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Ex Parte Young and the Transformation of the Federal Courts, 1890-1917 Ex Parte Young Symposium: A Centennial Recognition

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EX PARTE YOUNG AND THE TRANSFORMATION OF THE FEDERAL COURTS, 1890-1917

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I. INTRODUCTION

MORE than a century after the Supreme Court's decision in *Ex parte Young*,[1] judges and commentators still debate its meaning and significance.[2] Writing for the *Young* majority, Justice Rufus Peckham declared that his opinion contained "no new invention" and was rooted firmly in precedents going back to the Marshall Court.[3] In contrast, the sole dissenter, Justice John Marshall Harlan, charged that the opinion "departs" from "principles previously announced" and "would work a radical change in our governmental system."[4] The views of subsequent commentators have ranged freely between those interpretive antipodes.[5]

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1. 209 U.S. 123 (1908).

2. *E.g.*, Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) (justices divide into three differing groups in explaining the *Young* doctrine).

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

4. *Id.* at 169, 175 (Harlan, J., dissenting).

5. Critics of *Young* include the following: DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, at 54 (1990) ("*Young* rejected sound precedent ... [and supported a new doctrine] that the Court had manufactured out of whole cloth."); 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, 219 (2004) (arguing that *Young*'s reasoning "is untenable," and its "fiction permits what the Framers of the Constitution rejected in 1787"); Charles Warren, *Federal & State Court Interference*, 43 HARV. L. REV. 345, 375 (1930) (stating that *Young* "clearly violates the spirit and theory" of the federal anti-injunction act, 28 U.S.C. § 2283, and "directly promotes collisions" between federal and state "sovereignties"). Defenders of the decision include the following: CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS 292 (4th ed. 1983) (stating that *Young* is "indispensable to the establishment of constitutional government and the rule of law"); Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1139 (1969) (stating that *Young* recognized that "the Constitution is an integral aspect of the substantive law" and that the Constitution "gives the *right* to the remedy"); Daniel Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 37, 38 n.178 (noting that *Young* "grew" from a recognized "nineteenth-century tradition" and provided an established remedy that was "required, or at least inspired, by the Due Process Clause").

Perhaps the only conclusion that commentators have generally agreed on is that, whatever its legal standing, *Young* was highly controversial as a political matter. Progressives generally denounced it, while their adversaries praised it.[6] Those contrasting views, not surprisingly, had less to do with *Young*'s technical reasoning than with its practical consequences. *Young* affirmed a muscular power in the federal courts to enjoin the enforcement of state laws and regulatory actions, and commentators divided for the most part according to their views about the desirability of that result.[7] Had *Young* come down three years after *Brown v. Board of Education*[8] rather than three years after *Lochner v. New York*,[9] the initial battle lines would have been strikingly different.[10] Indeed, *Young*'s legal reputation over the past century has risen and fallen, and its legal meaning has broadened and contracted, with the tides of American politics and the shifting political goals of its interpreters.

Instead of examining either *Young*'s doctrinal pedigree or its political salience, however, I wish to consider the case from a different perspective. This article focuses on *Young*'s place in the Court's jurisprudence at a particular time in American history and its role in the institutional evolution of American law and government. From that perspective, *Young*'s most important and enduring significance emerges more clearly. The decision was a key component in the transformation of the federal judiciary that the Supreme Court orchestrated between approximately 1890 and the First World War. The case did not mark a radical, or perhaps even substantial, break with the past; instead, it helped extend the trendlines that the Court had begun shaping after the post-Reconstruction settlement of the 1870s and 1880s. Ratifying, solidifying, and accelerating those trendlines, *Young* helped create a newly powerful and activist federal judiciary that emerged at the turn of the twentieth century and continued to operate into the twenty-first. *Young* was not, in other words, a towering landmark commanding the jurisprudential countryside but rather, to switch metaphors, one integral component in a complex turbine that generated heightened levels of federal judicial power.

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6. *See* Eridania Pérez-Jaquez, *Constitutionalizing State Sovereign Immunity:* Ex Parte Young *and the Conservative Wing's Attempt to Restore Federalism and Empower States*, 51 RUTGERS L. REV. 229, 243, 260 (1999).

7. *E.g.*, Michael E. Solimine, *Congress,* Ex parte Young*, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 111-18 (2008). Solimine pointed out that *Young* came down the same year that the Court announced three other decisions that outraged Progressives. *Id.* at 113 n.60. The three were the *Employers' Liabilities Cases*, 207 U.S. 463, 503-04 (1908) (invalidating the first Federal Employers Liability Act); *Adair v. United States*, 208 U.S. 161, 180 (1908) (voiding a federal statute that made "yellow dog" contracts unenforceable); and *Loewe v. Lawlor*, 208 U.S. 274, 302 (1908) (applying the Sherman Antitrust Act to labor unions).

8. 347 U.S. 483 (1954).

9. 198 U.S. 45 (1905).

10. *E.g.*, OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 4-6 (1978).

II. THE TRANSFORMATION OF THE FEDERAL JUDICIARY, 1890-1917

During the years from 1890 to 1917 the Supreme Court transformed the federal judiciary to meet the new challenges of a tumultuous and centralizing industrial age. The changes it made ranged across the doctrinal landscape, and their cumulative impact accelerated the nationalization and centralization of American law, government, and society. The Court imposed new national and centrally enforced limitations on governmental power, tightened federal judicial control over the states, extended the reach of congressional and presidential power, expanded the authority of federal judges to make national law, reconceptualized the role of the lower federal courts, and reoriented the jurisdiction of the entire federal judiciary to ensure the more effective enforcement of national law.

That transformation required more than a quarter of a century to complete, though neither its beginning nor ending was rigidly marked off from the periods that preceded and followed it.[11] It had deep doctrinal roots in the Constitution and the decisions of the Marshall Court, while the Fourteenth Amendment provided a pivotal constitutional mandate that undergirded the transformation. The expansion of federal jurisdiction that came with Republican Reconstruction also played a critical role, especially the grant of general "federal question" jurisdiction in 1875.[12] Still, however, through the tumultuous 1870s and 1880s, powerful social and political forces—congressional threats against the national courts, continued sectional bitterness and persisting racial strife, traditional ideas about states' rights and the limited nature of federal power, and growing political support for the nation's lurch toward a racially repressive and "states' rights"-oriented post-Reconstruction settlement—combined to cabin tightly the interpretations that judges placed on those constitutional and statutory authorities. Indeed, increasing Democratic and Southern strength in Congress ratified the

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11. There were hints of the future in the 1880s, for example, and traces of the past in the 1890s. Hints included the foreshadowing of substantive due process in *Mugler v. Kansas*, 123 U.S. 623, 661 (1887), the determination that corporations were "persons" within the meaning of the Due Process Clause in *Santa Clara v. Southern Pacific Railroad Co.*, 118 U.S. 394, 410 (1886), and the Court's occasional recognition of implied federal rights of action both at law and in equity in, for example, the *Virginia Coupon Cases*, 114 U.S. 269, 300-01, 308, 309, 311, 317 (1885). *See* Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 449 (1987) (discussing the Court's use of implied rights of action). Traces of the past included the Court's apparent backtracking on its earliest substantive-due-process decision (*Chicago, Minneapolis & St. Paul Railway Co. v. Minnesota*, 134 U.S. 418 (1890)) in *Budd v. New York*, 143 U.S. 517 (1892), and *Brass v. North Dakota*, 153 U.S. 391 (1894), and its continuing efforts to limit federal jurisdiction and in some areas to favor diversity jurisdiction over federal-question jurisdiction. EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958, at 266-73 (1992).

12. Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470. In the long run, Professor William M. Wiecek explained, "all the jurisdictional statutes of the Reconstruction era laid the groundwork for the judicial self assertiveness of the late nineteenth and early twentieth centuries." William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333, 334 (1969). *See generally* STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS (1968).

emerging post-Reconstruction settlement and produced the restrictive Judiciary Act of 1887-88 that trimmed the federal judiciary's jurisdiction and induced the Court to concentrate for the next few years on limiting rather than expanding that jurisdiction.[13]

Similarly, the period's ending date—the First World War—marked no final moment when the role and doctrines of the federal courts became frozen in time. The decades after 1917 witnessed numerous shifts as new social problems, political alignments, and judicial appointments periodically led the Court to alter its policies and readjust its doctrines. Change was unavoidable. Indeed, the period from 1890 to 1917 contained its own hesitations and inconsistencies, for during those tumultuous years the Court, like the country at large, confronted rapid social changes and unnerving new challenges that often left it anxious, divided, and uncertain. In spite of all such qualifications, however, the years from 1890 to 1917 marked a distinctive and critical period in the Court's history, one in which it worked a substantial transformation in the role, orientation, and jurisdiction of the federal courts.

By 1890 the crises created by slavery, the Civil War, and Reconstruction had passed, resolved for the time in a post-Reconstruction settlement that turned race-related issues into "local" matters, thereby freeing national power to address the new problems of industrialization without implicating bitterly divisive and potentially deadlocking racial issues.[14] It was in 1890 that the Court, looking backward, solidified the post-Reconstruction settlement with its decision in *Hans v. Louisiana*.[15] There, it construed the Eleventh Amendment broadly to limit federal judicial power over the states,[16] while it also reaffirmed the principle established in *Munn v. Illinois*[17] that the legislature, not the judiciary, exercised final authority over state economic regulation.[18] But it was also in 1890 when the Court, looking forward, began—on the very same day it decided *Hans*—to narrow the Eleventh Amendment by holding it inapplicable to counties[19] and then—a bare three weeks later—flatly contradicted *Hans* by announcing that it

13. *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 56-102 (1928); PURCELL, *supra* note 11, at 266.

14. Pamela S. Karlan, *Contracting the Thirteenth Amendment:* Hodges v. United States, 85 B.U. L. REV. 783, 794-809 (2005); Edward A. Purcell, Jr., *The Particularly Dubious Case of* Hans v. Louisiana*: An Essay on Law, Race, History, and Federal Courts*, 81 N.C. L. REV. 1927, 2030-33 (2003). In 1923 Charles Warren, the preeminent historian of the Court in the early twentieth century, acknowledged the connection between the Court's growing power and prestige and its willingness to allow the white South to handle "the race question" as it wished. The Court's decisions affirming the post-Reconstruction settlement "were most fortunate," Warren explained. "They largely eliminated from National politics the negro question which had so long embittered Congressional debates; they relegated the burden and the duty of protecting the negro to the States, to whom they properly belonged; and they served to restore confidence in the National Court in the Southern States." 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 1856-1918, at 330 (1923).

15. 134 U.S. 1 (1890).

16. *Id.* at 10.

17. 94 U.S. 113 (1877).

18. *Hans*, 134 U.S. at 21.

19. Lincoln County v. Luning, 133 U.S. 529, 531 (1890).

was the judiciary after all, and not the legislature, that had final word on issues of state economic regulation.[20] Thus, 1890 can be seen as a high point of both the Eleventh Amendment and state legislative power and a low point of both the Fourteenth Amendment and federal judicial power. Equally, it can be seen as the year that the Court began to reverse those respective high and low points.[21] Those twin and complementary reversals lay at the heart of the transformation.

By 1917 those reversals and the many related changes that combined with them to transform the federal judiciary were essentially complete. There would always be critics of the transformation's results, and in subsequent decades such critics would sometimes gain power and seek to reorient the federal judiciary and reshape its powers. Although successors changed the contours and applications of many doctrines, they seldom succeeded in making more than narrow-gaged alterations in the fundamental institutional framework that the transformation had established.[22] Indeed, rather than seeking to substantially narrow the federal judiciary's powers, those who ascended to the high bench usually wound up seeking to redirect those powers toward their own new and different national goals. Succeeding generations witnessed both expansions in the scope of federal law and changes in the social interests it served, and with them changes in both the social consequences of federal judicial power and the political coalitions that supported its exercise. Regardless of later developments, however, the basic institutional results of the transformation remained firmly in place.[23] The federal judiciary's broad supervisory authority and entrenched institutional status

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20. Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418, 458 (1890).

21. Purcell, *supra* note 14, at 1962-75, 2039-55. The Court imposed other limits on the states in 1890. *See, e.g.*, Leisy v. Hardin, 135 U.S. 100, 125 (1890) (holding that states cannot bar in-state sales of out-of-state liquor in its original package); Lyng v. Michigan, 135 U.S. 161, 166 (1890) (holding that states cannot "lay a tax on interstate commerce in any form").

22. The doctrine of *Young*, for example, was repeatedly criticized over the years and often remolded to broaden or narrow its scope. *E.g.*, Douglas Laycock, *Federal Interference with State Prosecutions: The Cases* Dombrowski *Forgot*, 46 U. CHI. L. REV. 636, 641-42 (1979); Aviam Soifer & H.C. Macgill, *The* Younger *Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1148-49 & n.49 (1975). But even in narrowing periods the Court carefully preserved the doctrine, held it ready for use when necessary, and tailored it to serve the national goals and values of the majority justices. Similarly, the "general federal common law" played an important role in the transformation, and the post-New Deal Court abolished that law in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). The abolition, however, did not substantially change the institutional results of the transformation and, in fact, ultimately strengthened them. *See* Edward A. Purcell, Jr., *The Story of* Erie*: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, *in* CIVIL PROCEDURE STORIES 21, 75-76 (Kevin M. Clermont ed., 2d ed. 2008).

23. For more recent debates over the practical significance of federal judicial power, see generally PHILLIP J. COOPER, HARD JUDICIAL CHOICES: FEDERAL DISTRICT COURT JUDGES AND STATE AND LOCAL OFFICIALS (1988); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURT REFORMED AMERICA'S PRISONS (1998); FISS, *supra* note 10; LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976); DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003); PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983).

continued to make it a regular, powerful, and often decisive player in American politics and policymaking.[24]

A. *Sources of the Transformation*

Powerful centripetal forces drove the transformation. The economy's rapid expansion and centralization seemed to require national law to foster an emerging national market and address the spreading consequences of industrialization. Energizing moral issues that transcended state lines—the "Mormon Question," prohibition, prostitution, gambling, and child labor—generated additional pressures to extend national regulation into areas traditionally subject to state authority.[25] Those nationalizing forces, moreover, required the expansion of federal law not only to order ever larger areas of social and economic activity[26] but also to ensure that the laws of the states—wherever they remained in control—were cabined by national rules that limited their extraterritorial reach and protected states from the intrusion of other states' laws.[27] Those pressures combined to invert the practical significance of the nation's federal structure, turning it in many areas from an admired bulwark of diversity and localism into a troubling obstacle to order, efficiency, and uniformity.

