not prohibit the enhancement of attorneys' fees against a state under 42 U.S.C. § 1988 (1988)).

In the Supreme Court's 1989 term, the Court did not decide any cases construing the abrogation powers of the eleventh amendment. *But see* Ngirainges v. Sanchez, 110 S. Ct. 1737 (1990) (noting that the eleventh amendment is by its express terms inapplicable to U.S. territories).

6. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803). In his infamous words, Chief Justice Marshall stated:

> The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to

this doctrine is the curious result of the Court's eleventh amendment jurisprudence. Under this jurisprudence, the eleventh amendment may be abrogated using a two-prong test. This test asks, first, whether Congress has made its intention to abrogate "unmistakably clear in the language of the statute,"[7] and second, whether Congress possesses the power to abrogate the states' sovereign immunity.[8]

The Court first approved the doctrine of abrogation in *Fitzpatrick v. Bitzer*,[9] a case in which the Court found that congressional intent was sufficiently clear to abrogate the eleventh amendment. The Court also found that Congress possessed the power to override the states' immunity under section five of the fourteenth amendment[10] and had exercised this power when it enacted amendments to the Civil Rights Act of 1964.[11] This holding rested on the rationale that because Congress' powers under the fourteenth amendment were granted subsequent to

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writing, if these limits may, at any time, be passed by those intended to be restrained? . . . It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, *the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.*

Id. (emphasis added).

7. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

8. This two-prong approach was originally proposed in Parden v. Terminal Ry., 377 U.S. 184 (1964). In an opinion written by Justice Brennan, the Court stated:

Here, for the first time in this Court, a State's claim of immunity against suit by an individual meets a suit brought upon a cause of action expressly created by Congress. Two questions are thus presented: (1) Did Congress in enacting the FELA *intend* to subject a State to suit in these circumstances? (2) Did it have the *power* to do so, as against the State's claim of immunity?

Id. at 187 (emphasis added).

9. 427 U.S. 445 (1976).

10. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

11. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended in scattered sections of 42 U.S.C. and 5 U.S.C.). *See Fitzpatrick*, 427 U.S. at 447.

the eleventh amendment, they thereby dispossessed the states of that portion of their sovereignty which would otherwise inhibit Congress' plenary authority under the fourteenth amendment.[12]

Thirteen years later, in *Pennsylvania v. Union Gas Co.*,[13] the Court held for the first time that Congress could abrogate the eleventh amendment pursuant to its powers under the commerce clause. The Court's rationale rested on Congress' plenary authority under article I even though this authority was "antecedent" to the eleventh amendment and, according to the Court's rationale in *Fitzpatrick*, should have made the commerce clause subject to the eleventh amendment's commands.[14] The Court arrived at this seemingly improbable result by reasoning that if the principle of sovereign immunity existed prior to the eleventh amendment, the orthodox view since 1890,[15] then the article I grant of power under the commerce clause enabled Congress to dispossess the states' immunity.[16] However, if the principle of sovereign immunity was originally introduced by the eleventh amendment, then the amendment's language was not sufficiently compelling to "obliterate" Congress' previously granted commerce powers. Because the eleventh amendment[17] refers only to "[t]he *Judicial* power," rather than to *Congress'* authority under article I, its language does not diminish Congress' power under the commerce clause.[18] Under either view, the Court concluded that the commerce power allowed Congress to abrogate the eleventh amendment.

Although its analysis was limited to the commerce clause, *Union Gas* hints of potentially unrestricted abrogation power by Congress. Under the Court's reasoning, all powers included in article I supplanted any preexisting notion of sovereign immunity. Furthermore, because the eleventh amendment limits only judicial power, it is impotent in the face of all congressional powers granted under article I.[19] As a result of *Union Gas'* po-

12. *Fitzpatrick*, 427 U.S. at 456.

13. 109 S. Ct. 2273 (1989).

14. *Id.* at 2283.

15. *See* Hans v. Louisiana, 134 U.S. 1 (1890).

16. *Union Gas*, 109 S. Ct. at 2283.

17. The eleventh 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." U.S. CONST. amend. XI.

18. *Union Gas*, 109 S. Ct. at 2283 (emphasis added).

19. *Cf.* Hoffman v. Connecticut Dep't of Income Maintenance, 109 S. Ct. 2818, 2824

tentially far-reaching effects on Congress' abrogation powers and because the Court prefers to decide dispositive statutory construction issues in order to avoid constitutional questions,[20] the first prong of the Court's test—the "unmistakably clear statement" requirement—has become the primary barrier between federal judicial power and the states' sovereign immunity under the eleventh amendment.

Although scholars have actively discussed the limits of congressional power under the eleventh amendment,[21] the clear statement test has received relatively little attention.[22] This dearth of analysis exists notwithstanding the fact that "[i]n every case it has heard, the Supreme Court has upheld congressional power to impose suit upon the states" and "the results have turned, not on the Court's power holdings, but on its view of congressional intent."[23]

(1989) (Scalia, J., concurring in the judgment) (stating that while "*Union Gas* involved Congress' powers under the Commerce Clause . . . there is no basis for treating its powers under the Bankruptcy Clause any differently").

20. *See Union Gas*, 109 S. Ct. at 2277 (indicating that if a clear expression of intent is not found, then the court will not need to consider the constitutional question of legislative power). *See also* Note, *Congressional Abrogation of State Sovereign Immunity*, 86 COLUM. L. REV. 1436, 1439 n.29 (1986).

21. Articles discussing the eleventh amendment include Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989); Massey, *supra* note 2; Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203 (1978); Tribe, *supra* note 1. *See also* articles cited in *Union Gas*, 109 S. Ct. at 2286 n.1 (Stevens, J., concurring).

22. While there are numerous articles which mention the clear statement test in the eleventh amendment context, *e.g.*, Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1473 n.201 (1987), most of these articles assume that the scope and content of the clear statement rule is apparent. *See, e.g.*, Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of* Atascadero State Hospital v. Scanlon, 74 GEO. L.J. 363, 391 (1985) (looking at the implications of a failure to satisfy the clear statement test without articulating what the test's requirements are); Note, *Reconciling Federalism and Individual Rights: The Burger Court's Treatment of the Eleventh and Fourteenth Amendments*, 68 VA. L. REV. 865, 883-84 (1982). In addition, many of these articles were written prior to the Court's major eleventh amendment clear statement decisions. *See, e.g.*, Tribe, *supra* note 1, at 691, 695-96; Field, *supra* note 21, at 1240-76. For a discussion of the clear statement test not limited to the context of the eleventh amendment, see Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982) [hereinafter Note, *Clear Statements*].

23. Field, *supra* note 21, at 1240. *See also Union Gas*, 109 S. Ct. at 2281 (describing the "trail unmistakably leading to the conclusion that Congress may permit suits against the States" and noting that "every Court of Appeals to have reached this issue has concluded that Congress has the authority to abrogate States' immunity from suit" and listing citations); Edelman v. Jordan, 415 U.S. 651, 672 (1974) (stating that "[t]he ques-

This Note explores the clear statement test after *Dellmuth v. Muth* and *Pennsylvania v. Union Gas Co.* Part II summarizes the history of the clear statement test prior to the Court's 1988 term. Part III reviews the Court's decisions in *Dellmuth* and *Union Gas*; in part IV, these cases are used to explore the parameters of the textual and unequivocal requirements of the clear statement test. Part V discusses the assumptions implicit in these requirements—namely, the importance of state immunity in our federal system, the significance of the political process in protecting this immunity, and the necessity of a clear statement test to ensure that the political process has properly functioned. Part V concludes that these assumptions are inconsistent with the rationale which prompted the Supreme Court to accept sovereign immunity as a constitutional principle grounded in the eleventh amendment. Because only a constitutional rationale justifies judicial rejection of otherwise valid legislation, this Note concludes that if sovereign immunity continues to be considered a constitutional doctrine, the courts should follow Justice Scalia's lead and discard the clear statement test.

II. Historical Background of the Clear Statement Test

The eleventh amendment was ratified in response to the Supreme Court decision of *Chisholm v. Georgia*,[24] in which the Court held that article III of the Constitution allowed private suits against states in federal court. The modern interpretation of the eleventh amendment came nearly one hundred years later in *Hans v. Louisiana*.[25] *Hans* gave rise to the notion that the eleventh amendment was emblematic of a larger constitutional principle of sovereign immunity which existed prior to its ratification.[26] Therefore, while it was strenuously argued that the text of the eleventh amendment precludes only suits against a state by non-citizens and aliens who lack other bases of federal jurisdiction,[27] the *Hans* decision barred all private suits brought

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tion of waiver or consent under the Eleventh Amendment was found in [prior Supreme Court] cases to turn on whether Congress had intended to abrogate the [states'] immunity . . .").

24. 2 U.S. (2 Dall.) 419 (1793).

25. 134 U.S. 1 (1890).

26. *See* Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2296-301 (1989) (Scalia, J., concurring in part and dissenting in part).

27. *See id.* at 2286 & n.2 (Stevens, J., concurring); *id.* at 2296 (Scalia, J., concurring in part and dissenting in part); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 258-302 (Brennan, J., dissenting) (giving an "exhaustive historical review and analysis," *id.* at 302

against states in federal court regardless of the jurisdictional basis.[28]

To mitigate the effects of this broad interpretation of sovereign immunity, a number of judicially created exceptions were subsequently read into the eleventh amendment. Perhaps the most significant exception was introduced by *Ex parte Young*,[29] which allowed suits against state officers in their official capacity even though the state itself was immune from suit. In addition to this exception, which was subsequently limited in a number of ways,[30] suits against states could be brought in federal court if the state consented to waive its sovereign immunity.[31]

For nearly one hundred years consent to suit was viewed as lying within the states' voluntary control.[32] However, in *Parden v. Terminal Railway*,[33] the Court held that a state could involuntarily "consent" to suit. In justifying this result, the Court also hinted that Congress might have the power to abrogate the eleventh amendment.

In *Parden*, the Court held that by operating a railroad in

(Blackmun, J., dissenting), and suggesting "that the [Eleventh] Amendment was intended simply to adopt the narrow view of the state-citizen and state-alien diversity clauses; henceforth, a State could not be sued in federal court where the [sole] basis of jurisdiction was that the plaintiff was a citizen of another State or an alien," *id.* at 286-87 (Brennan, J., dissenting)).

28. The notion that the eleventh amendment was a symbol of a larger principle of sovereign immunity was followed in a number of subsequent cases. *See, e.g.*, Monaco v. Mississippi, 292 U.S. 313 (1934) (precluding suits brought against states by foreign governments though the eleventh amendment literally applies only to "Citizens or Subjects" of a foreign country); *Ex parte* New York, 256 U.S. 490 (1921) (holding that the eleventh amendment also barred suits in admiralty against a state even though the literal text of the eleventh amendment merely bars suits "in law or equity").

29. 209 U.S. 123, 159-60 (1908). The exception established in *Ex parte* Young was intended to be consistent with *Hans*. It was based on the fiction that unconstitutional acts by state officers could not be authorized by the state and therefore were not suits against the state.

30. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 663 (1974) (confining the *Ex parte Young* exception to prospective, injunctive relief); Younger v. Harris, 401 U.S. 37 (1971) (introducing the doctrine of federal court abstention in state criminal proceedings in which a parallel state action has commenced); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) (requiring federal court abstention when a state issue of law is ambiguous and its resolution may obviate the need for resolving a federal question). *See also* Massey, *supra* note 2, at 78-84 (discussing the *Younger* and *Pullman* abstention doctrines).

31. *See, e.g.*, Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2287 (1989) (Stevens, J., concurring) (listing cases).

32. *E.g.*, Clark v. Barnard, 108 U.S. 436, 447 (1883) (stating that "immunity from suit belonging to a State . . . is a personal privilege which it may waive at pleasure").

33. 377 U.S. 184 (1964).

interstate commerce, the state constructively waived its sovereign immunity.[34] The Court stated, "Where a State's consent to suit is alleged to arise from an act not wholly within its own sphere of authority but within a sphere . . . subject to the constitutional power of the Federal Government, the question whether the State's act constitutes the alleged consent is one of federal law."[35] In altering the concept of consent, the Court reasoned that if the question of consent were one of voluntary state control, rather than federal law, "congressional power . . . would be meaningless [because] the State, on the basis of its own law or intention, could conclusively deny the waiver."[36] "By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation."[37] Twenty-five years after *Parden*, Justice Brennan's view, that upon ratification of the Constitution the states relinquished the portion of their sovereignty which stood in the way of Congress' commerce powers, would prevail in *Union Gas*.

In dissenting to *Parden*'s constructive waiver theory, Justice White outlined the essential components of the clear statement test. He stated:

> It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect an automatic and compulsory waiver of rights arising under another. Only when Congress has *clearly* considered the problem and *expressly declared* that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense.[38]

Justice White concluded that "[a] decent respect for the normally preferred position of constitutional rights dictates that if Congress decides to exercise its power to condition privileges within its control on the forfeiture of constitutional rights its intention to do so should appear with *unmistakable clarity*."[39] The Court embraced this clear statement policy in several opinions subsequent to *Parden*. Outside the context of the eleventh

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34. *Id.* at 196.
35. *Id.*
36. *Id.*
37. *Id.* at 192.
38. *Id.* at 198-99 (White, J., dissenting) (emphasis added).
39. *Id.* at 199 (emphasis added).

amendment, the Supreme Court recognized a congressional clarity requirement in the area of federal criminal legislation in *United States v. Bass*.[40] Because congressional activity in such "traditionally sensitive areas" alters "the federal-state balance," the Court stated that "the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in" "the sensitive relation between federal and state criminal jurisdiction."[41]

The first eleventh amendment case in which the majority relied on the clear statement rule came two years after *Bass* in *Employees v. Department of Public Health & Welfare*.[42] The Court noted that although the state was literally subject to the provisions of the Fair Labor Standards Act of 1938,[43] "[t]he question [was] whether Congress ha[d] brought the States to heel, in the sense of lifting their immunity from suit in a federal court."[44] The Court held that it would not "infer" that Congress deprived the states of their constitutional immunity unless Congress "indicat[ed] in some way by clear language that the constitutional immunity was swept away."[45]

Employees was soon followed by *Edelman v. Jordan*,[46] which also utilized the clear statement rule. Rejecting the lower court's finding of a constructive waiver, the Court stated that it "will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' "[47]

The Court first found that the eleventh amendment's clear statement test had been met in *Fitzpatrick v. Bitzer*.[48] By amending the definition of "person" "to include 'governments, governmental agencies, [and] political subdivisions,' " "the

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40. 404 U.S. 336 (1971) (holding that a clear statutory statement was required before a federal law enacted under Congress' commerce clause powers could make criminal the mere possession of a gun by a convicted felon without some actual nexus with interstate commerce).

41. *Id.* at 349.

42. 411 U.S. 279 (1973).

43. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201-219 (1988)).

44. *Employees*, 411 U.S. at 283.

45. *Id.* at 285.

46. 415 U.S. 651 (1974).

47. *Id.* at 673 (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)).

