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Saving Section 5: Lessons from Consent Decrees and *Ex parte Young*

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Table of Contents

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I. Introduction

Much attention has been paid by legal scholars to the permissibility and scope of remedial measures afforded by federal courts—acting pursuant to the well-established doctrine of *Ex parte Young*[1]—in response to suits alleging violations of federal law by State officials.[2] Much attention has also been paid by legal scholars, especially in the last few years, to the permissibility and scope of remedial measures afforded by Congress—acting pursuant to Section 5 of the Fourteenth Amendment[3]—in response to actual or potential violations of federal law (namely, due process and equal protection) by States.[4] But very little academic literature has attempted to analyze or compare critically these two vehicles for remedying federal-law violations by States, and specifically the Supreme Court's response to these distinct but related vehicles, together under the same rubric.[5] And none of the existing literature attempts to draw upon the

1. *Ex parte* Young, 209 U.S. 123 (1908). *See infra* Part II (examining scope of federal courts' power under *Young* doctrine). Indeed, the *Young* doctrine provides federal courts the necessary discretion to go beyond the express requirements of federal law to ensure that the violation is properly remedied, as, for example, in the school desegregation and prison reform cases. *See infra* Part II.A.2 (examining modern development of *Young* doctrine).

2. *See infra* note 21 (citing sources on development of *Young* doctrine).

3. *See infra* Part III (examining scope of Congress's power under Section 5 of Fourteenth Amendment). A familiar example of Congress's efforts under Section 5 of the Fourteenth Amendment is the Voting Rights Act of 1965, 42 U.S.C. §§ 1971–1973bb-1.

4. *See infra* note 357 (collecting sources).

5. Professor Thomas has thoughtfully raised the connection between judge-ordered remedial decrees in equity and Congress's Section 5 enforcement authority. *See* Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 335–39, 349–52 (2004) [hereinafter Thomas, *Prophylactic Remedy*] ("[T]he Court has used the analogue of judicial remedial power to define the parameters of the legislature's designated remedial power."); Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 724–39 (2001) [hereinafter Thomas, *Remedial Rights*] (comparing Supreme Court's requirements of "causal nexus between remedy and violation" in judicial prophylactic remedies and Section 5 remedies). However,

special insights offered by consent decrees, the focus of this Article, as an example of remedial judicial authority at its broadest and most comparable to a legislative remedy.

My thesis is that doing so will expose the unsupportable nature of the Supreme Court's jurisprudence in this area—a jurisprudence that grants considerable discretion to federal district court judges to order prophylactic relief for federal-law violations by States while narrowly limiting congressional power to prevent or remedy such conduct. The inconsistency is most stark when one considers the consent decree context, in which Supreme Court doctrine effectively permits district courts unchecked authority to enter and enforce prophylactic remedies against States, provided the parties initially agree. This inconsistent treatment is problematic not only from a federalism perspective because it renders unclear the correct balance of State-federal power, but also from a separation-of-powers perspective because it ignores the relative capacity of federal courts and Congress to provide such relief. The inconsistent treatment also cannot be squared with the Rehnquist Court's apparent fixation with States' rights. Instead, it perhaps reveals the Rehnquist Court's deeper twin concerns of enhancing judicial supremacy and limiting congressional power, even at the expense of State sovereignty and doctrinal coherence.

The tension is best resolved, I argue, not by reducing federal court authority under *Ex parte Young* but rather by recognizing the constitutionally mandated, institutionally justified, and democratically sanctioned role of Congress in fashioning remedial legislation under Section 5 of the Fourteenth Amendment and thus according it the discretion understandably wielded by district court judges in resolving the complex and serious problems created by a State's defiance of federal law.

Professor Thomas compares the two contexts at a level of generality that, while sufficient for her purposes of indicating a common prophylactic role, fails to reveal the tension between the differing levels of deference accorded by the Supreme Court. Similarly, Professors Hamilton and Schoenbrod refer to the law of remedies and judicial equity in reviewing the recent Section 5 jurisprudence. Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469, 479–87 (1999). All three scholars arrive at a similar conclusion that the Section 5 power is merely subject to (Thomas) or should be subject to (Hamilton/Schoenbrod) the same (or greater) limits placed on judicial prophylactic relief. *Id.* at 486; Thomas, *Prophylactic Remedy*, at 337, 352; Thomas, *Remedial Rights*, at 728. I, however, argue that the Supreme Court has in fact placed greater constraints on the Section 5 power than on comparable judicial relief, and that Congress is owed the broader deference given district judges in entering consent decrees against States. None of the previous work considers the special insights offered by the consent decree context or the overlay of *Ex parte Young*, as examined here through the Supreme Court's decision in *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004), *infra* Part II.C.

