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STUDENT COMMENT

CONSTITUTIONAL LAW—ABROGATION OF STATE SOVEREIGN IMMUNITY UNDER CERCLA


INTRODUCTION

In Pennsylvania v. Union Gas Co.,¹ the United States Supreme Court held that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA),² permits a private party to sue a state for damages in federal court.³

This case is significant because the eleventh amendment⁴ to the United States Constitution has been construed to grant a state sovereign immunity⁵ from suit by its own citizens in federal court.⁶ Sovereign immunity has barred such a suit even though the amendment’s restriction of judicial power does not explicitly disallow it.⁷

4. 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.
5. The doctrine of sovereign immunity dates back to France in the 1500s. See Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition of Jurisdiction, 35 Stan. L. Rev. 1033, 1064 (1983).
   Sovereign immunity is based on the premise that the King can do no wrong. “The law... ascribes to the King the attribute of sovereignty: he is sovereign and independent within his own dominions; and [he] owes no kind of objection to any other potentate upon earth.” Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 458 (1793) (quoting Sir William Blackstone) (emphasis in original) (citation omitted).
7. In Hans, a citizen of Louisiana sued the state for damages when the state failed to pay a debt owed on a bond held by Hans. Id. at 21. Hans alleged that the state’s refusal to pay violated the state’s constitution, which had a contracts clause ensuring payment on the bond obligation. The Court held that neither article III of the Constitution, nor the Judiciary Act of 1875 giving effect to federal question jurisdiction under article III, allowed Hans to sue Louisiana. The Court reached this
The *Union Gas* Court used a two-part test to determine whether Congress had overridden state sovereign immunity. First, the Court applied a statutory construction analysis to determine whether Congress intended to override states' immunity. Second, the Court looked at whether abrogation of immunity by Congress was constitutionally permissible. Abrogation was permissible only when Congress has constitutional authority to create a cause of action in federal court, and the state has consented to jurisdiction.

In *Union Gas*, the Court held that the language of CERCLA demonstrated an intent to hold states liable for damages in federal court. Despite precedent holding that congressional intent to override immunity must be "unmistakably clear," the Court found clear intent by collectively analyzing four different sections of the statute.

The Court then held that the commerce clause granted Congress the power to enact CERCLA and create a cause of action in federal court that would supersede state sovereign immunity. Finally, the conclusion in spite of the fact that the eleventh amendment did not expressly prohibit such a suit. *Id.* at 21.

With *Hans*, the Court established "judicial sovereign immunity," which may only be abrogated where the state has consented to the suit. *Id.* at 16. This immunity is not grounded in the language of the Constitution, but is lifted from a long history of sovereign immunity in the common law and engrafted upon the eleventh amendment. See *Union Gas*, 109 S. Ct. at 2286 (Stevens, J., concurring); see also Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 684 (1976) (the focus in eleventh amendment cases is not on the eleventh amendment but on the concept of immunity, a concept of which the amendment is but a reminder and exemplification).

9. *Id.* at 2277.
10. *Id.* at 2281.
11. *Id.* at 2284.
12. *Id.* at 2280.
13. Although the rule has fluctuated over time, the prevailing test is announced in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). In *Atascadero*, 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." *Id.* at 242.

15. *Id.* at 2285. The Court cites six Supreme Court cases, none of which have holdings based on the premise for which the Court cites them. The issue of Congress' commerce clause power was only mentioned in the dictum of these cases. See *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 475 (1987) (plurality held that injured seamen could not sue state because Jones Act had no express language showing intent to allow suit); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 252 (state did not waive constitutional immunity on issue of indemnity) (1985); *Green v. Mansour*, 474 U.S. 64, 74 (1985) (suit which had become moot under congressional amendment of AFDC program could not proceed against the state under the Declaratory Judgment Act); *Quern v. Jordan*, 440 U.S. 332, 349 (1979) (notice to plaintiff class about state administrative remedies for recovering...
Court declared that states consented to jurisdiction under CERCLA when they ratified the Constitution containing the commerce clause.\textsuperscript{16}

The \textit{Union Gas} decision did little to clarify eleventh amendment jurisprudence.\textsuperscript{17} However, the Court applied sound reasoning, based on strong policy arguments, to arrive at the right conclusion. CERCLA has been broadly construed to impose liability on private parties, federal and local governments, so states should not escape liability when they are responsible for environmental harm.

\textbf{I. CERCLA}

Congress enacted CERCLA to provide the federal government with authority to clean up old hazardous waste sites.\textsuperscript{18} CERCLA was a controversial statute,\textsuperscript{19} passed by a lame duck Congress in response to the tragic discovery of an abandoned waste dump at Love Canal, New York, and "the discovery of the Valley of Drums in Ken-

\begin{itemize}
\item \textsuperscript{16} \textit{Union Gas}, 109 S. Ct. at 2284.
\item \textsuperscript{17} Justice Scalia criticizes the majority for adding to the clutter, rather than clearing up "the allegedly muddled eleventh amendment jurisprudence." \textit{Id.} at 2305 (Scalia, J., dissenting); \textit{see also} Tribe, \textit{supra} note 7, at 688 (describing the Court's approach to the eleventh amendment as "schizophrenic").
\item \textsuperscript{19} \textsuperscript{CERCLA} "is designed to clean up releases of hazardous substances rather than to regulate the use of products, the emission or discharge of substances, or the disposal of wastes." Strohbehn, \textit{supra}, at 15083. Regulation of the hazardous waste industry is covered by the Solid Waste Disposal Act, commonly known as "RCRA." \textit{See} 42 U.S.C. §§ 6901-6987 (1982 & Supp. V 1987). RCRA is preventative whereas CERCLA is remedial. \textit{See Note, Superfund and California's Implementation: Potential Conflict, 19 CAL. W.L. REV. 373, 376 & n.23 (1983).}
\item \textsuperscript{19} For an extensive discussion of the legislative history of CERCLA, see Grad, \textit{supra} note 18. The bill which became CERCLA was the product of a last minute compromise, drafted by a group of senators, and was not extensively considered by either house of Congress. During Senate consideration of the compromise bill, Senator Baker explained: "This compromise is a fragile thing. . . . [I]t was the subject of extensive negotiations, . . . and it deals with a very difficult subject." 126 CONG. REC. 30,916 (1980); \textit{cf.} United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1111 (D. Minn. 1982) (Senate made last minute amendments removing provisions imposing liability for personal injury); Strohbehn, \textit{supra} note 18, at 15083 (provisions for personal injury joint and several liability removed).
\end{itemize}
tucky.”20 The pressure under which the statute was created and enacted resulted in a fragmented legislative history and a law that lacks clarity.21

Section 111 of the SARA amendments established a fund of 8.5 billion dollars to be used for government cleanup actions.22 Section 105 is entitled the National Contingency Plan (NCP), and requires the President to establish procedures and standards for responding to releases of hazardous substances.23 Section 115 delegates primary responsibility for administration of CERCLA to the Environmental Protection Agency (EPA).24

Under CERCLA, the EPA has three main alternatives for ensuring

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As one commentator has pointed out with respect to the legislative history of CERCLA:

The legislative history of a statute is always important in gathering the legislative intent for its implementation. In the instance of the “Superfund” legislation, a hastily assembled bill and a fragmented legislative history add to the usual difficulty of discerning the full meaning of the law. The legislation that did pass, with all of its inadequacies, was the best that could be done at the time.

Grad, supra note 18, at 2. Another commentator concludes that, as a result of the inadequate drafting, courts are left to develop the standards of liability under CERCLA. See Giblin, Judicial Development of Standards of Liability in Government Enforcement Actions Under the Comprehensive Environmental Response, Compensation and Liability Act, 33 CLEV. ST. L. REV. 1, 3 (1984–85).

