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I. INTRODUCTION

Since the inception of our nation, the most serious threats to the rights of the people have come when legislators and judges have considered the country to be pressed with problems so great as to require "creative interpretation" of our constitutional rights. Today, the most urgent problems facing our nation are the imminent dangers threatening the natural environment in which we live.

Since the 1960's, Congress has passed act after act placing increasingly restrictive standards and controls on the way we treat our environment. These standards frequently collide head-on with the guaranteed freedoms we thought were secured by the Constitution. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[1] and the Superfund Amendments and Reauthorization Act of 1986 (SARA)[2] constitute a very broad response to environmental dangers. CERCLA conflicts with the Eleventh Amendment of the Constitution. In *Pennsylvania v. Union Gas Co.*,[3] the U.S. Supreme Court's plurality decision reopened the old wounds of the struggle between two opposing theories of the Eleventh Amendment.

The Court must settle this interpretive battle in order to return stability to Eleventh Amendment jurisprudence. Will the Eleventh Amendment or other constitutional provisions be able to check the sweeping effects of environmental legislation on the rights of the people and states? Or, will the urgent needs of the times continue to change the way we interpret our Constitution?

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1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1988).

2. Superfund Amendments and Reauthorization Act of 1986 (codified in various sections of 42 U.S.C. §§ 9601-9675).

3. 491 U.S. 1 (1989).

II. BRIEF HISTORY OF STATE SOVEREIGN IMMUNITY

For several hundred years the Supreme Court has struggled over the question of state sovereign immunity. Such a struggle is perhaps inevitable in our unique system of federalism which attempts to balance the power of each sovereign state with the sovereign power of the federal government. Ratification of the Constitution made it clear that the sovereign status of the states would be diminished, reducing them to subsidiary sovereigns, while ultimate authority would rest in the strong centralized national sovereign.

The subservient status of the states toward the federal government was not at first seen as a barrier to state sovereign immunity. It was not until the Supreme Court began to interpret Article III of the Constitution as an abrogation of sovereign immunity that the debate became heated.[4]

The doctrine of sovereign immunity originated with the English courts at least as early as the thirteenth century.[5] The doctrine was transplanted to America by the early colonists and adopted by the several states after the revolution. By the time the Constitution was ratified, the idea of state sovereign immunity was widely accepted[6] but not universal.[7] Early American rejections of the doctrine were contained in colonial charters which expressly gave citizens the right to sue their colonial governments.[8] Probably the most widely held view of state sovereign immunity after the revolution was that immunity existed unless a state gave its consent to be sued.[9]

The most serious problem facing the future of the doctrine of state sovereign immunity has been its apparent clash with Article III of the Constitution. Article III established the basis

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4. *See* Letitia A. Sears, Comment, Pennsylvania v. Union Gas: *Congressional Abrogation of State Sovereign Immunity Under the Commerce Clause, or, Living With Hans*, 58 FORDHAM L. REV. 513, 515-16 (1989).

5. *See* 9 SIR WILLIAM HOLDSWORTH, A History of English Law 8 (3d ed. 1944).

6. Sovereign immunity was widely accepted throughout the American colonies primarily due to the circulation of Blackstone's COMMENTARIES ON THE LAWS OF ENGLAND. SELECTED WRITINGS OF EDMUND BURKE 126-27 (W. J. Bate ed. 1960).

7. Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 89 (1989).

8. *Id; see also* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 16, 19 (William F. Swindler ed. 1975).

9. *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 526-27 (Jonathan Elliot ed. 1836).

for federal jurisdiction over the states in a number of situations. For example, federal jurisdiction exists when there is a controversy "between a State and citizens of another State . . . or foreign . . . citizens or Subjects."[10] The inconsistency between state sovereign immunity and Article III has been the subject of much debate among constitutional scholars. Traditionally, two opposing explanations of Article III have been propounded.

