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## *Douglas and the Fate of Ex Parte Young*

Dissents are frequently an unreliable guide for assessing the implications of majority opinions. As Judge Friendly once put it, “Often their predictions partake of Cassandra’s gloom more than of her accuracy.”<sup>1</sup> Sometimes, however, the rationale of a dissent may help to explain a majority’s decision *not* to decide a particular issue, as embodied in the Supreme Court’s February 22, 2012, holding in *Douglas v. Independent Living Center of Southern California, Inc.*<sup>2</sup> Writing for a five-to-four majority, Justice Breyer avoided the question on which the Justices had granted certiorari, i.e., whether the Supremacy Clause provides Medicaid beneficiaries and providers with a cause of action to enjoin California state officials from enforcing a state law allegedly in violation of—and therefore preempted by—the federal Medicaid statute.<sup>3</sup> Because intervening administrative action had changed the posture of the case, the majority concluded that the matter should be returned to the Ninth Circuit, which could consider the effect of such developments—if any—as a matter of first impression.

Although the majority’s reasoning may not have been self-evident, the result may best be understood in light of Chief Justice Roberts’s sweeping dissent. Writing for himself and Justices Scalia, Thomas, and Alito, the Chief Justice saw the issue presented in *Douglas* as akin to the one he had successfully litigated before the Court in *Gonzaga University v. Doe*.<sup>4</sup> The *Gonzaga* Court had

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1. Local 1545, United Bhd. of Carpenters & Joiners of Am. v. Vincent, 286 F.2d 127, 132 (2d Cir. 1960).
  2. No. 09-958 (U.S. Feb. 22, 2012), <http://www.supremecourt.gov/opinions/11pdf/09-958.pdf> (to be reported at 132 S. Ct. 1204).
  3. See *id.* at 1-2 (majority opinion); see also Indep. Living Ctr. of S. Cal., Inc. v. Shewry, 543 F.3d 1050 (9th Cir. 2008) (holding that the Supremacy Clause *does* provide a cause of action to challenge a California state law for violating the equal-access mandate of the Medicaid statute, 42 U.S.C. § 1396a(a)(30)(A) (2006)).
  4. 536 U.S. 273 (2002).

held that private litigants could not enforce a federal statute through 42 U.S.C. §1983 if Congress did not clearly intend for the underlying statute to be privately enforceable.<sup>5</sup> As Chief Justice Roberts put it in *Douglas*,

[T]o say that there is a federal statutory right enforceable under the Supremacy Clause, when there is no such right under the pertinent statute itself, would effect a complete end-run around this Court's implied right of action and 42 U.S.C. §1983 jurisprudence. . . . This body of law would serve no purpose if a plaintiff could overcome the absence of a statutory right of action simply by invoking a right of action under the Supremacy Clause to the exact same effect.<sup>6</sup>

Thus, while the majority pursued a narrow course, the Chief would have held that injunctive relief would seldom be available to private plaintiffs under the Supremacy Clause to enjoin governmental officers from violating federal statutes that do not themselves provide a cause of action.<sup>7</sup> Given that Justice Kennedy (who joined Justice Breyer's majority opinion in *Douglas*) had himself argued for an analogous result in his concurrence in *Virginia Office for Protection & Advocacy (VOPA) v. Stewart*,<sup>8</sup> there may already be five votes to take such a potentially momentous—and troubling—step.

Consider *Ex parte Young*.<sup>9</sup> Although scholars continue to debate the origins and scope of the 1908 decision,<sup>10</sup> the case has routinely been cited for the proposition that the Supremacy Clause authorizes equitable relief against state officers for prospective violations of federal law (1) notwithstanding state sovereign immunity, and (2) regardless of whether the underlying federal law is itself privately enforceable.<sup>11</sup> Whether or not *Ex parte Young* itself articulated this rule,<sup>12</sup> it is now generally understood that injunctive relief for constitutional

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5. *Id.* at 286.

6. *Douglas*, slip op. at 4 (Roberts, C.J., dissenting).

7. See *id.* at 9.

8. See 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring) (suggesting that claims for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908), are only available as a “pre-emptive assertion in equity of a defense that would otherwise have been available in the State’s enforcement proceedings at law”).

9. 209 U.S. 123.

10. See, e.g., David L. Shapiro, *Ex Parte Young and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69 (2011) (summarizing the historical and contemporary debate over *Ex parte Young* and citing most of the relevant contributions thereto).

