

## EX PARTE YOUNG AND THE USES OF HISTORY

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### INTRODUCTION

*Ex parte Young*,<sup>1</sup> much discussed by scholars and often cited by courts, has suffered, or enjoyed, a rebirth of scholarly interest of late.<sup>2</sup> My own interest in the case, which dates back quite a way,<sup>3</sup> has led me to study not only this recent spate of attention but some of the older discussions as well.

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This Article was originally entitled “Rashomon and *Ex parte Young*.” But then, quite by accident, I ran across an article—Heather K. Gerken, *Rashomon and the Roberts Court*, 68 OHIO ST. L. J. 1213 (2007)—that came out a while ago on a completely different subject. Since I could not charge her with prospective plagiarism of a good title, I decided to change mine to the more prosaic one at the top of the page.

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

2. See, e.g., Barry Friedman, *The Story of Ex parte Young: Once Controversial, Now Canon*, in FEDERAL COURTS STORIES 247 (Vicki C. Jackson & Judith Resnik eds., 2010); John Harrison, *Ex parte Young*, 60 STAN. L. REV. 989 (2008); Sina Kian, Note, *Pleading Sovereign Immunity: The Doctrinal Underpinnings of Hans v. Louisiana and Ex parte Young*, 61 STAN. L. REV. 1233 (2009); Joshua Newborn, Comment, *An Analysis of Credible Threat Standing and Ex parte Young for Second Amendment Litigation*, 16 GEO. MASON L. REV. 927 (2009). The *University of Toledo Law Review* has published a Symposium entitled *Ex parte Young Symposium: A Centennial Recognition*, containing an Introduction and seven articles on various aspects and implications of the decision. *Ex parte Young Symposium: A Centennial Recognition*, 40 U. TOLEDO L. REV. 819 (2009).

As this article was going to press, the Supreme Court decided that under the doctrine of *Ex parte Young*, a federal court was allowed to hear a lawsuit for prospective relief brought against state officials by another agency of the same state. *Va. Office for Prot. & Advocacy v. Stewart*, No. 09-529 (U.S. Apr. 19, 2011). The three opinions in the case highlight the continuing debate over the meaning and application of *Young*, and while a full discussion of the case must be left to future scholarship, of particular interest to readers of this article is the citation by Justice Kennedy (in a concurring opinion joined by Justice Thomas) of the article by John Harrison, cited earlier in this footnote and discussed at length in the text that follows. *Stewart*, slip op. at 9 (Kennedy, J., concurring).

3. See, e.g., David L. Shapiro, Comment, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 63, 83 (1984).

As many familiar with the case are aware, the decision was handed down during the *Lochner* era,<sup>4</sup> was met with staunch opposition from progressives in the states and in Congress, and has led to legislation designed to reduce its adverse impact on a range of reform efforts in the states.<sup>5</sup> But I have found that with very few exceptions,<sup>6</sup> most scholars, now and in the recent past, agree that the case was correctly decided.<sup>7</sup> Yet the range of justifications for the result, and the analyses of its implications, are almost as diverse as the ethnic makeup of a typical subway car on a New York City 1 train. How can such a range of views exist about a case—that just recently celebrated its centennial—on such matters as its rationale, its novelty, the proper characterization of its holding, the lessons it teaches about state-federal relations, and the proper role of the federal courts? And what, if anything, does this tell us about the nature of legal scholarship? After briefly describing the case (in terms as neutral as I can muster), and surveying the views expressed by judges and scholars, these are the questions I will address in this Article.

Of course, it is quite likely that some of my own opinions, both about the case and about a number of related substantive questions, will surface, or try to, in the course of this Article. But to the extent they do, the damage is essentially collateral. My goal is not to add to the plethora of scholarly and judicial opinions on the case, but rather to consider them, to try to account for them, and, ultimately, to ask whether they should have much bearing on current debates about the underlying questions they raise. My conclusion, briefly stated, is that arguments about iconic cases like *Young* tend to mask more important questions about both the substance and the process of constitutional interpretation.

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4. *Lochner v. New York*, 198 U.S. 45 (1905). *Lochner* is a decision generally viewed as a cornerstone of the Supreme Court's use of substantive due process to free private economic activity from state control. Indeed, in the thirty years following *Lochner*, "the Court invalidated almost 200 laws and regulations on the ground that they violated economic rights protected by the Due Process Clause." GREGORY E. MAGGS & PETER J. SMITH, *CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH* 632 (2009).

5. The story is fully told in Michael E. Solimine, *Ex parte Young: An Interbranch Perspective*, 40 U. TOL. L. REV. 999, 1000, 1002, 1011 (2009).

6. See, e.g., James Leonard, *Ubi Remedium Ibi Jus, or, Where There's a Remedy, There's a Right: A Skeptic's Critique of Ex parte Young*, 54 SYRACUSE L. REV. 215 (2004).

7. See Friedman, *supra* note 2, at 271 ("With remarkably little dissent, liberals and conservatives tend to support, if not downright applaud the rule of *Ex parte Young*.").

I.  
THE DECISION IN *EX PARTE YOUNG*

If you have read even this far, you are probably already familiar with the *Young* decision. Nevertheless, a brief summary will be useful for those less informed and for purposes of the discussion that follows.

At the turn of the twentieth century, when many states were attempting to regulate what they regarded as the excesses of the growth of American industry, including the charging of exorbitant and/or discriminatory railroad rates, lawyers for the railroads turned to the federal courts for assistance. The *Young* litigation, a federal court action brought by shareholders of several railroads against Young, the Attorney General of Minnesota, was a part of this effort. The plaintiffs, in their capacity as railroad shareholders, complained that the state's legislation regulating railroad rates was confiscatory and thus invalid under the Fourteenth Amendment, and sought injunctive relief against civil and criminal enforcement of the laws setting those rates. The trial judge entered a preliminary injunction barring enforcement, an injunction Young proceeded to disobey by filing a state court enforcement action against the railroads. The shareholders responded by seeking to have Young held in contempt of the federal court injunction. When the trial court agreed (rejecting, as it had before, Young's claim that the federal suit was barred by the Eleventh Amendment<sup>8</sup>), Young filed petitions in the Supreme Court for writs of habeas corpus and certiorari.<sup>9</sup>

The Court, over only one dissent, dismissed the petitions. It first held that the court below had federal "arising under" jurisdiction because the action raised questions of federal due process, equal protection, and interference with interstate commerce.<sup>10</sup> The

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8. U.S. CONST. amend. XI provides: "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 States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

9. For a fuller description of the information summarized in this paragraph, see Friedman, *supra* note 2, at 259–64. Although Friedman refers only to a petition for habeas corpus in the Supreme Court, the heading of the case itself states that it is on "Petition for Writs of Habeas Corpus and Certiorari." *Ex parte Young*, 209 U.S. 123, 123 (1908).

10. See *Young*, 209 U.S. at 142–44. In a recent article, the authors note that while the original action in *Young* involved complete diversity of citizenship between the adverse parties, the contempt proceeding was initiated by an action that included a shareholder who was a co-citizen of the defendant, thus destroying the complete diversity required under the rule of *Straubridge v. Curtis*, 7 U.S. (3

Court then turned to the merits of the plaintiffs' complaint, holding that the legislation violated due process because the rates had been set without a prior hearing and the prospective penalties were so Draconian as to "intimidate the company and its officers from resorting to the courts to test the validity" of the rates established by the laws under attack.<sup>11</sup> As a result, the laws were "unconstitutional on their face, without regard to the question of the insufficiency of those rates."<sup>12</sup>

Only then did the Court address Young's "most material and important objection made to the jurisdiction" of the trial court, i.e., that the suit was, in effect, one against the State—an objection "to be considered with reference to the Eleventh and Fourteenth Amendments."<sup>13</sup> If the act sought to be enforced is unconstitutional, the Court said, the official who seeks enforcement in the name of the State "is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."<sup>14</sup>

The Court turned next to the question of whether a court of equity had jurisdiction to enjoin criminal proceedings, noting parenthetically that this issue "really forms part of the contention that the State cannot be sued."<sup>15</sup> In a relatively brief discussion, citing only its own prior decisions, the Court acknowledged that equity could not ordinarily enjoin criminal proceedings but stated that there was a recognized exception when such proceedings were "instituted by a party to a suit already pending before [the equity court] and to try the same right that is in issue there."<sup>16</sup> Here, the enforcement proceedings instituted by Young in the state court raised questions of constitutionality that were identical to those already raised in the pending federal action. Moreover, the remedy at law (raising the federal defense of unconstitutionality in the state court prosecution) was inadequate because of, inter alia, the complexity of the constitutional issues, the substantial possibility of delay while those issues were being litigated, and the even more

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Cranch) 267 (1806). See Ann Woolhandler & Michael G. Collins, *Federal Question Jurisdiction and Justice Holmes*, 84 NOTRE DAME L. REV. 2151, 2175 (2009).

