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Mr. Justice Rufus W. Peckham and the Case of *Ex Parte Young*: Lochnerizing *Munn v. Illinois*†

**William F. Duker***

**I. INTRODUCTION**

When Rufus W. Peckham has been remembered at all it has been as the author of *Lochner v. New York*¹ — and even then it is Holmes’ attack on Justice Peckham’s opinion,² rather than the opinion itself, that is most often recalled.³ *Lochner* no longer stands as a barrier to state regulation of the workday,⁴ and the eventual failure of its underlying rationale has historically marked the Fuller Court era.⁵ But *Lochner* remains a symbol of the concept of substantive due process.⁶

Justice Peckham employed the judicial philosophy embodied in *Lochner* for the final time in *Ex parte Young*,⁷ a case in which the Court held that the eleventh amendment and protected concepts of state sovereign immunity did not bar a federal injunction restraining a state attorney general from enforcing a state law repugnant to the due process clause of the fourteenth amendment. To Justice Peckham the use of a state’s name to enforce an unconstitutional law was an act without authority which did not affect the state in its sovereign or governmental capacity. It was “simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because

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† This is the last of three articles by the author dealing with the Fuller Court and its impact on modern constitutional jurisprudence.


1. 198 U.S. 45 (1905).
2. Id. at 74.
4. *Lochner* was effectively overruled in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
unconstitutional."

Although *Lochner* later haunted the Warren Court, *Young* provided a useful mechanism for effectuating that Court's civil rights campaign. In *Dombrowski v. Pfister*, for instance, the Court relied on the *Young* doctrine to enjoin Louisiana officials from prosecuting or threatening to prosecute members of the Southern Conference Educational Fund for violations of the state's Subversive Activities and Communist Control Law and the Communist Propaganda Control Law. Federal injunctive relief was appropriate, the Court reasoned, to prevent the substantial loss or impairment of freedom of expression that would result if the appellants were forced to await state court disposition.

In *Griffin v. Prince Edward County School Board*, the Warren Court relied upon *Young* as authority to uphold the power of a federal district court to enjoin county officials from paying tuition grants or giving tax exemptions to racially segregated private schools so long as the county public schools remained closed. The Court granted relief exceeding *Young*'s simple injunction by holding that the district court could require county officials to exercise their taxing powers to levy taxes adequate to reopen, operate and maintain an integrated public school system.

Because the modern civil rights injunction properly can be traced to *Ex parte Young*, an inquiry into what lay behind Justice Peckham's opinion in that case is not simply of historical interest but of modern relevance as well. The search for Justice Peckham's foundation in *Young* actually takes us back through the rate-regulation cases to *Munn v. Illinois*, since Peckham's objective in *Young* was to "Lochnerize" *Munn*. Justice Peckham

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8. Id. at 159.
10. *Ex parte Young* permitted "the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect." Edelman v. Jordan, 415 U.S. 651, 664 (1974).
14. Id. at 232.
15. Id. at 233.
17. 94 U.S. 113 (1877).
actually attempted to direct a Fuller Court assault on *Munn* while he was still a judge on the New York Court of Appeals, but it was only after his appointment to the Supreme Court that he was able to lead the Court to *Munn's* Achilles' heel. *Munn* was not officially overruled, but the ability of state legislatures to regulate rates was circumscribed by ultimate judicial authority to determine whether the rates constituted a deprivation of property without due process of law. Thus, even though *Young* is commonly studied today as a case pitting the federal judiciary against the state courts, the case, like *Lochner*, was actually a confrontation between the respective powers of state legislatures and the federal judiciary.

II. Two Views of *Ex parte Young*

*Ex parte Young* came before the United States Supreme Court on an application for leave to file a petition for writs of *habeas corpus* and *certiorari* on behalf of Minnesota's attorney general, Edward T. Young. Young had been imprisoned for contempt by the United States Circuit Court for the District of Minnesota after failing to obey an injunction issued by the circuit court restraining the operation of the railroad rate regulations prescribed by the state legislature and the state railroad commission. The injunction had originally been sought by stockholders of the railroad who claimed that the prescribed rates were confiscatory and that the penalty provisions of the statute prevented the company from resorting to the courts to test its validity. Young challenged the circuit court's jurisdiction on the theory that he was acting on behalf of the state, which was in turn immune from suit under the eleventh amendment.