Opponents of sovereign immunity usually characterize Article III as expressing a clear intent to abrogate any notion of state sovereign immunity that may have existed at the time of ratification. Supporters of sovereign immunity see Article III as merely expressing a statement of available federal jurisdiction to be considered only in light of the existing doctrine of state sovereign immunity. Another explanation of Article III is that it is merely an attempt to give the federal judiciary jurisdiction limited to those cases in which the state is a plaintiff against a private citizen. Despite numerous appeals to the history by both sides, no definitive explanation of the intent behind Article III has arisen.

A. Chisholm and the Eleventh Amendment

The debate over the meaning of Article III eventually culminated in the Supreme Court's controversial decision in *Chisholm v. Georgia*.[11] The Court in *Chisholm* held that, in light of express provisions in the Constitution, particularly Article III, a state could be sued in federal court by a citizen of another state.[12] Several of the Justices in *Chisholm* explained that by virtue of having joined the federal union, states had consented to be sued by private citizens in federal court because of the supremacy of the federal government over the states.[13] Only Justice Cushing found that the states' immunity had been specifically abrogated by Article III.[14]

The decision in *Chisholm* caused such a furor that Congress began working within days to construct a constitutional amendment reversing the effects of the decision.[15] As a result

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10. U.S. CONST. art. III, § 2.
11. 2 U.S. (2 Dall.) 419 (1793).
12. *Id.*
13. *Id.* at 464-65.
14. *Id.* at 467 (Cushing, J., concurring).
15. John E. Nowak, *The Scope of Congressional Power to Create Causes of*

of their efforts, the Eleventh Amendment was drafted, overwhelmingly ratified, and put into effect by January 8, 1798.[16]

Traditionally, two explanations have been proffered for the widespread support the Eleventh Amendment received in Congress after the *Chisholm* decision. One common explanation points out that the states were under a heavy burden of debt from foreign creditors and desired to default on those debts without suffering any consequence.[17] The second explanation is simply that there was an overwhelming understanding among the framers of the Constitution that the states were intended to be immune from citizen's suits.[18] These differing explanations form the basis for the current schisms in modern Eleventh Amendment debate. Regardless of Congress' attempt to settle the sovereign immunity question, the Eleventh Amendment may have caused more confusion over states' sovereign immunity than did the *Chisholm* decision.

B. 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 any Foreign State.[19]

Although the wording of the amendment seems clear, it leaves open several questions concerning state immunity. The answers to such questions turn on what one sees as the intended purpose in passing the amendment.

On its face, the Eleventh Amendment is not a full assertion of the doctrine of sovereign immunity. It simply defines a narrow set of circumstances in which suits against the states

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Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 COLUM. L. REV. 1413, 1436 (1975).

16. *See* Peter N. Swan, *The Eleventh Amendment Revisited: Suits Against State Government Entities and Their Employees in Federal Courts*, 14 J. COLL. & U.L. 1, 3 (1987).

17. Louise L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 19 (1963); *see also* Petty v. Tennessee-Missouri Bridge Comm'n., 359 U.S. 275 (1959); Missouri v. Fiske, 290 U.S. 18, 27 (1933).

18. *See* CHARLES G. HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835 at 138 (1944); *see also* Hans v. Louisiana, 134 U.S. 1, 11-15 (1890).

19. U.S. CONST. amend XI.

cannot be heard in federal court. The amendment makes no mention of suits by a state's own citizens or by the federal government. Accordingly, post-amendment debate has centered on whether the Eleventh Amendment was created (1) for the purpose of constitutionalizing the common law doctrine of sovereign immunity or (2) to eliminate a narrow class of suits between a state and a citizen of another state. Wranglings over the breadth and limits of the Eleventh Amendment focus upon these two questions. The faction which supports the notion that the Eleventh Amendment establishes the traditional notions of state sovereign immunity is called the "conventionalist" faction.[20] The faction which supports the theory that the Eleventh Amendment should be narrowly interpreted has come to be called the "revisionist" faction.[21]

C. *The Rule in* Hans v.Louisiana

Part of the debate concerning wrangling about the scope of the Eleventh Amendment was settled by the Supreme Court in *Hans v. Louisiana*.[22] The decision in *Hans* expanded the Court's previous interpretation of the Eleventh Amendment[23] and "adopted the traditional view that the amendment was intended to correct the error of *Chisholm*" by codifying the doctrine of state sovereign immunity.[24] *Hans* was a solid victory for the conventionalists. Today, *Hans* stands for the proposition that Eleventh Amendment protection extends to suits by a state's own citizens as well as to those instituted by citizens of other states. Although *Hans* has been widely criticized by the revisionists as being wrongly decided,[25] it has remained effectively in force since it was handed down in 1890.

