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The Story of *Ex parte Young*: Once Controversial, Now Canon

Barry Friedman

On its face the law of federal jurisdiction often appears technical and dry. It purports to a certain neutrality of application. Not far below the surface of jurisdictional doctrine, however, rest deeply important substantive choices. That is why such a seemingly arid subject matter is so closely studied and hotly contested.

Time, though, plays funny tricks on jurisdictional doctrines. The law of jurisdiction grants access to the courts, and access is required to protect rights. Yet, over time, the kinds of plaintiffs coming to federal court, and the rights they seek to assert, change. In the *Lochner* era, at the turn of the twentieth century, corporate plaintiffs and their allies sought protection of property and contract rights in federal court. In the 1960s and 1970s, civil rights plaintiffs came to federal court seeking redress on issues of equality and personal liberty. The doctrine that at its inception favors one ideology may come in a later day to favor another. That is why the law of federal jurisdiction is constantly changing.

It is the rare jurisdictional doctrine that stands the test of time unaltered, but the rule of *Ex parte Young*¹ is one that has. Born in the crucible of the class wars of the late nineteenth and early twentieth centuries, *Ex parte Young* has become bedrock. The Eleventh Amendment to the Constitution protects states from certain suits as defendants in federal court. Despite that amendment, *Ex parte Young* holds that plaintiffs may sue state officials in federal court to enjoin the enforcement of unconstitutional acts. The doctrine has been relied upon, over the course of one hundred years, by plaintiffs of all ideological stripes. *Ex parte Young* is also a case that, in a sense, gives a lie to broad notions of “parity” between state and federal courts. One of the most enduring issues of federal jurisdiction is whether state courts will be as protective as their federal cousins in protecting federal constitutional rights.² Yet, even at times when the Supreme Court has developed jurisdictional doctrine that appears to favor state court jurisdiction, the rule of *Ex parte Young* has endured. As the history and application of that doctrine indicate, when state laws are being challenged as violative of federal constitutional rights, there is often a preference for, and a sense to, having a choice to adjudicate those claims in federal court. The implicit message of *Ex parte Young* is that when a state law is

¹ 209 U.S. 123 (1908).

² See Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 Colum. L. Rev. 1211 (2004); Erwin Chemerinsky, *Federal Jurisdiction* 34 (2d ed. 1994); Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977).

challenged as unconstitutional, adjudication of the constitutionality of that law ought not to be left to the state courts.

The Political Milieu of Ex parte Young

Ex parte Young was decided at a time in which many saw a class war raging in the United States, and the decision definitely took sides. Handed down in 1907, *Ex parte Young* is very much the product of the *Lochner* era.³ In fact, the Justice who wrote the majority opinion in *Ex parte Young* was Rufus Peckham, who had authored *Lochner* just two years earlier.

Yet, the roots of *Ex parte Young* go much further back, to the Gilded Age. This is a period of American constitutional history that today is somewhat obscure. To understand *Ex parte Young*, therefore, it is necessary to return to this period of American history, and recall what happened that shaped this great *Lochner*-era jurisdictional battle.

Following the Civil War, as part of the Reconstruction of the South and of the Union, the nation adopted three constitutional amendments. The centerpiece of these was the Fourteenth Amendment, ratified in 1868. That Amendment familiarly prohibits state laws that deny people equal protection of the laws, or deprive them of life, liberty or property without due process of law. The amendment also protects the privileges and immunities of citizens of the United States. However, the Supreme Court effectively gutted the “privileges or immunities” clause in its 1873 decision in the *Slaughterhouse Cases*.⁴

In a sense the *Slaughterhouse* decision was no accident, for fairly quickly after Reconstruction the nation turned its back on the commitments of that era.⁵ The clear purpose of Reconstruction was to aid the newly-emancipated slaves, granting to them and protecting a variety of civil liberties. Reconstruction also rather radically altered antebellum understandings of federalism. Yet, in cases like *Slaughterhouse*, and in the *Civil Rights Cases*,⁶ which overturned the Civil Rights Act of 1875, the Supreme Court

³ See *Lochner v. New York*, 198 U.S. 45 (1905). Many of the background events discussed here are set out at length in Barry Friedman, *The Will of the People* (forthcoming 2009). On the attacks on courts in the *Lochner* era, see *id.* at ch. 6; Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. Rev. 1383 (2001); William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (1994). For revisionist accounts, see David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 Geo. L.J. 1 (2003); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 Am. Pol. Sci. Rev. 511 (2002); Owen M. Fiss, *History of the Supreme Court of the United States, Volume VIII: Troubled Beginnings of the Modern State, 1888-1910* (1993).

⁴ 83 U.S. (16 Wall.) 36 (1873).

⁵ See Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 Const. Comment. 115, 122 (1994); Friedman, *The Will of the People*, *supra* note 3, at ch. 5.

⁶ *The Civil Rights Cases*, 109 U.S. 3 (1883).

echoed the national sentiment that enough had been done for the freedmen, and that there was a limit to the extent to which the national government should usurp state authority. When *Slaughterhouse* was decided, the *Nation* – a journal that previously had been highly supportive of Reconstruction – gently commended the Court for showing “a very laudable determination to cling to the old and well-settled maxims of interpretation” (read: states’ rights).⁷ The *New York Times* joined much of the national press in declaring the *Civil Rights Cases* a fitting burial of Reconstruction: “The judgment of the court is but a final chapter in a history full of wretched blunders, made possible by the sincerest and noblest sentiment of humanity.”⁸

There are a variety of reasons why the nation abandoned Reconstruction, but the chief one may well have been economic. It was expensive maintaining the military force necessary to keep the South under control, and the national will to do so simply evaporated. The Panic of 1873 sapped the nation of resources.⁹ Industrialists, who financed the Civil War and were doing the same during Reconstruction, tired of this risky use of their capital. In 1876, the results of the presidential contest between the Republican Rutherford Hayes and the Democrat Samuel Tilden were hotly contested, amid widespread claims of voter fraud. The crisis ultimately was resolved in a deal – historians seem to agree it happened, even as they disagree how explicit it was – that gave the decision to the Republican Hayes, in exchange for ordering Union troops in the South to stand down.¹⁰ One tragic result was the plundering of the civil liberties of the emancipated slaves, an act of fundamental injustice that the nation did not really begin to address again until the civil rights movement of the mid-twentieth century.

The end of Reconstruction was hastened by the industrial revolution, which hit the United States full force after the Civil War, changing the economy in startling ways. Railroads and communications lines swept across the country, and manufacturing concerns grew rapidly. America’s agrarian economy was slipping away. Instead of general merchants selling to local customers, corporations distributed goods widely through their agents. The nation’s first mail-order house, Montgomery Ward, opened its doors in 1872. In 1870 the average firm had eight people; by 1900 over 1500 firms employed more than 500. Firms integrated horizontally and vertically. John D.

⁷ *The Right to Confiscate*, 19 *Nation* 199, 200 (Sept. 24, 1874). A mere seven years earlier, the *Nation* had argued that “Congress is directly invested with full power to legislate” to ensure the protection of blacks’ civil rights. 2 *Nation* 262, (March 1, 1866), *quoted in* Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866-1876* 162 (1985).

⁸ Editorial, *The Rights of Negroes*, *N.Y. Times*, Oct. 18, 1883, at 4.

⁹ Eric Foner, *Reconstruction: America’s Unfinished Revolution 1863-1877* 524 (1988); Richard Franklin Bensel, *The Political Economy of American Industrialization, 1877-1900* (2000).

¹⁰ Foner, *supra* note 9, at 581-82; *see also* C. Vann Woodward, *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction* 7-8 (1966) (“In effect the Southerners were abandoning the cause of Tilden in exchange for control over two states, and the Republicans were abandoning the Negro in exchange for the peaceful possession of the Presidency.”).