18. See, e.g., Weems Steamboat Co. v. People's Steamboat Co., 214 U.S. 345 (1909). Justice Peckham there distinguished *Munn* from a case where a steamboat company claimed the right to use another steamboat company's private wharf against the latter company's will upon payment of reasonable compensation. The wharf was the only one available, was located at the terminus of a public highway, and was open on occasion to public use. Peckham nevertheless sidestepped *Munn* by finding no dedication to the public and no acceptance of dedication by public authority. Id. at 356.


21. The statute provided that any officer, agent or employee of a railroad company who caused, counseled, advised or assisted a company to violate the regulation could be punished by imprisonment for a period of ninety days for each offense. 1907 Minn. Laws, ch. 232, § 6.

Writing for the entire Court except Justice Harlan, Justice Peckham began his opinion by acknowledging the importance of the case because it involved the "delicate matter" of federal-state court relations. Justice Peckham also admitted that intelligent men may differ as to the correct answers to the questions the Court was called upon to decide.\textsuperscript{23} He then held that, without regard to the sufficiency of the rates in issue, the regulations were on their face unconstitutional because they effectively blocked resort to the courts, thereby establishing the decision of the legislature and the railroad commission as conclusive on the issue of the sufficiency of the rates:

\[\text{[W]hen the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.}\textsuperscript{24}\]

Peckham regretted the clash between the federal and state courts but considered the exercise of power by the federal judiciary as an essential limitation upon state legislatures.\textsuperscript{25}

Having found the challenged rates act unconstitutional, Peckham proceeded to consider whether there was an equitable remedy available in the federal courts. If the suit was in fact one against the State of Minnesota and if the injunction issued against the state attorney general prohibited state action to enforce obedience to valid state law, the eleventh amendment would operate as a bar to federal court access.\textsuperscript{26} Since Justice Peckham did not understand the fourteenth amendment to have limited the sovereign immunity provided by the earlier amendment,\textsuperscript{27} the federal circuit court's exercise of power could be up-

\begin{itemize}
\item \textsuperscript{23} Id. at 142.
\item \textsuperscript{24} Id. at 147. Justice Peckham reaffirmed this doctrine in Willcox v. Consolidated Gas Co., 212 U.S. 19, 53-54 (1909).
\item \textsuperscript{25} Young was thus not only a direct ancestor of the Warren Court's Dombrowski v. Pfister, 380 U.S. 479 (1965), it was an ancestor with strikingly similar features. Both Young and Dombrowski required federal judicial interference with state court proceedings to prevent irreparable injury. In neither case, however, was the true purpose of federal judicial intervention to interfere with the decisions or rulings of state courts. Rather, the Court aimed at protecting substantive rights placed in jeopardy by state legislatures and enforcement officials.
\item \textsuperscript{26} For the history of the eleventh amendment, see C. Jacobs, The Eleventh Amendment and Sovereign Immunity (1972); Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U. Pa. L. Rev. 515 (1978).
\item \textsuperscript{27} 209 U.S. at 150.
\end{itemize}
held only by finding an exception to the rule that a federal court of equity had no jurisdiction to enjoin state criminal proceedings. After Justice Peckham exhaustively examined the precedents — for him an unusual approach — he determined that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

Justice Harlan stood alone in viewing the case as a federal court infringement upon the rightful place of state courts rather than as a matter of judicial limitation on legislative power. "Too little consequence," said Harlan, "has been attached 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 . . . ." The ability of the state to invoke the jurisdiction of its courts was vital to the preservation of the federal system. Justice Harlan warned that the "country should never be allowed to think that the Constitution can, in any case, be evaded or amended by mere judicial interpretation, or that its behests may be nullified by an ingenious construction of its provisions."

Justice Harlan agreed with Justice Peckham that the fourteenth amendment had not amended or otherwise limited the eleventh. However, with not a little embarrassment, having earlier in his judicial career written a dissenting opinion coming close to Peckham's opinion in Young, Harlan read the precedents to allow the barrier to suits against states to be surmounted only when the state officials, acting pursuant to an un-

28. See Pratt, Rhetorical Styles on the Fuller Court, 24 Am. J.L. Hist. 189 (1980). Peckham cited fewer precedents than any other member of the Fuller Court. He cited an average of 1.34 cases per page, compared with Holmes' 3.35 page average and a Court page average of 1.91. Although the citing of cases does not lack ambiguity, and is therefore not very helpful in labeling a judge as a formalist or an instrumentalist, it is quite interesting to note that when Peckham had precedent on his side, he was not loath to use it.

