Environmental protection is a growing concern in the United States and around the world. This concern is evident in extensive media coverage of environmental issues and politics. Environmental protection was a major issue in the 1988 Presidential campaign. Recognizing the need for environmental legislation, Congress enacted The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). CERCLA’s primary purpose is to provide a comprehensive approach to remedying hazardous waste problems. The Act does so by providing enforcement authority and funding for hazardous waste clean-ups.

Unlike pollution, the eleventh amendment is not a growing concern of the public. It is not a fixture in the news, nor was it a vital component in President Bush’s campaign. Judicial interpretation of the eleventh amendment will not have the direct impact on the lives of future generations that the environment will. However, in Pennsylvania v. Union Gas Co., the United States Supreme Court’s interpretation of the eleventh amendment was instrumental in determining the future scope and effectiveness of CERCLA.

In Union Gas, a third-party plaintiff filed a complaint in federal court against the State of Pennsylvania. The complaint alleged that Pennsylvania was liable, under the provisions of CERCLA, for the cost of cleaning-up a hazardous waste site. The state raised the eleventh amendment as a bar to the suit. This was the first case

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1 Martz, The Green Summit, NEWSWEEK, July 24, 1989, at 12. The heads of state of the world’s seven most productive industrial nations gathered in Paris, France in July, 1989. The meeting was planned as a forum for foreign policy and economic discussion. However, it turned into a “green summit” as the leaders’ primary focus turned towards environmental issues. For the first time the environment had center stage at a world-powers summit.

2 Chappie, Environmental Protection in 1989: Can Bush, Congress Move Legislation On Clean Air, Waste Issues?, 19 ENV’T REP. 1883 (1989). President Bush included environmental issues in his campaign. He supported control of acid rain, the Clean Air Act, elimination of ocean dumping, and he went to Boston Harbor to publicize the pollution in Governor Dukakis’ home state.


7 Union Gas, 109 S. Ct. at 2277.

8 Id.

9 The eleventh amendment states:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity,
in which the Supreme Court addressed whether Congress can enact legislation under its commerce power which effectively abrogates the states’ eleventh amendment immunity.\textsuperscript{10} In analyzing this issue, the Supreme Court examined its previous decisions,\textsuperscript{11} the holding of each Court of Appeals to decide this issue,\textsuperscript{12} the purposes of CERCLA,\textsuperscript{13} and the balance of power between state and federal government.\textsuperscript{14}

The \textit{Union Gas} opinion follows a line of Supreme Court cases which make exceptions to the eleventh amendment’s grant of state immunity.\textsuperscript{15} The exception in \textit{Union Gas}; that Congress may abrogate eleventh amendment immunity under its commerce power, enables the federal government to provide a comprehensive solution to hazardous waste problems.\textsuperscript{16} This casenote reviews the facts of \textit{Union Gas}, the history of eleventh amendment jurisprudence, and the purposes of CERCLA. The note critically analyzes the Supreme Court’s approach to evading eleventh amendment immunity. Finally, the note contemplates the impact of \textit{Union Gas} on CERCLA and eleventh amendment law.

**FACTS**

**Substantive Facts**

Predecessors of Union Gas owned and operated a carburetted water gas plant near Brodhead Creek in Stroudsburg, Pennsylvania.\textsuperscript{17} The plant operated from 1890 through 1948 and produced coal tar as a by-product of the gas processing.\textsuperscript{18} \textit{Union Gas} and its predecessors allegedly deposited the coal tar in the ground near Brodhead Creek.\textsuperscript{19} From 1953 to 1970, Union Gas sold portions of the land near Brodhead

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\textsuperscript{10} \textit{Union Gas}, 109 S. Ct. at 2281. The Supreme Court has interpreted the eleventh amendment as a broad grant of sovereign immunity to the states, prohibiting federal jurisdiction in cases where citizens sue states for money damages in federal court. See \textit{Hans v. Louisiana}, 134 U.S. 1 (1890).


\textsuperscript{12} \textit{Union Gas}, 109 S. Ct. at 2281. See, e.g., \textit{United States v. Union Gas Co.}, 832 F.2d 1343 (3d Cir. 1987); \textit{In re McKvey Trucking Inc.}, 812 F.2d 311 (7th Cir.), cert. denied, 484 U.S. 895 (1987).

\textsuperscript{13} \textit{Union Gas}, 109 S. Ct. at 2285. Congress intended CERCLA as a sweeping remedy to hazardous waste problems.

\textsuperscript{14} \textit{Id.}

\textsuperscript{15} \textit{Id.} at 2281. See cases cited \textit{supra} note 11. See also \textit{Welch v. Texas Dept. of Highway and Pub. Transp.}, 483 U.S. 468 (1987).

\textsuperscript{16} \textit{Union Gas}, 109 S. Ct. at 2285.