Rockefeller pronounced, “The day of combination is here to stay. Individualism is gone, never to return.”¹¹

Rapid economic change led to inevitable strife. Four million immigrants flooded to American shores each decade from 1870 to 1900.¹² Millions more Americans left their farms for the cities. The crash of 1873 ushered in hard times for many people. The effects of economic dislocation were felt in the great railway strike of 1877, and the Haymarket Riots of 1886.¹³ Union organizations grew to protect workers’ interests, and industrial magnates hired Pinkerton guards to protect their property and subvert union activities. A class war was in the works that would continue well into the twentieth century. When President Hayes called in federal troops to quell the railroad riot, his predecessor Ulysses S. Grant – who had steered the country through much of Reconstruction – noted how times had changed. When he had used troops to protect the freedmen in the South, “the sound of indignation belched forth,” but now “there is no hesitation in exhausting the whole power of the government to suppress a strike on the slightest intimation that danger threatens.”¹⁴

The railroads played an important role in both the rapid economic change and its ensuing turmoil. Initially the railroads were welcomed across America with open arms. Cities and towns took on immense debt to fund the roads, which were seen as a certain vehicle to economic prosperity.¹⁵ No one wanted to be left out. But as that economic prosperity proved elusive, many came to hate the railroads and blame them for all economic ills. Municipalities defaulted on their debt. And the Granger movement was born.

One of the primary opponents of the railroads was the National Grange of the Patrons of Husbandry. The farmers of the West (and their allies in related organizations in the South) came to believe that the railroads were bankrupting them to line the pockets of Eastern industrialists. They saw discrimination in railroad rates, and crushing tariffs. These farmers formed into voluntary associations, such as the Grange – a quaint-

¹¹ Allan Nevins, *John D. Rockefeller* 622 (1940), quoted in Wallace Mendelson, *Capitalism, Democracy, and the Supreme Court* 16 (1960); see generally Friedman, *The Will of the People*, *supra* note 3, at ch. 5; Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958* 24 (1992); Robert H. Wiebe, *The Search for Order: 1877-1920* 23 (1967).

¹² See Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 *Am. Bus. L.J.* 553, 598, 600 (1994).

¹³ Foner, *supra* note 5, at 583-84; Wiebe, *supra* note 11, at 10.

¹⁴ Letter from Ulysses S. Grant to Daniel Ammen (Aug. 28, 1877), quoted in William Gillette, *Retreat From Reconstruction 1869-1879* 348 (1979).

¹⁵ See, e.g., Richard C. Cortner, *The Iron Horse and the Constitution: The Railroads and the Transformation of the Fourteenth Amendment* 1-5 (1993); Simon Sterne, *Railway Legislation and Management*, quoted in Charles Fairman, *History of the Supreme Court of the United States, Volume VI: Reconstruction and Reunion, 1864-1888, Part Two* 291 (1987); *The Railroad Manuals*, 19 *Nation* 206, 206 (Sept. 24, 1874).

sounding organization that in its day turned the quiet fury of the prairie against the perceived economic depredations of the railroads.¹⁶

The Grangers' remedy for perceived ills of the railroads was to elect officials who enacted state laws regulating the rates of the railroads and sister ventures like the grain elevators. "The outraged popular feeling" at "the unquestionable extortions of the railways," the *Chicago Tribune* told its readers (as though they did not know), took political action "in the way of public meetings, conventions, and organizations, which in due time resulted in legislative enactments."¹⁷ Or, in the more pungent words of Charles Francis Adams, John Adams' grandson and an accomplished pundit of the era, "the laws made those who were to use the railroads . . . the final arbiters as to what it was reasonable they should pay for such use."¹⁸

Although the Granger movement would itself largely disappear by the turn of the twentieth century, its mission to bring the railroads to heel was taken on by others. The Populists formed the most broad-based movement of the late nineteenth century. They sought to have the states take over the railroads altogether. In the early twentieth century, the Progressives – a widespread movement of social reformers – again took up the call of railroad rate regulation.¹⁹

Throughout this long period from the Gilded Age through the *Lochner* era, industrialists fought back against these movements and their "social legislation." Business and property interests stridently resisted these laws, which they said were "socialistic" or "communistic" cast.²⁰ Indeed, these struggles formed the basis for much of the case law of the *Lochner* era, striking down state and national laws on grounds such as the liberty of contract.

The refuge of these business interests, and particularly the railroad lawyers, was the federal courts.²¹ State judges often were elected, and could be seen to pander to the

¹⁶ See *Farmer Discontent, 1865-1900* 17 (Vernon Carstensen ed., 1974); Jonathan Periam, *The Groundswell: a History of the Origins, Aims, and Progress of the Farmer's Movement* (1874), reprinted in Carstensen, *supra*, at 22.

¹⁷ Editorial, *The Granger Decisions*, *Chi. Trib.*, Mar. 3, 1877, at 4.

¹⁸ Charles Francis Adams, Jr., *The Granger Movement*, 20 *North Am. Rev.* 394, 395 (1875).

¹⁹ See Fiss, *supra* note 3, at 185-221(1993); Friedman, *The Will of the People*, *supra* note 3, at ch. 6.

²⁰ John Norton Pomeroy, *The Supreme Court and State Repudiation*, 17 *Am. L. Rev.* 684, 712, 718-19 (1883); see also Mendelson, *supra* note 11, at 57 (referring to the Granger laws as "hayseed socialism"); *Com. & Fin. Chron.*, Mar. 29, 1890, quoted in Richard Franklin Bense, *The Political Economy of American Industrialization, 1877-1900* 335 (2000) (lauding a Supreme Court case which struck down a state railroad rate regulation and referring to the regulation as "Socialistic legislation"); William H. Taft, *Charges Against the Federal Judiciary*, 1 *Va. L. Reg.* 389, 396 (1896) (commenting on the "socialistic" nature of legislation supported by Southern and Western farmers, seeking to cripple corporations, especially railroads, and redistribute some of their wealth).

²¹ See generally Gillman, *supra* note 3; Friedman, *The Will of the People*, *supra* note 3, at ch. 5.

local electorate. In one famous instance when they did not, Illinois' respected Chief Justice was tossed from office in the next election. While the farmers chortled, the *Chicago Tribune*, generally sympathetic to the Grangers, called it "the most brutal outrage ever perpetrated in the State of Illinois under the auspices of universal suffrage."²² State juries were seen as even worse. An author in the *Central Law Journal* wrote that "[t]he prejudice of juries against corporations and the difficulty with which the latter can obtain what is their due, even when justice is on their side, is often commented upon."²³ And so, to federal court the railroads fled.

In a sense, the case that became *Ex parte Young* was the product of a great concerted effort by railroad lawyers to create favorable doctrines in federal courts to protect their rights. Today we think of the litigation that resulted in *Brown v. Board of Education*²⁴ as perhaps the first great litigation campaign in American history. But long before the National Association for the Advancement of Colored People even existed, railroad magnates and their lawyers were planning carefully to see that the law evolved in their favor.

Two Lines of Doctrine

The decision in *Ex parte Young* rests at the intersection of two somewhat intricate lines of doctrine. The first involves how the Fourteenth Amendment, enacted to protect the freedmen, gradually came to offer succor to railroads concerned about rate regulation. The second permitted suitors into federal court to challenge state laws, despite the seeming bar of the Eleventh Amendment.

The Road to Reasonableness. In the 1873 *Slaughterhouse Cases*, the Supreme Court clearly signaled that the broad clauses of the Fourteenth Amendment would have a limited scope.²⁵ *Slaughterhouse* was an odd case, in that the Court's first test of this central Reconstruction amendment was on behalf of white butchers complaining about a slaughterhouse monopoly the State of Louisiana had granted. As indicated above, the privileges and immunities clause was limited severely by the Court's holding that it applied to a very narrow set of national rights. Similarly, the Justices cabined the scope of the equal protection clause by indicating it was to be almost exclusively about protection of the freedmen. The butchers in *Slaughterhouse* also raised a due process claim, which the Court dismissively rejected with little legal analysis: "under no construction of that provision that we have ever seen . . . can the restraint imposed by the

²² *The Defeat of Judge Lawrence*, Chi. Trib., June 6, 1873, at 3.

²³ Current Topics, 18 Cent. L.J. 17, 17 (1880).

²⁴ 347 U.S. 483 (1954).

²⁵ See 83 U.S. (16 Wall.) at 73-82.