48. 427 U.S. 445 (1976).

threshold fact of congressional authorization" to sue a state was found by reference to the amendments to the statutory text.[49]

Two years later in *Hutto v. Finney*,[50] the Court held that Congress may "amend its definition of taxable [court] costs and have the amended class of costs apply to the States, as it does to all other litigants, *without expressly stating that it intends to abrogate the States' Eleventh Amendment immunity*."[51] Thus, even without an "express statutory waiver of the State's immunity,"[52] the Court held that Congress' abrogation intent was sufficiently clear. Justifying this result, the Court stated that "[t]he Act itself could not be broader [because it] applies to 'any' action brought to enforce certain civil rights laws [and because it] contains no hint of an exception for States."[53] The Court relied heavily on the Act's legislative history[54] and rejected the argument that "Congress must enact express statutory language making the States liable if it wishes to abrogate their immunity."[55]

The Court's decision in *Hutto* seemed to undermine the

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49. *Id.* at 448 n.1, 449 n.2 (noting that the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103 (1972), amended the Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(a), (b), 78 Stat. 241, 253 (1964) (codified as amended at 42 U.S.C. § 2000e (a) (1988)).

50. 437 U.S. 678 (1978).

51. *Id.* at 696 (emphasis added).

52. Quern v. Jordan, 440 U.S. 332, 344 n.16 (1979) (explaining the Court's holding in *Hutto*).

53. *Hutto*, 437 U.S. at 694. *See also id.* at 693 n.21 for relevant statutory language. The state lost the appeal of the case on the merits and was assessed attorney's fees "as part of the costs" under the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified as amended at 42 U.S.C. § 1988 (1988)). In pertinent part, 42 U.S.C. § 1988 declares, "In any action or proceeding to enforce [enumerated statutory provisions] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

54. *Hutto*, 437 U.S. at 694 (quoting from the House and Senate reports accompanying the bill).

55. *Id. But see id.* at 704 (Powell, J., dissenting in part) (rejecting the Court's conclusion that explicit statutory language is unnecessary to abrogate the eleventh amendment and that "legislative history [may] substitute for explicit statutory language"). The Court distinguished *Employees* and *Edelman* as "cases [which] concern retroactive liability for pre-litigation conduct rather than expenses incurred in litigation seeking only prospective relief." *Id.* at 695. Even though the eleventh amendment was not at issue, the Court also relied on Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927), a case challenging the Supreme Court's award of costs against a state in criminal cases, by stating, "Far from requiring an explicit abrogation of state immunity, [in *Fairmont*] we relied on a statutory mandate that was entirely silent on the question of state liability." *Hutto*, 437 U.S. at 696.

"foundations" of the clear statement test.[56] However, in *Quern v. Jordan*,[57] the Court responded by explaining that in *Hutto* "the statute had 'a history focusing directly on the question of state liability.' "[58] The Court went on to firmly reject the approach taken in *Hutto* by dismissing the argument that section 1983[59] abrogates the states' immunity. In so doing, the Court articulated the strict requirements of the clear statement test:

> [Section] 1983 does not *explicitly and by clear language indicate on its face* an intent to sweep away the immunity of the States; nor does it 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.[60]

The clear statement approach established in *Quern* was controlling in several subsequent cases.[61]

Finally, in *Atascadero State Hospital v. Scanlon*,[62] the Court adopted an even stricter requirement for meeting the clear statement test by eliminating all reliance on legislative history. The Court stated 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*."[63] For purposes of eleventh amendment abrogation, the Court considered reliance on the "legislative history of [an] Act" to be inappropriate and expressed great reluctance to allow "inferences from general statutory language" under the clear statement test.[64]

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56. *Cf. Hutto*, 437 U.S. at 700-01 (Brennan, J., concurring) (stating reasons why the "foundations" of *Edelman* "seem[ed] to have been seriously undermined").

57. 440 U.S. 332 (1979).

58. *Id.* at 344-45 (quoting from *Hutto*, 437 U.S. at 698 n.31).

59. 42 U.S.C. § 1983 (1988). In pertinent part section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 procedure for redress.

Id.

60. *Quern*, 440 U.S. at 345 (emphasis added).

61. *See, e.g.*, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 15-18 (1981).

62. 473 U.S. 234 (1985).

63. *Id.* at 242 (emphasis added).

64. *Id.*

Since *Atascadero*, the Court has limited the abrogation inquiry to statutory text and has required the text to be unmistakably clear in all subsequent eleventh amendment cases.[65] The Court emphasized the new *Atascadero* standard twenty-three years after Justice White's *Parden* dissent had outlined the need for congressional clarity in the eleventh amendment context. In *Welch v. Texas Department of Highways and Public Transportation*,[66] the Court held that to the extent *Parden* was "inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled."[67]

Despite the Supreme Court's hearty embrace of the clear statement doctrine, commentators have been divided on the merits of the clear statement rule. Professor Tribe considers the rule "an appropriate and useful approach to reconciling national power with state litigational immunity" because it allows the political process the "greatest opportunity to protect the states' interests."[68] In contrast, Professor Field considers a strict application of the rule "objectionable" because it "leads courts to deny causes of action that were intended by Congress."[69] As a result, "[w]hile the rule appears to be one of judicial restraint, it effectively gives courts a veto over congressional causes of action."[70]

Notwithstanding this criticism, it is now settled that "[w]here the Eleventh Amendment applies, the Court has devised a clear-statement principle more robust than its require-

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65. *E.g.*, Hoffman v. Connecticut Dep't of Income Maintenance, 109 S. Ct. 2818, 2821 (1989); Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 471-72 (1987) (plurality opinion).

66. 483 U.S. at 468.

67. *Id.* at 478.

68. Tribe, *supra* note 1, at 695-96. Professor Tribe explained why he agreed with the clear statement rule as follows:

> [C]ourts should not abrogate state immunity unless they are sure that Congress has considered the federalism interests compromised by suits against states. By making a law unenforceable against the states unless a contrary intent were apparent in the language of the statute, the clear statement rule would further ensure that attempts to limit state power were unmistakable, thereby structuring the legislative process to allow the centrifugal forces in Congress the greatest opportunity to protect the states' interests.

Id. at 695.

69. Field, *supra* note 21, at 1272-73.

70. *Id.* Professor Field also criticized the clear statement rule for its retroactive effect on laws enacted prior to the annunciation of the rule and for its "presumption against a particular result." *Id.* at 1273. Professor Field believes such negative presumptions should exist only when "congressional legislation contravenes fundamental principles." *Id.*

ment of clarity in any other situation."[71] While the validity of the test is conceded,[72] the application of the clear statement test has not always been consistent. This was especially true in *Dellmuth* and *Union Gas*.

III. Application of the Clear Statement Test in *Dellmuth* and *Union Gas*

During the October 1988 term, the Supreme Court decided *Dellmuth* and *Union Gas* and applied the clear statement test in each case to determine whether Congress' abrogation intent was sufficiently clear. The two cases illustrate divergent approaches in what is purportedly the same clear statement test. This divergence not only highlights the flexibility still possible in this "stringent test,"[73] but also reveals differing views about the rationale supporting it. Ultimately, it is "unmistakably clear" that there is little consensus on either the approach or the necessity of the clear statement test in eleventh amendment jurisprudence.

A. Dellmuth v. Muth

The Court's project in *Dellmuth* was to define the narrow contours of the unmistakably clear statement test as formulated in *Atascadero State Hospital v. Scanlon*.[74] In *Dellmuth* the Court stated, "Lest *Atascadero* be thought to contain any ambiguity, we reaffirm today that in this area of the law, evidence of congressional intent must be both *unequivocal* and *textual*."[75] Textual evidence must be written in the "language of the statute"[76] and must demonstrate with "perfect confidence" that Congress intended to abrogate the eleventh amendment.[77] Any-

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71. Will v. Michigan Dep't of State Police, 109 S. Ct. 2304, 2314 (1989) (Brennan, J., dissenting).

72. *See Union Gas*, 109 S. Ct. at 2303, 2304 (O'Connor, J., dissenting) (indicating that although she agrees with Justice Scalia that Congress lacks the power to abrogate the eleventh amendment, making the clear statement test irrelevant, she has participated in the clear statement inquiry because "that view does not command a majority of the Court"); Hoffman v. Connecticut Dep't of Income Maintenance, 109 S. Ct. 2818, 2824 (1989).

73. *Dellmuth*, 109 S. Ct. at 2400.

74. 473 U.S. 234 (1985). See *supra* text accompanying notes 62-65 for the formulation of the clear statement test in *Atascadero*.

75. *Dellmuth*, 109 S. Ct. at 2401 (emphasis added).

76. *Id.* (quoting *Atascadero*, 473 U.S. at 242).

77. *Id.*

thing less "will not suffice."[78] Under this "simple" test,[79] traditional methods of statutory interpretation are unavailing. A statute's legislative history and underlying purposes are "irrelevant."[80] Likewise, inferences obtained from the "statutory structure," no matter how logical their force, are insufficient to abrogate sovereign immunity because such inferences by definition are not "unequivocal declarations" as required by the rule.[81]

1. *The facts*

Dellmuth addressed whether the "comprehensive scheme" enacted under the Education of the Handicapped Act (EHA)[82] abrogated the states' sovereign immunity. Congress enacted the EHA to ensure that children who are handicapped within the meaning of the Act receive a free public education appropriate for their needs.[83] The EHA provides that the parents of a handicapped child may challenge the sufficiency of their child's "individualized education program" in an administrative hearing and may obtain subsequent judicial review in federal district court.[84]

Muth challenged the adequacy of his son's individualized education program under the EHA's statutory procedure seeking injunctive relief and attorneys' fees.[85] After an administrative hearing the district court entered judgment against the Central Bucks School District of Pennsylvania and the Commonwealth of Pennsylvania, making them jointly and severally liable for attorneys' fees and costs incurred due to delays in state administrative proceedings.[86] The district court and the Court of Appeals for the Third Circuit agreed[87] that the eleventh

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78. *Id.* at 2402.

79. *Id.* at 2400.

80. *Id.* at 2401.

81. *Id.* at 2402.

82. Pub. L. No. 91-230, §§ 601-661, 84 Stat. 121, 175-87 (1970) (codified as amended at 20 U.S.C. §§ 1400-1461 (1988)).

83. *Dellmuth*, 109 S. Ct. at 2398.

84. *Id.* at 2399. *See also* 20 U.S.C. § 1415 (1988).

85. *Dellmuth*, 109 S. Ct. at 2399. Muth also sought declaratory relief and reimbursement for his son's private-school tuition expenses incurred during the pendency of the administrative challenge. *Id.*

86. *Id.* While the district court found the revised individualized education program had been appropriate for the school year in question, the court awarded private tuition expenses and attorney's fees resulting from procedural infirmities in Pennsylvania's administrative proceedings. *Id.*

87. Muth v. Central Bucks School Dist., 839 F.2d 113 (3d Cir. 1988); Muth *ex rel.* Muth v. Smith, No. 84-2032 (E.D. Pa. Aug. 28, 1986) (WESTLAW, DCTU database,

amendment did not bar the judgment against the Commonwealth of Pennsylvania because "the text of the EHA and its legislative history leave no doubt that Congress intended to abrogate the 11th amendment immunity of the states."[88] The Supreme Court disagreed with the courts below and reversed.[89]

2. *The* Dellmuth *Court's analysis*

In holding that the EHA did not satisfy the clear statement test, the Supreme Court grouped the arguments for abrogation into textual and nontextual classifications, depending on whether the evidence of abrogation was found within the statutory text. Under this classification scheme, the Court indicated that the EHA's legislative history and underlying purposes were nontextual arguments of congressional intent.[90] Because of the strictness of the statutory clarity required, the Court quickly disposed of the nontextual arguments for abrogation. "If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met."[91] Accordingly, because the clear statement test requires unmistakably clear *statutory* language, the Court simply dismissed all nontextual arguments as "beside the point."[92] The Court then turned to "the proper focus of an inquiry into congressional abrogation:"[93] the textual evidence.

In its inquiry into relevant textual evidence, the Court considered whether such evidence was "unequivocal" in demonstrating that the states' sovereign immunity had been abrogated. To answer this question, the Court considered the EHA's statutory provisions to determine whether Congress had chosen to ex-

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1986 WL 10640 at 29-35). *See also* Muth v. Smith, 646 F. Supp. 280 (E.D. Pa. 1986) (initial summary judgement in favor of Muth on the ground that Pennsylvania's due process procedures did not comply with the requirements of the EHA).

88. *Dellmuth*, 109 S. Ct. at 2399 (quoting *Muth*, 839 F.2d at 128).

89. *Id.* at 2400. Because the EHA was enacted pursuant to section 5 of the fourteenth amendment, congressional power was explicitly assumed to exist under the Court's decision in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). *See Dellmuth*, 109 S. Ct. at 2400 n.1.

90. *Dellmuth*, 109 S. Ct. at 2400-01.

91. *Id.* at 2401.

92. *Id.*

93. *Id.* at 2402.

ercise its "acknowledged powers of abrogation."[94] While no "magic words" were required,[95] the EHA's inferences suggesting that Congress had intended for states to be liable did not meet the unequivocal threshold of the clear statement rule. Because "[t]he EHA makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity," and because it did not "address abrogation in even oblique terms," the Court concluded that the clear statement test had not been met.[96]

Responding to the "gist of the dissent's argument . . . that application of the governing law in *Atascadero* is unfair," the Court stated that "[t]his complaint appears to be premised on an unrealistic and cynical view of the legislative process."[97] In the Court's view, if Congress actually intends to abrogate the states' constitutionally protected immunity from suit, it does not intentionally drop "coy hints but [then] stop short of making its intention manifest."[98] Therefore, a statute will meet the strictures of the clear statement rule only if Congress makes an "unequivocal declaration" of abrogation that allows a court to conclude with "perfect confidence" that the political processes have properly functioned and the states' sovereign immunity has been duly considered.[99]

3. *The* Dellmuth *Court's rationale for its clear statement rule*

The underlying rationale of the *Dellmuth* Court's approach is that the clear statement test is necessary to "temper Congress' acknowledged powers of abrogation."[100] Even though the Court assumed Congress had the power to abrogate the states' immunity in this case,[101] congressional power must be restrained to protect "the fundamental constitutional balance between the Federal Government and the States."[102] As abrogation of sovereign immunity places "considerable strain" on the federalism principles underlying the eleventh amendment, a "stringent"

94. *Id.* at 2400.
95. *See* Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2280 n.4 (1989).
96. *Dellmuth*, 109 S. Ct. at 2402.
97. *Id.* at 2401.
98. *Id.*
99. *Id.* at 2401-02.
100. *Id.* at 2400.
101. *Id.* at 2400 n.1.
102. *Id.* (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985)).

eleventh amendment test is "an essential component of our constitutional structure."[103] Because the principles underlying the clear statement test are of constitutional significance, "imperfect confidence" of abrogation intent will not satisfy the clear statement rule[104] even when "actual congressional intent"[105] may be logically inferred under normal rules of statutory construction.[106]

4. Justice Scalia's concurring opinion

In a one-paragraph concurring opinion, Justice Scalia joined the opinion of the Court "with the understanding that . . . explicit reference to state sovereign immunity or the Eleventh Amendment" is not necessary to satisfy the clear statement test.[107] According to Justice Scalia, the clear statement test allows congressional abrogation if the "statutory text . . . clearly subjects States to suit"[108] so that "no fair doubt" regarding congressional intent exists.[109]

Although Justice Scalia paid lip service to the clear statement rule in *Dellmuth*, his enthusiasm for the rule seems doubtful. In *Union Gas*, he ridiculed the rule for "achiev[ing] the worst of [two] worlds" because it "perpetuates the complexities" of *Hans v. Louisiana*[110] while denying the benefits *Hans* sought to create.[111] Thus "[i]f *Hans* means only that federal-question suits for money damages against the States cannot be brought in federal court unless Congress clearly says so, it means nothing at all."[112]

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103. *Id.* at 2400.

