

Spring 1990

Superfund: A Super Abrogation of State Sovereign Immunity

Lynne E. Noyes

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Lynne E. Noyes, *Superfund: A Super Abrogation of State Sovereign Immunity*, 55 Mo. L. REV. (1990)
Available at: <https://scholarship.law.missouri.edu/mlr/vol55/iss2/4>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

SUPERFUND: A "SUPER" ABROGATION OF STATE SOVEREIGN IMMUNITY

*Pennsylvania v. Union Gas Co.*¹

In June of 1989 the United States Supreme Court held that the eleventh amendment of the United States Constitution does not bar a private citizen from seeking monetary damages in federal court from a state in an action arising under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and its subsequent amendments.² In upholding the decision of the Third Circuit Court of Appeals in *United States v. Union Gas Co.*³ (*Union II*), five members of the Court found that CERCLA⁴ as amended by the Superfund Amendments and Reauthorization Act (SARA),⁵ clearly expresses a congressional intent to permit suits against a state in federal court for monetary damages for conduct described in the statute.⁶ The plurality agreed that Congress has the constitutional authority to override the state's eleventh amendment sovereign immunity when legislating pursuant to the commerce clause.⁷ To fully understand the ramifications of this decision one must review the circumstances leading to this case; the purpose of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); and the history and case law behind the eleventh amendment.

1. 109 S. Ct. 2273 (1989).

2. *Id.*

3. 832 F.2d 1343 (3d Cir. 1987) [hereinafter *Union III*].

4. 42 U.S.C. §§ 9601-9657 (1982).

5. SARA, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

6. *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273 (1989). The opinion was written by Justice Brennan. The first two parts were joined by Justices Marshall, Blackmun, Stevens and Scalia. Justice Stevens wrote a separate concurring opinion.

7. *Id.* In parts III and IV of the opinion, Justice Brennan was joined by Justices Marshall, Blackmun and Stevens. Justice White wrote a separate opinion concurring in the result but disagreeing with the reasoning of the majority.

I. HISTORY OF THE CASE

The predecessors of the Union Gas Co. owned and operated a carburetted water gas plant close to Brodhead Creek in Stroudsburg, Pennsylvania between 1890 and 1948.⁸ After 1948, the plant was dismantled. In 1953 and 1970, Union Gas Co. sold part of its land near the creek to the Pennsylvania Power and Light Co. which then granted easements over the land to the Borough of Stroudsburg.⁹ In 1950, because of flooding problems, the borough, the State of Pennsylvania, and the Army Corps of Engineers dug levees and erected dikes, redirecting the flow of Brodhead Creek.¹⁰ In early 1980, the borough assigned its easements to the state.¹¹ In October 1980, the state was excavating at the creek when it struck a large deposit of coal tar that began to seep into Brodhead Creek.¹² Brodhead Creek thus became the first "Superfund" site in the nation.¹³ To clean up the coal tar that had seeped into the creek and to prevent further seepage, the state and federal government dredged the back channel of the creek and installed a slurry wall.¹⁴ The federal government reimbursed the state for all its clean-up costs—approximately \$720,000.¹⁵

The federal government sought recoupment of its clean-up costs from the Union Gas Co. in the District Court of the Eastern District of Pennsylvania.¹⁶ The United States filed under sections 9604 and 9607 of CERCLA and various sections of the Clean Water Act.¹⁷ The United States claimed Union Gas was liable because the government believed the coal tar had been deposited into the ground near Brodhead Creek by Union Gas and its predecessors as a by-product of the carburetted water processing.¹⁸ Union Gas denied liability and filed a third party complaint against the State and the Borough of Stroudsburg.¹⁹ Union

8. United States v. Union Gas Co., 792 F.2d 372, 374 (3d Cir. 1986) [hereinafter *Union I*].

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 374 n.1.

14. *Union I*, 792 F.2d 372 at 374.

15. *Id.*

16. United States v. Union Gas Co., 575 F. Supp. 949 (E.D. Pa. 1983).

17. Federal Water Pollution Control Act, 33 U.S.C. § 1321(b)(3), (f)(2) (1948). This Note will not discuss liability under the Federal Water Pollution Act because Union Gas did not file a third party claim with respect to these claims. *Union I*, 792 F.2d at 375 n.2.

18. *Union I*, 792 F.2d at 375.

19. *Id.* The Borough of Stroudsburg did not raise an eleventh amendment

Gas alleged that as "owners and operators" of the facility at Brodhead Creek the State and borough were responsible for the release of any hazardous substance.²⁰ Union Gas further claimed the State should pay for the clean-up. Union Gas believed the State was liable under CERCLA because they had "negligently caused, or contributed to, the discharge of coal tar into Brodhead Creek" by their recent excavation and earlier construction of dikes and levees.²¹ Believing the eleventh amendment barred the third-party complaint, the State filed a motion to dismiss.²²

The district court granted the State's motion to dismiss because it did not believe CERCLA contained a clear statement of congressional intent to abrogate sovereign immunity which is required for Congress to abrogate a state's immunity from liability in federal court.²³ Therefore, the district court failed to address the issue whether Congress could remove a state's sovereign immunity pursuant to its powers under the commerce clause as opposed to its powers under the fourteenth amendment. Subsequently, Union Gas and the United States reached a settlement, which resulted in a voluntary dismissal of the primary claim.²⁴

Union Gas appealed the dismissal of its claim against the State. The Third Circuit Court of Appeals affirmed,²⁵ agreeing that CERCLA did not contain the requisite clear congressional intent to abrogate a state's eleventh amendment immunity. So, initially, the Third Circuit did not address whether Congress can abrogate a state's immunity pursuant to the commerce clause. Union Gas petitioned for certiorari on October 8, 1986.²⁶ On October 17th, the President signed the Superfund Amendments and Reauthorization Act (SARA)²⁷ to CERCLA.²⁸ The Supreme Court vacated the appellate court's prior

defense in the district court, nor did they appear on the initial appeal to the Third Circuit. Therefore the Third Circuit did not discuss or decide whether the eleventh amendment immunity would reach the borough. *Id.* at 375 n.3. Furthermore the immunity of the borough is tangential to the issue of the abrogation of a state's eleventh amendment immunity raised in this Note and will therefore not be discussed.

20. *United States v. Union Gas Co.*, 575 F. Supp. 949, 950 (E.D. Pa. 1983).

21. *Union I*, 792 F.2d at 375.

22. *Id.*

23. *United States v. Union Gas Co.*, 575 F. Supp. at 952.

24. *Union I*, 792 F. 2d at 375.

25. *Id.* at 383.

26. *Union II*, 832 F.2d at 1346.

27. SARA, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

28. 42 U.S.C. §§ 9601-9657.

opinion and remanded the case for reconsideration in light of SARA.²⁹

Upon remand, the Third Circuit concluded SARA provides CERCLA with the clear language necessary to abrogate state sovereign immunity.³⁰ Thus, the court had to address the constitutional issue of "the power of Congress to abrogate the eleventh amendment not by the later fourteenth amendment but by the commerce power of the earlier Article I."³¹ The Third Circuit found Congress had such power and the State of Pennsylvania appealed to the United States Supreme Court.³² The United States Supreme Court granted certiorari³³ and heard the case in October of 1988.

II. PURPOSE OF CERCLA

CERCLA was a "bold effort to meet the threat to the public health and environment posed by inactive hazardous waste sites."³⁴ In 1979 the Environmental Protection Agency (EPA) estimated there were approximately thirty to fifty thousand inactive and uncontrolled hazardous waste sites in the United States.³⁵ Of these sites, approximately two thousand present a serious risk to the public health.³⁶ The current Solid Waste Disposal Act³⁷ provided a "cradle-to-grave" regulatory regime for the management of solid and hazardous wastes and was designed specifically to prohibit the open dumping of such wastes.³⁸ But, as the EPA findings point out, the law was "clearly inadequate" for dealing with the myriad of abandoned and inactive hazardous waste sites.³⁹ CERCLA initiates and establishes "a comprehensive response and financing mechanism to abate and control the vast problems associated with . . . hazardous waste disposal sites."⁴⁰ CERCLA provides a mechanism for cleaning up hazardous

29. *United States v. Union Gas*, 479 U.S. 1025 (1987).

30. *Union II*, 832 F.2d at 1345.

31. *Id.*

32. *Pennsylvania v. Union Gas Co.*, 485 U.S. 958 (1988).

33. *Id.*

34. *Union I*, 792 F.2d at 372.

35. H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 18, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120.

36. *Id.*

37. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795.

38. H.R. REP. NO. 1016, *supra* note 35, at 17, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120.

39. *Id.* at 17, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6119-20.