22. 42 U.S.C. § 9611(a) (Supp. V 1987). The five year, 8.5 billion dollar fund appropriation replaces the expired 1.6 billion dollar fund established under CERCLA.


Section 105 also requires the President to develop a ranking of priority sites for response and remedial action entitled the National Priorities List (NPL). 42 U.S.C. § 9605(c). NPL is codified at 40 C.F.R. § 300, app. B (1989).

cleanup of hazardous waste dumps. First, the EPA can bring a response action under section 104 and use superfund money to clean up the site. Second, the EPA may bring an abatement action under section 106 when it is determined "that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." Section 106 enforcement actions do not require state cooperation and allow the government to force clean up of sites without expending federal Superfund monies. Finally, under section 122, the EPA can enter into a settlement agreement with the responsible parties in which the responsible parties agree to fund and undertake the clean up action.

A section 104 response action is authorized whenever there is a release or threatened release of a hazardous substance, pollutant, or contaminant into the environment which presents an imminent and substantial danger to the public health or welfare. The response action is designed to remove, or arrange for removal, of the hazardous substance. The federal government cannot bring a response action unless the state in which the release occurs enters into an agreement with the EPA. Under section 104, the state must contract to: (1) assure all future maintenance of the removal and reme-

26. 42 U.S.C. § 9606(a) (1982). The district court in the district where the threat occurs has jurisdiction to grant equitable relief as required to protect the public interest. Id. Only the federal government, and not a state, may seek injunctive relief under section 106. See New York v. Shore Realty Corp., 759 F.2d 1032, 1049-50 (2d Cir. 1985).
29. 42 U.S.C. § 9604(a)(1) (Supp. V 1987). Under the SARA amendments, the EPA may allow the owner or operator of the vessel or facility, or any other responsible party, to fund and carry out the response action. Id. In the legislative history of SARA, the report of the House Energy and Commerce Committee states that the administrator should use private monies whenever possible to conduct actions under section 104. See H.R. Rep. No. 253 (I), supra note 27, at 2837. "Congress must facilitate cleanups of hazardous substances by the responsible parties while assuring a strong EPA oversight role . . . ." Id.
30. H.R. Rep. No. 253 (I), supra note 27, at 2837. Long range remedial action is limited by section 2, subdivision 1 of section 104. Remedial actions are cut off at 12 months or 2 million dollars, whichever comes first, regardless of the state of the environment. Id. at 2899.
dial actions; (2) assure the availability of an acceptable hazardous waste disposal facility; and (3) assure payment of or pay ten percent of the costs of the remedial action.\textsuperscript{32}

When the federal government brings a response action, it may sue any potentially responsible parties (PRPs) under section 107 to recover response costs and damages to replenish the Superfund.\textsuperscript{33} Liability is triggered when there is a release,\textsuperscript{34} or a threatened release,\textsuperscript{35} of a hazardous substance from a facility\textsuperscript{36} causing response

\textsuperscript{32} 42 U.S.C. § 9604(c)(3) (Supp. V 1987). Responsibility for costs of the remedial action may rise to 50 percent of any sums expended if the action is in response to a release from a state owned or operated facility. \textit{id.} § 9604(c)(3)(C)(ii).


Citizens may bring a civil action to enforce the standards imposed under CERCLA. \textit{See} 42 U.S.C. § 9659 (Supp. V 1987). The citizen suit provision is limited to equitable remedies and does not provide a means for recovering response costs or damages. \textit{See id.}

\textsuperscript{34} The term "release" is defined in the statute to include: any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident ... and (D) the normal application of fertilizer. 42 U.S.C. § 9601(22) (Supp. V 1987).

\textsuperscript{35} The term "threatened release" is not defined by the statute.

\textsuperscript{36} The term "facility" is defined in the statute to include: (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel. 42 U.S.C. § 9601(9) (Supp. V 1987).
costs to be incurred. 37 Under section 107, there are four categories of PRPs including: (1) the current owner or operator of the site; 38 (2) any previous owner or operator who owned or operated the site at the time hazardous substances were disposed of; 39 (3) any owner or possessor of hazardous substances who arranged for disposal or treatment of such substances at the site; 40 and (4) any person who transported hazardous substances to the site. 41

CERCLA is silent on the nature of liability imposed under section 107. In United States v. Chem-Dyne Corp., 42 the first court to address the issue held defendants, as the generators and transporters, subject to joint and several liability. 43 The majority of courts have followed, imposing joint and several liability where the harm caused is indivisible. 44

CERCLA has also been interpreted to impose strict liability without regard to fault or willfulness. In United States v. Price, 45 the court held that Congress intended to impose strict liability, subject only to the affirmative defenses in section 107(b). 46 The Price court was con-

38. Id. § 9607(a)(1).
39. Id. § 9607(a)(2).
40. Id. § 9607(a)(3).
41. Id. § 9607(a)(4).
43. Id. at 810. After determining that CERCLA required the development of a uniform federal common law, the court addressed the liability issue. Although Congress deleted references to strict, joint, and several liability from the final bill (in order to avoid universal application to inappropriate circumstances), the court looked to the legislative history to determine that common law principles should apply. Relying on the RESTATEMENT (SECOND) OF TORTS § 875 (1979), the court stated that when two or more persons cause a single, indivisible harm, each is subject to liability for the entire harm. Chem-Dyne, 572 F. Supp. at 810.

In United States v. A & F Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984), however, the court stated that a rigid application of joint and several liability is “inappropriate” because “joint and several liability is extremely harsh and unfair if it is imposed on a defendant who contributed only a small amount of waste to a site.” Id. at 1256; see also United States v. Stringfellow, 14 Envtl. L. Rep. (Envtl. L. Inst.) 20385, 20387 (C.D. Cal. Apr. 5, 1984) (supporting A & F Materials and the adoption of a flexible approach to the apportionment of liability when two or more persons cause a single or distinct harm, as opposed to a single indivisible harm).
46. Id. at 1113–14. The three affirmative defenses listed in section 107(b) include: (1) an act of God; (2) an act of war; (3) an act or omission by a third party. To claim the third party defense requires that there be no contractual relationship be-
cerned that a less stringent standard would not be in conjunction with "the legislative aims of CERCLA which include goals such as cost-spreading and assurance that responsible parties bear their cost of the clean up." The legislative history of the SARA amendments confirms that Congress intended a strict, joint and several liability standard.

The section 107 liability provision is sweeping and has been interpreted broadly to include remote parties with little or no connection to the resulting environmental harm. In *New York v. Shore Realty Corp.*, the court held that under section 107(a)(1), current owners or operators are liable regardless of whether they caused or contributed to the release or threatened release. In another case, current owners or operators were held to include a lender who foreclosed on a mortgage held on a garbage dump which had been declared a hazardous waste facility.

between the third party and the defendant, or that the defendant exercised due care, taking precautions against foreseeable acts or omissions by the third party. 42 U.S.C. § 9607(b) (1982).

47. Price, 577 F. Supp. at 1114; see also Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572 (5th Cir. 1988) (imposing strict liability on current owners of facility which releases or threatens to release a hazardous substance); New York v. Shore Realty Corp., 759 F.2d 1032, 1044-45 (2d Cir. 1985) (finding defendants strictly liable, without causation, to avoid opening a loophole in CERCLA's coverage).


50. 759 F.2d 1032 (2d Cir. 1985).