State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held” a constitutional violation.²⁶

A strong motivating force for the *Slaughterhouse* majority was federalism. These Justices declined to interpret the Fourteenth Amendment in a way that “radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people.”²⁷ Dissenting Justice Stephen Field, a Democrat Lincoln had appointed to the Court, noted wryly that under the majority’s decision the Fourteenth Amendment “was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.”²⁸

A mere three years after *Slaughterhouse*, the Supreme Court was tackling Granger legislation under the same amendment. *Munn v. Illinois* was a challenge to Illinois’ warehouse rate law.²⁹ The Illinois Supreme Court had sustained this law following the ejection of the Chief Justice when that court struck down the railroad rate law. The *Munn* Court, given its turn, also upheld the Granger legislation: “For protection against abuses by legislatures the people must resort to the polls, not to the courts.”³⁰ The *Munn* decision was seen as a clear response to the popular passions of the era. Lord James Bryce, a British diplomat who – like de Tocqueville before him – famously chronicled American life and politics, noted how the decisions in the Granger cases such as *Munn* and its companions “represent a different view of the sacredness of private rights and of the powers of a legislature from that entertained by Chief-Justice Marshall and his contemporaries,” and quickly fingered the reason: “They reveal that current of opinion which now runs strongly in America against what are called monopolies and the powers of incorporated companies.”³¹

Business was furious about the *Munn* decision and vowed to do something about it, largely by obtaining favorable appointments to the Supreme Court. Business interests frequently compared *Munn* to the Supreme Court’s infamous ruling in *Dred Scott*, the decision that denied Congress the power to resolve the question of slavery in the territories.³² In the years after *Munn*, business interests frequently conditioned contributions to political parties (particularly the Republicans, with which they typically

²⁶ *Id.* at 80.

²⁷ *Id.* at 81, 78.

²⁸ *Id.* at 96 (Field, J., dissenting).

²⁹ 94 U.S. 113 (1876).

³⁰ *Id.* at 134.

³¹ James Bryce, *The American Commonwealth, Volume I: The National Government-The State Governments* 274 (1914).

³² *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

were allied) on some significant say in who was appointed to the Supreme Court.³³ For the next generation, with the White House in Republican hands a majority of the time, and the Senate always, the Supreme Court took on a Republican and deeply pro-business cast. “The Republican party’s long lease of power has resulted in making the Federal judiciary almost entirely Republican in political faith,” observed the *Nation* by 1885.³⁴

By 1890, membership changes on the Supreme Court signaled a new vitality to the Fourteenth Amendment when it came to the constitutionality of rate legislation. In 1886, in *Santa Clara County v. Southern Pacific Railroad Company*, the Supreme Court held that corporations fell within the protections of the Fourteenth Amendment.³⁵ The Chief Justice, Morrison Waite, waved off lawyers who would have debated the issue, saying the Court was unanimously of the opinion that “the Fourteenth Amendment . . . applies to these corporations”.³⁶ As for the applicability of the Fourteenth Amendment to rate laws, *Munn* had left the door open a crack, holding (in the face of contrary indications in the *Slaughterhouse Cases*) that laws adopted under the state’s “police power” were subject to judicial review.³⁷ But the *Munn* Court sharply curtailed such review for businesses like railroads or grain elevators, which affected the “public interest.”³⁸ In the 1890 decision in *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*, however, the Court decided that “[t]he question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination.”³⁹ According to the Court, the question in each case would be whether the corporation was allowed a “reasonable profit[]” on its investment.⁴⁰ This decision “practically overrules *Munn v. Illinois*,” protested Justice Bradley in dissent.⁴¹ Now it was the turn of the

³³ See Robert D. Marcus, *Grand Old Party: Political Structure in the Gilded Age, 1880-1896* 50-53, 153, 256-57 (1971); Edward Chase Kirkland, *Dream and Thought in the Business Community, 1860-1900* 135 (1956); Tony A. Freyer, *The Federal Courts, Localism, and the National Economy, 1865-1900*, 53 *Bus. Hist. Rev.* 343, 345 (1979); see generally Gillman, *supra* note 3.

³⁴ *The President and the Judiciary*, 40 *Nation* 336, 337 (Apr. 23, 1885).

³⁵ 118 U.S. 394 (1886).

³⁶ *Id.* at 396; see also Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 *Mich. L. Rev.* 643, 664 (1909) (noting that the Chief Justice told counsel during oral argument that the Justices had already decided the issue); Arthur Selwyn Miller, *The Supreme Court and American Capitalism* 54 (1968)

³⁷ *Munn*, 94 U.S. at 125.

³⁸ *Id.* at 129-35.

³⁹ 134 U.S. 418, 458 (1890).

⁴⁰ *Id.*

⁴¹ *Id.* at 462 (Bradley, J., dissenting).

Farmer's Alliance of Minnesota to call a Supreme Court decision "a second Dred Scott."⁴²

From here the doctrine zigged and zagged, but ended up largely in favor of judicial review of rate regulation. In 1892, in *Budd v. New York*, the Court called reports of the *Munn* doctrine's death greatly exaggerated, holding that in the *Minnesota Milk Rate Case* the rate had been fixed by a commission, not the legislature, which is what justified judicial review.⁴³ Interestingly, when *Budd* was decided by the New York Court of Appeals, on its way to the Supreme Court, Justice Peckham was a judge on the New York court. He dissented volubly from that court's decision upholding the New York law, arguing *Munn* was unsupportable and should be ignored.⁴⁴ On the Supreme Court, Justice David Brewer dissented in *Budd*, taking up Peckham's call.⁴⁵ In 1894, in *Reagan v. Farmers' Loan & Trust Co.* (try to follow these case names – they will be important in just a moment!), the Court re-explained *Budd*, holding that the state law was upheld simply in that case because there had been a failure of a showing of reasonableness.⁴⁶ Not so in *Reagan*, which enshrined the fair return on investment rule, effectively incorporating the Takings Clause of the Fifth Amendment through the Fourteenth.⁴⁷ Then, by *Smyth v. Ames* in 1898 the game was over, the Court squarely holding that even legislatively set rates would be subject to judicial review.⁴⁸ The standards were still vague – in *Smyth* the Court found that the state law effectively allowed no return on the railroad's investment– but by now the question of the judicial review of railroad rates for "reasonableness" was settled.⁴⁹

Suing States. Just as the rate regulation cases solved one problem for the railroads, it created another: how to get into federal court for litigation of the reasonableness of rates? The states were eager to see the cases adjudicated in their own courts. But, as noted, the corporations were equally desirous of fleeing the state courts for federal court. This increasingly would be the case as the reasonableness of rates turned on questions of fact to which appellate courts would give some deference.

The problem the corporations faced was the Eleventh Amendment. That amendment states that "[t]he Judicial power of the United States shall not be construed to

⁴² See Bensel, *supra* note 9, at 335.

⁴³ 143 U.S. 517, 546 (1892).

⁴⁴ People ex rel. Annan v. Walsh, 22 N.E. 682, 682-83 (N.Y. 1889) (Peckham, J., dissenting), *cert. granted sub nom.* Budd v. People, 143 U.S. 517 (1892).

⁴⁵ *Budd*, 143 U.S. at 548-51 (Brewer, J., dissenting).

⁴⁶ 154 U.S. 362, 398 (1894).

⁴⁷ *Id.* at 399, 410-11; *see also* Fiss, *supra* note 3, at 204-05.

⁴⁸ 169 U.S. 466, 516-17 (1898).

⁴⁹ *Id.* at 526-27.

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.”⁵⁰ On its face the amendment seemed a bar against these out-of-state railroads suing states in federal court. In the Supreme Court’s shifting Eleventh Amendment doctrine, however, the text of the Eleventh Amendment had held very little sway.

