Pennsylvania v. Union Gas Company: A Private Cause of Action against the States under CERCLA, as Amended by Sara

Robert Toland II
Casenote

PENNSYLVANIA v. UNION GAS COMPANY: A PRIVATE CAUSE OF ACTION AGAINST THE STATES UNDER CERCLA, AS AMENDED BY SARA

Table of Contents

I. INTRODUCTION .................................................. 197

II. THE HISTORICAL DEVELOPMENT OF THE ELEVENTH AMENDMENT .................................................. 200
   A. The Hans v. Louisiana Decision .......................... 205
   B. State Consent to Suit in Federal Court ............. 211
      1. Express Consent ...................................... 211
      2. Implicit Consent ..................................... 212
   C. Congressional Abrogation of Eleventh Amendment Protection .................................................. 217

III. THE PENNSYLVANIA v. UNION GAS CO. CASE .............. 219
   A. The Factual Background and Procedural History .... 220
   B. The Language of CERCLA, as Amended by SARA ...... 222
      1. Justice Brennan's Opinion ......................... 222
      2. Justice White's Opinion ........................... 225
   B. The Eleventh Amendment and the Commerce Clause .................................................. 228
      1. Justice Brennan's Opinion ......................... 228
      2. Justice Stevens's Opinion ....................... 231

IV. ANALYSIS ...................................................... 235
   A. The Language of CERCLA, as Amended by SARA ...... 235
   B. The Eleventh Amendment ................................. 237
      1. The Hans v. Louisiana Decision .................. 237
      2. Congressional Abrogation under Article I ....... 238

V. CONCLUSION ..................................................... 242

(197)
I. INTRODUCTION

In Pennsylvania v. Union Gas Co.,¹ the Supreme Court held that the states may be held liable for damages in private suits under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),² as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA).³ The Court in Union Gas was faced with two issues: (1) whether the language of CERCLA, as amended by SARA, indicated a clear congressional intent to provide a private cause of action against the states; and, (2) whether Congress has the power to strip the states of their eleventh amendment protection when legislating pursuant to its article I commerce clause power.⁴ These issues so divided the Court that a different five-to-four split on each issue made up the decision of the Court.⁵

The first issue presented is simply one of statutory construction—whether the statutory language involved indicates congressional intent to allow a private cause of action against the states. The importance of this issue is the degree of specificity with which the members of the Court believe Congress must speak when stripping the states of their sovereign immunity⁶ provided

4. Union Gas, 109 S. Ct. at 2277. The commerce clause of article I provides: "The Congress shall have the Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. I, § 8. This power has been construed expansively. See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981).
5. The Court in Union Gas was presented with a third issue: Whether to overrule the century-old decision in Hans v. Louisiana, 134 U.S. 1 (1890), which interpreted the eleventh amendment to bar the federal courts from entertaining suits against the states involving federal questions. The plurality of the Court, however, avoided this issue by finding Pennsylvania liable under CERCLA, as amended by SARA, on other grounds. Union Gas, 109 S. Ct. at 2286.
6. The doctrine of sovereign immunity stems from the general rule that the King could not be sued in his own courts. See J. Locke, First Treatise of Government ¶ 8 (1690); Massey, State Sovereignty and the Tenth and Eleventh Amendments, 56 U. Chi. L. Rev. 61, 87-97 (1989) ("At least four hundred years before

http://digitalcommons.law.villanova.edu/elj/vol1/iss1/6
the states under the eleventh amendment. Through a line of decisions, a plurality of the Court had held that Congress must speak with "unmistakably clear language" before it will be found to have stripped states of their immunity. The majority's opinion in Union Gas, however, suggests that five members of the Court require something less.

The second issue involves the fundamental principles of federalism upon which our dualistic system of government was formed. When the states created the federal government, they created a limited government, reserving to themselves all other powers: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Hence, the federal courts' jurisdiction under article III is limited to hearing only certain cases. A plurality of the Court in Union Gas reaffirmed a line of prior decisions which held that, despite the federal courts' limited jurisdiction, the states consented to certain suits in federal court when they gave Congress the power to legislate under the commerce clause. Thus, when Congress, pursuant to its commerce clause powers, specifically indicates its intent to provide a private cause of action for damages against the states, the states are amendable to suit in federal court.

The Union Gas decision is significant for two reasons. First, by holding that the federal courts may entertain private suits against

---

6. The eleventh amendment bars federal courts from hearing certain cases and has long been characterized as an embodiment of the states' sovereign immunity, which goes beyond the literal words of the amendment. See, e.g., Hans v. Louisiana, 134 U.S. 1 (1890). For the text of the eleventh amendment, see infra note 26 and accompanying text.

7. While the plurality asserted that the language of CERCLA, as amended by SARA, did provide an unmistakably clear indication of Congress's intent to provide a cause of action against the states, this author finds that the language is not so unmistakably clear.


9. U.S. CONST. amend X.


11. For the text of article III, see infra note 20 and accompanying text.


the states for damages under CERCLA, as amended by SARA, the Court has paved the way for potentially enormous state liability.\textsuperscript{14} Considering that there are presently more than 1,200 hazardous-waste sites listed, with cleanup complete on only thirty-six,\textsuperscript{15} the decision will almost certainly subject the states to substantial liability.\textsuperscript{16} And second, the case provided an opportunity for the Court's two newest members to express their views on the difficult issues surrounding the eleventh amendment. These newest members have affirmed the Court's trend away from a new-found federalism and toward a strengthened state sovereignty.\textsuperscript{17}

This article first considers the historical development of the eleventh amendment and the federal courts' jurisdiction immediately prior to the Court's decision in \textit{Union Gas}. The article then examines the \textit{Union Gas} decision, focusing on each issue and the various opinions on that issue. And finally, this article analyzes the \textit{Union Gas} decision and suggests some alternatives.

\section*{II. THE HISTORICAL DEVELOPMENT OF ELEVENTH AMENDMENT}

Speaking on the Supreme Court, Chief Justice Marshall observed: "It is most true that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should."\textsuperscript{18} Although this passage is inaccurate today since the Chief Justice was referring to the Supreme Court, which hears cases today solely within its discretion by writ of certiorari, the passage is an accurate characterization of the lower federal courts' jurisdiction.\textsuperscript{19}

\begin{itemize}
  \item[14.] The potential for liability under CERCLA is enormous. \textit{See}, \textit{e.g.}, Simon, \textit{Deals that Smell Bad}, \textit{FORBES}, May 15, 1989 at 49 ("The estimated cost of cleaning up the nation's 10,000-plus toxic waste dumps: a staggering $500 billion over the next 50 years. . . . Cleanup costs can run anywhere from $100,000 to $500 million or more per site, depending on the type of waste and the extent of the problem, and how it is cleaned up.").
  \item[15.] \textit{Philadelphia Inquirer}, June 15, 1989, \textsection A, at 3, col. 2. \textit{See also} Easterbrook, \textit{Cleaning Up}, \textit{NEWSWEEK}, July 24, 1989, at 26 ("Of the 1,224 sites on the formal Superfund inventory, just 27 have been 'delisted' as fully clean.").
  \item[16.] In addition to those sites presently listed, some 30,000 possible cleanup sites have been identified. \textit{Philadelphia Inquirer}, June 15, 1989, \textsection A, at 3, col. 2.
  \item[17.] Both Justices Scalia and Kennedy, along with the Chief Justice and Justice O'Connor, would affirm the result in \textit{Hans v. Louisiana}, 134 U.S. 1 (1890), and would overrule the decision in \textit{Parden v. Terminal Ry.}, 377 U.S. 184 (1964). \textit{Union Gas}, 109 S. Ct. at 2296-99 & 2202-03.
  \item[19.] \textit{See} \textit{Colorado River Water Conservation Dist. v. United States}, 424 U.S. 800, 817 (1976) (there exists a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."). Conversely, the federal courts

\url{http://digitalcommons.law.villanova.edu/elj/vol1/iss1/6}
The federal courts' nine bases of jurisdiction are specifically set forth in article III of the Constitution:

The judicial power shall extend [1] to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; [2] to all Cases affecting Ambassadors, other public Ministers and Consuls; [3] to all Cases of admiralty and maritime Jurisdiction; [4] to Controversies to which the United States shall be a Party; [5] to Controversies between two or more States; [6] between a State and Citizens of another State; [7] between Citizens of different States; [8] between Citizens of the same State claiming Lands under Grants of different States, and [9] between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.20

When the Supreme Court considered the scope of article III in Chisholm v. Georgia,21 it read the plain language of jurisdictional base number six to permit federal courts to entertain actions between a state and citizens of another state.22 Considering that the language of article III provides that federal jurisdiction extends to cases "between a State and Citizens of another State,"23 the Court's decision might appear to be a fair reading of that language. The several states, however, reacted quickly to the Chisholm decision24 and adopted the eleventh amendment, effec-

may not exercise jurisdiction if it is improper. See FED.R.CIV.P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

Somewhere in between exist suits over which the federal courts have proper jurisdiction, but should abstain from hearing the case. See, e.g., Younger v. Harris, 401 U.S. 37, 53 (1971) (federal courts should abstain from enjoining state criminal prosecutions except in extraordinary circumstances); Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941) (federal courts should abstain from hearing case involving an unsettled issue of state law, the resolution of which would avoid a federal constitutional issue).

20. U.S. CONST. art. III, § 2. The numbers included in the text of article III indicate the federal courts' nine jurisdictional bases and are referred to by number throughout this article.
21. 2 U.S. (2 Dall.) 419 (1793).
22. Id. at 450. The five Justices sitting in Chisholm each wrote a separate opinion, with only Justice Iredell dissenting.
24. Justice Brennan chronologizes the events following the Court's decision in Chisholm in his dissent in Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985). In his dissent, Justice Brennan points out that the Chisholm decision was handed down on February 18, 1793, and a resolution was introduced the next day in the House of Representatives, which provided:
tively reversing that decision. 25

As ultimately ratified, the eleventh amendment provides:

The Judicial power of the United States shall not be con-
strued to extend to any suit in law or equity, commenced
or prosecuted against one of the United States by [1] Cit-
izens of another State, or [2] by Citizens or Subjects of
any Foreign State. 26

"[N]o State shall be liable to be made a party defendant in any of the
Judicial Courts established or to be established under the authority of
the United States, at the suit of any person or persons, citizens or for-
eigners, or of any body politic or corporate whether within or without
the United States."

A tascadero, 473 U.S. at 283-84 (quoting 1 C. Warren, The Supreme Court in
United States History 101 (rev. ed. 1937)).

The following day, February 20, 1793, another resolution was introduced in
the Senate, which provided: "'The Judicial power of the United States shall not
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.'" Id. at 284 (quoting 3 AN NALS OF CONG. 651-52 (1793)).

On January 2, 1794, a resolution was introduced in the Senate which con-
tained the language of the eleventh amendment as ultimately ratified. That res-
solution simply added three words to the resolution introduced on February 20,
1793: "'The Judicial power of the United States shall not be construed to extend
to any suit in law or equity . . . .'" Id. at 285 (quoting 4 AN NALS OF CONG. 25
(1794) (emphasis added indicating new material)). Two theories for the added
"be construed to" language have been advanced: (1) To "rebuke the Supreme
Court for its construction of the words 'between a State and citizens of another
State' in Chisholm"; and, (2) to "assure the retrospective application of the Elev-
enth Amendment." A tascadero, 473 U.S. at 288 (Brennan, J., dissenting) (respec-
tively citing Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow
Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Ju-
AMENDMENT AND SOVEREIGN IMMUNITY 68-69 (1972)). See also Massey, supra note
6, at 111-20.