29. 209 U.S. at 155-56.
30. Id. at 176 (Harlan, J., dissenting).
31. Id. at 183.
32. Id. at 192.
33. See In re Ayers, 123 U.S. 443, 510 (1887) (Harlan, J., dissenting).
constitutional state act, were committing or about to commit "some specific wrong or trespass to the injury of the plaintiff's rights." Young was not such a case. Relief was not sought against Young individually but rather against him in his capacity as attorney general, with the object of blocking Minnesota from testing the constitutionality of its regulations in its own courts. The proper remedy, noted Harlan, was by writ of error from the highest court of the state to the United States Supreme Court for redress of every constitutional right denied by the state court. Peckham replied that if the statute was unconstitutional, it lacked the authority of, and therefore did not affect, the state in its sovereign capacity. To await the proceedings in the state court would place the railroad company in peril of large financial loss and its officers in great risk of fine and imprisonment. While Harlan rejected the power of the circuit court to issue the injunction, he answered Peckham by arguing that the company and its officers were not placed in peril because the circuit court injunction in effect prohibited the company from obeying the state law.

Young was not an easy case for either Peckham or Harlan. Harlan had to confess the error of an earlier dissent and overlook what was at least his own dicta in an earlier opinion of the Court. Peckham not only had to climb to a point never before reached by the Court, but he had to do so on a line tied to a legal fiction.

III. FORM, FICTION, AND FEDERALISM

Justice Peckham's rejection of the idea that the fourteenth amendment limited the eleventh forced resort to the legal fiction that although a state could not be sued, an action could be brought in federal court against a state officer attempting to enforce an unconstitutional state statute. The fiction brought to fruition a seed planted by Mr. Chief Justice Marshall in Osborn

34. 209 U.S. at 169, 192 (Harlan, J., dissenting) (emphasis in original).
35. Id. at 176. This view conformed to that expressed by Harlan in cases challenging systematic exclusion of Blacks from grand and petit juries, where Harlan had the support of the majority of the Court. Gibson v. Mississippi, 162 U.S. 565 (1896) (removal petition denied); Andrews v. Swartz, 156 U.S. 272 (1895) (habeas petition denied); In re Woods, 140 U.S. 278 (1891) (habeas petition denied).
36. 209 U.S. at 159.
37. Id. at 155.
38. Id. at 178 (Harlan, J., dissenting).
v. Bank of the United States. Unlike Osborn and the other early eleventh amendment cases, Young involved a constitutional claim based upon a provision adopted after the eleventh amendment — a provision which, to make the fiction a farce, regulated state action. Justice Peckham did not spend any time distinguishing due process from contract clause cases, nor did he worry about the paradox presented by separating the actions of state officers from those of the state in a due process claim case; after all, earlier cases had already (uncritically) accepted the paradox. Given the prevailing understanding of federalism, the fiction can be understood as an attempt to placate the states, whose statutes were being invalidated under substantive due process at the same time they were being assured that the fourteenth amendment had not dramatically altered the relationship between state and federal governments. In other words, the legal fiction was designed to temper the strain between substantive due process and the prevailing understanding of the privileges and immunities, due process and equal protection clauses of the fourteenth amendment.

The privileges and immunities, due process, and equal protection clauses were all understood to insure equal treatment before the laws. A similar understanding of these clauses directed the Court’s responses in Plessey v. Ferguson, upholding a state statute providing “separate but equal” accommodations for black and white train passengers, and in Patterson v. Colorado, rejecting an attempt to incorporate first amendment rights into the fourteenth amendment. Substantive due process was a natural outgrowth of the equality of treatment interpretation: The Fuller Court, led by Mr. Justice Peckham, took one step back from the clauses of the fourteenth amendment and required that state legislatures assume a neutral position in en-

42. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).
44. Civil Rights Cases, 109 U.S. 3 (1883).
45. 163 U.S. 537 (1896).
46. 205 U.S. 454 (1907).
Legislation that discriminated against a particular economic class was presumptively void. But however natural an outgrowth, substantive due process, unlike the clauses from which it grew, as then understood, had a profound impact on federal-state relations.

Rate regulation, like restrictions on "liberty of contract," was a response by the elected branches to changing economic conditions. Unlike criminal law it was not part of the established role of the legislature and violated the neutrality demanded by substantive due process. Substantive due process had emerged as a counterpart to federalism — federalism limiting federal government, substantive due process limiting state government. The Supreme Court would interfere with state process only when state legislation violated the Court's "neutral principles."