51. *Id.* at 1044. To require causation would open "a huge loophole" in CERCLA's coverage since new purchasers of hazardous waste facilities who did not cause the dumping would not be liable. *Id.* at 1045. This result would frustrate the goals of the statute since those who actually caused the harm are frequently impossible to find. *Id.*

In *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, a real estate developer who built on top of creosote pools left by the previous owner was held liable as a previous owner under section 107(a)(2). Relying on an expansive interpretation of "disposal," the Fifth Circuit held that movement and dispersement of the land by the developer constituted a "disposal." In *United States v. Monsanto Co.*, the Fourth Circuit held that two individuals who previously owned the site, but leased it to others who did the dumping, were liable. The court stated that "the statute does not sanction such willful or negligent blindness on the part of absentee owners." In *United States v. Wade*, a federal district court held that only a minimal nexus between the defendant generator and the site was required. The court stated a sufficient nexus is established where it is proved "that a defendant's waste was disposed of at a site and that the substances that make the defendant's waste hazardous are also present at the site." The court emphasized that the release of a hazardous substance "which results in the incurrence of response costs and liability need only be of 'a' hazardous substance and not necessarily one contained in the defendant's waste." In addition, a "possessor or owner" under section 107(a)(3) need not be a generator. In *United States v. Northeastern Pharmaceutical & Chemical Co.*, a corporate vice president, who was also the plant supervisor, was held personally liable because he arranged for the disposal of hazardous substances on behalf of the company. Possession of a hazardous substance is equated with control over the substance, and a person need not own, see or touch the substance to be liable. Northeastern Pharmaceutical and the other cases demonstrate...
strate the great extent of liability imposed on private parties by CERCLA.

Both the federal and local governments are also liable for cleanup costs under CERCLA. In *Artesian Water Co. v. Government of New Castle County*, a political subdivision of Delaware was found liable for response costs under section 107. CERCLA was interpreted as pre-empting any state law tort immunity provided to the county. Also, CERCLA’s definition of person was found to clearly encompass local governments.

Section 120 of CERCLA also holds every department, agency and instrumentality of the United States subject to compliance with CERCLA. The federal government is subject to liability under section 107 in the same manner and to the same extent as any nongovernmental entity.

In deciding *Pennsylvania v. Union Gas Co.*, the United States Supreme Court expanded the already large category of potentially responsible parties to include state governments. Like the federal and local governments, states may now be sued for damages by private parties in federal court under section 107.

II. ELEVENTH AMENDMENT

Beginning with *Hans v. Louisiana* in 1890, the Supreme Court has struggled over the meaning of the eleventh amendment. Notwith-
standing the plain words of the amendment, it is generally interpreted to provide that states may not be sued by one of their own citizens in federal court.\footnote{72}

The clutter of eleventh amendment jurisprudence results from the difficulty of an analysis that must proceed on several levels. First, federalism creates a tension between the federal and state governments the Court must balance.\footnote{73} Second, separation of powers involves the conflict between Congress' ability to regulate an area and the corresponding ability of the judiciary to adjudicate it.\footnote{74} Finally, the Court struggles over whether the Constitution means what it says, or whether the meaning expands with the spirit of the text.\footnote{75} Legal fictions have only added to the confusion.\footnote{76}

\footnote{72. See \textit{Hans}, 134 U.S. at 14–16.}
\footnote{73. See \textit{Pennsylvania v. Union Gas}, 109 S. Ct. 2273, 2287 (1989) (Stevens, J., concurring) (expansion of state immunity under eleventh amendment is based not on the amendment, but on prudential concerns for federalism).}
\footnote{74. See \textit{Parden v. Terminal Ry.}, 377 U.S. 184, 190 (1964) (states are liable under \textit{FELA}, in part, because otherwise the Act would give employees a remedy without an effective means of enforcement), \textit{overruled in part}, \textit{Welch v. Texas Dep't of Highways & Pub. Transp.}, 483 U.S. 468 (1987) (plurality decision).}
\footnote{75. See, e.g., \textit{Atascadero State Hosp. v. Scanlon}, 473 U.S. 234, 289 (1985) (Brennan, J., dissenting) (neither the original Constitution, nor the eleventh amendment established a principle of sovereign immunity as a limit on the federal judicial power); \textit{Monaco v. Mississippi}, 292 U.S. 313, 322 (1934) (a literal application of article III and the eleventh amendment is inappropriate because "[b]ehind the words of the constitutional provisions are postulates which limit and control").}
\footnote{76. In \textit{Ex Parte Young}, 209 U.S. 123 (1908), the Court developed the fiction that a suit against a state officer for enforcing an unconstitutional state law was not a suit against the state. \textit{Id.} at 159. The Court reasoned that because the state official acted illegally in violation of the Constitution, the official was stripped of his official representative character and was "subjected in his person to the consequences of his individual conduct." \textit{Id.} at 159–60. The Court confounded this fiction in \textit{Edelman v. Jordan}, 415 U.S. 651 (1974). In \textit{Edelman}, the Court held that the eleventh amendment barred retroactive relief for past violations of federal regulations under a federal-state aid program. \textit{Id.} at 678. The Court distinguished \textit{Young}, reasoning that the award in this case would be a form of compensation, paid out of state funds and "in practical effect [was] indistinguishable in many aspects from an award of damages against the State." \textit{Id.} at 668. The Court later held in \textit{Quern v. Jordan}, 440 U.S. 332 (1979), that a federal court could issue an order requiring state officials to send an explanatory notice to plaintiffs advising them of state administrative procedures for recovering welfare benefits. \textit{Id.} at 347–48. In \textit{Green v. Mansour}, 474 U.S. 64 (1985), the Court distinguished \textit{Quern} stating that the notice relief in that case did not bind state officials in any way because it was ancillary to the injunctive prospective relief allowed in \textit{Quern}. \textit{Id.} at 71. Petitioners in \textit{Green} were seeking an injunction, a declaratory judgment and notice relief, claiming that the method of calculating earned income to determine benefits under the Federal Aid to Families With Dependent Children (AFDC) program used by the Michi-}
The eleventh amendment to the United States Constitution provides:

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. 77

The amendment was enacted to limit the federal judicial power granted under article III. 78 Article III describes the jurisdiction of the federal judicial power and, in pertinent part, provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. 79

In *Chisholm v. Georgia,* 80 the Court held that the state-citizen diversity clause of article III gave the Court jurisdiction to hear a suit by a citizen of South Carolina against the state of Georgia. 81 The Court awarded a damage judgment against Georgia, allowing the South Carolina citizen to recover on a revolutionary war debt. 82

States were alarmed by the *Chisholm* decision. Most states had incurred large debts during the Revolutionary War, and feared suits similar to *Chisholm.* 83 The decision prompted swift enactment of the

gan Director of Social Services violated federal law. *Id.* at 66. While the claim was pending, Congress amended the statute rendering the claims moot. *See id.* The Court proceeded anyway and determined that the eleventh amendment barred notice relief because it can only be awarded as an ancillary form of relief to an injunction. Since there was "no continuing violation of federal law to enjoin," notice relief was unavailable. *Id.* at 71. The Court also denied a declaratory judgment for allegedly unlawful past actions of the state because the judgment could be used as res judicata in state court and would then serve to operate as a damage award against the state—a result barred by the eleventh amendment. *Id.* at 73.

In *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89 (1984), the Court limited *Young* to violations of federal law. The Court held that it need not decide eleventh amendment issues "when a plaintiff alleges that a state official has violated state law." *Id.* at 106 (emphasis in original). Reasoning that *Young* protected the federal interest, the Court stated that "[a] federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law." *Id.*

77. U.S. CONST. amend. XI.
78. See Tribe, *supra* note 7, at 684.
80. 2 U.S. (2 Dall.) 419 (1793).
81. *Id.* at 450–51.
82. *Id.* at 479–80.
83. See *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 406 (1821) (states originally objected to the adoption of the Constitution because of their great indebtedness and fear that these debts might be prosecuted in federal courts).
eleventh amendment, thereby overruling *Chisholm*.\(^{84}\) By ratifying the eleventh amendment, the states were protected from suit by citizens of other states.\(^{85}\) While the amendment only prohibits suits against a state by citizens of another state, or by citizens of a foreign state, the Supreme Court has expanded the jurisdictional prohibition to bar suits against a state by the state’s own citizens, and to bar suits against a state by a foreign state.