11. *Young*, 209 U.S. at 147.

12. *Id.* at 148.

13. *Id.* at 149.

14. *Id.* at 160.

15. *Id.* at 161.

16. *Id.* at 162 (quoting *In re Sawyer*, 124 US 200, 211 (1887)) (internal quotation marks omitted).

substantial possibility that no employee would be willing to risk the heavy penalties involved in disobeying the law.<sup>17</sup>

In its important concluding paragraphs, the Court noted that it was merely following a line of decisions beginning with *Osborn v. Bank of United States*,<sup>18</sup> “the only difference . . . being that in this case the injury complained of is the threatened commencement of suits, civil or criminal, to enforce the act, instead of, as in the *Osborn* case, an actual and direct trespass upon or interference with tangible property.”<sup>19</sup> The difference, the Court stated, was

not of a radical nature . . . [W]here the state official, instead of directly interfering with tangible property, is about to commence suits, which have for their object the enforcement of an act which violates the Federal Constitution, . . . he is seeking the same justification from the authority of the State as in other cases. The sovereignty of the state is no more involved in one case than in the other. The State cannot in either case impart to the official immunity from responsibility to the supreme authority of the United States.<sup>20</sup>

As a final analogy, the Court compared the equitable action instituted by the shareholders to a writ of habeas corpus for the discharge of a state prisoner on the ground that he is in custody in violation of the Federal Constitution, concluding that, just as in such cases, the present suit was “not a suit against the State.”<sup>21</sup>

In an extraordinarily lengthy dissent, Justice Harlan, though the author of one of the principal cases relied on by the majority,<sup>22</sup>

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17. *Young*, 209 U.S. at 163–65.

18. 22 U.S. (9 Wheat.) 738 (1824). *Osborn* was a federal court action brought by the Bank against a state official to enjoin him from enforcing a state law claimed to violate the rights of the Bank under federal law. After issuance and service of the injunction, the defendant seized certain Bank property pursuant to the state law, and was ordered by the federal court to return the seized property, with interest. The Supreme Court affirmed the decree (except with respect to the award of interest). As the Court noted in *Young*, the defendant’s action in *Osborn*—seizure of the Bank’s tangible property—fell within the scope of the tort of trespass. *Young*, 209 U.S. at 167.

19. *Young*, 209 U.S. at 167.

20. *Id.* (citing *In re Ayers*, 123 U.S. 443 (1887)). In *Ayers*, the Court held that the doctrine of sovereign immunity barred an injunction against a state official when the object of the injunction was “indirectly, to compel the specific performance of a [state’s] contract . . .” 123 U.S. at 502.

21. *Young*, 209 U.S. at 168.

22. *See, e.g., Young*, 209 U.S. at 154 (citing *Smyth v. Ames*, 169 U.S. 466 (1898) (Harlan, J.) (affirming federal court injunction against enforcement of state statute regulating railroad rates)). To add to the confusion, Justice Harlan was also the author of *Fitts v. McGhee*, 172 U.S. 516 (1898), in which the Court held that a

argued that the Eleventh Amendment barred a suit to enjoin a state officer from appearing in the state's own courts to enforce the state's laws. "[T]o tie the hands of the State" in this way, he contended, "would work a radical change in our governmental system. . . . We must assume—a decent respect for the States requires us to assume—that the state courts will enforce every right secured by the Constitution," and if they fail in this obligation the error is subject to review and reversal in the Supreme Court.<sup>23</sup>

## II. INTERPRETATIONS

So there it is. Under appropriate circumstances, and even in the absence of federal statutory authority, a federal action will lie to enjoin a state officer from going to state court to seek civil or criminal enforcement of a state law when the action is based on the ground that enforcement will violate the constitutional rights of the plaintiff.<sup>24</sup>

This statement of *Young's* holding sounds straightforward, but appearances can be deceiving. The heart of the dispute between the parties seems to relate to the question of whether the action—presumably the original action for injunctive relief—is barred by the Eleventh Amendment, or perhaps by the doctrine of sovereign immunity that the Supreme Court has found embedded in the Constitution and underlying, or at least reflected in, the Eleventh Amendment.<sup>25</sup> But another question is also presented: Since no

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suit to declare unconstitutional (and to enjoin enforcement of) a state law setting bridge tolls was barred by sovereign immunity and, in addition, that equity had no jurisdiction to enjoin a criminal prosecution for violation of that law. The Court's decision in *Young* appeared to sweep away much of the confusion engendered by these decisions (especially *Fitts*), while Justice Harlan's dissent struck this reader as an attempt, through incomprehensible distinctions, to preserve, and even increase, as much of the confusion as possible.

23. *Young*, 209 U.S. at 174–76 (Harlan, J., dissenting).

24. There are several statutory obstacles to such relief, however. The Anti-Injunction Act, dating back to the Act of March 2, 1793, 1 Stat. 335, prohibits a federal court (with certain stated exceptions) from staying proceedings in a state court. 28 U.S.C. § 2283 (2006). The Act has been construed to apply only to *pending* state proceedings or to state proceedings that are commenced before "any proceedings of substance on the merits have taken place in the federal court." *Hicks v. Miranda*, 422 U.S. 332, 349 (1975). In addition, federal statutes forbid injunctions against enforcement of state tax laws and, in certain cases, against enforcement of state rate orders, so long as a "plain, speedy, and efficient remedy may be had" in the state courts. 28 U.S.C. §§ 1341, 1342 (2006).

25. In *Hans v. Louisiana*, 134 U.S. 1 (1890), the first case squarely holding that a State could not be sued without its consent in a federal court by one of its

federal statute is cited as the source of either the right asserted or the remedy sought,<sup>26</sup> what is the source of that right and that remedy? As it turns out, both of these questions have given rise to widely divergent responses.

On whether the action was essentially one against the State and thus barred from the federal courts, one approach that surfaced in the latter part of the last century is that the reasoning of the *Young* Court was a paradigmatic legal fiction. After all, the very foundation of the plaintiffs' claim was that the law the state officer (Young) sought to enforce was constitutionally invalid because enforcement would violate the Fourteenth Amendment's prohibition against a state's deprivation of a person's property without due process.<sup>27</sup> At the same time, the Court's holding regarding the Eleventh Amend-

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own citizens, the Court's opinion was not entirely clear as to whether its holding was an application of the Eleventh Amendment itself or a decision that the Amendment merely restored the doctrine of state sovereign immunity to its original and rightful place. 134 U.S. at 10–19. Though subsequent decisions, for example *Edelman v. Jordan*, 415 U.S. 651 (1974), tended to equate the Amendment with the immunity doctrine, the Court ruled in *Alden v. Maine*, 527 U.S. 706, 754 (1999), that a state had a constitutional right to claim sovereign immunity from the assertion of a federal claim against it in its own courts and thus left no doubt that the doctrine existed independently of the terms of the Amendment.

26. Provisions of the 1871 Civil Rights Act, Act of April 20, 1871 § 1, 17 Stat. 13, now embodied in 42 U.S.C. § 1983 (2006), might have been cited, but as in most cases seeking relief against state and local officials that were decided prior to *Monroe v. Pape*, 365 U.S. 167 (1961), it was not. In *Monroe*, the Court held that an action under § 1983 could be brought by private individuals against local police officers for damages resulting from a search and seizure alleged to have occurred in violation of their constitutional rights. 365 U.S. at 172. As noted in Hart & Wechsler's *The Federal Courts and the Federal System*, "[M]any suits that might have been brought under § 1983 as it has recently been interpreted [i.e., suits brought prior to *Monroe*] were treated instead as actions for a remedy (usually an injunction) implied directly under the Constitution." RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 948 (6th ed. 2009) [hereinafter HART & WECHSLER].

