In *Scalmer (R9)*, found a waiver by Calij. of 11th Amend. immunity by accepting fed. funding under the Rehabilitation Act 5304.

Leg. history indicates Congress acted under 53 of 14th Amend.

But our cases require an unequivocal expression of intent to abrogate the const. right of a State to immunity. *Pennhurst II*; *Quarr v. Jordan.* Reverse.
Intent to abrogate must be clear – but suggested relevance of e.g. intent where statute is silent.

Hutto is not applicable – JP5 held that citizen's fees were part of costs & could be recovered vs State.

Unequivocally clear as to intent to abrogate.
The Chief Justice

Rev.

must be clear statement—more than.

Justice Brennan

App'm

not in accord w/ Court on

11th Amend.

in enacting 504 Congress intended to hold states accountable. See leg. hist.

Hence was wrong.

Justice White

Rev.

clear statement rule is sound

d not clear here.
Justice Marshall: Affirm

Justice Blackmun: Affirm. Congressional intent can be found.

Justice Powell: Rev.
See my notes. Agree with clear statement rule.
Justice Rehnquist

Justice Stevens

Affirm

Would overrule 11, 22, 33, 44.

Then u necessary to affirm.

Justice O'Connor

Rev.

Resembles controls.
April 29, 1985

Re: 84-351 - Atascadero State Hospital v. Scanlon

Dear Lewis:

I shall await the dissent.

Respectfully,

Justice Powell

Copies to the Conference
April 30, 1985

No. 84-351

Atascadero State Hospital
v. Scanlon

Dear Lewis,

I'll be circulating a dissent in the above in due course.

Sincerely,

Justice Powell

Copies to the Conference
April 30, 1985

No. 84-351 Atascadero State Hospital and California Dept. of Mental Health v. Scanlon

Dear Lewis,

Please join me.

Sincerely,

[Signature]

Justice Powell

Copies to the Conference
April 30, 1985

Re: No. 84-351-Atascadero State Hospital and California Dept. of Mental Health v. Douglas James Scanlon

Dear Lewis:

I await the dissent.

Sincerely,

T.M.

Justice Powell
cc: The Conference
May 1, 1985

Re: 84-351 - Atascadero State Hosp. v. Scanlon

Dear Lewis:

Please join me.

Sincerely,

Justice Powell

cc: The Conference
Dear Lewis,

I join your circulating draft with a comment or two. First, I am surprised to find that §504 is a statute enforcing the Fourteenth Amendment rather than Spending Clause legislation. The section was patterned after Title VI, which is a Spending Clause law, and both are triggered by the acceptance of federal funds.

Second, the Eleventh Amendment argument is all the stronger because the Rehabilitation Act does not contain a private right of action. That right has to be implied, all of which indicates Congress did not have an eye on authorizing litigation against states.

Sincerely,

Justice Powell

Copies to the Conference
May 3, 1985

84-351 Atascadero State Hospital v. Scanlon

Dear Byron:

My thanks for your join note.

As for your suggestions, I will leave open in my next circulation the question whether §504 was adopted pursuant to the Fourteenth Amendment or the Spending Clause or both. The petitioners conceded below that the Act was Fourteenth Amendment legislation. We therefore do not have to decide the question.

I did not mention the absence of any provision for a private right of action. I do not think the presence of such a provision would in any way relieve Congress from the requirement that its intention to authorize suits against states be made unequivocally clear. I could mention the absence of the private right of action, but add that the presence of such a provision would not relieve Congress of its basic obligation. Unless you think we should add such a note, I am inclined to leave the draft as written - though I have no real objection to such a note.

Sincerely,

Justice White

lfp/ss
May 22, 1985

Re: No. 84-351 - Atascadero State Hosp. v. Scanlon

Dear Lewis:

I join.

Regards,

Justice Powell

Copies to the Conference
MEMORANDUM

TO: Annmarie         DATE: June 21, 1985
FROM: Lewis F. Powell, Jr.

84-351 Atascadero State Hospital v. Scanlon

This is a rough memo dictated as I read WJB's 65 typed page dissent delivered to us only today, even though our opinion was circulated five weeks ago. Most of my notes are simply quotes or statements as to what WJB says.