The history of the Eleventh Amendment is deeply contested, but the version the Court favors (and perhaps is correct) is that it was adopted in a “shock of surprise” at the Court’s own decision in *Chisholm v. Georgia*.⁵¹ *Chisholm* was an assumpsit action seeking money damages from Georgia for goods obtained during the Revolutionary War. Eschewing arguments about sovereign immunity, the Supreme Court majority – over an important dissent by Justice Iredell – held that the suit could be maintained.⁵² Within a year of the final judgment in *Chisholm*, the amendment had been ratified, though its certification was delayed for various reasons.⁵³

Although the Eleventh Amendment seemed an absolute bar to suits against states in federal court, the Supreme Court rapidly got around that bar by holding that state officials could still be sued in the federal courts to enjoin unconstitutional state action. The seminal statement was Chief Justice John Marshall’s opinion in *Osborn v. Bank of the United States*.⁵⁴ *Osborn* involved a suit for an injunction and return of money that agents of the State of Ohio had forcibly seized in payment of taxes the state had imposed on the Bank of the United States. The imposition of such taxes clearly was contrary to the Court’s holding in *McCulloch v. Maryland*,⁵⁵ which became central to the conclusion of whether state officials could be sued. In *Osborn*, the Chief Justice held the suit could be maintained, stating that “a void act [cannot] afford any protection to the officers who execute it.”⁵⁶ Because the officers “could derive neither authority nor protection from the act which they executed,” Marshall explained, “this suit is not against the State of Ohio within the view of the constitution, the State being no party on the record.”⁵⁷

Osborn didn’t quite solve the problem of suing states, however, because later cases made clear there were limits on naming officials as proxies for the state itself. It

⁵⁰ U.S. Const. amend. XI.

⁵¹ 2 U.S. (2 Dall.) 419 (1793). For more on the “shock of surprise” story, see Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* 978-87 (5th ed. 2003).

⁵² *Chisolm*, 2 U.S. (2 Dall.) at 466.

⁵³ John V. Orth, *The Judicial Power of the United States: The Eleventh Amendment in American History* 20 (1987).

⁵⁴ 22 U.S. (9 Wheat.) 738 (1824).

⁵⁵ 17 U.S. (4 Wheat.) 316 (1819).

⁵⁶ *Osborn*, 22 U.S. (9 Wheat.) at 839.

⁵⁷ *Id.* at 868.

was not (always) a simple task of substituting the names on the complaint. The Supreme Court's jurisprudence on suing state officials in lieu of the state itself makes the line of cases on rate regulation look like a very straight road. Scholars and the Court alike have struggled to explain the winding doctrine.⁵⁸

Perhaps the most persuasive explanation of the convoluted doctrine has had to do not with the law, but with the ability of the Court to enforce its orders. Thus, John Orth, in an extensive study of the Eleventh Amendment, concludes that the *Osborn* rule largely stuck until the Court was faced with a host of cases involving southern states repudiating their debts following Reconstruction.⁵⁹ Once President Hayes removed the military as a means of controlling state governments, Supreme Court decisions ordering those states to pay their debts were likely to be ignored. So, argues Orth, the Court hid behind the Eleventh Amendment to avoid ruling on state repudiations.⁶⁰ For example, in *Hans v. Louisiana*, the Supreme Court held that despite the plain language of the Eleventh Amendment, which bars only suits "by citizens of another State," the amendment also applied to bar a suit by a state's own citizens.⁶¹ Because many of those suits were aimed not at the state, but state officials, following *Osborn*, the Court's doctrine as to when state officials could be sued became a quagmire.

Whatever the validity of Orth's assessment, by the time the issue shifted from southern state debt to rate regulation, the Court was back in the saddle, willing to adjudicate cases against the states. As early as 1891, the Court in *Pennoyer v. McConnaughy* allowed a suit against a state official regarding the constitutionality of a state statute.⁶² Then, in *Reagan v. Farmers' Loan & Trust Co.*, the Court upheld an injunctive suit against the state attorney general and the railroad commission regarding rates.⁶³ As Justice Brewer explained for the Court: "There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal treatment of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment."⁶⁴ By the 1898 decision in *Smyth v. Ames*, Justice Harlan could write: "It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a state from enforcing an

⁵⁸ See generally Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 Notre Dame L. Rev. 953 (2000); Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 Notre Dame L. Rev. 859 (2000); Laura S. Fitzgerald, *Beyond Marbury: Jurisdictional Self-Dealing in Seminole Tribe*, 52 Vand. L. Rev. 407 (1999).

⁵⁹ See generally Orth, *supra* note 53.

⁶⁰ See generally *id.* at 75-81, 117-18.

⁶¹ 134 U.S. 1 (1890).

⁶² 140 U.S. 1 (1891).

⁶³ 154 U.S. 362.

⁶⁴ *Id.* at 390.

unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of that amendment.”⁶⁵

There were two flies in the ointment when it came to suing states. The first was that despite the clarity of cases like *Smyth*, the Court’s doctrine in the southern bond cases still muddied the waters. The second was *Fitts v. McGhee*.⁶⁶ This was an 1899 case in which the Court held that the governor and the attorney general could not be sued regarding a bridge toll, in light of the Eleventh Amendment.⁶⁷ With Justice Harlan again writing, the Court denied jurisdiction because the “state officers named held [no] special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement.”⁶⁸ Allowing suit in this case, Harlan explained, “[a]s a state can act only by its officers, an order retraining those officers from taking any steps, by means of judicial proceedings, in execution [of the state law] is one which restrains the state itself.”⁶⁹ The Court also noted that there was an ongoing criminal action in state court against those who had collected the tolls, and a federal court ought not to interfere in such an ongoing criminal action.⁷⁰

The Minnesota Litigation that Became Ex parte Young

Both of these lines of doctrine came to play in Minnesota’s own rate wars. Minnesota was one of the Granger states, and its history of rate regulation was every bit as tortured as the Supreme Court’s rate and Eleventh Amendment decisions. Its first law was passed in 1871 and upheld in the early Granger litigation.⁷¹ In 1874 the state repealed the law and appointed a commission to set rates.⁷² The hunger for action against the railroads was reflected in the words of one commissioner, who said “it is time to take these robber corporations by the scruff of the neck and shake them over hell.”⁷³ But Minnesotans also needed the railroads, which resulted in much temporizing and

⁶⁵ 169 U.S. at 518-19.

⁶⁶ 172 U.S. 516 (1899).

⁶⁷ *Id.* at 533.

⁶⁸ *Id.* at 530.

⁶⁹ *Id.* at 529.

⁷⁰ *Id.* at 532.

⁷¹ The 1871 rate law was sustained in *Winona and St. Peter R.R. Co. v. Blake*, 94 U.S. 180 (1876), a companion case to *Munn v. Illinois*, 94 U.S. 113 (1876). See Charles Fairman, *The So-called Granger Cases, Lord Hale, and Justice Bradley*, 5 Stan. L. Rev. 587, 600-02 (1953).

⁷² Cortner, *supra* note 15, at 20.

⁷³ *Id.* at 27.

equivocating. One result was the rate legislation invalidated in the *Minnesota Milk Rate Case*.⁷⁴

The early 1900s saw renewed calls for rate regulation throughout the country. In 1907, *Everybody's Magazine* commented “[t]he railroad company corrupts every fount and channel of American political and public life.”⁷⁵ Theodore Roosevelt’s trust-busting set the example for those anxious to go after corporations. As of the summer of 1907, some thirty-two states had passed almost three hundred laws regulating railroads.⁷⁶ The periodical voice of the railway industry, *Railway Age*, was unhappy: “Nothing in our political history has been more discreditable than the brutal, unreasoning and insensate abuse that, in the name of reform, the politicians have heaped upon railway management in recent months.”⁷⁷

Minnesota’s most recent rate laws were at the heart of *Ex parte Young*. In 1907, the Minnesota legislature adopted a limit of two cents per passenger mile (a drop from three cents), as an attempt to force the railroads to compromise on rates generally.⁷⁸ When that did not work, the state’s attorney general, Edward T. Young – a youthful man with a bright face and an enormous walrus moustache⁷⁹ – persuaded the legislature to take some action to ameliorate pressure on the roads. His goal was to avoid litigation, as well as put the state in a better position should litigation result nonetheless. Savvy about the rule of *Fitts v. McGhee*, the legislation also gave no particular state officer given authority to enforce the rates. Then, to fend off litigation, harsh penalties were imposed for violating the rate limits. Each violation of the commodity rates could result in ninety days in jail (this could add up quickly), and a violation of the passenger rates yielded five years in prison and a \$5,000 fine.⁸⁰ In light of their severity, it was going to be difficult to find a railway employee willing to face these penalties to challenge the legislation.

It looked for a while as if the railroads might bend to the rates, and so other states quickly followed suit. The *Minnesota Tribune* hopefully reported, “Railroads Accept the Situation.”⁸¹ North Carolina and Alabama enacted rate laws that quickly turned into grand fights over the injunctive power of the federal courts.⁸²

⁷⁴ 134 U.S. 418.