104. *Id.* at 2402.

105. *See id.* at 2405 (Brennan, J., dissenting) (stating that the *Dellmuth* majority appears to agree with the dissent's reading of "actual congressional intent"). *See also* Will v. Michigan Dep't of State Police, 109 S. Ct. 2304, 2314 (1989) (Brennan, J., dissenting) (stating that the Court in *Dellmuth* "intimated that the clear-statement principle is not simply a means of discerning congressional intent").

106. *See Dellmuth*, 109 S. Ct. at 2402.

107. *Id.* at 2403 (Scalia, J., concurring).

108. *Id.*

109. *Cf.* Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2296 (1989) (Scalia, J., concurring in part and dissenting in part) (stating that "no fair doubt" remained that Congress intended to abrogate the states' sovereign immunity under "CERCLA as amended by SARA"). *See also infra* text accompanying notes 173-75 for a discussion of Justice Scalia's opinion in *Union Gas*.

110. 134 U.S. 1 (1890). *See supra* notes 25-28 and accompanying text for a discussion of *Hans*.

111. *Union Gas*, 109 S. Ct. at 2299 (Scalia, J., concurring in part and dissenting in part).

112. *Id.*

Only eight days after this rebuke, Justice Scalia refused to apply the clear statement prong as part of the abrogation inquiry in *Hoffman v. Connecticut Department of Income Maintenance*.[113] He refused because "it makes no sense" to affirm the constitutional principle of sovereign immunity and at the same time assume "that Congress can override this principle by statute."[114]

5. The dissent's views of the clear statement test

Writing for the dissent in *Dellmuth*, Justice Brennan argued that under the "standard method" for determining congressional intent, there was "no doubt that Congress intended to abrogate the 11th amendment immunity of the states."[115] After reviewing the EHA's statutory scheme and finding that it had placed an "overarching responsibility" upon the states, the dissent had "no trouble" inferring abrogation of the eleventh amendment from the "text of the EHA."[116] Because Justice Brennan felt that these inferences were both textual and unequivocal, he argued that "[t]he Court reaches the conclusion it does only because it requires *more* than unequivocal text."[117]

The dissent emphatically rejected the rationale underlying the Court's clear statement approach and concluded that the eleventh amendment "is 'unequivocally' textually abrogated when state amenability to suit is the logical inference from the language and structure of the text."[118] Responding to the Court's view that the eleventh amendment is "an essential component of our constitutional structure,"[119] Justice Brennan flatly asserted, "There simply is no constitutional principle of state sovereign immunity."[120] Unencumbered by arguments seeking to preserve the "federal-state balance," the dissent objected to the Court's approach because it rejected nontextual evidence of intent. The dissent indicated that nontextual evidence such as an act's legis-

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113. 109 S. Ct. 2818, 2824 (1989) (Scalia, J., concurring in the judgment).

114. *Id.*

115. *Dellmuth*, 109 S. Ct. at 2403 (Brennan, J., dissenting) (quoting Muth v. Central Bucks School Dist., 839 F.2d 113, 128 (3d Cir. 1988).

116. *Id.* at 2403-04.

117. *Id.* at 2405 (emphasis in original).

118. *Id.*

119. *Id.* at 2406 (quoting *Dellmuth*, 109 S. Ct. at 2400).

120. *Id.* at 2406 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 259 (1985) (Brennan, J., dissenting)).

lative history should be part of the analytical approach to determine Congress' actual intent.[121]

While disagreeing with the Court's conclusions and approach, the dissent was consistent with the Court in one respect: the intent of Congress should be measured by the original intent of the enacting Congress. Rather than advocating an approach whereby the words of the United States Code are given their "fair and reasonable meaning"[122] regardless of the date each statutory provision was enacted, the dissent's approach sought to ascertain the will of Congress "when it enacted the EHA."[123] Justice Brennan relied on Congress' original intent when he argued that the Court's "[r]etroactive application of new drafting regulations" was "simply unprincipled"[124] because "there was no rule *in 1975* of the sort the Court" is now using to "gaug[e] the *Ninety-Fourth Congress'* intent."[125]

Similarly, the majority understood the relevant intent to be that of the enacting Congress when it dismissed possible evidence of abrogation intent. The Court stated that "[i]t is far from certain . . . that the 1986 Amendments to the Rehabilitation Act are a useful guide to congressional intent *in 1975*."[126] Although both the *Dellmuth* majority and dissent agreed that it is the original congressional intent which is measured by the clear statement test, even this agreement seemed to vanish in *Pennsylvania v. Union Gas Co.*[127]

B. Pennsylvania v. Union Gas Co.

1. The facts

The United States brought suit against Union Gas Company to recover the costs of cleaning up a hazardous substance at the nation's first Superfund site.[128] Union Gas Company responded by filing a third-party complaint against the State of Pennsylvania. Noting that the state had an ownership interest in the site, Union Gas Company asserted that the state was both a

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121. *Id.*

122. *See* Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2296 (1989) (Scalia, J., concurring in part and dissenting in part).

123. *Dellmuth*, 109 S. Ct. at 2407 n.3.

124. *Id.* at 2406.

125. *Id.* at 2407 (emphasis added).

126. *Id.* at 2401 (emphasis added).

127. 109 S. Ct. 2273 (1989).

128. *Id.* at 2276-77.

"person"[129] and an "owner or operator"[130] subject to liability within the meaning of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[131]

The district court dismissed the third-party complaint against Pennsylvania, holding that states were immune from suit because CERCLA does not satisfy the eleventh amendment's clear statement rule.[132] The United States Court of Appeals for the Third Circuit affirmed on the same ground, finding that "CERCLA does not evidence congressional intent to abrogate states' eleventh amendment immunity."[133]

While Union Gas Company's petition for certiorari was pending before the Supreme Court, Congress amended CERCLA by passing the Superfund Amendments and Reauthorization Act of 1986 (SARA).[134] The Supreme Court granted certiorari, simultaneously vacated the court of appeals decision, and remanded the case for reconsideration in light of the SARA amendments.[135] On remand, the court of appeals held that CERCLA, as amended by SARA, clearly expressed an intent to abrogate the states' eleventh amendment immunity.[136] The Supreme Court again granted certiorari[137] and affirmed.[138]

2. *The* Union Gas *Court's analysis*

Applying the two-prong approach for finding eleventh amendment abrogation,[139] the Court first answered the question whether Congress had made its intention to abrogate the eleventh amendment "unmistakably clear." The Court held that CERCLA, and its amendments in SARA, "together convey a message of unmistakable clarity: Congress intended that States be liable along with everyone else for cleanup costs recoverable

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129. *See* 42 U.S.C. § 9601(21) (1988).

130. *See id.* § 9601(20)(A).

131. *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, § 107, 94 Stat. 2767, 2781 (1980) (codified as amended at 42 U.S.C. § 9607 (1988)) (liability section of CERCLA).

132. United States v. Union Gas Co., 575 F. Supp. 949, 950-53 (E.D. Pa. 1983).

133. United States v. Union Gas Co., 792 F.2d 372, 383 (3d Cir. 1986).

134. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended in scattered sections of 42 U.S.C.).

135. Union Gas Co. v. Pennsylvania, 479 U.S. 1025 (1987).

136. United States v. Union Gas Co., 832 F.2d 1343 (3d Cir. 1987).

137. Pennsylvania v. Union Gas Co., 485 U.S. 958 (1988).

138. Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2286 (1989).

139. *See supra* text accompanying notes 7-8.

under CERCLA."[140] After deciding that CERCLA met the clear statement prong, the Court found that Congress had power under the commerce clause to abrogate the eleventh amendment.[141]

The Court's clear statement holding was purportedly based on the *Atascadero* test.[142] However, the Court used an "analytical approach" distinct from the analysis used by the Court in *Dellmuth* and prior decisions.[143] One major departure in *Union Gas* was the Court's use of inferences derived from the statutory text to suffice as evidence that Congress' intent to abrogate the eleventh amendment was "unmistakably clear in the language of the statute."[144]

In addition to the Court's reliance on statutory inferences, another analytical departure was the *Union Gas* Court's disregard for the original intent of the enacting Congress. Instead of searching the statutory text for evidence of intent at the time of legislative enactment, the *Union Gas* Court accumulated evidence to measure intent based on a "combination" of all "sections of the statute" within "CERCLA and SARA together."[145] The Court felt that by viewing the statutory provisions together to decipher congressional intent, a "cascade of plain language" emerged.[146]

Notwithstanding these significant differences, the *Union Gas* Court did not purport to change the textual and unequivocal requirements of the clear statement test. Although the *Union Gas* decision did not expressly classify abrogation evidence as either textual or nontextual, these classifications were implicit in the Court's opinion. The Court drew its analysis entirely from the statutory text and placed no reliance on the legislative history of CERCLA or SARA.[147] Similarly, although the

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140. *Union Gas*, 109 S. Ct. at 2278.

141. *Id.* at 2281-86. See also *supra* text accompanying notes 13-18 for a discussion of the *Union Gas* Court's resolution of the power issue.

142. *See Union Gas*, 109 S. Ct. at 2277 (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985), and stating that Congress may override state sovereign immunity if its intent is "unmistakably clear").

143. *Id.* at 2291 (White, J., concurring) (indicating that the analytical approach adopted by the Court in *Union Gas* had been rejected in Employees v. Missouri Dep't of Pub. Health and Welfare, 411 U.S. 279 (1973)).

144. *See Union Gas*, 109 S. Ct. at 2280. *See also* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

145. *Union Gas*, 109 S. Ct. at 2278 n.2 (emphasis omitted).

146. *Id.* at 2279.

147. *See id.* at 2277-80.

Union Gas Court did not expressly search for an "unequivocal declaration" which specifically "address[ed] abrogation,"[148] the Court agreed that the abrogation evidence must be "unmistakably clear."[149] Noting that the clear statement test does not require explicit reference to the eleventh amendment or any other "magic words,"[150] the Court concluded that statutory inferences were sufficient to constitute unequivocal evidence of congressional intent.[151]

3. *The* Union Gas *Court's rationale*

The *Union Gas* Court's rationale for taking a different analytical approach than in *Dellmuth* is evident from the disagreement the majority had with the "judicial headcount" argument raised by Justice White.[152] In his separate opinion, Justice White suggested that if the lower court judges who had heard the case were divided on the issue of abrogation, then *unmistakable* statutory clarity must be missing.[153] The majority responded by hinting at the "fundamental reason" the Court had taken a different analytical approach in *Union Gas*.[154] Justice Brennan stated, "[S]urely judges can disagree about the content and rigor of the standard of 'unmistakable clarity,' and if they do, they are likely to reach different results on States' amenability to suit *for reasons having nothing to do with the statutory language itself*."[155]

Because many Court members feel that the states' sovereign immunity is constitutionally protected by the eleventh amendment,[156] faithful statutory interpretation is less important than

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148. Dellmuth v. Muth, 109 S. Ct. 2397, 2402 (1989).

149. *Union Gas*, 109 S. Ct. at 2277 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

150. *Id.* at 2280 n.4.

151. *See id.* at 2280.

152. *See id.* at 2278 n.2. (quoting *Union Gas*, 109 S. Ct. at 2290 (White, J., concurring in the judgment)).

153. Justice White noted that in the court of appeals and the district court's decisions, United States v. Union Gas Co., 792 F.2d 372 (3d Cir. 1986); 575 F. Supp. 949 (E.D. Pa. 1983), only one of the four judges who examined abrogation found " 'unmistakable' abrogation of the Eleventh Amendment" under CERCLA. *Union Gas*, 109 S. Ct. at 2289 (White, J., concurring in the judgment). This "is relevant because the disagreement suggests that the statute's provisions about State liability were certainly not 'unmistakably clear.' " *Id.* at 2290.

154. *Union Gas*, 109 S. Ct. at 2278 n.2.

155. *Id.* (emphasis added).

156. *See id.* at 2295-99 (Scalia, J., concurring in part and dissenting in part, joined

the constitutional imperative they feel to uphold the states' immunity.[157] Thus, where a statute arguably contemplates state amenability to suit, their position requires "perfect confidence" to find that the eleventh amendment has been abrogated. On the opposite extreme, the *Union Gas* majority's relaxation of the standard of statutory clarity can be explained not by differences between the statutory language at issue in *Union Gas* and *Dellmuth*, but by the majority's belief that sovereign immunity is not founded upon constitutional principles.[158] As the Court itself recognized, the difference in the outcome between *Union Gas* and *Dellmuth* was over the constitutional requirements of the eleventh amendment and had "nothing to do with the statutory language itself."[159]

4. Justice White's separate opinion

In part one of a two-part opinion, Justice White and three other members of the Court strongly disagreed with the majority on whether the clear statement test had been met in *Union Gas*.[160] These justices indicated that the *Union Gas* majority had lost sight of the "underlying theory behind" the clear statement rule which requires a "search for unmistakable proof that Congress purposefully intended to set aside the States' immunity."[161] By ignoring this requirement, these justices asserted that *Union Gas* "substantially undermines our precedents."[162]

Justice White identified two significant analytical departures that highlighted the divergent approach adopted by the

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by Rehnquist, C.J., O'Connor, J., and Kennedy, J., as to part II of the opinion) (concluding that "the Eleventh Amendment . . . reflected[] a consensus that the doctrine of sovereign immunity . . . was part of the understood background against which the Constitution was adopted").

157. *See Dellmuth*, 109 S. Ct. at 2401-02 (Kennedy, J., joined by Rehnquist, C.J., White, J., and O'Connor, J.) (stating that "imperfect confidence [of congressional intent] will not suffice given the special constitutional concerns in this area" of the eleventh amendment).

158. *See supra* text accompanying notes 119-20.

159. *Union Gas*, 109 S. Ct. at 2278 n.2.

160. *See id.* at 2289 (White, J., concurring in the judgement, joined as to part I, regarding the clear statement test, by Rehnquist, C.J., O'Connor, J., and Kennedy, J.). It should be noted that Chief Justice Rehnquist, Justice O'Connor and Justice Kennedy joined Justice White in part I of his opinion concluding that the clear statement test had not been met. They also agreed with Justice Scalia in his separate opinion that Congress lacks the power to override the sovereign immunity of the states. Therefore, these three Justices dissented as to the entire opinion by the Court.

161. *Id.* at 2290 n.1.