27. The notion that *Young's* approach to sovereign immunity constituted a legal "fiction" was articulated by the Court in Justice Powell's majority opinion in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984), and has often been repeated. See, e.g., Friedman, *supra* note 2, at 266; Marcia L. McCormick, *Solving the Mystery of How Ex parte Young Escaped the Federalist Revolution*, 40 U. TOL. L. REV. 909, 921 (2009); Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1197 (1988). Cf. Harrison, *supra* note 2, at 1011 n.94 (discussing the origin of the "fiction" interpretation). Taking the idea that *Young* rolled out a "fiction" one step further, David Currie wrote that the decision "rejected sound precedent" and "manufactured [a new doctrine] out of whole cloth." DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1886–1986, at 54 (1990).

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ment rested on the determination that Young's actions in violation of the Fourteenth Amendment were not committed by the State.<sup>28</sup> Indeed, the Court itself underscored the paradox, without acknowledging it, when it specifically held, in *Home Telephone*,<sup>29</sup> that actions by state officers could be treated as "acts of the State within the Fourteenth Amendment," even if they were also in violation of state law.<sup>30</sup>

Other scholars have expressed a very different view on the immunity issue. The doctrine of sovereign immunity, they contend, has always distinguished between holding the State itself responsible for its alleged wrongs and holding an individual officer responsible for his.<sup>31</sup> In the latter case, the officer may be able to escape liability (in an action at law or in equity) by *defending* on the ground that he was acting pursuant to law, but that defense will fail if the law relied on is itself a violation of our supreme law—the Federal Constitution. This concept of individual responsibility is an essential corollary to the immunity of the sovereign and has been recognized in this country on both the state and federal levels.<sup>32</sup> Thus the result in *Young* on the immunity issue was neither novel nor anomalous.

For some scholars, whether or not they regard the *Young* rationale as a fiction, *Young's* approach, being critical to the rule of law, properly extends over a broad range of rights and remedies against government officers for actual or threatened constitutional violations.<sup>33</sup> Indeed, in her Introduction to the recent Symposium on

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28. *Young*, 209 U.S. at 160.

29. *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913).

30. *Id.* at 282–83.

31. See, e.g., Shapiro, *supra* note 3, at 71–72, 84–85; Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1–19 (1963); see also Kian, *supra* note 2, at 1235 (noting that under established common law rules of pleading, plaintiff could complain that public officer had injured him by committing a "state-sanctioned" wrong, and if officer raised the state's immunity as defense, that defense would fail if state's authorization of the challenged conduct violated the Constitution). One problem that has always perplexed those who adopt this view is the extent, if any, to which the judgment against a particular officer of the government has preclusive effect in subsequent actions involving other officers or the government itself. See HART & WECHSLER, *supra* note 26, at 857, and authorities cited therein.

32. See, e.g., *United States v. Lee*, 106 U.S. 196 (1882) (federal); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 870–71 (1824) (state).

33. See, e.g., Carlos M. Vázquez, *Night and Day: Coeur d'Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 21 (1998). Two important studies by Professor Ann Woolhandler that help to situate *Young* within the gradual development of remedies for constitutional violations are: Ann Woolhandler, *The Common Law Origins of Constitutionally*

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the case, Rebecca Zietlow writes that “without [the decision], courts likely would have been unable to develop the vast constitutional jurisprudence of the twentieth century.”<sup>34</sup>

But in the recently expressed view of one scholar, a proper understanding of *Young* supports the position that the area of official activity unprotected by the State’s immunity is considerably narrower, extending only to such traditional wrongs as trespass to property and to essentially defensive claims that any attempt by the officer to bring judicial proceedings to enforce the law would be subject to a defense that the law itself was constitutionally invalid.<sup>35</sup>

A similar, and not unrelated, range of views exists with respect to the source of the plaintiff’s cause of action. The question is analytically distinct from that of sovereign immunity, since if the plaintiff has no cause of action to allege, the officer’s defense of state authorization need never be raised. Nevertheless, the analysis of each question tends to merge with the analysis of the other, and thus it is hard to blame courts, commentators in general, or this commentator in particular for any confusion that creeps into the discussion. For some, the cause of action recognized in *Young* was novel in two senses.<sup>36</sup> First, it was based not on the traditional tort of trespass to tangible property but rather on the idea that a suit lay to prevent a state officer from enforcing an unconstitutional law, even before the tort of “malicious prosecution” was fully recognized. Second, the cause of action rested not on some notion of common law, either general or emanating from the states, but on a truly federal base—perhaps that the Constitution itself authorized, if it did not mandate, a judicial remedy in equity for such a threatened wrong. After all, unless the cause of action was created by federal law, what was the source of federal question jurisdiction? The notion that the jurisdictional statute embraced state law claims

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*Compelled Remedies*, 107 YALE L.J. 77 (1997) [hereinafter Woolhandler, *Common Law*]; Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396 (1987) [hereinafter Woolhandler, *Patterns*].

34. Rebecca E. Zietlow, *Ex parte Young: The Font of Civil Rights Law*, 40 U. TOL. L. REV. ix (2009).

35. See Harrison, *supra* note 2. Harrison recognizes, however, that given his interpretation of *Young*, post-*Young* decisions, especially those rendered during and since the latter half of the twentieth century, have broadened the areas in which a state officer cannot assert the defense of sovereign immunity. See *id.* at 1008–09 (discussing *Edelman v. Jordan*, 415 U.S. 651 (1974)), 1020 (discussing *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)).

36. See, e.g., HART & WECHSLER, *supra* note 26, at 891. I am one of the co-authors of this book and have been since publication of the second edition in 1973.

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with federal ingredients was then only in the process of developing.<sup>37</sup>

Others have found it difficult to accept either of these claims. The notion of “traditional wrongs” like trespass to tangible property, in their view, was never so inflexible as to preclude the kind of extension recognized not only in *Young* but in earlier decisions as well.<sup>38</sup> And in the pre-*Erie*<sup>39</sup> haze created both by *Swift v. Tyson*<sup>40</sup> and the notion of “federal equity,”<sup>41</sup> the Supreme Court and other federal courts seldom paused to worry about the source of the law underlying a valid claim to injunctive relief; the notion that the remedial right in such cases derived somehow from federal law was one that evolved slowly and almost without being noticed.<sup>42</sup> As for the notion that “arising under” jurisdiction under the general federal question statute was only later to embrace state law claims including federal ingredients, such “federal ingredient” cases were probably the norm and not the exception well before (and including) *Young*.<sup>43</sup>

John Harrison recently moved this ball even further down field. Harrison contends that *Young* was not truly a case of an action to prevent a threatened wrong in the sense of an imminent tort but rather an example of a well-recognized right of a prospective defendant to obtain injunctive relief against prosecution if he could establish not only that he had a valid defense to such prosecution but

37. See *id.* at 785–86 (discussing *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921)); *id.* at 795 (discussing *Hopkins v. Walker*, 244 U.S. 486 (1917)). But see *infra* note 42 and accompanying text.

38. See, e.g., Woolhandler, *Common Law*, *supra* note 33, at 129–32. Two of the earlier decisions, both cited in *Young*, are *Smyth v. Ames*, 169 U.S. 466 (1898) and *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894). R

39. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

40. 41 U.S. (16 Pet.) 1 (1842).