25. Hans v. Louisiana, 134 U.S. 1, 11 (1889) ("This amendment, expres-
sing the will of the ultimate sovereignty of the whole country, superior to all
legislatures and all courts, actually reversed the decision of the Supreme Court
[in Chisholm]"). See also Welch v. Texas Dep't of Highways & Pub. Transp., 483
Chisholm] 'created such a shock of surprise that the Eleventh Amendment was at
once proposed and adopted.'") (quoting Monaco v. Mississippi, 292 U.S. 313,
325 (1934)).

26. U.S. CONST. amend. XI. The numbers included in the text of the elev-
enth amendment indicate the two jurisdictional bases that the amendment ex-
plicitly repealed.

The eleventh amendment was designed primarily to avoid states being sued
by citizens of other states for debt obligations incurred during the Revolutionary
(Brennan, J., dissenting); Massey, supra note 6, at 64. As Charles Warren
observed:

In the crucial condition of the finances of most of the States at that

http://digitalcommons.law.villanova.edu/elj/vol1/iss1/6
Reaction to the Court's decision in *Chisholm* was so alacritous because many believed that such a result was not possible in the dualistic system created under the Constitution.\(^{27}\) Despite the plain language of article III, many believe that the federal courts were not given the power under the Constitution to entertain suits against the states and that the eleventh amendment simply corrected this erroneous interpretation in *Chisholm*.\(^{28}\) In other words, many believe that the states never intended to surrender

\[^{27}\] The most frequently quoted passage in support of this proposition is Alexander Hamilton's Federalist Paper Number 81. See, e.g., Edelman v. Jordan, 415 U.S. 651, 661-62 n.9 (1974); Monaco v. Mississippi, 292 U.S. 313, 324-25 (1934); Hans v. Louisiana, 134 U.S. 1, 12-13 (1890). For the text of Hamilton's Federalist Paper Number 81, see infra note 53.


Present thinking among many scholars is that a majority of those commenting on this subject prior to the Constitution being ratified believed that the states were amenable to suit in federal court. See, e.g., Marshall, *Fighting the Words of the Eleventh Amendment*, 102 Harv. L. Rev. 1342, 1349-50 n.30 (1989) (noting that “[e]ven the pro-Hans members of the Court now seem to agree that there is no clear evidence of a consensus about article III’s effect on state sovereign immunity.”) (citing Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 483-84 (1987) (“At most, then, the historical materials show that—to the extent this question was debated—the intentions of the framers and Ratifiers were ambiguous.”)); C. Jacobs, supra note 24, at 40; Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. Pa. L. Rev. 515, 521 (1977).
their sovereign immunity when creating the federal judiciary under article III.29

When the language of the eleventh amendment and article III is compared, it would appear that the eleventh amendment was designed to repeal two of article III's jurisdictional bases.30 Jurisdictional bases six and nine of article III extend the jurisdiction of the federal courts to controversies "between a State and Citizens of another State" and "between a State . . . and foreign States, Citizens or Subjects."31 The eleventh amendment parallels the language of article III by stripping the federal courts of the power to hear cases against a state by "Citizens of another State, or by Citizens or Subjects of any Foreign State."32 The close tailoring of the eleventh amendment to article III certainly suggests that the eleventh amendment was only designed to strip the federal courts of their power to hear cases involving a state and citizens of another or foreign state. The eleventh amend-

29. See, e.g., Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98 (1984). In Pennhurst, the Court observed that "federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.' . . . In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III . . . ." Id. (citation omitted) (quoting Hans v. Louisiana, 134 U.S. 1, 15 (1890)). See also Employees v. Missouri Dep't of Pub. Health & Welfare, 411 U.S. 279, 291-92 (1973) (Marshall, J., concurring); Ex parte New York, 256 U.S. 490, 497 (1921).

In addition to the theoretical problems of state amenability to suit in federal court, a number of practical problems are presented in a dual system of government if one body is allowed to entertain an action in which the other political unit is involved. One significant problem involves enforcement of a judgment against a state. See THE FEDERALIST No. 81, at 549 (A. Hamilton) (J. Cooke ed. 1961) ("To what purpose would it be to authorize suits against states, for the debts they owe? How could recoveries be enforced?"); 3 ELLIOT'S DEBATES at 527 (1941) (G. Mason) ("A power which cannot be executed ought not to be granted"); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 482 (1987); Hans v. Louisiana, 134 U.S. 1, 13 (1890). This problem, of course, is presented in an action permitted under one of the exceptions to the eleventh amendment bar.

30. See, e.g., Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 286-87 (1985) (Brennan, J., dissenting); Fletcher, supra note 24, at 1060 ("if they intended the [eleventh] amendment to forbid [federal-question suits], their drafting was extraordinarily inept.").


32. U.S. CONST. amend. XI. But cf. Gunter v. Atlantic Coast Line R.R. Co., 200 U.S. 273, 284 (1906); Clark v. Barnard, 108 U.S. 436, 447 (1883) ("The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction . . . .")
ment, however, has been characterized variously as "a jurisdictional bar, an exemplification of sovereign immunity, [and] an embodiment of federalist ideals of state sovereignty."\(^{33}\)

Although the language of the amendment is simple on its face, it has been enlarged and restricted by a line of decisions to its present-day position. The Court has expanded the protection of the amendment by barring suits against a state by its own citizens involving a federal question.\(^{34}\) The Court has restricted the amendment’s protection by allowing federal courts to hear suits against states in two situations: (1) When the state has consented to the suit;\(^{35}\) and, (2) when Congress has abrogated the eleventh amendment protection by providing that the states may be held liable.\(^{36}\) The remainder of this section of the article examines the expansion and contraction of the eleventh amendment, and its corresponding effect on the federal courts’ jurisdiction.

A. The *Hans v. Louisiana* Decision

The Court expanded the scope of the eleventh amendment

\(^{33}\) Massey, *supra* note 6, at 63-64 n.15. *See also supra* note 32 and accompanying text (describing the amendment as a waivable privilege).

\(^{34}\) See *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). The holding in *Hans* has even been expanded to include other actions against states. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 3 n.4 (1988) ("state cannot be sued without its consent by foreign state") (citing *Monaco v. Mississippi*, 292 U.S. 313 (1934) (suits against states by foreign states barred); *Ex parte New York*, No. 1, 256 U.S. 490 (1921) (suits against states in admiralty barred)).


A third exception to the eleventh amendment restriction of federal jurisdiction was created in *Ex parte Young*, 209 U.S. 123 (1908). The Court there was faced with the issue of whether a federal court could enjoin the Attorney General of Minnesota from enforcing a state law claimed to be unconstitutional. *Id.* at 149. The Court held that federal courts could enjoin such action, reasoning: If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. *Id.* at 159-60 (citing *In re Ayers*, 123 U.S. 443, 507 (1887)).

The Court further defined this exception in *Edelman v. Jordan*, 415 U.S. 651 (1974). There, the Court held that a federal court could grant relief under *Ex parte Young* only to the extent that such relief was prospective in nature. *Id.* at 668-69. *See also Quern v. Jordan*, 440 U.S. 332, 348 (1979) (availability of retroactive relief left to the states not the federal courts); Massey, *supra* note 6, at 69-70; Note, *Reconciling Federalism and Individual Rights: The Burger Court’s Treatment of the Eleventh and Fourteenth Amendments*, 68 VA. L. REV. 865, 870-71 (1982).
in *Hans v. Louisiana*, by extending its jurisdictional bar to include suits against a state by its own citizens in an action involving a federal question. Despite the plain language of the eleventh amendment, the Court held that its significance did not lie in the mere words, but in the fundamental principle of sovereign immunity which limits the federal courts' power under article III. Thus, the Court held that the literal terms of the amendment must give way to the principle of sovereign immunity embodied in the amendment.

The *Chisholm* and *Hans* decisions are at odds. In *Chisholm*, the Court declined to read beneath the language of article III in pursuit of an implicit or inherent exception to federal jurisdiction for suits involving states. The Court in *Hans*, on the other hand, had little difficulty finding that the language of the eleventh amendment, which specifically repealed only two of the nine article III jurisdictional bases, contained principles of sovereign immunity which went beyond the actual language of the amendment to implicitly bar suits between a state and its own citizens involving a federal question.

In addition, the two decisions have created a considerable debate within the Court and among scholars as to the propriety of the Court's holding in *Hans*. This debate has been extensively

37. 134 U.S. 1 (1890).
38. Id. at 15. This expands the jurisdictional bar of the federal courts to jurisdictional base number one under article III. For the text of article III, see supra note 20 and accompanying text.
42. *Hans*, 134 U.S. at 15. Cf. Marshall, supra note 28 at 1344 ("Pure textualism, however, is not the predominant mode of constitutional interpretation. The reporters are replete with cases in which the Court has gone beyond the apparent meaning of a constitutional provision and instilled it with meaning that falls well outside the bounds of plausible reading."); J. ELY, DEMOCRACY AND DISTRUST 16 (1980) ("the most important datum bearing on what was intended is the constitutional language itself. This is especially true where the legislative history is in unusual disarray . . . .") (emphasis in original).
considered in other works^44 and an exhaustive discussion here would prove unnecessary for a complete understanding of the issues presented in *Union Gas*.^45 It is sufficient to understand the two positions on this issue.

Four members of the Court—Justices Brennan, Marshall, Blackmun, and Stevens—referred to by some as the revisionists,^46 believe that the *Hans* decision was incorrectly decided and should be overturned.^47 This group^48 relies primarily on the language of the eleventh amendment and the debates surrounding the ratification of the Constitution in support of its position. Since the language of the eleventh amendment so closely tracks the language of article III, they maintain, it was designed and intended to repeal only jurisdictional bases six and nine, not federal-question jurisdiction as well.^49 In addition, this group believes that, while some of the commentators’ remarks prior to ratification of the Constitution indicated that the states intended to retain their sovereign immunity under the constitutional plan, the majority did not.^50

---

^44. For a list of the material in this area, see supra note 43.

^45. A plurality of the Court in *Union Gas* did not address the continued validity of *Hans* since it found that, assuming that the eleventh amendment protects states against federal-question suits, the states consented to suit in federal court when they granted Congress the power to regulate interstate commerce under article I of the Constitution. *Union Gas*, 109 S. Ct. at 2286.

^46. See Massey, supra note 6, at 62.

^47. For a list of the decisions in which this group has written, see supra note 43.

^48. This author concurs with professor Massey’s assertion that “[t]he ‘revisionists’ are not a monolithic bloc; no suggestion is made here that each revisionist shares all the views of the other revisionists.” Massey, supra note 6, at 62 n.9.

^49. See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 259 (1985) (Brennan, J., dissenting) (“Nor, given the limited terms in which it was written, could the Amendment’s narrow and technical language be understood to have instituted a sweeping new limitation on the federal judicial power whenever an individual attempts to sue a State.”). See supra note 30 and accompanying text.

^50. In his dissenting opinion in *Atascadero State Hosp. v. Scanlon*, 473...
The other group—Chief Justice Rhenquist and Justices White, O'Connor, Scalia, and Kennedy—believes in the continued validity of *Hans*. While they agree that the evidence that the U.S. 234 (1985), Justice Brennan examined a number of commentators' remarks on the state-citizen diversity clause prior to ratification of the Constitution, including discussion by George Mason, John Madison, Patrick Henry, Edmund Pendleton, John Marshall, and Edmund Randolph. *Id.* at 264-69. Justice Brennan concluded that, while "[t]he Madison and Marshall remarks have been cited as evidence of an inherent limitation on Article III jurisdiction . . . they were a minority of those given at the Convention." *Id.* at 269. See also *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 496 (1987) (Brennan, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.). For example, Patrick Henry, an opponent of ratification, stated:

"As to controversies between a state and the citizens of another state, [Madison's] construction of it is to me perfectly incomprehensible. He says it will seldom happen that a state has such demands on individuals. There is nothing to warrant such an assertion. But he says that the state may be plaintiff only. If gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state without discriminating between plaintiff and defendant. What says the honorable gentleman? The contrary—that the state can only be plaintiff. When the state is debtor, there is no reciprocity. It seems to me that gentlemen may put what construction they please on it. What is justice to be done to one party, and not to the other? If gentlemen take this liberty now, what will they not do when our rights and liberties are in their power."