Although not expressly forbidden by the eleventh amendment, the Court held in *Hans v. Louisiana*\(^{86}\) "that a Louisiana citizen could not sue Louisiana in federal court for failing to pay off state bonds in violation of the federal contracts clause."\(^{87}\) In so deciding, the Court established the judicial doctrine of sovereign immunity which is "exemplified"\(^{88}\) in the eleventh amendment.\(^{89}\)

If the *Hans* Court had not extended immunity to Louisiana, in-state citizens would have been able to sue under the article III "arising under" jurisdictional clause, while such suits by out-of-state residents would be barred by the eleventh amendment.\(^{90}\) Such a literal reading of the eleventh amendment would have the absurd result of treating in-state and out-of-state residents differently.\(^{91}\) Therefore, the Court concluded that a comprehensive sovereign immunity was

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\(^{84}\) See *Fletcher*, supra note 5, at 1058–59.

\(^{85}\) One commentator reads the eleventh amendment as a method used to narrow the affirmative grant of citizen-state jurisdiction in article III, rather than a method to prohibit federal courts from exercising jurisdiction in such cases. See *id.* at 1038. The argument of this "diversity theory" is that federal question jurisdiction may be exercised where a state is sued by a citizen of another state, even though the language of the eleventh amendment apparently prohibits it. *Id.*

\(^{86}\) 134 U.S. 1 (1890).

\(^{87}\) *Fletcher*, supra note 5, at 1039; see *Hans*, 134 U.S. at 21.

\(^{88}\) See *Ex parte New York*, 256 U.S. 490 (1921). "[T]he Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given[;] ... not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification." *Id.* at 497.

\(^{89}\) The Court did not want a repeat of *Chisholm*. Consequently, it used a historical approach to extend the eleventh amendment’s jurisdictional bar. The Court stated, "’It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. ... Unless ... there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal.’" *Hans*, 134 U.S. at 13 (quoting *The Federalist* No. 81 (A. Hamilton)) (emphasis in original).

Another historical approach is that article III never removed state sovereign immunity, and that the eleventh amendment simply restores the original understanding of article III. See *Baker*, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 159, 144 (1977). It is ironic that the same language from *The Federalist* No. 81 (A. Hamilton), used to establish judicial sovereign immunity in *Hans*, is invoked in *Union Gas* as one rationale for revoking a state’s immunity under the plenary power of the commerce clause. See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2284 (1989).

\(^{90}\) See *Marshall*, supra note 71, at 1352.

\(^{91}\) *Hans*, 134 U.S. at 15.
an understood element of the eleventh amendment.92

State sovereign immunity was expanded even further in Monaco v. Mississippi.93 In Monaco, the Court held that Mississippi could not be sued by Monaco, a principality of Paris, France. Monaco sought to recover payment on a state bond issued by Mississippi in 1883.94

Monaco emphasized that neither the positive grants of jurisdiction under article III, nor the literal restrictions of the eleventh amendment completely define when a state can be sued.95 The Court stated: "Behind the words of the constitutional provisions are postulates which limit and control."96 In Monaco, the postulate was that states retained their sovereignty unless they consented to suit.97

Monaco recognized that in certain cases, states surrendered their immunity "'in the plan of the convention.'"98 Disputes between two states, or between the United States and a state are within the jurisdiction of the Supreme Court because the defendant state has consented in the plan of the convention.99 The Court reasoned that the constitutional plan provided the means for judicial settlement of certain cases in order to maintain the union.100 However, the Court reasoned that since a foreign state lies outside the union, federalist concerns did not apply, and no surrender of immunity could be inferred in favor of a foreign state.101

Both in Hans and Monaco the Court declared that states could consent to suit in federal court.102 Both cases also concluded that consent was necessary unless a state had already surrendered immunity in the plan of the convention.103

In Parden v. Terminal Railway,104 the Court confounded the consent theory by holding that a waiver could be implied from the conduct of

92. Id. at 16.
93. 292 U.S. 313 (1934).
94. Id. at 330.
95. See id. at 321.
96. Id. at 322.
97. Id. 322–23.
98. Id. (quoting The Federalist No. 81 (A. Hamilton)).
99. Id. at 328–29.
100. Id.
101. Id. at 330.
102. Id. at 322–23 (stating that the requirement of consent to be sued is necessarily implied in the eleventh amendment); Hans v. Louisiana, 134 U.S. 1, 20 (1890) (states cannot be made the subject of judicial cognizance unless the state consents to be sued or initiates the action).
103. The Court in both cases supported this conclusion by referring to The Federalist No. 81 (A. Hamilton). Monaco, 292 U.S. at 324; Hans, 134 U.S. at 13. For the portion of the text referred to by the Court in each case, see supra note 89.
The Court held that Alabama entered interstate commerce by operating a railroad and consequently waived its immunity under the eleventh amendment. The state thereby consented to a suit by an injured employee who sought damages under the Federal Employers Liability Act (FELA).

Parden also addressed the ability of Congress to override state sovereignty when legislating pursuant to the commerce clause. The Court stated in Parden that by empowering Congress to regulate commerce, the state surrendered their immunity from liability under FELA. However, the Court concluded that recognition of this congressional power alone was not enough to override immunity, rendering the assertion dicta. The Court held that a state must still consent to jurisdiction, in addition to any surrender of immunity in the constitutional plan.

Parden could be construed as holding that immunity is abrogated where Congress legislates pursuant to the commerce clause, but it is commonly understood to represent the implied waiver theory of consent. One of the major factors controlling the decision in Parden was state accountability. Underlying the theories of congressional abrogation and implied waiver was the fact that if the injured plaintiff was not allowed to sue the state, FELA's remedies were meaningless. The necessity of upholding comprehensive federal regulations outweighed state sovereign immunity, although only temporarily.


105. Parden, 377 U.S. at 192.
106. Id. at 196-97.
107. Id. at 192.
108. See id. at 191.
109. Id.
110. Id. at 192.
111. Id. This assertion by the Court is contrary to the historical analysis of Monaco and Hans, which required either state consent, or a surrender of immunity in the plan of the convention, but not both. See supra note 103 and accompanying text.
113. If the plaintiff was not allowed to sue the state, there would be no means by which liability could be enforced. Parden, 377 U.S. at 197. The Court reasoned that states were entering spheres normally occupied by private parties and corporations. As a result, allowing them to escape regulation "would bear the seeds of a substantial impediment to the efficient working of our federalism." Id. at 197.
114. Id. at 196.
ment of Public Health and Welfare. In *Employees*, employees of a Missouri state mental hospital sued the state under the Fair Labor Standards Act (FLSA) for overtime compensation, liquidated damages, and attorney's fees. The Court found that the FLSA definition of employer explicitly included state-run mental hospitals. However, the Court reasoned that state hospitals were not for profit and not proprietary like the railroad run by Alabama in *Parden*. The Court concluded that neither the inclusion of state hospitals in the definition of employer, nor the inference that commerce clause power swept away the state's immunity, was enough to impose liability under FLSA.

Unlike the *Parden* analysis, state accountability was one factor that prevented the Court in *Employees* from imposing state liability. A holding for the plaintiff would mean that a myriad of state government employees could sue the state. These suits would, in effect, impose a pervasive scheme of federal regulation directly affecting state treasuries. The Court refused to reach such a result without clear language from Congress that state immunity had been abrogated.