41. See HART & WECHSLER, *supra* note 26, at 575–79. R

42. See Woolhandler, *Common Law*, *supra* note 33, at 131–32. In a post-*Young* case, *Ward v. Love County*, 253 U.S. 17, 22–23 (1920), the Court, reversing an Oklahoma state court judgment, held that private plaintiffs were entitled to recover taxes coercively collected by the county in violation of federal law, despite the absence of any such remedy under Oklahoma law. The decision may be viewed as recognizing a federal remedy for the county's violation of federal law, see HART & WECHSLER, *supra* note 26, at 718–19, but once again, the pre-*Erie* decision did not focus on the source of the law affording the remedy. Moreover, restitution under such circumstances—even if unavailable under the particular state's law—was part of the “general common law” in vogue at the time, and since the action was one brought against a local government entity, state sovereign immunity was not an issue. See *Lincoln Cnty. v. Luning*, 133 U.S. 529, 530 (1890). R

43. This argument is persuasively made in Woolhandler & Collins, *supra* note 10, at 2177–78. R

that, for some reason, the ability to raise that defense if and when prosecuted was not itself sufficient to afford protection.<sup>44</sup> And indeed, the fact that the action was brought by a prospective defendant (or the shareholders of a prospective defendant) was also the answer to any claim of sovereign immunity: just as no such immunity claim would be accepted in response to a defense asserted in an enforcement proceeding, it was not acceptable in a proceeding initiated by a prospective defendant for the purpose of raising the same defense. The purpose of the injunction was not to require the defendant to act affirmatively on behalf of the State but rather to require the defendant to *refrain* from commencing or pursuing judicial proceedings to enforce an invalid law.

As a stunning illustration of the range of views just summarized, consider the reaction of two scholars to the Supreme Court's decision, almost seventy years after *Young*, in *Edelman v. Jordan*.<sup>45</sup> In *Edelman*, Jordan had brought an individual and class action in federal court against various state officers, including Edelman, seeking declaratory and injunctive relief on the ground that the defendants were administering a certain federal–state aid program in a manner inconsistent with federal regulations and with the Fourteenth Amendment. After the grant of relief in the courts below, a divided Supreme Court reversed in part, holding that, while *Young* permitted prospective relief (in this case, an order requiring *future* compliance with the law), it did not allow *retrospective* relief (in this case, an order to release benefits that had been “wrongfully withheld”), even if that retrospective relief was incorporated not in a judgment for damages but in an injunctive decree.<sup>46</sup> The Eleventh Amendment, the Court concluded, barred such an award.<sup>47</sup>

Richard Fallon, writing some twenty years ago about *Young* and *Edelman* in a section of his well-known article on the ideologies of federal courts,<sup>48</sup> described *Young* as “a constitutional fiction,” and stated that its holding and rationale

lived, moved, and had its being in the assumptions and values of the nationalist model [i.e., a model that accords the vindication of federal rights in federal court a higher priority than the protection of state sovereignty]. The case's doctrinal innovation lay in its authorization of an injunction to prevent a state's attorney general from initiating a suit in state court, where fed-

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44. Harrison, *supra* note 2.

45. 415 U.S. 651 (1974).

46. *Id.* at 663–69.

47. *Id.* at 669.

48. Fallon, *supra* note 27, at 1195–98.

eral rights at least in theory would have been protected as fully as in federal court.<sup>49</sup>

But, Fallon continued, the dialogue, or struggle, between the “Federalist” and “Nationalist” models has persisted, and this struggle is nowhere better exemplified than in *Edelman*, where “the majority relied on the Federalist premise of state sovereignty to bar retroactive financial relief that was payable from a state’s treasury.”<sup>50</sup> Thus, in Fallon’s view, *Edelman* was a retreat from the principle on which *Young* was based.

For Harrison, on the other hand, *Edelman* represents a significant *extension* of the *Young* doctrine. Aside from a few ambiguous decisions in the years following *Young*, he contends, the Supreme Court had not, until *Edelman*, viewed *Young*’s approach to sovereign immunity as allowing *affirmative* relief, so long as the relief imposed no retroactive liability on the state’s treasury.<sup>51</sup> Yet in *Edelman* itself, as well as in later cases, the Court sustained relief against a state official that not only imposed an affirmative duty on the official but also required the expenditure of state funds in order to comply with the law in the future.<sup>52</sup>

How remarkable. Two respected scholars look at two landmark decisions; one sees the later decision as restricting the scope of the earlier, and the other sees just the reverse.

To round out the picture of scholarly analysis, and to underscore the broad range of scholarly reaction, two other recent studies deserve mention. Charlton Copeland, adopting a middle

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49. *Id.* at 1196.

50. *Id.* at 1197–98. Others have taken a similar view with respect to the distinction drawn in *Edelman*. See, e.g., Rochelle Bobroff, *Ex parte Young as a Tool To Enforce Safety-Net and Civil-Rights Statutes*, 40 U. TOL. L. REV. 819, 826, 840–84 (2009) (arguing that barring of retrospective relief in *Edelman* “began eroding the power” of *Young*, and that since the Court is unlikely to change direction, the remedy lies with Congress—perhaps through the exercise of its power to condition the availability to a state of federal funding on the waiver of the state’s sovereign immunity in matters related to the funding).

51. Harrison states:

[Prior to *Edelman*,] *Young* was not cited for the proposition that affirmative injunctive relief was available against state governments provided only that the relief was prospective. With a few minor exceptions, cases that relied on *Young* as setting the limits of sovereign immunity all involved injunction against enforcement litigation, or physical enforcement actions like seizure of property to collect taxes.

Harrison, *supra* note 2, at 1009.

52. See, e.g., *Milliken v. Bradley*, 433 U.S. 267 (1977). Indeed, in *Milliken*, the expenditure required to achieve future compliance was seen as necessary in order to correct for wrongs committed in the past. *Id.* at 289–90.

ground, views *Young* as epitomizing the “duality” of American federalism as a prominent example of the Court’s recognition of national supremacy operating within the constrictions of a system also premised on state sovereignty.<sup>53</sup> And Edward Purcell, in a thorough examination of *Young*, its times, and its antecedents, views the case as a significant part of the centralization of power in the national government and of the growth of federal judicial power.<sup>54</sup>

### III. IS THERE A TEXT IN THIS CLASS?<sup>55</sup>

At this point, the reader may well expect the writer—acting with Olympian detachment—to lay bare all the fallacies of those who have opined on *Young* in the past and to set forth for the very first time, definitively and with gusto, the true meaning of the case and its place in the jurisprudential constellation. Would that I could! But unfortunately, I have made no startling archival discoveries in papers not previously available, and have few if any new insights on those materials already plundered by my predecessors. Moreover, I doubt that I could escape my own preferences, strive as I might for objectivity, in appraising those materials.

I concede at the outset that I would like to make a convincing argument that *Young* set us firmly on the course of recognizing a federal right, sovereign immunity notwithstanding; to restrain gov-

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53. Charlton C. Copeland, *Ex parte Young: Sovereignty, Immunity, and the Constitutional Structure of American Federalism*, 40 U. TOL. L. REV. 843, 843–44 (2009).

54. Edward A. Purcell, Jr., *Ex parte Young and the Transformation of the Federal Courts 1890–1917*, 40 U. TOL. L. REV. 931, 937, 947 (2009). Purcell discusses both the sources of the transformation (including the desire of the “comfortable classes, the legal profession’s eastern elite, and most of those who sat on the federal bench” to have the federal government take action to protect the established—and growing—economic and social order) and the various doctrines that assisted in that transformation (including the imposition of constitutional limits on state legislation and the growth of federal common law, which he contends was gradually transmuted into the law of the Constitution itself). As a part of this development, he views *Young* as advancing the transformation in eight ways, including the implication of a cause of action directly under the Fourteenth Amendment, broadening the ability of federal courts to enjoin state criminal prosecutions, narrowing the concept of an “adequate remedy at law,” and invoking the Due Process Clause as a limitation on the power of the states to deny access to a judicial forum to challenge state action. *Id.* at 946–47.

55. The heading of this section is the title of a book by Stanley Fish, published in 1980 and subtitled: “The Authority of Interpretive Communities.” STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980). His theme, oversimplified, is that readers bring to a text to their assumptions, experiences, and values, and tend to find in it what those assumptions, experiences, and values prompt them to find.

ernment officials from violating individual rights, be they statutory or constitutional; to require them to comply with their legal duties in the future; and to require financial restitution, from the state treasury if necessary, for wrongs already committed. I fear, though, that the decision is too ambiguous, its context too remote from the year 2011, and its forerunners too confusing, to ground that argument in anything sturdy enough to withstand attack. But I do believe, on the basis of my own research, that at least some of the scholarly views discussed here tend either to overstate the novelty and path-breaking character of the decision or, on the other hand, to understate its contribution.

