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# RESPONSE

## EX PARTE YOUNG AFTER SEMINOLE TRIBE

DAVID P. CURRIE\*

My message is one of calm placidity: Not to worry; *Ex parte Young*<sup>1</sup> is alive and well and living in the Supreme Court.

By way of background let me say that I am that *rara avis*, a law professor who thinks *Hans v. Louisiana*<sup>2</sup> was rightly decided.<sup>3</sup> For the reasons given by Justice Bradley,<sup>4</sup> I am quite convinced that the Federal Question Clause of Article III does not extend the judicial power to suits against nonconsenting states. That being so, it follows that the much lamented first half of the decision in *Seminole Tribe v. Florida*<sup>5</sup> is also right, for a long series of decisions makes abundantly clear that Congress cannot give the federal courts jurisdiction over matters outside Article III.<sup>6</sup>

Nor do I consider *Ex parte Young*, as Justice Souter does in his dissenting opinion in *Seminole Tribe*, as an obvious corollary of *Hans*.<sup>7</sup> On the contrary, *Ex parte Young* squarely contradicts that decision. For even if sovereign immunity was only a matter of form in

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<sup>1</sup> 209 U.S. 123 (1908).

<sup>2</sup> 134 U.S. 1 (1890) (holding that judicial power of United States does not extend to suits against state by one of its own citizens unless state consents to be sued).

<sup>3</sup> See David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888-1986*, at 7-9 (1990).

<sup>4</sup> See *Hans*, 134 U.S. at 12-18.

<sup>5</sup> 116 S. Ct. 1114, 1119-32 (1996).

<sup>6</sup> See, e.g., *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949); *Muskrat v. United States*, 219 U.S. 346 (1911); *The Propeller Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1852); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800). There is not much to be said even for *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), which concluded that Congress could make states suable under section 5 of the Fourteenth Amendment; that section came after the Eighth Amendment as well as the Eleventh, but that does not mean Congress may authorize cruel and unusual punishments to enforce the Due Process and Equal Protection Clauses. See Currie, *supra* note 3, at 573-74.

<sup>7</sup> See *Seminole Tribe*, 116 S. Ct. at 1178 (Souter, J., dissenting).

England,<sup>8</sup> it meant enough to our founding generation that they rose up to smite the Supreme Court when it had the audacity to permit suits against states.<sup>9</sup> One does not go to the trouble of amending the Constitution in order to alter the caption on the complaint.<sup>10</sup>

Frankly, I find this quite deplorable. Sovereign immunity is a rotten idea. If states commit wrongs, they should be accountable for them. As *Ex parte Young* recognized, constitutional rights cannot adequately be assured without judicial remedies against states or their officers. But, as our first President reminded us, if the Constitution is defective it should be amended, not ignored; twisting the Constitution is not good for the rule of law.<sup>11</sup>

Now what about *Seminole Tribe*'s additional holding that the Indian Gaming Regulatory Act precluded suit against the Governor under *Ex parte Young*?<sup>12</sup>

1) There is nothing startling in the notion that a statute providing some remedies for the violation of federal law impliedly precludes others. It happens all the time. In recent years, specific statutory remedial schemes have been held to preclude federal common law remedies,<sup>13</sup> *Bivens* remedies,<sup>14</sup> section 1983 remedies,<sup>15</sup> federal question<sup>16</sup> and supplementary jurisdiction<sup>17</sup> over state law remedies, and state remedies themselves.<sup>18</sup> Indeed, there will be cases in which such an inference is entirely plausible. Professor Jackson is quite right that the fact that the plaintiff has no remedy does not mean that the suit was against the state,<sup>19</sup> as the Court said it was;<sup>20</sup> the complaint might have

<sup>8</sup> See David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, at 19-20 (1985) (discussing *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)); Louis L. Jaffe, *Judicial Control of Administrative Action* 197 (1965).

<sup>9</sup> See U.S. Const. amend. XI.

<sup>10</sup> See Currie, *supra* note 8, at 104-05 (discussing *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824)).

<sup>11</sup> See Washington's Farewell Address, in 1 A *Compilation of the Messages and Papers of the Presidents* 213, 220 (James D. Richardson ed., 1900).

<sup>12</sup> See *Seminole Tribe*, 116 S. Ct. at 1123-24.

