2008

Expatriation

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time the federal suit was initiated. Accordingly, the Court concluded that the civil suit was not foreclosed as a disruptive and premature venture into federal court.

Second, the Court recognized that the Constitution made the State of Minnesota immune from suits by private individuals. The shareholder suit was plainly barred, accordingly, if it was understood to be an attempt to hold the state itself responsible. The Supreme Court explained, however, that since the shareholders had not identified Minnesota as the defendant, but had named only the attorney general, their suit was not against the state itself and thus was not subject to the state's sovereign immunity. This second aspect of *Ex parte Young* is often called a *fiction*—form over substance. The shareholders had no quarrel with the attorney general personally. They sued him only because he was the official responsible for enforcing the statute to which the shareholders objected, and they wanted an injunction to keep him from doing what he regarded as his official duty to enforce the statute on the state's behalf. Nevertheless, the Supreme Court held that the attorney general could not assert the state's immunity to defeat the shareholder suit.

The decision in *Ex parte Young* was a product of its times. Early in the twentieth century, the Supreme Court often used the due process clause of the Fourteenth Amendment as a basis for invalidating state regulations of economic activity. To advance that agenda, it was helpful (if not essential) to open the federal courts to civil lawsuits by business interests. Thus *Ex parte Young* was part of a larger story that included cases like *Lochner v. New York*, 198 U.S. 145 (1905), in which the Court invalidated state labor legislation. Decisions like *Lochner* are now largely disparaged as illustrations of a Supreme Court bent on resisting modern social welfare programs. Yet the procedural framework that *Ex parte Young* established in the economic context supports federal lawsuits in a wide range of extraordinarily important fields. For example, individuals who are threatened with criminal charges for expressing unpopular views can bring federal civil actions against responsible state officials and head off criminal prosecution in state court. Even more important, a state's sovereign immunity cannot be set up to defeat federal suits advancing federal constitutional rights—as long as individuals are careful to name only a state officer as the defendant, not the state itself. Accordingly, individuals are able to address unconstitutional actions by the states indirectly by suing one of the state's agents.

SEE ALSO *Federal Jurisdiction; State Sovereign Immunity*

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Larry Yackle

EXPATRIATION

Expatriation is the act of forsaking one's status of citizenship and with it one's duty of allegiance to the state. At the time of the American Revolution (1775–1783), the prevailing legal view was that birth, not choice, determined citizenship and allegiance. Treaties marking the end of the revolution validated the decisions of colonists to opt out of British citizenship by birth in favor of citizenship by choice in the new republic, but this acceptance of expatriation by force of arms worked only retrospectively. The right of Americans to shift their allegiance elsewhere early ran afoul of a strong national interest in preserving U.S. neutrality. During the wars between France and England that spanned the turn of the nineteenth century, Americans were prohibited from taking up arms for either side. When the Connecticut-born commander of a French privateer raised expatriation as a defense to his prosecution in *United States v. Williams,* 29 F. Cas. 1330 (C.C.D. Ct. 1799) (No. 17, 708), Chief Justice Oliver Ellsworth opined in the circuit court that U.S. law followed the common law in not recognizing expatriation without the consent of the sovereign. Other federal courts agreed and the Supreme Court, after skirting the issue in several cases, eventually concurred in *Shanks v. Dupont*, 28 U.S. 242 (1830). Meanwhile, among the grievances that led to war in 1812 had been the Royal Navy's practice of conscripting from U.S. vessels at sea those seamen born subjects of the British Crown, without regard for their status as naturalized citizens of the United States. Other revolutions in the Americas soon spread and accentuated the problem of substituted allegiances. By the middle of the nineteenth century, various bilateral agreements between the old world and the new provided for reciprocal recognition of the personal decisions of emigrants to change citizenship and transfer allegiance. Notable among American expatriates are the author Henry James (1843–1916) and the entertainer Josephine Baker (1906–1975).

Where states had once resisted expatriation, they grew increasingly disposed to strip citizenship in retaliation for conduct deemed disloyal. The Constitution of the United States assigns to Congress in Article I, Section 8, clause 3 the power to create a domestic process of naturalization, that is, for recognizing new citizens by choice. By the close of the Civil War (1861–1865), Congress had presumed a concomitant power to recognize, and thus to regulate,

expatriation. In the Act of March 3, 1865, Congress declared desertion and draft evasion to be acts of expatriation. This was the first law in which Congress, while paying lip service to expatriation as a personal right to choose, nevertheless insisted on imputing it from acts more or less ambiguous about allegiance.