#### A. *Some Observations*

To begin, I doubt that *Young* is properly characterized as inaugurating, or even as representing, a “fiction,” i.e., a way of circumventing the bar of sovereign immunity and actually forcing the state to comply with its duty under law. After all, the notion that the individual officer may be held responsible, just as any individual may, for past or threatened violations of rights and may not hide behind the shield of legal authorization when the authorization is itself non-existent or invalid, has co-existed with the doctrine of sovereign immunity since at least the late thirteenth century.<sup>56</sup> Thus, to consider one without the other, or to regard either as a “fiction,” strikes me as favoring one side of the coin over the other. True, the problem is complicated by the question of the *res judicata* effect of a judgment against a government officer in subsequent actions against, or by, the government itself or other officers, but that question has never been fully resolved.<sup>57</sup> And even in the absence of preclusive effect, a judicial decision, especially one by the highest court in a jurisdiction, will have both precedential and “in terrorem” effect on subsequent actions.

Moreover, I am far from clear that *Young* must be regarded as establishing the existence of a *federal* cause of action to enjoin wrongful conduct by a government official, given the casual way in which federal courts of the time applied or even developed remedies for the violation of constitutional rights, especially in equity, without discussing, or apparently even worrying about, the source of law from which those remedies were derived. As already noted, there is a strong case for the conclusion that the transition from

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56. See Jaffe, *supra* note 31, at 1–3 (noting that the responsibility of the individual officer dates back to the time of King Edward I).

57. See HART & WECHSLER, *supra* note 26, at 857, and authorities cited therein.

“general” to “federal” law was far more gradual than is generally thought and that *Young* itself was part of that process but hardly its culmination.<sup>58</sup>

Finally, those who take a broad view of *Young* tend to neglect, or overlook, the fact that the decision resembled many prior cases involving relief against a government officer, cases in which the relief obtained either required the officer herself to compensate the plaintiff for loss or (as in *Young* itself) required her *not* to take action that would violate the plaintiff’s rights. Ordering a person to take an action that can be effectively performed only in her capacity as an officer of government, and that effectively orders the government itself to *act* through an agent, is surely harder to reconcile with the notion of the sovereign’s immunity from suit than is an order not to act.

To be sure, there were a few Supreme Court decisions requiring state officials to perform duties regarded as “ministerial”<sup>59</sup> and to return real property when the plaintiff could establish an entitlement to possession.<sup>60</sup> But note that each of these relatively rare instances involved a situation in which (as in habeas corpus) the remedy was rooted in a writ such as of mandamus or ejectment available at common law and did not require the action of a court of equity.<sup>61</sup>

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58. See Woolhandler, *Common Law*, *supra* note 33, at 129–32; see also discussion *supra* note 42. In addition, the view that the interpretation of the general federal question statute was not extended to embrace state law claims containing significant federal elements until a few years after *Young* has been effectively and persuasively challenged. See *supra* note 43 and accompanying text. This challenge undermines the argument that federal question jurisdiction could not have existed in *Young* unless the cause of action was federally created.

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59. See, e.g., *Rolston v. Mo. Fund Comm’rs*, 120 U.S. 390 (1887) (holding that mortgage trustees could restrain state officers from selling the mortgaged property to satisfy prior liens, and could *require* the assignment of those liens to the trustees); see also Woolhandler, *Common Law*, *supra* note 33, at 110, 119 (discussing decisions requiring state courts to exercise their mandamus power).

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60. See, e.g., *Tindal v. Wesley*, 167 U.S. 204, 224 (1897) (holding, in a diversity case, that the plaintiffs could bring suit against state officers to recover real property and damages for unlawful possession). The Court relied in part on *United States v. Lee*, 106 U.S. 196 (1882) (rejecting a defense of sovereign immunity in an ejectment suit brought against federal officers in allegedly unlawful possession of real property). Cf. *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845) (upholding statutory withdrawal of a traditional right of action against a customs collector and emphasizing other options available to a claimant, including the remedies of replevin, detinue, and trover).

61. As a technical matter, the Supreme Court held in *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 536–40 (1838), a case involving an order requiring payment of claimed compensation from the federal treasury, that jurisdiction to issue “man-

I have problems as well with the view—exemplified most clearly by the work of John Harrison<sup>62</sup>—that *Young* added little or nothing to our constitutional jurisprudence since it involved only a well-recognized anticipatory action by a prospective defendant. First, while Harrison relies almost exclusively on treatises contemporaneous with the decision in *Young* to buttress his point, he overlooks the emphasis in several of those treatises (and what appears to be an implicit assumption in others) that courts of equity are generally barred from interfering with *criminal* prosecutions, either pending or anticipated.<sup>63</sup> Thus the 1905 edition of Pomeroy's *Equity Jurisprudence*, the source perhaps most heavily relied on by Harrison,<sup>64</sup> does indeed speak of the use of injunctions to stay actions at law. However, in an early section of his discussion of the topic, in which he notes that as a general rule equity does not interfere with actions at law, Pomeroy states flatly, and without qualification, that “[c]riminal proceedings will *never* be enjoined.”<sup>65</sup> In the following

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damus” to an executive officer existed (perhaps only) in the courts of the District of Columbia. This gap was corrected by the Mandamus and Venue Act of 1962, 28 U.S.C. § 1361 (2007), which gives jurisdiction to all federal district courts to issue writs “in the nature of mandamus” to compel a federal officer to perform his duty. But there is a conflict among the federal courts on the scope of this authority. See PETER L. STRAUSS, TODD D. RAKOFF & CYNTHIA R. FARINA, GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 1109–12 (10th rev. ed. 2003).

62. Harrison, *supra* note 2. For a similar, but considerably broader, defense of *Young* as fitting within a well-established tradition, see Kian, *supra* note 2, at 1272–79.

63. The general rule summarized in these treatises—that courts of equity may not interfere with pending or anticipated criminal prosecutions—goes well beyond the statutory prohibition of injunctions against pending state proceedings (civil or criminal) that dates back to 1793 (Act of March 2, 1793, § 5, 1 Stat. 334–35) and that is now embodied in 28 U.S.C. § 2283 (2006). Indeed, in the excerpts from those treatises discussed here, that statute is not even referred to.

The point is nicely illustrated by *In re Sawyer*, 124 U.S. 200 (1887). In *Sawyer*, the Court held that there was no federal jurisdiction to enjoin proceedings for removal of a state police judge, reasoning that if the proceedings were criminal, equity could not enjoin them as a matter of a long-recognized limitation on its authority; if quasi-criminal or civil, the injunction was barred by the Anti-Injunction Act; and if neither criminal nor civil, equity could not in any event interfere with proceedings for removal of a public officer. 124 U.S. at 219–21.

The *Sawyer* decision, as cited in *Ex parte Young*, 209 U.S. 123, 162, spoke in dictum of an exception with respect to criminal prosecutions instituted by a party to a suit already pending in equity for the purpose of trying the same right already in issue in the equitable action. But none of the treatises discussed here (including that of Joseph Story, relied on in *Sawyer*) described an exception in such terms.