⁷⁵ Cortner, *supra* note 15, at 153 (quoting *The Railway Age*, Jan. 18, 1907, at 69).

⁷⁶ Cortner, *supra* note 15, at 135.

⁷⁷ *Id.* (citing *The Railway Age*, Feb. 15, 1907, at 202; *The Railway Age*, Aug. 9, 1907, at 192).

⁷⁸ See Brief for Petitioner on Hearing of Rule to Show Cause, *Ex parte Young*, 209 U.S. 123, (1907) 1907 WL 18905, at *3; Cortner, *supra* note 15, at 139-41.

⁷⁹ For a picture of Young, see *Minneapolis Trib.*, July 3, 1907, at 1.

⁸⁰ Cortner, *supra* note 15, at 145.

⁸¹ Editorial, *Railroads Accept the Situation*, *Minneapolis Trib.*, May 8, 1907, at 4.

⁸² Cortner, *supra* note 15, at 147-48.

Despite optimism in Minnesota, the railroads were actively plotting a strategy to use shareholder derivative suits to challenge the rate law. Such suits were necessary given that the high penalty provisions would inhibit any railroad employee from violating the law to allow a challenge. The moving force behind the suits was John Stewart Kennedy, a Scottish émigré and financier who owned huge stakes in the Northern Pacific and Great Northern railroads.⁸³ Kennedy hired local counsel to represent the shareholders: the firm of How, Butler and Mitchell. Rumors swirled in the local press about such a forthcoming shareholder suit.

On May 31, 1907, nine suits were filed together in the District of Minnesota challenging the constitutionality of various Minnesota rate laws. One ground of challenge was the confiscatory nature of the rates under the Fourteenth Amendment. Another was the Commerce Clause of the Constitution. The railroads were particularly anxious to get a ruling that these intrastate rates impermissibly affected interstate commerce. The *Minnesota Tribune* deemed the litigation “one of the most gigantic lawsuits ever filed in the courts of this country.”⁸⁴ The case fell to federal judge William H. Lochren, who had been appointed by the conservative Democrat Grover Cleveland, with the warm support of J.J. Hill, the president of the Great Northern Railroad. Lochren’s facial hair put Young’s to shame;⁸⁵ coincidentally as well, his name with just little jumbling spelled “Lochner.” Lochren issued a temporary restraining order against the rates that very same day.⁸⁶

Young quickly moved to dismiss the actions on the grounds that they were collusive, and an impermissible suit against the State of Minnesota given the Eleventh Amendment. Judge Lochren denied the motion and set the case for a hearing on a preliminary injunction. The hearing took two weeks; the *Tribune* called it “one of the greatest gatherings of prominent lawyers from all parts of the country.”⁸⁷ Attorney General Young demurred to the complaint, again raising his Eleventh Amendment claim. At the heart of his argument that the suit was an impermissible one against the state was the quandary that would become known ultimately as the *Ex parte Young* fiction:

“Counsel for the plaintiffs contend . . . that these actions are not against the state, and yet at the same time they argue with equal vehemence that by means of these actions they have prevented the state from initiating any proceedings to enforce its laws. . . . If the state is a party, how can the suits be maintained in the face of the

⁸³ *Id.* at 155.

⁸⁴ Minneapolis Trib., June 1, 1907, at 1.

⁸⁵ For a picture of Lochren, see Minneapolis Trib., Sept. 21, 1907, at 1.

⁸⁶ Cortner, *supra* note 15, at 157.

⁸⁷ *Id.* at 163.

Eleventh Amendment? If the state is not a party no objection can reasonably be offered by these suitors to any steps it may take to enforce its laws.”⁸⁸

Young was aggressive in claiming the suit could not be maintained under existing precedent:

“It would be a waste of time and would be almost discourteous to this court for me to argue the proposition, which is now so well settled, that a suit against the officers of a state to either compel them to perform discretionary duties or to prevent them from performing such duties is a suit against the state.”⁸⁹

On September 20, Judge Lochren ruled against the Minnesota law, setting the stage for what would happen next by holding that the Attorney General was amenable to suit.⁹⁰ Although Lochren clearly was sympathetic to the railroads, he declined to rule for them on Commerce Clause grounds, arguing the claim was foreclosed by existing Supreme Court precedent. Not so the Fourteenth Amendment rate claim, however, which Judge Lochren recognized as valid. Lochren was scathing in discussing the penalties imposed by Minnesota in an attempt to forestall litigation, calling them “vicious, almost a disgrace to the civilization of the age.”⁹¹ As for the claimed Eleventh Amendment bar, Lochren could not see how it could apply in light of the Fourteenth Amendment. “There must be some way to enforce that provision of the Constitution,” he said, claiming “[i]t would be a reproach to the courts did they fail to provide an adequate remedy in a case of that sort.”⁹² The remedy was an injunction against state officers: “This has been done in so many cases that it seems to me it does not now require argument to sustain that position.”⁹³

By now the issue of injunctions against state officials was plainly a hot one throughout the country. As early as July, predictions were the case would go to the Supreme Court.⁹⁴ On July 4, at a Chautauqua in Evansville, Indiana, the Governor of Missouri – Joseph Folk – gave a barnstormer of an address to some ten thousand people complaining about threats to state sovereignty from centralizing federal authority. “Nowhere is this encroachment on the rights of the states more marked than in the wholesale nullification of state laws by federal injunction without hearing and trial.”⁹⁵

⁸⁸ Cortner, *supra* note 15, at 163-64.

⁸⁹ *Id.*

⁹⁰ Perkins v. N. Pac. Ry. Co., 155 F. 445 (1907).

⁹¹ *Id.* at 449.

⁹² *Id.* at 447.

⁹³ *Id.* at 448.

⁹⁴ Cortner, *supra* note 15, at 160.

⁹⁵ Minneapolis Trib. July 5, 1907, at 1.

Two weeks later, Supreme Court Justice David Brewer actually responded to “My friend Folk from Missouri,” in a speech to the agents of the Northwestern Mutual Life Insurance Agency, of which he was a trustee. (Ethical obligations apparently were quite different for judges in those days.) “I have been given to understand that Governor Folk has been denouncing the federal courts for issuing an injunction to the railways in Missouri to protect them from the operation of the state statutes,” Brewer reported, noting that “[i]t is a popular practice to say that they are very wicked, for instance, like life insurance companies.” Brewer was unrelenting in denying Folk’s claims, signaling his views on the merits of rate legislation: “I say to you that taking the earnings and the money invested in railroads as a whole, there is not a fair return for the money invested.”⁹⁶ A meeting of the Attorneys General of several states that commenced in St. Louis in late September featured a speech by Young, and issued memorials to the President and Congress to limit the injunctive power of the federal courts.⁹⁷

After Lochren handed down his decision, Young was coy to the press about his response. On September 22 the *Tribune* reported of Young: “I am unable to say at present just what the nature of the next step will be but it is our purpose to have the principal points in the case settled as soon as possible.”⁹⁸ Young’s strategy became clear soon enough. Two days later he defied the federal injunction and filed suit under the rate law against the Northern Pacific in the Ramsey County state district court.⁹⁹ Young’s move was met with universal approbation by the Minnesota bar and press. Commentators recognized the difficult spot he was in and praised him for acting in the only way possible to bring the case before the Supreme Court “as quickly as possible.”¹⁰⁰

As expected, Young was then held in contempt by Judge Lochren, permitting a habeas corpus proceeding in the Supreme Court. Lochren fined Young one hundred dollars, and committed him to the custody of Federal Marshal Grimshaw, with whom he was required to check in daily.¹⁰¹ Alluding to Young’s popularity, the marshal joked, “I have to be mighty careful, for if I don’t look out, he will escape from my jurisdiction and break into the governor’s office.”¹⁰² On October 25, Young’s attorney filed a motion for leave to file a petition for a writ of habeas corpus in the Supreme Court. Three days later

⁹⁶ Minneapolis Trib., July 18, 1907, at 1.

⁹⁷ William D. Guthrie, *The Eleventh Article of Amendment to the Constitution of the United States*, 8 Colum. L. Rev. 183, 183 (1908).