Equally important, fundamental institutional considerations shaped the transformation's direction and content. The upsurge in responsive state and federal regulatory activity placed intense pressure on the Court to honor two fundamental principles: first, that there were constitutional limits on

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24. It was revealing that, at the end of the period, an unprecedented political and ideological battle erupted over a Supreme Court nominee. In early 1916 President Woodrow Wilson nominated Louis D. Brandeis to the Court in an effort to rally Progressive support behind his reelection campaign, and the nation's anti-Progressive forces combined to launch an unprecedented, organized, and vicious assault against the candidate. ALDEN L. TODD, JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS 37-39 (1964). By 1916, the new role, power, and impact of the federal judiciary had become clear to everyone.

25. *See, e.g.*, SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 57 (2002).

26. The Court had sought to protect a burgeoning national market since the middle of the nineteenth century, and its efforts intensified in the century's last quarter. TONY FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY 99-114 (1979); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1879-1891*, 96 AM. POL. SCI. REV. 511, 512-19 (2002); Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875-1890*, 38 J. ECON. HIST. 631, 648-49 (1978).

27. *E.g.*, Allgeyer v. Louisiana, 165 U.S. 578 (1897) (invalidating a state statute that barred the state's citizens from contracting with out-of-state insurance companies that had not registered in the state); Union Transit Co. v. Kentucky, 199 U.S. 194 (1905) (holding that a state cannot tax property beyond its jurisdiction). *See also* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 182-84 (2000) (discussing how nineteenth-century developments in communications, technology, and the burgeoning national market led the Court to use constitutional provisions to limit the extraterritorial application of state law).

governmental power and, second, that the courts would enforce those limits.[28] At the same time, however, the rapid increase in suits challenging regulatory actions meant that the Court itself was unable to review more than a handful of such cases. Recognizing the burdens that a rapidly swelling docket placed on the Court, Congress created a new tier of intermediate federal courts of appeals in 1891 and began to shift the Court's appellate jurisdiction from a mandatory to a discretionary basis.[29] The new intermediate federal appeals courts, however, could only hear cases brought originally in the federal trial courts,[30] and the Supreme Court's greater discretionary control over its own docket did not alter the fact that it was still unable to review more than a minuscule number of the cases that pressed for its attention.[31] In that institutional context, a widespread and often intense suspicion of state courts, the intensifying desire of national corporations for federal forums, and the growing importance of trial-court fact-finding in suits challenging administrative actions[32] combined to inspire a growing conviction among the justices that the jurisdiction of the federal trial courts should be reshaped to enable them more easily and commonly to hear the nationally important cases that seemed to warrant federal adjudication.[33] A deep faith in the integrity, independence, and capabilities of the national judiciary—fervent among the comfortable classes, the legal profession's eastern elite, and

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28. From the broadest perspective, the turn-of-the-century Court's principal accomplishment was to affirm those two principles, reshape the federal judiciary to serve them more effectively, and expand the reach and role of national law generally, not to apply those limits to invalidate most legislative responses to new social conditions. On the varied motives and purposes attributed to the justices, see, e.g., OWEN FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 46-50 (1993) (maintaining that judges sought to define inherent limits on government arising from the nation's fundamental "social contract"); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 86-95 (asserting that judges sought to minimize factional conflict by rejecting special or unequal "class legislation"); David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 31-35 (2003) (arguing that judges sought to protect the fundamental liberties of Americans); Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1505-29 (1998) (contending that judges sought to protect "normal" and "ordinary" activities of life from administrative control).

29. The Judiciary Act of 1891 (the "Evarts Act"), 26 Stat. 826, 828 (1891), created intermediate federal appellate courts and made cases coming from those courts reviewable in the Supreme Court only by discretionary writ of certiorari. Further, in 1914 and 1916 Congress made large numbers of decisions in the state courts that involved federal claims reviewable in the Court only by certiorari. Act of Dec. 23, 1914, 38 Stat. 790 (1914); Act of Sept. 6, 1916, 39 Stat. 726 (1916). In 1925 the "Judges Bill" made virtually all of the Court's docket discretionary. Act of Feb. 13, 1925, 43 Stat. 939, 937 (1925).

30. Evarts Act, 26 Stat. at 826.

31. Maria Angela Jardim de Santa Cruz Oliviera, *Reforming the Brazilian Federal Court: A Comparative Approach*, 5 WASH U. GLOBAL STUD. L. REV. 99, 117 nn.85-87 (2006).

32. This was especially true in complex ratemaking cases. "Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a state legislature for the carriage of passengers and freight are unreasonable." Chi., Milwaukee & St. Paul Ry. Co. v. Tompkins, 176 U.S. 167, 172 (1900). *See generally* Stephen A. Siegel, *Understanding the* Lochner *Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 194-232 (1984) (examining problems of rate regulation and the Court's treatment of the issue).

33. *See* PURCELL, *supra* note 11, at 262-91; Siegel, *supra* note 32, at 209, 220.

most of those who sat on the federal bench—confirmed the wisdom of such a change.

Further, the growing political militance, escalating social turmoil, and deepening economic distress that scarred the 1870s and 1880s and then dominated the 1890s generated a growing belief that the national government needed to take forceful action to safeguard the nation's established social and economic order.[34] Many Americans came to see the vigorous assertion of federal judicial authority as a particularly desirable and effective way to achieve that goal. Thus, in response to those varied considerations and pressures, the Court began in the 1890s to expand the scope of national law, strengthen its own ability to supervise the nation's legal system, and alter the rules of federal jurisdiction to ensure that legally, socially, and economically important cases could more easily be brought in the federal trial courts.

The justices were, in fact, acutely aware of the importance of ensuring that the lower federal courts were available as initial forums for resolving important national issues. Concurring in the Court's initial acceptance of what would become substantive due process, Justice Samuel Miller—surely no advocate of centralization and nationalization—readily accepted the principle that "oppressive" state regulatory legislation necessitated a judicial remedy, "especially in the courts of the United States."[35] Throughout the late nineteenth and early twentieth centuries, bitter battles for forum control raged between national corporations and their private and governmental adversaries, swamping the courts with fiercely contested jurisdictional disputes that, by the beginning of the twentieth century, accounted for almost twenty percent of the cases heard in the federal circuit courts.[36] "That the parties preferred to take the subject matter of the litigation into the Federal courts, instead of proceeding in one of the courts of the State," the Court declared in 1908, "is not wrongful."[37] The next year it reaffirmed that principle even more emphatically: "The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied," the justices insisted, and the exercise of federal jurisdiction in such cases "cannot be the subject of proper criticism."[38]

Congress further spurred the transformation. Beginning with the Interstate Commerce Act of 1887, it became increasingly active in regulating the national economy, imposing limitations on corporate activities, and addressing the social consequences of industrialization.[39] Although the Court sometimes checked those efforts, over the quarter century after 1890 it approved ever broader

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34. *See, e.g.*, ROBERT V. BRUCE, 1877: YEAR OF VIOLENCE, at 314-16 (1959); SAMUEL T. MCSEVENEY, THE POLITICS OF DEPRESSION 35-38, 41, 87-97, 176-80 (1972); Gregory Bush, *Containing the Gilded Age Mob*, 19 REVS. AM. HIST. 48, 52-53 (1991).

35. Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418, 459 (1890) (Miller, J., concurring).

36. PURCELL, *supra* note 11, at 277. On the battles for forum control in the turn-of-the-century courts, see, for example, *id.* at 87-126.

37. *In re* Metro. Ry. Receivership, 208 U.S. 90, 111 (1908).

38. Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909).

39. The Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887).

assertions of congressional power.[40] In 1905 it stretched the Commerce Clause by adopting the expansive stream-of-commerce doctrine,[41] and in 1914 it relied on "the complete and paramount authority of Congress" over interstate commerce to approve the national legislature's control over wholly intrastate railroad rates "in all matters" bearing "a close and substantial relation to interstate traffic."[42] Generalizing a series of early twentieth-century cases upholding congressional power to prohibit certain products from interstate commerce, the Court announced in 1913 the expansive principle that the Commerce Clause gave Congress a plenary "police" power over all goods and services involved in interstate commerce.[43]

Broader and more frequent exercises of congressional power, and their usual acceptance by the Court, did far more than expand the powers of Congress. They also expanded the federal judiciary's power. First, the steady multiplication of congressional acts meant that federal courts would increasingly construe and apply a spreading national statutory law. Thus, as the authoritative exponent of federal law, the Supreme Court would inevitably exert a growing influence over ever larger areas of American life.

Second, the general nature of some congressional statutes, and especially their frequent incorporation of common-law terms, gave the federal judiciary considerable leeway in determining their reach. The common-law language of the Sherman Antitrust Act, for example, effectively delegated to the federal courts a new authority for shaping national policy through the guise of statutory construction.[44] When the Court adopted its "rule of reason" in 1911, it in effect announced that the federal courts would decide for themselves exactly when "combinations" were unlawful and would thus exercise a sweeping power to control the course and form of corporate consolidations and to supervise their organization of the national economy.[45] The very next year, moreover, the Court further broadened the act's scope and its own power when it effectively denied the relevance of state law to the act's reach by ruling that state corporation law could not provide defenses to federal antitrust prosecutions.[46] Indeed, although

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40. Keith E. Whittington, *Congress Before the* Lochner *Court*, 85 B.U. L. REV. 821, 831 (2005) (noting that between 1890 and 1919 the Court heard 158 challenges to federal statutes and struck down only 23 of them, "giving Congress a success rate of eighty-five percent").

41. Swift & Co. v. United States, 196 U.S. 375, 399 (1905).

42. Houston E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342, 351 (1914).

43. Hoke v. United States, 227 U.S. 308, 319, 323 (1913).

44. The Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890). Similarly, the Safety Appliance Act, 27 Stat. 531 (1893), amended 29 Stat. 85 (1896), and the Federal Employers' Liability Act, 35 Stat. 65 (1908), amended 36 Stat. 291 (1910), required the federal courts to construe basic common-law terms and to determine in large part the extent to which federal law would replace state tort law. *See* PURCELL, *supra* note 11, at 163-72.

45. Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911); Am. Tobacco Co. v. United States, 221 U.S. 106, 179-80 (1911). *See generally* RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW 26-58 (1996) (discussing Sherman Act in the federal courts from 1890 to 1911).

46. United States v. Union Pac. R.R. Co., 226 U.S. 61, 86 (1912); HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, at 245, 266 (1991).

the statute was not explicit on the subject, the federal courts construed it to grant themselves exclusive jurisdiction over all suits under the act, thus prohibiting state courts from participating in its interpretation and application.[47]

Third, as the economy continued to nationalize and congressional enactments multiplied, their centralizing momentum nourished a growing belief that national law was increasingly necessary and ever more broadly legitimate. That belief, in turn, suggested that the federal courts might themselves properly make national law more frequently and confidently. Indeed, the nationalization of the economy and the expansion of federal legislation reverberated richly with ideas about the coextensive nature of federal legislative and judicial power. Going back to Hamilton's essays in *The Federalist* and the decisions of the Marshall Court, the scope of federal judicial power had often been understood as being co-extensive with federal legislative power.[48] If the latter was expanding, then the former might properly do so as well. On that logic, in 1901 the Court set aside state common law and declared its authority to make and enforce a truly national common law of interstate commerce, a body of law that was independent of the states, supreme over state laws, and alterable only by Congress.[49]

Further, one of the principal characteristics of the new congressional activism was the establishment of federal regulatory agencies, a development that led the federal judiciary to pay close heed to the national government's increasingly pervasive regulatory practices.[50] The spread of agency regulation

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47. Section 4 of the Sherman Act "invested" the federal courts "with jurisdiction" to "prevent and restrain violations of this act," and section 7 provided that "[a]ny person" injured by violations of the act "may sue therefor in any circuit court of the United States." Act of July 2, 1890 (Sherman Antitrust Act), ch. 647, §§ 4, 7, 26 Stat. 209, 210 (1890). No section, however, provided that federal jurisdiction was "exclusive" or that state courts were barred from hearing suits under the act. The legislative history on the issue was ambiguous. The Senate, by a vote of 13-36, defeated an amendment offered by Senator Reagan specifying that suits under the act could be brought in either state or federal court, but Senator Edmunds, a principal opponent, argued against the amendment on the ground that it was unnecessary because the act, as written, left litigants free to sue in either a state or federal court. The debate was confused by conflicting views as to the power of Congress with respect to state courts and uncertainty about the authority of state courts to grant a treble-damages remedy. *See* 1-4 KINTNER, FEDERAL ANTITRUST LAW § 4.13 (2008). Subsequently, the Court settled the issue, declaring that jurisdiction under both the Sherman Act and the amending Clayton Act was exclusive in the federal courts. Blumenstock Brothers Adver. Agency v. Curtis Publ'g Co., 252 U.S. 436, 440 (1920); Gen. Inv. Co. v. Lake Shore & Mich. S. Ry. Co., 260 U.S. 261, 286-88 (1922).

48. FEDERALIST NO. 80 (Alexander Hamilton); G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35, ch. 8 (1988).

49. W. Union Tel. Co. v. Call Publ'g Co., 181 U.S. 92, 101-02 (1901). Revealingly, the Court ignored the idea of coextensive powers when, addressing a dispute between states over riparian rights, it created substantive federal common law to decide the case and ruled that Congress had no authority to legislate over such matters. Kansas v. Colorado, 206 U.S. 46, 94-97 (1907). *See* PURCELL, *supra* note 27, at 57-63.

50. William M. Wiecek, *Justice David J. Brewer and 'The Constitution in Exile'*, 33 J. SUP. CT. HIST. 170, 176 (2008). For example, the Court checked the Interstate Commerce Commission closely in its early years, denying its power to set rates and to make "final" findings of fact before acceding to both when Congress expressly granted those powers to the commission in the Hepburn

forced the Court gradually to develop a distinctive body of administrative law, applying general legal principles to allow an increasingly wide scope for agency regulation[51] while still ensuring that agency actions were within the limits of delegated authority and supported by evidence in the record.[52] This widening and ongoing involvement with the administration of national regulatory programs focused the federal judiciary more commonly on issues of federal law and highlighted the spread of national standards in economic and regulatory matters.

Finally, the new and more prominent role that the United States began to play in world affairs in the late nineteenth century further reinforced the Court's nationalizing and centralizing thrust. After 1890 it approved broader congressional power to organize and govern territorial acquisitions[53] and embraced the proposition that the federal government had exclusive authority over issues of immigration and naturalization,[54] thereby restricting or eliminating powers that the states had exercised for more than a century. Similarly, the Court began to accord ever greater authority and discretion to the executive in conducting foreign policy, exercising congressionally delegated powers, and concluding "executive agreements" with foreign nations.[55] Perhaps most striking, in dealing with those issues the Court began to invoke amorphous principles of implied national powers. Upholding congressional authority to exclude aliens, it relied on the "inherent and inalienable right" of the national government to control its territory;[56] approving the executive's use of deadly force to protect federal officials, it cited unspecified "rights, duties, and obligations growing out of the Constitution, our international relations, and all

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Act of 1906. *See* Interstate Commerce Comm'n v. Cincinnati, New Orleans & Tex. Pac. Ry. Co., 167 U.S. 479, 504-05 (1897); Interstate Commerce Comm'n v. Ala. Midland Ry. Co., 168 U.S. 144, 161-62 (1897).