40. *Id.* at 22, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119,

waste sites, as well as imposing costs for remedial action on responsible "persons"⁴¹ and "owners and operators."⁴² CERCLA establishes a Hazardous Waste Response Fund—hence the nickname "Superfund"—for the clean-up of hazardous waste sites and provides that the fund be replenished by "potentially responsible parties" including current property owners, owners at the time of disposal, people who arrange for disposal, past off-site generators, and even certain transporters of a hazardous waste.⁴³ It empowers the President to coordinate with states in which there is a hazardous waste site emergency to clean-up the dangerous waste or prevent the danger from escalating.⁴⁴ CERCLA further establishes regulations for inactive hazardous waste sites, provides for a national inventory of such sites, and establishes a program for appropriate environmental response actions to protect the public health and environment.⁴⁵

Just as CERCLA corrects the faults in the Solid Waste Disposal Act, SARA supplements the inadequacies of CERCLA. In passing CERCLA, Congress severely underestimated the number of abandoned sites, as well as the cost and type of clean-up.⁴⁶ SARA provides an additional ten billion dollars to clean up the nation's worst abandoned sites. SARA also establishes national clean-up standards, a schedule for EPA activities, and enhances the EPA's response and enforcement authority.⁴⁷

III. CONGRESSIONAL INTENT

The eleventh amendment⁴⁸ acts as a jurisdictional bar to suits brought in the federal courts against state governments when suit is brought by anyone other than the United States or another state.⁴⁹

6125.

41. 42 U.S.C. § 9601(21) (1980).

42. *Id.* § 9601(20).

43. *Id.* § 9607.

44. *Union I*, 792 F.2d. at 372.

45. H.R. REP. No. 1016, *supra* note 35.

46. H.R. REP. No. 253, 99th Cong., 2d Sess., pt. 1 at 54, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2836.

47. *Id.*

48. The eleventh amendment states:

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

U.S. CONST. amend. XI.

49. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 46-55, § 2.11

The bar applies to all types of suits for damages and retroactive relief, but not to prospective injunctive relief requiring the state to comply with federal law.⁵⁰ The Supreme Court has construed the amendment broadly to preclude even suits against a state by the state's own citizens.⁵¹ The amendment does not prohibit a suit against the state in state court. Whether a state is subject to suits in state court is dependent on whether the state has waived its immunity.⁵²

Eleventh amendment immunity can be abrogated in two exclusive, alternative ways: (1) Congress can abrogate it statutorily by providing for suits against states, or (2) states can waive their sovereign immunity and consent to be sued.⁵³ Congress may abrogate the state's immunity only by making its intention unmistakably clear in the language of a statute.⁵⁴ A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the eleventh amendment.⁵⁵ Congress has, through clear statutory language and legislative intent, effectively enacted a number of laws abrogating a state's immunity in federal court.⁵⁶

Accordingly, in *Pennsylvania v. Union Gas Co.*,⁵⁷ before reaching the question of Congress's power of abrogation under the commerce clause, the Court had to decide whether CERCLA, as amended by SARA, clearly expresses an intent to abrogate sovereign immunity for conduct described in the statute.⁵⁸ The majority found CERCLA and

(1986) [hereinafter J. NOWAK].

50. *Id.*; see also *Edelman v. Jordan*, 415 U.S. 651, 667 (1974), *reh'g denied*, 416 U.S. 1000 (1974).

51. *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 486 (1987) (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)).

52. Boren, *Suits Against States in Federal Court: The Current Eleventh Amendment Controversy*, 25 AM. BUS. L.J. 701, 717 (1988).

53. *Union II*, 832 F.2d at 1346; accord *Welch*, 483 U.S. at 478-88.

54. *Welch*, 483 U.S. at 471 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

55. *Id.* at 476.

56. *United States v. Union Gas Co.*, 575 F. Supp. at 951; see also *Hutto v. Finney*, 437 U.S. 678 (1978), *reh'g denied*, 439 U.S. 1122 (1979) (Civil Rights Attorney's Fees Awards Act (1982)); *McNabb v. United States Dep't of Educ.*, 862 F.2d 681 (8th Cir. 1988), *cert. denied*, 110 S. Ct. 55 (1989) (Randolph Sheppard Act); *Witter v. Pennsylvania Nat'l Guard*, 462 F. Supp. 299 (E.D. Pa. 1978) (Vietnam Era Veterans Readjustment Act); *Parks v. Pavkovic*, 536 F. Supp. 296 (N.D. Ill. 1982), *aff'd in part, rev'd in part*, 753 F.2d 1397 (1985) (Education for All Handicapped Children Act (1975)).

57. 109 S. Ct. 2273 (1989).

58. In *Union II* the Third Circuit found that SARA demonstrated Congress' unmistakable intent to subject the states to suit in federal court. *Union II*, 832 F.2d at 1347. In *Union I*, the Third Circuit found that CERCLA did not contain

SARA contained the requisite intent. First, CERCLA explicitly included states within its definition of "persons."⁵⁹ Second, "owners and operators" are defined by referring to certain activities that a "person" may undertake.⁶⁰ Section 9601(20)(D) of SARA excludes from liability states that are "owners and operators" when ownership or control was "acquired involuntarily through bankruptcy, tax delinquency, abandon-

the requisite congressional intent because 1) the suggestion that states might be sued was found in a provision separate from the one that created the plaintiff's cause of action, 2) § 9607(g) explicitly waives federal sovereign immunity and there is no other similar provision referring to state sovereign immunity, 3) § 9607(a) which Union gas claimed abrogated the eleventh amendment has meaningful function regardless of Union Gas' interpretation—to establish a cause of action by the United States against states that own or operate hazardous waste sites. and 4) Congressional abrogation. *Union I*, 792 F.2d at 378-82. Otherwise the United States would be left with the problem of suing each state under its own tort law. The Third Circuit also refuted Union Gas' argument that Pennsylvania waived its immunity because the state's "purchase and clean up efforts are not sufficiently emphatic to constitute a constructive waiver of its constitutional right. It would be unreasonable to infer from Pennsylvania's actions that it had waived one of its most important and longstanding constitutional rights." *Id.* at 376 n.5.

59. 42 U.S.C. § 9601(21) (Supp. IV 1986). 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. *Id.*

60. *Id.* § 9601(20)(A), (D). Subsection A provides:

The term "owner or operator" means . . . in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and . . . 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.

...

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 same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

Id.

ment;" or other situations in which the state acquires title by virtue of its sovereign function.⁶¹ SARA also states that the exclusion it provides shall not apply "to any state or local government which has caused or contributed to the release or threatened release of a hazardous substance."⁶² Furthermore, such a state or local government shall be subject to the provisions of this Act (CERCLA as amended by SARA) in the same manner and to the same extent as any nongovernmental entity, including liability under section 9607.⁶³ SARA's express exclusion from liability of states who acquire ownership involuntarily would not be necessary unless Congress intended states, as owners and operators, to be liable along with everyone else for clean-up costs recoverable under the statute.⁶⁴ CERCLA further provides that states shall not be liable for costs or damages as a result of actions taken in response to emergency situations at facilities owned by another unless the state responds with gross negligence or intentional misconduct.⁶⁵ Again, the majority opinion, as written by Justice Brennan, contended that Congress need not exempt states from liability unless they would otherwise be liable. Similarly, section 9659(a)(1)⁶⁶ states that citizen suits can be brought against any person—including the United States and any other governmental agency. As a result, these citizen suits would be unnecessary if Congress had not specifically overridden the state's immunity from suit elsewhere in the statute.⁶⁷ Finally, the Court placed great emphasis on the SARA language describing the potential liability of the states. This language basically tracked the language used in CERCLA to waive the federal government's immunity

61. *Id.*

62. *Id.*

63. *Id.*

64. *Union Gas*, 109 S. Ct. at 2278 (1989).

65. 42 U.S.C. § 9607(d)(2) (Supp. IV 1987).

66. *Id.* § 9659. Citizens suits

(a) Authority to bring civil actions

Except as provided in subsections (d) and (e) of this section and in section 9613(h) of this title (relating to timing of judicial review), any person may commence a civil action on his own behalf-

(1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter (including any provision of an agreement under section 9620 of this title, relating to Federal facilities)

Id.

67. *Union Gas*, 109 S. Ct. at 2279.

from suit.⁶⁸ The majority further rejected Pennsylvania's and the dissent's proposition that SARA meant to make states liable in enforcement actions brought by the federal government and not by private citizens. The majority reasoned that if CERCLA did not subject the states to suit by private citizens, then the last sentence of section 9601(20)(D)—"to the same extent as any non-governmental entity, including liability under section 9607"—would have no meaning.⁶⁹ Section 9607 provides for liability in damages; a special remedy requiring special statutory language when the state's immunity from suits by private citizens is involved. In light of section 9601(20)(D)'s "very precise language, it would be exceedingly odd to interpret this provision as merely a signal that the United States—rather than private citizens—could sue the states for damages under CERCLA."⁷⁰ Like the Third Circuit in *Union II*, a majority of the *Union Gas* Court found that in CERCLA, as amended by SARA, Congress demonstrated its specific contemplation of the states' position in the constitutional scheme and chose to make them liable to suit by individuals in federal court.⁷¹

In his concurring opinion, Justice White found no "unmistakably clear language . . . that expresses Congress's intent to abrogate the State's Eleventh Amendment immunity."⁷² Justice White found the significance which the majority placed on CERCLA's inclusion of states within its definition of "persons" as "suspect."⁷³ In Justice White's view, such significance placed on this definitional section would render

68. *Id.* Compare § 9601(20)(D) with § 9620(a)(1). For text of § 9601(20)(D), see *supra* note 60.