The Article proceeds as follows: Part II discusses the origins of and recent developments in *Ex parte Young* doctrine, starting with traditional injunctive orders that follow judgments against State[6] officials and then focusing on the special category of consent decrees against State actors. The *Young* doctrine, originally conceived as a narrow exception to State sovereign immunity from suit in federal court, has gradually expanded over time to confer relatively broad remedial authority on federal district judges. Part II.A shows the clear trend over the last seventy years of federal courts routinely exercising broad remedial powers in suits alleging federal-law violations by State actors, notwithstanding a few recent Supreme Court cases cutting back on the applicability of *Young* and the scope of equitable relief more generally. As demonstrated in Part II.B, nowhere is this clearer than in the context of consent decrees ratified and issued by district courts in institutional reform litigation against State entities. Part II.C focuses on one such example in depth: the 2004 Supreme Court decision in *Frew ex rel. Frew v. Hawkins*.[7] At issue in *Frew* was the enforceability of an extensive, eighty-page consent decree issued by a federal district court in a suit alleging that the State of Texas failed to comply with certain obligations under the federal Medicaid law. Part II.C reviews the reasoning in *Frew* and discusses the Supreme Court's unanimous and sweeping conclusion regarding the permissibility of the consent decree's relief under an implicitly expansive interpretation of *Ex parte Young* doctrine.

Part III shifts gears to discuss the scope of Congress's enforcement power under Section 5 of the Fourteenth Amendment. Part III.A discusses Section 5's historical and textual mandate empowering Congress to enforce the provisions of the Fourteenth Amendment, including due process and equal protection rights, against the States. Part III.B shows its broad construction by the Supreme Court during the civil-rights era. Part III.C demonstrates how, despite the aforementioned history and precedent, the Rehnquist Court has adopted a relatively narrow view of the congressional power to enact Section 5 legislation. The focus of Part III.C is on the recent line of cases striking down portions of federal civil rights statutes that provided for enforcement against State entities. This section reviews how the Court construes such legislation as beyond Congress's Section 5 power and, more precisely, how the Court narrows congressional power by restrictively applying its confused and confusing "congruence and proportionality" doctrine.

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6. When I use the capitalized term "State" in this article, I mean to refer to only state-level governmental officials and entities as opposed to other subsidiary, local governmental (city, county, etc.) entities. The distinction is important to the extent Eleventh Amendment concerns shape one's view of the extent of permissible relief.

7. Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431 (2004).

Part IV juxtaposes the Court's disparate treatment of the enforcement mechanisms at issue. Based on the discussions in Parts II and III, the difference in deference paid to federal district courts in ordering *Ex parte Young* relief and that paid to Congress in fashioning Section 5 legislation becomes readily apparent. The section pays special attention to the less restrictive tailoring analysis applied by the Supreme Court when analyzing a lower-court decree as opposed to congressional legislation. The contrast is clearest between *Young*-based consent decrees and Section 5 legislation.

But establishing this disparate treatment is not enough: One might argue that the different contexts, despite implicating similar federalism concerns, are sufficiently distinguishable to warrant such disparate treatment. After all, in the typical *Young* case, a court has adjudicated an actual federal-law violation before awarding relief against the State official, and that injunctive relief is usually narrowly designed to apply only to the parties named in the lawsuit. This is not the case with respect to Section 5 legislation. The consent decree example, however, collapses these apparent distinctions, making the contexts surprisingly comparable in most relevant aspects. In *Frew* itself, for example, the district court entered a consent decree imposing class-wide, statewide, affirmative obligations well beyond the explicit scope of the Medicaid statute (much like Congress in enacting prophylactic Section 5 legislation) before making any findings regarding alleged violations of the Medicaid statute.