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20. *See* Charles J. Williamson, *CERCLA, as Amended by SARA, Abrogates State Immunity Under the Eleventh Amendment Rendering States Liable for Money Damages in Federal Court, and Congress Has the Authority, Under the Commerce Clause, to Enact Such Legislation:* Pennsylvania v. Union Gas Co., 109 S.Ct 2273 (1989), 39 S. TEX. L. REV. 723, 741 (1990).

21. *Id.*

22. 134 U.S. 1 (1890).

23. Previously, the Court had more narrowly confined the meaning of the amendment to its literal wording. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 342 (1819).

24. CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 110 (1972).

25. *See* Sears, *supra* note 4, at 519-22.

D. Abrogation and Waiver of Immunity

Although the Eleventh Amendment has survived numerous frontal assaults, the Court has created several exceptions which allow private parties to avoid the consequences of *Hans* and obtain relief from states in federal court.[26] A state may waive its Eleventh Amendment protection by consenting to suit or Congress may abrogate the sovereign immunity of the states by statute under certain provisions of the Constitution.

Waiver of sovereign immunity occurs when a state makes a voluntary appearance and defends itself on the merits of a case in federal court,[27] when a state passes a statute expressing its consent to be sued,[28] or when a state continues an activity after a federal statute is passed establishing a federal standard for that activity.[29]

Congressional abrogation of the Eleventh Amendment occurs when Congress uses its superior power to override state immunity by passing a statute pursuant to one of its constitutional sources of power. Traditional constitutional provisions under which the Supreme Court has recognized Congress' right to exercise its power of abrogation are the Fourteenth Amendment,[30] the Commerce Clause[31] and possibly the Fifteenth Amendment.[32]

This use of Congressional override, however, has been limited by the Court. It is not enough to show that a federal statute was passed under the Fourteenth Amendment or the Commerce Clause to prove Congress' intent to override the Eleventh Amendment. The Court has recently formulated a standard which must be met in order to find that a federal statute abrogates the Eleventh Amendment. In *Atascadero State Hosp. v. Scanlon*,[33] the Court held that in order to override state

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26. The additional remedy of seeking redress from state officers is not discussed within the scope of this paper. *See* Ex parte Young, 209 U.S. 123 (1908).

27. *See* Clark v. Barnard, 108 U.S. 436, 447 (1883). *But see* Edelman v. Jordan, 415 U.S. 651 (1974) (a state that has defended and lost on the merits may raise an Eleventh Amendment defense on appeal).

28. *See, e.g.*, Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959).

29. This type of waiver, however, may have been severely limited if not completely abolished. *See* Welch v. State Dep't. of Highways & Pub. Transp., 483 U.S. 468, 477 (1987); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

30. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

31. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

32. *See* City of Rome v. United States, 446 U.S. 156 (1980).

33. 473 U.S. 234 (1985).

sovereign immunity, "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making his intention unmistakably clear in the language of the statute."[34] This standard has rarely been met.

The Court has refused to find a clear abrogation of the Eleventh Amendment under section 1983 of the Civil Rights Act,[35] the Rehabilitation Act of 1973,[36] the Education to the Handicapped Act,[37] and the Bankruptcy Code.[38] However, the Court has found a clear abrogation of the Eleventh Amendment under Title VII of the Civil Rights Act of 1964,[39] and more recently, under the SARA amendments of CERCLA.[40] This recent finding of the Court makes the CERCLA statute of more imminent concern to the states.