Those who authored the Constitution feared a powerful central government and that fear continued to influence constitutional law throughout the nineteenth century. But, with the victory of the progressives and the decline of substantive due process as a means of limiting state governments, federalism weakened as a check on the national government. The traditional nineteenth century notion of federalism only interfered with the new bulwarks of liberty, the process-oriented rights of the Bill of Rights. By gradually expanding these rights, the Supreme Court sought to accommodate the spirit of limited government that prevailed in the age of substantive due process and yet to acknowledge the idea of democracy that brought that age to an end. That Justice Peckham's legal fiction was never discarded during this development attests to its total circumvention of the eleventh amendment.

IV. THE FULLER COURT, RATE REGULATION AND THE PROBLEM OF SOVEREIGN IMMUNITY

Finding that "when property is devoted to public use, it is subject to public regulation," the Court in Munn v. Illinois held that the state legislature could regulate the rates charged by grain elevators and that the legislature's decision was conclusive and not subject to judicial review. In the other Granger Cases accompanying Munn to the Supreme Court, a wide range of rail-

47. Duker, Peckham, supra note 3.
road regulation was approved. Mr. Justice Field charged the Court with subverting the rights of private property, arguing that only where some right or privilege was conferred by the government was the compensation one received for his property a legitimate matter of regulation. In the minds of Mr. Chief Justice Waite and the majority, however, adequate remedy was available at the polls if the legislature abused its power.

The Fuller Court’s first major assault on Munn came in Chicago, Milwaukee & St. Paul Railway v. Minnesota. The Minnesota legislature had delegated power to a commission to set railroad rates in the state; the state supreme court subsequently ruled that the rates established were not subject to judicial review. The United States Supreme Court voted six to three to reverse, finding that the statute deprived the company of its due process right to a judicial investigation. Justice Blatchford wrote:

The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law. . . .

No longer were rates made conclusive by the decision of a state legislature or commission. Due process demanded judicial oversight.

Justice Bradley contended that the majority “practically
overrule[d] *Munn v. Illinois,* and that the question of rates was a legislative one. For Bradley, due process of law did not require a judicial forum. Final power must rest somewhere, and in this case Minnesota had entrusted that power to the legislature or to the commission established by the legislature. Only where the legislature or commission acted arbitrarily or fraudulently could judicial relief be invoked. In all other cases, the remedy lay with the people.

The opportunity to test whether *Munn* had, in fact, been overruled, was within the Court's reach. Three months before the Supreme Court heard arguments in the Minnesota rate case, the New York Court of Appeals resisted Judge Rufus Peckham's attempt to disregard *Munn* and invalidate state statutes regulating the price charged by grain elevators. The New York high court found the business of elevating grain to be “peculiarly affected . . . with a public interest” and declared, as had Justices Waite and Bradley, that the remedy for illegitimate uses of the police power was to be found at the polls.

Justice Peckham's dissent in the New York court's decision reexamined the authorities relied upon by Waite in *Munn* and concluded that they did not justify the decision. Peckham asserted that the legislature had no power to limit the compensation that an individual might receive for the use of his own property which was neither devoted to a public use nor endowed with special privileges from the state. The democratic remedy was not only insacient, it was invalid. The majority opinion, charged Peckham, would have government become the seat of class conflict:

To uphold legislation of this character is to provide the most frequent opportunity for arraying class against class; and, in

57. *Id.* at 461 (Bradley, J., dissenting).
58. *Id.* at 466.
59. Although Bradley may have thought *Munn* to be “practically overruled,” Harlan did not. Nevertheless, Harlan was aware that other members of the Court would continue their efforts to see *Munn* discarded. In a September 8, 1891 letter to Fuller, Harlan wrote: “[Justice] Brewer is here, looking well. But *Munn v. Illinois* is still in force, ready to do battle against all the Romans, however able or noble.” (Fuller Court letters on file in the Yale Law Library).
60. People v. Budd, 117 N.Y. 1, 22 N.E. 670, 78 N.Y.S. App. 185 (1889).
61. *Id.* at 22, 22 N.E. at 677, 78 N.Y.S. App. at 192.
62. *Id.* at 29, 22 N.E. at 680, 78 N.Y.S. App. at 195.
63. *Id.* at 40, 22 N.E. at 686-86, 78 N.Y.S. App. at 200 (Peckham, J., dissenting) (dissenting opinion incorporated into People v. Budd, 117 N.Y. at 34-71, 78 N.Y.S. App. at 197-210).
addition to the ordinary competition that exists throughout all industries, a new competition will be introduced, that of competition for the possession of government, so that legislative aid may be given to the class in possession thereof in its contest with rival classes or interests in all sections and corners of the industrial world.\textsuperscript{64}