51. *E.g.*, Interstate Commerce Comm'n v. Ill. Cent. R.R. Co., 215 U.S. 452, 470 (1910).

52. *See, e.g.*, Interstate Commerce Comm'n v. Louisville & Nashville R.R. Co., 227 U.S. 88, 92 (1913) (holding that a federal equity court may set aside an agency finding that lacks supporting evidence in record); Phila. Co. v. Stimson, 223 U.S. 605, 620 (1912) (holding that a federal official acting in excess of authority may be enjoined); Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 108 (1902) (holding that a federal equity court may enjoin an action of the Postmaster General unsupported by evidence). Checking such actions by injunction was not unprecedented, though in the nineteenth century the Court had usually relied on mandamus, a narrower remedy limited to instances where an official had a positive duty to act. *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 121-31 (1998). *See generally* Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197 (1991) (analyzing nineteenth-century judicial review of administrative decision-making).

53. *E.g.*, De Lima v. Bidwell, 182 U.S. 1, 196-97 (1901). *See generally* JAMES EDWARD KERR, THE INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM (1982).

54. *E.g.*, Lem Moon Sing v. United States, 158 U.S. 538, 543 (1895); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893); Chae Chan Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581, 600-01 (1889).

55. *E.g.*, Marshall Field & Co. v. Clark, 143 U.S. 649, 694 (1892). *See* EDWARD G. WHITE, THE CONSTITUTION AND THE NEW DEAL 37-42 (2000); Walter LaFeber, *The Constitution and United States Foreign Policy: An Interpretation*, 74 J. AM. HIST. 695, 702-08 (1987).

56. *Fong Yue Ting*, 149 U.S. at 711.

the protection implied by the nature of the government under the Constitution."[57] Those decisions planted the seeds for vastly expanded federal powers in international affairs, powers that would ultimately resonate in domestic affairs as well.[58]

B. *Doctrines of the Transformation*

The Court's decisions transforming the role and jurisdiction of the federal courts ranged widely across the doctrinal universe and reshaped American law from highly technical rules of procedure to fundamental principles of constitutional law. The justices naturally drew on established precedents and "traditional" principles, but they also remolded those precedents and principles by infusing new meanings, identifying new implications, and giving new breadth and vigor to their application. Together, they changed the law in six general areas.

1. *Constitutional Limits on State Legislation*

First, the Court expanded the constitutional limits on legislative action, especially limits on actions of the states. The doctrines of substantive due process and "liberty of contract" had gestated in the state courts during the nineteenth century, but at century's end the Supreme Court embraced them and gave them national application, imposing uniform and judicially enforceable limits on both state and federal power.[59] While those were highly visible and particularly controversial doctrines, they constituted only a small part of the new constitutional limitations the Court imposed. There were many others. Between 1910 and 1916 the Court developed the doctrine of "unconstitutional conditions,"

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57. *In re* Neagle, 135 U.S. 1, 64 (1890). *See also* Tucker v. Alexandroff, 183 U.S. 424, 434-35 (1902) (holding that the commander-in-chief power "assumed" to allow the President, absent legislative authorization, to permit foreign troops to enter United States in pursuit of Indians).

58. The expansion of the national government's powers over immigration and foreign affairs and especially the use of the concept of "implied" powers were in some tension with the broad assertion of judicial authority that characterized the transformation. For the Court's willingness to have the federal judicial power limited in immigration and exclusion matters, see, for example, United States v. Ju Toy, 198 U.S. 253, 262-63 (1905) (upholding a congressional act making an administrator's factual decision final and conclusive on the question of the alleged American "citizenship" of a petitioner seeking entry); *Lem Moon Sing*, 158 U.S. at 543 (upholding a congressional act that denied federal courts the authority to review decisions of an administrator refusing person admission to United States). In cases involving immigration, especially Asian immigration, and the foreign-affairs powers of the national government the operative social and political considerations were quite different from those that animated the Court in the other areas discussed. *See, e.g.*, LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW ch. 4 (1995).

59. *E.g.*, Adair v. United States, 208 U.S. 161, 180-81 (1908) (invalidating a federal statute prohibiting railroads from requiring employees to sign "yellow dog" contracts); Lochner v. New York, 198 U.S. 45, 64 (1905) (invalidating a state statute limiting bakers' work hours); Allgeyer v. Louisiana, 165 U.S. 578, 593 (1897) (invalidating a state statute prohibiting contracts with out-of-state insurance companies).

limiting a variety of state efforts to regulate corporations by subjecting them to local taxation, licensing, and other such restrictions.[60] Further, it also began to use other constitutional provisions to limit state government. In 1897, for example, it held that the Fourteenth Amendment incorporated the Takings Clause of the Fifth Amendment,[61] making the latter provision applicable against the states.[62]

Similarly, the Court began to develop constitutional limits on the extra-territorial reach of state laws.[63] A burgeoning national market in a nation with a federalized law-making structure inevitably created both practical uncertainties and complex choice-of-law questions, and national rules seemed increasingly necessary to mark the limits of state regulatory power and to prevent the laws of one state from intruding into the affairs of another. Although the Court was reluctant to constitutionalize choice-of-law rules, in the early twentieth century it began using both the Full Faith and Credit Clause and the Due Process Clause to impose boundaries on the "legislative jurisdiction" of the states.[64] In cases involving out-of-state parties and events, it used the former to identify situations where the Constitution required a forum state to enforce the laws of another state, while it used the latter to identify situations where the Constitution prohibited a forum state from enforcing its own laws.[65] No state, the Court explained in 1914,

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60. GERARD C. HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW: A CONTRIBUTION TO THE HISTORY AND THEORY OF JURISTIC PERSONS IN ANGLO-AMERICAN LAW ch. 8 (1918). *See also* Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 335-41 (1935) (discussing Court cases between 1910 and 1922 that addressed states' treatment of foreign corporations).

61. Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897).

62. Hale v. Henkel, 201 U.S. 43 (1906), extended the protections of the Fourth Amendment to corporations and seemed to hint that some analogous restrictions on state power might be available to corporations under the Fourteenth Amendment. *Id.* at 76-77. *Hale* also held, however, that the self-incrimination provision of the Fifth Amendment did not apply to corporations. The turn-of-the-century Court refused to incorporate other provisions of the Bill of Rights. *E.g.*, Minneapolis & St. Paul R.R. Co. v. Bombolis, 241 U.S. 211, 217 (1916) (Seventh Amendment right to trial by unanimous jury); Twining v. New Jersey, 211 U.S. 78, 99 (1908) (Fifth Amendment right against self-incrimination); Patterson v. Colorado, 205 U.S. 454, 460 (1907) (First Amendment right to free speech); West v. Louisiana, 194 U.S. 258, 261-62 (1904) (Sixth Amendment right to confront witnesses); Maxwell v. Dow, 176 U.S. 581, 595 (1900) (Sixth Amendment right to twelve-person jury).

63. The problem of the extraterritorial application of state law helped spur the development of substantive due process. *E.g.*, *Allgeyer*, 165 U.S. at 593 (holding that due process voided a state statute barring a state's citizens from contracting with out-of-state insurance companies not registered in state).

64. PURCELL, *supra* note 27, at 182-84.

65. *E.g.*, N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357, 376-77 (1918) (holding that the Due Process Clause prohibits a state from applying its own law to a contract made in another state); N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 162 (1914) (holding that the Due Process Clause limits the ability of a forum state to apply its own laws); Supreme Council of Royal Arcanum v. Green, 237 U.S. 531, 542 (1915) (requiring the forum state to apply the laws of the chartering state to a suit involving a fraternal benevolent corporation); Converse v. Hamilton, 224 U.S. 241, 260 (1912) (requiring the forum state to apply the law of another state because the issue was within "the regulatory power" of the latter).

may acquire the right to exert an authority beyond its borders which it cannot exercise consistently with the Constitution ... [b]ut the Constitution and its limitations are the safeguards of all the States preventing any and all of them under the guise of license or otherwise from exercising powers not possessed.[66]

Further, the need to control the extraterritorial reach of state laws combined with a growing call for uniform national rules to highlight the utility of two powerful and centralizing doctrines, the "dormant" Commerce Clause[67] and "field" preemption.[68] At the turn of the century the Court began to wield both to exclude state laws from many regulatory areas. Although the Court had long recognized the dormant Commerce Clause, in the late nineteenth century its unpredictable and fact-based decisions had usually allowed state measures to pass scrutiny.[69] In the 1890s, however, it began to use the doctrine more widely and, in the early twentieth century, to apply it more restrictively. "In more cases than not" after 1910, Alexander Bickel explained, the doctrine operated "to inhibit state regulatory power."[70]

More striking, the Court relied increasingly on the related doctrine of preemption and in the early twentieth century expanded it well beyond its Supremacy Clause roots.[71] The Court began to preempt state laws not only when they conflicted with federal law but also when federal law "occupied" a "field."[72] In such cases, federal law displaced all state and local laws regardless of whether they conflicted with federal law.[73] In some cases, moreover, the Court held that state laws were preempted even when the relevant statutes and legislative histories offered no basis for doing so.[74] In *Southern Railway v. Reid*[75] in 1912 the Court issued "for the first time consistently clear and explicit statements of genuine preemption principles," adopting the sweeping rule that whenever federal law occupied an area it necessarily terminated the "general authority of the state to enact any laws in that area in the future—even those that are

66. N.Y. Life Ins. Co., 234 U.S. at 164.

67. *E.g.*, McDermott v. Wisconsin, 228 U.S. 115, 131-32 (1913).

68. *E.g.*, N. Pac. R.R. Co. v. Washington, 222 U.S. 370, 378-79 (1912).

69. *See* CURRIE, *supra* note 5, at 31-40.

70. ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921, at 265 (1984) (referring to the period from 1910 to 1914). Some dormant Commerce Clause cases, Bickel commented, exemplified "judicial intervention in the handling of social problems that were themselves, at this time, the virtually unquestioned autonomous concern of state and local government, if of any government at all." *Id.*

71. *E.g.*, Adams Express Co. v. Croninger, 226 U.S. 491, 506 (1913).

72. *E.g.*, S. Ry. Co. v. R.R. Comm'n of Ind., 236 U.S. 439, 447-48 (1915).

73. *E.g.*, *Adams Express Co.*, 226 U.S. at 506 (preempting state laws designed to regulate transportation company efforts to limit its liability in interstate commerce). *See* BICKLE & SCHMIDT, *supra* note 70, at 270-75, 415-18. *See also* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 770-85 (1994) (arguing that modern preemption is based not on the Supremacy Clause but on the Necessary and Proper Clause).

74. BICKEL & SCHMIDT, *supra* note 70, at 271-75.

75. 222 U.S. 424 (1912). *Accord, e.g.*, Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co., 237 U.S. 597 (1915).

consistent with and supplement federal law."[76] In developing its expanded preemption doctrine, the Court was "predominantly" and "unnecessarily hostile to state legislation."[77] Indeed, it seemed particularly hostile to state workman's compensation laws, holding them wholly preempted in areas controlled by the Federal Employers' Liability Act or falling within the admiralty jurisdiction of the national courts. In both areas the law should be "uniform," the Court ruled, and that required the imposition of national law and the exclusion of state law.[78]

Together, the dormant Commerce Clause and the Court's new field-preemption doctrine substantially "enhanced federal power." Their frequent use to invalidate state laws, Stephen Gardbaum concluded, stood "in stark contrast to the Court's practice of almost always upholding state laws during the previous century."[79] Nationalization of the economy, the Court and many others had come to believe, required the nationalization of law and the uniformity of economic regulation.[80]

2. *Federal Equity Jurisdiction*

The Court's second major change, perhaps equally well known and certainly as controversial, was the expansion of federal equity jurisdiction. After 1890, the federal courts increasingly issued injunctions to block state regulatory actions[81] and began using due-process ideas to justify "rate-making" injunctions, and by the early twentieth century they were hearing a wide variety of equitable suits challenging state efforts to establish or regulate the rates charged by railroads and other public utilities.[82] Similarly, they also began to scrutinize state taxation more thoroughly and more frequently, and federal injunctions against state taxes grew in number and prominence.[83] So, too, did federal equity receiverships, with

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76. Stephen A. Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 534 (1997); Gardbaum, *supra* note 73, at 795-805; Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 166.

77. BICKEL & SCHMIDT, *supra* note 70, at 270.

78. *See* N.Y. Cent. R.R. Co. v. Winfield, 244 U.S. 147, 148-49 (1917); S. Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917).

79. Gardbaum, *supra* note 73, at 801.

80. *Id.*; Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017, 1067 (1988).

81. "Prior to 1890, the inferior federal courts had issued a few injunctions restraining state and county officials from enforcing state legislative acts alleged to be unconstitutional. It was not until after 1890, however, that these courts began the practice of enjoining state county attorneys and state attorneys general, from initiating criminal prosecutions under alleged invalid state liquor and railroad rate laws." Warren, *supra* note 5, at 373. *See also* Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 CAL. L. REV. 487, 532 n.140 (1965).

82. *E.g.*, Smyth v. Ames, 169 U.S. 466 (1898); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894). For more analysis of the Court's controversies regarding railroad and utility-rate regulation, see generally Siegel, *supra* note 32, at 232-59.

83. *E.g.*, Meyer v. Wells Fargo & Co., 223 U.S. 298, 302 (1912) (holding that a state gross-receipts tax imposed an unconstitutional burden on interstate commerce); Dewey v. Des Moines, 173 U.S. 193, 203 (1899) (stating that state taxation must be limited to "persons and property or

some 200 railroads seeking federal judicial protection in the 1880s and more than 350 doing so in the 1890s.[84] "[F]ederal judges presiding over reorganizations were not at all timid about stretching their authority,"[85] Robert Gordon noted, and in the decades around the turn of the century they adopted increasingly expansive views of federal equity power in administering corporate reorganizations.[86]

Perhaps most politically explosive, industrial strife and new labor-union militance gave rise to the federal labor injunction, a tool that the Supreme Court embraced and strengthened in 1895 when it decided *In re Debs*.[87] There, the Court announced the vital principle that the federal courts had an inherent and sweeping power, absent congressional authorization, to enjoin any labor action that interfered with interstate commerce.[88] By the first decade of the twentieth century the lower federal courts were enjoining more and more strikes, boycotts, organizing campaigns, and other labor-union activities, and their injunctions grew in both the sweep of their prohibitions and the frequency of their use.[89]

The turn-of-the-century Court repeatedly expanded the availability of federal equity jurisdiction. In 1908 it interpreted the Sherman Antitrust Act to provide a basis for enjoining labor activities,[90] and it broadened the kinds of "property" that equity would protect, including employer rights under the

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upon the business done within the State"); Lyng v. Michigan, 135 U.S. 161, 166 (1890) (holding that states cannot "lay a tax on interstate commerce in any form"); Welton v. Missouri, 91 U.S. 275, 281 (1876) (invalidating a local sales tax that discriminated against out-of-state goods). The federal courts also held that they were not prohibited from issuing tax injunctions even when state law prohibited state courts from issuing such injunctive relief. *In re* Tyler, 149 U.S. 164, 188-89 (1893); Taylor v. Louisville & Nashville R.R. Co., 88 F. 350, 356 (6th Cir. 1898). Demonstrating its greater concern with controlling the states, the Court held that the territorial limits on state taxation imposed by the Fourteenth Amendment were inapplicable to the United States government under the same due-process language in the Fifth Amendment. United States v. Bennett, 232 U.S. 299, 305-06 (1914). *See also infra* note 136.