64. See Harrison, *supra* note 2, at 997–99 and nn.40, 41, 43, 44, 47.

65. 4 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE § 1361, at 2703 n.4 (3d ed. 1905) (emphasis added). Interestingly, in an edition published *after Young*, the treatise includes the same sentence, but now followed in brackets by “except where

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sections, which deal with exceptions to the general rule but which appear to apply *only* to injunctions against civil proceedings, he states that equitable relief is available if (1) the controversy involves a matter exclusively cognizable in equity, (2) equity has concurrent jurisdiction, as in matters involving fraud, or the legal remedy of the party seeking relief is inadequate, or (3) a judgment has already been obtained by fraud, accident, or mistake, or the defendant has been deprived of the opportunity to assert a defense.<sup>66</sup>

As for other authorities invoked by Harrison, John Willard seems to devote his attention entirely to suits in equity seeking to restrain *civil* actions at law.<sup>67</sup> Joseph Story states flatly that courts of equity “will not interfere to stay proceedings in any criminal matters or in any cases not strictly of a civil nature,” adding only that the prohibition is limited to cases “where the parties seeking redress by such proceedings [i.e., in any criminal matter or in any proceedings not of a civil nature] are not the plaintiffs in equity” (and, of course, in *Young* they were not).<sup>68</sup> And C.L. Bates, while recognizing the power of federal equity courts to restrain a state officer from enforcing an invalid state law, does so on the basis of Supreme Court decisions prior to *Young* upholding the authority of an equity court to prevent acts of injury to the plaintiff’s rights and property.<sup>69</sup> Thus, in finding an exception to the general rule barring injunctions against criminal prosecutions, the *Young* Court—follow-

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there is an attempt to enforce a law that is unconstitutional and void and the attempt will result in irreparable injury to vested property rights.” *Id.* § 1361b (Spencer W. Symons ed., 5th ed. 1941) (citing post-*Young* federal (and state) decisions).

66. *Id.* §§ 1362–64.

67. JOHN WILLARD, A TREATISE ON EQUITY JURISPRUDENCE 341–48 (New York, Banks & Brothers Law Publishers 1863). Willard’s treatise, which focuses primarily on the law of New York, does flatly state, in the course of discussing injunctions against proceedings in other jurisdictions: “Nor will the courts of the United States enjoin proceedings in a state court.” *Id.* at 347–48.

68. 2 JOSEPH STORY, EQUITY JURISPRUDENCE § 893 (Melville M. Bigelow ed., 13th ed. 1886). In another section, discussing anti-suit injunctions, Story states that it has been “long recognized in America . . . that the State courts cannot enjoin proceedings in the courts of the United States, nor the latter in the former courts.” *Id.* § 900. No reference is made to the Anti-Injunction Act, 28 U.S.C. § 2283 (2006).

69. 1 C.L. BATES, FEDERAL EQUITY PROCEDURE §§ 559–561 (1901). One of the cases heavily relied on by Bates is *Reagan v. Farmers’ Loan & Trust Co.*, 154 U.S. 362 (1894). Bates does *not* rely on the theory that the plaintiff is simply seeking equitable assistance in vindicating a defense to a legal action, but rather on the explanation that the plaintiff is seeking to prevent “wrong and injury” to his rights and property. Bates, *supra*, § 560. In a later brief and rather cryptic section, Bates does discuss the question of equity jurisdiction with respect to criminal proceedings; while referring to the general prohibition of injunctions against such proceedings,

ing the very Supreme Court precedents invoked a few years earlier by Bates and citing no decisions of any other court—appeared not to be relying on common law tradition (or on state law) so much as extending those traditions by analogy to the cases allowing relief against more traditional violations of property rights by federal and state government officials.<sup>70</sup> Indeed, this inference is strongly supported by the language used by the Court—language that Harrison acknowledges and tries valiantly though, I believe, unsuccessfully to explain.<sup>71</sup>

This brings us to the second major problem with Harrison's analysis: the failure to acknowledge the strong support for understanding the case as a step in the evolution of an action for equitable relief based solely on the notion of remedy rooted in (or at least derived from) the Constitution. The Court's language speaks not in terms of the prospective defendant bringing suit to assert an anticipated defense to an enforcement action but rather of the plaintiff's objective of preventing a constitutional wrong analogous to a traditional trespass on, or seizure of, the plaintiff's property.<sup>72</sup> Moreover, in failing even to refer to the exhaustive research of such scholars as Ann Woolhandler, Harrison also overlooks the rich, if not entirely coherent, history of actions that marked two gradual

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he refrains from saying anything particularly informative about exceptional circumstances when an injunction may be obtained. *See id.* § 568.

70. One of those Supreme Court precedents was *Smyth v. Ames*, 169 U.S. 466 (1898), and another was *Dobbins v. Los Angeles*, 195 U.S. 223 (1904). Both contain language not found in the discussion of criminal prosecutions in either the treatises or, to my knowledge, in state decisions, that an injunction against a criminal prosecution was available "where property rights will [otherwise] be destroyed." *Dobbins*, 195 U.S. at 241; *accord Smyth*, 169 U.S. at 527–28 ("The duty rests upon all courts . . . to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation."). And in *Dobbins*, the property right in question was a permit obtained from the state. *Dobbins*, 195 U.S. at 239.

71. Harrison concedes that according to the "conventional account," Justice Peckham, writing for the Court in *Young*, "treated the institution of enforcement proceedings by Young as a private tort." Harrison, *supra* note 2, at 1002. And indeed, Justice Peckham, as noted above *supra* notes 18–20, directly analogized the action to enjoin Young to the action brought in *Osborn* to prevent "an actual or direct trespass upon or interference with tangible property." *Ex parte Young*, 209 U.S. 123, 167 (1908). But, Harrison argues, Peckham did not ask, as he would have if the action were premised on enjoining a tort, whether damages would have been an adequate remedy; rather he asked whether the opportunity to defend an enforcement action was an adequate remedy. Harrison, *supra* note 2, at 1002–03. Moreover, Justice Peckham drew an analogy to the writ of habeas corpus, which was another available procedure to challenge the validity of a state criminal proceeding without offending sovereign immunity. *Id.* at 1003–04.

72. *See supra* note 20.

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transitions: (1) from the granting of relief against wrongs to tangible property to the granting of relief against the constitutional wrong of enforcing an invalid law, and (2) from the development of remedies without concern over the source of law to the federalization, and even constitutionalization, of those same forms of relief.<sup>73</sup>

### B. *Some Reflections*

Generalizations are dangerous, but this one is probably far from original. I believe that when legal academics, and especially those who are not professional historians, turn to history as an aspect of their inquiry into a problem of current importance, they tend to find in their investigations that history supports their personal values and preferences, or to put it more tactfully, their hypotheses. And I include myself to the extent I have dabbled as an amateur in historical materials.<sup>74</sup>

It is understandable that an advocate, in attempting to persuade a court, would argue that history supports the position of his client. Perhaps one can also understand that a judge is likely to find what he hopes to find in order to support a result arrived at for other reasons.<sup>75</sup> Should we expect a scholar to be different, to start without any preconceptions, or if she has any, to be quite willing to abandon them if the evidence is not supportive? If we do expect a scholar to be different, we should not be surprised when she admits

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73. See Woolhandler, *Common Law*, *supra* note 33; Woolhandler, *Patterns*, *supra* note 33. For more recent, informative scholarship bearing on this period, see Purcell, *supra* note 54; Woolhandler & Collins, *supra* note 10.

74. See, e.g., Shapiro, *supra* note 3; David L. Shapiro, *The Enigma of the Lawyer's Duty To Serve*, 55 N.Y.U. L. REV. 735, 739–53 (1980). I do not concede that these and other historical inquiries that I have made reached erroneous conclusions, only that the conclusions reached tended to support my original hypotheses.

75. Such accusations are not uncommon. In one of the earliest, Mark De Wolfe Howe wrote: “[O]nly within recent years have the justices who have discovered and embraced the solacing simplicities [of historical adjudication] endeavored to persuade us that a careful reading of history confirms their confidence.” Mark De Wolfe Howe, *Split Decisions*, N.Y. REVIEW OF BOOKS (July 1, 1965), at 17. In this effort, he continued, the Justices “have at least taught us that a selective interpretation of history can provide much satisfaction to the interpreter.” *Id.*

For a recent, especially virulent example of a similar accusation, see William G. Merkel, *The District of Columbia v. Heller and Antonin Scalia's Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349 (2009). In criticizing the decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008) (upholding an individual's “right to bear arms” under the Second Amendment), Merkel claims the decision demonstrates that “clever result-oriented jurists are quite capable of ignoring the overwhelming weight of the evidence in order to justify striking down legislation based on a constitutional understanding that did not exist when the constitutional text was ratified.” Merkel, *supra*, at 355.

that the evidence supports a conclusion she would have preferred not to reach. But I believe we are.