§ 9620. Federal facilities

(a) Application of chapter to Federal Government

(1) In general

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. Nothing in this section shall be construed to affect the liability of any person or entity under sections 9606 and 9607 of this title.

42 U.S.C. § 9620(a)(1) (Supp. IV 1987).

69. *Union Gas*, 109 S. Ct. at 2279.

70. *Id.* at 2230.

71. *Id.* at ___; *Union II*, 832 F.2d. at 1348.

72. *Union Gas*, 109 S. Ct. at 2289 (White, J., concurring). Justice White was joined in part by Chief Justice Rehnquist, Justice O'Connor and Justice Kennedy.

73. *Id.* at 2290.

other sections of the statute "wholly redundant."⁷⁴ Justice White explained that the definitional section also includes the "United States Government" within the term "persons." If this definitional section was sufficient, then section 9607(g), which renders the federal government subject to suit under the statutes' liability provisions, would be superfluous and redundant. Instead, Justice White reasoned that Congress did not think that including the United States Government or the states within the definition of "persons" would be sufficient to abrogate one or the other's sovereign immunity. Yet, the majority never stated that the inclusion of states within the term "persons" was sufficient by itself, to abrogate their sovereign immunity.⁷⁵ The majority looked at the combined provisions of CERCLA and SARA. Justice White vehemently objected to this combination analysis. This analysis lost sight of the "underlying theory behind" the Court's cases, "undermine[d]" the Court's precedents, and made "this difficult case artificially easier."⁷⁶ Instead of the combination analysis used by the majority, Justice White looked at CERCLA and SARA independently of each other. In his view, there were three options: 1) Congress abrogated state sovereign immunity when it enacted CERCLA (in which case section 9607(g) would be redundant); 2) Congress did not abrogate sovereign immunity until it adopted SARA; or 3) Congress did not have an intent to abrogate in either instance.⁷⁷ Justice White chose to believe the last of these three possibilities.

Secondly, Justice White stated the portion of CERCLA on which the majority relied and the portion of the Fair Labor Standards Act (FLSA), on which the Court previously relied in *Employees v. Missouri Department of Public Health and Welfare*⁷⁸ are in all relevant respects "indistinguishable."⁷⁹ In *Employees*, the Court concluded that the relevant statutory term that described who was covered by the Act included the states as employers. The Court, however, found congressional intent to make states subject to enforcement actions brought by the federal government only; not actions brought by private litigants.⁸⁰ Using the same rationale, Justice White concluded Congress intended the states to be liable to enforcement actions brought only by the federal government. Like CERCLA, the FLSA was designed to be "comprehensive in nature."⁸¹ Therefore, the Court's previous policy finding of the

74. *Id.*

75. *Id.* at 2279.

76. *Id.* at 2290 n.1.

77. *Id.*

78. 411 U.S. 279 (1973).

79. *Union Gas*, 109 S. Ct. at 2291.

80. *Employees*, 411 U.S. at 286.

81. *Union Gas*, 109 S. Ct. at 2291.

FLSA, as far as the states are concerned, "is wholly served by allowing the delicate federal-state relationship to be managed through enforcement actions directed by [the federal government]—and not through litigation by private parties against the states."⁸² By the same analysis, states subjected to enforcement actions brought by the federal government is a viable means to achieve CERCLA's ends.⁸³

Next, Justice White rejected the majority's interpretation of section 9601(20)(D), making states that have involuntarily acquired ownership of the property liable in so far as they cause or contribute to the release of a hazardous substance.⁸⁴ Justice White believed section 9601(20)(D) was enacted solely as a limitation on governmental unit liability. Under limited circumstances, state governments "will be forced to pay" the federal government for clean-ups at involuntarily-acquired sites.⁸⁵ By rejecting Justice White's interpretation that section 9601(20)(D) limited the liability of states who involuntarily acquired ownership only to the federal government, the majority was left to "contort" the section to read as "an implicit statement that elsewhere the eleventh amendment has been waived for private law suits."⁸⁶

Finally, Justice White rejected the majority's view that the last sentence of section 9601(20)(D)—making states who acquire ownership involuntarily and who cause a release of hazardous chemicals, liable to the same extent as any non-governmental entity—provides a clear abrogation of immunity. Instead, Justice White said this provision exists to make states liable to the federal government.⁸⁷ Justice White agreed with the majority that no statutory provision is necessary to permit the United States to sue a state. Section 9601(20)(D), however, expressly forbids such suits against states that are involuntary owners. Therefore, the last sentence "operates to put some states back into the class of entities that may be liable to the United States, after Congress had previously exempted them from such actions."⁸⁸ This interpretation of SARA is consistent with the Court's previous interpretation of a similar section of the FLSA in *Employees*.⁸⁹ Justice White believed Congress may have added this phrase ("as any nongovernmental entity"), as a statutory exclamation point to emphasize that states which are involuntary owners, which actually cause subsequent discharges, should be liable under the statute, regardless of their involuntary owner

82. *Id.* (citing *Employees*, 411 U.S. at 286).

83. *Id.*

84. *Id.* at 2292. For text of § 9601(20)(D), see *supra* note 59.

85. *Id.*

86. *Id.* at 2292 & n.4.

87. *Id.* at 2293-94.

88. *Id.* at 2294.

89. *Id.* at 2293.

status, when the United States seeks recovery.⁹⁰ Second, Justice White speculated that Congress added the phrase so that local governments that cause discharges at involuntarily-acquired sites would be liable regardless of any state-law immunity doctrines for such local governmental entities. Justice White concluded that "it is incongruous to attribute such sweeping significance—an eleventh amendment abrogation . . . —to this one phrase in the definitional portion of SARA/CERCLA."⁹¹ Even if the majority's interpretation of section 9601(20)(D) was itself "reasonable," the existence of an alternative non-abrogation "reasonable" interpretation of the section dictates a rejection of the majority's conclusion that CERCLA, as amended by SARA, contains an unmistakably clear statement of Congressional intent to abrogate.⁹²

In his separate opinion, Justice Scalia agreed with the majority's interpretation of CERCLA and SARA.⁹³ He stated Justice White was "perhaps correct" if one assumes the purpose of the Court is to "plumb the intent of the particular Congress that enacted a particular provision."⁹⁴ Rather, the purpose of the Court, in the eyes of Justice Scalia, is to give "fair and reasonable meaning to the text of the United States Code" and not to enter the "minds of the Members of Congress—who need have nothing in mind in order for their votes to be lawful and effective."⁹⁵ Whether it was CERCLA or SARA that "envisioned" that states are liable to private persons for money damages is irrelevant to Justice Scalia. He stated, "The law does" render states liable in private suits.⁹⁶

The language of section 9659 of CERCLA, on which the majority based its finding that Congress intended civil actions against the individual states, is similar, if not identical in certain paragraphs, to the language used in at least eleven other federal environmental statutes. The Clean Air Act states that "any person may commence a civil action . . . against any person including (i) the United States and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution . . . against the Administrator," or against any person who proposes to construct or modify a major emitting facility.⁹⁷ Unlike CERCLA, the Clean Air Act and the other eleven federal environmental statutes continue to state

90. *Id.* at 2294 n.6.

91. *Id.*

92. *Id.* at 2294.

93. *Id.* at 2295.

94. *Id.* at 2296.