Although consent decrees do have the obvious distinguishing trait of initial agreement to the terms by State officials, upon closer scrutiny, that distinction does not meaningfully mitigate federalism concerns. As a doctrinal matter, the Supreme Court in *Frew* assumed without deciding that the State's initial consent did not constitute a waiver of its sovereign immunity.[8] Moreover, there is a distinction between consent by "the State" to decree terms and consent by individual State officials. The named State officials who agree to a decree may have different incentives than other State officials and, as a result, their consent may not reflect the will of the State legislature or State governor. Furthermore, even assuming a collective will, a State's initial consent is very different from a State's voluntary compliance: After all, the consent is obtained under the duress of costly litigation; the State cannot ordinarily back away from any of the terms for the duration of the decree; and, in certain circumstances, the court can modify the decree terms despite the State's objection.

8. *Id.* at 436–37 ("[W]e do not address the waiver argument.").

Importantly, the irrationality of the differing treatment does not necessarily tell us which approach—the "strict scrutiny" approach in present Section 5 cases, the "middle road" approach in traditional *Ex parte Young* cases, or the most deferential approach in *Young*-based consent decree cases such as *Frew*—is preferable. I therefore discuss textual, institutional, and other reasons why the Court should apply the greater deference afforded district courts in *Young*-based consent decree cases when reviewing the validity of Section 5 legislation. It is imprudent for the Court to apply more exacting scrutiny to Congress—a more democratic and better equipped (both in terms of identifying violations and fashioning complex remedial schemes) institution operating with a historical and textual mandate—than to district court judges.

Part V suggests that the Court's consent decree jurisprudence not only highlights the problem with its approach to Section 5, but also suggests a solution. In *Frew*, the Court's inquiry essentially turned on whether the consent decree was "related to" and "furthered objectives of" federal law. I argue that applying this standard to Section 5 legislation—specifically, whether Congress's enforcement effort is "related to" and "furthers the objectives of" Section 1 of the Fourteenth Amendment—would afford Congress appropriate discretion and provide the Court a mode of review with which it is already familiar.

The Article concludes by discussing the possible motivations behind the existing inconsistency by reference to larger themes drawn from the Rehnquist Court's jurisprudence: judicial supremacy and the limitation of congressional power.

II. The Expanding Scope of Ex Parte Young *Relief and Consent Decrees*

This section seeks to provide a descriptive account of the evolving (and, for the most part, broadening) scope of the *Young* doctrine. It discusses two separate but related species of relief resulting from *Young*-based litigation: Part II.A focuses on injunctive relief ordered by a district court after a judgment of liability against State officials; Part II.B focuses on consent decrees in which the parties agree to certain relief in the form of a judicial order. The latter form of relief, notably broader, is examined more closely in Part II.C through the Supreme Court's 2004 decision in *Frew ex rel. Frew v. Hawkins*.

A. The Evolving Scope of the Young *Doctrine*

1. Basic Theory and Origins

State sovereign immunity, grounded in federalism notions of state autonomy and linked to the Eleventh Amendment, limits the reach of federal judicial power against the States. In other words, as currently construed, the Eleventh Amendment generally prohibits, subject to some important exceptions, suits brought by individuals in federal court against State governments, including those suits based on a State's violation of federal law.[9]

Nevertheless, federal courts are not powerless to protect individuals when States flout federal law. The principle of State sovereign immunity can be circumvented, at least in part, by a suit naming a State officer as defendant instead of the State.[10] This practice has its roots in English common law, under which the King's officers—but not the King himself—could be sued to remedy governmental wrongs.[11] On a more practical level, the doctrinal move

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9. Seminole Tribe v. Florida, 517 U.S. 44, 54–56 (1996). The proper construction of the bounds of State sovereign immunity and the Eleventh Amendment has been the subject of heated debate almost since the beginning of American constitutional law. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 393–409 (4th ed. 2003) (summarizing the historical development of Eleventh Amendment jurisprudence). Many distinguished jurists and scholars have argued in favor of the "diversity theory" of the Eleventh Amendment: The amendment bars suit in federal court only when the suit is based on diversity (as opposed to federal question or admiralty) jurisdiction. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 301 (1985) (Brennan, J., dissenting) (arguing for diversity theory); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 *passim* (1989) (explaining and advocating diversity theory). However, it is clear that the Rehnquist Court has rejected that position in favor of a more robust view of State sovereign immunity. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 727–28 (1999) (determining scope of State sovereign immunity by looking beyond letter of Eleventh Amendment to "history and experience"); *Seminole Tribe*, 517 U.S. at 54–55 (noting that Congress may abrogate State sovereign immunity through valid exercise of its power).