<sup>13</sup> See *City of Milwaukee v. Illinois (II)*, 451 U.S. 304, 332 (1981).

<sup>14</sup> See *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)).

<sup>15</sup> See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981).

<sup>16</sup> See *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 817 (1986).

<sup>17</sup> See *Aldinger v. Howard*, 427 U.S. 1, 17 (1976).

<sup>18</sup> See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 140 (1990).

<sup>19</sup> See Vicki C. Jackson, *Seminole Tribe*, *The Eleventh Amendment and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. Rev. 495, 520 (1997) (arguing that "Court might have analyzed the statute to conclude that it authorized no cause of action against the Governor—but that determination does not go to whether the suit against the Governor is one against the State").

<sup>20</sup> *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1124 (1996).

been dismissed for failure to state a claim.<sup>21</sup> But that is a cosmetic flaw. Doctrinally speaking, *Seminole Tribe* was just another application of the *Sea Clammers*<sup>22</sup> principle that specific statutory remedies may preempt actions under section 1983,<sup>23</sup> for *Ex parte Young* today is a section 1983 case.

2) There is no reason to distinguish for this purpose between *Ex parte Young* and *Bivens*,<sup>24</sup> as Justice Souter's dissent in *Seminole Tribe* would have us do.<sup>25</sup> In *Bivens* itself, to answer the difficult question of where the Court got the authority to create a damage remedy for victims of federal constitutional wrongs, Justice Harlan relied on cases like *Ex parte Young*. If the Court may invent equitable remedies against officers, Justice Harlan argued, it may invent legal remedies too.<sup>26</sup> Since *Bivens* and *Ex parte Young* have the same pedigree, they are subject to the same possibilities of preclusion.

3) Congress is perfectly free to abolish the remedy recognized by *Ex parte Young*. Henry Hart was right that *Marbury v. Madison*<sup>27</sup> makes clear that judicial review is an essential part of the constitutional system of checks and balances;<sup>28</sup> if constitutional limitations are to be enforced, neither Congress nor the states may be the ultimate judges of their own powers. Thus, there would be serious constitutional difficulties were Congress to close all courts to questions of the constitutionality of state laws or, given the special role the framers contemplated for the Supreme Court, to strip that Court of its essential jurisdiction.

But to abolish the *Ex parte Young* remedy closes only the district courts and only to anticipatory relief, which is important but hardly required, even in constitutional cases. We got along without it until the 1870s absent the accident of diverse citizenship or a special statu-

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<sup>21</sup> Jackson, *supra* note 19, at 520-21.

<sup>22</sup> *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981).

<sup>23</sup> 42 U.S.C. § 1983 (1994).

<sup>24</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>25</sup> 116 S. Ct. at 1181-82 (Souter, J., dissenting).

<sup>26</sup> *Bivens*, 403 U.S. at 404 (Harlan, J., concurring). The analogy was not perfect. Equitable remedies were originally based on the fact that the Practice Conformity Act of 1872, ch. 255, §§ 5-6, 17 Stat. 196, which required federal courts to follow state procedures in common law cases, allowed them to develop their own equitable remedies. But that provision seems to have disappeared when Congress empowered the Supreme Court to promulgate federal procedural rules. See Rules Enabling Act of 1934, 28 U.S.C. § 2071 (1994). The sources of legal and equitable remedies are now identical.

<sup>27</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>28</sup> See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365 (1953) (citing *Marbury*, 5 U.S. (1 Cranch) at 177).

tory provision,<sup>29</sup> since there was no general federal question jurisdiction. And even if the substantive provisions of the Constitution were construed to require anticipatory district court relief today, it would not help in *Seminole Tribe*, for that case involved only statutory rights, not the Constitution.<sup>30</sup>

4) That said, application of the *Sea Clammers* principle in *Seminole Tribe* makes no sense. The majority held *Ex parte Young* precluded by a provision it had just declared unconstitutional—the section authorizing suit against the state itself.<sup>31</sup> One of the essential characteristics of unconstitutional provisions is that they have no effect. Moreover, the inability to make the state suable removes the only plausible basis for believing that Congress would have wanted to forbid suit against the Governor under *Ex parte Young*. The Congress that enacted the Indian Gaming Regulatory Act<sup>32</sup> did its best to expand remedies for violation of its provisions; the last thing that Congress would have wanted was to leave the offended party with no remedy at all.