95. *Id.*

96. *Id.*

97. Air Pollution Prevention and Control, 42 U.S.C. §§ 7401-642 (1982).

that no action may be commenced until sixty days after the plaintiff has given notice of the violation to the Administrator, the state where the violation occurs, and to any alleged violator.⁹⁸ The other federal environmental statutes with similar language allowing for citizen suits are: the Toxic Substances Control Act,⁹⁹ the Endangered Species Act,¹⁰⁰ the Surface Mining Control and Reclamation Act of 1977,¹⁰¹ the Water Pollution Prevention and Control Act,¹⁰² the Public Health Service Act¹⁰³ and the Resource Conservation and Recovery Act.¹⁰⁴ One environmental law textbook notes that under the Clean Air Act, the potential for citizen-initiated enforcement against individual polluters has not been realized.¹⁰⁵ The authors believe that the national environmental groups prefer to challenge the Environmental Protection Agency's rules and standards which are applied broadly across the nation, rather than enforce specific standards at the local level.¹⁰⁶ This rationale, of preferring to challenge national standards, is what distinguishes citizen suits against the states under these other federal environmental statutes from citizen suits brought pursuant to CERCLA. Suits under these other statutes are designed to force a state to comply with standards already established by the federal agencies or by the states themselves. The purpose is for such suits to seek prospective relief, which is clearly allowed by the Constitution.¹⁰⁷ Furthermore, when these standards or policies were set, the states had several opportunities to voice their objections to the administrative body. But, citizen suits brought under CERCLA are designed to seek immediate monetary damages against a state for the cost of cleaning up a hazardous waste site. The plaintiff is not seeking necessarily to force a state into compliance, rather he is seeking the cost of clean-up for an individual site. Such relief may amount to a suit for retroactive relief.

98. 42 U.S.C. § 7604(b) (1982).

99. 15 U.S.C. § 2619 (1982).

100. 16 U.S.C. § 1540 (1982).

101. 30 U.S.C. § 1270 (1982).

102. 33 U.S.C. § 1365 (1982).

103. 42 U.S.C. § 300j-8 (1982).

104. 42 U.S.C. § 6972 (1982).

105. F. ANDERSON, D. MANDELKER & A. TARLOCK, *ENVIRONMENTAL PROTECTION: LAW AND POLICY* 151 (1984).

106. *Id.*

107. *See supra* notes 49-56 and accompanying text.

IV. HISTORY OF THE ELEVENTH AMENDMENT

The eleventh amendment was passed in reaction to the Supreme Court's decision in *Chisholm v. Georgia*.¹⁰⁸ *Chisholm* was an original action in assumpsit, filed by the executor of a South Carolina estate, to recover money owed to the estate by the state of Georgia.¹⁰⁹ The deceased, Robert Faquar, had furnished supplies during the Revolutionary War to Georgia pursuant to a contract.¹¹⁰ Georgia did not deny the debt; it just refused to appear on the ground that the federal court had no jurisdiction.¹¹¹ In a four to one decision, the Court decided it had jurisdiction pursuant to article III, section 2 of the Constitution.¹¹² In writing their opinions *seriatim*, the four justices who voted together¹¹³ rested their decision on article III and the states having limited sovereignty in a national democracy, rather than a congressional grant of jurisdiction.¹¹⁴ Five years later the eleventh amendment was ratified.¹¹⁵ Its language has been construed to mean that courts cannot, pursuant to their article III powers, subject states to suit.¹¹⁶

Because *Chisholm* was an action in assumpsit—a state law cause of action—scholars have argued that the eleventh amendment was intended to reach only cases of diversity jurisdiction.¹¹⁷ This view is

108. 2 U.S. (2 Dall.) 419 (1793).

109. *Id.*

110. Boren, *supra* note 52, at 704.

111. J. NOWAK, *supra* note 49, at 47.

112. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 473-80 (1793). Article III, § 2 states:

The Judicial Power shall extend 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; -to all Cases affecting Ambassadors, other public Ministers and Consuls; -to all Cases of admiralty and maritime Jurisdiction; -to Controversies to which the United States shall be a Party; -to Controversies between two or more States; -between a State and Citizens of another State; -between Citizens of different States; -between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

113. Justices Blair, Wilson, Cushing, and Jay.

114. J. NOWAK, *supra* note 49, at 47.

115. Boren, *supra* note 52, at 706.

116. *Union II*, 832 F.2d at 1353.

117. *Union II*, 832 F.2d at 1353 n.8. *But see* Boren, 25 AM. BUS. L.J. 701, 713 (1988) ("Based upon this evidence, a cogent argument can be made that the

expressed clearly in the dissenting opinion of *Welch v. Texas*.¹¹⁸ The dissenters believed a suit brought by an individual under a federal law against a state is not barred by the eleventh amendment.¹¹⁹ The dissenters' view of the amendment is merely an academic argument in light of the unanimous Supreme Court decision in *Hans v. Louisiana*¹²⁰ in which the Court held the eleventh amendment bar included federal question jurisdiction. *Hans* has been consistently upheld¹²¹ and even referred to as one of the most stable principles in constitutional jurisprudence.¹²² The Court in *Welch* stated that federal question actions are "unquestionably" suits in "law or equity" and are, thus, within the plain language of the amendment.¹²³ After *Hans*, the Court expanded the reach of the eleventh amendment to include suits in admiralty and suits by foreign sovereigns.¹²⁴ Thus, the eleventh amendment embodies the constitutional foundation of state sovereign immunity.¹²⁵

amendment was very limited in its scope and was not intended to apply to federal question cases."). Boren looked at such evidence as the debates of state conventions including the views of Alexander Hamilton and John Hamilton, as well as the limited wording of the amendment especially in light of the expressions of the four majority justices in *Chisholm* that the defense of sovereign immunity did not exist under the Constitution.

118. 483 U.S. 468 (1987). In *Welch* an employee of the Texan Highways Department was injured while working on a ferry dock operated by the department. The employee filed suit against the department and the state under § 33 of the Jones Act, 46 U.S.C. § 688 (1982), which in effect applies remedial provisions of the Federal Employers Liability Act. The district court dismissed the suit as barred by the eleventh amendment and the Supreme court affirmed. *Welch v. Texas*, 483 U.S. 468, 471-72 (1987). Like CERCLA, FLSA was passed by Congress pursuant to the commerce clause. The court also stated that an action under the Jones Act unquestionably is an action to recover damages from the state. *Id.* at 475.

119. *Id.* at 497. Justices Marshall, Blackmun and Stevens joined Justice Brennan in his dissent which stated that the eleventh amendment only applies to diversity suits and not suits based on federal questions. They reach this opinion because of the parallels between article III and the eleventh amendment.

120. 134 U.S. 1 (1890).

121. See *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934).

122. See *Welch*, 483 U.S. at 486.

123. *Id.* at 485.

124. Note, *More Plenary Than Thou: A Post-Welch Compromise Theory of Congressional Power to Abrogate State Sovereign Immunity*, 88 COLUM. L. REV. 1022, 1026 (1988).

125. *Welch*, 483 U.S. at 472; *United States v. Union Gas Co.*, 575 F. Supp. at 950.

V. CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE

In a question of state sovereign immunity, finding congressional intent is only the first question the Court must address. Upon finding congressional intent to abrogate eleventh amendment immunity, the Court must then decide whether the commerce clause¹²⁶ grants Congress such power.¹²⁷ The Supreme Court has recognized explicitly that the fourteenth amendment grants Congress the power to abrogate state sovereign immunity.¹²⁸ CERCLA was enacted, however, pursuant to Congress's article I commerce clause powers.¹²⁹ The Supreme Court either has expressly reserved the question whether Congress has this power under article I¹³⁰ or assumed, "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 section 5 of the fourteenth amendment."¹³¹ In *Welch*, the Supreme Court stated that an argument for "such authority" starts from the proposition that the Constitution authorizes Congress to regulate matters within admiralty and maritime jurisdiction, either under the commerce clause or the necessary and proper clause.¹³² By ratifying the Constitution, the states necessarily consented to suit in federal court with respect to enactments under either clause.¹³³ The Court in *Welch*

126. U.S. CONST. art. I, § 8, col. 3. The commerce clause says "[T]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." *Id.*

127. *Union Gas*, 109 S. Ct. at 2295. The third part of Justice Brennan's opinion was joined by Justices Marshall, Blackmun and Stevens. Justice White joined in the result but "disagreed with much of the reasoning." *Id.*

128. *Union II*, 832 F.2d. at 1351 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

129. *Id.*

130. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 252 (1985). Indian tribes brought action in federal district court alleging their ancestors conveyed tribal land to New York State under a 1975 agreement that violated the Nonintercourse Act of 1793 which required United States' approval for the purchase of Indian land. The district court found for the Indians, awarded damages and held that New York must indemnify the relevant counties for these damages. The Supreme Court affirmed everything below except the ancillary jurisdiction over New York.

131. *Welch*, 483 U.S. at 475. The Supreme Court did not need to reach the constitutional argument because they did not find the requisite clear Congressional intent to abrogate under the Jones Act.

132. *Welch*, 483 U.S. at 475 n.5.