I am not arguing, nor do I believe, that there is no external reality—no truth waiting to be found if only we had the skill and objectivity to find it; I assert only that we tend to see that reality through the prism of our own preferences, especially when we are using the past to support an argument about how to deal with the present. Moreover, I am convinced that this frailty is given strength by the almost inevitable ambiguity of the raw materials themselves, by the almost infinite expansiveness of those materials, and by the difficulty of fully understanding—not just intellectually but emotionally—the context in which the materials had their origin.

Applying these airy thoughts to the range of views about *Young*, I find that several issues of current importance are implicated by one's version of the *Young* story. First, *Young* raises the question whether state courts should be the principal recourse not only for the protection of state interests but also for the vindication of federal rights.<sup>76</sup> Those who would answer in the affirmative tend to narrow their view of the holding and rationale of *Young*, while those who would answer in the negative, and who favor accessibility to federal courts for protection, tend to view *Young* as firmly setting us on a course that recognized a federal cause of action both to prevent state officials from violating their federal obligations and to require their compliance.

This disagreement has a further dimension. At one level, it concerns only the question of whether the federal courts, when acting without legislative direction, should use an expressly recognized or implicit common law authority to recognize such a cause of action.<sup>77</sup> This question has in part been mooted by the twentieth century recognition of a legislative mandate embodied in 42 U.S.C.

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76. This position—that state courts should be the principal recourse—is made somewhat more difficult to defend by the decision in *Alden v. Maine*, 527 U.S. 706 (1999), discussed *supra* note 25.

77. One reflection of the debate on that question is the current division in the Supreme Court over the reach of the *Bivens* doctrine. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (authorizing damages actions against *federal* officers for violation of constitutional rights although no such remedy is expressly prescribed by statute); see generally HART & WECHSLER, *supra* note 26, at 733–42 (describing the early growth and more recent constriction of the doctrine, and noting that Justice Scalia, in a concurrence joined by Justice Thomas in *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 75 (2001), characterized the *Bivens* decision as “a relic of the heady days in which this Court assumed common-law powers to create causes of action”).

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§ 1983,<sup>78</sup> but only “in part” because the section has been construed to preserve the sovereign immunity of the states even in instances in which Congress has the power, in the view of the current Court, to abrogate that immunity.<sup>79</sup> On another level, the debate extends beyond the question of whether the federal courts can or should act without the benefit of Congress, to the question of whether the federal government can act at all, given that state sovereign immunity, with some anomalous and criticized exceptions,<sup>80</sup> has been accorded constitutional status.<sup>81</sup>

There is another, and in my view even more fundamental, disagreement between those who see *Young* as a relatively narrow decision rendered on relatively narrow grounds and those who tell a significantly broader version of the story. And that disagreement involves the nature and consequences of the protections in the Constitution against *both* federal and state governmental intrusion. John Harrison, in a brief discussion in his conclusion, summarizes it perfectly. Constitutional rules limiting government, he tells us, have their own remedial apparatus: “invalidity and nothing more,”<sup>82</sup> not damages and not injunctive relief. And *Young* does not contain any implication to the contrary since the anti-suit injunction “rested on

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78. Congress has provided a broad range of remedies against any “person who, under color of” state law, “subjects, or causes to be subjected” any other person to the deprivation of any federal right, privilege, or immunity. See 42 U.S.C. § 1983 (2006). The availability of such remedies has been significantly expanded in a line of decisions beginning with *Monroe v. Pape*, 365 U.S. 167, 172 (1961). See *supra* note 26.

79. See *Will v. Mich. Dept. of State Police*, 491 U.S. 58 (1989) (holding that a “person,” in the language quoted in 42 U.S.C. § 1983 does not include the state or its agencies).

80. Perhaps the most notable exception, allowing abrogation in legislation enacted pursuant to the power conferred by Amendment XIV, Section 5, was laid down in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). For criticisms of this exception on different grounds, see John Harrison, *State Sovereign Immunity and Congress’s Enforcement Powers*, 2006 SUP. CT. REV. 353, 399–400, and Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 20–24. For discussion of several other exceptions, see HART & WECHSLER, *supra* note 26, at 884–85, 924–27.

81. Any doubts on this score were resolved in *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996) (holding that the “principle of state sovereign immunity embodied in the Eleventh Amendment” bars a suit to enforce a state’s federal statutory duty to negotiate in good faith with an Indian tribe toward the formation of a compact). The Court went on in *Alden v. Maine*, 527 U.S. at 713, to make clear that the constitutional status of sovereign immunity existed separate and apart from the jurisdictional limitation imposed by the Eleventh Amendment. See *supra* note 25.

82. Harrison, *supra* note 2, at 1020.

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ordinary principles of equity.”<sup>83</sup> Rules about power should not be transformed into rules about duty. And of course, those who seek to do exactly that—rely on the Constitution as a basis for the formulation of legally enforceable duties—see *Young* as strong support for the opposite view. As a result of that difference in perspective, Harrison views *Edelman* as a questionable expansion of constitutional jurisprudence, while others view the case as at least a significant roadblock in the path of an evolving doctrine of the protection of federal rights.

One further note about the consequences of attaching iconic status to a decision that may not be entitled to such praise, or blame, is in order. Its supporters tend to invoke it, and its critics to decry it, when it simply cannot bear the weight it is asked to carry. Thus in the recent symposium on the case, David Sloss uses it as support for the existence of a constitutional right to a treaty preemption defense in a criminal action<sup>84</sup>—an argument that may find some support in *Marbury v. Madison*,<sup>85</sup> but comes up empty from the well of *Young*. And in his assault on *Young* in the same symposium, James Leonard begins by asking whether a state should be required to spend its limited resources to implement a federal court order to educate illegal aliens or instead to implement a state law requiring reduction of the student-teacher ratio in public school classes<sup>86</sup>—a rhetorical question that is far more appropriately addressed to those cases explicitly authorizing affirmative relief (like *Edelman*<sup>87</sup>) than to *Young*.

#### IV.

#### A MODEST PROPOSAL<sup>88</sup>

One way of testing the significance of *Young* is to ask whether it would have to be overruled either to grant a particular form of requested relief or to hold that a particular form of relief is impermis-

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83. *Id.* at 1022.

84. David Sloss, *The Constitutional Right to a Treaty Preemption Defense*, 40 U. TOL. L. REV. 971 (2009).

85. 5 U.S. (1 Cranch) 137 (1803).

86. James Leonard, *Ex parte Young and Hard Times*, 40 U. TOL. L. REV. 889 (2009).

87. *Edelman v. Jordan*, 415 U.S. 651 (1974).

88. The phrase is part of the title of a famous satirical essay by Jonathan Swift published anonymously in 1729, and entitled in full, *A Modest Proposal: For Preventing the Children of the Poor People of Ireland From Being a Burden to Their Parents or Country, and for Making Them Beneficial to the Public*. See JONATHAN SWIFT, *A Modest Proposal: For Preventing the Children of the Poor People of Ireland From Being a Burden to Their Parents or Country, and for Making Them Beneficial to the Public*, in SELECTIONS

sible. There is surely a point at which the Supreme Court, in order to reach a particular result, would have to overrule *Young*. Some would view that “core” of *Young* quite narrowly—as limited to the availability of injunctive relief against a government officer in accordance with then-accepted principles of equity. Even those who view the decision more broadly, I suggest, would have difficulty arguing that for the Court to deny *affirmative* relief (ordering an officer to take action on behalf of the government the officer represents) would require that the case be overruled.<sup>89</sup> Nor would overruling be required in order to decide that the Constitution itself cannot, at least without the aid of statutory authority, furnish the basis of an award of damages against an officer who causes injury as a result of a violation of one’s constitutional rights.<sup>90</sup>

At the same time, *Young* does not foreclose such results. A decision like *Young*—one that drew attention at the time and that continues to be the source of discussion and debate—possesses a capacity for growth well beyond its core, even though such growth is far from assured and may well be stunted or even rolled back in later years.<sup>91</sup> And in fact the line of decisions of which *Young* is an

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FROM THE PROSE OF JONATHAN SWIFT 229, 229 (1885). Suffice it to say here that Swift’s proposal was far more extreme than mine.