84. Albro Martin, *Railroads and the Equity Receivership: An Essay on Institutional Change*, 34 J. ECON. HIST. 685, 705 (1974).

85. Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, *in* PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70, 108 (Gerald L. Geison ed., 1983).

86. *See, e.g.*, N. Pac. Co. v. Boyd, 228 U.S. 482, 502 (1913); Louisville Trust Co. v. Louisville, New Albany & Chi. Ry. Co., 174 U.S. 674, 688-89 (1899).

87. 158 U.S. 564 (1895).

88. PURCELL, *supra* note 27, at 60-63.

89. DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM 76-89 (1995); WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 59-97 (1991); FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 89-105 (1930). By 1920 American courts had issued close to a thousand such injunctions. IRVING BERNSTEIN, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920-1933, at 200-01 (1966).

90. *E.g.*, Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 436-39 (1911) (allowing an injunction for circulation of an "Unfair" list urging the boycott of a company); Lowe v. Lawlor, 208 U.S. 274, 303 (1908) (allowing an injunction under the Sherman Antitrust Act).

notorious "yellow-dog" contract.[91] Further, it stretched the gateway concept of "irreparable harm" while narrowing the restrictive requirement that equity jurisdiction existed only when there was no "adequate remedy at law."[92] Finally, it extended the principle that federal equity would enjoin the enforcement of unconstitutional laws to the broader principle that it would also enjoin efforts to enforce concededly constitutional state laws if the means of enforcement were unconstitutional.[93]

3. *Federal Common Law*

While the Court expanded constitutional limitations and the scope of federal equity jurisdiction, it also expanded the reach of substantive "general" federal common law. In 1842 its decision in *Swift v. Tyson*[94] authorized the federal courts to make their own "independent" judgments on general common-law issues free from the rules enforced by state courts,[95] and over the following half-century their decisions gradually and substantially expanded the general law's realm. While *Swift* had addressed issues of commercial law, by the late nineteenth century the federal courts had stretched the "general" law to include most common-law fields, including wills, contracts, torts, deeds, mortgages, rules of evidence, and measures of damages. Indeed, in 1888 the Court acknowledged that the problem of identifying the scope of general law had become "an embarrassing one."[96] In 1893 it further extended the reach of general law to cover essentially the entire field of industrial torts;[97] in 1910 it began treating important elements of local property law as questions of general federal law;[98] and in 1917 it used the idea of general law both to expand federal judicial power and to limit state legislative authority in admiralty matters.[99]

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91. The Court invalidated both state and federal statutes outlawing "yellow-dog" contracts. Coppage v. Kansas, 236 U.S. 1, 14-15 (1915) (state); Adair v. United States, 208 U.S. 161, 179-80 (1908) (federal).

92. Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917) (recognizing "good will" of employees as "property" protectable by injunction); Smyth v. Ames, 169 U.S. 466, 518 (1898) (suggesting the possibility that a rate regulation could give rise to multiple suits was sufficient to deny an "adequate remedy at law); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 395 (1894) (suggesting that an "adequate remedy at law" sufficient to oust federal equity had to be a remedy available in the federal courts). *See also* Dianne Avery, *Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894-1921*, 37 BUFF. L. REV. 1, 70-76 (1989).

93. Greene v. Louisville & Interurban R.R. Co., 244 U.S. 499, 507 (1917) (stating that the "principle" of *Young* is "not confined to the maintenance of suits for restraining the enforcement of statutes which as enacted by the state legislature are in themselves unconstitutional").

94. 41 U.S. (16 Pet.) 1 (1842).

95. *Id.* at 18-19. *See also* TONY FREYER, HARMONY AND DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM 1-11, 14-17 (1981).

96. Bucher v. Cheshire R.R. Co., 125 U.S. 555, 583 (1888).

97. Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 370-71 (1893).

98. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 359 (1910).

99. S. Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917).

More fundamentally, the Court extended the concept of general law to include legal principles it considered "fundamental" to reasonable constitutional order and thereby gradually created a form of "general" constitutional law. Exercising their "independent" judgment of state law in cases brought under diversity jurisdiction, federal courts began using principles of general constitutional law to protect out-of-state creditors, bondholders, and corporations from state actions they considered abusive or unfair. In doing so, they "applied their own presumption about the scope of state and local government powers," Professors Ann Woolhander and Michael G. Collins explained, and they interpreted "state constitutional provisions based on what they referred to as principles of 'general constitutional law.'"[100] By the late nineteenth century the federal courts were using general constitutional law as a basis for deciding cases involving such fundamental issues as "takings of property, taxing and spending for public purposes, rate making and delegation doctrines, and the permissible limits of governmental power."[101] Together, their decisions "provided a ready source of substantive limits on governmental action" and freed the federal courts from state-court rules of constitutional and common law.[102]

Indeed, the Court's conception of general common law underwrote what may have been its boldest assertion of federal judicial power. In 1907, considering a dispute over riparian rights between two states, it invoked its 1901 decision establishing a federal common law of interstate commerce[103] to rule that neither the states nor any other branch of the federal government could make law to control such interstate disputes. Only the Court itself, the justices declared in *Kansas v. Colorado,* held such power, a power unchecked by any other level or branch of government.[104]

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100. Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative State*, 87 CAL. L. REV. 613, 623 (1999) [hereinafter Woolhandler & Collins, *Judicial Federalism*]. In a wide-ranging series of superb and incisive articles, Professors Woolhandler and Collins have explored the complex doctrinal processes by which the idea of "general" law gave rise to a "general" constitutional law which the Court, in turn, transformed into truly "federal" constitutional law, that is, law based on the Constitution. Most directly on point are Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*," 74 TULANE L. REV. 1263 (2000) [hereinafter Collins, *Before* Lochner]; Michael G. Collins, *October Term, 1896—Embracing Due Process*, AM. J. LEGAL HIST. 71 (2001) [hereinafter Collins, *October Term*]; Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77 (1997) [hereinafter Woolhandler, *Common Law Origins*]; Woolhandler, *supra* note 11; and Woolhandler, *supra* note 52. Other illuminating articles in the series include the following: Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995) [hereinafter Woolhandler & Collins, *State Standing*]; Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WISC. L. REV. 39; Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993); and Michael G. Collins, *'Economic Rights,' Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEORGETOWN L.J. 1493 (1989) [hereinafter Collins, *Economic Rights*].

101. Collins, *Before* Lochner, *supra* note 100, at 1265.

102. *Id.* at 1267.

103. W. Union Tel. Co. v. Call Publ'g Co., 181 U.S. 92, 102 (1901).

104. 206 U.S. 46, 97 (1907). *See also* PURCELL, *supra* note 27, at 57-60.

4. *Sources of Federal Law and Jurisdiction*

More broadly, the Court reconceived both the sources of federal law and the role and jurisdiction of the federal courts. As for the sources of federal law, its cautious but growing reliance on the Fourteenth Amendment merged with the amorphous and elastic idea of "general" law, especially "general" constitutional law, to underwrite a broadened understanding of constitutional limits and, more important, a growing sense that the Constitution required the courts to enforce those limits against government more tightly and commonly.[105] The Court transmuted "general" constitutional law into the law of the Constitution itself, expanded the scope of the Constitution's provisions, and came to understand the Constitution—in particular, the Fourteenth Amendment—as authorizing the courts to recognize causes of action and provide appropriate remedies for its violation. During the 1890s "formerly nonfederal constitutional principles associated with takings, public-purpose limits, rate reasonableness questions and others, "were expressly rechristened as federal limits on state governments."[106]

Indeed, Professor Collins has identified the Court's 1896-97 Term as "Federalization's Moment," the exact time when the justices—addressing issues of takings, contractual freedom, the requirement of just compensation, the reasonableness of rate regulation, and "public purpose" limits on state taxation—began transmuting issues of "general" law into explicitly federal constitutional issues.[107] Revealingly, too, the Term witnessed a striking moment of judicial candor from the justice who would subsequently author both *Young* and *Lochner*. Writing for the Court in *Fallbrook Irrigation District v. Bradley* in 1896, Justice Peckham explained that he relied explicitly on the Fourteenth Amendment rather than on "general" law because he was no longer willing to invoke "the pretext" of general constitutional law.[108] Peckham made the significance of the shift from general to truly federal constitutional law crystal clear: the federal courts would henceforth "be justified" in reaching their decisions on constitutional-law issues

105. *See* Collins, *Before* Lochner, *supra* note 100, at 1305-11.

106. *Id.* at 1311. *Accord* Woolhandler, *supra* note 11, at 398-99. What had happened gradually became clear to some commentators. In the late nineteenth century the Court's "majority were content to rest the doctrine of no taxation for a private purpose on the essential nature of government." By the early twentieth century, however, the "philosophical and political error of their ways has been abandoned by their successors," and the Court's limiting "doctrines are now applied as interpretations of the Fourteenth Amendment." Thomas Reed Powell, *Taxation of Things in Transit, I*, 7 VA. L. REV. 167, 176-77 (1920).

107. *See* Collins, *Before* Lochner, *supra* note 100, at 1305-11; Collins, *October Term, supra* note 100, at 92-96. Professor Collins suggested a variety of social and legal reasons why the 1896 Term proved pivotal, including the fact that the "sweeping re-election of the Republicans" in the 1896 election ended the "immediate threat to the Court" from Populist and Democratic attacks. Collins, *October Term, 1896, supra* note 100, at 92-96 (quote at 96).

108. *Fallbrook*, 164 U.S. 112, 155 (1896). Professor Collins and Professor Siegel have both pointed to the significance of this relatively unknown case. *See* Collins, *October Term, supra* note 100, at 76; Siegel, *supra* note 32, at 216 n.130. Three years before Peckham's admission, Justice Stephen J. Field made a similar acknowledgment of the Court's calculated use of general federal common law as a tool to enable it to ignore state law and "control" an issue with a different rule. Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 397-99, 401 (1893) (Field, J., dissenting).

regardless of "clear and repeated decisions of the highest court of the state to the contrary."[109]

As the Court reconceived the sources of federal law, it simultaneously reconceived the role and jurisdiction of the lower federal courts. Indeed, if the 1896 Term marked the Court's first decisions transforming "general" constitutional law into the law of the Constitution itself, the two pathbreaking state ratemaking cases decided during the 1890s—*Reagan v. Farmers' Loan & Trust Co.*[110] and *Smyth v. Ames*[111]—bracketed the Term and confirmed that sometime between 1894 and 1898 the Court's understanding of the law and jurisdiction of the federal courts had changed drastically.

Deciding *Reagan* in 1894, the Court had been unable to specify whether it was state, federal, or "general" law that made the state's rates "unreasonable," and it failed to identify the suit's jurisdictional basis as resting on a federal question.[112] Instead, it relied on the presence of diversity jurisdiction and stressed repeatedly that the plaintiff was entitled to the protection of a federal court because he was "a citizen of another state."[113] Four years later, however, addressing the identical ratemaking issue in *Smyth v. Ames*, the Court understood both the law and jurisdiction quite differently. Then, it voided the state's rates as unreasonable on explicitly federal grounds—the Fourteenth Amendment—and expressly affirmed that the lower court had jurisdiction over the suit because plaintiff's claim presented a federal question.[114] Thus, by 1898 the Court had come to understand that the law limiting state ratemaking was not general law but the law of the United States Constitution itself. Further, it had also come to understand that diversity jurisdiction was unnecessary in such a case because the claim fell within the trial court's general federal-question jurisdiction and, consequently, that the plaintiff was entitled to the protection of a federal court not because he was a citizen from another state but because he relied on a federal right. The Court had come to understand, in other words, that citizenship and diversity jurisdiction were irrelevant when plaintiffs raised claims under the Fourteenth Amendment and that the role of the lower courts was to protect federal rights whether they belonged to citizens or non-citizens of a forum state.[115]

That reconceptualization not only expanded the reach of federal law but also expanded the jurisdiction and power of the entire federal judiciary. In theory, general law was "state" law, not truly "federal" law. Hence, state courts were not bound by the general-law rules of the federal courts, and state legislatures could alter or abolish them and, at least sometimes, make their new statutory provisions

109. *Fallbrook*, 164 U.S. at 155.

110. 154 U.S. 362 (1894).

111. 169 U.S. 466 (1898).

112. *See Reagan*, 154 U.S. at 390-91, 412.

113. *Id.* at 391. *See also id.* at 395, 399.

114. *See Smyth*, 169 U.S. at 518, 522-27.

115. *See* Purcell, *supra* note 14, at 2045-49; Woolhandler, *Common Law Origins*, *supra* note 100, at 129-32.

binding on the federal courts.[116] Further, claims based on general law did not give rise to federal-question jurisdiction in the lower courts, and they did not come within the Supreme Court's appellate jurisdiction over state-court cases.[117] Reconceptualizing general constitutional law as truly "federal law," then, abolished all those limitations on federal judicial power. It made the rulings of the federal courts on those federalized issues binding on state courts under the Supremacy Clause, and it deprived state legislatures of the power to overturn them by statute and impose their state-law rules on the federal courts. Further, it made cases raising such federalized issues initially cognizable in the national courts under their general federal-question jurisdiction, and it made the decisions of state courts addressing such issues reviewable on appeal in the United States Supreme Court.[118] The reconceptualization thus radically changed the relationship between the federal judiciary and the states, both their courts and their legislatures.

The reconceptualization quickly inspired a cascade of compatible and reinforcing doctrinal shifts.[119] One was the Court's decision to cut back on the scope of federal diversity jurisdiction.[120] Believing that future federal-law challenges to regulatory efforts would likely bring "a great flood of litigation" to the national courts,[121] and recognizing that those suits would henceforth usually be brought under federal-question jurisdiction, the Court sought to offset anticipated docket growth by systematically and selectively narrowing the scope of diversity jurisdiction.[122] In a series of decisions between 1900 and 1906 it adjusted a variety of jurisdictional rules to accomplish that result, in effect

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116. The *Swift* doctrine freed federal courts from following state-court rulings on common-law issues but not from following applicable state statutes that codified those issues. *See* ARMISTEAD M. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 563-64 (1928) (explaining the general rule and identifying situations where federal courts could avoid the force of state statutes that altered common-law rules).