\textsuperscript{18} \textit{Id.}

\textsuperscript{19} \textit{Id.} at 375.
Creek to Pennsylvania Power and Light Company. The Borough of Stroudsburg subsequently acquired easements to this land. Stroudsburg assigned these easements to the Commonwealth of Pennsylvania in early 1980.

On October 7, 1980, Pennsylvania struck a coal tar deposit while excavating at the creek to control flooding. The coal tar released into Brodhead Creek. The Environmental Protection Agency (EPA) learned of the situation and deemed the coal tar a hazardous substance. The EPA declared Brodhead Creek the first Superfund site in the United States and ordered a clean-up. Pennsylvania and the federal government combined forces and expurgated the site. The federal government reimbursed the state for clean-up costs in the amount of $720.00.

Procedural Facts

The United States filed suit against Union Gas in the District Court for the Eastern District of Pennsylvania. The complaint alleged that Union Gas was liable, under the provisions of CERCLA, for $450,000 of the clean-up costs. Union Gas denied all liability in their answer and filed a third-party complaint, pursuant to Fed. R. Civ. P. 14, against Pennsylvania. Union Gas claimed that Pennsylvania was liable for a share of the clean-up costs because it was an owner and operator of the site within the meaning of CERCLA.

Pennsylvania moved to dismiss their joinder as a third-party defendant on the ground that the eleventh amendment barred the suit. Pennsylvania asserted that the Supreme Court’s opinion in Hans v. Louisiana made it clear that the eleventh amendment precludes federal court jurisdiction when a private citizen brings a suit

20 Id. at 374.
21 Id.
22 Id.
24 Id.
25 Id.
26 Id. Superfund is a popular synonym for CERCLA because the statute’s clean-up funds are derived from a tax on chemical manufacturers. See Easterbrook, Cleaning Up, Newsweek, July 24, 1989, at 27, 37.
27 Union Gas, 109 S. Ct. at 2276.
28 Id.
29 Id.
30 Id. at 2277.
31 Id.
32 Fed. R. Civ. P. 14(a) provides that a defending party, as third-party plaintiff, may cause a summons and complaint to be delivered upon a non-party who is or may be liable for all or part of the plaintiff's claim against the defending party.
33 Union Gas, 109 S. Ct. at 2277.
34 Id.
35 Id.
36 Hans v. Louisiana, 134 U.S. 1 (1890). In Hans, the Supreme Court held that the eleventh amendment precluded both party-based and subject matter jurisdiction of federal courts when a citizen sued a state for money damages.
for money damages against a state.\textsuperscript{37} The district court scrutinized CERCLA's language and legislative history and determined that Congress did not clearly express its intent to abrogate eleventh amendment immunity in enacting CERCLA.\textsuperscript{38} Consequently, the court dismissed Union Gas' third-party complaint. Finding no clear intent to abrogate, the court did not have to decide if Congress has the power to abrogate eleventh amendment immunity when legislating pursuant to its commerce clause powers.\textsuperscript{39}

The United States amended its complaint, revising damage figures, and Union Gas amended its third-party complaint.\textsuperscript{40} Again, the district court dismissed Union Gas' third-party complaint on the original grounds.\textsuperscript{41} Five months later, the United States and Union Gas reached a settlement and the district court dismissed the case between them.\textsuperscript{42}

Union Gas appealed the dismissal of the third-party complaint to the United States Court of Appeals for the Third Circuit.\textsuperscript{43} A two member majority of that court affirmed the district court's order.\textsuperscript{44} The court noted that state waiver of immunity and clear legislative intent to abrogate are the only methods of evading a state's eleventh amendment immunity to suit in federal court.\textsuperscript{45} The Court of Appeals agreed with the district court's holding that Congress did not effectively abrogate immunity under CERCLA.\textsuperscript{46}

Union Gas petitioned the United States Supreme Court for a Writ of Certiorari.\textsuperscript{47} While the petition was pending, Congress amended CERCLA with the Superfund Amendments and Reauthorization Act of 1986 (SARA).\textsuperscript{48} The Supreme Court granted certiorari, vacated the Third Circuit's opinion, and remanded for further consideration in light of SARA.\textsuperscript{49} On remand, the Third Circuit held that CERCLA's amended language contains the clear intent of Congress required to abrogate the eleventh amendment immunity protecting Pennsylvania from federal court jurisdiction.\textsuperscript{50} The court concluded that Congress can enact legislation under its Commerce