In\textit{ Budd v. New York},\textsuperscript{65} Justice Blatchford again wrote for the majority of the Supreme Court and denied that he had earlier signaled the demise of\textit{ Munn}. He argued that what was said in the Minnesota case had no reference to a case where rates were not set by a commission but by the legislature itself.\textsuperscript{66} Judicial intervention was required in the earlier case only to insure that the commission acted within the bounds of its delegated power.\textsuperscript{67} Justice Brewer's response for the minority was a condensed version of Peckham's thirty-six page dissent from the state court's opinion. Like Peckham, Brewer found the paternal theory of government "odious" and observed that "[t]he utmost possible liberty to the individual, and the fullest possible protection to him and his property, [was] both the limitation and duty of government."\textsuperscript{68}

When the opportunity next arose to overrule\textit{ Munn}, in\textit{ Brass v. North Dakota},\textsuperscript{69} three of the Justices who were tied to the case had been replaced.\textsuperscript{70} If the\textit{ Budd} minority could attract the support of two of the new Court members, Justice Brewer could now write for the majority. Justices White and Jackson were persuaded to join Brewer; however, Justice Brown, a mem-

\textsuperscript{64} Id. at 68-69, 22 N.E. at 694, 78 N.Y.S. App. at 209 (Peckham, J., dissenting).
\textsuperscript{65} 143 U.S. 517 (1892).
\textsuperscript{66} Id. at 546-47.
\textsuperscript{67} Compare Justice Blatchford's reasoning with Peckham's approach to cases involving the claim that the commission exceeded its delegated power or the claim that the rates established were confiscatory.\textit{ Siler v. Louisville \\& N.R.R.}, 213 U.S. 175 (1909). Peckham's opinion in\textit{ Siler} rivals his opinion in\textit{ Young} in its importance to federal jurisdiction. See\textit{ Aldinger v. Howard}, 427 U.S. 1 (1976). The rate regulation involved in\textit{ Siler} was not only contested on federal grounds (alleged to be confiscatory and to interfere with interstate commerce) but on state grounds as well (commission action challenged as exceeding statutory authority). Finding the federal question not merely colorable or fraudulently set up for the mere purpose of endeavoring to give the federal courts jurisdiction, Peckham observed that the federal question ought to be avoided and the case decided upon the determination that the action of the state commission was\textit{ ultra vires}, even though there was no construction of the state statute by the state's high court.
\textsuperscript{68} 143 U.S. at 551 (Brewer, J., dissenting).
\textsuperscript{69} 153 U.S. 391 (1894).
\textsuperscript{70} Samuel Blatchford, Lucius Q. Lamar and Joseph P. Bradley were replaced by Edward Douglas White, Howell Edmunds Jackson and George Shiras.
ber of the Budd minority, was reluctant to overrule Munn on a bare majority vote. Although disappointed with the outcome of Brass v. North Dakota, Brewer was given the opportunity to reaffirm the principle of Chicago, Milwaukee & St. Paul Railway v. Minnesota in Reagan v. Farmers’ Loan & Trust Co. In Reagan the Court enjoined the enforcement of railroad rates set by a state railroad commission. Because the case was an equitable action commenced by the trustee of a railroad company against both the state attorney general and members of the state railroad commission, a new issue was injected into the rate-regulation debate: Was the suit one against the state and therefore barred by sovereign immunity?

Prior to Reagan, suits against state officers who asserted sovereign immunity involved claims brought under the contract clause of the Constitution, rather than under the due process clause of the fourteenth amendment. In deciding those cases, the Waite Court initially bound itself by a rigid interpretation of the nominal party rule articulated by Marshall in Osborn v. Bank of the United States, but later began to look beyond the named parties and to question whether the state was an indispensable party. In cases questioning the extent to which federal courts were empowered to afford relief to creditors of southern states that defaulted or repudiated their indebtedness, the balance struck between state immunity and the restriction imposed by the contract clause was precarious. It left the states unable to seize the property of those who had tendered coupons from state bonds in payment of taxes. The coupon holders in turn, finding the marketability of their coupons badly damaged, were unable to obtain affirmative relief against the state to compel redemp-

71. 153 U.S. at 410 (Brewer, J., dissenting).
72. 134 U.S. 418 (1890).
73. 154 U.S. 362 (1894).
75. 22 U.S. (9 Wheat.) 738 (1824).
76. The nominal party rule made its last appearance as a controlling principle in United States v. Lee, 106 U.S. 196 (1882).
77. See Poindexter v. Greenhow, 114 U.S. 270 (1885).
tion despite the fact that the coupons were constitutionally binding obligations on the state. It was in this context that *In re Ayers*, perhaps the leading nineteenth century sovereign immunity case, arose.