162. *Id.*

Court in *Union Gas*. One departure was the Court's willingness to "imply" congressional intent to abrogate sovereign immunity "from [the Court's] sense of what would best serve the general policy ends Congress was trying to achieve in a statute."[163] In Justice White's view, this departure was of such significance that it "obliterated" the "entire purpose" of the clear statement rule.[164] Justice White recognized that "overwhelming implications" from a statute may meet the textual and unequivocal requirements of the clear statement test if those implications "leave no room for any other reasonable construction" of the statute.[165] However, he noted that because alternative inferences existed to explain the statutory text of CERCLA and SARA without implying abrogation,[166] such overwhelming implications did not exist in this case. Therefore, according to Justice White, the Court should be barred from making a policy choice between alternate implications because the " 'clear statement' rule mandates that the choice is to be left to Congress—to resolve with an explicit declaration of its decision—and not to be implied by this Court."[167]

Another analytical departure identified by Justice White was the Court's " 'combination' analysis." Instead of searching for congressional intent on the dates CERCLA and SARA were respectively passed, the Court "blurred" the search for congressional intent by viewing the statute as amended.[168] Justice White rejected this approach "outright."[169] In his view, "[t]he search for an 'unmistakable statement' of abrogation is the search for unmistakable proof that Congress purposefully intended to set aside the States' immunity. It is, therefore, the search for a historical fact that either was or was not true at the time Congress legislated."[170] As applied to this case, Justice White viewed the proper analysis of congressional intent as follows:

> [E]ither Congress abrogated the Eleventh Amendment when it

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163. *Id.* at 2291.

164. *Id.*

165. *Id.* at 2294 (quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974)).

166. *See generally Union Gas*, 109 S. Ct. at 2292-94 (noting that "everyone agrees that States may be liable . . . to the United States"). *See also infra* notes 234-38 and accompanying text.

167. *Id.* at 2291 n.3.

168. *Id.* at 2290 n.1.

169. *Id.*

170. *Id.*

> enacted CERCLA . . . or Congress did not do so until it adopted SARA . . . or Congress did not have an intent to abrogate in either instance. Blurring the choice among these possible historical facts by resting on a 'combination' analysis is only an effort to make this difficult case artificially easier.[171]

Therefore, under his view, the Court's approach of "parsing together various fragments scattered about a statute, as if it were a legislative quote-acrostic,"[172] defeats the purposes underlying the clear statement rule.

5. Justice Scalia's concurring opinion

Justice Scalia, concurring that Congress' abrogation intent was unmistakably clear, articulated the essential disagreement over congressional intent which divided the Court. Conceding that Justice White's conclusion regarding the clear statement issue may be correct under "his methodology of considering CERCLA and SARA separately," Justice Scalia concluded that Justice White's "methodology is not mine nor, I think, the one that courts have traditionally followed."[173] An approach which "plumb[s] the intent of the particular Congress that enacted a particular provision" was simply not the task of a court.[174] Under Justice Scalia's approach, a court's task is "to give fair and reasonable meaning to the text of the United States Code" without regard to Congress' intent.[175]

IV. The Textual and Unequivocal Requirements of the Clear Statement Test

While the *Dellmuth* and *Union Gas* Courts both purport to use the clear statement test as a necessary predicate to analyze congressional abrogation, the two opinions are at odds due to their distinct analytical approaches: the *Dellmuth* Court searching for express declarations to test the intent of a specific Congress, the *Union Gas* Court relying on inferences derived from a

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171. *Id.*

172. *Id.* at 2295 n.7.

173. *Id.* at 2295-96 (Scalia, J., concurring in part and dissenting in part).

174. *Id.* at 2296.

175. *Id. See also* Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 428-31 (1989) (describing Justice Scalia's view on legislative intent and legislative history).

combination of statutory provisions enacted "by various Congresses at various times."[176]

Not only do the separate approaches clash, but each decision's approach is motivated by a different rationale: *Dellmuth* purporting to protect the constitutional immunity guaranteed by the eleventh amendment, and *Union Gas* merely asking whether the Congress has exercised its constitutional power. The difference in these underlying rationales is important. Unless the Constitution protects state sovereign immunity, then a strict clear statement test creates an unwarranted judicial veto over valid congressional legislation. In other words, the rigor of the clear statement test is necessarily supplied by its rationale.

Although the majorities in *Dellmuth* and *Union Gas* disagree over the analytical approach and rationale inherent in the clear statement test, both Courts apparently agree that the clear statement test requires that Congress' abrogation intent be "both unequivocal and textual."[177] It also appears that both Courts agree on the contours of the textual evidence requirement.[178] However, they remain far apart on what should be considered unequivocal evidence of congressional intent.

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176. *Union Gas*, 109 S. Ct. at 2296 (Scalia, J., concurring in part and dissenting in part).

177. *Dellmuth*, 109 S. Ct. at 2401. Both *Dellmuth* and *Union Gas* rely on the clear statement test as articulated in Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985). *See Dellmuth*, 109 S. Ct. at 2400; *Union Gas*, 109 S. Ct. at 2277. *See also supra* notes 75, 139-42 and accompanying text. As articulated in *Atascadero*, the clear statement test requires that congressional intent be "unmistakably clear in the language of the statute." *Atascadero*, 473 U.S. at 242. This is essentially synonymous with the "unequivocal and textual" articulation in *Dellmuth*. That the Court intended the two expressions to be synonymous is illustrated by the *Dellmuth* Court's intention to merely "reaffirm" the *Atascadero* test. The *Dellmuth* Court stated, "Lest *Atascadero* be thought to contain any ambiguity, we reaffirm today that in this area of the law, evidence of congressional intent must be both unequivocal and textual." *Dellmuth*, 109 S. Ct. at 2401. Indeed, while disagreeing with what should be considered unequivocal, the dissent in *Dellmuth* did not take issue with this new articulation of the *Atascadero* test when it argued that the *Dellmuth* majority was in error because the states' sovereign immunity had been " 'unequivocally' textually abrogated." *See id.* at 2405 (Brennan, J., dissenting). As the "unequivocal" requirement is easily derived from the expression "unmistakably clear" and as the "textual" requirement is essentially synonymous with the "language of the statute" articulation in *Atascadero*, the *Dellmuth* expression in this Note is intended to be merely a recital of the *Atascadero* test upon which both Courts rely.

178. There is some apparent confusion about the contours of the textual requirement of the clear statement test. This confusion was caused by *Dellmuth*'s classification of a statutory provision as nontextual abrogation evidence. However, upon closer analysis it appears that this confusion can be resolved. *See infra* text accompanying notes 180-92.

A. The Textual Requirement of the Clear Statement Test

The *Dellmuth* Court initiated its analysis under the clear statement test by classifying all arguments for abrogation as textual or nontextual. Because nontextual arguments are rejected as "beside the point,"[179] this classification scheme has significant consequences. Unfortunately, the Court did not provide any principles for making such classifications, apparently assuming the distinction between textual and nontextual evidence is obvious. However, *Dellmuth*'s classification of the amendments to the Rehabilitation Act as *non*textual abrogation evidence was not obvious.[180]

While the statutory scheme at issue in *Dellmuth* was created by the EHA, respondent Muth argued that the Rehabilitation Act Amendments of 1986[181] were a potential source of abrogation evidence. One provision in these amendments expressly abrogates states' eleventh amendment immunity for violations of any "Federal statute prohibiting discrimination by recipients of Federal financial assistance."[182] Muth argued that "[i]f the EHA is not a 'Federal statute prohibiting discrimination by recipients of Federal financial assistance,' no federal statue is."[183] Although the Court did not expressly indicate why it classified the Rehabilitation Act amendments as nontextual, it appears upon close inspection that these statutory amendments should

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179. *Dellmuth*, 109 S. Ct. at 2401.

180. *Id.* at 2400 (stating that the "[r]espondent supplements these [textual] points with some nontextual arguments [including] the 1986 Amendments to another statute, the Rehabilitation Act").

181. Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1807 (1986) (codified in scattered sections of 29 U.S.C. and at 42 U.S.C. § 2000d-7 (1988)).

182. 42 U.S.C. § 2000d-7(a) (1988). In its entirety this provision reads:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a state for a violation of a statue referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any pubic or private entity other than a state.

(citations omitted).

183. Brief of Respondent at 31-32, Dellmuth v. Muth, 109 S. Ct. 2397 (1989) (No. 87-1855). *See also* Brief of *Amici Curiae* in Opposition to Petition of Certiorari at 11-13, Dellmuth v. Muth, 109 S. Ct. 2397 (1989) (No. 87-1855) (arguing that the EHA falls within the provisions of 42 U.S.C. § 2000d-7(a)(1) of the Rehabilitation Act amendments).

have been classified as textual abrogation evidence and in fact were so treated by the Court.

There is an important reason why the Rehabilitation Act amendments should be properly classified as textual evidence of abrogation: they literally are statutory as required by *Atascadero*. Obviously, properly enacted statutes are binding law whether enacted from an original bill or from a subsequent amendment. The Court apparently agrees with this straightforward notion because it consistently has considered subsequent amendments to be textual evidence. In *Union Gas*, the Court vacated and remanded the original court of appeals decision to reconsider congressional abrogation in light of the CERCLA amendments.[184] And in *Dellmuth*, the Court classified the 1986 amendments to the EHA as textual evidence.[185] Therefore, the Rehabilitation Act amendments should not be classified differently from the EHA amendments unless there is some fundamental distinction between the two.

One possible distinction is that the amendments to the EHA directly amended the text of the EHA's statutory scheme at issue in *Dellmuth*, whereas the Rehabilitation Act amendments did not directly amend the text of the EHA. Another potential distinction is that the Rehabilitation Act amendments did not specifically refer to the EHA but attempted to abrogate the eleventh amendment in a broad fashion without specifically identifying all of the statutes which prohibit "discrimination by recipients of Federal financial assistance."[186] However, while it may be relevant that the Rehabilitation Act amendments did not change the text of the EHA and did not explicitly abrogate sovereign immunity for actions against the states, these ambiguities should be accounted for under the unequivocal prong—not the textual prong—of the clear statement test. These ambiguities have no bearing on whether the evidence is textually or nontextually based. Rather, they relate solely to the proper in-

184. Union Gas Co. v. Pennsylvania, 479 U.S. 1025 (1987).

185. *Dellmuth*, 109 S. Ct. at 2402.

186. *See supra* note 182 quoting 42 U.S.C. § 2000d-7(a) (1988). The Court's reluctance to apply the Rehabilitation Act amendments' abrogation provision is quite consistent with *Dellmuth*'s approach to the clear statement rule. Since the rule is designed to force Congress to make the abrogation decision, a broad abrogation statute effectively neutralizes political accountability by passing the decision to the courts. By requiring courts to interpret and apply ambiguous abrogation instructions, Congress is spared from political opposition by states and others who are subsequently forced to take their case to court.

terpretation of statutory evidence. Therefore, no relevant distinction appears to exist for classifying one amendment as textual while classifying other amendments as nontextual.

Another reason the Rehabilitation Act amendments should be classified as textual evidence is that it appears *Dellmuth* in fact so treated these amendments. Because the Court indicated that nontextual evidence should be dismissed as "beside the point,"[187] their subsequent analysis sheds light on the true nature of this evidence. As the Court did not dismiss this evidence until after applying the Rehabilitation Act amendments to the facts of the case, the Court must have actually considered the amendments to be textual evidence. In its analysis, the Court noted that the amendments could not apply because they abrogated the eleventh amendment only prospectively for "violations that occur in whole or in part after October 21, 1986."[188] As the issues in the lawsuit occurred before this date, the Court concluded that the Rehabilitation Act amendments could not apply of their own force. Therefore, the Court considered these amendments relevant only to the extent they shed light on Congress' abrogation intent when it originally enacted the EHA. In dismissing this latter contention, the Court indicated that "[i]t is far from certain . . . that the 1986 Amendments to the Rehabilitation Act are a useful guide to congressional intent in 1975."[189]

Although the Court may have been correct in concluding that the amendments did not apply to the facts of this case nor conclusively demonstrate evidence of Congress' previous abrogation intent, this conclusion merely answers the question whether the abrogation evidence is unequivocal, not whether the statute itself is nontextual. By failing to dismiss the Rehabilitation Act amendments outright, the Court implicitly acknowledged that these amendments constitute textual evidence. Therefore, all statutory text, regardless of when or within what legislative enactment it becomes law, apparently constitutes textual evidence under the clear statement rule.

The remaining classifications in *Dellmuth* are consistent with the straightforward notion that textual evidence is simply the statutory language of any validly enacted federal law. The

187. *Dellmuth*, 109 S. Ct. at 2401.
188. *Id.* at 2400-01 (quoting 42 U.S.C. § 2000d-7(b) (1988)).
189. *Id.* at 2401.

statutory provisions of the EHA, as well as those from the 1986 amendments to the EHA, were classified as textual evidence of abrogation.[190] Even the statutory purpose, enacted in the preamble to the EHA legislation, was classified as textual evidence notwithstanding it "simply ha[d] nothing to do with the States' sovereign immunity."[191] In contrast, the EHA's legislative history contained outside the statutory text was dismissed without consideration as irrelevant nontextual evidence.[192]

Union Gas supports a straightforward notion of the textual evidence requirement because it also relied exclusively on statutory text in its analysis. While not explicitly classifying the arguments for abrogation as textual or nontextual, the analysis in *Union Gas* ignored any reliance on the legislative history of CERCLA or SARA.[193] This lack of reliance is especially notable because Justice Brennan, who wrote the majority opinion in *Union Gas*, had previously noted his opposition to the omission of legislative history in his dissenting opinion in *Dellmuth*.[194] Nevertheless, in addition to ignoring legislative history, the *Union Gas* Court refrained from attempting to derive congressional intent from its own notions of the statute's overall purpose. Although respondent Union Gas Company tried to invoke the underlying purposes of CERCLA in its argument,[195] the Court did not rely on the statutory purpose even though the Court ultimately held for Union Gas Company.[196]

The refusal to consider the statutory purpose in *Union Gas* provides a clear example of the straightforward nature of the textual classification. In *Union Gas*, the Court ignored the statutory purpose when it was derived from the nature of CERCLA. Yet in *Dellmuth*, the Court classified the EHA's statutory purpose as textual evidence when expressed in the statute's pream-

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190. *See id.* at 2402.

191. *Id.*

192. *Id.* at 2401.

193. *See Union Gas*, 109 S. Ct. at 2277-80.

194. *Dellmuth*, 109 S. Ct. at 2406 (Brennan, J., dissenting).

195. *Union Gas*, 109 S. Ct. at 2291 (White, J., concurring in the judgment) (citing United States v. Union Gas Co., 792 F.2d 372, 381 (3d Cir. 1986) which summarizes respondent's contention before the Third Circuit Court of Appeals regarding the comprehensive nature of CERCLA).

196. While the Court briefly identified the purpose of CERCLA in a single sentence, this was merely by way of background to the analysis which followed. *See Union Gas*, 109 S. Ct. at 2277. *See also id.* at 2291 & n.3 (White, J., concurring in the judgment) (noting that it is the respondent, not the Court, who "finds much significance" in the "purposes of CERCLA").

ble.[197] This dichotomy indicates that the textual requirement is a strict one based solely on the form of the evidence rather than its substance. Accordingly, the textual requirement limits the Court's permissible analysis solely (and simply) to abrogation evidence enacted in statutory text.

B. The Unequivocal Requirement of the Clear Statement Test

Although the two opinions appear to agree on the classification of textual and nontextual abrogation evidence, the question of what is required for unequivocal abrogation evidence leaves the Courts far apart. This gap is exemplified by the two Courts' different analytical approaches to determine whether congressional intent is unmistakably clear.