\textsuperscript{37} United States v. Union Gas Co., 792 F.2d at 375.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Union Gas}, 792 F.2d at 375.
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} \textit{Id.} at 373. (A. Leon Higginbotham, J., dissented and filed an opinion. \textit{Id.} at 383.) J. Higginbotham opined that CERCLA expressed Congress' clear intent that states could be liable and that Congress' plain language should not be discarded absent legislative history suggesting the language has an alternative meaning.
\textsuperscript{45} \textit{Id.} at 376. The eleventh amendment protects states from suit in federal court unless the state waives immunity and consents to suit or Congress abrogates immunity with clear, unequivocal language.
\textsuperscript{46} See \textit{id.} at 374.
\textsuperscript{47} Pennsylvania v. Union Gas Co., 109 S. Ct at 2277.
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.}
\textsuperscript{50} \textit{Id.}
Pennsylvania petitioned the Supreme Court for a Writ of Certiorari. The Supreme Court granted the Writ and affirmed the Third Circuit. The court explained that the federal government is often the only body capable of providing solutions to environmental problems, and these solutions must contain a cause of action for money damages against states to be effective.

BACKGROUND

The Eleventh Amendment

The eleventh amendment states that:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of a Foreign State.

In his concurring opinion in Union Gas, Justice Stevens emphasized the existence of two eleventh amendments. First, there is the literal and proper meaning of the amendment. Proponents of this view claim the amendment’s language and history are so clear that it can only be interpreted as a bar to suits against states where federal jurisdiction is party based. Second, there exists a judicially expanded version of the eleventh amendment which confers broad sovereign immunity upon the states. The “second eleventh amendment” arose from the Supreme Court’s decision in Hans v. Louisiana. In Hans, the Supreme Court departed from the amendment’s plain language and extended eleventh amendment immunity to preclude suits against states in which federal jurisdiction was premised on subject matter.

I. The First Eleventh Amendment

The Supreme Court’s decision in Chisholm v. Georgia planted the seed from...
which the eleventh amendment grew. In Chisholm, the Supreme Court exercised original jurisdiction in an action in assumpsit. A South Carolina citizen brought suit against the State of Georgia. The Supreme Court interpreted Article III’s grant of party-based jurisdiction literally and rejected the view that the clause pertained only to suits in which the state was a plaintiff.

The states radically opposed Chisholm, fearing liability in federal courts for revolutionary war debts. Under state law, most states were immune to a cause of action for debt recovery. However, the Chisholm doctrine employed Article III’s party-based jurisdiction as a federal limitation on state immunity laws. Even if state law rendered a state immune from a cause of action for debt recovery in state court, Chisholm allowed federal courts to entertain state law claims against a state if jurisdiction was based on the state-citizen or state-alien diversity clauses of Article III. Thus, a plaintiff could use Article III party-based jurisdiction to circumvent state law immunity and recover war debts from a state in federal court. In response to the states’ opposition of Chisholm, Congress proposed and the states ratified the eleventh amendment.

A. Pre-Hans Eleventh Amendment Jurisprudence

On its face, the eleventh amendment is unambiguous and seems to dictate that states are immune only from suits brought in federal court which are premised on party-status jurisdiction. From ratification through the Civil War, the Supreme Court construed the amendment within the narrow parameters of its language. Congress did not empower the federal courts with original federal question jurisdiction until 1875, but the Pre-Civil War Supreme Court had several opportunities to decide federal question cases against states on direct appeal, as well as admiralty cases against states. These decisions reflect the Supreme Court’s understanding that the eleventh amendment’s grant of state immunity was limited to state-citizen and state-alien diversity cases.

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63 Chisholm, 2 U.S. (Dall.) 419.
64 Article III of the United States Constitution grants federal courts the power to hear “controversies between a State and Citizens of another State,” U.S. CONST. art. III, § 2; See Id.
65 Cullison, Interpretation of the Eleventh Amendment, 5 HOUS. L. REV. 1, 7, 9, 16 (1967).
67 Id.
68 Id.
69 Id.
71 Gibbons, supra note 57, at 1941.
72 The Judiciary Act of 1801 did grant federal question jurisdiction to the federal circuit courts, but the act was repealed in 1802. See id. at 1946.
74 Id.
Cohens v. Virginia\textsuperscript{75} was the first case in which a state asserted the eleventh amendment as a defense.\textsuperscript{76} In Cohens, the Supreme Court held that the eleventh amendment did not apply because the case involved a writ of error in a criminal proceeding.\textsuperscript{77} The court reasoned that a criminal defendant's petition for writ of error is not within the eleventh amendment's scope of suits "commenced or prosecuted" against a state.\textsuperscript{78} However, in dictum, Justice Marshall stated that if the eleventh amendment did apply it would not prohibit a suit against a state in which federal jurisdiction was premised on subject matter.\textsuperscript{79} In Osborn v. Bank of the United States,\textsuperscript{80} the eleventh amendment did not bar a private citizen's suit because the state was not a party of record, even though recovery was sought from state funds.\textsuperscript{81} This decision did not limit eleventh amendment immunity on Article III grounds, but it does indicate the narrow stance the Supreme Court took in construing the scope of the amendment.\textsuperscript{82}