In order to avoid obligations under its Funding Act of 1871, Virginia directed its attorneys to institute suits by summary proceedings against anyone who tendered coupons in payment of their taxes. Such taxpayers were required to submit to a default judgment or to appear in court and plead the tender of coupons and then affirmatively prove that the coupons tendered were not counterfeit. The ability to prove that the coupons were genuine was seriously impeded by a restriction against the use of expert testimony and by a requirement that the bond from which the coupon had been detached be produced. Compliance with this latter requirement was practically impossible since few of the bonds were owned by Virginia residents.

Coupon owners who had purchased coupons for resale brought suit for injunctive relief, alleging that the defendant officials were destroying the market for the coupons and that the statutes purporting to authorize their actions were unconstitutional. The federal circuit court held for the complainants and issued an injunction. After the order was disregarded by the state’s attorney general, the court found the attorney general guilty of contempt and committed him to the custody of the United States marshal. The case came before the Supreme Court on a petition for habeas corpus.

Counsel for the petitioner, led by former United States Senator Roscoe Conkling, argued that the circuit court lacked jurisdiction because the injunctive proceeding was, in fact, a suit against the state. The Court accepted the argument and ordered Ayers released. The Court’s rationale was that the real injury was breach of contract and that the remedy for breach was on the contract itself. Since only the parties to the contract were capable of breaching it, the Court concluded that the suit in issue had to be a suit against the state. Justice Field concurred but emphasized that he did not understand the opinion of the Court to bar federal injunctive relief against state officers attempting to act pursuant to unconstitutional state legislation,

79. 123 U.S. 443 (1887).
80. *Id.* at 503.
that deprived one of the use of his property without due process.81 Justice Harlan, however, could see no distinction affecting federal jurisdiction between a suit against state officers that enjoined their seizure of private property pursuant to an invalid state statute, and a suit that enjoined them from bringing an action ordered by the state that would result in injury to the complainant's rights.82 Presumably Justice Harlan viewed the attorney general's action in bringing the suit as an interference with the complainant's contract rights and therefore no less tortious than the case Justice Field sought to shelter from the holding. Harlan's view of the injury was influenced by the nominal party rule of Osborn, which, he argued, admitted of no exception.83 Based on reasoning contrary to his position in Young, Harlan alone voted to deny habeas relief.

The Fuller Court reaffirmed the Ayers rule in Pennoyer v. McConnaughy84 and provided a clear distinction between suits that were barred by sovereign immunity and those that were maintainable. The former cases were those "where the suit is brought against the officers of the State, as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts."85 The latter cases were those "where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff."86

The problems of sovereign immunity and rate regulation converged in Reagan v. Farmers' Loan & Trust Co. Before Justice Brewer could determine whether the rates set by the commission were reasonable, he had to determine whether the suit was maintainable. Although, as Justice Harlan emphasized in Young, the state statute establishing the commission waived sovereign immunity, Brewer did not rely on the waiver. In reply to the state attorney general's eleventh amendment challenge, Brewer observed:

81. Id. at 509 (Field, J., concurring).
82. Id. at 516 (Harlan, J., dissenting).
83. Id. at 511. Compare Harlan's position in this case with his position in Young and with Marshall's opinion in Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828).
84. 140 U.S. 1 (1891).
85. Id. at 10.
86. Id.
So far from the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment.87

Professor Jacobs, who read Ayers to mean that "[m]ere institution of state judicial proceedings to enforce an unconstitutional regulation was not . . . a wrong for which relief should be afforded," puzzled over the result in Reagan.88 He suspected that by differentiating between governmental and pecuniary state interests Brewer was seeking to divert attention from the more embarrassing question of whether the suit was against the state officer in his individual or representative capacity.89 However, it may be that the cases provide a lesson in pleading. Contrary to Ayers, the injury alleged in Reagan was the target of the requested injunction. Brewer's response to the state attorney general then was that the direct remedy for the injury was not aimed at the state.90

After passing the threshold question, Justice Brewer was met with a challenge to the judiciary's power to inquire into the reasonableness of the rates. While the courts were not to perform the administrative duty of framing or revising the schedule of rates, Brewer observed that it was

within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the bus-

88. Jacobs, supra note 26, at 133-34.
89. Id. at 134.
iness of transportation that equal protection which is the constitutional right of all owners of other property.91

Relying primarily on an assessment of the potential for dividends from net income after capital expenses, and with the support of the entire Court, Brewer concluded that the rates were unreasonable92 and affirmed the circuit court's injunction.