Other such laws followed into the next century, among them the Expatriation Act of 1907, in which Congress equated naturalization in a foreign state and taking a foreign oath of allegiance with expatriation. The same act of Congress declared that a woman's marriage to a foreigner cost her citizenship in the United States. In *Mackenzie v. Hare*, 239 U.S. 299 (1915), the Supreme Court agreed that Congress could make an act of expatriation out of a woman's choice of a foreign husband, notwithstanding her objection that she had intended by her nuptials nothing of the sort. In the Nationality Act of 1940, Congress added to the list of conducts proving a U.S. citizen's intent to expatriate: service in the government or armed forces of a foreign state, voting in a foreign election, and treason against the United States. Later, during the postwar Red Scare, Congress made expatriating acts out of attempts to overthrow the U.S. government by force, seditious conspiracy, and advocating violence to overthrow the U.S. government. Eventually, the Supreme Court ruled in *Afroyim v. Rusk*, 387 U.S. 253 (1967) that, notwithstanding the Nationality Act, an American who voted in a local election while visiting another country did not forfeit his or her U.S. citizenship. According to the Court, Congress could not, through ordinary legislation, take away citizenship that the Constitution itself conferred directly in the first sentence of the Fourteenth Amendment.

SEE ALSO *Citizenship; Denaturalization and Expatriation; Naturalization and the Constitution*

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EX POST FACTO LAWS

Ex post facto laws are retroactive criminal laws that punish individuals for acts committed prior to the adoption of such laws, when the acts were not crimes. Ex post facto is Latin for *arising after the fact*. The U.S. Constitution, in Article I, Section 9, expressly excludes the power to make ex post facto laws from the powers granted to Congress. In addition, Article I, Section 10 expressly forbids the state government authority to make ex post facto laws. These clauses require only the adoption of laws that apply prospectively.

The prohibition arose from opposition to the use of ex post facto laws in English history. The authors of the Constitution distrusted any kind of retroactive legislation. Alexander Hamilton (c. 1755–1804) in *Federalist Papers* No. 84 says that the use of ex post facto laws is a favorite of those who want a powerful instrument for tyranny.

Prior to the earliest Supreme Court case on ex post facto laws, *Calder v. Bull*, 3 U.S. 386 (1798), ex post facto prohibitions were thought to apply to both criminal and civil statutes. The *Calder* case involved a dispute over the contents of a will and was thus a civil matter. However in *Calder* the Court limited the ex post fact prohibition to criminal laws, identifying four types of laws it considered ex post facto. These included laws working retroactively to criminalize an innocent action performed before the law was adopted; laws increasing the aggravation of a crime after its commission; laws increasing the punishment for a crime after the fact; and laws changing the rules of evidence after the commission of a crime, if they were detrimental to a defendant. These forms of ex post facto actions have dangerous political possibilities.

The *Calder* case has been controversial because it forced property owners to rely upon contract to protect property rather than the ex post facto clause. The case has been controversially cited as an example of "orginalist" thinking. Some contemporary critics of ex post facto laws want to see the prohibition extended to civil laws in order to protect rights from arbitrary government actions. A few justices in the history of the court have argued that the case was wrongly argued and should be overturned.

In dealing with ex post facto laws the Supreme Court allows legal procedures to be changed retroactively, but the substance of the law can only be changed prospectively. In *Gut v. Minnesota*, 76 U. S. 35 (1869), the Court held that a change in the location of a trial was procedural and not substantive.

In *Weaver v. Graham*, 450 U. S. 24 (1981), the Court issued a two-part test for defining an ex post facto violation: It said that to be retroactive it had to be passed after a crime was committed and that it must disadvantage the offender. The test was further clarified in *Collins v. Youngblood*, 497 U.S. 37 (1990), when it ruled that laws changing the definition of a crime to increase punishment are unconstitutional. This rule was applied in *Lynce v. Mathis*, 519 U. S. 433 (1997), when a prisoner's early-release credits were deleted by law, retroactively increasing his punishment.