The Supreme Court's reluctance to extend eleventh amendment state immunity to admiralty cases further illustrates its literal interpretation of the eleventh amendment. In United States v. Peters,\textsuperscript{84} Justice Marshall, writing for the majority, found that the eleventh amendment did not bar a citizen's admiralty suit against a state official for recovery of funds also claimed by the Commonwealth of Pennsylvania.\textsuperscript{85} In United States v. Bright,\textsuperscript{86} Justice Bushrod Washington\textsuperscript{87} noted that the eleventh amendment expressly applies to suits in "law or equity," but does not mention suits in admiralty.\textsuperscript{88}

At no time prior to 1890\textsuperscript{89} did the Supreme Court offer an expansive reading of the eleventh amendment.\textsuperscript{90} During this period, the court had numerous opportunities\textsuperscript{91} to extend eleventh amendment immunity beyond the dictate of the amend-

\textsuperscript{75} 19 U.S. (6 Wheat.) 264 (1821).
\textsuperscript{76} Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction, 35 Stan. L. Rev. 1033, 1084-87 (1983).
\textsuperscript{77} See Cohens, 19 U.S. (6 Wheat.) 264.
\textsuperscript{78} See Atascadero, 473 U.S. at 295.
\textsuperscript{79} See Id. at 296.
\textsuperscript{80} 22 U.S. (9 Wheat.) 738 (1824).
\textsuperscript{81} Id. at 857.
\textsuperscript{82} Atascadero, 473 U.S. at 298.
\textsuperscript{83} See cases cited infra notes 84-88.
\textsuperscript{84} 9 U.S. (5 Cranch) 115 (1809).
\textsuperscript{85} Id. at 139.
\textsuperscript{86} 24 Fed. Cas. 1232 (D. Pa. 1809).
\textsuperscript{87} Justice Washington sat on the Marshall Court when it decided Peters.
\textsuperscript{88} Bright, 24 Fed. Cas. at 1236.
\textsuperscript{89} 1890 is the year the Supreme Court construed the eleventh amendment as a bar to all suits against states (federal questions and admiralty as well as diversity) in Hans v. Louisiana.
\textsuperscript{90} Gibbons, supra note 57, at 1968.
\textsuperscript{91} In cases like Osborn, Cohens, and Peters the court could have read the eleventh amendment to preclude suits against state officials and suits arising under federal questions or admiralty. See also Ex parte Madrazzo, 32 U.S. (7 Pet.) 627 (1833).
ment’s plain language. Despite the opportunity, the court never interpreted the amendment to preclude suits premised on federal questions or admiralty, nor did the court expand the amendment to protect state officials. The pre-1890 opinions concerning the eleventh amendment are not free of ambiguity and they do not expressly state that the amendment pertains solely to party-based claims against a state. Nevertheless, these opinions show that the court understood that eleventh amendment immunity extends no further than the confines of the amendment’s plain language.

The Second Eleventh Amendment

The judicially expanded version of the eleventh amendment is rooted in the 1890 case of Hans v. Louisiana. In Hans, a Louisiana citizen sued his own state to receive payment on a state-issued bond. Hans sought federal jurisdiction pursuant to Article III’s “arising under” clause. Departing from its stance in Cohens and Peters, the Supreme Court stretched the scope of the eleventh amendment beyond its plain language. The court held that the amendment precluded federal courts from hearing suits brought by private citizens against states even when jurisdiction is exercised pursuant to a federal question.

Post-Hans Eleventh Amendment Jurisprudence

Hans is conventionally viewed as a judicial enlargement of eleventh amendment immunity. This view has influenced the adjudication of post-Hans eleventh amendment cases. The Supreme Court has not focused on the letter of the amendment, but on Hans’ principle of broad sovereign immunity. In many situations, the doctrine of pure sovereign immunity is incompatible with policy needs and our federal system of government. As a result, the Supreme Court made exceptions

92 Gibbons, supra note 57, at 1968.
93 Id.
94 Fletcher, supra note 76, at 1087.
95 Id.
96 The judicially expanded eleventh amendment precluded federal courts from hearing any suit against states brought by citizens seeking money damages. The language of the amendment indicates that only diversity suits against states are prohibited. Thus, applying the amendment to federal question suits, as the court did in Hans, is an expansion of state immunity.
97 134 U.S. 1 (1890).
98 Id. at 1.
99 Hans’ action was based on the Contracts Clause of the Constitution. U.S. Const. art. I, § 10. Thus, it was a federal question, not diversity case.
100 See Hans v. Louisiana, 134 U.S. at 10, 11. The court noted that interpreting the eleventh amendment to bar diverse citizens from suing a state, but allowing a citizen to sue his own state under federal law, would be as startling and unexpected as was the courts decision in Chisholm.
101 Id. at 13.
104 Ex parte New York, 256 U.S. at 497; See also Id.
when necessary to escape the effect of *Hans*.\(^{105}\)