III. THE STATUTORY FRAMEWORK OF CERCLA AND THE SARA AMENDMENTS

In 1980, CERCLA was enacted by Congress to address some of the deficiencies in the Resource Conservation and Recovery Act of 1976 (RCRA).[41] The RCRA was concerned with protecting the environment from the disposal of hazardous substances.[42] Among the problems CERCLA was intended to address was the need to provide a retroactive remedy for inactive hazardous waste disposal sites.[43] A recurring difficulty with the cleanup of hazardous materials under previous law was the fact that some of the most dangerous threats to the welfare of the environment were created years ago when large quantities of hazardous materials were left behind by now defunct companies. Furthermore, many of the properties on which the hazardous materials are located have passed through several hands with the current owners having little knowledge of or

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34. *Id.* at 242.
35. *See* Quern v. Jordan, 440 U.S. 332 (1979).
36. *See Atascadero*, 473 U.S. 234.
37. *See* Dellmuth v. Muth, 491 U.S. 223 (1989).
38. *See* Hoffman v. Connecticut Department of Income Maintenance, 492 U.S. 96 (1989).
39. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).
40. *Union Gas*, 491 U.S. 1.
41. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992 (1988).
42. James K. Floyd, Note, *Piercing the Veil of Sovereign Immunity: Holding States Liable in* Pennsylvania v. Union Gas Co., 35 S.D.L. REV. 341, 344-45 (1990).
43. *See* H.R. Rep. No. 1016, 96th Cong., 2d Sess. 5, *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120.

culpability in the storage or disposal of the materials.

CERCLA certainly appeared to resolve the problem of retroactive application,[44] but the statute was plagued by other deficiencies which limited its effectiveness.[45] In 1986, Congress passed the SARA amendments to CERCLA in order to cure some of the statute's shortcomings by: (1) adding $8.5 billion[46] to the Superfund;[47] (2) allowing EPA to settle with responsible parties;[48] and (3) allowing liable parties to seek contribution from other responsible parties.[49] In addition, CERCLA was changed in ways that may not have been obvious until the Supreme Court's decision in *Union Gas*.[50]

A. *Liability of Persons as Owners or Operators*

Central to the issue of state immunity under CERCLA is the question of who qualifies as a "person" or as an "owner or operator". Joint and several liability under CERCLA has been strictly imposed upon persons who are or were owners or operators of hazardous waste vessels or facilities. Recently, the Supreme Court has based its decisions about application of the Eleventh Amendment on the issue of whether or not state governments are specifically included in these terms. If states are "persons" or "owners or operators" under the statute then they may be subject to potentially devastating liability.

It is apparent from CERCLA itself that strict liability, at the very least, is implied by section 9607(a)(1). Section 9607(a)(1) states:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
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> (1) the owner and operator of a vessel or a facility,

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44. *See* United States v. Monsanto Co., 858 F.2d 160, 174 (4th Cir. 1988)("Congress intended CERCLA's liability provisions to apply retroactively to pre-enactment disposal activities."); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 733 (8th Cir. 1986)("The statutory scheme itself is overwhelmingly remedial and retroactive."); United States v. Sharon Steel Corp., 681 F. Supp. 1492, 1495 (D. Utah 1987)("CERCLA is meant to be both remedial and retroactive.").

45. H.R. Rep. No. 253, 99th Cong. 2d Sess. 4, *reprinted in* 1986 U.S.C.C.A.N. 2836, 2837.

46. The original allotment was $1.6 billion. 42 U.S.C. § 9604(a)(1)(1980).

47. 42 U.S.C. § 9611.

48. *Id.* § 9622.

49. *Id.* § 9613(f).

50. *Union Gas*, 409 U.S. 1.