133. *Id.* at 475 n.5. The Court continued to state that they had "no occasion to consider" the validity of the additional holding in *Parden v. Terminal Ry.*, 377

did not have to reach this decision because "Congress [did] not express in unmistakable statutory language its intention to allow States to be sued in federal court under the Jones Act."¹³⁴

This is the first argument put forth by Justice Brennan to support the Court's holding that Congress has the power to abrogate pursuant to the commerce clause.¹³⁵ This was also one of the main reasons behind the Third Circuit's holding in *Union II*.¹³⁶ These opinions reason that "participation of the states in our federal scheme has resulted in a relinquishment of state authority in the commerce area."¹³⁷ Congressional authority over interstate commerce stems from the plenary powers that have been granted to the national legislature and represents a displacement of state sovereignty.¹³⁸ Prohibiting congressional power to abrogate under article I would ignore the states' representation in Congress and the states' consent to diminished power implicit in their acceptance of the Constitution.¹³⁹

Hence, what the Supreme Court has given the states through interpretations of the eleventh amendment is circumscribed by the states' acceptance of the principle of federalism embodied in the Constitution. The sovereign immunity of the eleventh amendment forms a presumption that the states may not be sued. This presumption may be refuted by acts of Congress.¹⁴⁰

U.S. 184 (1964), that Congress has the power to abrogate a state's eleventh amendment immunity under the commerce clause to the extent states are engaged in interstate commerce. *Welch*, 483 U.S. at 478 n.8. In *Parden* a state was held to have impliedly waived its privilege of sovereign immunity where it voluntarily operated a federally regulated railway for profit. *Richard Anderson Photography v. Brown*, 852 F.2d 114, 121 (4th Cir. 1988). The precedential value of *Parden* has been extremely narrowed and to the extent the decision is inconsistent with the requirement that abrogation of eleventh amendment immunity must be expressed in unmistakably clear language, it has been overruled. *Welch*, 483 U.S. at 478.

134. *Welch*, 483 U.S. at 475.

135. *Union Gas*, 109 S. Ct. at 2281.

136. *Union II*, 832 F.2d at 1355.

137. *Id.* at 1356.

138. *Id.*

139. *Id.* at 1355.

140. *Brown*, 852 F.2d at 125 (Boyle, J., dissenting in part and concurring in part). The majority in *Brown* decided that Congress did not have the requisite clear intent to abrogate state immunity in the language of the federal Copyright Act which was passed pursuant to the commerce clause. Justice Boyle believed the act contained the necessary clear intent and continued to state that Congress had the power to abrogate pursuant to article I. *Id.*

Article I envisions national government with exclusive power to regulate certain subjects, when such regulation would serve the nation's interests.¹⁴¹ Allowing a state to avoid such national control by raising the defense of sovereign immunity would be inconsistent with the constitutional plan.¹⁴² In *Union Gas*, the plurality of the Court stated, it is "no accident that every appeals court to have reached this issue has concluded that Congress has the authority to abrogate state's immunity from suit when legislating pursuant to the plenary powers granted it by the Constitution."¹⁴³ Even if the Court had never before discussed the specific connection between congressional authority under the commerce clause and state's immunity from suit, "careful regard for precedent still would mandate the conclusion that Congress has the power to abrogate immunity when exercising its plenary authority to regulate interstate commerce."¹⁴⁴

The plurality reasoned that the states gave their consent to be held liable in ratifying the Constitution containing the commerce clause, rather than consenting on a case-by-case basis.¹⁴⁵

[Congressional power] conferred under the commerce clause 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.¹⁴⁶

The vastness of the commerce clause is not important. Rather the importance of the clause is its effect on the powers of the states. The Court has consistently held the commerce clause powers displace state authority even when Congress has chosen not to act.¹⁴⁷

The Supreme Court has allowed federal court jurisdiction against unconsenting states when brought by sister states, by the United States, or under section 5 of the fourteenth amendment.¹⁴⁸ The plurality believed when Congress acts pursuant to section 5, it is exercising legislative authority that is plenary within the terms of the constitution-

141. Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulations: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 694 (1976).

142. *Id.*

143. 109 S. Ct. at 2281 (citations omitted).

144. *Id.* at 2282.

145. *Id.* at 2284.

146. *Id.*

147. *Id.* (citations omitted).

148. *Welch*, 483 U.S. at 474; see also Tribe, *supra* note 141.

al grant. "[I]t is exercising that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority."¹⁴⁹ In so reasoning, the Court "emphasized the 'shift in the federal-state balance' occasioned by the Civil War Amendments."¹⁵⁰ Justice Brennan further argued the same reasoning used by the Court to allow congressional abrogation under section 5 of the fourteenth amendment is "as applicable to Commerce Clause."¹⁵¹ Like the fourteenth amendment, the commerce clause gives power to Congress while it takes power away from the states. Every addition of power to the federal government involves a corresponding diminution of the governmental powers of the states. A state cannot deny to the federal government the right to exercise all its granted powers, even though the exercise of such powers may interfere with the full enjoyment of rights to which the state may otherwise have been entitled.¹⁵² This expansion of federal power and contraction of state power "is the meaning, in fact, of a 'plenary' grant of authority."¹⁵³ It makes no sense to conceive of section 5 as somehow being an "ultraplenary" grant of power.¹⁵⁴

The plurality rejected the argument that Congress can abrogate only under those amendments passed after the eleventh amendment. Deciding precisely what actions the Constitution does or does not authorize to Congress is a problem in itself. Like the plurality, the *Union II* court interpreted the provisions of the Constitution as an entire document and not on a "time line."¹⁵⁵ "The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity."¹⁵⁶ The *Union II* court continued by saying the Constitution is not "self destructive" in that the powers it grants in one section (such as the power to regulate interstate commerce), it does not immediately take away on the other hand.¹⁵⁷ "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."¹⁵⁸

149. 109 S. Ct. at 2282 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

150. *Id.*

151. *Id.*

152. *Id.* (citing *Ex parte Virginia*, 100 U.S. 339 (1880)).

153. *Id.*

154. *Id.*

155. *Union II*, 832 F.2d. at 1351.

156. *Id.* at 1351 (citations omitted).

157. *Id.*

158. 109 S. Ct. at 2283.

Lower courts have said Congress can only waive eleventh amendment immunity in legislation passed pursuant to amendments ratified with full awareness of the eleventh amendment.¹⁵⁹ So as the eleventh amendment limits article III jurisdiction, so does the fourteenth amendment limit eleventh amendment immunity.¹⁶⁰ Evidently these amendments passed after the eleventh amendment were designed specifically to expand federal power and to provide Congress with the authority to implement these powers through the federal judiciary.¹⁶¹ To further this argument, proponents have narrowly interpreted the precedential value of *Fitzpatrick v. Bitzer*¹⁶²—availability of retroactive money damages when legislating under section 5 of the fourteenth amendment—as being the only area where Congress has such power.

Yet the fourteenth amendment, unlike the commerce clause, protects individual rights from the state. Because of the importance of such individual rights, an argument can be made that Congress wanted to allow explicitly for federal causes of action to protect these rights for individuals. Granting the power to create causes of action in these post civil war amendments, however, does not mean Congress is prohibited from using the powers granted in other provisions of the constitution to abrogate sovereign immunity.¹⁶³

Next, the majority stated the language of the eleventh amendment gives "no hint that it limits *congressional* authority;" it refers only to the "judicial power" and forbids construing that power to extend to the enumerated suits.¹⁶⁴ This language was "plainly intended to rein in

159. Brief of *Amici Curiae* in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 11, *Commonwealth v. Union Gas Co.*, 832 F.2d 1343 (3d Cir. 1987) (No. 87-1241).

160. *Id.* at 10.

161. *Id.* at 11. Other post civil war amendments which grant individuals protection against the states and provide for congressional abrogation are the thirteenth which abolishes slavery, the fifteenth which concerns the right to vote, the nineteenth which concerns women's suffrage and the twenty-fourth which prohibits poll taxes. *Id.* at 11 n.13.

162. 427 U.S. 445 (1976)

163. Justice Scalia rejects this argument in his dissent by stating that when the court has considered whether a surrender of state immunity is inherent in the plan of the convention they have done so under the rubric of the various grants of jurisdiction in Article III. The Court has 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." 109 S. Ct. at 2300-01.

164. *Id.* at 2282-83. In reaching this conclusion, the Supreme Court expressly rejected the arguments of the State of Pennsylvania that the eleventh amendment restricts both federal judiciary and congressional powers. Proponents of Pennsylvania's interpretation of the eleventh amendment argue

the judiciary, not Congress.¹⁶⁵ The eleventh amendment "was intended as a limitation on judicial, not congressional power."¹⁶⁶ It limits the jurisdiction of federal courts as originally constructed under article III and affirmed in *Chisholm*.¹⁶⁷ The Third Circuit stated "the language of the [eleventh] amendment does not, nor was it ever intended to, limit Congress' Article [sic] I powers; rather, it limits the courts' power to construe the grant of judicial power in Article [sic] III to abrogate the state's presumptive immunity from diversity suits."¹⁶⁸ Thus the eleventh amendment was intended as a limitation on judicial, not congressional power.¹⁶⁹

The Supreme Court cases, which have construed the eleventh amendment broadly to prohibit a federal question suit against a state by its own citizens, limit the ability of an individual to receive damages from the illegal acts of a state.¹⁷⁰ These cases restrict the ability of the federal judiciary to grant relief but they do not necessarily address the different problem of whether Congress has the power to create a federal cause of action against the states.¹⁷¹ In other words, concluding that neither article III nor the Judiciary Act of 1879 automatically eliminate sovereign immunity does not begin to address the question whether "other Congressional enactments, not designed simply to

that construing the eleventh amendment as only curtailing power of the judiciary is an incorrect use of the words "judicial power." The words "judicial power" in Article III have been understood as placing an outer limit on federal court jurisdiction and "implicitly prohibiting" Congress from granting jurisdiction to the federal court beyond its powers. Therefore limitations on article III judicial power are limitations on the power of Congress to confer jurisdiction. The Constitution does not authorize Congress to extend the jurisdiction of the federal courts beyond that which they are expressly prohibited from considering. However such an interpretation of the eleventh amendment is inconsistent with the view espoused by the Supreme Court in *Welch*.