The clear language rule was reaffirmed in *Atascadero State Hospital v. Scanlon*, where the Court enunciated 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." The handicapped respondent in *Atascadero* claimed that the state discriminated against him by denying him employment at a state hospital. The Court found no clear statement in the federal Rehabilitation Act removing state immunity and de-

115. 411 U.S. 279, 296 (1973) (Marshall, J., concurring) ("[T]he concept cannot be stretched sufficiently further to encompass this case.").
116. *Id.* at 281.
117. *Id.* at 283.
118. *Id.* at 284.
119. *Id.* at 285.
120. The Court pointed out that *Parden* involved a rather isolated state activity, while the activity involved in *Employees* pervasively affected the hierarchy of a state government. *Id.*
121. *Id.* at 284–85.
122. *Id.* at 285. From a policy standpoint it is important to note that unlike the plaintiff in *Parden*, the plaintiffs in *Employees* could still get relief by having the Secretary of Labor bring an action against the state. *Id.* at 285–86. Sovereign immunity does not prohibit suits against the states by the United States. See *United States v. Mississippi*, 380 U.S. 128, 140–41 (1965).
123. *Id.* at 285.
125. *Id.* at 242.
126. *Id.* at 236.
nied relief.127 Expressing concern for the balance of powers, the Court in Atascadero reasoned it should not take an expansive view of its own jurisdiction unless the "clearest indications" existed that Congress had expanded the Court's power.128

In Welch v. Texas Department of Highways and Public Transportation,129 the Court declined an invitation to overrule Hans, and instead reaffirmed eleventh amendment sovereign immunity.130 A plurality of the Court partially overruled Parden.131 The Court stated that abrogation of sovereign immunity could not be inferred solely from Congress' powers under the commerce clause, an assertion made by the Parden Court in dicta.132 The Welch Court reiterated that Congress must express in unmistakably clear language that immunity is overruled.133

The test of unmistakable clarity required by Employees, Atascadero, and Welch, allows the Court to implicitly balance state interests against sweeping congressional power to regulate states under the commerce clause.134 In contrast, Congress' power to abrogate state immunity under the fourteenth amendment is not subject to a clear statement test by the Court.

127. Id. at 247. The Rehabilitation Act of 1973 provides that qualified handicapped individuals will not be excluded from, denied benefits in, or be discriminated against under any program receiving federal assistance. See 29 U.S.C. § 794 (1988).

128. Atascadero, 473 U.S. at 243. This is so even though it is the duty of the Court "'to say what the law is.'" Id. (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

One commentator uses Marbury's principles to attack the congressional abrogation theory of sovereign immunity. See Marshall, supra note 71, at 1348. The congressional abrogation theory asserts that since the eleventh amendment restricts only the "judicial power," it does not by itself restrict Congress' authority to expand the jurisdiction of the Court. Marshall argues that Marbury does restrict Congress' ability to expand the Court's jurisdiction. Id. This conclusion follows from the fact that the Judiciary Act of 1789 struck down by the Court in Marbury was an explicit expansion by Congress of a constitutionally limited grant of original jurisdiction in article III, § 2, cl. 2. Id.

In his concurrence in Union Gas, Justice Stevens draws the clear distinction between congressional abrogation of judicially created sovereign immunity, and congressional abrogation of sovereign immunity constraints explicit in the eleventh amendment. He makes it clear that the former is permissible under Marbury, whereas the latter is not. Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2286 (1989) (Stevens, J., concurring). Congress may never overrule a constitutional provision. Id. 129. 483 U.S. 468 (1987).

130. See id. at 495–96 (Scalia, J., concurring).

131. Id. at 478.

132. Id.

133. Id.

134. See Baker, supra note 89, at 187 ("a balancing of state and national interests underlies the clear statement requirement" and affects how clear the congressional statement must be).
In *Fitzpatrick v. Bitzer*, eleventh amendment sovereign immunity bowed to Congress’ plenary power to legislate as a means of enforcing the substantive guarantees of the fourteenth amendment. The Court based its decision in *Fitzpatrick* on the fact that the fourteenth amendment was specifically designed to limit state authority.

The Court held that the eleventh amendment did not bar citizens of Connecticut from suing their state to recover a back pay award withheld due to sex discrimination in a retirement benefits plan. The suit was brought under Title VII of the Civil Rights Act. Since the definition of “person” under Title VII includes governments, governmental agencies, and political subdivisions, the Court found that Congress intended to bring states within the purview of the statute. The Court in *Fitzpatrick* did not require Congress to demonstrate an unmistakable clarity to override state immunity, as it had previously required in commerce clause cases.

In *Pennsylvania v. Union Gas Co.*, the Court relied on *Fitzpatrick* and drew an analogy between Congress’ plenary authority under the article I commerce clause and Congress’ plenary authority under the fourteenth amendment. The Court then found the clear intent necessary to override state immunity, and thereby rendered states liable to suit in federal court under CERCLA.

### III. *Pennsylvania v. Union Gas Co.*

In *Union Gas*, predecessors of Union Gas had operated a coal gasification plant near Brodhead Creek in Stroudsburg, Pennsylvania,
for about fifty years. Several years after the plant closed, the state acquired easements and performed excavations to control flooding along the creek. While excavating the state struck a large deposit of coal tar, causing the tar to begin "to seep into the creek." The EPA "determined that the tar was a hazardous substance and declared the site the nation's first emergency Superfund site." Both the state and federal government cleaned up the site, with the federal government reimbursing the state $720,000 for cleanup costs.

The United States sued Union Gas under sections 104 and 106 of CERCLA. In response, "Union Gas filed a third-party complaint against Pennsylvania, asserting that the State was responsible for at least a portion of the costs because it was an 'owner or operator' of the hazardous-waste site . . . ." The district court dismissed the complaint finding a suit against the state was barred by the eleventh amendment. The United States Court of Appeals for the Third Circuit affirmed, "finding no clear expression of congressional intent to hold States liable in monetary damages under CERCLA." The Supreme Court granted certiorari, and while the case was pending, Congress amended CERCLA by passing the SARA amendments. As a result, the Court vacated the decision of the Third Circuit and remanded the case for reconsideration in light of the SARA amendments. On remand, the Third Circuit held that states were liable for damages under CERCLA, the eleventh amendment not barring suit.

On appeal, the Supreme Court held that CERCLA, as amended by SARA, expresses a clear intent to hold states liable for damages in federal court. The Court also held that Congress was acting

144. Id. at 2276.
145. Id.
146. Id. (The plant had been dismantled about 1950.).
147. Id.
148. Id. at 2277. Union Gas also claimed in its third party complaint that the state was responsible "because its flood-control efforts had negligently caused or contributed to the release of the coal tar into the creek." Id.
149. Id.
150. Id. See generally Note, Congressional Abrogation of the Eleventh Amendment—States Are Not Subject to Suits in Federal Court Brought by Private Parties Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 32 VILL. L. REV. 769 (1987) (analysis of case below criticizing the Third Circuit Court of Appeal's mechanical application of the Employees and Atascadero rules).
151. Union Gas, 109 S. Ct. at 2277.
152. Id.
154. Union Gas, 109 S. Ct. at 2280. The case was a plurality decision. Justice Scalia wrote a separate opinion concurring on the issue of congressional intent, but dissenting from the holding of the plurality on Congress' ability to abrogate the im-
within its authority “when legislating pursuant to the Commerce Clause” to hold states so liable.\textsuperscript{155}

Justice Brennan used a five-part analysis of four different sections of the statute to hold that CERCLA, as amended by SARA, shows an unmistakably clear intent to hold states liable. First, “‘[s]tates’ are explicitly included within the statute’s definition of ‘persons.’” \textsuperscript{156} The liability provision of the statute applies to “owners or operators” and “persons.” \textsuperscript{157} An “owner or operator” “is defined by reference to certain activities that a ‘person’ may undertake.” \textsuperscript{158}

\textsuperscript{155} Id. at 2286. On this portion of the plurality decision, Justice Stevens wrote a concurrence to clarify his opinion that Congress could only abrogate the judicially created eleventh amendment immunity represented in \textit{Hans}. \textit{Id.} (Stevens, J., concurring). Justice Stevens stressed that Congress could never use its powers under the commerce clause to expand the Court’s jurisdiction in violation of the plain language of the eleventh amendment, because “[a] statute cannot amend the Constitution.” \textit{Id.} Justice White also wrote a separate concurrence agreeing that Congress can abrogate a state’s immunity, but disagreeing with Justice Brennan’s reasoning. \textit{Id.} at 2289 (White, J., concurring).