11. See, e.g., *id.* at 74.

12. See Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 81 (1997) (“[T]he landmarks in the study of constitutional remedies, such as . . .

violations does not require a freestanding statutory cause of action (and instead arises under the relevant constitutional provision).<sup>13</sup>

To similar effect, preemption claims challenging the prospective enforcement of state law have historically been recognized under the Supremacy Clause despite the absence of a statutory cause of action.<sup>14</sup> Thus, as Justice Scalia explained for the Court just last Term, in assessing the availability of a remedy under *Ex parte Young*, “a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.”<sup>15</sup>

To its credit, the *Douglas* dissent did not ignore *Ex parte Young* and its progeny. Instead, it dismissed the relevance of those cases by suggesting that relief under *Ex parte Young* should not be available to litigants who “are not subject to or threatened with any enforcement proceeding” by the state whose law they seek to challenge.<sup>16</sup> So understood, the Supremacy Clause would only support injunctive relief for “the pre-emptive assertion in equity of a defense that would otherwise have been available in the State’s enforcement proceedings at law.”<sup>17</sup>

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*Ex parte Young*, 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.” (footnote omitted)).

13. See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring in the judgment) (invoking “the presumed availability of federal equitable relief against threatened invasions of constitutional interests”).
14. See, e.g., *Shaw v. Delta Air Lines, Inc.*, 403 U.S. 85, 96 n.14 (1983) (finding that preemption claims seeking injunctive relief under the Supremacy Clause against state regulations presented a federal question); see also David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355 (2004) (explaining the background and scope of the *Shaw* decision and its successors and detailing the relationship between those cases and more general debates over the scope of the Supremacy Clause).
15. *Va. Office for Prot. & Advocacy (VOPA) v. Stewart*, 131 S. Ct. 1632, 1639 (2011) (internal quotation marks omitted).
16. *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, No. 09-958, slip op. at 5 (U.S. Feb. 22, 2012) (Roberts, C.J., dissenting), <http://www.supremecourt.gov/opinions/11pdf/09-958.pdf> (to be reported at 132 S. Ct. 1204).
17. *Id.* (quoting *VOPA*, 131 S. Ct. at 1642 (Kennedy, J., concurring)). As Professor Catherine Sharkey explains, it may well be that the plaintiffs in *Douglas* could have met this higher standard through clever pleading. See Catherine M. Sharkey, *Preemption as a Judicial End-Run Around the Administrative Process?*, 122 YALE L.J. ONLINE 1 (2012). But see Aroostook Band of Micmacs v. Ryan, 404 F.3d 48, 61 (1st Cir. 2005) (“Just because a federal issue could arise as a defense to a state law action does not mean that the federal issue can *only* arise as a defense to a state law action.... [A]n *Ex parte Young* action—‘though ultimately “defensive” in the sense that it seeks to prevent harms threatened by state officials—does constitute a federal question . . .’” (quoting Local Union No. 12004, United Steelworkers

Although at least one scholar—Professor John Harrison—has argued for precisely this understanding of *Ex parte Young*,<sup>18</sup> the Supreme Court itself has never previously embraced it, and Chief Justice Roberts did not provide additional explanation for why such a reading is the correct one. Such an omission is particularly telling given that the injury in such cases does not arise merely from the state subjecting a specific party to enforcement proceedings based on an unconstitutional state law. Rather, the injury arises from the state's enforcement of an unconstitutional law writ large.<sup>19</sup> So construed, *Young* is part of a jurisprudential imperative recognizing the ability of litigants to enjoin *any* unconstitutional state action without a distinct statutory right to do so—because the Constitution itself may in some cases require such a remedy.<sup>20</sup> Even if such remedies are not constitutionally compelled, they still play a critical role in ensuring the supremacy of federal law. They also provide a safeguard against all unconstitutional state conduct, not merely conduct that arises from efforts to enforce unconstitutional state law. As Justice Rehnquist explained in *Green v. Mansour*, “[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause.”<sup>21</sup>

Had the *Douglas* dissenters had their way, then, the Court would have deprived the Supremacy Clause of such force. The dissenters would have limited Supremacy Clause-based injunctions to situations in which (1) the underlying federal right was itself privately enforceable, or (2) injunctive relief was sought to preempt an impending state enforcement proceeding. Whether or not such a result would be normatively desirable, it would be inordinately momentous, for it would suggest that the Supremacy Clause is only violated by a state's *actual* enforcement of a preempted federal law, and not merely the enactment or *potential* enforcement thereof. In any case in which the underlying federal right could be violated *without* a state enforcement action, the *Douglas* dissenters would foreclose injunctive relief unless Congress specifically provided a cause of action.