Despite the multitude of judicial exceptions to eleventh amendment sovereign immunity, *Hans* is still good law. This is evident from the Supreme Court’s decision in *Edelman v. Jordan*.\(^{106}\) *Edelman* limited an exception to state immunity previously created in *Ex parte Young*.\(^{107}\) In *Ex parte Young*, the eleventh amendment did not bar a private individual’s suit against a state official for misconduct in his official capacity.\(^{108}\) *Edelman* limited the *Young* exception by holding that a suit instituted under the *Young* exception applies only towards prospective grants of relief.\(^{109}\) *Edelman* shows that the eleventh amendment, as interpreted in *Hans*, bars certain federal question causes of action against states in federal court.

**ANALYSIS**

**The Decision**

There were three issues before the Supreme Court in *Union Gas*:

1. Does CERCLA express Congress’ clear intent to subject states to suits in federal court?

2. Can Congress enact legislation under its Commerce Clause powers which effectively abrogates the states’ eleventh amendment sovereign immunity?

3. Should *Hans v. Louisiana* be overturned on the ground that the eleventh amendment is not a broad constitutional grant of sovereign immunity?

The Court considered these issues in the above order. After holding that Congress intended CERCLA to permit suits for money damages against states,\(^{110}\) the Court concluded that the Commerce Clause grants Congress the power to abrogate eleventh amendment immunity.\(^{111}\) The resolution of the first two issues made the legitimacy of *Hans* moot because the decision already favored *Union Gas*.\(^{112}\) Thus, the

\(^{105}\) See Fitzpatrick v. Bitzer, 427 U.S. 445. (Congress may abrogate eleventh amendment immunity when legislating under the fourteenth amendment, sec. 5); *Ex parte Young*, 209 U.S. 123 (1908) (The eleventh amendment does not bar suits against state officials); *Employees v. Missouri Dept. of Pub. Health & Welfare*, 411 U.S. 279. (A state may waive its immunity, subjecting itself to suit in federal court.)


\(^{107}\) Id. at 663-71.

\(^{108}\) See *Young*, 209 U.S. at 167.

\(^{109}\) See *Edelman*, 415 U.S. 651. See also *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 104-106 (1984). *Young* is distinguished from these cases because *Young* rests on the vindication of federal rights, while *Edelman* balances federal rights against the competing interest of the constitutional immunity of the states.


\(^{111}\) Id. at 2286.

\(^{112}\) Id.
Union Gas opinion adds another exception to the existing pile which permit citizens to sue states for money damages in federal court.

**Congress' Clear Intent**

The Supreme Court has stated that Congress can abrogate state immunity, but it must express its intention to abrogate in unmistakable language. In *Union Gas*, the court examined CERCLA’s language, as amended by SARA, and determined that Congress effectively abrogated state immunity. CERCLA includes “persons” and “owners or operators” as those potentially liable for clean-up costs. States are expressly incorporated in the definition of “persons.” “Owners or operators” are persons, within the meaning of CERCLA, who undertake certain hazardous waste related activities. Under SARA, a state is excluded from the category of “owners or operators” if the state acquired ownership or control of the waste site involuntarily. However, SARA further explains that states which voluntarily acquire control are subject to liability to the same extent as any nongovernmental entity.

The Supreme Court held that the express inclusion of states under CERCLA’s liability section and SARA’s provision protecting states from liability when involuntarily acquiring control illustrate Congress’ clear intent to subject states to CERCLA liability. The court reasoned that Congress would not need to protect states from liability when the state involuntarily acquired the property unless Congress had abrogated eleventh amendment immunity elsewhere in the statute.

**Congress’ Commerce Clause Powers**

*Union Gas* was the first case in which the Supreme Court held that congress could abrogate eleventh amendment immunity when acting pursuant to its commerce powers. The court noted that each Circuit Court to address this issue concluded that the Commerce Clause grants Congress the power to abrogate state