*Atascadero*, 473 U.S. at 266-67 (quoting 3 ELLiot's Debates 543 (1941)).

In addition, Justice Brennan noted that, while the debates focused not on federal-question jurisdiction but on state-citizen jurisdiction:

"[T]he apparent willingness of many delegates to read the state-citizen clause as abrogating sovereign immunity in state-law causes of action suggests that they would have been even more willing to permit suits against States in federal-question cases, where Congress had authorized such suits in the exercise of its Article I or other powers."

*Id.* at 264.

51. This group has been referred to as adhering to the "conventional doctrine." See Massey, supra note 6, at 62. Justice Powell was among this group and wrote the plurality opinion in *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987).

In his dissenting opinion in *Union Gas*, Justice Scalia, joined by Justice Kennedy, asserted his belief in the continued validity of *Hans*. *Union Gas*, 109 S. Ct. at 2296-99 (Scalia, J., dissenting, joined by the Chief Justice and O'Connor and Kennedy, JJ.). Although Justice White did not join this part of Justice Scalia's opinion, it is presumed that he would vote to uphold *Hans* if the issue were dispositive since he has so held in the past. See, e.g., *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987).

52. See, e.g., *Union Gas*, 109 S. Ct. at 2296-99; *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 495 (1987) (Powell, J., joined by the Chief Justice and Justices White and O'Connor, JJ.); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 244 n.3 (1985) ("Justice Brennan long has maintained that the settled view of *Hans v. Louisiana*, as established in the holdings and reasoning of the above cited cases, is wrong. . . . It is a view, of course, that he is entitled to hold. But the Court has never accepted it, and we see no reason to make a further response to the scholarly, 55-page elaboration of it today.").
states did not surrender their sovereign immunity under the Constitution is not so overwhelming as was once believed. They believe that the contrary evidence is not so clear either and that the principle of stare decisis requires that *Hans* be followed.

While the evidence that the revisionists muster in support of their claim that *Hans* was incorrectly decided is beyond the scope

53. After reviewing the statements of the commentators on this issue made prior to ratification, Justice Powell concluded that "[a]t most, then, the historical materials show that—to the extent this question was debated—the intentions of the Framers and Ratifiers were ambiguous." Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 483-84 (1987).

The most frequently cited passage in support of the fact that the states never intended to surrender their sovereign immunity when creating the federal judiciary is Alexander Hamilton's Federalist Paper Number 81:

> Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here, a supposition which has excited some alarm upon very mistaken grounds: It has been suggested that an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities. A suggestion which the following considerations prove to be without foundation.

> It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless therefore, 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. The circumstances which are necessary to produce an alienation of state sovereignty, were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no colour to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against states, for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting state; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.


54. In Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987), Justice Powell claims that overruling *Hans* would involve overruling some 17 other cases in addition to *Hans* itself. *Id.* at 494 n.27. See also Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 n.3 (1985). *But see* Jackson, supra note 34 at 119-20 (stating that Justice Powell's figures are overblown).

Ironically, Justice Powell and the plurality in *Welch* overruled part of their decision in *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), and two sentences later state that the decision to overrule *Hans* "depends in large part on adherence to the doctrine of stare decisis." *Welch*, 483 U.S. at 478-79.
of this article, the evidence clearly indicates that Hans should be overturned. The most prudent tack for the Supreme Court would be to overrule Hans and interpret the eleventh amendment as the language reads—federal jurisdiction does not extend to suits against states by citizens of other states or foreign countries. The bulk of the evidence indicates that this was the original intent of the amendment, and such an interpretation is consonant with the plain language of the amendment. If the states believe that amenability to suit in federal court in cases involving the Constitution or laws of the United States is repugnant to principles of federalism and state sovereignty, they may simply amend the Constitution and strip the federal courts of their jurisdiction over these cases. This is exactly what occurred in the aftermath of Chisholm; the plain language of article III was read exactly as it provided, and the states reacted by repealing those two jurisdictional bases.

Although the issue of whether to uphold Hans was presented to the Court in Union Gas, a plurality of the Court declined to address it, and instead found that Congress, by enacting CERCLA, as amended by SARA, had stripped the states' immunity under the eleventh amendment and that Congress had this power under the commerce clause. Thus, although the revisionists won a small victory, in that liability may be imposed on the states under CERCLA, the Hans decision remains. Undoubtedly, the

55. See also Massey, supra note 6, at 65; Fletcher, supra note 24, at 1062.
56. The dissent in Union Gas stated that its reluctance to overturn Hans was based on the doctrine of stare decisis. While this doctrine is an important jurisprudential tenet, it is an unpersuasive basis to follow an incorrectly decided opinion into its second century. Cf. Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (“Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification.”). Likewise unconvincing is the dissent’s contention that it would be unreasonable to overturn Hans after Congress had proceeded on the premise of its continued validity for nearly a century. Union Gas, 109 S. Ct. at 2298. See also Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 495-96 (1987) (Scalia, J., concurring). If this were a convincing justification for not overturning a prior decision, no decision would ever be overturned.
57. Union Gas, 109 S. Ct. at 2286 (“Given our ruling in favor of Union Gas, we need not reach its argument that Hans . . . should be overruled.”). This is the tack the Third Circuit took when presented with the case. United States v. Union Gas Co., 852 F.2d 1343, 1354 (3d Cir. 1987), aff’d 109 S. Ct. 2273 (1989). See also Massey, supra note 6, at 148 (listing this result as one of options facing Court in Union Gas). Other circuit courts have followed this same tack in other areas: McVey Trucking, Inc. v. Illinois (in re McVey Trucking, Inc.), 812 F.2d 311 (7th Cir. 1987), cert. denied, 484 U.S. 895 (1987); County of Monroe v. Florida, 678 F.2d 1124 (2d Cir. 1982), cert. denied, 459 U.S. 1104 (1983); Peel v. Florida Dep’t of Transp., 600 F.2d 1070 (5th Cir. 1979); Mills Music, Inc. v. Arizona, 591 F.2d 1278 (9th Cir. 1979).
Hans decision will continue to spark lively debate within the Court and among authorities.

B. STATE CONSENT TO SUIT IN FEDERAL COURT

A state may consent to suit in federal court in one of two ways. First, a state may "expressly" consent to suit in federal court. For example, a state will be found to have expressly consented to suit in federal court when it appears in the suit. Second, a state may "implicitly" consent to suit in federal court. For example, a state will be held to have implicitly consented to suit in federal court when it acts in an area regulated by Congress where Congress has expressly provided that the states may be held liable in federal court.

I. Express Consent

Although the eleventh amendment may be considered a jurisdictional bar, the Supreme Court has long held that a state may waive this defect and confer jurisdiction on the federal courts. This position is an anomaly in constitutional law since, in all other cases, parties may not expand the federal courts' article III jurisdiction by simply consenting to the suit in federal court.

59. See, e.g., Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276 (1959) (eleventh amendment provides "an immunity which a State may waive at its pleasure . . . as by a general appearance in litigation in a federal court . . . .") (citing Clark v. Barnard, 108 U.S. 436, 447-48 (1883)).
62. See supra note 30 and accompanying text.
A state's sovereign immunity not only dictates whether it may be sued, but where it may be sued. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984). Thus, a state may consent to suit in state court, while preserving its immunity in federal court, and vice versa.
Since the eleventh amendment can be viewed as restricting the federal courts' jurisdiction, it would appear that the states may not expand the federal courts' jurisdiction simply by consent. Such action is effectively a unilateral constitutional amendment, normally requiring ratification by the legislatures of three quarters of the states. Notwithstanding this anomolism, the court adheres to its position that the federal courts may hear suits by citizens against consenting states.

2. Implicit Consent

The Court has also developed an exception to the eleventh amendment bar where a state implicitly consents to suit in federal court. In Parden v. Terminal Railway, the Court was presented with the issue of whether a state-owned and -operated railway could be sued by its employees in federal court on a cause of action expressly created by Congress. The employees of the rail-

64. See, e.g., People's Bank v. Calhoun, 102 U.S. 256, 260-61 (1880) ("It needs no citation of authorities to show that the mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case. If this were once conceded, the Federal courts would become the common resort of persons who have no right, either under the Constitution or laws of the United States, to litigate in those courts.").

See also Massey, supra note 6, at 63. Professor Massey notes that one justification for this anomaly is that the eleventh amendment is not a jurisdictional barrier, but is simply a waivable immunity granted to the states. Id. at 63 n.15. As professor Massey appropriately points out, however, this characterization has never been embraced by the Supreme Court, "which continues to characterize the amendment as alternatively a jurisdictional bar, an exemplification of sovereign immunity, or an embodiment of federalist ideals of state sovereignty." Id. at 64 n.15. For cases characterizing the eleventh amendment as a waivable privilege, see supra note 32. Cf. Union Gas, 109 S. Ct. at 2286-89 (Stevens, J., concurring) (describing the "two eleventh amendments": (1) the literal terms, which may not be waived; and, (2) the construed terms, which may be waived and abrogated).

65. See Massey, supra note 6, at 66 ("Since the jurisdictional denial is constitutionally mandated, parties may not confer jurisdiction by waiver . . . .").

66. U.S. CONST. art. V.


68. This doctrine is also called "waiver." See, e.g., Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 473-74 (1987).


70. Id. at 184. Although the Court in Hans interpreted the eleventh amendment to include suits against a state by its own citizens under the Constitution or laws of the United States, Hans, 154 U.S. at 15, Hans involved a suit under the Constitution and Parden was the first case involving a "suit brought on a cause of action expressly created by Congress." Parden, 377 U.S. at 187. But see Union Gas, 109 S. Ct. at 2299 (Scalia, J., dissenting) ("In Hans, as here, there was a
way brought suit in federal court under the Federal Employers’ Liability Act of 1908,\textsuperscript{71} alleging injuries sustained while employed by the railway.\textsuperscript{72} The statute provided that “‘every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce,’ and that ‘under this chapter an action may be brought in a district court of the United States . . . .’”\textsuperscript{73}

The Court determined that Congress had the power to abrogate the states’ sovereign immunity because the states had necessarily “surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.”\textsuperscript{74} The Court considered the balance of power between the federal and state governments and observed that a state’s operation of a railway system in interstate commerce:

“[M]ust be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution . . . . [T]here is no such limitation upon the plenary power to regulate commerce [as there is upon the federal power to tax state instrumentalities]. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.”\textsuperscript{75}

The Court then fashioned a pseudo-syllogistic analysis, which the author has termed the “implicit-consent doctrine”:

By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon

\begin{itemize}
\item \textsuperscript{71} Act of Apr. 22, 1908, Pub. L. No. 100, 35 Stat. 65 (codified as amended 45 U.S.C. §§ 51-60 (1982)).
\item \textsuperscript{72} \textit{Parden}, 377 U.S. at 184-85.
\item \textsuperscript{73} \textit{Id.} at 185-86 (quoting 45 U.S.C. §§ 51 & 56).
\item \textsuperscript{74} \textit{Id.} at 191.
\item \textsuperscript{75} \textit{Id.} at 191-92 (quoting United States v. California, 297 U.S. 175, 184-85 (1936)).
\end{itemize}
amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.\textsuperscript{76}

More succinctly, the doctrine may be phrased as follows: Because the states empowered Congress to regulate interstate commerce, a state implicitly consents to suit in federal court when it acts in an area which Congress has regulated pursuant to that power.\textsuperscript{77} This test requires no evidence that Congress intended to abrogate the states' immunity, but simply that Congress regulated a certain activity and a state's activities were of the sort regulated by Congress.\textsuperscript{78} Moreover, the Court held that "we should not presume to say, in the absence of express provision to the contrary, that . . . [Congress] intended to exclude a particular group of such workers from the benefits conferred by the Act."\textsuperscript{79} Thus, under the analytical framework in \textit{Parden}, a state may be liable under any and every federal statute, unless the statute expressly excludes states from liability.\textsuperscript{80}

The Court considered essentially the same issue in \textit{Employees v. Missouri Department of Public Health and Welfare}.\textsuperscript{81} That case involved an action by state employees against the state under the Fair Labor Standards Act of 1938 (FLSA)\textsuperscript{82} for overtime compen-

\textsuperscript{76} Id. at 192.