In *Dellmuth*, the Court searched for an "unequivocal declaration" to determine if Congress had abrogated the states' sovereign immunity[198] while in *Union Gas*, the Court inferred abrogation by accumulating statutory evidence.[199] In further contrast, the *Dellmuth* Court measured congressional intent at the time of statutory enactment[200] while the *Union Gas* Court discovered intent by viewing the statutory text as a whole.[201] The uncertainty created by these distinct approaches raises a number of questions.

1. Statutory inferences

One question raised by the *Dellmuth* and *Union Gas* opinions is whether inferences should be drawn from the statutory text in determining Congress' abrogation intent. Although neither opinion held that inferences from statutory provisions are nontextual,[202] *Dellmuth* seemed to preclude almost all inferences under the unequivocal prong of the clear statement test.

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197. *Dellmuth*, 109 S. Ct. at 2402.

198. *Id.* at 2402. *See also id.* (noting that "[t]he EHA makes no reference to the Eleventh Amendment or the States' sovereign immunity . . . . [n]or does [it] address abrogation in even oblique terms").

199. *See infra* notes 215-27 and accompanying text.

200. *See supra* notes 122-26 and accompanying text.

201. *See supra* notes 145-46, 168-72 and accompanying text.

202. *See Dellmuth*, 109 S. Ct. at 2402 (grouping "permissible inferences" within its discussion of textual abrogation evidence); *Union Gas*, 109 S. Ct. at 2277-80 (basing the Court's analysis and conclusions on the inferences drawn from statutory language). *See also id.* at 2291, 2293-94 (White, J., concurring in the judgment) (arguing against the Court's use of inferences but recognizing that inferences are acceptable under the Court's

In *Dellmuth*, the Court considered and rejected several inferences drawn from the EHA's statutory text. For example, the Court considered one provision of the EHA amendments which allowed an award of attorneys' fees if a "State . . . unreasonably protracted the final resolution of [an] action or proceeding" to enforce the EHA.[203] The Court ignored the logical inference that a state normally cannot prolong a suit without being a party itself. The Court instead found that because the provision did not specifically address which parties are subject to suit, but merely addressed which parties are liable for attorneys' fees, no abrogation intent could be found.[204]

Another provision creating logical inferences of abrogation was the EHA's judicial review section.[205] The EHA grants general jurisdiction to federal district courts to "grant such relief as the court determines is appropriate" for "any party aggrieved" by noncompliance with the administrative process required by the Act.[206] Because "the state is responsible for guaranteeing that a child will receive both the substantive and procedural rights set forth in the Act,"[207] and because state responsibility implies that "Congress clearly contemplated litigation under the Act against a state in the federal courts,"[208] the strength of this inference made it "the centerpiece of the Court of Appeals textual analysis."[209] Nevertheless, the court dismissed this inference

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abrogation precedents).

203. 20 U.S.C. § 1415 (e)(4)(G) (1988). This section provides:

> The provisions of subparagraph (F) [*reducing* the amount of attorneys' fees awarded to a prevailing parent or guardian in defined circumstances] shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

Id.

204. *Dellmuth*, 109 S. Ct. at 2402. However, the Court's argument construed the statutory provisions at issue very narrowly. While 20 U.S.C. § 1415(e)(4) (1988) dealt solely with attorneys' fees, these provisions have meaning only in the context of the statutory remedial procedures and federal court jurisdiction available under the remainder of the EHA. *See* 20 U.S.C. § 1415 (1988).

205. 20 U.S.C. § 1415(e)(2) (1988).

206. *Id. See also Dellmuth*, 109 S. Ct. at 2400 (discussing 20 U.S.C. § 1415 (e)(2) (1988)).

207. Muth v. Central Bucks School Dist., 839 F.2d 113, 129 (3d Cir. 1988) (quoting David D. v. Dartmouth School Comm., 775 F.2d 411, 422 (1st Cir. 1985)).

208. *Id.*

209. *Dellmuth*, 109 S. Ct. at 2402. The Court apparently erred when it stated that 20 U.S.C. § 1400 (b)(9) rather than 20 U.S.C. § 1415(e)(2) was "the centerpiece of the Court of Appeal's textual analysis." *Dellmuth*, 109 S. Ct. at 2402. This is because the Court refers to the court of appeal's "centerpiece" as providing "judicial review for ag-

of abrogation and along with it the "most basic of political knowledge that free public education is provided by and under the aegis of the states."[210]

Responding to these forceful inferences of congressional abrogation intent, the Court laid down the strict rule that "a permissible inference . . . . would not be the unequivocal declaration which, we reaffirm today, is necessary before we will determine that Congress intended to exercise its powers of abrogation."[211] However, the Court did acknowledge that the statutory structure of the EHA implies "that States were intended to be subject to damages actions."[212] The Court stated, "We recognize that the EHA's frequent reference to the States, and its delineation of the States' important role in securing an appropriate education for handicapped children, make the States, along with local agencies, logical defendants in suits alleging violations of the EHA."[213]

Despite the "logical force" of these acknowledged inferences, the Court classified them as merely "permissible"—implying that other plausible inferences exist which explain the states' role under the statute, and at the same time allow the states to retain their sovereign immunity. The Court did not, however, outline these other plausible inferences, and the dissent cast doubt on whether the Court could have had any in mind. The dissent asserted, "[W]here a State has elected to provide educational services to the handicapped [child] directly, or where under the EHA [the State] is required to provide direct services, the State would appear to be the *only* proper defendant in a federal action to enforce EHA rights."[214] Because the Court

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grieved parties." *Id.* As section 1415 (e)(2) does provide judicial review whereas section 1400(a)(9) merely provides a statutory preamble specifying the findings of Congress, *compare* 20 U.S.C. § 1415(e)(2) (1988) *with* 20 U.S.C. § 1400(b)(9) (1988), and as the court of appeal's decision focuses much more attention on the federal jurisdictional provisions of section 1415(e)(2) than on section 1400(b)(9), *compare* Muth v. Central Bucks School Dist., 839 F.2d 113, 119, 126, 129-30 (3d Cir. 1988) *with id.* at 128, and finally, because the Court had already concluded its discussion of section 1400(b)(9), *see Dellmuth*, 109 S. Ct. at 2402, it is apparent that the court meant to refer to section 1415(e)(2) as the "centerpiece of the Court of Appeal's textual analysis" rather than section 1400(b)(9).

210. Muth v. Central Bucks School Dist., 839 F.2d 113, 129 (3d Cir. 1988) (quoting David D. v. Dartmouth School Comm., 775 F.2d 411, 422 (1st Cir. 1985)).

211. *Dellmuth*, 109 S. Ct. at 2402.

212. *Id.*

213. *Id. See also id.* at 2403 (Brennan, J., dissenting) (discussing some of the "overarching responsibilities placed upon the States" by the EHA).

214. *Id.* at 2404 (Brennan, J., dissenting) (emphasis added).

acknowledged that the inferences at issue in *Dellmuth* had great logical force, the Court's holding may properly be interpreted as precluding not only permissible inferences, but also the best possible inferences.

In sharp contrast, the majority in *Union Gas* relied extensively on inferences to establish congressional intent even though there was "room" for other "reasonable construction[s]" of the statute. The primary inference of abrogation relied upon by the Court was drawn from CERCLA's definitions of "persons"[215] and of "owners or operators."[216] Under CERCLA, states are explicitly included in the definition of "persons" while "owners or operators" are "defined by reference to certain activities that a 'person' may undertake."[217] Unless excluded from these definitions, owners or operators may be liable for clean-up costs under the general liability provisions of the Act.[218]

Section 101(20)(D) of SARA excludes from the definition of owners or operators "States that 'acquired ownership or control involuntarily . . . by virtue of its function as sovereign.' "[219] However, this exclusion does not apply to "any State or local government which has caused or contributed to the release . . . of a hazardous substance."[220] This section further provides that by causing or contributing to a release, "a State or local government shall be subject to the provisions of this [Act] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability."[221] From this provision, added by SARA, the Court inferred that Congress had abrogated the states' sovereign immunity because "the 'exclusion' furnished to the States in § 101(20)(D) would be unnecessary unless such a background understanding were at work."[222]

Similarly, the *Union Gas* Court reviewed another statutory provision and again found that Congress had implicitly abrogated the states' sovereign immunity. Section 107(d)(2) of CERCLA provides that a state will not be liable for damages caused

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215. 42 U.S.C. § 9601(21) (1988).

216. *Id.* at § 9601(20)(A).

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

218. *See* 42 U.S.C. § 9607(a) (1988).

219. *Union Gas*, 109 S. Ct. at 2277 (quoting 42 U.S.C. § 9601(20)(D) (1988)). See *infra* note 267 for the complete text of section 9601(20)(D).

220. 42 U.S.C. § 9601(20)(D) (1988).

221. *Id. See also Union Gas*, 109 S. Ct. at 2278.

222. *Union Gas*, 109 S. Ct. at 2278.

by its "actions taken in response to an emergency created by . . . a hazardous substance . . . from a facility owned by another person."[223] However, this exception "shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State."[224] Noting that this provision explicitly recognized a state's potential liability if it mishandled hazardous waste clean-up operations, the Court concluded that Congress implicitly intended to abrogate the states' sovereign immunity; "Congress need not exempt States from liability" when they properly manage clean-up procedures "unless they would otherwise be liable."[225]

Finally, the Court indicated that under CERCLA's citizen suit provisions, civil actions against a state were allowed only "to the extent permitted by the eleventh amendment to the Constitution."[226] Noting that the *Union Gas* case was not a citizen suit, the Court inferred that the reservation of states' rights against abrogation for citizen suits "would be unnecessary if Congress had not elsewhere in the statute overridden the States' immunity from suit."[227]

Although the above inferences pointed toward Congress' "background understanding" that abrogation was intended, they did not provide the unequivocal declaration of abrogation contemplated by *Dellmuth*.[228] However, the Court may have found the required declaration by analogy to Congress' express abrogation of the *federal* government's sovereign immunity under CERCLA. Section 120(a)(1) of CERCLA states that "[e]ach department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) *shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under [the Act].*"[229]

It was "highly significant" to the Court that section

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223. 42 U.S.C. § 9607(d)(2) (1988).

224. *Id.*

225. *Union Gas*, 109 S. Ct. at 2278.

226. *Id.* at 2279 (quoting 42 U.S.C. § 9659(a)(1) (1988)).

227. *Union Gas*, 109 S. Ct. at 2279.

228. *See Dellmuth*, 109 S. Ct. at 2402. *But see Union Gas*, 109 S. Ct. at 2293 (White, J., concurring in the judgment) (stating that "[t]he Court argues that the last clause of the last sentence of § 9601(20)(D) . . . provides the clear statement of abrogation required by our cases").

229. 42 U.S.C. § 9620(a)(1) (1988) (emphasis added).

101(20)(D) of SARA used "mirroring language" to describe the *states'* potential liability.[230] Section 101(20)(D) provides that the exclusion from liability given to states that involuntarily acquire hazardous waste sites

> shall not apply to any State or local government which has caused or contributed to the release . . . of a hazardous substance . . . and such a *State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under [the Act].*[231]

"[T]herefore, Congress must have intended to override the States' immunity from suit [in section 101(20)(D) of SARA], just as it waived the Federal Government's immunity in § 120(a)(1) [of CERCLA]."[232]

From these statutorily based inferences and this "mirroring language," the *Union Gas* Court concluded that Congress intended "that States would be liable in any circumstance described in [the general liability section of CERCLA] from which they were not expressly excluded."[233] This presumption of state liability, created in *Union Gas*, turned *Dellmuth*'s inference rule on its head and revealed the disparity of approach used in the two opinions. While in *Dellmuth* the Court had strictly "reaffirmed" that even the best permissible inferences were not enough to abrogate sovereign immunity, in *Union Gas* the Court was willing to infer complete abrogation of the eleventh amendment except where states were expressly excluded from liability. By creating opposing presumptions of state amenability to federal suit, the acceptable use of inferences remains an open question after *Dellmuth* and *Union Gas*.

To fill this void, Justice White proposed using the *Edelman* rule, which allows inferences when there is " 'no room for any other reasonable construction' of the statute in question."[234] This alternate inference rule could be construed as splitting the difference between *Dellmuth* and *Union Gas* by approving abrogation inferences as long as they are reasonable. However, in

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230. *Union Gas*, 109 S. Ct. at 2279.

231. 42 U.S.C. § 9601(20)(D) (1988) (emphasis added).

232. *Union Gas*, 109 S. Ct. at 2279.

233. *Id.* at 2278.

234. *Id.* at 2294 (White, J., concurring in the judgment) (quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974)).

Justice White's view, the "existence of an alternate, nonabrogating 'reasonable' interpretation . . . dictates rejection of [the abrogation] view."[235] Therefore, instead of asking whether abrogation itself may be reasonably inferred, Justice White understands the *Edelman* rule to "trump" abrogation if any alternate inference exists.

Although stated differently than *Dellmuth*'s heavy presumption against inferences, Justice White's alternate inference rule leads to the same result. Because non-abrogating statutory interpretations almost always exist, abrogation inferences can likewise be avoided under this rule. One nonabrogating inference which can almost always be used to limit statutory provisions implying state amenability to suit is the assumption that these provisions apply solely to the federal government.[236] This alternate inference was used in *Union Gas*. In his separate opinion, Justice White indicated that the Court's abrogation inferences under CERCLA and SARA make "perfectly good sense without any contortion . . . to imply an intent of Congress to abrogate the Eleventh Amendment."[237] This is because "everyone agrees that States may be liable under [these Acts]: the liability of the Commonwealth of Pennsylvania to the United States."[238]

Justice White indicated that a rule which precludes abrogation inferences, when alternate nonabrogating inferences exist, was not new. What was new was *Union Gas*' approach because it allowed abrogation inferences in the face of alternate nonabrogating inference of federal enforcement. Elaborating on this point, Justice White stated in *Employees v. Missouri Department of Public Health and Welfare*,[239] that "the precise analytical approach" used in *Union Gas* had previously been "rejected."[240] Therefore, he argued that the Court "should conclude, as [the Court] did in *Employees*, that Congress' intent could have been to let the Act's policies be achieved through enforcement actions taken by the Federal government against the

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235. *Id.*

236. *See id.* at 2291, 2292 & n.4., 2293-94 (countering the majority's inferences by the alternate inference that statutory provisions inferring state amenability to suit refer solely to state liability to the federal government).

237. *Id.* at 2292.

238. *Id.*

239. 411 U.S. 279 (1973).

240. *Union Gas*, 109 S. Ct. at 2291 (White, J., concurring in the judgment).