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113 Welch v. Texas Dept. of Highway & Pub. Transp., 483 U.S. at 475-76 (The court assumed that Congress could abrogate under its commerce powers, but decided the case on a waiver theory). See Green v. Mansour, 474 U.S. 64, 68 (1985) (Congress, pursuant to a valid exercise of power, can abrogate if it unequivocally expresses its intent to do so).
114 See *Union Gas*, 109 S. Ct. at 2282.
116 Id. § 9601(21) (1980).
117 Id. § 9601(20)(a) (1980).
119 See id.
120 See id.
122 Id.
123 Id. at 2281. The court had twice assumed that the Commerce Clause gave Congress the power to abrogate, but *Union Gas* was the first case it directly addressed the issue. See Welch v. Texas Dept. of Highway & Pub. Transp., 483 U.S. at 475-76; County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 252 (1985).
immunity. The Supreme Court found that its previous decisions support Congressional abrogation of state immunity. In *Parden v. Terminal Railway of Alabama Docks Department*, the court noted that the states relinquished a portion of their sovereignty when they ratified the Constitution and the Constitution grants Congress the right to regulate commerce. In *Fitzpatrick v. Bitzer*, Congress was able to abrogate eleventh amendment immunity when legislating under §5 of the fourteenth amendment. These cases emphasize Congress' general ability to subject states to suits for money damages in federal court and lay a firm foundation for the decision in *Union Gas*.

In the *Union Gas* opinion, Justice Brennan quoted from *Ex parte Virginia* to emphasize the post Civil War shift in federal-state power. In *Ex parte Virginia*, the Court held that judicial enforcement of the prohibitions of the fourteenth amendment is not an encroachment on state sovereign immunity. The court stated that:

No law can be [an invasion of state immunity], which the people of the States have, by the Constitution of the United States, empowered Congress to enact. . . . [I]n exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach that extent.

The *Union Gas* opinion harmonized this quote regarding Congress' fourteenth amendment powers with Congress' power to abrogate eleventh amendment immunity when acting under its commerce powers. Both are express Constitutional grants of authority. Both grants are plenary and expand federal power while diminishing state rights. Thus, the reasoning in *Ex parte Virginia* applies to the Commerce Clause as well as the fourteenth amendment. A state's sovereign immunity is not invaded when Congress exercises Constitutionally granted powers, even if such exercise interferes with rights the state enjoyed before Congress obtained this power.

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124 *Union Gas*, 109 S. Ct. at 2281.
125 *Id.*
127 *Id.* at 191. However, *Parden* was decided on a waiver theory and not on Commerce Clause abrogation.
129 See *id.* See also *Quern v. Jordan*, 440 U.S. 332 (1979).
131 100 U.S. 339 (1880).
132 *Id.* at 346.
133 *Id.*
134 *Union Gas*, 109 S. Ct. at 2282.
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.* at 2282-83.
This Ex parte Virginia reasoning indicates the Court’s understanding that there is no conflict between a state’s eleventh amendment immunity and Congress’ power to abrogate via Commerce Clause legislation. The states gave Congress the power to regulate commerce when they ratified the Constitution. This grant of Constitutional power to Congress caused a corresponding diminution of state rights.\textsuperscript{139} The states relinquished their eleventh amendment immunity in causes of action arising under Commerce Clause legislation which clearly expresses Congress’ intent to abrogate. Immunity from such causes of action would violate the Ex parte Virginia doctrine because a state would be exercising her right to immunity while disregarding the valid Constitutional limitations which Congress applied to those rights.\textsuperscript{140} The Supreme Court further explained that the language of the eleventh amendment endorses this reasoning.\textsuperscript{141} The amendment expressly limits the extent of federal judicial power.\textsuperscript{142} However, it does not limit the power which the Constitution confers upon Congress.\textsuperscript{143} Thus, the eleventh amendment does not preclude Congressional abrogation of state eleventh amendment immunity when Congress acts pursuant to a Constitutional grant of power.

_Cercla And Union Gas_

Congress’ Article I abrogation power is the legal theory upon which the Supreme Court decided Union Gas, but the decision also serves a valid policy interest. Union Gas illustrates the Supreme Court’s support of environmental legislation. The decision will have a positive effect on the country’s hazardous waste problem.\textsuperscript{144} The American public will view these points as the significant thrust of Union Gas.\textsuperscript{145} Consequently, society will view the decision favorably.

The Court stressed that the federal government must supply the answers to environmental problems.\textsuperscript{146} State law is often incapable of remediating environmental harm.\textsuperscript{147} State law regarding the environment tends to intrude on the rights of other states and their municipalities.\textsuperscript{148} The environment does not stop at the border of any particular state. State A may pollute its own waterways, but the pollution is likely to run into State B. Each state may have different environmental laws. In Union Gas, the Supreme Court recognized that uniformity is the most efficient method of environmental legislation.\textsuperscript{149} Any entity violating a statute must

\textsuperscript{139} Id. at 2282.
\textsuperscript{140} Id. at 2283.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} See Supreme Court Holds States May Be Liable, 20 ENV’T REP. 460 (1989).
\textsuperscript{145} Cleaning Up, supra note 26. The public is vastly in favor of environmental protection. Society perceives environmental problems as fundamentally disgraceful.
\textsuperscript{146} Union Gas, 109 S. Ct. at 2285.
\textsuperscript{148} See, e.g., id.
\textsuperscript{149} Union Gas, 109 S. Ct. at 2285.
be liable for money damages to create effective legislation.\textsuperscript{150} Previous legislative attempts at environmental protection failed because they focused on prevention, not monetary compensation.\textsuperscript{151}\textit{Union Gas} commands that all responsible parties pay monetary damages under CERCLA.