\textsuperscript{77} Cf. \textit{Welch v. Texas Dep't of Highways & Pub. Transp.}, 483 U.S. 468, 475 n.5 (1987) ("the Constitution authorizes Congress to regulate matters within the admiralty and maritime jurisdiction, either under the Commerce Clause or the Necessary and Proper Clause. . . . By ratifying the Constitution, the argument runs, the States necessarily consented to suit in federal court with respect to enactments under either Clause.") (citing D. ROBERTSON, ADMIRALTY AND FEDERALISM 142-45 (1970)).

\textsuperscript{78} In fact, the statutory language involved in \textit{Parden} was devoid of language indicating Congress's intent to strip the states of the protection given under the eleventh amendment. For the text of the statutory language involved in \textit{Parden}, see supra note 73 and accompanying text. \textit{But see Fitzpatrick v. Bitzer}, 427 U.S. 445 (1976). In \textit{Fitzpatrick}, the Court asserted that the distinction between \textit{Parden} and \textit{Employees v. Missouri Dep't of Pub. Health & Welfare}, 411 U.S. 279 (1973), was that congressional authorization to sue the states in federal court was present in \textit{Parden}, but lacking in \textit{Employees}. \textit{Id.} at 452. The Court then stated that the congressional authorization in \textit{Parden} was the power of Congress under the commerce clause of the Constitution. \textit{Id.} Oddly, the Court in \textit{Fitzpatrick} failed to observe that the act involved in \textit{Employees} was based on the commerce clause as well.

\textsuperscript{79} \textit{Parden}, 377 U.S. at 190.

\textsuperscript{80} This would be the states' potential liability if \textit{Hans} were overruled.

\textsuperscript{81} 411 U.S. 279 (1973).

sation under section 16(b)\textsuperscript{83} and other costs.\textsuperscript{84} The Court was faced with the issue of whether the states were amenable to suit in federal court under FLSA.\textsuperscript{85}

The Court first examined the language of FLSA and concluded that the states, acting as employers, were generally subject to the provisions of the Act.\textsuperscript{86} The Court then examined section 16(b) of FLSA, which provides:

"Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction . . . ."\textsuperscript{87}

Under the \textit{Parden} analysis, any state that violated FLSA would be held to have implicitly consented to suit under this provision since it does not specifically exclude the states from coverage.\textsuperscript{88} The Court in \textit{Employees}, however, distinguished \textit{Parden} by observing that that case involved the state operation of a railway system, which is normally a proprietary operation, while the case before it involved mental hospitals, state cancer hospitals, and training schools for delinquent girls, which are generally not proprietary operations.\textsuperscript{89} The Court was concerned that the scope of a contrary holding might "implicate elevator operators, janitors, charwomen, security guards, secretaries, and the like in every office building in a State's governmental hierarchy."\textsuperscript{90} The Court

\begin{itemize}
\item \textsuperscript{83} Present version at 29 U.S.C. § 216(b).
\item \textsuperscript{84} \textit{Employees}, 411 U.S. at 281. The employees also sought an amount equal to their overtime compensation as liquidated damages plus attorneys' fees. \textit{Id.} at 283.
\item \textsuperscript{85} \textit{Id.} at 282-83. The Act prior to 1966 had excluded states from its provisions. In 1966, however, section 3(d) was amended to provide that states were excluded from the provisions "(except with respect to employees of a State, or political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section . . . .)." Act of Sept. 23, 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 830, 831 (present version at 29 U.S.C. § 203(d) (1982)). The last sentence of section 3(r) covers the operation of hospitals, institutes for the mentally and physically handicapped and institutes for learning. 29 U.S.C. § 203(r).
\item \textsuperscript{87} \textit{Employees}, 411 U.S. at 283 (quoting 29 U.S.C. § 216(b)).
\item \textsuperscript{88} See supra notes 78-79 and accompanying text.
\item \textsuperscript{89} \textit{Employees}, 411 U.S. at 284.
\item \textsuperscript{90} \textit{Id.} at 285.
\end{itemize}
held that such a far-reaching result required a more definitive articulation by Congress of its intent to strip the states of their sovereign immunity under the eleventh amendment.\textsuperscript{91}

By requiring that Congress indicate its intent to strip the states of their immunity with greater specificity, the Court destroyed the fundamental logic in the \textit{Parden} decision.\textsuperscript{92} Under \textit{Parden}, the specificity with which Congress speaks is wholly irrelevant; all that was considered was whether Congress had provided a cause of action and whether the state had acted in the regulated area. Although the degree of specificity with which Congress has spoken may go to whether the state has notice that it may be held to have consented to suit in federal court, it is irrelevant to the analytical framework established in \textit{Parden}.

A substantial blow to the \textit{Parden} decision came in \textit{Welch v. Texas Department of Highways and Public Transportation}.\textsuperscript{93} The Court in \textit{Welch} was faced with essentially the same issue it faced in \textit{Parden}: Whether a state has implicitly consented to suit when operating an automobile and passenger ferry under the Jones Act,\textsuperscript{94} which applied the remedial provisions of the Federal Employers' Liability Act of 1908,\textsuperscript{95} the Act involved in \textit{Parden}, to seamen.\textsuperscript{96} After reviewing \textit{Employees} and other subsequent decisions which held that congressional intent must be apparent before the states will be held to have waived their immunity,\textsuperscript{97} the Court held that

\begin{itemize}
\item \textsuperscript{91} \textit{Id.} "[W]e decline to extend \textit{Parden} to cover every exercise by Congress of its commerce power, where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear." \textit{Id.} at 286-87.
\item \textsuperscript{92} While the implications of a contrary holding are far-reaching, the underlying distinction between the two activities is elusive. The Court suggests that Congress need not speak definitively where a small number of state employees are involved, but must speak specifically where a large number of state employees are implicated; analytically, such a distinction is meaningless.
\item \textsuperscript{93} \textit{See Edelman v. Jordan}, 415 U.S. 651, 673 (1974) ("Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as would leave no room for any other reasonable construction.'") (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)).
\item \textsuperscript{95} Act of Apr. 22, 1908, Pub. L. No. 100, 35 Stat. 65 (codified as amended 45 U.S.C. §§ 51-60 (1982)).
\item \textsuperscript{96} \textit{Welch}, 483 U.S. at 471. \textit{See} 46 U.S.C. § 688(a) (applying remedial provisions of Federal Employers' Liability Act to seamen).
\end{itemize}
"to the extent that Parden v. Terminal Railway . . . is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled." 98

Thus, today's doctrine of implicit consent emerged: A state will be held to have implicitly consented to suit in federal court only where Congress has unequivocally indicated its intent to hold states amenable to suit and the state has acted in the regulated area. 99

C. CONGRESSIONAL ABROGATION OF ELEVENTH AMENDMENT PROTECTION

Another exception to the eleventh amendment's bar to federal court jurisdiction is where Congress has abrogated the states' eleventh amendment protection. 100 In Fitzpatrick v. Bitzer, 101 the Court considered whether Congress had the power to abrogate the states' eleventh amendment protection when it provided a cause of action against the states in the 1972 amendments to Title VII of the Civil Rights Act of 1964. 102 The Court recognized that, although all power begins with the states, "'every addition of power to the general government involves a corresponding diminution of the governmental powers of the States.'" 103 Consider-

98. Welch, 483 U.S. at 478 (footnote omitted).

99. Justice Scalia's dissent in Union Gas, which is joined by the Chief Justice and Justices O'Connor and Kennedy, would overrule Parden entirely and completely do away with the implicit-consent doctrine. Union Gas, 109 S. Ct. at 2302-03.

100. This action can be viewed as repealing the eleventh amendment, which should be subject to the normal requirements of a constitutional amendment, but instead is accomplished by the requirements of a simple legislative enactment. Compare U.S. Const. art. V (requiring ratification "by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof . . . .") with U.S. Const. art. I, § 7 (requiring mere majority of House and Senate to pass a law). Cf. supra note 66 and accompanying text (allowing states to confer jurisdiction on federal courts by consent effectively allows states to unilaterally repeal eleventh amendment).


103. Id. at 455 (quoting Ex parte Virginia, 100 U.S. 399, 346 (1880)). Cf. U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").
ing the relationship between the enforcement provisions of the fourteenth amendment\textsuperscript{104} and the immunity provided under the eleventh amendment, the Court concluded:

[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce “by appropriate legislation” the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.\textsuperscript{105}

Thus, when acting pursuant to its power under section 5 of the fourteenth amendment, Congress has the power to abrogate the states’ eleventh amendment immunity. As in Parden, however, the Court failed to express the degree of specificity with which Congress must speak when it abrogates the states' sovereign immunity under the eleventh amendment.

In Quern v. Jordan,\textsuperscript{106} the Court reexamined the issues it had considered in Fitzpatrick. Examining the language of section 1 of the Civil Rights Act of 1871,\textsuperscript{107} the Court held that section 1 evinced no congressional intent to abrogate the states’ sovereign immunity and thus, the states were not amenable to suit in federal court under that statute.\textsuperscript{108} Citing its decision in Employees, the

\begin{thebibliography}{9}
\bibitem{104} Section 5 of the fourteenth amendment provides that “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”\ U.S. Const. amend. XIV, § 5.
\bibitem{105} Fitzpatrick, 427 U.S. at 456.
\bibitem{106} 440 U.S. 332 (1979).
\bibitem{108} Quern, 440 U.S. at 343. In support of this conclusion, the Court noted: Given the importance of the States’ traditional sovereign immunity, if in fact the Members of the 42d Congress believed that § 1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with the other evils that they thought would result from the Act. Instead, § 1 passed with only limited debate and not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting § 1. We can
\end{thebibliography}
Court then observed that "[o]ur cases consistently have required a clearer showing of congressional purpose to abrogate Eleventh Amendment immunity than our Brother Brennan is able to marshal." 109

Thus, the doctrine of congressional abrogation of the states' eleventh amendment immunity emerged: The states are amenable to suit in federal court where Congress has so indicated by clear and unmistakable language. The distinction between congressional abrogation of state sovereign immunity and the implicit-consent doctrine is considered toward the end of this article. 110

III. THE PENNSYLVANIA V. UNION GAS CO. CASE

The Union Gas decision involves essentially two issues: (1) whether Congress expressed a clear intent to strip the states of their eleventh amendment immunity under CERCLA, as amended by SARA; and, (2) whether Congress has such power when legislating pursuant to the commerce clause of article I of the Constitution. 111 Answering both of these in the affirmative, five Justices found that the states may be liable in suits by private individuals for damages. These issues so divided the Court, however, that five Justices felt compelled to express their views, the result being a different five-to-four split on each issue. 112

The various opinions are as follows: (1) Justice Brennan wrote the opinion of the Court on the first issue and was joined by Justices Marshall, Blackmun, Stevens, and Scalia, and was joined on the second issue by Justices Marshall, Blackmun, and Stevens; 113 (2) Justice Stevens wrote an opinion concurring in the

only conclude that this silence on the matter is itself a significant indication of the legislative intent of § 1.