10. The Court approved of such officer suits as early as 1824. *See* Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 389 (1894) (allowing suit against state attorney general and members of state railroad commission); Osborn v. President of the Bank of the United States, 22 U.S. (9 Wheat.) 738, 857–58 (1824) (allowing suit against state auditor and treasurer and their successors and agents). *But see In re* Ayers, 123 U.S. 443, 496–97 (1887) (limiting officer suit because State official's act did not give rise to cause of action cognizable at common law). The emergence of the *Young* doctrine, from a historical perspective, has been tied to *Lochner*-era concerns; that is, courts needed a way to circumvent Eleventh Amendment immunity in order to review the constitutionality of state economic regulations as a matter of substantive due process. Patricia L. Barsalou & Scott A. Stengel, *Ex Parte Young: Relativity in Practice*, 72 AM. BANKR. L.J. 455, 471–82 (1998).

11. JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 41 (1987); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1–2 (1963).

represents an accommodation between State sovereign immunity and the need to ensure the supremacy of federal law.[12] It is that accommodation—embraced, embellished, and brought to the forefront in *Ex parte Young*—that forms the basis of what is today referred to as the *Young* doctrine.

Although the doctrine has evolved over time, the facts and reasoning of *Young* itself are instructive as to its theoretical underpinnings. The State of Minnesota adopted a law limiting railroad rates.[13] A group of railroad company shareholders, alleging the law to be unconstitutional, instituted an action in federal court against State attorney general Edward Young to enjoin enforcement of the law.[14] The court issued a preliminary injunction against Young.[15] After a series of unsuccessful proceedings below,[16] Young argued to the Supreme Court that the Eleventh Amendment required dismissal of the nonconsented suit. The Supreme Court disagreed, holding that the Eleventh Amendment does not bar suits against State officers to enjoin constitutional violations because State officers have no authority to violate the federal Constitution.[17] Therefore, the Court concluded, their illegal acts were essentially *ultra vires* and stripped of the State authority protected by Eleventh Amendment immunity.[18]

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12. *See* CHEMERINSKY, *supra* note 9, at 420–22 (defending *Young*'s legal fiction as useful balancing mechanism).

13. *Ex parte* Young, 209 U.S. 123, 127 (1908).

14. *Id.* at 129.

15. *Id.* at 132.

16. The procedural posture of the case was actually much more complicated. Following entry of the preliminary injunction, the State—contrary to the federal court's order—filed a mandamus action in State court to compel the railroad's compliance with the law at issue. *Id.* at 133–34. The federal court then entered contempt sanctions and an order to hold Young in custody pending compliance. *Id.* at 126, 134. Thereafter, Young filed a petition for writ of habeas corpus in the Supreme Court. *Id.* at 126–27. Although not relevant for our purposes, *Young* also thereby implicated concerns relating to the proper relationship between State and federal courts now embodied in the doctrine known as *Younger* abstention.

17. *Id.* at 160.

18. The Court explained:

> The act to be enforced is alleged to be unconstitutional, and if it be so, 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 simply an illegal act upon the part of a state official in attempting to use the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior 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

2. Modern Development (1970s–1980s)

Notwithstanding the "obvious fiction"[19] employed in *Young* to justify its circumvention (albeit limited) of State sovereign immunity, the *Young* doctrine has not only persisted but has grown to become the primary vehicle for challenging unconstitutional conduct by States.[20] Though *Young*'s development has not been a one-way ticket to obliterating Eleventh Amendment immunity, a review of the numerous battles over the type, scope, and availability of relief illustrates the steady expansion of affirmative remedial measures in *Young* suits. The history is fairly extensive,[21] so only the relevant highlights are covered here.