The application of CERCLA liability to the states affords the statute a clear opportunity to attain its goals. CERCLA's main objectives are to prevent hazardous waste contamination and provide incentive for voluntary clean-up when a spill does occur.\textsuperscript{152} States own or operate a large number of waste sites.\textsuperscript{153} Absent a cause of action for money damages, there is less incentive for a state to voluntarily participate in waste clean-ups.\textsuperscript{154} Potential CERCLA liability will motivate states to voluntarily expunge all contamination sites. Additionally, if states clean their sites quickly, their potential liability is limited.\textsuperscript{155}

In light of \textit{Union Gas}, states will be more prudent in spending Superfund money.\textsuperscript{156} In the past, states would overspend when involved in waste clean-ups because they were spending Superfund money and realized that the eleventh amendment prevented the use of state funds.\textsuperscript{157} States will actively oversee clean-up expenditures if they know that state funds are subject to use.\textsuperscript{158} Furthermore, potential state liability will benefit clean-up and settlement negotiations.\textsuperscript{159} States will no longer use immunity as a bargaining chip.\textsuperscript{160} When a state bargains with a private entity to apportion Superfund liability or to arrange a clean-up procedure, the state must bargain in good faith. Before \textit{Union Gas}, a state could walk away from negotiations knowing there was no monetary risk.\textsuperscript{161} States did not have to bargain with private entities at arms length. Now states will feel pressure to reach settlements. Potential state liability will foster fair settlements and speedy clean-up arrangements.\textsuperscript{162}

\textbf{The Dichotomy Of Hans v. Louisiana}

While the practical effect of \textit{Union Gas} will be applauded, the Court should

\textsuperscript{150} \textit{Id.}


\textsuperscript{153} States own or operate 16% of waste sites nationwide. EPA Office of Emergency Response, estimate July 1, 1988.

\textsuperscript{154} Supreme Court Holds States May Be Liable, supra note 145, at 460.

\textsuperscript{155} \textit{Id.}

\textsuperscript{156} \textit{Id.}

\textsuperscript{157} \textit{Id.} For example, at the Brodhead Creek site, contractors were charging EPA workers $16 a day for the use of a shovel.

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{Id.}

\textsuperscript{160} \textit{Id.}

\textsuperscript{161} \textit{Id.}

\textsuperscript{162} \textit{Id.}
have caused that effect by overturning *Hans*. The court could have overturned *Hans* and achieved the same environmental policy results without ever deciding if Congress can abrogate immunity under its commerce powers. Overturning *Hans* would limit eleventh amendment immunity to diversity cases. A state could not cry immunity when a cause of action against it arose under federal law. Pennsylvania could not have raised the eleventh amendment as a defense to Union Gas' federal law claim. Overturning *Hans* would cleanse the murky waters surrounding eleventh amendment law. Furthermore, destroying the *Hans* fiction would be in accordance with the history and letter of the eleventh amendment.

Eleventh amendment case law is confusing. *Hans*, the starting point for modern eleventh amendment law, has numerous exceptions. The exceptions are designed to avoid the constricting effect of the *Hans* decision. Add further exceptions which limit or expand the original exceptions and it is difficult to determine when a private party can sue a state for money damages in federal court. Limiting eleventh amendment immunity to diversity cases would untangle the complex web of eleventh amendment law.

If *Hans* was correctly decided, then many of the Supreme Court's eleventh amendment decisions are erroneous. The eleventh amendment speaks of judicial power. In an actual eleventh amendment case, the question is whether the federal court has the power to hear the case. In *Clark v. Barnard*, the Supreme Court held that a state may waive immunity and consent to suit in federal court. However, it is well settled that a party may not waive a defect in subject matter jurisdiction. This is especially true where a federal court does not have Article III jurisdiction. If *Hans* was correct, then the eleventh amendment bars federal jurisdiction where a state is the defendant and a private citizen brings suit to recover money damages based on a federal question. In this situation, the federal courts have no jurisdiction and a waiver of state immunity does not invoke subject matter jurisdiction.