States . . . . and not through litigation by private parties against the States."[241]

In *Union Gas*, the majority conceded that CERCLA's discussion of state liability would not be rendered meaningless by inferring state liability to the federal government.[242] However, resting its conclusion on the "highly specific" nature of the abrogation-inferring provisions of CERCLA and SARA and on the fact that "no explicit statutory authorization is necessary before the Federal Government may sue a State," the *Union Gas* Court ignored Justice White's stand-by alternative inference that these provisions could be interpreted as merely authorizing state amenability to enforcement suits by the federal government.[243]

Nevertheless, only eight days after *Dellmuth* and *Union Gas*, the Supreme Court relied on Justice White's alternate-inference rule to neutralize a statute which appeared to explicitly abrogate sovereign immunity. Writing for a plurality in *Hoffman v. Connecticut Department of Income Maintenance*,[244] Justice White stated that an apparently explicit abrogation provision was "not render[ed] irrelevant" by the nonabrogating "construction we give" to it.[245] The statutory provision in *Hoffman* stated, "[N]otwithstanding any assertion of sovereign immunity . . . a determination by [a] court . . . arising under [this section] binds governmental units."[246] Because "[t]he section applies to the Federal Government as well,"[247] Justice White felt that his alter-

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241. *Id.*
242. *Id.*
243. *Id.* at 2279-80 (emphasis omitted).
244. 109 S. Ct. 2818 (1989) (plurality opinion by White, J.).
245. *Id.* at 2823.
246. 11 U.S.C. § 106(c) (1988). In its entirety, section 106(c) states:

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—

(1) a provision of this title that contains "creditor," "entity," or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

See also Hoffman, 109 S. Ct. at 2822-23.

247. *Hoffman*, 109 S. Ct. at 2822-23. The plurality also contrasted the wording of 11 U.S.C. § 106(c) (1988) with the express, but narrow, abrogation provisions of section 106(a)-(b) concluding that if section 106(c) were construed to abrogate sovereign immunity, it "would apply in a scattershot fashion to over 100 Code provisions." *Hoffman*, 109 S. Ct. at 2822. The plurality also noted that the section 106(c) only applied to "issues" which differed from the term "claim" used in section 106(a)-(b) and from the terms "cases" and "proceedings" used elsewhere in the statute. *Id.* at 2823. Finally, the Court felt the wording was "more indicative of declaratory and injunctive relief than of mone-

nate-inference approach precluded the logical inference that states were subject to private suits. If Justice White's view is correct and liability to the federal government is a reasonable statutory construction, then the alternate inference rule is nearly tantamount to a rule precluding inferences altogether.

While the dismissal-of-logical-inferences approach used in *Dellmuth* and the alternate-inference approach advocated by Justice White may both seem extreme, they are consistent with the stated goal of the clear statement test: "perfect confidence" of congressional intent.[248] Therefore, perhaps the more salient issue is not whether inferences should be allowed but whether perfect confidence is a legitimate goal. To answer the latter question, the assumptions and purposes inherent in the clear statement test must be analyzed as well. These assumptions and purposes are discussed in detail in Part V.

2. *Congressional intent*

In addition to the uncertainty created by the differing approaches to statutory inferences, the *Dellmuth* and *Union Gas* opinions raise the question whether congressional intent means the literal intent of the enacting Congress or if congressional intent is merely a convenient fiction for making sense of the provisions of a statute.[249] In *Dellmuth*, the opinions of both the majority and the dissent assumed that the intent of the enacting Congress is conclusive under the unequivocal prong of the clear statement test.[250] The respondent in *Dellmuth* also shared this assumption.[251] In contrast, the Court in *Union Gas* blurred the

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tary recovery." *Id.*

248. *Dellmuth*, 109 S. Ct. at 2401.

249. For sources discussing statutory interpretation and congressional intent, see generally Sunstein, *supra* note 75, at 428-34; Note, *Clear Statements*, *supra* note 22, at 894 (stating that the Supreme Court "now invokes a literalist reading of statutory terms as a surrogate for actual legislative intent"); Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) (stating that "[b]ecause legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539 (1947) (stating "[a]ll these years I have avoided speaking of the 'legislative intent' and I shall continue to be on guard against using it . . . . [Courts] do not delve into the mind of legislators or their draftsmen, or committee members").

250. *See supra* text accompanying notes 122-26.

251. Respondent Muth, the father of the handicapped child, argued that the 1986 amendments to the Rehabilitation Act demonstrated congressional intent as it existed in 1975, when the EHA was passed. In his brief he stated, "This amendment—which was passed by a unanimous vote in both Houses—reflects Congress' intent in enacting the

focus on congressional intent as evidenced by its " 'combination' analysis," which conceived of an aggregate congressional intent directed towards the entire statutory scheme.[252]

The Court's ability to discover congressional intent is hampered not only by the Court's disagreement regarding the concept of congressional intent, but by the Court's formulation of the clear statement rule which prohibits the use of legislative history. Under this formulation, even if the Court could agree when congressional intent should be measured, the Court's ability to accurately ascertain such intent may be minimized to the point that deciphering congressional intent may not be more than a rhetorical goal.

Circumventing these difficulties, Justice Scalia replaced the search for congressional intent with the search for the most logical interpretation of the United States Code as amended.[253] Under his approach, consideration of a statute's legislative history is insignificant. A court's task is

> not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.[254]

While Justice Scalia's approach overcomes the problem of determining when and how to measure congressional intent, it also may undercut some of the rationale underlying the clear statement test. If the goal of the clear statement test were merely to ascertain the most logical interpretation of a given statutory provision, normal rules of statutory construction—including the use of legislative history—would seem best suited for this purpose. However, normal rules of statutory construction are ignored precisely because the goal of the test does not include making the most sense of the United States Code. Rather, the test seeks to protect the sovereign immunity of the

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EHA originally *in 1975*." Brief of Respondent at 32 n.48, Dellmuth v. Muth, 109 S. Ct. 2397 (1989) (No. 87-1855) (emphasis added) (citations omitted). *See also Dellmuth*, 109 S. Ct. at 2401 (quoting from Brief of Respondent). The petitioner may not have shared this view of Congressional intent. *See* Brief for Petitioner at 49, Dellmuth v. Muth, 109 S. Ct. 2397 (1989) (No. 87-1855) (stating that "[n]either the language of the EHA nor its 1986 amendment provide evidence that Congress intended to sweep away the States' immunity *when it legislated in this area*") (emphasis added).

252. *Union Gas*, 109 S. Ct. at 2290 n.1 (White, J., concurring in the judgment).

253. *Id.* at 2296 (Scalia, J., concurring in part and dissenting in part).

254. *Id.*

states by requiring that Congress squarely consider and specifically reject the sovereign immunity of the states.[255] By requiring Congress to be politically accountable for stripping away the states' sovereign immunity, the real issue for the Court is not whether the most accurate interpretation of the Code entails eleventh amendment abrogation, but whether the states opposing abrogation had the opportunity to do so. Accordingly, Justice Scalia's plain meaning approach could undercut the purpose of the clear statement test—to assure that battles over abrogation occur in the halls of Congress rather than before the bar of the federal courts.

However, Justice Scalia's approach undercuts the purpose of the clear statement test only if the "fair and reasonable meaning" of the Code somehow misrepresents Congress' actual intent.[256] If one assumes that the Code says exactly what Congress intended and that the Code's language is the best way to alert opponents that the federal-state balance is being altered, then Justice Scalia's approach harmonizes with both the clear statement's preclusion of legislative history as well as its goal of making Congress politically accountable for eleventh amendment abrogation. Therefore, confusion over when and how to measure congressional intent could be alleviated if "fair and reasonable" statutory interpretations suffice to put opponents of abrogation on notice.

3. *Complete or partial abrogation*

The third concern raised by the Court's divergent approaches in *Dellmuth* and *Union Gas* is whether a statute's abrogation language should be interpreted to completely abrogate sovereign immunity or whether the statute's immunity is abrogated only with respect to a portion of the statute. Notwithstanding the complaints articulated in *Dellmuth* and *Union Gas*,[257] the Court in both cases assumed that the issue before it

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255. *Cf.* United States v. Bass, 404 U.S. 336, 349 (1971) (stating that "the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision" affecting "the federal-state balance").

256. *Dellmuth* apparently assumes that a "fair and reasonable" statutory interpretation is misleading because only unequivocal statements from the statute, rather than logical inferences, suffice to abrogate the states' sovereign immunity. *See supra* text accompanying notes 211-13.

257. In *Dellmuth*, the dissent complained that the Court's holding precluding any abrogation ignored that in some circumstances "the State would appear to be the only

was complete abrogation.[258] However, the statutory text in both cases appeared to abrogate the eleventh amendment for some, but not all, purposes. Because the Court felt the issue was whether the statutory scheme *completely* abrogated the eleventh amendment, the majority opinions necessarily had to ignore relevant statutory provisions in reaching their ultimate conclusions—*Dellmuth* ignoring the limited instances where abrogation was allowed and *Union Gas* overlooking the instances where abrogation was denied. By assuming that the clear statement test requires complete abrogation, the Court appears to have ignored what Congress "clearly" intended even though the underlying rationale of the clear statement test requires strict judicial adherence to Congress' "unequivocal declaration[s]."[259]

In *Dellmuth*, the Court dismissed an amendment to the EHA which precluded a "reduction of attorney's fees . . . 'if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action.' "[260] As discussed above,[261] the Court ignored the amendment's logical inference that if a state could prolong a federal suit it must be subject to the jurisdiction of the federal courts. The Court justified this result by indicating that because the amendment dealt solely with the subject of attorneys' fees and did "not alter or

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proper defendant in a federal action to enforce EHA rights." *Dellmuth*, 109 S. Ct. at 2404 (Brennan, J., dissenting). Moreover, the dissent noted that under the Court's holding "it is not even clear that in those situations where the State is the only proper defendant, an action could always be brought against the State even in *state* court." *Id.* at 2404 n.1 (emphasis in original) (citing Will v. Michigan Dep't of State Police, 109 S. Ct. 2304, 2308-10 (1989)).

In *Union Gas*, Justice White argued against the "view that limitless State liability under CERCLA is the best means to achieve the statute's ends." *Union Gas*, 109 S. Ct. at 2291 n.3 (White, J., concurring in the judgment). He proposed an interpretation of SARA that entailed only a limited form of abrogation and consequent liability on the states. *See id.* at 2293 n.5.

258. In *Dellmuth* the Court stated, "The question before us is whether the Education of the Handicapped Act abrogates the States' Eleventh Amendment immunity from suit in the federal courts." *Dellmuth*, 109 S. Ct. at 2398. In *Union Gas*, the Court stated, "This case presents the question[] whether the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), permits a suit for monetary damages against a State in federal court." *Union Gas*, 109 S. Ct. at 2276 (citations omitted).

259. *See Dellmuth*, 109 S. Ct. at 2402.

260. *Id.* at 2400 (quoting 20 U.S.C. § 1415 (e)(4)(G) (1988)).

261. *See supra* notes 203-04 and accompanying text.

speak to what parties are subject to suit," complete abrogation could not be found.[262]

However, the Court appeared to be answering the wrong question when it agreed that the attorneys' fees provisions were not "directly relevant."[263] Because the courts below had awarded attorneys' fees against the state,[264] the Court could have construed these provisions to abrogate the eleventh amendment solely as to these costs. Abrogation under the statute for attorneys' fees would have been a logical interpretation of the EHA because a State officer may be sued for injunctive relief under the Supreme Court's precedents beginning with *Ex parte Young*.[265] Because respondent Muth's initial suit sought injunctive relief against a state officer, in addition to attorneys' fees, limiting abrogation solely to attorneys' fees would have benefitted Muth in his injunction request.[266] Nevertheless, under the Court's narrow statutory construction, no abrogation intent existed under *any* portion of the EHA *including* the provisions dealing with attorneys' fees.

Just as the Court too narrowly construed the abrogation-inferring statutory provisions in *Dellmuth*, the Court in *Union Gas* may have construed the abrogation-enabling text of SARA too broadly. According to Justice White, the abrogation-enabling provision upon which the *Union Gas* Court relied "only applies to facilities acquired by State and local governments '*involuntarily* . . . by virtue of [their] function[s] as sovereign.' "[267] Because the facilities at issue were acquired *voluntarily*,[268] the ab-

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262. *Dellmuth*, 109 S. Ct. at 2402.

263. *Id.*

264. *Id.* at 2399.

265. 209 U.S. 123, 159-60 (1908).

266. *Dellmuth*, 109 S. Ct. at 2399.

267. *Union Gas*, 109 S. Ct. at 2293 (White, J., concurring in the judgment) (quoting 42 U.S.C. § 9601(20)(D) (1988) (emphasis added)). In its entirety this section states:

> (D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

42 U.S.C. § 9601(20)(D) (1988).

268. Involuntary acquisitions are defined as those acquired "through bankruptcy,

rogation-enabling provision was irrelevant. Therefore, Justice White accused the majority of finding abrogation under a provision which was inapplicable to the facts of the case.

While the Court brushed this statutory interpretation aside,[269] Justice White argued that the Court was "plainly wrong."[270] He felt that the abrogation-enabling provision was necessarily limited by the rest of the section which applied solely to involuntary owners of hazardous waste sites. If this provision "is the means by which Congress intended to make the States liable to suit . . . States would remain immune for sites which they owned and operated by choice."[271] Under this interpretation, "[a] State would be immune from private suit . . . for costs associated with the clean-up of a State-created, owned and operated hazardous-waste dump, but it would be liable for discharges at sites it acquired when an owner abandoned his property."[272] Therefore, "[u]nder the Court's reading of the statute, we are left with the paradox of Congress being tougher on States that find themselves involuntary operators of waste sites, than it was on those that had owned and operated such facilities on their own accord."[273] As this result could not be correct, Justice White concluded that the Court's attempt to use this provision to infer complete abrogation ignored the plain meaning of the statute upon which it purportedly found unmistakable statutory clarity.

Rather than overlook relevant statutory language to determine complete abrogation as was done in both *Dellmuth* and *Union Gas*, Justice White suggested a limited approach to the abrogation issue. He noted that if he were to accept the Court's view that the abrogation-enabling provision in *Union Gas* was unmistakably clear, then a proper interpretation of the provision would make "State and local governments . . . liable only if they

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tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign." 42 U.S.C. § 9601(20)(D) (1988). In *Union Gas*, the State acquired "a permanent easement or fee title to much of the site." Brief for Respondent at 3, Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989) (No. 87-1241); *see also Union Gas*, 109 S. Ct. at 2276 (stating that Pennsylvania acquired "easements to the property").

269. The Court stated that "[s]ection 101(20)(D) obviously explains and qualifies the entire definition of 'owner or operator'—not just that part of the definition applicable to involuntary owners." *Union Gas*, 109 S. Ct. at 2280.

270. *Id.* at 2293 (White, J., concurring in the judgment).

271. *Id.*

272. *Id.*

273. *Id.*

have 'caused or contributed' to a release of toxic materials."[274] Therefore, if the provision

> is the source of the Eleventh Amendment waiver, and if—as the Court contends its provisions are meant to address all state and local governments that own or operate toxic sites, then perhaps Congress abrogated the Eleventh Amendment only far enough to make States liable under this less stringent ["caused or contributed"] rule—[regardless of] whether they are voluntary or involuntary owners of a site.[275]

This narrow approach which construes abrogation for some, but not all, purposes of a statute was followed in *Hoffman v. Connecticut Department of Income Maintenance*.[276] Writing for the plurality, Justice White affirmed the court of appeals' finding of abrogation "only to the extent necessary for the bankruptcy court to determine a state's rights in the debtor's estate."[277] This partial-abrogation approach contrasts significantly with the approaches of *Union Gas* and *Dellmuth* in which complete abrogation was either inferred or denied.

Because the underlying rationale of the clear statement rule is that abrogation significantly alters the balance of power between the federal government and the states, it seems odd that the abrogation issue should be considered an all-or-nothing proposition. Assuming that abrogation power exists, surely it is more reasonable to construe abrogation narrowly, as suggested by Justice White, than to allow abrogation for all purposes, especially when those purposes may not be presented by the facts before the Court. Therefore, limited abrogation seems to harmonize the need to preserve the federal-state balance and at the same time recognize that some statutory inferences are too strong to be ignored.