> (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,
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> (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, shall be liable for—
>
> (A) all costs of removal or remedial action . . . .[51]

The defenses referred to are limited to the following:

> (1) an act of God;
> (2) an act of war;
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship . . . if (defendant) (a) exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . . .[52]

Courts have been more zealous than even the statute itself in holding parties strictly liable for CERCLA violations. In *New York v. Shore Realty Corp.*, the court held:

> Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the compromise. Section 9601(32) provides that 'liability' under CERCLA 'shall be construed to be the standard of liability' under section 311 of the Clean Water Act, 33 U.S.C. § 1321, which courts have held to be strict liability . . . .[53]

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51. 42 U.S.C. § 9607(a).
52. *Id.* § 9607(b).
53. 759 F.2d 1032, 1042 (2nd Cir. 1985) (citing Steuart Transp. Co. v. Allied

In *United States v. Hooker Chemicals. & Plastics Corp.*,[54] the court imposed joint and several liability but stated that a party could show that the harm was divisible.[55] From the express provisions of CERCLA as well as from the federal court decisions one can conclude that any "person" who can be classified as an owner or operator is potentially under a great burden of liability, and thus, even greater weight is placed upon how the courts and the statute define the terms "person" or "owner or operator," and specifically, whether states are included in those terms.

B. The SARA Amendments

Of the major achievements of the SARA amendments, two have adversely affected states' sovereign immunity. The first is in the expanded definitions that expressly and impliedly include states as potentially liable parties for hazardous waste violations. The second is the added provision which allows for citizens suits.

1. SARA's new definitions

SARA's first significant expansion was an express inclusion of states in its definition of "persons". Section 101(21) provides:

> The 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.[56]

SARA also impliedly included states when it defines an "owner or operator" as "a 'person' who engages in certain activities."[57] Thus, if a state is engaged in certain illegal activities, described by the SARA amendments, it could be held liable for damages.

The SARA amendments also contain an exclusion for states

Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979).

54. 680 F. Supp. 546, 549 (W.D.N.Y. 1988).

55. United States v. Chem-Dyne Corp., 572 F. Supp. 802, 811 (S.D. Ohio 1983) (If there are genuine issues of material fact concerning the divisibility of the harm and any potential apportionment, the defendants are not entitled to judgment as a matter of law.)

56. 42 U.S.C. § 9601(21) (emphasis added).

57. Floyd, *supra*, note 42 at 347; *see also* 42 U.S.C. § 9601(20)(A).

which applies in certain circumstances, but the wording of the exclusion probably does more harm than good to state immunity. The exclusion provides that:

> 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 a sovereign.[58]

But the exclusion does not apply where the state "has caused or contributed to the release or threatened release of a hazardous substance from (a) facility, . . . "[59]

Further, the SARA exclusion for states contains a clause which potentially destroys any state immunity that may have been retained in other parts of the statute. Section 101(20) specifies that a state "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."[60] Thus, under this section a state could be subject to actions in federal court just like any other private or governmental party.

2. The citizen suit provision

In addition to the inclusion of states as potentially liable parties, SARA's provision for citizen's suits represents a formidable attack on state sovereign immunity. It is one thing to allow the federal government to take legal action against states for violations of federal law under CERCLA;[61] it is quite another to allow private citizens to sue the state in direct contradiction to the express provision of the Eleventh Amendment and the Court's pronouncement in *Hans*.

The failure to provide for citizen's suits for contribution was considered to be one of the great deficiencies in the original CERCLA statute.[62] The SARA amendments attempted to

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58. 42 U.S.C. § 9601(20)(D).
59. *Id.*
60. *Id.* (emphasis added).
61. The nature of federalism and the preemptive powers of the national sovereign demand that at least the federal government have the power to initiate judicial action against a state in federal court.
62. Floyd, *supra* note 42.

remedy this by enacting section 310.[63] Section 310 provides that any person may commence a citizen's suit "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) . . . in violation of any . . . regulation."[64] It is interesting to note that the clause which most clearly abrogates the Eleventh Amendment cites the amendment as its only limitation.