165. *Id.* at 2283.

166. *Union II*, 832 F.2d at 1353 n.8.

167. *Brown*, 852 F.2d at 125. "Congressional abrogation does not refer to an impermissible attempt to override a constitutional guarantee by a statutory decree." *Id.* Rather it refers to the ability of Congress to create a cause of action for money damages enforceable by a citizen suit against a state in federal court. *Union II*, 832 F.2d at 1345 n.1.

168. *Union II*, 832 F.2d at 1353.

169. *Id.* at 1353 n.8.

170. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975).

171. *Id.* at 1415.

implement Article III's grants of jurisdiction, may override State's immunity.¹⁷²

The rationale behind the view that the eleventh amendment is a limitation on judicial and not congressional power is that Congress is accountable to both the state and federal systems.¹⁷³ In contrast, to maintain our system of checks and balances, the federal judiciary, which is isolated from the political pressures of re-election and the influences of the states, should be constrained from abrogating state sovereign immunity.¹⁷⁴ Congress, which feels direct pressure from the states, will be inclined to abrogate eleventh amendment immunity only in those instances where the benefits clearly outweigh any detrimental effect on the states. A congressional grant of jurisdiction, allowing individual suits against a state, indicates Congress has determined that federal policy is preeminent and the hardship on the state is not severe.¹⁷⁵ If the states do not like the regulation, they can exert their influence to have the legislation changed.¹⁷⁶ Conversely, the states practically have no recourse when there has been judicial assumption of jurisdiction over a state.¹⁷⁷ Construing the eleventh amendment as a restriction on federal jurisdiction creates a constitutional restriction on the federal courts and maintains a vital balance. Allowing Congress to abrogate state sovereign immunity pursuant to its plenary article I powers will not upset this vital balance of our tripartite system. The states are represented in Congress which will be attentive to the state's needs as sovereigns, separate from the federal government.¹⁷⁸ Because the delegates in Congress will respond to state's needs, ignoring clear congressional intent to abrogate will "thwart the Constitution's plan by ignoring the representative nature of Congress."¹⁷⁹

The significance of the eleventh amendment lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in article III.¹⁸⁰ The contours of state sovereign immunity, which is vital to the federal system, are determined by the structure and requirements of the system itself.¹⁸¹ The language of the eleventh amendment does not mention sovereign immunity,

172. *Union Gas*, 109 S. Ct. at 2283.

173. *Nowak*, *supra* note 170, at 1441.

174. *Union II*, 832 F.2d. at 1355.

175. *Id.*

176. *Id.*

177. *See id.*

178. *Tribe*, *supra* note 141, at 695.

179. *Union II*, 832 F.2d at 1355.

180. *Welch*, 483 U.S. at 472 (citing *Penhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984)).

181. *See id.* at 472-74.

therefore, the judicial interpretation arising from the amendment must "by its nature" be less powerful than the sovereign immunity the states originally gave up when they ratified the Constitution.¹⁸² Constitutional law scholar and legal professor John E. Nowak believes that this interpretation of the eleventh amendment, as espoused by the plurality, supports the intentions of those who originally ratified the Constitution.¹⁸³ After analyzing the arguments raised at the Ratification Convention, Nowak concludes that even though not explicitly stated, the federalists believed Congress could grant federal court jurisdiction in suits against states, but they disclaimed any "inherent power of the judiciary to assume such jurisdiction."¹⁸⁴ Nowak further contends the apparent inconsistencies in the interpretations of the Ratification Convention can be reconciled by recognizing that opposition to article III was based on the fear that federal judges, who are tenured for life, would assume jurisdiction over these states and subject unconsenting states to suit.¹⁸⁵ None of the attacks on article III were directed at congressional grants of jurisdiction to federal courts. The confusion surrounding the eleventh amendment results from the failure of courts and commentators to draw the distinction between congressional power to create a private federal cause of action against the states, and the judicial power to imply such a cause of action.¹⁸⁶

"Laws enacted under the commerce power may sometimes interfere with local activities, but the creation of federal causes of actions against the states always involves the disruption of state activities by federal policies."¹⁸⁷ These federal intrusions into state affairs must meet a heavy burden of justification.¹⁸⁸ Requiring a statement of clear congressional intent before Congress may override eleventh amendment sovereign immunity assures that congressional intent—thus state interests—will be followed.¹⁸⁹ The requirement of clear congressional intent also ensures that attempts to limit state power are unmistakable. This allows the legislative process to protect the state's interests and to

182. *Brown*, 852 F.2d at 125.

183. Nowak, *supra* note 170, at 1464. Although Professor Nowak may agree with the majority that Congress has the power to abrogate sovereign immunity when legislating pursuant to the commerce clause, he does not agree that a retroactive cause of action for damages would be permissible even if created pursuant to congressional power in the fourteenth amendment. *Id.*

184. *Id.* at 1430.

185. *Id.* at 1428-30.

186. *Id.* at 1414.

187. *Id.* at 1442.

188. Lee, *Sovereign Immunity and the Eleventh Amendment: The Uses of History*, 18 THE URB. LAWYER 519, 547 (1986).

189. *Union II*, 832 F.2d at 1355.

check judicial interpretation of statutes.¹⁹⁰ Congress is checked further in that any congressional attempt to "confer jurisdiction and abrogate immunity must be reasonably ancillary to an otherwise valid substantive exercise of federal lawmaking power" and may not violate the tenth amendment by exercising its power in a way that impairs the state's integrity or ability to function effectively.¹⁹¹

The most far reaching result of *Union Gas* is the plurality's holding that "federal legislation under the commerce power must include the power to hold States financially accountable not only to the Federal Government, but to private citizens as well."¹⁹² Until this case, past Supreme Court decisions espoused the view that the eleventh amendment barred actions for damages, for past debts, or for retroactive relief of any type.¹⁹³ In *Edelman v. Jordan*,¹⁹⁴ the Court held that a suit by private parties seeking to impose a liability payable from public funds was foreclosed by the eleventh amendment.¹⁹⁵ The amendment has served as a "strict limitation" on federal courts to hear actions against a state government for money damages. Its basic purpose, according to the Supreme Court in *Ex parte Young*,¹⁹⁶ was to prevent disruption of state treasuries by retroactive relief.¹⁹⁷ Even so, the Court in *Ex parte Young* upheld prospective relief by a federal court even if it involved the use of state funds.¹⁹⁸ One of the major purposes of the amendment was to prevent undue burdens upon the state treasuries. Money damages are special because of their effect on the functions of state government and because they create a high degree of federal intrusion.¹⁹⁹ A strong state government is one that is fiscally autonomous.²⁰⁰ The awarding of monetary relief against states' treasuries subjects them to a much higher degree of federal interference than other types of relief.²⁰¹ A Congress free to create damage actions

190. Tribe, *supra* note 141, at 695.

191. *Id.* at 697.

192. *Union Gas*, 109 S. Ct. at 2285.

193. J. NOWAK, *supra* note 49, at 50, § 2.1.

194. 415 U.S. 651 (1974).

195. *Id.* at 663. The Court stated that the funds to satisfy the plaintiff's award of past due welfare payments must inevitably come from the general revenues of the State. Thus the award closely resembles a monetary award against the state itself, an award barred by the eleventh amendment. *Id.* at 663-65.

196. 209 U.S. 123 (1908).

197. Nowak, *supra* note 170, at 1421.

198. *Ex parte Young*, 209 U.S. 123 (1908).

199. Note, *supra* note 124, at 1045.

200. *Id.* at 1047.