Id.
109. Id. (citing Employees, 411 U.S. 279).
110. See infra notes 247-57 and accompanying text.
111. Union Gas, 109 S. Ct. at 2276.
112. Although the various opinions are listed below, this summary is helpful: (1) On the issue of whether Congress had clearly indicated its intent to strip the states of their eleventh amendment immunity: (a) Justices Brennan, Marshall, Blackmun, Stevens, and Scalia believed that Congress had indicated its intent; while (b) the Chief Justice and Justices White, O'Connor, and Kennedy believed that it had not; and (2) on the issue of whether Congress had the power to do this under its article I commerce clause power: (a) Justice Brennan, Marshall, Blackmun, Stevens, and White believed that it did; while (b) the Chief Justice and Justices O'Connor, Scalia, and Kennedy believed that it did not.
113. Id. at 2276.
judgment;\(^{114}\) (3) Justice White wrote an opinion in which he disagreed with Justice Brennan on the first issue and was joined by the Chief Justice and Justices O'Connor and Kennedy, and wrote a decision in which he agreed with Justice Brennan on the second issue;\(^{115}\) (4) Justice Scalia wrote an opinion in which he concurred with Justice Brennan's analysis on the first issue, and wrote an opinion in which he was joined by the Chief Justice and Justices O'Connor and Kennedy, in which he disagreed with Justice Brennan on the second issue;\(^{116}\) and, (5) Justice O'Connor wrote an opinion in which she simply stated that she joined with Justice White on the first issue and joined with Justice Scalia on the second issue.\(^{117}\) This section of the article will examine each issue in turn and the various opinions on that issue.

A. THE FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Between 1890 and 1948, the predecessors of the Union Gas Company owned and operated a carburated water-gas plant near the Brodhead Creek in Stroudsburg, Pennsylvania.\(^{118}\) A by-product of this operation was coal tar, which was dumped on the premises.\(^{119}\) In 1953 and 1970, Union Gas sold part of its land to the Pennsylvania Power and Light Company, which in turn granted easements to the Borough of Stroudsburg.\(^{120}\) In early 1980, the Borough of Stroudsburg assigned its easements over to the state of Pennsylvania.\(^{121}\)

On October 7, 1980, while excavating part of the Brodhead Creek as part of a flood-control program, the state struck a large deposit of coal tar, which began seeping into the creek.\(^{122}\) After the Environmental Protection Agency was alerted to the problem, it determined that the coal tar was a hazardous substance and declared the site to be the first Superfund cleanup site.\(^{123}\)

\(^{114}\) Id. at 2286.
\(^{115}\) Id. at 2289.
\(^{116}\) Id. at 2295.
\(^{117}\) Id. at 2303.
\(^{118}\) Id. at 2276.
\(^{120}\) Id.
\(^{121}\) Id.
\(^{122}\) Id.
\(^{123}\) Union Gas, 109 S. Ct. at 2276. As the Third Circuit observed, the "Brodhead Creek thus had the dubious distinction of being the first Superfund site in the nation." United States v. Union Gas Co., 792 F.2d 372, 374 n.1 (3d Cir. 1986).
After cleaning up the site, the United States brought suit against Union Gas under sections 104 and 107 of CERCLA to recoup its costs incurred in the cleanup. Union Gas filed a third-party complaint against Pennsylvania, claiming that it was liable for at least part of the cleanup costs as an owner or operator of the facility and because it was negligent in its excavation of the Brodhead Creek. Pennsylvania claimed that the eleventh amendment barred the action and the district court dismissed the third-party complaint. The United States then amended its complaint against Union Gas, and Union Gas filed an amended third-party complaint against Pennsylvania. The district court again dismissed Union Gas's third-party complaint, holding that the eleventh amendment barred the action.

Union Gas appealed the district court's dismissal of its third-party complaint, and the Third Circuit affirmed, finding no clear indication of congressional intent under CERCLA to strip the states of their eleventh amendment immunity. While Union Gas's petition for certiorari was pending before the Supreme Court, Congress passed the SARA amendments to CERCLA. The Supreme Court granted certiorari and vacated the Third Circuit's decision for reconsideration in light of these amendments. The Third Circuit, on remand, determined that the SARA amendments to CERCLA evinced a clear intent to hold states liable under its provisions and that Congress had this intent.

124. The United States and Pennsylvania worked together to clean up the site, and the United States reimbursed the state for all its costs. United States v. Union Gas Co., 832 F.2d 1343, 1345 (3d Cir. 1987).
125. 42 U.S.C. § 9604. Section 104 of CERCLA provides that the President is authorized to remove any hazardous substance which is released or threatened to be released into the environment. 42 U.S.C. § 9604(a)(1).
126. 42 U.S.C. § 9607. Section 107 of CERCLA provides that "the owner and operator of a vessel or a facility . . . shall be liable for— (A) all costs of removal or remedial action incurred by the United States . . . ." 42 U.S.C. § 9607(a)(1).
128. Id. at 2277.
131. Id.
132. Id. at 383.
power under the commerce clause in article I.\textsuperscript{135} Pennsylvania petitioned for certiorari,\textsuperscript{136} and, as described below, the Supreme Court affirmed.

B. The Language of CERCLA, as Amended by SARA

The issue of whether Congress had specifically articulated its intent to strip the states of their sovereign immunity under CERCLA, as amended by SARA, was addressed first since an answer in the negative would obviate deciding the constitutional issue of whether Congress had the power to strip the states of their sovereign immunity when legislating pursuant to the commerce clause of article I.\textsuperscript{137}

1. Justice Brennan's Opinion

Justice Brennan began by observing that, under section 107 of CERCLA, both "persons" and "owners and operators" may be held liable under the Act.\textsuperscript{138} Justice Brennan then noted that the states are included in the definition of "person" found in section 101(21),\textsuperscript{139} which provides that "[t]he term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body."\textsuperscript{140} Section 101(21) was not amended in the 1986 SARA amendments and, in its first round with this case,

138. Id. Section 107 provides:
(1) [T]he 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 incurrence of response costs, of a hazardous substance, \textit{shall be liable for . . .}.
140. 42 U.S.C. § 9601(21).
the Third Circuit held that it was an insufficient indication of con-gressional intent to hold the states liable under CERCLA.\textsuperscript{141}

Justice Brennan, however, concluded that the SARA amendments added a sufficient indication of Congress's intent to abrogate the states' immunity. Section 101(20)(D) was added in the SARA amendments, and provides:

The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.\textsuperscript{142}

Justice Brennan concluded that the exclusion from liability in section 101(20)(D) would be unnecessary had Congress not considered that the states could be liable in private suits under the provisions of CERCLA.\textsuperscript{143} Section 107(d)(2), Justice Brennan noted, buttressed his conclusion that SARA furnished the necessary indication of congressional intent to hold states liable under CERCLA.\textsuperscript{144} That section provides:

No State or local government shall be liable under this

\textsuperscript{141} See United States v. Union Gas Co., 792 F.2d 372, 379 (3d Cir. 1986) (court found that statutory provisions in CERCLA under sections 107 and 101(21) were similar to provisions involved in \textit{Employees}, which Supreme Court found insufficient to strip states of their eleventh amendment immunity). See also United States v. Union Gas Co., 575 F. Supp. 949 (E.D. Pa. 1983) (no clear indication of congressional intent to hold states liable under CERCLA).

\textsuperscript{142} 42 U.S.C. § 9601(20)(D). The provision in section 101(20)(D) is an exception to the definition in section 101(20)(A), which provides:

The term 'owner or operator' means . . . (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.


\textsuperscript{143} \textit{Union Gas}, 109 S. Ct. at 2278.

\textsuperscript{144} Id.
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.145

Justice Brennan concluded that "Congress need not exempt States from liability unless they would otherwise be liable."146 In addition, he concluded that section 310 of CERCLA, permitting citizens suits, further supported this finding.147 That section provides that citizens may bring suits "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) . . . ."148 Justice Brennan concluded that "[t]he 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."149

Finally, Justice Brennan found that the language in section 120(a)(1), added in the SARA amendments, supported his conclusion that the language in section 101(20)(D) was intended to strip the states of their eleventh amendment protection.150 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.151

This section closely mirrors the language in section 101(20)(D), which applies to states.152 Since the language of section 120(a)(1)

146. Union Gas, 109 S. Ct. at 2278.
147. Id. at 2279.
148. 42 U.S.C. § 9659(a)(1). This section was not added in the SARA amendments to CERCLA.
149. Union Gas, 109 S. Ct. at 2279.
150. Id.
152. For the text of section 101(20)(D), see supra note 142 and accompanying text.
could mean nothing less than a waiver of the federal government's immunity, Justice Brennan concluded, the similar provision in section 101(20)(D) likewise was an abrogation of the state governments' immunity. 153

Pennsylvania argued to the Court that, while the language of CERCLA, as amended by SARA, did indicate that the states may be liable to the United States, it did not indicate that the states may be liable to private entities. 154 Justice Brennan found that, although such an interpretation would not render the definition of person in section 101(21) meaningless, it would render meaningless the provision in section 101(20)(D) which provides that the states shall be liable "to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title." 155 Since no authorization for suits by the United States against the states is necessary, 156 Justice Brennan concluded that the provision in section 101(20)(D) would be superfluous under Pennsylvania's suggested interpretation. 157 According to this reasoning, Justice Brennan concluded that "the language of CERCLA as amended by SARA clearly evinces an intent to hold States liable in damages in federal court." 158

2. Justice White's Opinion

Justice White split his analysis of the statutory language into an analysis of CERCLA as it existed prior to the SARA amendments, and the SARA amendments themselves. At the outset, Justice White observed that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." 159

Justice White began his analysis of CERCLA by considering

154. Id. Pennsylvania relied on Employees, in which the Court held that, although the language of the Fair Labor Standards Act did not permit suits by private individuals, "the statute's explicit inclusion of state-run hospitals among those to whom the law would apply was not meaningless: since the statute allowed the United States to sue, the inclusion of States within the entities covered by the statute served to permit suits by the United States against the States." Union Gas, 109 S. Ct. at 2279 (citing Employees, 411 U.S. at 285-86).
158. Id. (footnote omitted).
159. Id. at 2289 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985)).
the provision in section 101(21) which defines "person" to include states. 160 This provision, he found, was not a sufficiently clear indication of Congress's intent to strip the states of their sovereign immunity. 161 Justice White first observed that three of the four judges considering this language in the initial consideration of the case found that this provision was not a sufficiently clear indication of congressional intent to abrogate the states' immunity, and thus, the provision could not be said to be unmistakably clear. 162 In addition, Justice White concluded that, since that definitional section also defined "person" to include the United States, it would be wholly redundant for Congress to hold the states and the United States liable under that provision since a separate provision provided for suits against the United States. 163

Finally, Justice White concluded that the provision in CERCLA defining "person" to include states was indistinguishable from the provision involved in Employees. 164 In Employees, the section defining employer to include states was held to subject the states to suit in federal court by the federal government, but not to suit by private individuals. 165 This conclusion, Justice White determined, was appropriate for the provisions involved in CERCLA as well. 166 Anything else, he maintained, would require a clearer statement than that included in section 101(21). 167

Justice White then turned to the provisions added in the SARA amendments to CERCLA. 168 Justice White read section 101(20)(D) to indicate that states and local governmental entities would be liable under section 107, but only to the United States and not private individuals. 169 Justice White determined that sec-