117. *Id.* at 163-74, 872-900.

118. The reconceptualization of the federal judicial power and the transition from "general" to truly "federal" law reflected, if it was not encouraged, by the rise of legal positivism in the late nineteenth century. Focusing attention on the sovereign authority that lay behind law, positivism made "general" law seem anomalous and even incoherent. As the Court was enforcing a de facto national law in many of its decisions, it seemed logical to find the source of that law in the Constitution.

119. The results included the expansion of both the pendent and ancillary jurisdictions of the lower federal courts, Siler v. Louisville & Nashville R.R. Co., 213 U.S. 173, 191 (1909) (pendent); Greene v. Louisville & Interurban R.R. Co., 244 U.S. 499, 508, 512-14 (1917) (pendent); Root v. Woolworth, 150 U.S. 401, 410-13 (1893) (ancillary), and the explicit assertion of a broad power in the federal courts to imply private causes of action from federal statutes. Tex. & Pac. R.R. Co. v. Rigsby, 241 U.S. 33, 38-40 (1916). *See generally* Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 71-83 (2001) (discussing the demise of the traditional standards for rights and remedies).

120. Previously, the federal courts had used diversity jurisdiction broadly to enforce "general" law and, in many cases, to protect essentially federal rights and interests. *See, e.g.*, Collins, *Before* Lochner, *supra* note 100, at 1267, 1283, 1302-03; Woolhandler, *Common Law Origins*, *supra* note 100, at 89-92, 156-57.

121. *Ex parte* Young, 209 U.S. 123, 166 (1908).

122. PURCELL, *supra* note 11, at 272-81.

barring large numbers of ordinary and relatively unimportant private tort and contract actions from the national courts.[123]

Another consequence was that the Court steadily narrowed Eleventh Amendment restrictions imposed on the national courts. Although it had expanded the Amendment's reach as part of the post-Reconstruction settlement, after 1890 it began to contract its scope severely and steadily.[124] By the early years of the twentieth century, it had established that the Eleventh Amendment would not bar the federal courts from enjoining state officials who attempted to enforce unconstitutional laws.[125] By the same time, it had also ruled that the Amendment did not prevent the federal courts from hearing suits against cities, counties, and other local government units, that it did not bar federal suits against states brought by the United States government, and that it did not prohibit the Court itself from hearing appeals from state courts in cases where states were parties and federal-law issues were involved.[126]

A third consequence of the transformation was the steady expansion of the Fourteenth Amendment and the continued elevation of its role. While in 1880 the Court had expressed doubts about the Amendment's judicial enforceability absent authorizing legislation,[127] a decade later it announced that the Amendment gave the federal courts inherent authority to review state economic regulation to ensure its reasonableness.[128] In *Reagan* and *Smyth*, the Court not only confirmed

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123. *Id.* It was revealing that in cutting back on diversity jurisdiction the Court took care to maintain the jurisdiction in cases involving such economically important actions as shareholder derivative suits, Doctor v. Harrington, 196 U.S. 579, 587 (1905), state condemnation proceedings, Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 255 (1905), federal receiverships in corporate reorganizations, *In re* Metropolitan Ry. Receivership, 208 U.S. 90, 109 (1908), and challenges to state regulatory efforts when the relevant state agency was alleged to be a "citizen" of the regulating state, R.R. Comm'n of La. v. Cumberland Tel. & Tel. Co., 212 U.S. 414, 418 (1909). Both shareholder derivative suits and equity receiverships grew rapidly in the federal courts between 1880 and 1900, and their national economic significance was apparent. *See* HOVENKAMP, *supra* note 46, at 44-45, 60-62 (derivative suits); Warren, *supra* note 5, at 364-66 (receiverships).

124. *See* JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES 121-52 (1987); Purcell, *supra* note 14, at 1962-75.

125. Smyth v. Ames, 169 U.S. 466, 518-19 (1898); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 389 (1894). Such other cases include, for example, *Gunter v. Atlantic Coast Railroad Co.*, 200 U.S. 273, 283 (1906); *Prout v. Starr*, 188 U.S. 537, 542-43 (1903); *Tindal v. Wesley*, 167 U.S. 204, 220 (1897); and *Scott v. Donald*, 165 U.S. 58, 69-70 (1897). *See* Woolhandler, *supra* note 11, at 446-49.

126. Workman v. New York, 179 U.S. 552, 565 (1900) (holding that municipalities are not protected by Eleventh Amendment); Smith v. Reeves, 178 U.S. 436, 449 (1900) (stating that the Supreme Court has authority to review state-court decisions in which states are parties and federal-law issues are involved); United States v. Texas, 143 U.S. 621, 644 (1892) (holding that the Eleventh Amendment does not bar a federal court from hearing suits against a state brought by the United States); Lincoln County v. Luning, 133 U.S. 529, 530-31 (1890) (holding that counties are not protected by the Eleventh Amendment). Cities and other local government agencies were regarded, in some other contexts, as sharing in a state's sovereign immunity. 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 29.6, at 624 (2d ed. 1986).

127. *Ex parte* Virginia, 100 U.S. 339, 345 (1880).

128. Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418, 458 (1890).

that new principle but enforced it with injunctions against state rates that the justices found unreasonable.[129]

Since its adoption, the Fourteenth Amendment had been in inherent tension with the Eleventh, the former—assuming its judicial enforceability absent authorizing legislation—expanding federal judicial power and the latter constraining it. The Court's reconceptualization and reorientation of the federal judiciary resolved most of that tension heavily in favor of federal judicial power. The change was starkly illustrated by the contrasting language of *In re Ayers*,[130] decided in 1887 at the height of the Court's acquiescence in the post-Reconstruction settlement, and *Home Telephone & Telegraph Co. v. Los Angeles*,[131] decided in 1913 when the transformation was largely complete. "To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment," *Ayers* had proclaimed approvingly and enthusiastically, "requires that it should be interpreted not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose."[132] The Court's language literally beamed on the Amendment.

By 1913, however, such prideful and solicitous language no longer fit the Eleventh Amendment but instead crowned its rival, the Fourteenth. Then, a unanimous Court in *Home Telephone* quickly and easily dismissed the relevance of the Eleventh Amendment and declared, in effect, that the Fourteenth Amendment reigned triumphant.[133] The latter Amendment was addressed "to every person, whether natural or juridical, who is the repository of state power," and it reached "any exercise by a State of power, in whatever form exerted."[134] Whether the action of a state official was lawful or unlawful under state law made no difference, for any action taken by any person acting under state authority necessarily came within the "comprehensive inclusiveness" of the Fourteenth Amendment.[135] *Home Telephone* announced the transformation in its fullest form, giving the Fourteenth Amendment a sweeping scope and declaring that the Constitution itself imposed a special role and duty on the national judiciary: the "Federal courts are charged under the Constitution" with the duty of enforcing the Fourteenth Amendment, and they—not the state courts—are "the primary source for applying and enforcing the Constitution of the United States in all cases covered by the Fourteenth Amendment."[136] In no way would

129. *Smyth*, 169 U.S. at 550; *Reagan*, 154 U.S. at 412-13.

130. 123 U.S. 443 (1887).

131. 227 U.S. 278 (1913).

132. *In re* Ayers, 123 U.S. at 505-06.

133. Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278, 286-87 (1913).

134. *Id.*

135. *Id.* at 287-88.

136. *Id.* at 284, 285. Illustrating the Court's special concern with limiting state, as opposed to federal, power, *Home Telephone* failed even to mention "the unanimous and apparently contradictory fifth amendment holding in *Hooe v. United States*, 218 U.S. 322, 336 (1910) (Harlan, J.), that the unauthorized taking of private property by a federal officer 'is not the act of the Government.'" CURRIE, *supra* note 5, at 109 n.123. *Home Telephone*, in other words, held that unlawful actions by state officials could constitute "state action" under the Fourteenth Amendment, even though only three years earlier *Hooe* had held that unlawful actions by federal officials could

the turn-of-the-century Court allow the Eleventh Amendment to interfere with that sweeping "constitutional" duty.

Further strengthening the bases of national authority, the reconceptualization not only expanded the federal judiciary's power but expanded the powers of Congress as well. To the extent that the Court broadened rights under the Fourteenth Amendment, it necessarily expanded congressional powers under Section 5 of the Amendment, which specifically gave Congress authority to enforce the rights it created.[137] Further, by federalizing the old general constitutional law and thereby broadening the scope of federal judicial power, the Court suggested, via the traditional concept of co-extensive powers, that the powers of Congress might also extend more broadly. Indeed, the Court followed that reasoning when it used the Constitution's grant of admiralty jurisdiction to the federal courts to imply a coextensive power in Congress to legislate over matters of maritime law.[138] More forcefully, in 1917 it implicitly stretched that theory to deny state legislative power altogether over all admiralty and maritime issues, thereby making congressional power in those areas exclusive.[139]

5. *Curbing State Legislative Restrictions on Federal Jurisdiction*

While the first four elements of the transformation cabined state power and expanded both federal lawmaking authority and the supervisory role of the national courts, its last two elements were defensive corollaries designed to safeguard those changes and ensure their efficacy. To serve the transformation's purposes, the Court had to protect the federal courts from state efforts to interfere with their jurisdiction and to avoid the force of their judgments. Thus, it had to check state legislative efforts to narrow or defeat federal jurisdiction, and it had to strengthen its own ability to supervise the state courts to ensure that, when they did hear issues of federal law, they resolved them properly and fully honored the mandate of the Supremacy Clause.

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not constitute "state action" under the Takings Clause of the Fifth Amendment. *See Home Tel. & Tel. Co.*, 227 U.S. at 288. Similarly, in 1914 the Court held that the due process limits on federal taxation under the Fifth Amendment were much less restrictive than the due process limits on state taxation imposed by the Fourteenth Amendment. United States v. Bennett, 232 U.S. 299, 304-07 (1914).

137. Professor Morton Horwitz suggested that nineteenth-century ideas of federalism and a general commitment to decentralization induced a majority of the Court in the 1870s to refuse to incorporate "general" law principles into the Fourteenth Amendment. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 24-25 (1992). The justices may well have recognized that such an incorporation would substantially expand both federal legislative and judicial power.

138. Butler v. Boston & Salem S. Co., 130 U.S. 527, 557 (1889) ("As the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature and not in the state legislatures."). *Accord In re* Garnett, 141 U.S. 1, 12 (1891). *See* Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214, 1230-37 (1954).

139. S. Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917).

The fifth component of the transformation, then, was the Court's effort to prevent state legislatures from constraining the jurisdiction of the national courts.[140] While it was long recognized that states generally could not restrict federal jurisdiction,[141] states nonetheless continued to adopt statutes designed to limit that jurisdiction indirectly. Some established new actions designed to provide an "adequate remedy at law" and, by limiting those actions to their own courts, to defeat federal equity jurisdiction. The Court commonly refused to allow such remedies to defeat federal equity and gradually established the firm principle that an adequate remedy at law sufficient to defeat federal equity jurisdiction had to be a remedy available in the federal courts.[142] To the same point, the Court held in 1893 that the federal courts were not barred from issuing tax injunctions even when state laws prohibited the local state courts from doing so.[143]

States also tried persistently to prevent foreign corporations from removing state-court actions to federal court. States had the power to exclude foreign corporations from intrastate commerce,[144] and approximately half of them used that power to underwrite statutes that penalized such corporations with expulsion if they invoked federal removal jurisdiction.[145] For half a century the Court struggled with those statutes, seeming to hold that states could not prevent foreign corporations from actually removing but that they could nonetheless

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140. The Court seemed to harbor a deep wariness about the work of state legislatures, and in *Young* counsel for the railroads played on that fear. "It has become the aim of some legislatures to frame their enactments with such cunning adroitness, and to hedge them about with such savage and drastic penalties, as to make it impossible to test the validity of such statutes in the courts save at a risk no prudent man would dare to assume." *Young*, 209 U.S. at 141 (argument for respondent, citing *Cotting v. Kan. City Stock Yards Co.*, 183 U.S. 79, 99-102 (1902) (discussing the Court's prior ratemaking cases)).

141. *See, e.g.*, Ry. Co. v. Whitton's Adm'r, 80 U.S. 270, 280 (1871) (denying state power to limit statutory wrongful-death suit to its own courts); Cowles v. Mercer County, 74 U.S. 118, 122 (1868) (denying state power to limit suits against counties to state courts in the county sued). *See generally* Woolhandler & Collins, *Judicial Federalism*, *supra* note 100 (discussing the history of federal-court review of state administrative actions).

142. PURCELL, supra note 27, at 323 n.34; Note, *Effect of the Existence of an Adequate Remedy at Law in the State Courts on Federal Equity Jurisdiction*, 49 HARV. L. REV. 950, 953 (1936).

143. *In re* Tyler, 149 U.S. 164, 188-89 (1893).

> Manifestly the object of this [state] legislation was to confine the remedy of the taxpayer for illegal assessment and taxation, to the payment of taxes under protest, and bringing suit against the county treasurer for recovery back, but all this is nothing to the purpose. The legislature of a State cannot determine the jurisdiction of the courts of the United States, and the action of such courts in according a remedy denied to the courts of a State does not involve a question of power.

Id. at 189. *See also* Taylor v. Louisville & Nashville R.R. Co., 88 F. 350, 366 (6th Cir. 1898) (modifying a tax injunction to allow railroad owners to pay a lower assessment on local taxes).

144. Paul v. Virginia, 75 U.S. 168 (1869). The Court also ruled that corporations were not "citizens" within the meaning of the Privileges and Immunities Clause and, hence, foreign corporations had no "right" to enter a state to conduct intrastate business. *Id.*

145. *See* PURCELL, *supra* note 11, at 202.

expel them from the state's intrastate commerce if they did.[146] In a series of decisions beginning in 1910, however, the Court announced a new doctrine of "unconstitutional conditions" designed to restrict state powers over foreign corporations in a variety of areas, including their use of anti-removal statutes.[147] States could not coerce foreign corporations to surrender their federal rights, it ruled, and they could not punish foreign corporations by excluding them from intrastate commerce if the corporations invoked federal removal jurisdiction.[148] By 1914 the Court's decisions had, in effect, invalidated most state anti-removal statutes,[149] leaving only an "extremely narrow" exception applicable solely to insurance companies,[150] an exception that the Court abolished eight years later.[151]

A third method of defeating federal jurisdiction was to integrate state courts in state administrative proceedings, thereby preempting a party's opportunity to challenge a state administrative ruling in federal court. In 1908 the Court terminated that possibility by ruling that, however much a state's administrative procedure might involve its courts, the procedure remained "administrative" and not "judicial." Hence, whenever a state's administrative process concluded, regardless of the extent to which its courts had been involved, parties could challenge the final result in a federal court free from any res judicata effect that might otherwise attach to the judgment of a state court.[152] Indeed, on occasion

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146. *See* HENDERSON, *supra* note 60, at 101-11; 132-47. *See* Doyle v. Continental Ins. Co., 94 U.S. 535, 535 (1876) (upholding state anti-removal statute), Sec. Mut. Life Ins. Co. v. Prewitt, 202 U.S. 246, 246 (1906) (upholding state anti-removal statute).