5) The sixty-four-thousand-dollar question is what effect *Seminole Tribe*'s restriction of *Ex parte Young* will have on other cases. In my opinion, very little. The most important cases are those like *Ex parte Young* itself, involving constitutional claims against state officers. No statute even conceivably precludes such suits. Far from providing a distinct set of remedies, section 1983 expressly authorizes suits in equity against those who violate constitutional rights under color of state law<sup>33</sup>—i.e., the remedy given in *Ex parte Young*. *Seminole Tribe* is no more a threat to *Ex parte Young* itself than was *Sea Clammers*, which has not impeded the enforcement of constitutional rights under section 1983.

6) As an original matter one might argue with some degree of plausibility that section 1983 impliedly bars judicially created remedies for the constitutional wrongs of *federal* officers, since it fails to mention them. Not so long ago the Court bought the equally flimsy argument that by not providing a remedy against local governments, that statute implicitly precluded supplemental jurisdiction to enforce state law.<sup>34</sup> But Justice Black made exactly that argument in *Bivens*,<sup>35</sup>

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<sup>29</sup> Such as existed, for example, in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 816 (1824) (finding jurisdiction conferred by act of Congress incorporating Bank of the United States).

<sup>30</sup> See *Seminole Tribe*, 116 S. Ct. at 1133.

<sup>31</sup> See *id.*

<sup>32</sup> Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at 25 U.S.C. §§ 2701-21 & 18 U.S.C. §§ 1166-68 (1994)).

<sup>33</sup> See 42 U.S.C. § 1983 (1994).

<sup>34</sup> See *Aldinger v. Howard*, 427 U.S. 1, 16-18 (1976).

the Court rejected it, and *Seminole Tribe* does not make it stronger. The fact is that in enacting remedies to protect federal rights from state infringement, Congress was not thinking about federal officers, one way or the other.<sup>36</sup>

7) Like *Sea Clammers*, *Seminole Tribe* will have its most significant effect on actions involving statutory, not constitutional rights. The test will be the same as in *Sea Clammers*: Does the statutory scheme evince a congressional design to preclude the remedy ordinarily afforded by section 1983? But a recent Ninth Circuit opinion shows that the answer may not always be the same: While the citizen-suit provision of the Clean Water Act precludes a section 1983 action for damages,<sup>37</sup> it contemplates injunctive suits against state officers, for the legislative history shows that Congress meant to afford such relief to the extent permitted by the Constitution.<sup>38</sup>

8) In short, the impact of *Seminole Tribe* upon *Ex parte Young* remedies turns on analysis of the terms, history, purpose, and context of the remedial provisions of the particular statute sought to be enforced. Thus, *Seminole Tribe* may well preclude the use of *Ex parte Young* in additional cases involving statutory rights. As I have said, there is nothing new about that in principle, as other types of remedies have often been precluded for identical reasons.<sup>39</sup> Indeed, it would be no great tragedy if the Court were to push *Seminole Tribe* so far as to overrule the holding in *Maine v. Thiboutot*<sup>40</sup> that section 1983 provides remedies for the violation of federal statutes in general, for as the dissent in that case demonstrated, that provision was meant to have no such effect.<sup>41</sup>

But the bottom line is you should relax; *Seminole Tribe* is no threat to *Ex parte Young* as a crucial remedy for the protection of constitutional rights.

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<sup>35</sup> See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 428-29 (1971) (Black, J., dissenting).

<sup>36</sup> The Court has also rightly rejected the argument that Congress implicitly overruled *Bivens* by amending the Federal Tort Claims Act, 28 U.S.C. § 2674 (1994), to make the United States liable for intentional wrongs committed in the course of law enforcement. See *Carlson v. Green*, 446 U.S. 14, 20 (1980).

<sup>37</sup> See 33 U.S.C. §§ 1261, 1365 (1994).

<sup>38</sup> See *National Resources Defense Council v. California Dep't of Transp.*, 96 F.3d 420 (9th Cir. 1996).

<sup>39</sup> See *supra* notes 13-18 and accompanying text.

<sup>40</sup> 448 U.S. 1 (1980).

<sup>41</sup> See *id.* at 14-19 (Powell, J., dissenting).