160. Id. For the text of section 101(21), see supra note 140 and accompanying text.
163. Union Gas, 109 S. Ct. at 2290. Justice White was referring to section 107(g), which provides: "For provisions relating to Federal agencies, see section 9620 of this title." 42 U.S.C. § 9607(g). For the text of section 120, see supra note 151 and accompanying text.
164. Union Gas, 109 S. Ct. at 2291. For the text of the provisions involved in Employees, see supra note 86.
165. Employees, 411 U.S. at 285-86.
166. Union Gas, 109 S. Ct. at 2291.
167. Id. at 2292.
168. Id.
169. Id. at 2290. For the text of section 101(20)(D), see supra note 142 and accompanying text.
tion 101(20)(D) was an unlikely provision to abrogate eleventh amendment protection since it applies only to facilities that a state acquires involuntarily by virtue of the state's function as sovereign.\textsuperscript{170} Since that section only applies to facilities acquired by the states involuntarily, the states' immunity would only be abrogated with respect to those sites, and not any sites that the state owned and operated by choice.\textsuperscript{171} This conclusion, Justice White found, was exactly opposite from what one would expect Congress to do; one would expect the states to be subject to suit for their proprietary operation of hazardous-waste sites while exempt from suit for sites acquired involuntarily.\textsuperscript{172}

Justice White concluded, however, that the provision in section 101(20)(D) did have meaning if construed to make the states liable to the United States, the conclusion that the Court reached in \textit{Employees}.\textsuperscript{173} While no congressional authorization is required for suit by the United States against a state,\textsuperscript{174} Justice White found that section 101(20)(D) was not superfluous since it exempted states from suit by the United States in certain situations, for example, in cases where the state became an involuntary owner.\textsuperscript{175} This, Justice White concluded, was exactly what the Court faced in \textit{Employees}, and the same result was appropriate in this case.\textsuperscript{176}

In conclusion, Justice White quoted \textit{Edelman v. Jordan},\textsuperscript{177} in which the Court observed that a waiver of immunity would only be found "'where stated' by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction of the statute in question.'"\textsuperscript{178} Since it was \textit{reasonable} to construe that Congress simply

\begin{itemize}
  \item 170. \textit{Union Gas}, 109 S. Ct. at 2292-93.
  \item 171. \textit{Id.} at 2293.
  \item 172. \textit{Id.} Justice White addressed Justice Brennan's explanation of this provision, which was that this part of section 101(20)(D) "explains and qualifies the entire definition of 'owner or operator'—not just that part of the definition applicable to involuntary owners." \textit{Id.} at 2280. Justice White observed that this analysis was wrong since the second sentence of section 101(20)(D), which imposes liability on states, exists \textit{only} as an exception to the first sentence of section 101(20)(D), which excepts states from liability where they acquired the site involuntarily. \textit{Id.}
  \item 173. \textit{Union Gas}, 109 S. Ct. at 2293.
  \item 175. \textit{Union Gas}, 109 S. Ct. at 2293.
  \item 176. \textit{Id.}
  \item 177. 415 U.S. 651 (1974).
\end{itemize}
intended to hold states liable to the federal government and not private individuals, Justice White concluded that it was inappropriate to hold that Congress had abrogated the states' eleventh amendment protection under CERCLA, as amended by SARA. 179

B. THE ELEVENTH AMENDMENT AND THE COMMERCE CLAUSE

1. Justice Brennan's Opinion

Since Justice Brennan found a clear congressional intent to abrogate the states' immunity, he proceeded to the constitutional issue of whether Congress has such power under the commerce clause of article I. Justice Brennan began by examining Parden and Employees, the message of which, he found, was that "the power to regulate commerce includes the power to override States' immunity from suit, but we will not conclude that Congress has overridden this immunity unless it does so clearly." 180

Quoting from Fitzpatrick, Justice Brennan considered the general principle of federalism that "'every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.'" 181 This proposition, he determined, applied with equal force to Congress's article I powers as it did to its power under section 5 of the fourteenth amendment. 182 Justice Brennan then turned to Justice Scalia's assertion in his dissent that "'[n]othing in [Fitzpatrick's] reasoning justifies limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution.'" 183 In response, Justice Brennan stated that, according to the dissent, the principles embodied in the

179. Id.
180. Id. at 2281. Justice Brennan also noted that, since the decision in Employees, the Court had twice assumed that Congress had the power to override the states' immunity under the commerce clause. Id. (citing Welch, 483 U.S. at 475-76; County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 252 (1985)). Justice Brennan also noted that every Court of Appeals to address this issue had concluded that Congress had such power. Id. (citing United States v. Union Gas Co., 832 F.2d 1343 (3d Cir. 1987); McVey Trucking, Inc. v. Illinois (in re McVey Trucking, Inc.), 812 F.2d 311 (7th Cir. 1987), cert. denied, 484 U.S. 895 (1987); County of Monroe v. Florida, 678 F.2d 1124 (2d Cir. 1982), cert. denied, 459 U.S. 1104 (1983); Peel v. Florida Dep't of Transp., 600 F.2d 1070 (5th Cir. 1979); Mills Music, Inc. v. Arizona, 591 F.2d 1278 (9th Cir. 1979)).
181. Union Gas, 109 S. Ct. at 2282 (quoting Fitzpatrick, 427 U.S. at 455 (quoting Ex parte Virginia, 100 U.S. 339, 346 (1880))).
182. Id. The legislation involved in Fitzpatrick was enacted pursuant to Congress's enforcement power in section 5 of the fourteenth amendment.
183. Union Gas, 109 S. Ct. at 2283 (quoting Justice Scalia's dissent, 109 S. Ct. at 2302). Justice Scalia was concerned that, if Congress were allowed to abrogate the states' sovereign immunity under any and all of its article I powers,
eleventh amendment predated the constitution itself, and thus, the commerce clause was not antecedent to the principles embodied in the eleventh amendment, but was subsequent to those principles.\textsuperscript{184} Thus, he concluded, the dissent could not properly rely on chronology in distinguishing \textit{Fitzpatrick}.\textsuperscript{185}

In part B of section III, Justice Brennan reviewed general principles of federalism and revisited the implicit-consent doctrine.\textsuperscript{186} Noting that the grant to Congress under the commerce clause is plenary, he observed:

Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable.\textsuperscript{187}

Thus, Justice Brennan revived the implicit-consent doctrine and held that "'[t]he States held liable under such a congressional enactment are thus not 'unconsenting'; they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis."\textsuperscript{188}

the doctrine of sovereign immunity would become a "practical nullity." \textit{Id.} at 2302.

\begin{itemize}
  \item \textsuperscript{184} \textit{Id.} at 2283.
  \item \textsuperscript{185} \textit{Id.} Justice Brennan noted that "'[e]ven if 'the principle embodied in the Eleventh Amendment' made its first appearance at the same moment as the Commerce Clause, and not before, the dissent could no longer rely on chronology in distinguishing \textit{Fitzpatrick}." \textit{Id.}
  \item In addition, Justice Brennan noted that the chronology of provisions would only make a difference if the eleventh amendment changed the state of affairs; \textit{i.e.}, that the commerce clause had permitted Congress to abrogate the states' sovereign immunity prior to the eleventh amendment. Justice Brennan observed that this analysis was untenable, however, because:
  \begin{itemize}
    \item The language of the Eleventh Amendment gives us no hint that it limits \textit{congressional} authority; it refers only to "'the \textit{judicial} power' and forbids "\textit{construing}" that power to extend to the enumerated suits—language plainly intended to rein in the judiciary, not Congress. It would be a fragile Constitution indeed if subsequent amendments could, without express reference, be interpreted to wipe out the original understanding of congressional power.
  \end{itemize}
\end{itemize}
\textit{Id.}

\begin{itemize}
  \item \textsuperscript{186} \textit{Id.} at 2284-86. For a discussion of the implicit-consent doctrine, see \textit{supra} notes 68-99 and accompanying text.
  \item \textsuperscript{187} \textit{Union Gas}, 109 S. Ct. at 2284.
  \item \textsuperscript{188} \textit{Id.}
\end{itemize}
This proposition—that the grant of commerce clause power without the power to provide for suit against the states in federal court would be incomplete—is at the heart of Justice Brennan's opinion. For example, Justice Brennan observed that Congress's article I commerce clause power has been construed to be extremely broad. This power, he observed, has also been construed to displace "state authority even where Congress has chosen not to act," and that it "sometimes precludes state regulation even though existing federal law does not pre-empt it . . . ." Accordingly, he found that, if Congress were not permitted to create a cause of action against the states for money damages in interstate commerce, no one could.

Justice Brennan concluded by addressing Pennsylvania's argument that article III does not permit Congress to provide an action against the states in federal court without their consent since this effectively allows Congress to improperly expand the federal courts' jurisdiction. Justice Brennan rejected Pennsylvania's argument on two grounds. First, he recited the implicit-consent doctrine: "[I]n approving the commerce power, the States consented to suits against them based on congressionally created causes of action." Second, Justice Brennan cited Fitzpatrick in support of the proposition that Congress may provide for a damages action against the states under the fourteenth amendment, and that this does not expand the federal courts' article III jurisdiction. Thus, Justice Brennan concluded that Congress may provide for suits against the states in federal court

189. Id. (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Wickard v. Filburn, 317 U.S. 111 (1942); Katzenbach v. McClung, 379 U.S. 294 (1964)).
192. Id. Justice Brennan observed that local attempts to deal with environmental problems have been invalidated under the commerce clause. Id. (citing Philadelphia v. New Jersey, 437 U.S. 617 (1978) (New Jersey's exclusion of out-of-state waste violated commerce clause)). Thus, he concluded, "we often must look to the Federal Government for environmental solutions. And often those solutions, to be satisfactory, must include a cause of action for money damages." Id. at 2285. For a discussion of the Philadelphia v. New Jersey case and the restrictions on local regulation of environmental problems, see generally Celebrezze, State Solid Waste Regulation and the Commerce Clause: Ohio's Initiative on a National Problem, 1 V.I.E.W. Proc. 49 (1988).
193. Union Gas, 109 S. Ct. at 2285. See also supra note 100.
194. Union Gas, 109 S. Ct. at 2285.
195. Id.
under the commerce clause because the states implicitly consented to such suit by granting Congress the power to regulate commerce in article I, which includes the essential authority to hold the states liable for damages in federal court.  

2. Justice Stevens's Opinion

Although Justice Stevens joined in Justice Brennan's opinion, he wrote a concurring opinion to set forth his views on the eleventh amendment. Justice Stevens started by noting the difference between the "two eleventh amendments": The first one is the literal language of the amendment, which restricts the power of the federal judiciary; and the second is the concept of sovereign immunity against federal-question cases embodied in the amendment, which began with Hans. Justice Stevens stated that Congress could not abrogate the protection in the former since it cannot amend the Constitution by a simple legislative enactment. He concluded that the latter, however, could be abrogated by Congress since it is merely a judicially created doctrine. Justice Stevens further supported his proposition that the limitation on the federal courts' power to entertain federal-question suits against states is not embodied in the literal eleventh amendment by noting that the states may waive their immunity and consent to suit in federal court while other parties may not.

Finally, Justice Stevens noted that the decision in Edelman buttressed his proposition that the immunity involved in federal-question cases is not under the eleventh amendment, but is a judicially created doctrine. In Edelman, the Court held that the

196. Id. at 2286.
197. Id. For a discussion of Hans, see supra notes 37-40 and accompanying text.
199. Id.
200. Id. at 2287 (citing Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 377 n.21 (1978); Sosna v. Iowa, 419 U.S. 393, 398 (1975); California v. LaRue, 409 U.S. 109, 112 n.3 (1972); American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18 & n.17 (1951); Mitchell v. Maurer, 293 U.S. 237, 244 (1934); Jackson v. Ashton, 33 U.S. 148, 149 (1834)).