89. I recognize that such a distinction may well be criticized as subject to manipulation. For example, a “negative” order may require a person to cease and desist from refusing to build a bridge as required by the provisions of a (particular) contract. But I believe that even though this distinction, like most distinctions, can be ridiculed, it still has a strong and valid core. Cf. David L. Shapiro, *The Death of the Up-Down Distinction*, 36 STAN. L. REV. 465, 465–67 (1984) (attempting, through satire, to make a similar point).

I recognize also that other pre-*Young* decisions may furnish a basis for arguing in support of the authority to grant broad affirmative relief without specific statutory authorization, and even to grant relief in the form of payment from the Treasury. See, e.g., *Roberts v. United States ex rel. Valentine*, 176 U.S. 221 (1900); *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838). But those decisions do not conflict with the argument in text that the questions are not governed by *Young*, and in any event, they all involved instances of the use of traditional prerogative writs available to courts of common law, especially the writ of mandamus. See *supra* note 61.

90. There may be instances, however, where the Constitution itself mandates a remedy, for example, with respect to the requirement of just compensation for the taking of property. See *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 316 (1987), discussed in HART & WECHSLER, *supra* note 26, at 313, 867.

91. The idea that a court, while purporting to “follow” precedent, may radically expand or constrict it in subsequent decisions is developed in KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 62–91 (1960). Though I do not share Llewellyn’s rather extreme cynicism with respect to the role of precedent but believe instead that the core of virtually any holding is significant, I agree

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important member has given rise to holdings allowing both affirmative relief and damages against government officers at both the state and federal level, without regard to the existence of statutory authority and without regard to the doctrine of sovereign immunity.<sup>92</sup> These developments are not without their critics, though, both on the bench and in the academy.

All of which brings me to my proposal. Precedent has its place, indeed in my view a most important place, and without it, and the principles of *stare decisis* that come with it, I firmly believe that our jurisprudence would be bereft.<sup>93</sup> But it has its limits too, especially for scholars. The controversy over the *Young* decision masks a more fundamental controversy, which *Young*, in my view, does little to resolve. That controversy, which has been addressed in later decisions, but which is far from settled by the oscillating views of the Supreme Court, involves both the proper function of the Court and the limits of congressional power. Should the Court, acting on its own and without the aid of statute, be able to compel governmental officers to act in ways not sanctioned by traditional rules of equity or the common law (in its prerogative writs), or to order them to pay damages for violations of constitutional prohibitions that do not also fit into accepted categories of traditional tort law? And to what extent is Congress limited in its ability to confer such power on the courts?

A hypothetical may be helpful in illustrating some aspects of these issues. Alpha Printing, a sole proprietorship, has for years

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with him that precedent is quite malleable and can be substantially confined without being overruled. See David L. Shapiro, *The Role of Precedent in Constitutional Adjudication*, 86 TEX. L. REV. 929, 931 (2008).

92. Thus, desegregation decrees having affirmative aspects, like decrees affecting penal institutions, have involved state as well as local entities. See, e.g., *Hutto v. Finney*, 437 U.S. 678, 685–89 (1978) (upholding federal court decree requiring state prison system to effectuate a variety of changes in prison conditions); *Meredith v. Fair*, 313 F.2d 534 (5th Cir. 1962) (holding state officer in contempt for interfering with federal court order requiring admission of a student to a state university), *cert. denied*, 372 U.S. 916 (1963); see generally ELAINE W. SHOEN & WILLIAM MURRAY TABB, REMEDIES: CASES AND PROBLEMS 240–53 (1989) (dealing with “structural injunctions”). And the line of cases beginning with *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), authorizes damages awards against federal officers though, at least at the time of *Bivens*, there was no express or implied statutory authority for the allowance of such awards. For a persuasive argument that legislation postdating the *Bivens* decision has ratified the availability of civil damages actions for violations of the Constitution, see James F. Pfander & David Baltmans, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 132–38 (2009).

93. See Shapiro, *supra* note 91.



contracted with the Administrative Office of the United States Courts (AO) for the printing of a variety of documents. A year ago, the AO failed to renew the contract and contracted instead with Beta Printing for the next four years. Alleging that the change of printers was based solely on the fact that Alpha had recently printed a book critical of the AO, Alpha brings a federal court action against the responsible official for injuries allegedly resulting from violation of its First Amendment rights and seeking (a) damages for the losses incurred, and (b) an order requiring that, if Alpha is qualified, it be awarded the next contract when the present contract expires. Assuming that the constitutional claim is at least a colorable one, what obstacles, if any, exist to entertaining all or part of the action?

Since the plaintiff seeks an affirmative order, and since I am willing to assume, perhaps incorrectly, that the injury claimed does not fit the mold of any traditional harm cognizable at law or in equity, I hope I have persuaded you by now that, whatever one's view of *Young*, a court should not simply cite that decision as a basis for entertaining any part of the action.<sup>94</sup> Whether the case is squarely governed by other precedent is not strictly relevant here.<sup>95</sup> If there is no governing precedent, any debate among scholars about the proper resolution of the hypothetical should treat *Young* as a footnote at best and spend time focusing on the fundamental questions of the role of the courts and of Congress with respect to protection of the rights guaranteed in the Constitution and the boundaries, if any, set by the doctrine of sovereign immunity. If

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94. I also assume that there is no relevant federal statute authorizing the action. The judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701–06 (2006), exclude from their coverage “the courts of the United States” (of which the AO is, I believe, a part), *id.* § 701(b)(1)(B), and also exclude an action seeking “money damages” from the statutory waiver of sovereign immunity and indispensable party defenses. *Id.* § 702. And for several reasons, the action is not one within the scope of either the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2006), or the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (2006).

95. I do note, however, the Court's consistent reluctance in recent years to recognize a claim brought for damages on the basis of the *Bivens* decision. *See* discussion *supra* note 92. Indeed, in a little-noticed passage in a recent decision ordering dismissal of a *Bivens* complaint, the Court said: “[W]e assume *without deciding* that respondent's First Amendment claim is actionable under *Bivens*.” *Ashcroft v. Iqbal*, 129 U.S. 1937, 1947 (2009) (emphasis added). Moreover, I believe that in addition to the problem of obtaining *any* form of affirmative relief against a government official without statutory authorization for such relief, a court must consider the contemporary applicability of *In re Ayers*, 123 U.S. 443 (1887), to a case seeking an order requiring the entry or performance of a contract with the government (as a remedy for unconstitutional action).

there is other precedent that may control, the debate should certainly address that precedent and consider whether it is controlling, and if it is, whether the precedent is sound and should be followed or overruled. Judges may be bound by precedent (to varying degrees, depending on which court's precedent is involved and on which court a judge sits), but scholarly debates outside the courtroom are not, and those debates may well affect the future course of decision.

In sum, I think it unfortunate that a scholar like Harrison (and he is offered here only as an example) should devote all but the concluding sentences of his article to the meaning of the *Young* decision, and then, at the very end, let the real cat out of the bag: his belief that, at least as a general rule, the sole consequence of a constitutional limitation is "invalidity and nothing more."<sup>96</sup> It is that contention that should be the focus of debate.

## V. CONCLUSION

In my early years as a teacher of Federal Courts, I used to suggest to students that when in doubt about the support for a particular position, especially one favoring the vindication of a federal right in a federal court, they could always invoke *Ex parte Young*. I was not consciously trying to be sarcastic, but I now realize that, like others before and since, I was attaching an iconic status to the decision that it did not quite deserve. And that status has led still others to a revisionism that gives the decision less significance than it deserves. Thus arguments about the case have become a proxy for a more important debate: To what extent, if any, should federal law (especially the Constitution) be available for use not only as a shield against state action but as a sword, and to what extent should litigants be able to unsheathe that sword in a suit against a state or local government, or its officers, in a federal court?

*Young* is certainly not irrelevant to that debate, but its significance should not be exaggerated. The most valuable scholarly studies of the decision, in my view, tell us more about how the decision fits into its complex historical context than they do about whether the decision supports a particular result in a controversial case arising in our own time.

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96. Harrison, *supra* note 2, at 1020; *see supra* notes 81–82.