\textsuperscript{157} \textit{Union Gas}, 109 S. Ct. at 2277 (citing 42 U.S.C. § 9607(a) (1982 & Supp. IV 1986) (current version in Supp. V 1987)). Specifically, the statute provides for the liability of the following persons:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incidence of response costs, of a hazardous substance, shall be liable . . . .


\textsuperscript{158} \textit{Union Gas}, 109 S. Ct. at 2277 (citing 42 U.S.C. § 9601(20)(A) (1982 & Supp. IV 1986) (current version in Supp. V 1987)). With an exception for persons merely holding security interests, the statute defines an “owner or operator” to include:

(i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand.

Hence, a state would be liable in any circumstance in which it were an owner or operator, as long as not expressly excluded.\cite{159}

Second, the SARA amendments included section 101(20)(D), a new provision excluding states from liability when they have acquired ownership or control of property involuntarily.\cite{160} However, the exclusion is limited and does not apply if a state "has caused or contributed to the release or threatened release of a hazardous substance from the facility."\cite{161} In such a case, a state is subject to liability under section 107 in the same manner, and to the same extent, as other parties.\cite{162} The Court reasoned that it would be unnecessary to exclude a state from liability unless Congress intended to hold states liable in the first place.\cite{163}

Third, the Court compared the exclusion language of section 101(20)(D) to the language of section 120(a)(1) which waives the federal government's immunity from damage suits under CERCLA.\cite{164} Finding the language identical, the Court concluded that section 101(20)(D) was one indication that Congress "intended to override the States' immunity from suit."\cite{165}

Fourth, the Court looked to another exclusion provision, section 107(d)(2), which exempts states from liability for responding to an emergency at a facility owned by another person.\cite{166} However, sec-

\begin{verbatim}
159. Union Gas, 109 S. Ct. at 2278.
160. Id. at 2277 (citing 42 U.S.C. § 9601(20)(D) (1982 & Supp. IV 1986) (current version in Supp. V 1987)). Specifically, the statute provides that "[t]he 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." 42 U.S.C. § 9601(20)(D) (Supp. V 1987).
161. Union Gas, 109 S. Ct. at 2277-78 (quoting 42 U.S.C. § 9601(20)(D)).
162. Id. at 2278.
163. Id.
164. Id. at 2279. Section 120(a)(1) provides:
Each 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 section 9607 of this title.
165. Union Gas, 109 S. Ct. at 2279.
No State or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.
\end{verbatim}
tion 107(d)(2) does impose liability on a state in emergency situations if damages are the result of the state's gross negligence or intentional misconduct. The Court saw this exclusion to the exclusion as "an explicit recognition of the potential liability of States under this statute." The Court turned to the citizen suit provision of the statute which provides that suits may be brought against a state only "to the extent permitted by the eleventh amendment." The Court discerned from this provision that "reservation of States' rights under the Eleventh Amendment would be unnecessary if Congress had not elsewhere in the statute overridden the States' immunity from suit."

Collectively, the Court held that the language of the statute "clearly evinces an intent to hold States liable in damages in federal court." The Court then determined that Congress had not exceeded its powers under the Constitution by holding states liable under CERCLA because the plenary authority of the commerce clause grants Congress the power to override state immunity.

In Union Gas, support for the congressional abrogation theory is drawn first from dicta in the Parden and Employees decisions. Both cases stated, without so holding, that states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce. As a result, the Court stated in Union Gas that "our decisions mark a trail unmistakably leading to the conclusion that Congress may permit suits against the States for money damages." In all,

167. Union Gas, 109 S. Ct. at 2278; see supra note 166.
168. Id. at 2278.

any person may commence a civil action on his own behalf—

(1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter . . . .

170. Id. at 2280.
171. Id. at 2286.
172. See id. at 2281.
173. See supra notes 104–19 and accompanying text.
174. Id. at 2281.
175. Union Gas, 109 S. Ct. at 2281.
176. See id. Specifically, the Court stated that "it is no accident . . . that every Court of Appeals have reached this issue has concluded that Congress has the
five circuits had previously reached the conclusion that Congress has the authority to override states' immunity when legislating under plenary grants of authority. The Court also relied on Fitzpatrick v. Bitzer, drawing an analogy between the plenary grant of authority in section five of the fourteenth amendment, and the plenary grant of authority under the commerce clause.

In Fitzpatrick, the abrogation of state immunity was based on the fourteenth amendment which, unlike the commerce clause, was enacted to limit state authority. However, the Court in Union Gas emphasized that both grants expand federal power and contract state power in the same manner. A plenary grant of authority is absolute and unqualified, so the Court refused to view the grant of authority under the fourteenth amendment as somehow "ultraplenary."

In order to find congressional abrogation of state immunity under CERCLA constitutional, the Court had to meet the additional requirement that the state had somehow consented to suit. The Court did so by reasoning that states had consented to suit through ratification of the Constitution containing the commerce clause. In doing so, states gave Congress authority to regulate commerce, and to render them liable for damages in federal court. The analysis of the Union Gas Court is a return to the theories enunciated in Monaco and

authority to abrogate States' immunity from suit when legislating pursuant to the plenary powers granted by the Constitution." Id.

177. See United States v. Union Gas Co., 832 F.2d 1343, 1357 (3d Cir. 1987) (sufficient evidence in the SARA amendments to manifest Congress' intent to abrogate sovereign immunity under the commerce clause), aff'd sub nom. Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989); In re McVey Trucking, Inc., 812 F.2d 311, 327-28 (7th Cir. 1987) (Congress has power to create a damages action against states in federal court pursuant to its plenary power under the commerce clause to regulate bankruptcies), cert. denied, 484 U.S. 895 (1987); County of Monroe v. Florida, 678 F.2d 1124, 1133 (2d Cir. 1982) (sovereign immunity overridden by Federal Extradition Act enacted by Congress pursuant to plenary powers granted under article IV), cert. denied, 459 U.S. 1104 (1983); Peel v. Florida Dep't of Transp., 600 F.2d 1070, 1081 (5th Cir. 1979) (Veterans Reemployment Rights Act, passed pursuant to the article I war power of Congress, is not barred by the eleventh amendment); Mills Music, Inc. v. Arizona, 591 F.2d 1278, 1285 (9th Cir. 1979) (language used by Congress acting under copyright and patent clause demonstrates clear intent to override state sovereign immunity).


179. Union Gas, 109 S. Ct. at 2282.

180. See Fitzpatrick v. Bitzer, 427 U.S. 445, 448 (1976); see supra notes 135–42 and accompanying text.


182. "Plenary" is defined as: "full, entire, complete, absolute, perfect, unqualified." Black's Law Dictionary 1038 (5th ed. 1979).

183. Union Gas, 109 S. Ct. at 2282.

184. Id. at 2284.
Hans.\textsuperscript{185} The Court stressed the often preemptive nature of the commerce clause power on state authority to regulate.\textsuperscript{186} If states are prohibited from regulating in certain areas, then precluding congressional action would leave those areas unregulated.\textsuperscript{187} Environmental regulation under CERCLA squarely presented this problem. If Congress was precluded from creating a federal damages action against states by private parties, states would escape liability for damages owed to private parties.\textsuperscript{188} Essentially, CERCLA would give private parties the right to recover cleanup costs without any cause of action to obtain the remedy.