The *Edelman* case further illustrates that *Hans*’ extension of eleventh amendment immunity to prohibit federal question cases is a judicial fiction. In *Edelman*, federal jurisdiction was found to exist, but only towards prospective relief. Either

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163 See supra note 56.
164 See supra notes 74-87.
165 See supra note 11.
167 *Pennsylvania v. Union Gas Co.*, 109 S. Ct. at 2286-87 (Stevens, J., concurring).
168 *Id.*
170 *Id.*
Article III grants jurisdiction or it does not. It says nothing about jurisdiction to render prospective relief, but not other forms of relief.\textsuperscript{174} These decisions are premised on a balance of federal-state power and not on the eleventh amendment. They cannot be based on the eleventh amendment because they do not concern the extent of federal judicial power.\textsuperscript{175}

History validates the conclusion that the eleventh amendment was not intended to apply to federal question cases. The impetus for the amendment, \textit{Chisholm v. Georgia},\textsuperscript{176} was a diversity case. The text of the amendment is clear and applies only to suits brought against a state by a citizen of \textit{another} state.\textsuperscript{177} There is no mention of immunity from suits arising under federal law.

The early eleventh amendment case law indicates that states did not even consider the eleventh amendment as a possible bar to suits arising under federal law. In three cases between 1810 and 1819, states, as defendants in civil suits, did not raise the amendment as a defense.\textsuperscript{178} In \textit{Cohens v. Virginia},\textsuperscript{179} Chief Justice Marshall stated that a state cannot be sued without its consent, but consent is not needed on a case-by-case basis.\textsuperscript{180} States surrendered certain rights when they ratified the Constitution, notably those rights which the Constitution gives to the federal government.\textsuperscript{181} Marshall noted that Article III of the Constitution grants the federal courts the power to hear all cases arising under the laws of the United States, and Article III does not preclude federal jurisdiction when a state is the defendant.\textsuperscript{182} The Justices on the Marshall Court lived through the ratification of the Constitution, the decision in \textit{Chisholm v. Georgia},\textsuperscript{183} and the ratification of the eleventh amendment. The \textit{Cohens} opinion and other Marshall Court eleventh amendment decisions, in all of which the Court declined to expand eleventh amendment immunity beyond diversity cases, should receive particular attention in analyzing the scope of eleventh amendment state immunity.\textsuperscript{184} In \textit{Union Gas}, the court should have overturned \textit{Hans v. Louisiana}. Early eleventh amendment jurisprudence, the text of the amendment, and the incompatibility of \textit{Hans} with Article III jurisdiction support this view.

\textbf{Conclusion}

The environment will benefit from \textit{Pennsylvania v. Union Gas Co}. The threat

\begin{itemize}
  \item See \textit{Union Gas}, 109 S. Ct. at 2287 (Stevens, J., concurring).
  \item \textit{Id}.
  \item 2 U.S. (Dall.) 419 (1793).
  \item U.S. \textsc{const.} amend. XI.
  \item 19 U.S. (6 Wheat.) 264 (1821).
  \item \textit{Id}, at 380.
  \item \textit{Id}.
  \item \textit{Id} at 382-83.
  \item 2 U.S. (Dall.) 419 (1793).
  \item \textit{See Atascadero State Hosp. v. Scanlon}, 473 U.S. at 290-91 (Brennan, J., dissenting).
\end{itemize}
of CERCLA liability will cause states to be more responsible in handling waste sites within their control. States will act with greater efficiency in cleaning sites where spills occur. If CERCLA is to be effective, Superfund money must be spent prudently. The threat of liability will make a state think twice before renting a shovel for $16 a day. To an extent CERCLA’s effectiveness depends on the strength which Congress gave it. However, the Courts holding in Union Gas provides CERCLA an opportunity to reach its goals.

The Court could have bestowed the same benefit upon the environment by reversing Hans as it did by creating another exception to Hans. The text of the eleventh amendment and the way its framers interpreted it indicate that it precludes only diversity-based cases against states in federal court. The post-Hans exceptions are confusing. The eleventh amendment speaks in terms limiting federal jurisdiction, but the post-Hans exceptions are based on federal-state balance of power. If the eleventh amendment is truly a bar to federal question jurisdiction over states, then concerns over balance of power should not effect the jurisdictional bar. The evidence weighs in favor of reversing Hans.

Why did the Court choose to avoid the Hans issue? Stare decisis is one plausible answer. It is possible that the Court did not want to disrupt its previous eleventh amendment rulings. It is also possible that the Court is slowly invalidating Hans. With each exception to eleventh amendment immunity the Hans doctrine offers less protection to the states. By making exceptions to eleventh amendment immunity the Court can reach the proper result in the case before it without seriously disturbing the balance of power between state and federal government.

Despite any valid concern for stare decisis or the balance of governmental power the Court should have overturned Hans. In overturning Hans the Court would have changed the confusing state of eleventh amendment law. Litigants would know the circumstances in which a state is subject to federal jurisdiction. The force of the eleventh amendment would be in accord with its language and its framers’ intent. The balance of state-federal power would be as the framers envisioned it. The Supreme Court would not have to make exceptions which are unjustifiable. In Union Gas, the Supreme Court arrived at the correct conclusion regarding the environment, but took a wrong turn in getting there.

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