That implication may help explain why Justice Kennedy, who argued for a narrow understanding of *Ex parte Young* in the VOPA case, nevertheless joined the majority in *Douglas* in sidestepping the issue. But unless he has a change of

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Of Am. v. Massachusetts, 377 F.3d 64, 74 (1st Cir. 2004))), overruled on other grounds by Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16 (1st Cir. 2006).

18. See, e.g., John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 1008 (2008).

19. See, e.g., Shapiro, *supra* note 10, at 86.

20. See Woolhandler, *supra* note 12.

21. 474 U.S. 64, 68 (1985).

heart on the merits, it may only be a matter of time before the Chief Justice's dissent in *Douglas* becomes law.

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At its core, the true problem with the Chief Justice's reasoning is that the analogy to the *Gonzaga* decision and 42 U.S.C. §1983 fails to persuade. In *Gonzaga*, the question was simply whether a statute Congress passed could be enforced through a cause of action Congress had separately provided.<sup>22</sup> The Court there concluded that private litigants could not enforce federal statutes through §1983 unless Congress unmistakably manifested an intent for the underlying statute to be privately enforceable. Although one may well disagree with the outcome in *Gonzaga*, it goes without saying that the result did not implicate constitutional concerns, since Congress has all but plenary power to define the parameters of federal nonconstitutional rights and remedies, and there is little to the view that the Constitution ever compels the existence of statutory remedies to vindicate wholly statutory rights. In contrast, if the Supremacy Clause divests state officers of the power to act in violation of *any* federal law (as *Ex parte Young* holds), then a plaintiff who seeks injunctive relief in a case like *Douglas* is seeking as much to enforce the Constitution against the state officer as he or she is seeking to enforce the relevant federal statute. An inability to bring such a suit would leave plaintiffs without a remedy for an ongoing constitutional violation, as opposed to leaving them without a remedy for a statutory violation (as in *Gonzaga*), or even a *prior* constitutional violation (as in *Bivens* cases<sup>23</sup>).

Taken to its logical extreme, the Chief's reasoning might even extend to suits for injunctive relief to enforce specific constitutional provisions (such as the Fourth Amendment), in addition to suits like those at issue in *Douglas*, which seek to enforce the Supremacy Clause. After all, other than the Suspension Clause<sup>24</sup> and the Takings Clause,<sup>25</sup> no constitutional provision expressly provides a cause of action. And if the answer is that no such cause of action is required to enforce these other provisions prospectively, one is left to

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22. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002).

23. See *supra* note 13 and accompanying text.

24. U.S. CONST. art. I, § 9, cl. 2.

25. *Id.* amend. V.

wonder why the Supremacy Clause is different in this regard; the *Douglas* dissent does not say.<sup>26</sup>

It may well be that Chief Justice Roberts believes—like Professor Harrison—that the only constitutionally required remedy in such cases is provided by state enforcement proceedings, which allow for “invalidity and nothing more.”<sup>27</sup> On this view, the Constitution is only a shield against state action, and not a sword.<sup>28</sup> For decades, the Supreme Court has steadfastly resisted that temptation, at least when it comes to injunctive relief.<sup>29</sup> If the Justices decide to change course, as *Douglas* suggests they soon might, one can only hope that such a decision will rest on more than just an unconvincing analogy to an (itself controversial) nonconstitutional case.

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<sup>26</sup>. One possibility is that it is not the Supremacy Clause that is different, but rather the Spending Clause—the source of Congress’s power to enact Medicaid. *Id.* art. I, § 8, cl. 1; cf. *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549, 561–62 (E.D. Mich. 2001) (arguing that Spending Clause statutes are more like contracts and are therefore not functionally equivalent to other federal statutes for Supremacy Clause purposes), *rev’d*, 289 F.3d 852 (6th Cir. 2002). There is much to say about the *Westside Mothers* view—which the Solicitor General came close to embracing in an amicus brief in support of the petitioner in *Douglas*. See Brief for the United States as Amicus Curiae Supporting Petitioner at 24–28, *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012) (No. 09-958), 2011 WL 2132705. For present purposes, it suffices to note that the language of the *Douglas* dissent is hardly limited to prospective enforcement of Spending Clause statutes—and that it is difficult to see why *Ex parte Young* and its progeny would countenance such a distinction.

<sup>27</sup>. Harrison, *supra* note 18, at 1020.

<sup>28</sup>. But see *Edelman v. Jordan*, 415 U.S. 651, 664 (1974) (“[*Ex parte Young*] has 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.”).

<sup>29</sup>. Cf. Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question After Minneci v. Pollard*, 161 U. PA. L. REV. (forthcoming 2012) (manuscript at 41–43), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2038641](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038641) (explaining that the Supreme Court has never categorically forsown the possibility of constitutionally compelled damages remedies).