Justice Stevens failed to recognize, however, that the Court has held that the states may consent to suit in federal court in cases between a state and a citizen of another state, contrary to the direct proscription contained in the eleventh amendment. See, e.g., Clark v. Barnard, 108 U.S. 436, 447 (1883). Thus, it is not only federal-question cases in which the states have been found to have consented to jurisdiction.
201. Union Gas, 109 S. Ct. at 2287.
eleventh amendment did not proscribe suits against state officials acting in their official capacity, so long as the relief granted was prospective. Justice Stevens observed, "[i]f Edelman simply involved an application of the limitation on judicial power contained in the Eleventh Amendment, once judicial power was found to exist to award prospective relief... it is difficult to understand why that same judicial power would not extend to award other forms of relief." In conclusion, Justice Stevens declared that "Congress is not superseding a constitutional provision in these cases, but rather is setting aside the Court's assessment of the extent to which the use of constitutionally prescribed federal authority is prudent."

3. Justice Scalia's Opinion

In part II of his opinion, Justice Scalia took the opportunity to comment on the continued validity of Hans. Justice Scalia adopted the reasoning in Welch, and rejected the argument that the Constitution contained a waiver of state immunity against suits involving federal questions. Since the federal government did not surrender its sovereign immunity under the constitution, Justice Scalia saw no reason to believe that the states surrendered their sovereign immunity to suits by citizens for violations of federal laws or the Constitution. In addition, Justice Scalia found that certain relief from violations of federal law was available, which somewhat obviated the need to allow suits against the states.

204. Id. at 2289.
205. Id. at 2299. Since part II of Justice Scalia's opinion was joined by Justice Kennedy, it appears that the Court is now split five-to-four on whether to overrule Hans: Justices Brennan, Marshall, Blackmun, and Stevens would overrule the decision, while the Chief Justice and Justices White, O'Connor, Scalia, and Kennedy support the decision.
206. Id. at 2297-98.
208. Union Gas, 109 S. Ct. at 2298. Justice Scalia buttressed this conclusion by noting that, if anything, suits against the federal government would be more important since "suits against the States for violation of the Constitution or laws can at least be brought by the Federal Government itself..." Id. (citing United States v. Mississippi, 380 U.S. 128, 140-41 (1965)).
209. Id. (citing Ex parte Young, 209 U.S. 123 (1908) (federal courts may enjoin state official's violations of federal law); Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978) (money damages are available against county and municipal officials)).
Justice Scalia also found that, even if he were wrong in his analysis that the states' did not surrender their sovereign immunity under the Constitution, the issue was a close one. Since the issue was so close, he maintained, it would be improper to overrule a decision that has been the law for a full century. Reversing *Hans*, Justice Scalia noted, would involve reversing seventeen other decisions that relied on its validity. In addition, he found that forty-nine Congresses had proceeded believing in the continued validity of *Hans*. Accordingly, Justice Scalia, joined by the Chief Justice and Justices O'Connor and Kennedy, "decline[d] respondents' invitation to overrule *Hans v. Louisiana*.

In part III of his opinion, Justice Scalia began by reviewing various decisions in which the Court had held that principles of federalism guaranteed the states' their right to sovereign immunity. For example, Justice Scalia quoted the following passage:

"The ‘constitutionally mandated balance of power’ between the States and the Federal Government was adopted by the Framers to ensure the protection of ‘our fundamental liberties.’ By guaranteeing the sovereign immunity of the States against suit in federal court, the Eleventh Amendment serves to maintain this balance."

Justice Scalia then rejected the proposition that Congress had the power under article I to strip the states of this immunity. Justice Scalia reasoned that any analysis of the states' surrender of sovereign immunity must begin with article III of the Constitution, and not article I. To allow federal jurisdiction

210. *Id.*
211. *Id.* See also *Welch*, 483 U.S. at 496 (Scalia, J., concurring).
212. *Union Gas*, 109 S. Ct. at 2298 (citing *Welch*, 483 U.S. at 494 n.27). But see *Jackson*, supra note 34, at 119-20 (stating that Justice Powell's same figure in *Welch* was exaggerated).
213. *Union Gas*, 109 S. Ct. at 2298. This reasoning, however, would prevent the Court from ever overruling any decision. While the decision in *Parden* has not been the law as long as the *Hans* decision, it is entirely possible that Congress has relied on it over the last quarter century. Notwithstanding, Justice Scalia evidenced little hesitation in maintaining that *Parden* should be entirely overruled. See *Union Gas*, 109 S. Ct. at 2303.
215. *Id.* at 2299-300.
217. *Id.* at 2301.
218. *Id.* Justice Scalia observed that "[w]hen we have turned to consider
over any action under which Congress has power to legislate under article I, he concluded, would exceed the federal courts' jurisdiction under the Constitutional plan.\(^{219}\)

Justice Scalia placed particular emphasis on the chronology of the constitutional provisions involved.\(^{220}\) First, he recognized that Congress has the power to strip the states of their eleventh amendment immunity when legislating pursuant to the enforcement provision of the fourteenth amendment because the provisions of that amendment "’were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress.’"\(^{221}\) He concluded that "[n]othing in this reasoning justifies limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution."\(^{222}\)

In part IV of his opinion, Justice Scalia expressly rejected the implicit-consent doctrine adopted in \textit{Parden}, and would overrule that decision entirely.\(^{223}\) Justice Scalia first observed that "all federal prescriptions are, insofar as their prospective application is concerned, in a sense conditional, and— to the extent that the objects of the prescriptions consciously engage in the activity or hold the status that produces liability— can be redescribed as invitations to ‘waiver.’"\(^{224}\) Thus, he concluded, there is little difference between the proposition that a state has waived its sovereign immunity by engaging in regulated activities or finding that Congress has abrogated the states' sovereign immunity.\(^{225}\) That proposition— that Congress can abrogate the states' sovereign immunity under its article I powers— he stated, was exactly what whether 'a surrender of [state] immunity [is inherent] in the plan of the convention,' we have discussed that issue under the rubric of the various grants of jurisdiction in \textit{Article III}, seeking to determine which of those grants must reasonably be thought to include suits against the States." \textit{Id. (emphasis in original) (quoting Monaco v. Mississippi, 292 U.S. 313, 328-30 (1934)).}

\(^{219}\) \textit{Id.}

\(^{220}\) \textit{Id.} He states, for example: "We have never gone thumbing through the Constitution, to see what other original grants of authority— as opposed to Amendments adopted after the Eleventh Amendment— might justify elimination of state sovereign immunity." \textit{Id.}

\(^{221}\) \textit{Id.} at 2302 (quoting \textit{Fitzpatrick}, 427 U.S. at 456 (quoting \textit{Ex parte Virginia}, 100 U.S. 399, 345 (1880))).

\(^{222}\) \textit{Id.}

\(^{223}\) \textit{Id.} at 2302-03. Noting that the Court in \textit{Welch} overruled \textit{Parden} to the extent that it did not require a clear articulation of Congress's intent to strip the states of their eleventh amendment immunity, Justice Scalia stated that he "would drop the other shoe." \textit{Id.} at 2303.

\(^{224}\) \textit{Id.} at 2303.

\(^{225}\) \textit{Id.}
IV. ANALYSIS

This section of this article examines the various issues involved in the Union Gas decision. First, this section considers the language in CERCLA, as amended by SARA, and whether it provides the required unmistakably clear indication of congressional intent to strip the states of their eleventh amendment protection. Second, the article examines the eleventh amendment issues and suggests some needed resolutions.

A. THE LANGUAGE OF CERCLA, AS AMENDED BY SARA

This author finds no unmistakably clear language that Congress intended to hold the states liable in federal court to private individuals. While the author disagrees with Justice White’s statutory analysis, he reaches the correct result: CERCLA, as amended by SARA, evinces Congress’s intent to hold the states liable to suit by the United States, but not necessarily private individuals.

The polestar for this analysis is that the statutory language must state Congress’s intent “‘to abrogate the Eleventh Amendment in unmistakable language in the statute itself.’” Likewise, Congress must indicate its intent “‘by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.’”

Section 101(21) of CERCLA defines “person” to include states. Without more, of course, this provision is insufficient to hold the states liable to suit in federal court. The next section relied on by the majority in Union Gas is section 101(20)(D).

226. Id.
227. Instead of considering CERCLA in its present form, i.e., as amended by SARA, Justice White first examined CERCLA before the SARA amendments, and then the SARA amendments separately. Union Gas, 109 S. Ct. at 2289-94. As Justice Scalia observed, piecemeal statutory construction is not a traditional, nor effective, method of ascertaining congressional intent. Id. at 2295-96.
231. See, e.g., Employees, 411 U.S. at 285-86.
That section first excludes the states from liability where they have acquired a facility involuntarily.\textsuperscript{233} Section 101(20)(D) then provides that such exclusion does not apply where the state has caused or contributed to a release and that such state shall be subject to the provisions of CERCLA "to the same extent" as nongovernmental entities.\textsuperscript{234} This language does not unmistakably indicate that Congress intended to subject the states to private suit in federal court.

The majority believes that the exclusion from liability in section 101(20)(D) would be unnecessary had Congress not intended to subject the states to suit elsewhere.\textsuperscript{235} The flaw in this analysis is that nowhere else in CERCLA does Congress provide that the states shall be liable in private suits. While other provisions indicate that Congress intended the states to be liable to the United States, nothing in them indicates an intent to allow private suits against the states in federal court.\textsuperscript{236} A perfectly reasonable construction of such language is that Congress simply intended the states to be subject to suit by the United States.

The majority rejects this construction, finding that no such provision is necessary to effect such a result since no congressional authorization is necessary for suits by the United States against the states.\textsuperscript{237} The majority claims that "Congress would have had no cause to stress that States would be liable 'to the same extent . . . as any nongovernmental entity,'\textsuperscript{238} . . . if it had meant only that they could be liable to the United States."\textsuperscript{239} It is submitted that the majority's claim that this provision would be rendered meaningless if CERCLA were interpreted to merely hold the states liable to the United States is flawed for two reasons.

First, as Justice White observed, the first sentence of section 101(20)(D) provides an exception to the states' liability as owners and operators.\textsuperscript{240} To this extent, the provision has meaning if interpreted that the states are only liable to the United States.

\textsuperscript{233} 42 U.S.C. § 9601(20)(D).
\textsuperscript{234} Id.
\textsuperscript{235} Union Gas, 109 S. Ct. at 2278.
\textsuperscript{236} For the text of other relevant provisions, see supra notes 145, 148 & 151 and accompanying text.
\textsuperscript{237} Union Gas, 109 S. Ct. at 2280.
\textsuperscript{238} 42 U.S.C. § 9601(20)(D).
\textsuperscript{239} Union Gas, 109 S. Ct. at 2279 (citing United States v. Mississippi, 380 U.S. 128, 140-41 (1965) (footnote added)).
\textsuperscript{240} Id. at 2292. See 42 U.S.C. § 9601(20)(D).
The second sentence then acts as an "exception to the exception" contained in the first sentence; notwithstanding the first sentence, a state will be liable if it causes or contributes to a release at an involuntarily acquired facility. This provision still has meaning if construed to only extend the states’ liability to the United States: a state will generally not be liable to the United States for a facility acquired involuntarily unless the state causes or contributes to a release.

Second, the majority's claim that section 101(20)(D) must indicate Congress's intent to provide a private cause of action against the states since Congress need not provide that the states shall be liable to the United States erroneously presumes that it would be entirely unreasonable for Congress to include any provision that is unnecessary. This presumption is entirely unfounded; Congress frequently includes unnecessary provisions in legislation. For example, numerous acts exist in which Congress has specifically provided that the states shall be liable in citizens' suits to the extent permitted under the eleventh amendment. Unless Congress has indicated with unmistakably clear language elsewhere in that legislation that the states are subject to private suits, such language is entirely unnecessary since the eleventh amendment acts as a limitation on state liability without any such provision.