1. WJB says the Court has put the federal judiciary "in the unseemly position of exempting the states from compliance with laws that bind every other legal actor in our nation". P. 1. This is a gross overstatement for which WJB cites no authority.

2. Our decisions make it "difficult, but not impossible, for Congress to create private rights of action against the states". P. 9. And, in fn. 7, the Court "relentlessly" - by application of "its clear statement rule . . . serves no purpose other than obstructing the will of Congress". Annmarie, this could be answered because it is such an extreme statement. We could cite statutes in which Congress made its intention clear, and certainly the opinion of the Court today - if Congress was ever in doubt - reiterates the rule of construction repeatedly announced by the Court.

3. WJB states that our "sovereign immunity doctrine" has various unfortunate results, and is "inconsistent
with the essential function of the federal courts - to pro-
vide a fair and impartial forum for the uniform interpreta-
tion and enforcement of the supreme law of the land". P.
10, 11. We might point out as a general observation with
respect to the dissent that it appears to believe that only
the federal courts can be trusted to enforce the supreme law
of the land. This is a view that wholly rejects the concept
of federalism upon which our government was founded.

4. WJB refers to numerous decisions of this Court
as "unprecedented intrusion on Congress' law making power",
but says he could "tolerate" the decisions if they did not
show such a "lack of respect for precedent". P. 13. It is
the dissent, of course, that would disregard - and in effect
overrule - numerous decisions of the Court going back to
Hans.

We have discussed, Annmarie, that we might make a
short answer to WJB by starting with Hans v. Louisiana and
coming down to date, citing the cases that have sustained
Hans' interpretation of the Eleventh Amendment. And then
make the point that it is more than a little curious that
the dissent should accuse the Court of lack of respect for
precedent in view of the extent to which WJB ignores stare
decisis. If you have not had an opportunity to do so, I
suggest that you ask the Library today to try to give you a
list decisions of this Court that have followed Hans.

5. In Part III (p. 14, et seq.) WJB purports to
examine "new evidence" that indicates the Framers never in-
tended to constitutionalize the doctrine of "state sovereign immunity". The dissent goes on to say there is "no constitutional principle of state sovereign immunity" - despite numerous cases to the contrary. P. 15. The dissent quotes extensively from the ratifying conventions and other contemporaneous sources that we need not try to answer except in very general terms. I note a quote from John Marshall on p. 24 that seems to say that no one would "think that a state will be called to the bar of the federal court." I do not know why this statement from John Marshall was used, but WJB seems to think it supports his view with respect to sovereignty.

6. On p. 27, WJB acknowledges that Madison and Marshall have been cited as supporting an inherent limitation on Article III jurisdiction, citing Edelman, Monaco, and *Hans*.

7. On p. 38, the dissent quotes from the First Judiciary Act. On its face, the quote seems to support us, but I have not read carefully what Brennan says about it.

8. The dissent goes to work *Chisholm v. Georgia*, 2 Dall. 419 (1793). From a hurried reading, the dissent's prolonged discussion seems only to explain how that case resulted in the Eleventh Amendment. (P. 39, et seq.) The Amendment was adopted by vote of 23-2. See p. 44.

9. I do not find, even near the end of the dissent, any explicit call to overrule *Hans*. This, however, is
the purport of the elaborate historical essay. The concluding sentence on p. 65 makes this clear.

* * *

Annmarie: Obviously I have made only a fraction of the comments that come to mind when one reads this essay that is more appropriate for some historical society publication than a Supreme Court decision. In considering what we might say as a minimum, I think we should answer the assertion that our cases frustrate efforts by Congress to make the jurisdiction of this Court clear. We could cite statutes and cases.