As yet, it is unclear how section 310 will be interpreted by the courts, but it can only be understood if the reference to the Eleventh Amendment is viewed as only applying to this section and not to suits by persons provided for by other sections of CERCLA. Some argue that section 310 is limited to suits for injunctive relief only, but the fact that the Eleventh Amendment is invoked in this section and not in the others is evidence that Congress considered the Eleventh Amendment as having been abrogated by the other provisions of CERCLA. Thus, Congress felt it necessary to invoke it as a limit to this section only.[65]

IV. PENNSYLVANIA V. UNION GAS CO.

A. *Facts*

In 1980, the EPA and the State of Pennsylvania began efforts to clean up what became the first emergency Superfund site listed in the United States under the CERCLA guidelines.[66] For nearly 50 years the predecessors of Union Gas[67] operated a coal gasification plant near Brodhead Creek in Straudsberg, Pennsylvania.[68] As a byproduct of its main operations the plant produced large amounts of coal tar which were deposited on top of, and injected into, the soil surrounding the plant.[69]

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63. 42 U.S.C. § 9659.
64. *Id.* (emphasis added).
65. *Union Gas*, 491 U.S. at 10.
66. *Id.* at 5.
67. Union Gas Co. acquired the property by merger in 1978. Note, *Look Out States . . . Your Environmental Liability Could Be Bigger than You Think*, 30 NAT. RESOURCES J. 929 (1990).
68. *Id.*
69. *Id.* The predecessor plant's use of in-ground disposal of coal tar was considered state-of-the-art technology of that time. Respondent's Brief in Opposition to Petition for Writ of Certiorari at 3, Pennsylvania v. Union Gas Co., 109 S. Ct 2273 (1989) (No. 87-1241).

Years after the plant shut down and the property had changed hands, the State of Pennsylvania, together with the Borough of Stroudsburg and the Army Corps of Engineers, began excavating on the property as part of a flood control project along Brodhead Creek.[70] While excavating, the state disturbed the deposits of coal tar causing them to seep into Brodhead Creek.[71] Upon notification of the seepage, the EPA declared the coal tar a hazardous substance[72] and ordered that the site be cleaned.[73] The state and federal government completed cleanup of the Broadhead Creek site at a final cost of $1.4 million.[74] Eventually, the United States reimbursed Pennsylvania for the federal share of the cleanup expenses. The United States then filed a lawsuit against Union Gas to recover its expenditures pursuant to sections 104 and 106 of CERCLA.[75] as well as other environmental statutes.[76] Union Gas, in turn, filed a third-party complaint against the State of Pennsylvania, claiming that the state was liable as an "owner or operator" under CERCLA.[77] The district court dismissed the claim against Pennsylvania based on the bar of Eleventh Amendment immunity.[78] The Court of Appeals for the Third Circuit affirmed the district court's decision. The Supreme Court vacated the decision and remanded the case for consideration in light of the new SARA amendments which Congress had passed while the parties waited for the Supreme Court to grant certiorari.[79]

Upon remand, the Third Circuit held that in light of the new SARA amendments, the states had been made liable to private parties in suits under CERCLA and the SARA amendments created an unambiguous abrogation of state sovereign immunity granted by the Eleventh Amendment. In a plurality decision, the Supreme Court affirmed the Third Circuit decision.[80]

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70. United States v. Union Gas, 792 F.2d 372, 374 (3d Cir. 1986).
71. *Id.*
72. *See* 42 U.S.C.A. § 9601(14).
73. United States v. Union Gas, 792 F.2d 372, 374 (3d Cir. 1986).
74. *Id.* at 375.
75. 42 U.S.C. §§ 9604, 9606.
76. *Union Gas*, 491 U.S. at 6.
77. 42 U.S.C. § 9607(a).
78. *Union Gas*, 491 U.S. at 6.
79. *Id.*
80. *Id.*

B. Analysis

The decision in *Union Gas* was very fragmented with the Court issuing five different opinions. The judgment of the Court was announced by Justice Brennan who was joined by Justices Marshall, Blackmun and Stevens. According to Justice Brennan, there were two questions necessary for the Court to decide: (1) "whether CERCLA, as amended by SARA, clearly expresses an intent to hold States liable in damages for conduct described in the statute";[81] and (2) "whether Congress possesses the . . . power of abrogation under the Commerce Clause . . . ."[82]

