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Plus Ca Change . . . or If Hard Cases Make Bad Law, What Do Bad Cases Make?

Suzanna Sherry

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IF HARD CASES MAKE BAD LAW, WHAT DO BAD CASES MAKE?

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

Mr. Justice HARLAN delivered the opinion of the Court:

In this case, the court below issued an order enjoining Edward T. Young, the Attorney General of Minnesota, from enforcing certain state laws and regulations pertaining to railroad rates, on the ground that said laws were unconstitutional. When the Attorney General refused to comply, the court below held him in contempt. He thereupon brought a petition for a writ of habeas corpus, alleging that the court below lacked jurisdiction over the suit and thus could not properly issue the injunction. . . .

Petitioner's objection is that the suit is, in effect, one against the state of Minnesota, and that the injunction issued against the attorney general illegally prohibits state action, either criminal or civil, to enforce obedience to the statutes of the state. This objection is to be considered with reference to the Eleventh Amendment to the Federal Constitution. The Eleventh Amendment prohibits the commencement or prosecution of any suit against one of the United States by citizens of another state or citizens or subjects of any foreign state.

It is argued that if the act to be enforced is unconstitutional, then the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is further argued that as the act which the state attorney general seeks to enforce is a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior

* Earl R. Larson Professor of Law, University of Minnesota. All cases are real, raising the issues identified. Most of the language also came from the cases, although not necessarily from the majority opinion.

authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

While the preceding arguments are a clever attempt to surmount the obstacles posed by the 11th Amendment, we do not find them persuasive. Let it be observed that the federal suit was, as to the defendant Young, one against him as, and only because he was, attorney general of Minnesota. No relief was sought against him individually, but only in his capacity as attorney general. And the manifest, indeed the avowed and admitted, object of seeking such relief, was to tie the hands of the state so that it could not in any manner or by any mode of proceeding, in its own courts, test the validity of the statutes and orders in question. It would therefore seem clear that within the true meaning of the 11th Amendment the suit brought in the Federal court was one, in legal effect, against the state,—as much so as if the state had been formally named on the record as a party,—and therefore it was a suit to which, under the Amendment, so far as the state or its attorney general was concerned, the judicial power of the United States did not and could not extend. . . .

The intangible thing called a state, however extensive its powers, can never appear or be represented or known in any court in a litigated case, except by and through its officers. When, therefore, the Federal court forbade the defendant Young, as attorney general of Minnesota, from taking any action, suit, step, or proceeding whatever looking to the enforcement of the statutes in question, it in effect acted upon the state of Minnesota.

In exercising jurisdiction and issuing the injunction, the court below attached too little consequence to the fact that the courts of the states are under an obligation equally strong with that resting upon the courts of the Union to respect and enforce the provisions of the Federal Constitution as the supreme law of the land, and to guard rights secured or guaranteed by that instrument. We must assume—a decent respect for the states requires us to assume—that the state courts will enforce every right secured by the Constitution. . . .

The writ is granted and the contempt and injunction orders are vacated.

Excerpts from the New York Times, December 7, 1918

The Supreme Court is hearing its "laissez-faire capitalism" cases again. For the past several years, the Court's docket has been full of appeals from state court criminal convictions. These cases are not the usual thugs and scoundrels, however. These are captains of industry, and they and the companies they steer have been fined (or occasionally jailed) for violating state laws regulating every aspect of economic life, from wages and hours to prices and rates.

The Supreme Court usually strikes down such economic regulation under the Due Process Clause of the Fourteenth Amendment, overturning the conviction. But corporate leaders complain that during the long trip through the state courts, they are losing money each day that the regulation remains in effect. Moreover, occasionally the Supreme Court upholds the state law, as it did in an Oregon case earlier this year, leaving the conviction in place.

Uncomfortable with both the costs and the risks, financiers have begun to pressure Congress for relief. They are seeking a method of testing the constitutionality of state statutes without having to run the gauntlet of the state criminal justice system. Knowledgeable sources suggest that as the Court's refusal to allow federal courts to act in advance of a criminal prosecution rests on a constitutional base, only a constitutional amendment will remedy the problem.