Accordingly, a reasonable reading of the language in CERCLA does not provide the requisite unmistakably clear indication of Congress's intent to hold the states liable in private suits. While the language in section 101(20)(D) may be read that way, it is entirely reasonable to read the language as providing an exception to federal liability in certain situations.

B. The Eleventh Amendment

1. The Hans v. Louisiana Decision

It is also submitted that the Court should overrule the Hans decision and allow federal courts to entertain suits against states involving federal questions. The Court in Hans incorrectly


243. For a discussion of the Hans decision, see supra notes 51-56 and accompanying text.
found that the evidence indicated that the states had not intended to surrender their sovereign immunity when granting the federal judiciary its power under article III. As Justice Brennan has observed, the evidence in this area was anything but clear, and in fact a majority believed that the states had surrendered their immunity under the Constitution. In addition, this reading of the eleventh amendment is consistent with its actual language. If the states do not want to surrender their sovereign immunity with respect to federal-question cases, they may simply amend the Constitution to strip the federal courts of their jurisdiction over such suits, as they did after Chisholm.

Justice Scalia and the dissent's belief that *Hans* should be upheld on the grounds that Congress has relied on its continued validity for a full century is unfounded. If Congress has so relied, and does not believe that the states should be subject to suit in federal court in suits involving federal questions, the states may simply reverse this result and strip the federal courts of this jurisdiction. While Congress's reliance on the Court's decisions is an important consideration, it certainly is not controlling; such a rule would forever bar the Court from reversing a decision. In addition, the dissent's concern that Congress has relied on *Hans* seems somewhat disingenuous in light of the fact that they would completely overrule *Parden*, which may well have been relied on by Congress over the last quarter century.

2. Congressional Abrogation under Article I

If the Court eventually overrules *Hans*, whether Congress has the power under its article I powers to abrogate the states' sovereign immunity would become a moot issue since the states would be amenable to suit in all federal-question cases. The *Hans* decision remains intact, however, and this issue is not moot. The

---


245. See *Union Gas*, 109 S. Ct. at 2298 (Scalia, J., dissenting); *Welch*, 483 U.S. at 496 (Scalia, J., concurring).


247. The only effective difference between the states' potential liability if *Hans* were overruled and where Congress has abrogated their eleventh amendment protection is the specificity with which Congress must speak. When Congress abrogates the states' eleventh amendment protection under article I, it must make its intent unmistakably clear. *Union Gas*, 109 S. Ct. at 2281 (“the power to regulate commerce includes the power to override States’ immunity from suit, but we will not conclude that Congress has overridden this immunity unless it does so clearly.”). If *Hans* were overruled, the states would be poten-
related issue of whether any practical difference exists between
the implicit-consent doctrine and congressional abrogation of
state immunity is also presented in this discussion.

First, it is suggested that the Court should abolish the im-

cplicit-consent doctrine. As Justice Scalia observed, there is no dif-

ference—either conceptual or practical—between the implicit-

consent doctrine and congressional abrogation of eleventh

amendment protection.248 Conceptually, congressional abroga-

tion of immunity is premised on the grounds that the states gave

Congress the power to regulate in an area, and such delegation

included the power to hold the states liable in private suits. In

Fitzpatrick, for example, the Court held:

[W]e think that the Eleventh Amendment, and the prin-
ciple of state sovereignty which it embodies . . . are nec-
essarily limited by the enforcement provisions of § 5 of
the Fourteenth Amendment. In that section Congress is
expressly granted authority to enforce "by appropriate
legislation" the substantive provisions of the Fourteenth
Amendment, which themselves embody significant limi-
tations on state authority. When Congress acts pursuant
to § 5, not only is it exercising legislative authority that is
plenary within the terms of the constitutional grant, it is
exercising that authority under one section of a constitu-
tional Amendment whose other sections by their own
terms embody limitations on state authority.249

The implicit-consent doctrine is premised on similar grounds. In

Parden, the Court held that the state's operation of a railway sys-
tem in interstate commerce:

"[M]ust be in subordination to the power to regulate in-
terstate commerce, which has been granted specifically
to the national government. The sovereign power of the
states is necessarily diminished to the extent of the
grants of power to the federal government in the Consti-

tually liable under every statute, regardless of the specificity with which Congress
has spoken. This may be one reason the Hans proponents support that decision.
248. Union Gas, 109 S. Ct. at 2303. Justice Scalia stated that, "to acknowl-
dge that the Federal Government can make the waiver of state sovereign immu-
nity a condition to the State's action in a field that Congress has authority to
regulate, is substantially the same as acknowledging that the Federal Gover-
ment can eliminate state sovereign immunity in the exercise of its Article I pow-
ers . . . ." Id. (footnote omitted).
249. Fitzpatrick, 427 U.S. at 456. This passage was quoted at note 105 and
is quoted here for comparison.
When these two passages are compared, it becomes readily apparent that the doctrines are fundamentally the same: notwithstanding the construed language of the eleventh amendment, the states gave Congress the power to provide a private cause of action against the states.

In addition, no practical difference exists between the two doctrines. For example, assume that a federal statute unequivocally provides that any state which violates a state-employee's fourteenth amendment rights is subject to suit in federal court for damages sustained by that employee. A violating state could be held amenable to suit in federal court under either doctrine. First, the requirement that Congress speak clearly is satisfied; a requirement under both doctrines. Under the implicit-consent doctrine announced in Parden, the state would be amenable since: (1) The states gave Congress the power to regulate this activity in section 5 of the fourteenth amendment; (2) Congress conditioned employing citizens on amenability to suit in federal court; and, (3) by engaging employees, the state implicitly consented to suit in federal court.251 Under the more straightforward analysis of congressional abrogation in Fitzpatrick, the state would be amenable to suit since Congress spoke clearly to hold states amenable when they violate the statute.

Since there is no effective or conceptual difference between the two doctrines, it is submitted that one should be abandoned. In addition, the Court has often confused the two doctrines, citing cases which apply the implicit-consent doctrine in support of congressional abrogation and vice versa.252 This simply creates additional confusion in this already confused area, which could easily be avoided since both doctrines effect the same ultimate

250. Parden, 377 U.S. at 191-92 (quoting United States v. California, 279 U.S. 175, 184-85 (1936)).
251. This tracks the analysis used in the Parden decision. For the text of that analysis, see supra notes 76-77 and accompanying text.
252. See, e.g., Welch, 483 U.S. 468, 478 (citing Quern for the proposition that express congressional intent is required when considering the degree of specificity required under Parden); Quern, 440 U.S. 332, 343-44 (citing Employees when discussing the specificity with which Congress must speak when abrogating under Fitzpatrick).
ends. Of the two, congressional abrogation is a more straight-forward approach and is favorable to the implicit-consent doctrine. In addition, the "consent" involved in the implicit-consent doctrine is not the sort of consent associated with the proposition that states may consent to suit in federal court or waive their sovereign immunity.\(^{255}\)

If the implicit-consent doctrine is abandoned, the Court would be faced with the issue that the dissent in \textit{Union Gas} rejected: Whether Congress has the power under the commerce clause in article I to abrogate the states' immunity under the eleventh amendment.\(^{254}\) The answer to this question depends simply on one's beliefs in the federalist system. If one believes that a strong federal government— one that has the power to protect the rights guaranteed under the Constitution— is appropriate, then one allows such suits. If one believes that the states should be allowed greater autonomy in their affairs, then one denies such suits.\(^{255}\)

At this juncture, Justice Stevens's opinion is of import. If the eleventh amendment barred federal courts from hearing suits against states arising under the Constitution or laws of the United States, Congress could not override this protection, regardless of its specificity. Such a provision would be in direct violation of the eleventh amendment and article V of the Constitution,\(^{256}\) and would be invalid. As Justice Stevens observes, however, the states' protection against federal-question suits stems not from the literal terms of the eleventh amendment, but is a judicial interpretation of such language. Since this protection is a judicial

\(^{253}\) See, e.g., Clark v. Barnard, 108 U.S. 436, 447 (1883) ("The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction . . . .").

\(^{254}\) The Court has only allowed a private cause of action against the states premised on the commerce clause under the implicit-consent doctrine. See \textit{Union Gas}, 109 S. Ct. 2273; \textit{Parden}, 377 U.S. 184. Cf. \textit{Welch}, 483 U.S. at 475 (assuming "without deciding or intimating a view of the question, that the authority of Congress to subject unconsenting States to suit in federal court is not confined to § 5 of the Fourteenth Amendment"); \textit{County of Oneida v. Oneida Indian Nation}, 470 U.S. 226, 252 (1985).

\(^{255}\) Original intent— the oft ignored constitutional guidepost— indicates that Congress does have the power to subject the states to suit in federal court. For a discussion of the original intent surrounding the federal power to subject the states to suit in federal court, see \textit{supra} notes 37-54 and accompanying text.

\(^{256}\) For the text of article V, see \textit{supra} note 66 and accompanying text.
creation, any abrogation of it need not comport with the stric-
tures of the Constitution.257

The federal and state governments are involved more than ever in all areas of interstate commerce, and an integral part of the federal government’s power to regulate such activity is the power to render the states amenable to suit in federal court. An essential part of state accountability in federal court is liability for damages in suits by private individuals.

Without the power to hold the states accountable for money damages in private suits, Congress is deprived of one of its most effective means of regulating interstate commerce. If only the federal government is permitted to seek damages from the states, private entities will only engage in commerce with the states to the minimum extent necessary to reasonably conduct business. This is particularly true when environmental considerations are involved because of the potentially enormous liability for cleanups.

State sovereign immunity, and federal sovereign immunity for that matter, is an anachronism who’s time has passed. Today’s business world requires private individuals to transact with the states on numerous levels. To allow the states to freely conduct business without any accountability cries for change. While this author does not foresee the imminent fall of sovereign immunity, or even the inevitable fall, it is appropriate that Congress have the power to override such immunity when it deems necessary and provide for private suits against the states for damages. While the Supreme Court in Union Gas reached this result, its methodology, viz. the implicit-consent doctrine, perpetuates strained and confused doctrines in this area that are in desperate need of a cleanup.

V. CONCLUSION

In closing, the Court’s decision in Union Gas is attractive from an environmentalist’s standpoint since more state funds will now be available for cleaning up toxic-waste sites. The decision is disturbing, however, for three reasons. First, the majority strains the language of CERCLA, as amended by SARA, to find an unmistak-

257. Justice Stevens's analysis fails in only one respect. He maintains that the fact that the states' protection against federal-question suits is judicially created allows the states to consent to suit. However, the states have been held to have consented to suits involving citizens of other states, a direct prohibition in the eleventh amendment. See Clark v. Barnard, 108 U.S. 436, 447 (1883).
ably clear indication of congressional intent to allow private suits against the states for damages. While this author is in favor of such a result— and believes that Congress should so provide in future legislation— he does not read the language of CERCLA, as amended by SARA, to provide evidence of such an intent.

Second, the decision reveals the Court's two newest members' position on the issue of whether to continue to follow *Hans*. Instead of overruling the incorrectly decided decision, the two newest members unfortunately support the decision and all of its attendant confusion. Finally, the *Union Gas* decision perpetuates the confusing and unnecessary distinction between the implicit-consent doctrine and congressional abrogation of state sovereign immunity. A far more appealing and perspicuous avenue would be to hold that Congress has the power under article I to render the states liable to private suits in federal court for damages.

*Robert Toland II*