The Court reasoned that forcing states to pay damages to private parties would meet two of the important goals of CERCLA.\textsuperscript{189} First, CERCLA was intended to hold "everyone" who is responsible for hazardous waste contamination liable for cleanup costs.\textsuperscript{190} Including states as parties merely carried out CERCLA's comprehensive scheme.

Second, CERCLA encourages voluntary cleanups by allowing private parties to recover cleanup costs under the liability provisions.\textsuperscript{191} Every voluntary cleanup preserves limited Superfund dollars.\textsuperscript{192} Allowing private parties to sue states for cleanup costs makes it more likely that private parties will perform voluntary cleanups at state facilities. Because state facilities comprise a significant class of owners and operators, the Court concluded that a private damages action against the states was necessary.\textsuperscript{193}

Union Gas provided a clear opportunity for the Court to establish a theory of congressional abrogation of state sovereign immunity. However, Justice Stevens made it clear in his concurring opinion that Congress' plenary power to subject states to suit in federal court only applies to override judicially created sovereign immunity.\textsuperscript{194}

\textsuperscript{185} The Court cites Monaco for the proposition that consent by states to congressional authority under the Constitution was a surrender of immunity in the plan of the convention. \textit{Id.}; see \textit{supra} note 114 and accompanying text.

\textsuperscript{186} \textit{Union Gas}, 109 S. Ct. at 2284. Preemption displaces state authority even where Congress has not acted.

\textsuperscript{187} \textit{Id.}

\textsuperscript{188} \textit{Id.}

\textsuperscript{189} \textit{Id.} at 2285.

\textsuperscript{190} \textit{Id.} (emphasis in original).

\textsuperscript{191} \textit{Id.} Section 104(a) gives EPA authority to use Superfund dollars to cleanup a facility, but also allows an owner/operator or other responsible party to undertake the response action. Private parties may then recover costs under section 107. See \textit{supra} note 29 and accompanying text.

\textsuperscript{192} See Lyons, \textit{supra} note 49, at 281 & n.41 (EPA estimates cost to clean up NPL sites for the federal government will be between $11.7 to $22.7 billion).

\textsuperscript{193} \textit{Union Gas}, 109 S. Ct. at 2285.

\textsuperscript{194} \textit{Id.} at 2286 (Stevens, J., concurring).
Justice Stevens emphasized that Congress cannot override the sovereign immunity explicitly provided for in the eleventh amendment because “[a] statute cannot amend the Constitution.”

Justice White disagreed with the plurality conclusion that CERCLA expresses an unmistakably clear intent to hold states liable for damages in federal court. Justice White examined the language of CERCLA and SARA separately and concluded that neither congressional enactment contained the requisite clear language to abrogate state immunity.

Justice Scalia agreed with the plurality that Congress intended to hold states liable under CERCLA. He attacked Justice White’s method of statutory analysis, emphasizing that CERCLA and SARA must be examined as a whole, rather than by attempting “to plumb the intent of the particular Congress that enacted a particular provision.”

Justice Scalia disagreed with the plurality, however, on the issue of congressional power to override state sovereign immunity. Justice Scalia concluded that preserving *Hans*, while allowing Congress to overrule the sovereign immunity created by it, “achieves the worst of both worlds.” Justice Scalia found that the plurality’s holding did not resolve the complexities of eleventh amendment jurisprudence, nor did it preserve sovereign immunity as a fundamental principle of federalism.

Justice Scalia characterized the plurality’s reliance on *Fitzpatrick* as error. He pointed out the temporal difference between the fourteenth amendment, enacted after the eleventh amendment, and article I powers which remain subject to sovereign immunity under the eleventh amendment. Justice Scalia emphasized that the fourteenth amendment’s substantive provisions were intended to limit state authority and thereby permit abrogation of sovereign immunity.

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195. *Id.*

196. See *id.* at 2289 (White, J., concurring). Justice White agreed with the majority that Congress may abrogate state immunity under commerce clause, but did not concur with the reasoning of the majority. *Id.*

197. *Id.* at 2289–94.

198. *Id.* at 2295 (Scalia, J., concurring in part, dissenting in part).

199. *Id.* at 2295–96. Instead, Justice Scalia stated:

It is our task, as I see it, 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.

*Id.* at 2296.

200. *Id.* at 2299.

201. *Id.*

202. See *id.* at 2302.
Justice Scalia rejected the analogy being drawn between the fourteenth amendment and the commerce clause because the result is an expansion of Congress' power to override immunity to the extent of all of Congress' article I powers—powers so broad they would render immunity "a practical nullity."204 He stated that a constitutional interpretation that allows article III powers to be overcome by exercising article I powers is "too much at war with itself to endure."205

IV. Analysis

Union Gas is significant for eleventh amendment jurisprudence because it allows for substantial alteration of the judicial doctrine of state sovereign immunity as originally established under Hans v. Louisiana.206 Under Union Gas, Congress now has clear authority to abrogate judicially created sovereign immunity under its article I power to regulate commerce. Because congressional power to legislate under the commerce clause has grown considerably since the time of Hans, Union Gas has opened up a potentially vast area of state liability.207

After Union Gas, the test applied by future courts will be whether Congress has expressed a clear intent to override state immunity, and whether Congress is legislating pursuant to one of its plenary powers.208 However, because the test involves ascertaining the intent of Congress, courts will be able to continue to implicitly balance state and national interests to determine when to abrogate state immunity.209 The degree of state liability, and the availability of a remedy, will remain important policy considerations in this implicit balancing test.210

The plurality in Union Gas applied a statutory analysis similar to

203. Id.
204. Id. The plurality explicitly endorsed this analysis. See supra note 177.
205. Union Gas, 109 S. Ct. at 2303 (Scalia, J., concurring in part, dissenting in part).
206. 134 U.S. 1 (1890); see supra notes 70–73 and accompanying text.
207. See, e.g., Katzenbach v. McClung, 379 U.S. 294, 305 (1964) (a restaurant's insignificant purchases of food flowing through interstate commerce enough to allow federal regulation of restaurant under Title II of Civil Rights Act); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36–37 (1937) (commerce clause gives Congress constitutional authority to safeguard the rights of employees to organize labor unions, and this authority is not limited only to transactions which affect the flow of commerce).
208. See Union Gas, 109 S. Ct. at 2276.
209. See Baker, supra note 89, at 175 (recommending an overt balancing test, and comparing whether Congress or federal courts are better suited to perform the balancing).
210. These factors have been persuasive in previous decisions, and are unlikely to disappear as a result of Union Gas. See supra notes 113, 120.
that of Employees, yet reached a different result in part because of the nature of the state liability that would be imposed. Both the FLSA in Employees, and CERCLA in Union Gas, encompass states in their definition of person. The Court in Employees refused to infer abrogation from this alone, or from Congress' authority to regulate under the commerce clause. The possibility of pervasive and staggering state liability was one reason Employees refused to abrogate state immunity. This policy consideration did not prevent abrogation of immunity in Union Gas. Although the degree of liability of any particular state under Union Gas may be high, the nature of liability is not as pervasive as that in Employees. Cleanup of a state hazardous waste dump may be very expensive, but state liability under CERCLA will not impose a pervasive scheme of federal environmental regulation on the state.

Another major difference between Employees and Union Gas was the issue of whether a remedy was available. In Employees, while an individual employee was not allowed to sue the state, the Secretary of Labor was allowed to do so under the FLSA on behalf of the employee. But in Union Gas, if an individual incurring cleanup costs with respect to a state hazardous waste facility could not sue the state to recover damages, the individual would have no remedy to recover the costs.

Future cases involving the ability of an individual to sue a state will likely turn on whether the Court finds a clear expression of congressional intent to hold states liable. If so, the commerce clause, or perhaps other plenary powers, will allow Congress to override state immunity.