⁹⁸ *Battle*, Minneapolis Trib., Sept. 22, 1907, at 1.

⁹⁹ Cortner, *supra* note 15, at 170.

¹⁰⁰ See, e.g., Editorial, *Expediting Adjudication of Railroad Cases*, Minneapolis Trib., Sept. 26, 1907, at 4.

¹⁰¹ Minneapolis Trib., Oct. 22, 1907, at 7.

¹⁰² Cortner, *supra* note 15, at 176 (quoting Minneapolis Trib., Oct. 27, 1907, at 1).

the motion was granted, ordering Young released on own recognizance, and setting December 2 as the date for the Supreme Court hearing.¹⁰³

The Parties' Claims in the Supreme Court

Before the Supreme Court, Young relied strongly on the claim that the suit in federal court was effectively one against the State of Minnesota, which he argued was impermissible under the Eleventh Amendment. In response to the justification of the court below that the Fourteenth Amendment claims had to be adjudicated somewhere, Young pointed to the state courts: “The true theory of the relations between the States and the Federal government, requires that the question of the validity of State laws, which are claimed to be contrary to the limitations on State power contained in the Federal Constitution, should, in the nature of things, first be passed upon by the courts of the State . . .”¹⁰⁴

Young’s doctrinal case rested on *Fitts v. McGhee*, which had the advantage of being last in time in the long line of Eleventh Amendment cases. He argued that just as in Alabama, the Minnesota statute did not devolve formal enforcement authority upon him. But he also quoted the *Fitts* Court, which, in the course of explaining its result in light of *Reagan* and *Smyth*, drew a more important line, between a suit against a state official for trespass upon the plaintiff’s interests, and one “merely to test the constitutionality of a State statute, in the enforcement of which those officers will act only by formal judicial proceedings in the Courts of the State.”¹⁰⁵ The latter, Young insisted, was not acceptable in light of *Fitts*.

Opposing Young in the Supreme Court, the railroad stockholders claimed that a federal injunctive suit was essential to protect their rights. They also argued Young’s contempt of court was unjustifiable in any event, and that Minnesota was not the real party in interest in the suit. They relied heavily on the language in *Smyth* that a suit against the official to stop enforcement is not a suit against the state. But the stockholders’ main policy argument, that there simply had to be a federal injunctive action available, was set out in the third argument in the brief: “No court, federal or state, can afford equitable relief against laws of the kind involved [in this suit], unless the AG may be restrained from proceedings to enforce them.”¹⁰⁶ The stockholders also focused closely on the harsh penalties in the Minnesota statute, saying, “It was by many

¹⁰³ *Id.*

¹⁰⁴ Brief for Petitioner, Ex parte Young, 209 U.S. 123 (1907), 1907 WL 18905, at *51.

¹⁰⁵ *Id.* at *57 (quoting *Fitts*, 172 U.S. at 530).

¹⁰⁶ *See* Brief for Respondent, Ex parte Young, 209 U.S. 123 (1907), 1907 WL 18907, at *50.

considered a matter of congratulation that the legislature had enacted rate laws which, whether or not constitutional, the railroad companies could not successfully contest.”¹⁰⁷

The Supreme Court decision in Ex parte Young

The Supreme Court observed at the outset “the very great importance of this case, not only to the parties now before the court, but also to the great mass of the citizens of this country.” Justice Peckham, writing for the Court, even conceded the matter was not “entirely free from any possible doubt.” He acknowledged that questions of jurisdiction were frequently a “delicate matter,” especially given here, where “the assertion [is] that the suit is, in effect, against one of the states of the Union.”¹⁰⁸ And still, the outcome was that the contempt citation was upheld, as was the ability to sue state officials for injunctions against the enforcement of state laws.¹⁰⁹ *Ex parte Young* was a complete victory for the railroads.

The Court set the stage for its critical holding by declaring almost at the outset that the penalties imposed by Minnesota for violations of the rate law were “unconstitutional on their face.”¹¹⁰ Penalties this high had the same result “as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.”¹¹¹ Once that was settled, the main question presented itself: “We have, therefore, upon this record, the case of an unconstitutional act of the state legislature and an intention by the attorney general of the state to endeavor to enforce its provisions, to the injury of the company.” “The question that arises,” therefore, “is whether there is a remedy that the parties interested may resort to, by going into a Federal court of equity, in a case involving a violation of the Federal Constitution.”¹¹²

The rub, of course, was the Eleventh Amendment, but this did not detain the Court for long. The Justices held that state officials could be sued to restrain enforcement of unconstitutional laws. Justice Peckham’s opinion for the 8-1 majority got to this result by pushing aside *Fitts*, emphasizing its prior precedent, and adopting the fiction for which it is famous. The governing rule, Peckham stated, was that in *Smyth*, in which the Court held that such a suit was “not a suit against the state.”¹¹³ *Fitts* was strictly limited to cases in which the officer had no duty to enforce under the Constitution. Thus, in

¹⁰⁷ *Id.* at *51.

¹⁰⁸ *Ex parte Young*, 209 U.S. 123, 142 (1908).

¹⁰⁹ *Id.* at 166-67.

¹¹⁰ *Id.* at 148.

¹¹¹ *Id.* at 147.

¹¹² *Id.* at 149.

¹¹³ *Id.* at 154.

Fitts, “[a] state superintendent of schools might as well have been made a party.”¹¹⁴ In this case, Peckham explained, although the specific rate statute was silent as to enforcement authority, under his “general powers” Young plainly had and was exercising enforcement powers.¹¹⁵

Then, Justice Peckham offered the legal fiction that many have noted resting at the heart of *Ex Parte Young*:

“The answer to all [the claims regarding the Eleventh Amendment] is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.”¹¹⁶

In other words, the case was one to restrain a state law, but was not one against the state.

From here, the resolution of the case was a simple affair. True, Peckham acknowledged, federal courts ordinarily ought not to enjoin criminal proceedings.¹¹⁷ But in this case the federal suit had been first in time.¹¹⁸ And, given the harsh penalties for violation of the rate statute, there was no adequate remedy at law.¹¹⁹ Ergo, suit was permissible, Young’s jurisdictional defense failed, and the contempt finding of Judge Lochren was appropriate.¹²⁰

The only Justice to dissent was Harlan, the author of *Fitts*, who plainly was exercised, basically concluding that the majority’s reasoning failed to come to grips with the central issue of the case. The suit was against Young “*as, and only because he was, attorney general of Minnesota.*” The goal was “*to tie the hands of the state* so that it could

¹¹⁴ *Id.* at 156.

¹¹⁵ *Id.* at 154.

¹¹⁶ *Id.* at 159-60.

¹¹⁷ *Id.* at 161.

¹¹⁸ *Id.* at 161-62.

¹¹⁹ *Id.* at 163.

¹²⁰ *Id.* at 167-68.

not in any manner or by any mode of proceeding, *in its own courts*, test the validity of the statutes and orders in question.”¹²¹ Harlan seemed to acknowledge the penalties were troubling, but he believed addressing them at this juncture was putting the cart before the horse.¹²² Rather, the only question was whether the attorney general could be sued; if not, that was the end of the matter.¹²³ The rights at stake could be protected by the state court, with ultimate review in the Supreme Court.¹²⁴ Allowing suit to challenge the constitutionality of the rate statute in federal court was to him unfathomable: “This principle, if firmly established, would work a radical change in our governmental system. It would inaugurate a new era in the American judicial system and in the relations of the national and state governments. It would enable the subordinate Federal courts to supervise and control the official action of the states as if they were ‘dependencies’ or provinces.”¹²⁵

The Aftermath of Ex Parte Young

The waves caused by the decision in *Ex parte Young* radiated in many directions. Although the decision affected the parties and, ultimately, Minnesota rate law, its impact was felt quite quickly on jurisdictional practice as well. Before turning to the lasting significance of *Ex parte Young*, it is instructive (and interesting) to view its more immediate impact.

The Parties, and Minnesota Law. Despite the hullabaloo attendant the decision (of which, much more below), the decision in *Ex parte Young* had little lasting impact on Minnesota law. The immediate consensus was that the decision had invalidated the penalty provisions but not the rates themselves. After attempts to negotiate those rates failed, litigation re-commenced, this time before a Special Master appointed to take the extensive testimony. The Special Master recommended holding all the rates invalid, as confiscatory, a decision upheld by the District Court. The case then returned to the Supreme Court.