147. *See* HENDERSON, *supra* note 60, at 132.

148. *See, e.g.*, Ludwig v. W. Union Tel. Co., 216 U.S. 146, 146 (1910) (holding that applying an anti-removal statute to a company doing interstate business was an unconstitutional interference with the company's rights under the Commerce Clause); W. Union Tel. Co. v. Kansas, 216 U.S. 1, 45-47 (1910); Pullman Co. v. Kansas, 216 U.S. 56, 56 (1910); Int'l Text Book Co. v. Pigg, 217 U.S. 91, 107 (1910); Herndon v. Chi. Rock Island & Pac. Ry. Co., 218 U.S. 135, 158-59 (1910).

149. Harrison v. St. Louis & S.F. R.R. Co., 232 U.S. 318, 332-33 (1914).

150. *Paul*, 75 U.S. at 183 (ruling that the business of insurance did not constitute "commerce" and hence insurance companies were not protected by the Commerce Clause); Hooper v. Cal., 155 U.S. 648, 653 (1895).

151. The Court extinguished the narrow exception by overruling *Doyle* and *Prewitt* in *Terral v. Burke Construction Co.*, 257 U.S. 529, 529 (1922). The decision prevented states from punishing insurance companies that resorted to removal jurisdiction, and the companies immediately began using removal regularly and frequently. PURCELL, *supra* note 11, at 205.

152. Prentis v. Atl. Coast Line Co., 211 U.S. 210, 230 (1908). Two years earlier the Court rejected a similar state effort to avoid federal jurisdiction by making a commission order enforceable only in a state court. That statutory enforcement procedure, the Court ruled in *Mississippi Railroad Commission v. Illinois Central Railroad Co.*, 203 U.S. 335, 341 (1906), could not deprive the federal courts of their jurisdiction to review the matter. *Prentis* can be seen as imposing an exhaustion of remedies requirement, and the Court on occasion applied it to that effect. *E.g.*, Vandalia R.R. Co. v. Pub. Serv. Comm'n, 242 U.S. 255, 260 (1916). Its primary significance, however, was its ultimate guarantee of a federal forum once state administrative proceedings, however structured, were completed. *See* Bacon v. Rutland R.R. Co., 232 U.S. 134, 134-35 (1914). If regulated parties chose to challenge administrative orders in the state courts after the "administrative" process was completed, they forfeited their right under *Prentis*. *See* Detroit & Mackinac Ry. Co. v. Mich. R.R. Comm'n, 235 U.S. 402, 402-03 (1914). For the operation of the *Prentis* rule from the state viewpoint, see Oliver P. Field, *Memorandum on Some Recent Decisions*

the Court asserted the principle so vigorously that it seemed almost to claim that the Constitution itself established the jurisdiction of the federal courts and that access to the federal courts was a constitutional right.[153]

6. *Federal Control of State Courts*

The last component of the transformation comprised the Court's efforts to assert greater control over the state courts. On one level, the Court broadened the scope of the federal law that it required the state courts to follow. In 1903 it held that federal law, not state law, determined the *res judicata* effects of federal court decisions on federal-law issues, insisting that constitutional rights adjudicated in the federal courts "can never be taken away or impaired by state decisions."[154] Similarly, in 1912 it insisted on the obligation of state courts to honor and enforce federal law, notwithstanding any legal or policy disagreements they might harbor. "The suggestion that the act of Congress is not in harmony with the policy of the state and therefore that the courts of the state are free to decline jurisdiction," it declared, "is quite inadmissible." Congressional legislation controlled "all the people and all the states, and thereby established a policy for all" which the state courts were obligated to enforce.[155] Two years later the Court extended the reach of federal law further, holding that it controlled all issues in suits brought under the Federal Employers' Liability Act, including any related common-law issues that might arise.[156]

Even more boldly, in 1908 the Court declared in *General Oil Co. v. Crain* that—in the event the Eleventh Amendment barred an action in federal court—state courts were required to provide a remedy for a state official's violation of

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Relative to the Restraint and Recovery of Illegal Taxes in Iowa, 16 IOWA L. REV. 381, 386-90 (1931).

153. *Harrison*, 232 U.S. at 328 ("The judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several States may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious."); *Herndon*, 218 U.S. at 159 (stating that the "right to resort to the Federal courts is a creation of the Constitution of the United States and the statutes passed in pursuance thereof"). Not surprisingly, one of the most extreme statements came from Justice David J. Brewer: "[T]he jurisdiction of Federal courts primarily rests on the Constitution of the United States, and the extent of their jurisdiction is determined by its provisions." Giles v. Harris, 189 U.S. 475, 491 (1903) (Brewer, J., dissenting). As a result of such statements, some business interests maintained that Congress could not constitutionally limit diversity or removal jurisdiction, and they maintained that argument into the 1930s—using it to help defeat congressional efforts to restrict both—in spite of the fact that in 1922 the Court explicitly ruled that it was Congress, not the Constitution, that conferred jurisdiction on the federal courts. Kline v. Burke Constr. Co., 260 U.S. 226 (1922). *See also* PURCELL, *supra* note 11, at 242.

154. Deposit Bank v. Frankfurt, 191 U.S. 499, 517 (1903). *Accord* Gunter v. Atl. Coast Line R.R. Co., 200 U.S. 273, 290-91 (1906).

155. Mondou v. New York, New Haven & Hartford R.R. Co., 223 U.S. 1, 57 (1912).

156. Seaboard Air Line Ry. Co. v. Horton, 233 U.S. 492, 502 (1914). *Accord* S. Ry. Co. v. Gray, 241 U.S. 333, 338 (1916).

the U.S. Constitution.[157] Backing its declaration forcefully, it added that it would review and reverse any state-court decision that failed to provide a remedy in such a case.[158] With a revealing bluntness that echoed through many of its turn-of-the-century decisions, the Court justified its decision in *Crain* by explicitly acknowledging the possibility that state courts might purposely try to defeat federal law by preventing parties from obtaining judicial review of state regulatory actions.[159] "And it will not do to say that the argument is drawn from extremes," it proclaimed with fervor. "Constitutional provisions are based on the possibility of extremes."[160]

On a second level, the Court remolded its own appellate jurisdiction to broaden its reach over state-court judgments involving issues of federal law. In 1900 it affirmed without citation the principle that neither the Eleventh Amendment nor a state's consent to be sued only in its own courts could prevent the Court from reviewing any state-court judgment that denied "any right, title, privilege or immunity" secured by "the Constitution or laws of the United States."[161] Moreover, it gradually broadened the category of state-court judgments it would review as "final," expanding the scope of the "record" it would consider in determining finality[162] and accepting jurisdiction even when further proceedings or collateral actions were continuing.[163] Similarly, the Court began to impose clearer due-process limits on the ability of state courts to deny federal claims on state procedural grounds[164] and seemed to tighten the standards it would apply in evaluating the "adequacy" of state-court judgments that foreclosed consideration of federal rights.[165] The bottom line, it insisted, was that no state-law ground could be "adequate" if it was "set up as an evasion" or used

157. 209 U.S. 211, 226 (1908).

158. *Id.*

159. *Id.* at 228.

160. *Id.* at 226-27. *Crain*, the Court later explained, underwrote the principle that "a State cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent." Kenney v. Supreme Lodge, 252 U.S. 411, 415 (1920).

161. Smith v. Reeves, 178 U.S. 436, 445 (1900).

162. 16B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4009, at 151-55 (2d ed. 1996). Although the Court began the process earlier, it was not until the 1920s and 1930s that it regularly included the opinion below and even other material from the record as a whole in its review. *E.g.*, Clark v. Willard, 292 U.S. 112, 118 (1934).

163. *See* Detroit & Mackinac Ry. Co. v. Mich. R.R. Comm'n, 240 U.S. 564 (1916); Carondelet Canal & Navigation Co. v. Louisiana, 233 U.S. 362, 372 (1914).

164. *See* Postal Tel. Cable Co. v. City of Newport, 247 U.S. 464, 476 (1918); Saunders v. Shaw, 244 U.S. 317, 320 (1917).

165. The Court first announced the "adequacy" doctrine in *Chapman v. Goodnow's Administrator*, 123 U.S. 540 (1887). Alfred Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 954-55 & n.43 (1965). The Court seemed to tighten the "adequacy" requirement in the early twentieth century, *e.g.*, Enter. Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917); Rogers v. Alabama, 192 U.S. 226, 231 (1904), and then to tighten it even further in the early 1920s. Davis v. Weschler, 263 U.S. 22, 24-25 (1923); Ward v. Board of Comm'rs of Love County, 253 U.S. 17, 22-23 (1920). *See also* Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80, 119-40 (2002).

"merely to give color" to a denial of federal rights.[166] An "untenable construction" of state law could not be allowed to defeat a federal right, the Court declared in 1904. "To hold otherwise would open an easy method of avoiding the jurisdiction of this court."[167]

Perhaps most unprecedented, the Court announced in 1912 that its jurisdiction to review state-court judgments included the power to examine not just the law but the facts as well. It transformed what had previously been an "inflexible rule" that the Court would not reexamine a state court's findings of fact[168] into a rebuttable presumption with two highly serviceable exceptions. In a series of four cases it advanced, implemented, and then codified "two propositions" that were, it claimed in the last of the four, "well settled."[169] If a state court denied a federal right, the Court could reexamine the facts either when a party claimed that "there was no evidence whatever to support" the denial or when a state court's findings were "so intermingled" with its conclusions of law that it was "essentially necessary" to reexamine the former in order to review the latter.[170] The decisions provided a substantial new tool for the cause of judicial centralization and federal judicial supremacy.[171]

The Court's tightening control over the state courts was, finally, most broadly expanded by its transformation of the sources of federal law from

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166. Rogers v. Alabama, 192 U.S. 226, 231 (1904). *Accord* Union Pac. R.R. Co. v. Public Serv. Comm'n of Missouri, 248 U.S. 67, 69-70 (1918). The principle was not, of course, entirely new. *E.g.*, Osborn v. Bank of U.S., 22 U.S. (9 Wheat.) 738, 855-56 (1824). What was new was the development of an explicitly limiting doctrine that would be applied as a matter of course and the Court's overt suggestions about the unreliability of state courts and the need for especially keen-eyed federal judicial supervision.

167. Terre Haute & Indianapolis R.R. Co. v. Indiana, 194 U.S. 579, 589 (1904). The Court repeatedly emphasized that its jurisdiction required it to scrutinize state-court judgments to ensure that there was no evasion of federal law or federal rights. *E.g.*, Leathe v. Thomas, 207 U.S. 93, 99 (1907); Vandalia R.R. Co. v. Indiana, 207 U.S. 359, 367 (1907).

168. RICHARD F. WOLSON & PHILIP B. KURLAND, ROBERTSON & KIRKHAM: JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 198 (Richard F. Wolfson & Philip B. Kurland eds., rev. ed. 1951).

169. *Creswill*, 225 U.S. at 261. The three earlier cases in the sequence were *Kansas City Southern Railway Co. v. C.H. Albers Commission Co.*, 223 U.S. 573 (1912); *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U.S. 655 (1912); and *Washington v. Fairchild*, 224 U.S. 510 (1912). The Court used the doctrine readily in regulatory cases. *E.g.*, N.Y. & Queens Gas Co. v. McCall, 245 U.S. 345, 348-49 (1917); Norfolk & W. Ry. Co. v. West Virginia, 236 U.S. 605, 609-10 (1915).

170. *Creswill*, 225 U.S. at 261. The Court repeatedly reaffirmed the new power it claimed, even when reviewing state-court judgments that were entered on jury verdicts. *See* WOLSON & KURLAND, *supra* note 168, at 199, 202-05.

171. Although the Court employed a vigorous rhetoric, it reversed state-court decisions resting on state-law grounds relatively rarely. *See, e.g.*, Chi., Burlington & Quincy Ry. Co. v. Illinois, 200 U.S. 561, 595 (1906); Erie R.R. Co. v. Purdy, 185 U.S. 148, 154 (1902). Its reversals did not, of course, invariably favor corporate interests. *See, e.g.*, Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co., 205 U.S. 1, 8-9 (1907). On occasion they remedied instances of particularly egregious racial abuse. *See, e.g.*, Rogers v. Alabama, 192 U.S. 226, 231 (1904); Carter v. Texas, 177 U.S. 442, 447-48 (1900).

"general" constitutional principles to the Constitution.[172] Its appellate jurisdiction did not allow it to review non-federal issues, and as long as state-court decisions rested only on principles of "general" law—that is, "common law" issues that were controlled by "state" law—the Court had no jurisdiction to review them.[173] By transmuting "general" constitutional law into the law of the Constitution, the Court transformed issues of "general" law into authentically "federal" issues and hence brought them within its appellate jurisdiction. Thus, by reconceiving the sources of federal law, the Court in effect expanded its appellate jurisdiction and enabled it to review directly state-court decisions that involved any such issue.[174]

Thus, between approximately 1890 and 1917 the Court fundamentally reshaped the role and jurisdiction of the federal judiciary. It substantially widened the realm of national law that the federal courts controlled, expanded their equity and federal-question jurisdiction, strengthened their ability to check state regulatory actions, and reoriented them away from state-law claims and toward cases presenting federal-law issues. Further, it blocked state efforts to avoid the mandates of federal law or the jurisdiction and judgments of federal courts, and it guaranteed access to a federal forum for all parties asserting federal-law claims without regard for either their citizenship or their rights under state law. In that context, *Ex parte Young*'s significance emerges more clearly as but one integral part of a complex reorientation of the federal judicial system.

III. UNDERSTANDING *EX PARTE YOUNG*: A PIECE OF THE CONTINENT, A PART OF THE MAIN

Most broadly, and as a practical matter, *Ex parte Young* was important for one simple and well-understood reason: it opened the doors of the federal courts widely to suits seeking injunctions against state and local officials brought by plaintiffs claiming injury from governmental actions that allegedly violated federal law. It ensured that federal courts, not just state courts, could hear such suits, and that in turn ensured that the federal courts would play a paramount role in construing relevant federal law and guaranteeing that state and local officials complied with its mandates.[175] For plaintiffs, *Young* provided ready access to a highly preferred forum; for the federal courts, it provided a potentially sweeping supervisory power over the other levels and branches of government.

As a technical and doctrinal matter, *Young*'s significance was less clear and more diffuse. In fact, while it drew on and helped develop the law in at least eight different ways, none of its contributions was entirely new or wholly

172. *See, e.g.*, Collins, *Before* Lochner, *supra* note 100, at 1304-15 (discussing the jurisdictional shift from general common law to the Constitution).