Perhaps the most effective response would be a brief one. Perhaps we could start by saying that we have no inclination to accept the dissent's invitation to overrule *Hans* and the long line of decisions that have accepted its construction of the Eleventh Amendment for almost a century. (Cite as many cases here as we can). We might that even if there were time this near the end of our Term to write an historical essay in response to the 55 pages of the dissent's essay, this would serve no useful purpose. The Court has written a *judicial* opinion relying on long-settled precedents. As interesting as a counter historical essay might be in some quarters, we decline to engage in a debate that may be more appropriate in publications devoted to history. We do add that despite the claim of "new evidence", we find none in the dissent that isn't familiar to scholars or that the substance of which has not been recognized in
prior decisions. Justice Brennan's dissent certainly reflects a considerable scholarly effort that we respect, but it does no more than elaborate his long-held view with respect to *Hans* and the Eleventh Amendment - a view the Court consistently rejected. (Cite WJB's prior expressions).

I have not tried to state the foregoing very precisely, but it conveys thoughts that - if they appeal to you - can be refined by some of your skillful writing. With respect to federalism, there may be occasion to cite to *Garcia* and to the statements of Madison and others quoted therein. But as *Garcia* was a dissent, I would not rely on it except where other cases can be cited and *Garcia* can be referred to as "see also".

L.F.P., Jr.
In view of Justice Stevens' dissent, I may add a footnote substantially as follows:

In a dissent expressing his willingness to overrule Edelman as well as the ________ Supreme Court decisions that have followed Hans v. Louisiana, Justice Stevens would "further unravel[] the doctrine of stare decisis" because he views the Court's decision in Pennhurst as "repudiating at least 28 cases". (Cite) In short, Justice Stevens would ignores stare decisis in this case because of the view of a minority of the Court that we ignored it in two prior decisions. This reasoning
would indeed "unravel" a doctrine upon which the rule of law depends.

Annmarie: If you and your co-clerks think this sort of additional footnote is appropriate, I will try it out on Byron White. I would like for you, Annmarie, to fill in citations as well as counting the number of cases that have followed Hans. I would like to put the date of Edelman. And check Edelman, Annmarie, to see whether Justice Stewart joined that. Maybe we could say somewhat that six Justices of the Court including Justice Stewart, who sat in Edelman, have continued to follow Hans.
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* * *

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L.F.P., Jr.
The "new evidence," discovered by the dissent in the Federalism papers and the records of the state ratifying conventions, has been available to historians and Justices of this Court for almost two centuries. Some of it, viewed in isolation, is subject to varying interpretations. But none of the Framers questioned that the Constitution was to create a federal system with some authority expressly granted a federal government and the remainder retained by the several states. The Constitution would never had been ratified if the states
and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself.
June 24, 1985

Re: 84-351 - Atascadero State Hospital v. Scanlon

Dear Bill:

Please join me.

Respectfully,

Justice Brennan

Copies to the Conference
June 25, 1985

Re: 84-351 Atascadero State Hospital & California Department of Mental Health v. Douglas J. Scanlon

Dear Lewis,

You have responded very well to the hefty (and tardy) dissent in this case. Although I may be overly sensitive, it occurs to me you may agree with me that the wording of the last sentence in footnote 2 on page 5 might more properly refer to "judges" of state courts rather than "our brethren." I leave it to you whether to change it because I heartily endorse the thought expressed in the sentence.

Sincerely,

[Signature]

Justice Powell
June 26, 1985

Re: 84-351 - Atascadero State Hospital v. Scanlon

Dear Harry:

Please add my name to your separate dissent too.

Respectfully,

[Signature]

Justice Blackmun

Copies to the Conference
June 25, 1985

No. 84-351

Atascadero State Hospital
v. Scanlon

Dear Harry,

Please join me in your dissenting opinion.

Sincerely,

Bill

Justice Blackmun

Copies to the Conference
June 26, 1985

Re: No. 84-351-Atascadero State Hospital v. Scanlon

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Justice Brennan

cc: The Conference
June 26, 1985

Re: No. 84-351-Atascadero State Hospital v. Scanlon

Dear Harry:

Please join me in your dissent.

Sincerely,

T.M.

Justice Blackmun

cc: The Conference
June 26, 1985

84-351 Atascadero v. Scanlon

Dear John:

Here is a footnote I propose to add to note 3, on page 9 of my opinion in response to your dissent that I did not see until this morning - though I believe a typewritten draft came in yesterday. I enclose a copy of page 9 of my opinion on which I will make two stylistic changes.