In Smyth v. Ames,93 the Court reaffirmed the judicial role established by Mr. Justice Brewer in Reagan and upheld Circuit Justice Brewer's injunction restraining enforcement of Nebraska's railroad rates.94 Justice Harlan, who spoke for a unanimous Court, dealt quickly with the eleventh amendment issue and, though he would say otherwise in Young, held "that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State."95 Although acknowledging that the question of compensation was more easily determined by a commission than a court, Harlan stated that the courts could not shrink from the obligation of determining whether the company has been secured the rights guaranteed by the Constitution.96 The state legislature could not be the final judge of the validity of its own enactments.97 In determining that the rates were unreasonable, Harlan relied on the overall reasonableness to the public as well as to the company.

The following year, Justice Harlan again spoke for a united Court in Fitts v. McGhee.98 But this time he reversed a circuit court's judgment enjoining the state attorney general from instituting proceedings to enforce an allegedly unconstitutional statute that fixed tolls on a railroad bridge and from criminally

91. 154 U.S. at 399.
92. In two post-Young decisions, however, Peckham held that the presumption favored the validity of rates and found that the complainants in Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909), and Railroad Comm'n of La. v. Cumberland Tel. & Tel. Co., 212 U.S. 414 (1909), failed to sustain the burden of showing beyond any fair doubt that the rates were confiscatory.
93. 169 U.S. 466 (1888).
94. Probably weary from his circuit duties, Brewer wrote Fuller that "[i]f the brethren have any doubt as to the Nebraska Maximum rate case I am quite sure I could solve their doubts, but I do not care what becomes of the case." (n.d., Fuller Court letters on file in the Yale Law Library).
95. 169 U.S. at 518-19.
96. Id. at 527.
97. Id.
98. 172 U.S. 516 (1899).
prosecuting agents of the railroad company for levying rates higher than those set. Unlike the situations in Reagan and Smyth, the state officers in Fitts were not "specially charged" with the execution of the allegedly unconstitutional statute. Justice Harlan observed that if injunctive proceedings were allowed to test the constitutionality of state legislation where the state official had no special relation to the statute,

the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former as the executive of the State was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the State in litigation involving the enforcement of its statutes.99

Unlike the state officers in Reagan and Smyth, who had attempted to conceal their wrong behind an unconstitutional state statute, the attorney general in Fitts was not proceeding on the authority of an allegedly unconstitutional statute but was acting under his general power to enforce the laws.

While Harlan's analysis may have initially intrigued the Court or perhaps escaped its careful scrutiny, it soon became apparent that if the judiciary were to retain its role in checking the state regulatory schemes, his rigid approach would have to be abandoned.100 In hopes of ridding themselves of federal court oversight, many states, including Minnesota, took advantage of Fitts and rewrote their rate regulations—this time being careful not to impose any special enforcement duty on any officer or agency.101 But in Ex parte Young the Court closed the loophole. Justice Peckham held that it made no difference whether the state official acted pursuant to some positive law or the general law; if he sought to enforce an unconstitutional act, he could be enjoined by a federal court of equity.

99. Id. at 530.
100. See Prout v. Starr, 188 U.S. 537 (1903) (reaffirmed Smyth v. Ames, 169 U.S. 466 (1898)). Between Prout and Young, the eleventh amendment bar was raised by a state railroad commission and rejected by the Court, per Peckham in Mississippi R.R. Comm'n v. Illinois Cent. R.R., 203 U.S. 335 (1906). The action of the state commission did not concern rates, rather an order that the railroad company make stops at the town of Magnolia, Mississippi. Peckham's decision invalidating the order relied upon the commerce clause.
V. THE RESPONSE TO Young: SANCTIONING THE LOCHNER COURT

The federal judiciary provided the railroads with a refuge from the Panic of 1907. Prior to July 1, 1908, only one suit had been filed to enjoin an order of the Interstate Commerce Commission. By the end of the year, sixteen more had commenced. Ex parte Young finally secured the refuge from state regulation. But, as Peckham feared and Harlan predicted, progressive forces soon rose up in response to Young. The Nebraska legislature, no doubt still disturbed by the Court's response in Smyth v. Ames to the state's exercise of legislative power, demanded national legislation that would check federal judicial interference with state railroad regulation. Senator Crawford of South Dakota introduced an amendment to the bill creating the Commerce Court which prohibited the issuance of an injunction by a federal court except after ten days notice to the governor of the state. Such a limitation would allow time for the state attorney general to file suit in a state court to enforce the state rate regulation, and would thereby block federal court injunctive relief under the Judiciary Act of 1793.