173. *E.g.*, Pa. R.R. Co. v. Hughes, 191 U.S. 477, 485-86 (1903); United States v. Thompson, 93 U.S. 586, 588-89 (1876); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 616-21 (1875).

174. Collins, *Before* Lochner, *supra* note 100, at 1304-06.

175. The Court subsequently termed the decision "the fountainhead of federal injunctions against state prosecutions." Dombrowski v. Pfister, 380 U.S. 479, 483 (1965).

unprecedented.[176] In some areas it clarified the law and established principles with a new firmness; in others its salience was more indirect and uncertain. In all eight, however, it grew from and advanced the Court's transformation of the federal courts.

First, and most famously, *Young* articulated a ruthlessly effective theory for avoiding the Eleventh Amendment that became the Court's standard working rationale. Whenever a state official acts in violation of the Constitution, "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."[177] The actor was, in short, no longer an "official" but merely an "individual" and, hence, no longer within the protection of the Eleventh Amendment.[178]

Second, *Young* further limited the Eleventh Amendment by closing a loophole in its "stripping" theory. Edward T. Young, Minnesota's attorney general, had designed the state's rate statute carefully, insisting that it contain no provision imposing an enforcement duty on any specific state official.[179] He did so to bring the statute within the Court's ruling in *Fitts v. McGhee*,[180] an 1899 decision in which the Court dismissed a suit on Eleventh Amendment grounds.[181] *Fitts* had declared that an injunction would lie against state officials only when the officials were "specially charged with the execution of a state enactment" and took some otherwise wrongful action to enforce it.[182] There was, *Fitts* explained, "a wide difference" between, on the one hand, a suit where officials committed "some positive act" that constituted "a wrong or trespass" and, on the other hand, a suit against an officer who had no specific enforcement duty but sought only "to test the constitutionality of a state statute" through "formal judicial

176. A law review article summarizing the law in 1900, for example, stated the relevant rules in ways that were largely consistent with *Young* and its results, including use of identical language about officers being "stripped of their official character." Joseph Wheless, *Suits Against a State*, 34 AM. L. REV. 689, 707 (1900). Indeed, the Court itself had used the same "stripping" language in *Ayers*,123 U.S. at 507. Both *Ayers* (at 499-500) and the Wheless article (at 707) also emphasized, however, that relief was available only when state officials were "personally and individually liable" for wrongful acts and thus were "mere trespassers." On the requirement of a legal wrong, see *infra* text accompanying notes 188-194.

177. *Ex parte* Young, 209 U.S. 123, 160 (1908).

178. *Id.* In 1980, the Court stated that *Young* "decided that suits against state officials in federal courts are not barred by the Eleventh Amendment." Supreme Court of Va. v. Consumers Union of U.S., 446 U.S. 719, 737 (1980). It "clear[ed] the way for routine federal injunctions against threatened enforcement of state laws." DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 134 (1991).

179. RICHARD C. CORTNER, THE IRON HORSE AND THE CONSTITUTION: THE RAILROADS AND THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 144-45 (1993).

180. 172 U.S. 516 (1899). In his argument before the Court, Minnesota's attorney general maintained that the "Circuit Court was without jurisdiction under *Fitts v. McGhee*, 172 U.S. 516, which cannot be distinguished, and to sustain the suit in Minnesota, it must be shown that *Fitts v. McGhee* has been or should be overruled." *Young*, 209 U.S. at 138.

181. *Fitts*, 172 U.S. at 524.

182. *Id.* at 529.

proceedings in the courts of the State."[183] Officials taking the former course could be enjoined; those taking the latter could not.[184]

Discussing *Fitts* at length, *Young* distinguished it on the ground that the officials in the prior case had "no duty at all with regard to the act, and could not be properly made parties to the suit."[185] In contrast, *Young* explained, Minnesota's attorney general had a "general duty" under state law to enforce the rate statute, a duty that "sufficiently connected him with the duty of enforcement to make him a proper party."[186] More important, *Young* in effect overruled the apparent holding in *Fitts* that an injunction should not issue in the absence of an independent wrong or trespass and that the bare effort to enforce a law by bringing a single test action was not, by itself, a wrong sufficient to support a federal equity suit.[187]

Third, *Young* implied a federal cause of action directly under the Fourteenth Amendment.[188] The fact that the attorney general had committed no common-law trespass meant that he had committed no independent legal wrong capable of supporting a traditional common-law action.[189] The only possible wrong he had committed, then, was his attempt to enforce through a state judicial proceeding a statute alleged to be unconstitutional.[190] That attempt, *Young* held, was the equivalent of a traditional common-law wrong and was, therefore, sufficient by itself to support a cause of action.[191] Thus, *Young* dispensed with the requirement of a common-law trespass or other independent legal wrong that had traditionally been necessary to support a cause of action against a government official.[192] It made the bare attempt to enforce an unconstitutional act through a lawful and non-trespassory judicial proceeding sufficient to support plaintiff's

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183. *Id.* at 529-30.

184. *Id.* at 530.

185. *Ex parte* Young, 209 U.S. 123, 158 (1908).

186. *Id.* at 161.

187. *See, e.g., id.* at 158-59 (noting that "[a]n injunction to prevent [a state officer] from doing that which he has no legal right to do is not an interference with the discretion of [that officer]").

188. While *Young* altered the law in discarding the requirement of an independent legal wrong, it did not initiate the practice of implying private rights of action from the Constitution. The Court had previously done so, allowing both injunctive relief and suits for damages as remedies for constitutional violations. *See, e.g.*, Collins, *Economic Rights*, *supra* note 100, at 1517-25; Woolhandler, *supra* note 11, at 448-49.

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

190. *Id.* at 158.

191. The Court seemed, in effect, to overrule *In re* Ayers, 123 U.S. 443 (1887), which held that the mere threat of a single lawsuit seeking to enforce a statute did not justify the intervention of federal equity. *Id.* at 506-07. *See also* Woolhandler & Collins, *State Standing*, *supra* note 100, at 460 n.283.

192. *See, e.g.*, Fitts v. McGee, 172 U.S. 516, 529 (1899); *In re* Tyler, 149 U.S. 164, 190 (1893); Pennoyer v. McConnaughy, 140 U.S. 1, 10 (1891). For discussions of the traditional requirements, see generally CURRIE, *supra* note 5, at 50-54; Collins, *Economic Rights*, *supra* note 100, at 1511-17. On the complexity of nineteenth-century law dealing with suits against state officers and the ways in which the law evolved prior to *Young*, see Woolhandler, *supra* note 11, at 432-44.

suit.[193] Consequently, it made the claim of an alleged constitutional violation, by itself, the basis of plaintiff's right of action.[194]

Fourth, by recognizing a cause of action under the Fourteenth Amendment, *Young* provided an automatic basis for the federal courts to assert subject-matter jurisdiction over constitutional challenges to state actions[195] and to avoid the bar

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193. *Young*, 209 U.S. at 156-58. "The threat to commence those suits under such circumstances was therefore necessarily held to be equivalent to any other threatened wrong or injury to the property of plaintiff which had theretofore been held sufficient to authorize the suit against the officer." *Id.* at 158. *See also* Woolhandler, *supra* note 11, at 441-42.

194. The Court made its doctrinal move painfully explicit when it attempted to root its reasoning in precedent.

> [J]urisdiction of this general character has, in fact, been exercised by Federal courts from the time of *Osborn v. United States Bank* [22 U.S. (9 Wheat.) 738 (1824)] up to the present: the only difference in regard to the case of *Osborn* and the case in hand being that in this case the injury complained of is the threatened commitment of suits, civil or criminal, to enforce the act, instead of, as in the *Osborn case* [sic], an actual and direct trespass upon or interference with tangible property.

Young, 209 U.S. at 167. The Court then signaled its innovation, as courts often do, by explicitly denying it.

> A bill filed to prevent the commencement of suits to enforce an unconstitutional act, under the circumstances already mentioned, is *no new invention*, as we have already seen. The difference between an actual and direct interference with tangible property and the enjoining of state officers from enforcing an unconstitutional act, is *not of a radical nature*, and does not extend, in truth, the jurisdiction of the courts over the subject matter.

Id. (emphasis added). To cap its effort, the Court repeated its equation of an actual trespass with the initiation of an enforcement action, asserted that the "sovereignty of the State is, in reality, no more involved in one case than in the other," and denied that the Eleventh Amendment protected a state in either case. *Id.* Then, stretching for the cover of precedent once again, it cited as authority for that last assertion—of all cases—*In re Ayers*. *Id.* *Ayers* was not only one of the pillars of the post-Reconstruction effort to broaden the Eleventh Amendment and limit the jurisdiction of the federal courts, but it was also a case that *Young* was in the process of effectively overruling. Finding an action against state officials barred by the Eleventh Amendment, *Ayers* had also identified *Osborn* as recognizing the traditional basis on which a court could issue an injunction against state officials—the commission of a common law tort:

> There is nothing, therefore, in the judgment in that cause [*Osborn*], as finally determined, which extends its authority beyond the prevention and restraint of *the specific act done in pursuance* of the unconstitutional statute of Ohio, and in violation of the act of Congress chartering the bank, which consisted of *the unlawful seizure and detention of its property.* It was conceded throughout the case, in the argument at the bar and in the opinion of the court, that an action at law would lie, either of trespass or detinue, against the defendants *as individual trespassers guilty of a wrong in taking the property of the complainant illegally.*

Ayers, 123 U.S. at 499 (emphasis added). *See also* Woolhandler & Collins, *State Standing*, *supra* note 100, at 460-62.

195. There was no basis for invoking diversity jurisdiction in the underlying federal suit challenging the state statute, and the Court specifically found several federal questions sufficient to support the lower court's general federal-question jurisdiction. *Ex parte* Young, 209 U.S. 123, 143-45 (1908).

of the well-pleaded-complaint rule.[196] The latter rule limited federal-question jurisdiction to actions in which a sufficient federal-law issue appeared on the face of a properly pleaded complaint as a necessary element of plaintiff's cause of action.[197] Prior to *Young*, plaintiffs suing government officials had to plead a common-law cause of action and resorted to the Constitution only in reply to negate an official's defense of lawful authority.[198] Such a responsive invocation of federal law did not satisfy the well-pleaded-complaint rule, and hence prior to *Young* such actions did not come within general federal-question jurisdiction.[199] By establishing a specifically federal cause of action, however, *Young* in effect required plaintiffs to plead the constitutional violation in their complaint and thereby brought their claims within the well-pleaded-complaint rule and, consequently, within general federal-question jurisdiction.[200]

Fifth, *Young* broadened the federal courts' ability to enjoin state criminal prosecutions. Acknowledging as a general matter that "equity has no jurisdiction to enjoin criminal proceedings," the Court hastily added that "there are exceptions."[201] When a criminal prosecution was "brought to enforce an alleged unconstitutional statute," and the statute was challenged "in a suit already pending in a Federal court," the court could properly enjoin the appropriate party—"even though a state official"—from continuing the criminal prosecution until the federal equity court had disposed of the case before it.[202] Such injunctive relief was particularly appropriate, *Young* added, citing *Smyth v. Ames* among other cases, "'where property rights will [otherwise] be destroyed.'"[203]

Sixth, *Young* advanced a line of reasoning that anticipated, and likely helped inspire, the doctrine of "unconstitutional conditions" that the Court began to articulate two years later.[204] If states imposed "conditions" on a legal right that were "so onerous and impractical" that they essentially negated that right, *Young* stated, such oppressive conditions could be unconstitutional.[205] The Minnesota

196. *See* Tennessee v. Union & Planters Bank, 152 U.S. 454, 461 (1894); Metcalf v. Watertown, 128 U.S. 586, 589 (1888); Donald L. Doernberg, *There's No Reason For It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 601-07, 611-26 (1987); Hill, *Constitutional Remedies, supra* note 5, at 1128-36.

197. Hill, *supra* note 5, at 1128.

198. *Id.*

199. In terms of the well-pleaded-complaint rule, there is reason to question the extent of *Young*'s impact in equity suits as opposed to actions at law. In equity, pleading rules were more flexible and required plaintiff to provide a more complete account of the underlying dispute, and federal equity courts sometimes required plaintiffs to identify anticipated defenses and the nature of their proposed reply in their complaints. Collins, *Economic Right, supra* note 100, at 1514-17; Hill, *supra* note 5, at 1128-36.

200. "The question that arises 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." *Young*, 209 U.S. at 149.

201. *Ex parte* Young, 209 U.S. 123, 161 (1908).

202. *Id.* at 161-63.

203. *Id.* at 162 (quoting Dobbins v. Los Angeles, 195 U.S. 223, 239, 241 (1904)).

204. *See* HENDERSON, *supra* note 60, ch. 8; Hale, *supra* note 60, at 335-41.

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

rate statute "indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief" that parties would prefer to abandon the right "rather than face the conditions upon which it is offered or may be obtained."[206] Its "penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation."[207] The statute was, therefore, unconstitutional.[208] Thus, *Young*'s reasoning foreshadowed, and likely helped spur, the Court's development of general "unconstitutional conditions" doctrine between 1910 and 1916.

Seventh, *Young* broadened the reach of federal equity by narrowing the concept of an "adequate remedy at law."[209] Ordinarily, a party's ability to challenge a statute in an enforcement proceeding would constitute an adequate remedy at law, but the statute's severe sanctions—which the Court ruled "unconstitutional on their face"—made it unlikely that the railroads in *Young* would dare to violate it.[210] Thus, the opportunity to defend against a prosecution did not provide the railroads with an adequate remedy at law. More compelling, federal equity jurisdiction was also arguably lacking because the railroads could have challenged the rate law without violating it by appearing in the state-court mandamus proceeding that the attorney general had initiated.[211] The Court, however, was hardly satisfied with that. It denied the adequacy of such a remedy by citing a series of reasons why defending such an action would pose practical risks and dangers, including the contention that a jury "could not intelligently pass upon" matters in such a "complicated" rate-making case.[212] The Court simply ignored the fact that the attorney general's mandamus action in state court provided an immediate legal remedy that would minimize or eliminate most of the practical dangers—other than the constitutionally dubious "danger" of appearing in a state court and facing a jury—that it identified.[213] Equally

206. *Id.*

207. *Id.*

208. *Id.*

209. Here, again, *Young* was not unprecedented. The Court "in a series of cases decided since *Ayers* had already allowed suits against officers who had done nothing more than threaten suit under statutes attacked as unconstitutional." Those cases, however, represented "essentially unreasoned departures" from *Ayers*, and *Young* rationalized them by analogizing the threats as equivalent to trespasses. David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 154.

210. *Ex parte* Young, 209 U.S. 123, 148 (1908).

211. *Id.* at 133-34.