Whether the test of unmistakable clarity announced by the Court in Atascadero survives Union Gas is arguable. Union Gas followed a disjointed and far-reaching statutory analysis to find the necessary clarity. Courts and commentators agree that CERCLA is poorly drafted and generally lacks clarity. For that reason, the Court in Union Gas was correct in applying a comprehensive, structural analy-

212. The Court reasoned that imposition of liability on state institutions would impose a pervasive "new federal scheme of regulation." Id. at 285.
213. Imposition of liability under the Fair Labor Standards Act in Employees could potentially reach 2.7 million state or local government employees. Id. at 287.
214. Id. at 286.
215. See Pennsylvania v. Union Gas, 109 S. Ct. 2273, 2277 (1989). If the courts find no clear intent to override sovereign immunity, they will never reach the constitutional issue of abrogation.
216. See supra notes 157–69 and accompanying text.
217. See supra note 21 and accompanying text.
sis to find the clear intent necessary to hold states liable. 218

While the plurality in Union Gas relied upon five United States Court of Appeals’ decisions to support its finding of congressional abrogation of immunity under the commerce clause, 219 three of these cases did not base abrogation of sovereign immunity on the commerce clause. Instead, they were based on other congressional plenary grants of authority, including extradition powers under article IV, the war power under article I, and the copyright and patent clause. 220 If the Court’s reliance on these cases can be considered as an endorsement of their holdings, the Court appears likely to take an expansive view of Congress’ ability to abrogate state immunity under any plenary grant of authority in future decisions.

Prior to Union Gas, Congress has legislated under the assumption of state immunity provided by Hans. 221 Now, Congress will have to focus carefully on language subjecting or relieving states from liability, or else the courts will be left with the task of interpreting legislative intent. Under either result, the recognition of the congressional abrogation theory in Union Gas will make it easier to impose liability on states.

Union Gas has a significant effect on environmental law because it allows states to be subjected to liability under CERCLA. The rejection of absolute state immunity in Union Gas is supported by two policy considerations. First, subjecting states to liability will add to Congress’ objective of encouraging private party response actions. 222 A private party will be more likely to proceed with a cleanup at a previously state-owned or state-operated facility when there is the possibility of recovering cleanup costs from the state. Second, subjecting states to liability is fair. CERCLA’s liability provisions cover the federal government, local governments, and an array of private parties. States should not receive preferential treatment.

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218. There is a movement in the Court to approach detailed, complex statutes as a whole, deriving congressional intent from the entire structure of the statute. See United States v. Fausto, 484 U.S. 439, 444 (1988) (determining congressional intent under the Civil Service Reform Act by examining the purpose, the entirety of the text, and the structure of review it establishes); Starr, Of Forests and Trees: Structuralism in the Interpretation of Statutes, 56 GEO. WASH. L. REV. 703, 706 (1988) (describing comprehensive approach to complex statutes as structuralism in the interpretive process and a trend with the Court).


220. See County of Monroe v. Florida, 678 F.2d 1124, 1133 (2d Cir. 1982) (extradition power), cert. denied, 459 U.S. 1104 (1983); Peel v. Florida Dep’t of Transp., 600 F.2d 1070, 1081 (5th Cir. 1979) (war power); Mills Music, Inc. v. Arizona, 591 F.2d 1278, 1285 (9th Cir. 1979) (copyright and patent clause).

221. This point is raised by Justice Scalia as one reason not to alter the presumption of sovereign immunity as established by Hans. See Union Gas, 109 S. Ct. at 2298 (Scalia, J., concurring in part, dissenting in part).

222. See supra note 27.
Environmental harm must be remedied by all responsible parties if the purpose of CERCLA is to be achieved.

Nevertheless, the degree of state liability may be less than anticipated by the Court in Union Gas. One controlling factor in the plurality decision was that states were a significant class of owners and operators. But state-owned facilities actually comprise only a small percentage of the sites on the National Priorities List (NPL). Of the 1,219 final and proposed sites on the NPL, only 29 are currently state-owned. Information on facilities previously owned or operated by states is not available from the EPA. Hence, it is difficult to estimate the potential degree of state liability.

States should be subject to liability under section 107 to the same extent as any nongovernmental entity. However, the Court's analysis in Union Gas relied in part on section 101(20)(D) to impose state liability. This section excludes states who take property involuntarily and provides that “[t]he 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

223. See Union Gas, 109 S. Ct. at 2285. The Court cites to Respondent's Brief, which states that "the EPA has estimated that over 16% of all contamination sites on the National Priorities List are currently owned or controlled by states and local governments." Brief for Respondent at 8, Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989) (No. 87-1241).

224. The 29 sites are: (1) Kellogg-Deering Well Field, Norwalk, Connecticut; (2) Groveland Wells, Groveland, Massachusetts; (3) Sullivan's Ledge, New Bedford, Massachusetts; (4) Chemical Control, Elizabeth, New Jersey; (5) Radiation Technology, Inc., Rockaway Township, New Jersey; (6) Vineland State School, Vineland, New Jersey; (7) Brewster Well Field, Putnam County, New York; (8) Hudson River PCBs, Hudson River, New York; (9) Olean Well Field, Olean, New York; (10) Wide Beach Development, Brant, New York; (11) Fibers Public Supply Wells, Jobos, Puerto Rico; (12) Frontera Creek, Rio Abajo, Puerto Rico; (13) Vega Alta Public Supply Wells, Vega Alta, Puerto Rico; (14) Middletown Air Field, Middletown, Pennsylvania; (15) Old City of York Landfill, Seven Valleys, Pennsylvania; (16) West Virginia Ordnance, Point Pleasant, West Virginia; (17) Hipp Road Landfill, Duval County, Florida; (18) Maxey Flats Nuclear Disposal, Hillsboro, Kentucky; (19) Newport Dump, Newport, Kentucky; (20) North Carolina State University (Lot 86, Farm Unit #1), Raleigh, North Carolina; (21) North Hollywood Dump, Memphis, Tennessee; (22) Kerr-McGee (Kress Creek), DuPage County, Illinois; (23) Auto Ion Chemicals, Inc., Kalamazoo, Michigan; (24) Chem Central, Wyoming Township, Michigan; (25) University of Minnesota, Rosemount Residential Center, Rosemount, Minnesota; (26) South Valley, Albuquerque, New Mexico; (27) French, Ltd., Crosby, Texas; (28) Shenandoah Stables, Moscow Mills, Missouri; (29) Ordot Landfill, Guam. EPA NPL Technical Data Base, Final and Proposed NPL Sites with State As Sole Ownership (Jan. 1990) (computer printout available from the EPA).

substance from the facility . . . .”226 Under Shore Realty, current owners or operators are liable without reference to whether they caused or contributed to a release or threatened release.227 Under Tanglewood East Homeowners, previous owners are liable if there was a disposal of hazardous waste at the facility at the time of ownership.228 Because of the Court’s reliance on section 101(20)(D), plaintiffs attempting to recover CERCLA damages from states in the future may have to show the state caused or contributed to the harm, a burden not required in regard to other parties.

CONCLUSION

Union Gas diminishes the effect of the judicial doctrine of state sovereign immunity established under Hans. Now, where Congress is legislating pursuant to the commerce clause, and makes it clear that states will be subject to liability, private parties may recover damages from the states in federal court. Union Gas also expanded section 107, the liability provision of CERCLA, to correctly include states in CERCLA’s liability scheme. However, the Court in Union Gas was forced to include states under a section that could make it easier for states to elude liability.

Union Gas should provide a message to Congress that abrogation of state sovereign immunity must be made clear in the language of the statute. State immunity from suit by its own citizens in federal court is no longer the assumption. Congress must carefully assess whether state liability is appropriate, and carefully draft language that will impose liability. If not, the federal courts will be left with the task of adequately balancing national interests against state sovereignty.

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227. See New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985); see also supra notes 50–51 and accompanying text.
228. Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572–73 (5th Cir. 1988); see also supra notes 53–55 and accompanying text.