201. *Id.* at 1048.

against the states under any article I power would be able to effect significant redistributions out of the state treasuries.²⁰²

The plurality stated, however, that "a conclusion that Congress may not create a cause of action for money damages against the States would mean that no one could do so. And in many situations, it is only money damages that will carry out Congress' legitimate objectives under the Commerce Clause."²⁰³ Justice Brennan explained the general problem of environmental harm is often not susceptible to local solutions; therefore, the states must look to the federal government for environmental solutions.²⁰⁴ For these federal solutions to be satisfactory, they "must include a cause of action for money damages."²⁰⁵ CERCLA came about after Congress tried to solve the problems of hazardous substances through other means. Justice Brennan opined that prior statutes (such as the Resource, Conservation, and Recovery Act of 1976) failed because it focused on preventive measures to the exclusion of remedial ones.²⁰⁶ With CERCLA, Congress did not think it enough to allow just the federal government to recoup clean-up costs. Congress sought to encourage private parties to voluntarily clean-up hazardous waste sites by allowing them to recover a proportionate amount of the clean-up costs from other potentially responsible parties.²⁰⁷ The *Union Gas* plurality concluded that "[i]f States, which comprise a significant class of owners and operators of hazardous-waste sites, . . . need not pay for costs of clean-up, the overall effect on voluntary clean-ups [would] be substantial."²⁰⁸

Because state actions, such as those of Pennsylvania in the case at bar, will have occurred before the explicit announcement of the federal policy, the states will not have planned their finances to provide for such liabilities.²⁰⁹ Allowing retroactive abrogation defeats the purposes of requiring clear congressional intent before allowing a suit against a state. Clear intent is necessary to put the states on notice that they may be liable for failure to conform so they can plan their budgets and actions accordingly. Requiring clear congressional intent "has enabled states to exercise their choice knowingly, cognizant of the consequences of their participation."²¹⁰

202. *Id.*

203. *Union Gas*, 109 S. Ct. at 2284.

204. *Id.* at 2284-85.

205. *Id.* at 2285.

206. *Id.*

207. *Id.*

208. *Id.*

209. Brief of *Amici Curiae* in Support of Petition for Writ of Certiorari at 13, *Union Gas*, 109 S. Ct. at 2273 (No. 87-1241).

210. *Id.* at 43 (citing *Penhurst State School & Hosp. v. Halderman*, 451 U.S.

Pennsylvania was involved with the Brodhead Creek site years before the enactment of SARA. The excavation which uncovered the coal tar took place in 1980, six years before SARA. The state clearly had no notice that it might be liable to a private party for approximately \$720,000 worth of clean-up costs.²¹¹ Had the state known of its potential for liability, it could have conducted extensive environmental studies before deciding whether to purchase the easements. A state will now have to be as cautious as a private purchaser when acquiring property—even an easement. Such a broad retroactive abrogation in a suit for damages will destroy the constitutional protections the Supreme Court has carefully preserved. A policy against retroactive damages when Congress may otherwise abrogate sovereign immunity would be more predictable and less burdensome on the states.²¹²

The decision of the plurality fails to discuss the distinction between retroactive and prospective relief. Furthermore, the Court failed to even acknowledge, much less distinguish, its past holdings in *Edelman v. Jordan* and *Ex parte Young*.²¹³ Instead, a plurality of the Court expanded congressional power to not only abrogate sovereign immunity under the commerce clause, but also to create suits by private parties for monetary damages against the states. The only reasoning the Court gave for the expansion of relief available to private parties was that money damages are the "only" means to carry out Congress's objectives under the commerce clause.²¹⁴

The Third Circuit also misconstrued the importance and devastating effect of retroactively applying a cause of action for damages against the states. It addressed the issue in a footnote saying that in the absence of an eleventh amendment problem, it need not distinguish between the court's powers to grant retroactive or prospective relief because "either or both may be appropriate."²¹⁵ In light of the Court's holding, one is left to ponder what effect legislation passed pursuant to the commerce clause, and which now may allow for retroactive damages, will have on past decisions of the Court.²¹⁶

1, 17 (1981)).

211. Clearly the United States could have sought indemnification from the state of Pennsylvania if they felt the state was partially responsible for the release of the coal tar into Brodhead Creek. Instead, the United States reimbursed the state for the costs the state incurred in cleaning up the creek.

212. Note, *supra* note 124, at 1048.

213. See *supra* notes 194-202 and accompanying text.

214. *Union Gas*, 109 S. Ct. at 2284-85.

215. *Union II*, 832 F.2d at 1356 n.10.

216. See *Edelman v. Jordan*, 415 U.S. 651 (1974) (federal suit to order payment of illegally withheld welfare payments is barred by the eleventh amendment); *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459

Furthermore, the Court's conclusion that, if state owners and operators are not held liable to private parties for clean-up costs there will be a substantial negative effect on voluntary clean-ups, is misplaced as to the facts of this case. Such an argument would be valid if the Union Gas Co. had voluntarily cleaned up Brodhead Creek and was now asking for a proportionate share of the costs from the state. Union Gas was more than happy to stand back and let the state and federal government clean up the site. Union Gas sought recoupment from the state only after the federal government sought to make them pay for the complete cost of the clean up. CERCLA provided no "encouragement" or incentive to Union Gas Co. to voluntarily clean up the site. In this respect, Union Gas is fortunate that it had buried its toxic wastes in the area the state later acquired as an easement. Otherwise, this case would have never come into existence.

The plurality concluded by stating it does not follow from the holding that "Congress, pursuant to its authority under the Commerce Clause, could authorize suits in federal court that the bare terms of Article III would not permit."²¹⁷ The Court has never held that article III does not permit any suit for damages brought by private citizens when the states have consented to such suits. The majority reasoned the states consented to such suits by approving the commerce power.²¹⁸ Even if this consent was not present, the majority would still reject Pennsylvania's limitations on article III—that it applies only to suits for damages when the state has consented. To hold otherwise would leave the Court's previous holding in *Fitzpatrick v. Bitzer*²¹⁹ to "mean that the Fourteenth Amendment, though silent on the subject," expanded or changed the scope of article III.²²⁰ Thus, the judgment of the Third Circuit Court of Appeals was affirmed and the case was remanded for further proceedings consistent with the Court's opinion.²²¹

In his concurrence, Justice Stevens felt the need to "emphasize the distinction between our two Eleventh Amendments."²²² First, there is the literal interpretation of the plain language of the eleventh amendment—that the federal judicial power does not extend to diversity actions against the states. Second, there is the judicially created doctrine of sovereign immunity that the Court has added to the text of

(1945) (federal law suit for returning improperly collected state taxes is barred by the eleventh amendment).

217. *Union Gas*, 109 S. Ct. at 2285.

218. *Id.*

219. 427 U.S. 445 (1976).

220. *Union Gas*, 109 S. Ct. at 2285.

221. *Id.* at 2286.

222. *Id.*

the amendment.²²³ As to the former, Stevens believed that Congress does not have the power to abrogate sovereign immunity under the commerce clause, or under any other provision of the Constitution, because a statute cannot amend the Constitution.²²⁴ As to the judicially created doctrine of state immunity, however, Justice Stevens agreed that Congress has plenary power to subject the states to suit in federal court.²²⁵ Justice Stevens explained that in any "actual" (literal) eleventh amendment case the question is whether the federal court has the power to entertain the suit. When there is no power, Congress cannot provide it—even through a clear statement of intent.²²⁶ According to Justice Stevens, many of the Court's decisions which purport to apply the eleventh amendment do not deal with judicial power. Rather, they treat immunity "as a question of the proper role of the federal courts in the amalgam of federal-state relations."²²⁷ These cases are "antiethical" to traditional understandings of article III subject matter jurisdiction in that either the judicial power extends to a suit against a state, or it does not. Justice Stevens believed these cases are better understood as invoking comity and federalism concerns.²²⁸ These latter cases are the ones in which Justice Stevens believed congressional abrogation is appropriate.²²⁹ He explained that Congress is not superseding a constitutional provision, but "is setting aside the Court's assessment of the extent to which the use of constitutionally prescribed federal authority is prudent."²³⁰ Here, Congress has decided "the federal interest in protecting the environment outweighs" any benefits in keeping the states immune from monetary damages.²³¹ To the extent state immunity is based on a concern for comity, and not on a limitation on article III power, "congressional abrogation is entirely appropriate."²³²

Justice Stevens also addressed the majority's extension of the availability of monetary damages to private individuals. He stated that "once judicial power was found to exist to award prospective relief (even at some monetary cost to the state . . .), it is difficult to understand why that same judicial power would not extend to award other forms of

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 2287.

227. *Id.*

228. *Id.* at 2287.

229. *Id.*

230. *Id.* at 2289.