It was the southern rather than the progressive response to Young that prevailed, however. Senator Crawford's amendment was rejected and Congress accepted instead the amendment that had been suggested by Senator Bacon of Georgia shortly after Young was decided and which was now offered by Senator Overman of North Carolina. Overman's amend-

102. 22 I.C.C. ANN. REP. 20 (1908).
103. See the statement of Senator Overman during the debate to amend the bill establishing the Commerce Court: "I saw in Moody's Magazine last week that there are 150 cases of this kind now where one federal judge has tied the hands of the state officers, the governor, and the attorney general ...." 45 CONG. REC. 7256 (1910). See also Warren, Federal and State Court Interference, 43 HARV. L. REV. 345 (1930).
104. Ex parte Young, 209 U.S. at 166.
105. Id. at 183 (Harlan, J., dissenting).
106. See 3 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 439 (1st ed. 1922).
107. 45 CONG. REC. 7252 (1910).
109. See 45 CONG. REC. 7252-58 (1910). See also Hutcherson, A Case for Three Judges, 47 HARV. L. REV. 795, 798-813 (1934). The response to Young was thus similar to the response to the liberal use of federal habeas by the lower federal courts following the revocation of Supreme Court jurisdiction under the Habeas Corpus Act of 1867. Duker, Rose v. Mitchell, supra note 40, at 289.
110. 42 CONG. REC. 1665 (1908).
111. 45 CONG. REC. 7253-58 (1910).
ment responded only to concerns relating to federalism and left the Supreme Court free to protect the substantive values impaired by excess rate regulation.\textsuperscript{112} It required the convening of a three-judge panel where an injunction was sought against state officials attempting to enforce an allegedly unconstitutional state statute. It did allow a single federal judge to issue a temporary restraining order, but only if irreparable loss to the complainant would otherwise result. Under such circumstances the temporary restraining order could remain in force until three judges met “at the earliest practical day.”\textsuperscript{113} Appeal from the three-judge court was directly to the Supreme Court.\textsuperscript{114}

Although it is Roscoe Pound’s 1909 attack\textsuperscript{115} on Justice Peckham and the \textit{Lochner} Court that one thinks of today as expressing the prevailing contemporary response to the judicial philosophy embodied in \textit{Lochner} and \textit{Young}, the activist role assumed by the Supreme Court at the turn of the century was not only accepted by the majoritarian branches of the national government, it was reinforced. The democratic branches conspired with the Supreme Court in the transformation of the judicial role. Aid from the democratic arm of government began with the enactment of the Circuit Courts of Appeals Act in 1891,\textsuperscript{116} which cut the number of cases requiring Supreme Court attention and increased that Court’s ability to select cases offering an opportunity to identify important public values.\textsuperscript{117} The assistance continued through the swift approval of Cleveland’s nomination of Rufus Peckham,\textsuperscript{118} whose activist conception of the judicial role was well known, and was further evident in the enactment of the Three-Judge Act of 1910. While progressive forces were beginning to prevail in states such as Nebraska (Roscoe Pound and William Jennings Bryan\textsuperscript{119}) and Minnesota (Edward Young), by upholding the “right to property” and “liberty of contract,” the

\begin{footnotes}
\item[112] Act of June 18, 1910, ch. 309, § 17, 36 Stat. 539.
\item[113] Id. at 557.
\item[114] Although the prevailing understanding of federalism rejected lower federal court interference with state process, the Supreme Court at this time was considered to be part of a state’s process of law. \textit{See In re Frederick}, 149 U.S. 70 (1893).
\item[116] Ch. 517, 26 Stat. 826 (1891).
\item[118] Duker, \textit{Peckham}, supra note 3, at 55.
\item[119] Bryan was counsel for appellant in \textit{Smyth v. Ames}, 169 U.S. at 486.
\end{footnotes}
Court, led by Justice Rufus W. Peckham, was reflecting the substantive values of the day. The fact that the _Lochner_ philosophy would eventually be used to frustrate the rightful succession of progressivism\(^{120}\) while the _Young_ doctrine would be relied upon to effectuate "fundamental" principles illustrates the condemnation of _Lochner_ and the celebration of _Young_, an ironic result since _Young_ was little more than a manifestation and implementation of the _Lochner_ approach.

\(^{120}\) See _e.g._ Morehead v. Tipaldo, 298 U.S. 587 (1936).