1. Brennan's opinion

In his decision on the abrogation question, Brennan presented a three-pronged argument that began with an analysis of CERCLA's definitions of "persons" and "owners or operators" as well as the exclusion for states in certain situations. He came to the conclusion that:

> The express inclusion of States within the statute's definition of "persons," and the plain statement that States are to be considered "owners or operators" in all but very narrow circumstances, together convey a message of unmistakable clarity: Congress intended that States be liable along with everyone else for cleanup costs recoverable under CERCLA.[83]

Further, Brennan recognized that although the statute allows for express exclusions of states as potentially liable parties in certain circumstances, the only express exclusion, section 101(20)(D), did not apply under the circumstances of the case.[84]

Brennan next turned to several sections in the statute that indirectly support the notion that Congress intended that states be held liable under CERCLA. According to Brennan, the fact that Congress supplied an exception to a state's general liability under sections 101(20)(D) and 107(d)(2) was "explicit recognition of the potential liability of States under this stat-

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81. *Id.* at 5.
82. *Id.*
83. *Union Gas*, 491 U.S. at 8.
84. *Id.*

ute . . . ."[85] In other words, if states were not already liable under other CERCLA provisions, there would be no need for the specific exemptions.

Brennan's third argument was that "in § 101(20)(D), Congress used language virtually identical to that it chose in waiving the Federal Government's immunity from suits for damages under CERCLA."[86] This mirroring of the "unequivocal expression" of the waiver of federal sovereign immunity with that of the states was further evidence of a congressional intention to override state immunity.[87] Thus, the language of the waiver of the United States sovereign immunity became the language of abrogation of state sovereign immunity.

Brennan's response to the question whether Congress actually has power under the Commerce Clause to abrogate the Eleventh Amendment was little more than a restatement of a long line of cases decided by the Court recognizing that power.[88] Brennan answers that "every Court of Appeals to have reached this issue has concluded that Congress has the authority to abrogate States' immunity from suit when legislating pursuant to the plenary powers granted it by the Constitution."[89] In this case, it was the familiar power of the Commerce Clause.

2. *Stevens' concurring opinion*

Justice Stevens, in his concurring opinion, gave a scathing reply to the conventionalist view of the Eleventh Amendment expressed in *Hans*.[90] According to his belief, *Hans* was wrongly decided, and the Eleventh Amendment has never embodied a general grant of sovereign immunity to the states.[91] Therefore, there is no need to find, nor indeed, can there be any abrogation of the Eleventh Amendment. The prohibition against a state's own citizens suing it in federal court was

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85. *Id.*
86. *Id.* at 10; *see* 42 U.S.C. § 9620(a)(1).
87. *Union Gas*, 491 U.S. 1.
88. *See* Parden v. Terminal Ry. of Alabama Docks Dept., 377 U.S. 184 (1964); Employees v. Missouri Dept. of Pub. Health and Welfare, 411 U.S. 279, 286 (1973); Welch v. Texas Dept. of Highways and Pub. Trans., 483 U.S. 468, 475-76 (1987); County of Oneida v. Oneida Indian Nation for New York State, 470 U.S. 226, 252 (1985); Green v. Mansour, 474 U.S. 64, 68 (1985).
89. *Union Gas*, 491 U.S. at 15.
90. *Id.* at 23.
91. *Id.* at 23-25.

merely a judge-made rule and can be undone by judges without reference to the Eleventh Amendment.[92] This, of course, is the unadulterated revisionist view of the Eleventh Amendment.

3. White's dissent

Justice White wrote the dissenting opinion in *Union Gas*. In the first part White concluded that there was no "unmistakably clear language" in CERCLA or SARA to override the Eleventh Amendment.[93] White drew support for his opinion from the fact that many of the appellate courts found that the CERCLA provisions cited by Brennan did not express a clear abrogation of state immunity.[94] It stands to reason that if so many judges were mistaken on that issue then the declarations in CERCLA involving the Eleventh Amendment could not be "*unmistakable*".