212. *Id.* at 163-65. "All the objections to a remedy at law as being plainly inadequate are obviated by a suit in equity." *Id.* at 165.

213. The Court emphasized that the severity of the penalties the statute imposed could easily dissuade anyone from daring to violate it in order to test it judicially, *id.* at 163-65, but Young's mandamus action largely obviated such dangers. Indeed, the state's attorney general was obviously making a serious effort to bring the statute to a judicial test. Thus, the real issue presented was not whether there would be a quick judicial resolution but, rather, whether a federal or a state court would decide the issue and whether a jury would be involved in making the decision. The Court seemingly sought to obscure the crucial battle over forum control that lay at the heart of the litigation by a sweeping statement that seemed irrelevant, if not disingenuous. "The courts having

important, by stressing the dangers and infirmities of a jury in a ratemaking case, the Court encouraged corporate plaintiffs to seek relief in federal equity courts where they could avoid juries and, further, provided the lower federal courts with a new and pliable ground on which to grant their wishes.

Finally, *Young*'s analysis of the unconstitutional conditions that the Minnesota statute imposed carried two potentially far-reaching implications: one was that parties had a "right" of access to a judicial forum to challenge a state's allegedly wrongful actions; the other was that the Due Process Clause limited the power of the states to deny aggrieved parties access to such a forum.[214] The Court neither explained the nature and scope of such a right of access nor identified the extent of due-process protection, but its reasoning suggested the fundamental principle that the Constitution required some relatively unfettered access to a judicial forum—possibly even to a federal court—to challenge government impositions. That principle would resonate through the subsequent history of American constitutional law, never fully and finally accepted by the Court but persistently inspiring efforts to ensure the availability of effective judicial protections against governmental wrongdoing.[215]

Thus, *Young* carried forward the Court's transformation of the federal courts on a wide front. It clarified and solidified critical doctrines that served to expand the role of the federal courts in protecting federal rights and controlling the actions of the other levels and branches of government, especially those of the states. It was a flower of that broad transformation, and its meaning and significance are most fully and accurately understood only in that context.

Young's key role in the transformation was apparent, too, in the defensive note the Court struck at the opinion's conclusion. "There is nothing in the case before us," it declared, "that ought properly to breed hostility to the customary operation of Federal courts of justice in cases of this character."[216] Although the statement was striking in its express admission of *Young*'s controversial social import, it was more revealing in its implicit admission of *Young*'s pivotal legal significance. Earlier in its opinion, the Court had sought to justify its decision by invoking a broad principle: "The courts having jurisdiction, Federal or state, should at all times be open" to those seeking to protect "their property and their legal rights."[217] The Court's concluding caution that a "customary operation" should not "breed hostility," however, did not repeat the earlier reference to all courts, "Federal or state." Rather, it referred only to the former. While *Young* could be justified in theory as securing a right of access to courts generally, in other words, the decision was—as a matter of historical fact—only about

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jurisdiction, *Federal or state*, should at all times be open" to those seeking to protect "their property and their legal rights." *Id.* at 165 (emphasis added).

214. *Id.* at 181.

215. Compare, for example, the majority opinion in *Webster v. Doe*, 486 U.S. 592, 599-600 (1988) (suggesting a constitutional dimension to the question whether complainant had a right to bring his claim of government wrongdoing to a federal court) with Justice Scalia's dissent, *id.* at 606-21 (denying a general constitutional right to a judicial forum, especially to a federal forum).

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

217. *Id.* at 165.

securing access to a federal court. That was a central goal of the transformation, and the justices who decided *Young* and shaped the transformation understood and embraced that goal full well.[218]

IV. CONCLUSION: *YOUNG* AND SOME LESSONS OF THE TRANSFORMATION

Considering *Ex parte Young* in the transformation's context suggests several conclusions. Perhaps most obvious, it shows that "Progressives" and their like were hardly the primary, let alone sole, force driving the processes of nationalization and centralization that remade American law, government, and society in the decades around the turn of the century.[219] Rather, it was for the most part national business groups, the anti-Progressive wing of the Republican Party, and an emerging nationally oriented social and economic class that nourished the national market, structured the new centralizing corporate economy, and pressed for the efficiencies and protections they saw in uniform national law.[220] In the process, they supported the expansion of both federal law and the enforcement capabilities of the national courts.

Recognizing the nature of the transformation also shows that the enduring achievement of the turn-of-the-century Court was not political or economic but institutional. Above all, it expanded the scope and content of federal law, strengthened the ability of the federal courts to enforce that law, and established more firmly the primacy of the federal judiciary in authoritatively construing a supreme national law. It did not so much impose broad or severe limits on legislative power as it expanded the federal judiciary's ability to regularly supervise and, when necessary, check specific exercises of that power, especially

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218. In dissent, Harlan made the significance of the Court's ruling inescapable when he pointed to the alternative principle that *Young* rejected: "Surely, the right of a State to invoke the jurisdiction of its own courts is not less than the right of individuals to invoke the jurisdiction of a Federal court." *Ex parte* Young, 209 U.S. 123, 182 (1908) (Harlan, J., dissenting).

219. *Contra, e.g.*, RICHARD EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006). Historians and political scientists have demonstrated that the processes of nationalization and centralization had roots deep in the nineteenth century antedating both Progressivism and the New Deal. *See, e.g.*, RICHARD FRANKLIN BENSEL, YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859-1877 (1990); MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA (1977); CHARLES G. SELLERS, JR., THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815-1846 (1991); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1992); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 (1982); William E. Forbath, *Politics, State-Building, and the Courts, 1870-1920*, *in* 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 634-96 (Michael Grossberg & Christopher Tomlins eds., 2008).

220. The judiciary acted "largely in response to national-class needs." ROBERT H. WIEBE, SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY 148 (1995). Examining the attitudes of the Justices, Morton J. Horwitz distinguished between "old" conservatives who were suspicious of the new corporate economy and committed to maintaining governmental decentralization, and "new" conservatives who welcomed the new corporate economy and the legal nationalization that followed. HORWITZ, *supra* note 137, at chs. 1 & 3. The achievement of the turn-of-the-century Court was largely to institutionalize the attitudes of the "new" conservatives.

by the states.[221] Thus, the turn-of-the-century Court strengthened the role of the federal judiciary in American government and shifted power along both of the Constitution's structural axes: on one, from the states to the nation and, on the other, from all the levels and branches of government to the federal judiciary.[222]

More broadly, the transformation illustrated the dynamic and rebalancing nature of the American constitutional structure.[223] Massive social and economic changes across the nation and world radically altered the most basic conditions of life, demanding responses from all governmental institutions as well as a new activism on the part of the federal government.[224] Those social changes and governmental responses brought the increasing nationalization and centralization of law, and that development in turn generated new demands for a national check

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221. By one count, between 1874 and 1898 the Court struck down a total of 12 federal and 125 state statutes, and between 1898 and 1937 it voided approximately 50 federal and more than 400 state statutes. ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 511 (5th ed. 1976). By other counts, between 1887 and 1911 the Court used the Fourteenth Amendment and the Commerce and Contract Clauses to strike down state laws in 73 cases (out of a total of 862 cases reviewing state laws), and between 1890 and 1919 it voided federal laws in 23 cases (out of a total of 158 cases reviewing federal laws). Whittington, *supra* note 40, at 830-32. Two conclusions are clear. One is that the Court allowed the overwhelming number of both state and federal statutes to stand, and the other is that it did impose some significant limitations on Congress and, especially, the states. Based on those counts, after 1890 the Court voided an average of approximately one federal law and something between four and ten state laws every year. Some of the invalidations involved broad social and economic issues of high political visibility, and many in effect negated similar laws in other states that were not technically before the Court and helped block passage of yet other measures proposed or under active legislative consideration. For another discussion of the issue, see Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 Y.B. SUP. CT. HIST. SOC'Y 53.

222. PURCELL, *supra* note 27, at 39-40. Professor Woolhandler argued that *Young* and the availability of general federal-question jurisdiction "did not fundamentally alter the role of the federal courts so much as they gradually changed the labels under which litigants continued to do what they had done in the past." Woolhandler, *Common Law Origins*, *supra* note 100, at 81. Somewhat similarly, Professor John Harrison contended that *Young* created "no exception, no fiction, no new cause of action, and no paradox" and represented the simple exercise of "a standard tool of equity." John Harrison, Ex parte Young, 60 STAN. L. REV. 989, 990 (2008). In emphasizing, respectively, a shift in "labels" and the continuity of doctrines, both scholars obscured *Young*'s primary historical significance, its integral role in the transformation of the federal courts. The turn-of-the-century Court changed the scope and substance of federal law, expanded the power of Congress and the president, and altered fundamental ideas about the federal judicial power. It altered the jurisdiction of the U.S. Supreme Court, the role and jurisdiction of the lower federal courts, and the relationship between the federal courts and the other levels and branches of government, especially the state courts. Further, it changed the tactics of litigants, the social patterns of public and private litigation, and the practical impact that national law and the federal courts had on the operations of the American legal and political system. *Young* was a key element in those changes. Thus, *Young* did far more than merely change labels, and its alleged doctrinal consistency evidenced not the true historical significance of the case but the pliability of legal reasoning and the subtle and often disguised means through which the law remakes itself over time.

223. EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY chs. 7 & 10 (2007).

224. *See* FREYER, *supra* note 26, at 99-114; Gillman, *supra* note 26, at 512-19; McCurdy, *supra* note 26, at 648-49.

on government actions of all kinds. Between 1890 and 1917 the Supreme Court responded to those complex changes and the demands they placed on the institutions of American government by developing a responsive national law and laying the foundations for a broadened judicial power capable of challenging, channeling, and checking the other increasingly active and intrusive institutions of government.

Young and the transformation of the federal courts immediately provoked critics and inspired defenders, and they have continued to do so ever since.[225] Though many of the arguments for and against both have remained the same, the values and purposes that the arguments served have repeatedly shifted with the times. The changing views of *Young* and the transformation reveal the extent to which readapting and realigning branch affinities—the political and ideological biases that different groups have toward the various levels and branches of government—shaped conflicting interpretations of the basic principles of American law, especially those involving the fundamental but imprecise and evolving concepts of federalism and separation of powers.[226] Thus, *Young* and the transformation—and the evolving ways in which later generations have interpreted them—cannot be fully understood without an appreciation of the dynamics of constitutional interpretation and the powerful role that conflicting and shifting branch affinities play. Indeed, an understanding of those dynamics demonstrates the ultimate flaw that threatens all prescriptive theories of American constitutional government that attempt to portray its complex operations as timeless and specifically determined: life changes, and the nature and scope of the power that appeared desirable in one level or branch of government at one time and with some purposes and conditions in mind comes to seem no longer desirable at a later time with other conditions and purposes in mind. Such life changes often seem to require the rebalancing of the levels and branches of government and the shackling or elimination of some checks or the expansion and development of others. Accordingly, while the branch affinities and consequent constitutional theories of each generation's partisans may be relatively stable, those of later generations are commonly different. Famously, *Young* was an oppressive barrier to Progressives but a magic key for the Civil Rights Movement.[227]

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225. *E.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); LOUIS BOUDIN, GOVERNMENT BY JUDICIARY (1932); FISS, *supra* note 10; GILBERT ROE, OUR JUDICIAL OLIGARCHY (1912); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). In the late twentieth and early twenty-first century, much of the disagreement over *Young*'s significance focused on whether it could and should be used to support broad "structural" injunctions intended to change the operations of governmental institutions. *Compare, e.g.*, Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Reform Litigation*, 93 HARV. L. REV. 465 (1980), *with* SANDLER & SCHOENBROD, *supra* note 23, at ch. 4.

226. PURCELL, *supra* note 223, at 6-8.

227. "Ironically, *Ex Parte Young* [sic], the *bete noire* of liberals in the writer's law school days, has become 'the fountainhead' of federal power to enforce the Civil Rights Act." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 2 n.7 (1973). *See* Solimine, *supra* note 7, for a similar example of the changing social significance of a judicial institution.

Those considerations suggest, in turn, that the most illuminating service that legal history can provide is not primarily the examination of doctrines and principles but the study of the relationship of those doctrines and principles to the values, purposes, practices, social interests, institutional considerations, competing ideological formations, and contemporaneous and anticipated consequences that inspire and shape them.[228] As the contrasting opinions of Justices Peckham and Harlan illustrated, *Young* can be shown as a doctrinal matter to be either highly traditional or quite radical. Indeed, even when *Young* is accepted as rooted in precedent, its doctrinal language can be used to support either a broad or a narrow conception of federal judicial power.[229] Thus, though surely important, doctrine itself seems ultimately a highly dependent element of the law. When legal historians focus on it too tightly or exclusively, they miss much, if not most, of the significance of cases and much, if not most, of the legal system's operations.[230]

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228. *Cf.* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1945, 1066-83 (2001) (outlining a positive theory explaining the way social, political, and institutional processes change constitutional meanings).

229. Compare, for example, the interpretations of Professors Woolhandler and Harrison. Both stress *Young*'s continuity with the past and minimize the extent to which it changed the law. Professor Woolhandler concluded that her findings show "a historically settled consensus that the federal courts should administer a federalized set of rights and remedies for federal constitutional rights" and thus supports "the legitimacy of 'activist' Supreme Courts' expanding the use of federal question jurisdiction and [section] 1983." Woolhandler, *Common Law Origins*, *supra* note 100, at 81. Professor Harrison also sees *Young* in minimalist terms, as little more than an ordinary example of the long-established "anti-suit injunction." In contrast to Woolhandler, however, he concluded that "*Young* itself does not imply constitutional duties, claim-rights, or causes of action" and, consequently, that it provides no support for an active federal judiciary or for any authority to imply private rights of action for constitutional violations. Harrison, *supra* note 222, at 1021.

230. The debate over "*Lochner* revisionism" illustrates many of the same points. Progressives were scathing in their indictments of *Lochner* and insisted that it made a radical break with traditional principles. When "substantive due process" took on a different social and political significance later in the twentieth century, however, many of their liberal descendants began to view the case anew and discovered *Lochner*'s roots in traditional values, ideas, and doctrines. *See, e.g.*, Jack M. Balkin, *'Wrong the Day It Was Decided':* Lochner *and Constitutional Historicism*," 85 B.U. L. REV. 677 (2005); Gary D. Rowe, Lochner *Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221 (1999); Stephen A. Siegel, *The Revision Thickens*, 20 LAW & HIST. REV. 631 (2002). The practical truth is that *Lochner*'s meaning depends in large part on what changing historical contexts inspire different commentators to try to do with it, and over time most interpretations reflect those contextual changes and the commentators' ideological convictions. *Compare, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 98-112 (1992) (arguing that the "libertarian framework" of *Lochner* would invalidate racial segregation laws), *with* Karlan, *supra* note 14, at 794-809 (showing that *Lochner*'s sweeping and abstract principles were, in fact, ignored when racial discrimination cases came to the Court).