In the 1989 case of *Pennsylvania v. Union Gas Co.*,[92] the Court—temporarily at least—ended years of uncertainty by holding expressly that Congress acting pursuant to its Article I powers (as opposed to its Fourteenth Amendment powers) may abrogate the Eleventh Amendment immunity of the states, so long as it does so with sufficient clarity. Twenty-five years earlier the Court had stated that same principle,[93] but only as an alternative holding, and a later case had set forth a more restrictive rule.[94] The premises of *Union Gas* were that by consenting to ratification of the Constitution, with its Commerce Clause and other clauses empowering Congress and limiting the states, the states had implicitly authorized Congress to divest them of immunity, that the Eleventh Amendment was a restraint upon the courts and not similarly upon Congress, and that the exercises of Congress's powers under the Commerce Clause and other clauses would be incomplete without the ability to authorize damage actions against the states to enforce congressional enactments. The dissenters disputed each of these strands of the argument, and, while recognizing the Fourteenth Amendment abrogation power, would have held that no such power existed under Article I.

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the term "person" for the purpose of subjecting them to suit. The question arose after Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978), reinterpreted "person" to include municipal corporations. *Cf.* Alabama v. Pugh, 438 U.S. 781 (1978). The Court has reserved the question whether the Fourteenth Amendment itself, without congressional action, modifies the Eleventh Amendment to permit suits against states, Milliken v. Bradley, 433 U.S. 267, 290 n.23 (1977), but the result in *Milliken*, holding that the Governor could be enjoined to pay half the cost of providing compensatory education for certain schools, which would come from the state treasury, and in Scheuer v. Rhodes, 416 U.S. 232 (1974), permitting imposition of damages upon the governor, which would come from the state treasury, is suggestive. *But see* Mauclet v. Nyquist, 406 F. Supp. 1233 (W.D.N.Y. 1976) (refusing money damages under the Fourteenth Amendment), appeal dismissed sub nom. Rabinovitch v. Nyquist, 433 U.S. 901 (1977). The Court declined in *Ex parte* Young, 209 U.S. 123, 150 (1908), to view the Eleventh Amendment as modified by the Fourteenth.

[92] 491 U.S. 1 (1989). The plurality opinion of the Court was by Justice Brennan and was joined by the three other Justices who believed *Hans* was incorrectly decided. *See* id. at 23 (Justice Stevens concurring). The fifth vote was provided by Justice White, id. at 45, 55–56 (Justice White concurring), although he believed *Hans* was correctly decided and ought to be maintained and although he did not believe Congress had acted with sufficient clarity in the statutes before the Court to abrogate immunity. Justice Scalia thought the statutes were express enough but that Congress simply lacked the power. Id. at 29. Chief Justice Rehnquist and Justices O'Connor and Kennedy joined relevant portions of both opinions finding lack of power and lack of clarity.

[93] Parden v. Terminal Railway, 377 U.S. 184, 190–92 (1964). *See also* Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 283, 284, 285–86 (1973).

[94] Edelman v. Jordan, 415 U.S. 651, 672 (1974).