231. *Id.*

232. *Id.* at 2288 & n.4.

relief."²³³ "Compensatory or deterrence interests" alone are insufficient to overcome the dictates of the eleventh amendment.²³⁴ Stevens concluded by stating, "Even if a majority of this Court might have reached a different assessment of the proper balance of state and federal interests as an original matter, once Congress has spoken, we may not disregard its express decision to subject the States to liability under federal law."²³⁵

Pennsylvania put forth an argument adopted by Justice Scalia in his dissent.²³⁶ Pennsylvania argued the states never would have ratified the Constitution if they were to be stripped of their "sovereign authority" except as expressly provided by the constitution.²³⁷ Similarly, Justice Scalia argued that the eleventh amendment evidences the fundamental principle of federalism that the states retain their "sovereign prerogative of immunity." Therefore, it would be absurd to think the states would have adopted the eleventh amendment if it had contained a proviso that nothing contained therein would prevent a state from being sued by its own citizens in cases arising under federal law.²³⁸ Justice Scalia agreed with the plurality that article III did not automatically eliminate underlying state sovereign immunity. However, he disagreed about the amount of sovereign immunity that was implicitly eliminated by the ratification of the Constitution.²³⁹

The plurality's holding, allowing suits for money damages against the states, upsets what Justice Scalia perceived to be the fundamental balance between the state and federal powers. Justice Scalia maintained sovereign immunity is an "essential element of the constitutional checks and balances."²⁴⁰ He stated that sovereign immunity serves to maintain the "constitutionally mandated balance of power' between the States and the Federal Government as adopted by the Framers."²⁴¹ To Justice Scalia, sovereign immunity is a "structural component of

233. *Id.* at 2287.

234. *Id.* at 2288 (citing *Green v. Mansour*, 474 U.S. 64 (1985)).

235. *Id.* at 2289.

236. *Id.* at 2295. This latter portion, discussion Congressional power under the commerce clause was joined by Chief Justice Rehnquist, and Justices O'Connor and Kennedy.

237. Brief of the *Amici Curiae* in Support of Petitioner at 8, *Commonwealth v. Union Gas Co.*, 832 F.2d 1343 (3d Cir. 1987) (No. 87-1241), *cert. granted*, 108 S. Ct. 1219 (1988).

238. *Union Gas*, 109 S. Ct. at 2299-2300 (Scalia, J., concurring in part and dissenting in part) (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)).

239. *See id.* at 2299.

240. *Id.* at 2300.

241. *Id.* (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985), *reh'g denied*, 473 U.S. 926 (1985)).

federalism," and not a mere "default provision" that can be altered by an act of Congress done pursuant to its article I powers. Justice Scalia explained that the plurality erred in its steadfast refusal to accept the fundamental structural importance of the doctrine of sovereign immunity. This error permitted the plurality to regard abrogation pursuant to article I as an open question.²⁴² In Justice Scalia's view, every word of the Constitution may have its full effect without involving a compulsive suit against a state for recovery of money.²⁴³ Justice Scalia further disagreed with the plurality's view that "in approving the commerce power, the states consented to suits against them based on congressionally created causes of action."²⁴⁴ He stated the plurality's mere suggestion that this is the kind of consent the Court's cases had in mind when holding that "the states may not be sued without their consent," did not warrant response.²⁴⁵

Next, Justice Scalia implied that the federal courts are not the proper place for the type of suit involved here. The inherent necessity of a tribunal for the resolution of disputes between the United States and the individual states or between the states themselves is "incomparably greater," in his view, than the need for a tribunal to solve federal question disputes between private citizens and the states.²⁴⁶ Justice Scalia explained that the Constitution envisions the judicial means to assure compliance with its laws, but does not require that private individuals be able to bring suit against the federal government for violations of the Constitution.²⁴⁷ If, as the plurality contended, private initiation of suits against an offending state is essential to preserve "the structure," then Justice Scalia found it difficult to see why a private suit against the United States is not also "essential."²⁴⁸ If anything, suits against the United States should be more important, because suits against the states for violation of the Constitution can be brought by the federal government.²⁴⁹ Because federal law has given private citizens other forms of relief, Justice Scalia found it unnecessary to expand the available private remedies "to include a remedy not available, for a similar infraction, against the United States itself."²⁵⁰ Thus, in

242. *Id.* at 2303.

243. *Id.* at 2300 (quoting *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 449 (1793) (Iredell, J., dissenting)).

244. *Id.* at 2285.

245. *Id.* at 2281.

246. *Id.* at 2298 (Scalia, J., concurring in part and dissenting in part).

247. *Id.* (citing *United States v. Testan*, 424 U.S. 392 (1976) and U.S. CONST. art. I, § 9).

248. *Union Gas*, 109 S. Ct. at 2298.

249. *Id.*

250. *Id.*

ratifying the Constitution, the states did not provide unlimited power to Congress to unilaterally abrogate sovereign immunity. Justice Scalia's concerns—of the federal government intruding into state functions and upsetting the fundamental balance of powers—are legitimate, especially when faced with the reality that Congress does not represent the views of state legislatures as well as the Court would lead one to believe.

In his dissent, Justice Scalia also recognized the broad ramifications of the majority's holding. He stated that *Hans* has had a persuasive effect upon statutory law because it automatically assures "that private damages actions created by federal law do not extend against the States."²⁵¹ Furthermore, it is "impossible to say how many extant statutes would have included an explicit preclusion of suits against states if it had not been thought that such suits were barred automatically."²⁵² It is even conceivable, at least to Justice Scalia, that the seventeenth amendment, which eliminated the election of senators by state legislatures, would have contained a proviso protecting state sovereign immunity if it had been known at the time of ratification that the federal government could confer private individuals with causes of actions reaching state treasuries.

Justice Scalia rejected the plurality's argument that the same reasons which allow congressional abrogation of state immunity under section 5 of the fourteenth amendment also apply to abrogation under the commerce clause. Justice Scalia believed the principle of state sovereignty as embodied by the eleventh amendment is "necessarily limited" by the later Amendment, . . . whose substantive provisions were 'by express terms directed at the States.'²⁵³ Justice Scalia found that nothing in this reasoning justifies limiting, through appeal, the principle embodied in the eleventh amendment to antecedent provisions of the Constitution. He argued the eleventh amendment was "avowedly" directed against the power of the states and permits abrogation of their immunity "only for a limited purpose."²⁵⁴ If the commerce power enables Congress to abrogate state sovereign immunity, then so do all the other article I powers. Thus, Justice Scalia concluded that the plurality's interpretation of the Constitution as permitting Congress to eliminate sovereign immunity when it wants, "renders the doctrine a practical nullity and [the plurality's result] is therefore unreasonable."²⁵⁵

251. *Id.*

252. *Id.*

253. *Id.* at 2302 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453, 456) (1976)).

254. *Id.*

255. *Id.*

Finally, Justice Scalia addressed the doctrine of waiver as it applies to Pennsylvania as an "owner or operator."²⁵⁶ *Parden*²⁵⁷ is the only case in which the Court has held that the federal government can demand, as a condition to state involvement, the waiver of state immunity. The holding of *Parden*, however, was narrowed severely in *Welch*, and Justice Scalia would overrule what is left of the *Parden* decision. Justice Scalia explained:

[A]ll 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."²⁵⁸

Justice Scalia felt that "at the bottom" of all the waiver arguments is the acknowledgement that deciding the federal government can make the waiver of state sovereign immunity a condition to state action in a field that Congress can regulate is the same as finding congressional authority to eliminate state immunity in the exercise of article I powers. Justice Scalia said that this is "to adopt the very principle . . . [he has] just rejected."²⁵⁹ If sovereign immunity has "any reality," it must mean more than a verbal distinction between finding states liable as owners and operators and finding them liable as owner and operators if they chose to be owners and operators.²⁶⁰ Thus, Justice Scalia would have overruled the court of appeals because the federal courts have no power to entertain the present suit against Pennsylvania for the reasons he has stated.²⁶¹

VI. CONCLUSION

The eleventh amendment plays an important role in maintaining a balance between the powers of the state and federal governments. The inconsistent application of the scope of this amendment cannot be reconciled solely by its language or the intentions of the framers of the Constitution. When a state's eleventh amendment rights have been abrogated, the state is protected because Congress may abrogate

256. *Id.* The majority explained that since Union Gas eschewed reliance on the theory of waiver they need not discuss waiver and do not understand why Justice Scalia feels the need to do so. *Id.* at 2286 n.5.

257. 377 U.S. 184 (1964).

258. *Union Gas*, 109 S. Ct. at 2303.

259. *Id.*

260. *Id.*

261. *Id.*

pursuant to plenary constitutional powers only, and it must state clearly its intent to abrogate. Congress may abrogate pursuant to its article I powers because of these safeguards.

Creating a cause of action for retroactive damages, however, destroys all the protections built into our federal system to protect the states in their roles as sovereigns. The states will not have had notice, will not have been able to plan their actions, or will not have been able to structure their budgets to account for the possibility of monetary liabilities for their acts. Allowing Congress such a broad power to abrogate impairs the ability of the states to function autonomously and to serve as an effective counterbalance to federal powers. Permitting Congress to create retroactive causes of action for damages proceeds too far beyond its justified function in our democratic system.

LYNNE E. NOYES