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274. *Id.* at 2293 n.5.

275. *Id.*

276. 109 S. Ct. 2818 (1989).

277. *Id.* at 2821-22 (quoting *In re* Willington Convalescent Home 850 F.2d 50, 55 (2d Cir. 1988)). While the Court affirmed the lower court's limited abrogation conclusion, this was not the issue before the Supreme Court. Just as the Court has defined the abrogation issue broadly in *Dellmuth* and *Union Gas*, in *Hoffman* the Court was primarily concerned with the broad abrogation question of "whether § 106(c) of the Bankruptcy Code, 11 U.S.C. § 106(c), authorizes a bankruptcy court to issue a money judgment against a state that has not filed a proof of claim in the bankruptcy proceeding." *Id.* at 2821. To this broader question, the Court held that section 106(c) "did not abrogate the Eleventh Amendment immunity of the States." *Id.* at 2824.

4. General authorization rule

A final question raised by the contrasting approaches of *Dellmuth* and *Union Gas* is the contours and force of the rule prohibiting "[a] general authorization for suit in federal court."[278] As discussed above,[279] this prohibition was used in *Dellmuth* to strike down "the centerpiece of the Court of Appeal's textual analysis" because general authorizations are "not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."[280] The Court of Appeals for the Third Circuit had agreed with the reasoning of the first circuit which explained the EHA's general grant of federal jurisdiction[281] as follows:

> The culmination of the [EHA's] state administrative appeals process is the right of any party "aggrieved" by the decision or procedure employed to take the matter to either state or federal court. Obviously, since the state is responsible for guaranteeing that a child will receive both the substantive and procedural rights set forth in the Act, Congress intended that the State should be named as an opposing party, if not the sole party, to the proceeding. The legislative history reinforces this view.[282]

Thus, under the view of the first and third circuits, the general right of persons "aggrieved" to sue in federal court, combined with the logical inference that states are the most likely defendants in such a suit, created unmistakable clarity that abrogation was intended by Congress. However, without even discussing the lower courts' inference arguments, the Supreme Court struck down the EHA's jurisdictional statute under the prohibition against general authorizations to suit.[283]

This use of the general authorization prohibition is significant because the abrogation inference at issue in *Dellmuth* probably met Justice White's alternate-inference test. Because no reasonable nonabrogating inference existed to explain the EHA's

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278. *Dellmuth*, 109 S. Ct. at 2402 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985)).

279. *See supra* note 205-12 and accompanying text.

280. *Dellmuth*, 109 S. Ct. at 2402 (quoting *Atascadero*, 473 U.S. at 246).

281. *See* 20 U.S.C. § 1415(e)(2) (1988).

282. Muth v. Central Bucks School Dist., 839 F.2d 113, 129 (3d Cir. 1988) (quoting David D. v. Dartmouth School Comm., 775 F.2d 411, 422 (1st Cir. 1985)) (citations omitted).

283. *Dellmuth*, 109 S. Ct. at 2402.

jurisdictional grant, this case may have properly allowed the abrogation inference articulated by the courts of appeals to satisfy the clear statement test. The federal government does not appear to meet the definition of a party allowed to sue a state because the party entitled to sue in federal court is defined under the Act by reference to the "aggrieved" parents or guardian of the handicapped child entitled to assistance under the EHA.[284] Therefore, federal enforcement actions against the states under the jurisdictional sections of the EHA do not seem possible. For this reason, "the State would appear to be the only proper defendant in a federal action to enforce EHA rights."[285] By eliminating a compelling abrogation inference where the clear statement test's strict rule against inferences had failed, the Court elevated the general authorization prohibition into a potent weapon against abrogation.

In contrast to the *Dellmuth* Court's use of the general authorization prohibition, the Court in *Union Gas* specifically rested its finding of abrogation on "[t]wo *general* terms."[286] These "terms, among others, describe those who may be liable under CERCLA for the costs of remedial action: 'persons' and 'owners or operators.' "[287] As " 'States' are explicitly included within the statute's definition of 'persons' " and as "[t]he term 'owner or operator' is defined by reference to certain activities that a 'person' may undertake," the Court found that these "general terms" abrogated the states' sovereign immunity.[288]

One possible explanation for the difference between the two cases is that the jurisdictional provisions at issue in *Dellmuth* did not explicitly subject states to potential liability as did the definitional terms at issue in *Union Gas*. Without an explicit reference to states, the lower courts relied on inferences to subject the state to suit in *Dellmuth*. However, this distinction appears to be insignificant because the Court did not quarrel with the impact of the forceful abrogation inferences in *Dellmuth*. Indeed, the Court seemed to agree that there was no other possible explanation for the EHA provisions at issue other than state

284. *See* 20 U.S.C. § 1415(b), (e)(2) (1988).

285. *Dellmuth*, 109 S. Ct. at 2404 (Brennan, J., dissenting).

286. *Union Gas*, 109 S. Ct. at 2277 (emphasis added).

287. *Id.*

288. *Id.* at 2277-78. The Court in *Union Gas* did not rely solely on the definition of these general terms but also buttressed its opinion by relying on other statutory passages. *Id.* at 2278-80.

amenability to private suit.[289] Therefore, the fact that states were not explicitly mentioned as potential defendants under the EHA does not appear to adequately explain the different use of the general authorization prohibition in *Dellmuth* and *Union Gas*.

Another possible explanation for the difference in the two cases is that the general authorization prohibition is specifically limited to "general authorizations *for suit in federal court*."[290] As the "trigger words"[291] "persons" and "owners or operators" at issue in *Union Gas* invoked multiple statutory provisions, in addition to authorizing "suit in federal court," the prohibition against general authorizations may simply have been inapplicable. However, this explanation does not adequately address the vice which the general authorization prohibition attempts to remedy. Authorizations for suit in federal court are inadequate to abrogate the eleventh amendment only when they are too general; therefore, the general trigger words in *Union Gas* suffered from essentially the same vice. As general statements are antithetical to the clarity required by the clear statement test, the general authorization rule must be meant to preclude any general statutory term which ostensibly subjects a state to suit in federal court. Therefore, the two Courts' contrasting attitudes toward general authorizations seem to be in conflict.

While the approach in *Union Gas* may be criticized for ignoring the general authorization prohibition, strict adherence to this prohibition also raises concerns. Under the approach adopted by the Court in *Dellmuth*, abrogation statutes are vulnerable to attack on two fronts. First, a broadly worded abrogation statute could fail by definition under the prohibition because it is too general; second, a narrowly drawn abrogation statute could be ignored if the Court views the issue as complete, rather than partial, abrogation.[292] Therefore, if the general authorization prohibition is aggressively applied, as it was in *Dellmuth*, only a slim middle ground may exist for an abroga-

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289. *See Dellmuth*, 109 S. Ct. at 2405 (Brennan, J., dissenting) (noting that "[t]he Court does not seem to disagree with [Justice Brennan's] analysis of actual congressional intent").

290. *Id.* at 2402 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985)) (emphasis added).

291. *Cf.* Hoffman v. Connecticut Dep't of Income Maintenance, 109 S. Ct. 2818, 2822 (1989) (relating respondent's argument that the "trigger words" " 'creditor,' 'entity,' or 'governmental unit' " apply to states. *See* 11 U.S.C. § 106(c)(1) (1988)).

292. *See supra* text accompanying notes 274-77.

tion provision to avoid classification as being too general or too narrow.

V. JUSTIFICATION OF THE CLEAR STATEMENT TEST

Although *Dellmuth* and *Union Gas* appear to agree on the scope and application of the clear statement test's textual requirement, the Court continues to disagree over the unequivocal requirement. But while it is apparent that *Dellmuth* and *Union Gas* adopt different approaches to determine congressional intent under the rubric of the clear statement test, it is not apparent which approach should be followed in subsequent eleventh amendment cases. Because *Dellmuth* represents a significant analytical departure from traditional methods of determining congressional intent,[293] the strict approach in *Dellmuth* should bear the burden of persuasion. Complaining that this strict approach has failed to meet its burden, Justice Brennan stated,

> [T]he Court has never explained why it is that the constitutional principle it has created should require a novel approach to ascertaining congressional intent. As I said in *Atascadero*, "special rules of statutory drafting are not justified (nor are they justifiable) as efforts to determine the genuine intent of Congress; no reason has been advanced why ordinary canons of statutory construction would be inadequate to ascertain the intent of Congress." I entirely fail to see . . . why . . . the Court in the Eleventh Amendment context insists on setting up ever-tighter drafting regulations . . . . A genuine concern to identify Congress' purpose would lead the Court to consider both the logical inferences to be drawn from the text and structure of [a statute] *and* the statute's legislative history in deciding whether Congress intended to subject States to suit in federal court.[294]

While the reason for the clear statement test's "special rules of statutory drafting" may never have been fully articulated, the test's justification follows logically from its requirement of "perfect confidence."[295] This requirement is considered necessary to ensure that Congress has adequately considered the important federal-state balance before making states liable to suit. If "per-

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293. *See Dellmuth*, 109 S. Ct. at 2406 (Brennan, J., dissenting); *Union Gas*, 109 S. Ct. at 2295-96 (Scalia, J., concurring in part and dissenting in part).

294. *Dellmuth*, 109 S. Ct. at 2406 (Brennan, J., dissenting) (quoting *Atascadero*, 473 U.S. at 254 (emphasis in original) (citations omitted).

295. *Dellmuth*, 109 S. Ct. at 2401.

fect confidence" is required to determine what "Congress in fact intended,"[296] then it cannot be achieved apart from a strict approach which eliminates all potential error. That is why the *Dellmuth* approach uses "ever-tighter drafting regulations" and discourages the use of inferences, which are by their nature subject to potential error and therefore cannot give unequivocal assurance.[297]

In contrast, the approach used in *Union Gas* seems to be a sort of verbal sophistry. Although *Union Gas* purportedly requires "unmistakably clear" statutory language, in reality its approach settles for the best judgment of what "Congress must have intended."[298] The approach adopted by *Union Gas* seems adequate only if "fair and reasonable confidence,"[299] rather than "perfect confidence," is the threshold of clarity for abrogating the eleventh amendment. Accordingly, the underlying question is not which opinion's approach best interprets Congress' intent, but whether perfect confidence should be required at all. The reason advanced for requiring absolute certainty is that, unlike individuals or businesses, states have a "constitutional role" which "sets them apart."[300] Because the "federal-state balance"[301] is at stake, any act by Congress which upsets this equilibrium "should not be easily inferred."[302] Remarkably, however, the constitutional justification for "perfect confidence" is fundamentally at odds with some of the underlying assumptions of the clear statement test. This conflict seriously undermines the foundation upon which the test rests.

A. The Underlying Assumptions of the Clear Statement Test

The clear statement test rests on the following assumptions: First, the states' sovereign immunity is essential to "the funda-

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296. *Id.*

297. *See Union Gas*, 109 S. Ct. at 2291-92 (White, J., concurring in the judgment) (stating that "the entire purpose of our 'clear statement' rule would be obliterated if this Court were to imply Eleventh Amendment abrogation from our sense of what would best serve the general policy ends Congress was trying to achieve in a statute . . . even if it is 'latent' in the statutory scheme, or an advisable means of achieving the statute's ends").

298. *Id.* at 2279.

299. *Id.* at 2296 (Scalia, J., concurring in part and dissenting in part).

300. Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 477 (1987).

301. United States v. Bass, 404 U.S. 336, 349 (1971).

302. *Welch*, 483 U.S. at 477 (quoting Parden v. Terminal Ry., 377 U.S. 184, 198 (1964) (White, J., dissenting)).

mental constitutional balance between the Federal Government and the States;"[303] second, the political process is the primary means "[t]o temper Congress' acknowledged abrogation powers;"[304] and third, without an unequivocal statement in the statutory text, perfect confidence will not exist that the political process has properly functioned.[305] Thus, the issue is posed starkly: Are the assumptions underlying the clear statement test consistent with the test's frequently articulated goal of maintaining the federal-state balance?

One of the significant issues dividing the Court in *Dellmuth* and *Union Gas* is whether sovereign immunity is a constitutionally protected "component of our constitutional structure."[306] While a constitutional amendment would appear to elevate sovereign immunity to the sphere of constitutional protection (at least to the extent of the eleventh amendment's literal language),[307] Justice Brennan "maintain[s] that . . . 'there simply is no constitutional principle of state sovereign immunity.' "[308] The importance of the ultimate resolution of this debate cannot

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303. *Dellmuth*, 109 S. Ct. at 2400 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985)).

304. *Id.* Unlike the first and third assumptions, the second assumption is not explicitly mentioned in the *Dellmuth* and *Union Gas* opinions. However, it follows from the very nature of the test, which assumes that a clear congressional statement can override the sovereign immunity of the states. While Justice Scalia objects to this assumption, *see* Hoffman v. Connecticut Dep't of Income Maintenance, 109 S. Ct. 2818, 2824 (1989) (Scalia, J., concurring in the judgment), as does Justice Stevens with regards to his views of the literal language of the eleventh amendment, *see Union Gas*, 109 S. Ct. at 2286, the very existence of a test measuring Congress' abrogation intent implicitly assumes that the political process is the primary means of preserving the states' sovereign immunity. As one commentator stated, "That a clear statement rule can be consistent with the . . . view of the national political process as the source of the states' protection hardly seems novel." Brown, *supra* note 22, at 390. *Cf.* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985) (holding that the primary protection afforded the states under the tenth amendment is the national political process), *cert. denied*, 488 U.S. 889 (1988); South Carolina v. Baker, 108 S. Ct. 1355 (1988) (reaffirming *Garcia*); Brown, *supra* note 22, at 379 (arguing that the procedural safeguards afforded the states through the political process as articulated in *Garcia* may apply in the context of the eleventh amendment and that the clear statement test "might be a way for the judiciary to ensure that the national political process *has* protected the states") (emphasis in original).

305. *Dellmuth*, 109 S. Ct. at 2401-02.

306. *Compare id.* at 2400 *with id.* at 2406 (Brennan, J., dissenting).

307. *Union Gas*, 109 S. Ct. at 2286 (Stevens, J., concurring) (stating that the "literal interpretation of the plain language of the Eleventh Amendment" may not be abrogated by Congress "under the Commerce Clause, or any other provision of the Constitution").

308. *Dellmuth*, 109 S. Ct. at 2406 (Brennan, J., dissenting joined by Marshall, J., Blackmun, J. and Stevens, J.) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 259 (1985) (Brennan, J., dissenting)).

be overemphasized. If sovereign immunity is merely a component of comity, erected by stubborn precedents,[309] then the quest for absolute clarity would seem to be an unjustifiable exercise contravening the Court's "duty 'to give effect, if possible, to every clause and word of a statute.' "[310] Moreover, if the Court fails to implement the intent of Congress in its quest to maintain the federal-state balance, it may upset the fundamental constitutional balance between the legislature and the judiciary.[311] Therefore, a consensus regarding the constitutional foundation of sovereign immunity is crucial to a consensus on the justification of the clear statement test.