White bases his second argument on the fact that Congress also included the United States in its definition of the term "person," yet found it necessary to include a separate section detailing the waiver of immunity for the federal government.[95] If the inclusion of the United States in the definition of the term "person" was enough to waive sovereign immunity, why was the additional provision necessary? The fact that there was no like provision in CERCLA detailing the abrogation of state immunity is evidence that there was no such intent on the part of Congress.[96]

White's third argument was simply that any authority given by CERCLA over the states relates only to actions brought by the federal government and not to those brought by private citizens.[97] Concerning the language of CERCLA, White was joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy. With the balance of White's dissent these justices concurred in part and dissented in part.

In the second half of White's dissent, he agreed with Brennan that Congress has the power under the Commerce Clause to abrogate the Eleventh Amendment, though he disagreed with Brennan's reasoning. Justice Scalia filed a sepa-

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92. *Id.*
93. *Id.* at 45.
94. *Union Gas*, 491 U.S. at 46-47.
95. *Id.* at 47-48.
96. *Id.*
97. *Id.* at 48-49.

rate opinion concurring in part and dissenting in part. He too, was joined in part by Chief Justice Rehnquist and Justices O'Connor and Kennedy.

The mishmash of opinions in *Union Gas* is indicative of the state of the doctrine of state sovereign immunity in the Court today. The decision was a victory for the revisionists, but is it a firm, lasting victory?

C. *The Effects of* Union Gas

The most immediate and significant effect of the decision in *Union Gas* was the unrestrained introduction of broad liability for states under CERCLA and perhaps other environmental statutes. Of course, the decision has similar implications for other potentially liable parties. According to Brennan, "everyone who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup."[98] According to Stevens, "Congress has decided that the federal interest in protecting the environment outweighs *any countervailing interest* in not subjecting States to the possible award of monetary damages in a federal court."[99]

In the process of giving expanded authority under the CERCLA statute, the Eleventh Amendment may have lost a great deal of its significance except as an historical artifact. Although the holding in *Hans* was not specifically overturned and the Eleventh Amendment was not attacked head-on, the *Union Gas* decision represented an end-run around the sovereign immunity doctrine. With *Union Gas*, the Court expanded the authority of Congress to abrogate the Eleventh Amendment, negating any further need for direct attacks on the amendment.

In the process of dodging the Eleventh Amendment, recent Court interpretations of CERCLA may have become too difficult for states to bear. States are not like most entities. They are funded through taxes, by people who generally have little control over how their bureaucracy functions and how their money is spent. It is this position of the states that encouraged Congress to adopt the Eleventh Amendment and the Supreme Court to create the doctrine in *Hans*. These efforts have now been thwarted in the effort to remedy what is considered to be

98. *Id.* at 21.
99. *Union Gas*, 491 U.S. at 28 (emphasis added).

an immediate and serious threat to the environment.

The *Union Gas* decision has been closely followed in almost every federal circuit. However, the ultimate position of the Court (in light of its recent move toward the right) may change. *Union Gas* does not represent a solid backing of a majority within the Court and could be resting on shaky ground. A more solid position of the Court may emerge within the next several years.

V. CONCLUSION

Due to the increasing awareness of the imminent dangers to the environment in which we live, Congress has passed increasingly restrictive environmental statutes which have rekindled old conflicts about the meaning and scope of the Eleventh Amendment and the doctrine of state sovereign immunity. In the most recent round in that battle, the Supreme Court held that CERCLA, as amended by SARA, evidences a clear intent by Congress to abrogate the Eleventh Amendment and allow citizen suits against states found in violation of the statute. In doing so, the Court signaled a victory for the revisionist faction in the battle over the Eleventh Amendment and has curbed the effectiveness of the *Hans* decision as a protection of states immunity. The victory for the revisionists may be short lived in light of the splintered opinion of the Court in *Union Gas*. A majority of the Court has yet to solidify a more secure position on the Eleventh Amendment issue, and there is still hope that the states may not lose the few vestiges of sovereignty they have retained.

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