Unless you wish to make a further response, the case is ready to come down on Friday.

Sincerely,

Justice Stevens

lfp/ss

cc: The Conference
In light of this principle, we must determine whether Congress, in adopting the Rehabilitation Act, has chosen to override the Eleventh Amendment. Section 504 of the Rehabilitation Act provides in pertinent part:

Justice Brennan's


Petitioners assert that the Rehabilitation Act of 1973 does not represent an exercise of Congress' Fourteenth Amendment authority, but was
ADDASCADEO STATE HOSPITAL V. SCANLON

Add a footnote on p. 9 of the Court opinion as follows:

In a dissent expressing his willingness to overrule Edelman v. Jordan, 415 U.S. 651 (1974), as well as at least sixteen other Supreme Court decisions that have followed Hans v. Louisiana, see supra, JUSTICE STEVENS would "further unravel[] the doctrine of stare decisis," Florida Dept. of Health v. Florida Nursing Homes Assn., 450 U.S. 147, 155 (1981), because he views the Court's decision in Pennhurst as "repudiating at least 28 cases." Post, at __, citing Pennhurst State School & Hospital v. Halderman, 465 U.S. ___ n. 50 (1984) (STEVENS, J., dissenting). We previously have addressed at length his allegation that the decision in Pennhurst overruled precedents of this Court, and decline to do so again here. See Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, ___ nn. 19, 20, & 21 (1984). JUSTICE STEVENS would ignore stare decisis in this case because in the view of a minority of the Court two prior decisions of the Court ignored it. This reasoning would indeed "unravel" a doctrine upon which the rule of law depends.
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June 27, 1985

84-351 Atascadero State Hospital v. Scanlon

This case is here on certiorari to the Court of Appeals for the 9th Circuit. Respondent Scanlon instituted suit against petitioners, Atascadero State Hospital and the California Department of Mental Health, alleging he was denied employment solely because of certain physical handicaps, in violation of Section 504 of the Federal Rehabilitation Act of 1973.

The DC granted summary judgment to petitioners, holding that the suit in federal court against these state institutions was barred by the Eleventh amendment. The Court of Appeals reversed, holding that because the state participated in the programs under the Act, and received federal funds, it had impliedly consented to suit.

We granted this case to resolve a conflict with decisions in two other circuits. We now reverse the Court of Appeals, and agree with the District Court that the Eleventh Amendment prohibits this suit in federal court.

Although the Amendment does not apply when a state has waived its immunity, or when Congress, acting pursuant to the Fourteenth Amendment, abrogates the state's immunity, we find that neither of these requirements has been met.
The language of the Rehabilitation Act does not make clear an intention by Congress to deny state immunity. Nor did Congress condition participation in the funded programs on a state having consented to be sued in federal court.

For these reasons, more fully stated in the opinion of the Court filed today with the Clerk, we conclude that the Eleventh Amendment bars respondent's lawsuit.

Justice Brennan has filed a dissenting opinion in which Justices Marshall, Blackmun and Stevens join. Justice Blackmun also has filed a dissenting opinion in which Justices Brennan, Marshall and Stevens join, and Justice Stevens has filed a separate dissenting opinion.
84-351 Atascadero State Hospital v. Scanlon (Lee)

LFP for the Court 4/1/85
1st draft 4/29/85
2nd draft 5/24/85
3rd draft 6/25/85
Joined by SOC 4/30/85
WHR 5/1/85
BRW will comment or two 5/2/85
CJ 5/22/85

WJB dissenting
1st draft 6/21/85
2nd draft 6/26/85
Joined by JPS 6/24/85
HAB 6/25/85
TM 6/26/85

HAB dissenting
Typed draft 6/25/85
1st printed draft 6/25/85
Joined by WJB 6/25/85
TM 6/26/85
HAB 6/26/85

JPS dissenting
Typed draft 6/25/85
1st draft 6/26/85
JPS will await dissent 4/29/85
WJB will dissent 4/30/85
TM will await dissent
Two copies to Mr. Lind 5/8/85