In its 1913 decision in the *Minnesota Rate Cases*, a unanimous Supreme Court lent its imprimatur to the rate regulation adopted by the State of Minnesota.¹²⁶ Justice (and former governor of New York) Charles Evans Hughes authored the decision. Importantly, the Court held that the state remained free to regulate intrastate railroad rates

¹²¹ *Id.* at 174 (Harlan, J., dissenting).

¹²² *Id.* at 177.

¹²³ *Id.* at 178.

¹²⁴ *Id.* at 202.

¹²⁵ *Id.* at 175.

¹²⁶ 230 U.S. 352 (1913).

without running afoul of the Commerce Clause.¹²⁷ The big issue railroad attorneys wanted to resolve had been lost. It then held that the rates were not confiscatory, except as applied to one railroad.¹²⁸ The decision was viewed as a complete victory for the state.

And what about the participants in the litigation? Judge Lochren retired the week after *Ex parte Young* was decided, vindicated. Attorney General Young himself sought to turn the litigation to political advantage, seeking the Republican gubernatorial nomination. When he did not get it, the ever-gracious Young seconded the nomination of his rival.¹²⁹ Once he was out of office, Young continued the rate litigation on behalf of the state. Minnesota's Democratic Governor, John Albert Johnson, also had supported the litigation. He sought the nomination for the presidency of the United States, but that went once again to William Jennings Bryan. So, Johnson had to settle for re-election as Governor of Minnesota.¹³⁰ One of the chief lawyers representing the shareholders, Pierce Butler, got his own seat on the Supreme Court. Charles Evans Hughes, who wrote the *Minnesota Rate* decision, left the Court to run for President in 1916, a race in which he was narrowly defeated by Woodrow Wilson. President Herbert Hoover subsequently appointed Hughes as Chief Justice in 1930, a perch from which he presided over the stunning events precipitated by President Franklin Roosevelt's proposal of the famous Court-packing plan of 1937. The financier John Stewart Kennedy died in October of 1909, never getting to see the end of the contest he had started.¹³¹

Public Reaction, and the Three-Judge District Court. The decision in *Ex parte Young* set off what the Court itself would call a "storm of controversy."¹³² Although the railroads certainly were happy, those concerned about state regulation of the roads and federal injunctions more generally were not. "Supreme Court Sounds Dirge of State's Rights" was how the *Raleigh (North Carolina) News & Observer* put it.¹³³

In January of 1908, not long after the *Ex parte Young* decision, William Guthrie gave an address to the State Bar of New York at its meeting in New York City. Guthrie

¹²⁷ *Id.* at 432-33.

¹²⁸ *Id.* at 472.

¹²⁹ Minneapolis Trib., July 2, 1908, at 1.

¹³⁰ See Cortner, *supra* note 15, at 198.

¹³¹ *Id.* at 203.

¹³² *Steffel v. Thompson*, 415 U.S. 452, 465 (1974) (quoting Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* 967 (2d ed. 1973)).

¹³³ Cortner, *supra* note 15, at 197. See also *Heavy Blow at States' Rights*, Wash. Post, Mar. 24, 1908, at 1. Cf. *Rail Lines Win in Low Rate War*, Chi. Trib., Mar. 24, 1908, at 1 (calling the Minnesota rate law "drastic"); Editorial, *Milestones of Reaction*, N.Y. Times, Mar. 25, 1908, at 8 ("[T]he [state court] judges who are now sustained in fact declared the popular will more truly than the editors and Legislatures who misrepresented the people."); Editorial, *Confidence and the Courts*, N.Y. Times, Apr. 30, 1908, at 6 ("[T]he Supreme Court . . . in the Minnesota and North Carolina cases set up the bulwark of the Constitution against state attacks upon railroad property.").

was a talented lawyer who had argued many prominent cases before the Supreme Court and taught at Columbia Law School as well. Commencing his address, Guthrie said pointedly, “Of the important questions of constitutional law now before the country, none more vitally affects the peace and harmony of our dual system of government than that of the power of a federal court to enjoin a state officer from enforcing the provisions of a state statute in conflict with the Constitution of the United States.”¹³⁴

In his talk, Guthrie criticized legislative proposals introduced in Congress in the aftermath of *Ex parte Young* that would strip the federal courts of this injunctive power, though he recognized something had to be done. Stripping jurisdiction “would be a policy fraught with immeasurable danger to property interests as well as to personal liberty,” he said. “But, undoubtedly, some reform is called for.”¹³⁵ Guthrie was passionate about the need “for maintaining the absolute confidence of the people at large in the wisdom and impartiality of the federal judges.”¹³⁶ He noted as well that the judges “are justly sensitive to public opinion and distressed” by what Guthrie called “unjust and ignorant criticism.”¹³⁷

Most of the anger in Congress came from representatives of the South and West, where the impact of the *Ex parte Young* decision was most immediately felt. Senator Lee S. Overmann of North Carolina – that state’s first popularly elected senator – detailed the anger at the practice of federal injunctions. “I saw in Moody’s Magazine last week,” he said in the Senate, “that there are 150 cases of this kind now where one Federal judge had tied the hands of the state officers, the governor, and the attorney-general. . . . We have come to a sad day when one Federal judge can enjoin the officer of a sovereign State from proceeding to enforce the laws of one State.”¹³⁸

Overmann was a realist, though, and his comments were tailored to the compromise position that ultimately became law: adoption of the three-judge district court. After two years of jousting, Congress passed legislation that mandated the use of a three-judge district court whenever there was pending a request to enjoin a state law. The provision applied only to issuance of a preliminary injunction, not a temporary restraining order or a permanent injunction. Importantly, review of the three-judge court was directly to the Supreme Court. For a large number of years, at least, the future of *Ex parte Young* and the three-judge court were somewhat tied together.

¹³⁴ William D. Guthrie, *The Eleventh Article of Amendment to the Constitution of the United States*, 8 Colum. L. Rev. 183, 183 (1908).

¹³⁵ *Id.* at 205.

¹³⁶ *Id.* at 206.

¹³⁷ *Id.* at 207.

¹³⁸ Cortner, *supra* note 15, at 198 (citing 42 Cong. Rec. 4847, 61st Cong., 3rd sess., Dec. 14, 1910).

The Significance of Ex parte Young

What is truly remarkable about the decision in *Ex parte Young* is that a case born of such enormous contention, not just among the parties, but nationally, has become such bedrock in the law of federal jurisdiction. With remarkably little dissent, liberals and conservatives tend to support if not downright applaud the rule of *Ex parte Young*. The reason for this seems apparent: protecting rights requires a judicial forum at times, and all agree that in general the federal courts should be available to hear claims regarding the constitutionality of state laws.

Ironically, given the stature it has achieved, the legal basis for *Ex parte Young* consistently is derided as a fiction.¹³⁹ The Court's argument that Young's action was not that of the state, because it was unconstitutional, has persuaded few.¹⁴⁰ How could the suit against Attorney General Young be both against the state (for purposes of the Fourteenth Amendment) and yet at the same time not against the state (for purposes of the Eleventh Amendment)? In a classic example of "if you can't beat 'em, join 'em," by its 1984 decision in *Pennhurst State School & Hosp. v. Halderman*, the Court itself conceded the "fiction of *Young*."¹⁴¹ (The *Pennhurst* case also held *Ex parte Young* actions could not be used to sue state officials who refused to comply with state, as opposed to federal, law.)

Yet, the fictive nature of the argument in favor of injunctive power has been deemed necessary to protect constitutional rights. As David Currie, a great scholar of federal jurisdiction, explained, "[b]ehind the outlandish conceptual justification concocted to support this holding lay the not implausible conviction that federal constitutional rights could not be adequately protected without the intervention of federal equity; therefore the philosophy of immunity had to yield."¹⁴² It is for precisely this reason that *Ex parte Young* is almost universally applauded. The renowned treatise writer on procedure and federal jurisdiction Charles Alan Wright called the ruling "indispensable to the establishment of constitutional government and the rule of law."¹⁴³

¹³⁹ See, e.g., Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 Vand. L. Rev. 993, 996 (1994); Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 Hastings L.J. 1123, 1123 (1989); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1 (1988); David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 4 (1964) (stating that *Young* rests on an "outlandish conceptual justification").