Excerpts from the New York Times, April 1, 1921

Less than a year after the ratification of the most recent amendment to the Constitution, Congress is proposing yet another revision of our governing document. Congress yesterday voted to send to the states for ratification the judiciary amendment long sought by many in business and industry. Designed to allow the federal courts to rule on the constitutionality of state laws in advance of a criminal prosecution, it will become the twentieth amendment to the Constitution if it is ratified.

The text of the proposed amendment reads: "Notwithstanding any other provision of this Constitution, the judicial power of the United States shall extend to all cases, in law or equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, including suits brought against one of the United States or its agents or officers."

Excerpts from *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929)

Mr. Justice SUTHERLAND delivered the opinion of the Court:

Appellees are corporations in the business of selling gasoline in the state of Tennessee. That state recently enacted a law limiting the prices that may be charged for gasoline at both the wholesale and retail levels: . . . Appellees brought separate suits in the court below to enjoin the state officers named as appellants from carrying out their intention to enforce the act and institute criminal proceedings for violations of it against appellees, . . . and to have the act declared unconstitutional and void.

We conclude that the court below properly exercised jurisdiction, and that the state law violates the Fourteenth Amendment to the United States Constitution. We therefore affirm the issuance of the injunction. . . .

Until two years ago, federal courts did not have jurisdiction over suits such as this one, seeking to enjoin state officers from implementing allegedly unconstitutional laws. See *Ex parte Young*, 209 U.S. 123 (1908). But jurisdiction is now undeniably proper in light of the newly ratified Twentieth Amendment to the Constitution. . . .

Excerpts from *Texas Dep't of Highways and Public Transp. v. Welch*, 483 U.S. 468 (1987)

Mr. Justice SCALIA delivered the opinion of the Court:

The Texas Department of Highways and Public Transportation operates a free automobile and passenger ferry between Point Bolivar and Galveston, Texas. Petitioner Jean Welch, an employee of the State Highway Department, was injured while working on the ferry dock at Galveston. Relying on § 33 of the Jones Act, 46 U.S.C. § 688, she filed suit in the Federal District Court for the Southern District of Texas against the Highway Department and the State of Texas. . . .

This is a case of first impression, raising important constitutional questions. Until this case, no federal court had been asked to entertain a suit seeking monetary relief from a state or its agents or officers. After the Twentieth Amendment reversed this Court's holding in *Ex parte Young*, 209 U.S. 123 (1908), federal courts routinely enjoined states and their officers from enforcing unconstitutional laws. But this is the first time that a

plaintiff has sought not injunctive or a declaratory relief, but monetary compensation from the state coffers.

While the Twentieth Amendment on its face appears to authorize federal jurisdiction over "all cases" raising federal questions, such an interpretation would conflict with the underlying scheme of federalism adopted by the Constitution and unaltered by the Twentieth Amendment.

When the Constitution was drafted and adopted, it was not expected to change the states' previously existing immunity from monetary suits....

Nor did the adoption of the Twentieth Amendment abrogate the states' pre-existing sovereign immunity. The only thing the Twentieth Amendment accomplished was to correct the mistaken view of this Court in *Ex parte Young*, that a suit to enjoin an unconstitutional act by a state officer was equivalent to a suit against the state itself. An officer who is acting unconstitutionally, the Twentieth Amendment makes clear, is not acting on behalf of his state, and thus he may be enjoined by a federal court.

This case raises an entirely different question: whether a suit that seeks compensation to be paid from the state treasury is a suit against a state. We have no doubt that it is, and thus that it is barred by common law state sovereign immunity (unchanged by the Constitution) and by the interpretation of the Eleventh Amendment reached by this Court almost a century ago in *Hans v. Louisiana*, 134 U.S. 1 (1890). The Twentieth Amendment was not designed, and should not be lightly interpreted, to abolish that immunity. It establishes only that federal courts may grant injunctive and declaratory relief against states and their officers....

Respondent's suit must be dismissed for lack of jurisdiction.