While a constitutional justification would directly support the clear statement test, the second assumption—that the political process is the primary means of protecting the federal-state balance—appears to contradict the constitutional justification of the clear statement test.[312] The assertion that Congress may abrogate the states' sovereign immunity subject only to the political process seems to assume that sovereign immunity is not founded upon constitutional principles. As Justice Stevens so succinctly put it, "a statute cannot amend the Constitution."[313] Yet the Court implicitly assumed sovereign immunity was not constitutionally required in *Dellmuth* when the Court "acknowledged" Congress' extensive "powers of abrogation."[314] Similarly, in *Union Gas* the Court indicated that "[i]t would be difficult to overstate . . . . the vastness of [the commerce] power" which "confers on Congress the power of abrogation."[315]

Ironically, however, four of the Justices who upheld the strict clear statement test advanced in *Dellmuth* disagree that

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309. *See Union Gas*, 109 S. Ct. at 2286 (Stevens, J., concurring) (stating that there are "two Eleventh Amendments;" one is the literal interpretation of the words of the eleventh amendment while the other is the broader principle of sovereign immunity erected by the Court's precedents beginning with Hans v. Louisiana, 134 U.S. 1 (1890)).

310. Hoffman v. Connecticut Dep't of Income Maintenance, 109 S. Ct. 2818, 2823 (1989) (quoting United States v. Menasche, 348 U.S. 528, 538-39 (1955)).

311. *See* Note, *supra* note 20, at 1448. *See also* United States v. American Trucking Ass'ns, 310 U.S. 534, 542 (1940) (stating that "[i]n the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress").

312. *But cf.* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (holding that the states' role in the federal system is primarily guaranteed by the structure of the national political process rather than by the tenth amendment's guarantee reserving all nondelegated powers to the states), *cert. denied*, 488 U.S. 889 (1988).

313. *Union Gas*, 109 S. Ct. at 2286 (Stevens, J., concurring).

314. *Dellmuth*, 109 S. Ct. at 2400.

315. *Union Gas*, 109 S. Ct. at 2284-85.

the political process is the primary protection afforded to states by the eleventh amendment.[316] In addition to their understanding that "sovereign immunity . . . was part of the understood background against which the Constitution was adopted and which its jurisdictional provisions did not mean to sweep away," Justice Scalia, joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy, agreed that the states' sovereign immunity was not to be left to the political will of Congress.[317] These Justices agreed with prior Court opinions that sovereign immunity was "inherent in the constitutional plan."[318] They also indicated that because Congress has legislated for nearly one-hundred years under the assumption that states are protected from private damage actions created by federal laws, "[i]t is impossible to say how many extant statutes would have included an explicit preclusion of suits against States if it had not been thought that such suits were automatically barred."[319]

The view of these Justices was also reinforced by the history of the seventeenth amendment, which eliminated the election of senators by state legislatures.[320] In *Union Gas* the Justices stated,

> If it had been known at th[e] time [the seventeenth amendment was ratified] that the Federal Government could confer upon private individuals federal causes of action reaching state treasuries; and if the state legislatures had had the experience of urging the Senators they chose to protect them against the proposed creation of such liability; it is not inconceivable, especially at a time when voluntary state waiver of sovereign immunity was rare, that the Amendment (which had to be ratified by three-quarters of the same state legislatures) would have contained a proviso protecting against such incursions upon state sovereignty.[321]

It is surprising then, that the Justices holding these views would implicitly assume that Congress may override the eleventh amendment by meeting the strictures of the clear statement test.

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316. *See Dellmuth*, 109 S. Ct. at 2398.

317. *Union Gas*, 109 S. Ct. at 2297 (Scalia, J., concurring in part and dissenting in part, joined as to his dissent by Rehnquist, C.J., O'Connor, J., and Kennedy, J.).

318. *Id.* (quoting Monoco v. Mississippi, 292 U.S. 313, 329 (1934)).

319. *Id.* at 2298.

320. U.S. CONST. amend. XVII.

321. *Union Gas*, 109 S. Ct. at 2298-99.

Noting the inconsistency of "permitting Congress to overrule" the "fundamental principle of federalism evidenced by the Eleventh Amendment," Justice Scalia stated: "I think it plain that the position adopted by the Court contradicts the [constitutional] rationale of *Hans*."[322] Because this inconsistency is implicit in the clear statement test, Justice Scalia refused to consider the test when he wrote his concurring opinion in *Hoffman v. Connecticut Department of Income Maintenance*, only eight days after writing his dissent in *Union Gas*.[323] Justice O'Connor also appears to understand the inconsistency inherent in the clear statement test,[324] although she did not refuse to decide the merits of the clear statement issue.[325]

A possible explanation for the continued support by Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy of a strict clear statement test is their belief that the eleventh amendment creates a constitutional imperative to maintain sovereign immunity. For this reason, they have been willing to support the clear statement test as the only practical restraint left to preserve state sovereign immunity despite the inconsistency in their view. However, this result-oriented approach to constitutional adjudication ignores the long-term ramifications which follow from repeatedly assuming that untempered abrogation power exists. As Justice Brennan keenly observed in *Union Gas*,

> [s]ince *Employees*, we have twice *assumed* that Congress has the authority to abrogate States's immunity when acting pursuant to the Commerce Clause . . . . It is no accident, therefore, that every Court of Appeals to have reached this issue has concluded that Congress has the authority to abrogate States' immunity from suit when legislating pursuant to the plenary powers granted it by the Constitution.[326]

Accordingly, although the clear statement test may be a conven-

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322. *Id.* at 2299 (referring to Hans v. Louisiana, 134 U.S. 1 (1890)).

323. *See* Hoffman v. Connecticut Dep't of Income Maintenance, 109 S. Ct. 2818, 2824 (1989) (Scalia, J., concurring in the judgment).

324. *See Union Gas*, 109 S. Ct. at 2303-04 (O'Connor, J., concurring); *Hoffman*, 109 S. Ct. at 2824 (O'Connor, J., concurring).

325. *See Union Gas*, 109 S. Ct. at 2289; *Dellmuth*, 109 S. Ct. at 2398; *Hoffman*, 109 S. Ct. at 2821.

326. *Union Gas*, 109 S. Ct at 2281 (emphasis added) (citations omitted). *But see id.* at 2301 (Scalia, J., concurring in part and dissenting in part) (stating that the Court did not assume the abrogation power to actually exist, "but that we have assumed it *for the sake of argument*," and reviewing cases relied upon by Justice Brennan) (emphasis in original).

ient method of preserving state sovereign immunity in the short-run, in the long-run it only strengthens the assumption that sovereign immunity is a matter of legislative grace rather than constitutional principle. Because this "principle is too much at war with itself to endure," Justice Scalia predicted that either the Court would return to the constitutional principle enunciated in *Hans v. Louisiana*[327] or the constitutional rationale underlying the clear statement test would be overruled.[328]

In addition to the second assumption that the political process is the primary means of protecting the states' sovereign immunity, the third assumption underlying the clear statement test also contradicts the test's constitutional foundation. This assumption—that unmistakably clear language is necessary to assure that the political process has properly functioned—necessarily implies that Congress' abrogation power is plenary. As discussed above, the implication that Congress has unfettered abrogation power contradicts any constitutional basis for sovereign immunity.

In addition to this contradiction, the third assumption seems unrealistic.[329] If the political process only functioned when statutory text was unmistakably clear, then many, if not most, of this nation's laws would have been enacted outside the scope of the political process. Instead, if any assumption should exist regarding the political process it is that the political process tends to create more rather than less ambiguity.

Nevertheless, the opinions in *Dellmuth* and *Union Gas* ignore the fact that the political process is by nature ambiguous. Instead they assume that the political process somehow functions under clear rules that produce clear legislation. For example, in writing for the dissent in *Dellmuth*, Justice Brennan criticized the Court's strict clear statement approach by reference to his own apparent familiarity with the "rules" applicable to the political process. Justice Brennan stated,

> Though the special and strict drafting regulations the Court has now foisted on Congress are unjustifiable, still worse is the Court's retroactive application of these new rules. It would be one thing to tell Congress how in future the Court will measure Congress' intent. That at least would ensure that Congress and

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327. 134 U.S. 1 (1890).

328. *See Union Gas*, 109 S. Ct. at 2303 (Scalia, J., concurring in part and dissenting in part).

329. *See* Note, *Clear Statements*, *supra* note 22, at 904-07.

> this Court were operating under the same rules at the same time. But it makes no sense whatsoever to test congressional intent using a set of interpretive rules that Congress could not conceivably have foreseen at the time it acted—rules altogether different from and much more stringent than those with which Congress, reasonably relying upon this Court's opinions, believed itself to be working.[330]

While the dissent's notion that Congress and the Supreme Court should work together under the same legal rules is logically compelling, it ignores the reality that the Court's "rules" are often ambiguous and are constantly evolving. Moreover, whether members of Congress are actually aware of all of the Supreme Court's rules not only seems doubtful but is also irrelevant. As Justice Scalia pointed out, "Members of Congress . . . need have nothing in mind for their votes to be both lawful and effective."[331] Thus, the goal of consistent rules between Congress and the Supreme Court seems to reflect an overly idealistic view of the political process.

While the *Dellmuth* majority was quick to point out that the dissent's view of the "legislative process" was "unrealistic and cynical,"[332] the same criticism could probably be made about the Court's own views. By refusing to consider legislative history and statutory goals, while simultaneously demanding unequivocal statutory statements, the Court appears to assume that the political forces for and against abrogation cannot be fully aligned and discharged absent unmistakable statutory clarity. However, the political process is probably quite different. Legislators are influenced in their votes by the recommendation of their party or constituencies, by a broad notion of the legislation's goals or by summary reports prepared by their congressional staff. None of these political forces have ever required unequivocal language in order to exert pressure on the members of Congress. Accordingly, by requiring absolute statutory clarity in the eleventh amendment context before the Court will find that the political process has functioned, the Court is ignoring the actual political process to which Congress is subjected. This contrasts significantly with the realistic view of the political process the Court has shown in the context of the tenth amendment.

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330. *Dellmuth*, 109 S. Ct. at 2406 (Brennan, J., dissenting).

331. *Union Gas*, 109 S. Ct. at 2296 (Scalia, J., concurring in part and dissenting in part).

332. *Dellmuth*, 109 S. Ct. at 2401.

In *South Carolina v. Baker*,[333] the state challenged legislation imposing adverse federal tax consequences on the purchasers of certain types of bonds including bonds issued by states. South Carolina alleged that the political process failed to protect the state as required by the tenth amendment[334] because the legislation "was imposed by the vote of an uninformed Congress relying upon incomplete information."[335] Nevertheless, the Court indicated that courts could not "second-guess the substantive basis for congressional legislation."[336] Because South Carolina "had not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless" the Court would not presume that the political process operated in a defective manner.[337]

If the Supreme Court may not presume a defect based on the substantive content of legislation in the tenth amendment context, then it seems odd that the Court may presume a failing in the political process when unequivocal statutory clarity is lacking in the context of the eleventh amendment. Because under *Baker* the opportunity to participate in the political process may be all that the Constitution guarantees, it seems inappropriate to presume that the political process has failed to protect the states' sovereign immunity absent an unequivocal statement in the statutory text.

B. Recommendation

The assumptions underlying the clear statement test both contradict the constitutional foundation upon which the test is based and also make unrealistic presumptions regarding the nature of the political process. Without a constitutional foundation or a defect in the political process, the clear statement test takes on the character of a judicial veto over otherwise valid legislation. The constitutional imbalance created by the clear statement test between the legislative and judicial branches of government seems at least as serious as the balance sought to be

333. 485 U.S. 505 (1988).

334. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985) (holding that the tenth amendment guarantees to the states against encroaching federal legislation were protected primarily through the national political process).

335. *Baker*, 485 U.S. at 513 (quoting from Brief for Plaintiff at 101 (94, Orig.)).

336. *Id.*

337. *Id.*

protected between the federal government and the states. Therefore, courts should adopt the approach taken by Justice Scalia in *Hoffman v. Connecticut Department of Income Maintenance*.[338] Rejecting the clear statement test, Justice Scalia stated that "it makes no sense to affirm the constitutional principle [of sovereign immunity] established by *Hans v. Louisiana* . . . and to hold at the same time that Congress can override this principle by statute in the exercise of its Article I powers."[339] Adopting this view, the only issue is whether Congress has the power to abrogate the eleventh amendment immunity of the states.

While the Supreme Court has been reluctant to deny congressional power over the states' sovereign immunity, the Court does have the obligation to check congressional encroachments of power when the Constitution speaks. Resorting to the clear statement test not only ignores this obligation, but places the Court in the unseemly position of overriding the political process it seeks to support, thereby causing the Court to overreach its own authority. Accordingly, if the Court continues to assume that the eleventh amendment constitutionally protects the states from private suit in federal court absent the states' voluntary consent—as it has for one hundred years since *Hans*—then future eleventh amendment cases should be decided "without the necessity of considering whether Congress intended to exercise a power it did not possess."[340] In other words, courts should not consider whether Congress has been unmistakably clear in abrogating the eleventh amendment if Congress has no power to do so.

VI. Conclusion

The contrasting approaches to the eleventh amendment's clear statement test are dramatically illustrated in *Dellmuth* and *Union Gas*. While the Court purports to rely on the same test to measure congressional intent in both cases, in fact the opinions are deeply divided in their approach—*Dellmuth* requiring an unequivocal statement in the text of the statute and *Union Gas* allowing inferences to ascertain Congress' background understanding. If the proper goal of the clear statement

338. 109 S. Ct. 2818 (1989).
339. *Id.* at 2824 (Scalia, J., concurring in the judgment) (citations omitted).
340. *Id.*

test is to assure Congress' intent with "perfect confidence," then the strict approach reaffirmed in *Dellmuth* is necessary. However, whether "perfect confidence" is required remains an open question.

The justification for a strict clear statement test is the constitutional mandate of the eleventh amendment to protect the federal-state balance. Yet, the clear statement test assumes that the political process is the primary protection afforded to the states. The fact that the clear statement test assumes Congress may override the very Constitution upon which the test is founded highlights the test's inherent instability. Therefore, the eleventh amendment debate should focus on the assumptions inherent in the clear statement test—namely, whether sovereign immunity is constitutionally protected under the eleventh amendment, whether the political process is the eleventh amendment's primary source of protection, and whether a clear statement is actually needed to assure that the political process has functioned.

If sovereign immunity is a constitutional component of the federal-state balance, the clear statement test should not be the ultimate safeguard of the states' sovereign immunity. If the political process is the states' final reservoir of protection against suit in federal court, then why was the eleventh amendment ever passed? Because the Supreme Court Justices who support a strict clear statement test also support the constitutional interpretation of the eleventh amendment in *Hans*, their reliance on the clear statement test for mere political protection seems misplaced. With an internally inconsistent rationale, the test is easily criticized for its strict approach and may ultimately fall of its own weight. Unless the clear statement inquiry is discarded, the fundamental arguments over congressional power will be ignored amidst the debate over such things as the scope of permissible inferences from statutory text. When the test falls, the power issue will have been conceded to Congress, if indeed it has not been conceded to Congress already. Therefore, those favoring the states' sovereign immunity should look to the eleventh amendment for state protection, while those who feel it is not a constitutional principle should either bear the burden of explaining the inapplicability of the eleventh amendment or urge the amendment's repeal.

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