¹⁴⁰ But see John Harrison, *Ex Parte Young*, 60 Stan. L. Rev. 989, 989, 1000 (2008) (arguing that *Ex parte Young* "does not employ a legal fiction" because it endorses merely anti-suit injunctions against unconstitutional state actions) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821)); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 Harv. L. Rev. 61, 83, 85 (1984) (arguing the real fiction is the notion that states could be immune from suit for federal violations).

¹⁴¹ 465 U.S. 89, 105 (1984).

¹⁴² Currie, *supra* note 139.

¹⁴³ Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* 14 (6th ed. 2002).

One citation study of significant Supreme Court cases found it the tenth most influential.¹⁴⁴

In part *Young* has stood the test of time because commentators of all political stripes came to see its value. Henry Friendly, a federal judge who also was a great scholar of federal jurisdiction, candidly explained that for a progressive of his stripes *Ex parte Young*, which was “the *bête noir* of liberals in [his] law school days, has become ‘the fountainhead’ of federal power to enforce the Civil Rights Act.”¹⁴⁵ Yet, the injunctive power confirmed in *Young* played heavily on the liberal side in the civil rights disputes of the mid-twentieth century.¹⁴⁶ Indeed, the three-judge court (the jurisdiction of which was expanded to permanent injunctions and federal statutes) was utilized in *Brown v. Board of Education*,¹⁴⁷ and adopted by Congress to several other uses in the Civil Rights Act of 1964.¹⁴⁸ Although ultimately the three-judge format would be deemed too costly for most litigation, and was pared back substantially in 1976,¹⁴⁹ the *Ex parte Young* ruling itself has endured.¹⁵⁰

Controversy had not left the doctrine of *Ex parte Young* unscathed. During the fights over economic legislation in the years following *Young*, Congress limited (subject to certain exceptions) federal court injunctions of state tax and utility rate legislation.¹⁵¹ Responding to the federalism concerns that raise their heads when the *Young* remedy is sought, the Supreme Court has curtailed use of the injunction under certain circumstances. The rulings on this issue are extensive, but foremost lie abstention doctrines such as *Younger* abstention (which prohibits injunctions if state criminal proceedings are ongoing) and *Pullman* abstention (by which federal courts stay their hand

¹⁴⁴ Montgomery N. Kosma, *Measuring the Influence of Supreme Court Justices*, 27 J. Legal Stud. 333, 359 tbl.6 (1998). See also Michael E. Solimine, *Congress, Ex parte Young, and the Fate of the Three-Judge District Court*, forthcoming, U. Pitt. L. Rev. 2008; Owen M. Fiss, *The Civil Rights Injunction* 3-5 (1978); John C. Jeffries, Jr., et al., *Civil Rights Actions Enforcing the Constitution* 7 (2d ed. 2007).

¹⁴⁵ Henry J. Friendly, *Federal Jurisdiction: A General View* 3 n.7 (1973).

¹⁴⁶ *Id.* Friendly wrote in 1973 that the case “has become ‘the fountainhead’ of federal power to enforce the Civil Rights Act.”

¹⁴⁷ 347 U.S. 483 (1954).

¹⁴⁸ See Solimine, *supra* note 144.

¹⁴⁹ In 1976 Congress passed legislation restricting the jurisdiction of the three-judge district court to reapportionment cases. See Act of Aug. 12, 1976, Pub. L. 94-381, 90 Stat. 1119, codified in part at 28 U.S.C. § 2284. For a discussion of the 1976 legislation, see Solimine, *supra* note 144.

¹⁵⁰ See Jesse H. Choper & John C. Yoo, *Who’s Afraid of the Eleventh Amendment: The Limited Impact of the Court’s Sovereign Immunity Rulings*, 106 Colum. L. Rev. 213, 225-32 (2006).

¹⁵¹ See Act of May 14, 1934, 48 Stat. 775, codified at 28 U.S.C. § 1342 (known as the Johnson Act of 1934); Act of Aug. 21, 1937, 50 Stat. 738, codified at 28 U.S.C. § 1341 (known as the Tax Injunction Act of 1937). For a discussion of these statutes, see Solimine, *supra* note 144.

if proceedings in state court could avoid the need to resolve the federal constitutional question).¹⁵²

Nonetheless, the core of *Ex parte Young* remains and even has been expanded. Suitors who wish to obtain injunctions against state laws and practices can do so, as long as they are careful about the timing of their suit. Perhaps most important, in *Edelman v. Jordan* the Supreme Court relied on the *Young* fiction to permit suits against state officials for any sort of forward-looking relief, holding that the Eleventh Amendment primarily was a bar to suits seeking money damages from state treasuries.¹⁵³ In other words, if a federal plaintiff wanted to challenge the constitutionality of a state law, that was now permissible even if the plaintiff was not seeking to enjoin enforcement of that law against him. In 1997, in *Idaho v. Coeur d'Alene Tribe of Idaho*, Justice Kennedy suggested that the grant of an *Ex parte Young* injunction should be discretionary with federal courts, based on principles of equity and comity as well as the question of whether state law violated the federal Constitution.¹⁵⁴ But he only got one other vote for the idea, and the Court has not followed his suggestion subsequently.¹⁵⁵ Ironically, scholars derisive of the *Young* fiction typically are claiming not that the doctrine itself is impermissible, but rather that the scope of Eleventh Amendment immunity itself remains too large.¹⁵⁶ In a provocative recent article, one conservative scholar suggests *Edelman* was a bridge too far, and that the *Young* injunction should be confined basically to instances in which the federal suitor is fending off action by the state, the classic “anti-suit” injunction.¹⁵⁷ But even this critique was a stunning defense of *Young* itself.

As *Young* remains firm in the pantheon of federal jurisdiction, one cannot avoid remarking on its sub silentio message regarding the parity of state and federal courts. Quite unlike the history of *Young* itself, the question of the parity between state and federal courts is contested deeply.¹⁵⁸ Those who at any given moment dislike the

¹⁵² See *Younger v. Harris*, 401 U.S. 37 (1971); *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); see generally Solimine, *supra* note 144; Friedman, *Under the Law of Federal Jurisdiction*, *supra* note 2; Barry Friedman, *A Revisionist Theory of Abstention*, 88 Mich. L. Rev. 530 (1989).

¹⁵³ 415 U.S. 651, 663 (1974) (“Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.”).

¹⁵⁴ 521 U.S. 261, 270-81 (1997).

¹⁵⁵ See *Verizon Md. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270-76 (1997); see also Solimine, *supra* note 144, at n.105.

¹⁵⁶ See generally Althouse, *When to Believe a Legal Fiction*, *supra* note 139; Jackson, *supra* note 139.

¹⁵⁷ See Harrison, *supra* note 140.

¹⁵⁸ For scholarly discussions on the contested notion of parity, see, e.g., Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. Rev. 609, 614-16 (1991); Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 3 (1980); Larry W. Yackle, *Federal Courts* 23 (1999); Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. Rev. 593, 596-98 (1991).

exercise of federal jurisdiction maintain that state courts are equals with the federal courts when it comes to protecting federal rights. Proponents of federal jurisdiction, in turn, doubt this. Many of the Supreme Court's cases curtailing use of the federal injunctive power rest on such claims about parity.¹⁵⁹

Yet, at bottom, *Ex parte Young* stands as an unalterable testament to the fact that federal courts are necessary when questions of federal law predominate regarding federal rights. Recall that Attorney General Young's objection to the suit against him was precisely that the state courts could do the job. Admittedly in light of the huge penalty provisions this was disingenuous in that particular case. But many echo his general point. Judge Lochren, on the other hand, was not persuaded, insisting the guarantees of the Fourteenth Amendment compelled litigation in a *federal* court. By their unending, steadfast support of *Ex parte Young*, scholars and judges on both sides of the ideological spectrum seem to have signaled their agreement with Judge Lochren and the *Young* Court itself.

¹⁵⁹ See, e.g., *Stone v. Powell*, 428 U.S. 465, 493-94, 493 n.35 (1976).