Let us start with the traditional limits on *Young* suits. First, the plaintiffs must allege an ongoing, as opposed to just past, violation of law.[22] Second, that alleged violation must be of federal, as opposed to state, law.[23] Finally, as to the type of permissible relief in an otherwise valid *Young* suit, the Court has drawn a line—albeit fuzzy—between retrospective and prospective relief, a line (imperfectly) reflecting the Court's concern for protecting State treasuries.[24] Accordingly, the Court has held that the Eleventh Amendment prevents a federal court from awarding relief to compensate for past injuries—retrospective relief—when such a damages award will be paid from the State treasury, even if an individual officer is the named defendant.[25] But the Court

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> individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Id. at 159–60.

19. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 270 (1997).

20. Kenneth Culp Davis, *Suing the Government by Falsely Pretending To Sue an Officer*, 29 U. CHI. L. REV. 435, 437 (1962).

21. For further background on the development of the *Young* doctrine, see CHEMERINSKY, *supra* note 9, at 418–38; Barsalou & Stengel, *supra* note 10, at 471–86; James Leonard, *Ubi Remedium Ibi Jus, or, Where There's a Remedy, There's a Right: A Skeptic's Critique of* Ex Parte Young, 54 SYRACUSE L. REV. 215, 221–63 (2004).

22. Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 645 (2002).

23. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984).

24. Edelman v. Jordan, 415 U.S. 651, 677 (1974).

25. *Id.*; Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945). The facts of *Edelman v. Jordan* are illustrative. The plaintiffs sued Edelman, the relevant Illinois State official, on grounds that the State failed to comply with federal standards for processing welfare applications. *Edelman*, 415 U.S. at 653. The plaintiffs sought two types of relief: an order requiring the State official to provide back payments of all funds that were improperly withheld in the past and an injunction requiring the State official to comply with federal guidelines in the future. *Id.* at 656. The Court found that the Eleventh Amendment barred the former because such relief is the equivalent of monetary damages for the State's past conduct to be paid from the State treasury. *Id.* at 667.

has repeatedly recognized that the Eleventh Amendment does not prohibit a federal court from providing injunctive relief to ensure future compliance—prospective relief—against the same defendant, even though implementation of the terms of the injunction may cost the State significant money.[26]

The retrospective-prospective line, however, appears to be a fine one. In applying that line, the Court has relied in certain cases on the language in *Edelman* that the Eleventh Amendment does not bar "ancillary" relief against State treasuries. In *Hutto v. Finney*,[27] plaintiffs successfully challenged the conditions of their confinement in State prisons as violating the Eighth Amendment's prohibition on cruel and unusual punishment.[28] The district court awarded attorneys' fees to the plaintiffs to be paid by the State.[29] The Supreme Court held that the fee award did not run afoul of the Eleventh Amendment, reasoning that it was ancillary to the injunctive relief ordered in favor of the plaintiffs.[30] As Professor Chemerinsky has noted, *Hutto* "expanded the notion of permissible relief because in *Edelman* the Court spoke 'not of ancillary orders to pay money but of orders having ancillary effects on the treasury.'"[31]

Similarly, in *Quern v. Jordan*,[32] a follow-up to *Edelman*, the Supreme Court upheld as permissible ancillary relief the district court's order that the State send notices informing all class members that they were denied money owed to them and that administrative procedures were available for collecting the funds.[33] However, just six years later in *Green v. Mansour*,[34] the Court held that the Eleventh Amendment barred a federal court from compelling the State to send notices informing welfare recipients that they might wrongfully have

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26. *See* Quern v. Jordan, 440 U.S. 332, 346–49 (1979) (upholding order requiring State to notify members of plaintiff class that the State might wrongfully have denied them benefits); Milliken v. Bradley, 433 U.S. 267, 289–90 (1977) (upholding order requiring State to bear part of costs of programs to remedy effects of discrimination); *Edelman*, 415 U.S. at 667–68 (upholding order requiring State to pay retroactive benefits that had been wrongfully withheld).

27. Hutto v. Finney, 437 U.S. 678 (1978).

28. *Id.* at 680.

29. *Id.* at 684–85.

30. *Id.* at 691–92. The Court also approved additional attorneys' fees awarded by the appeals court under a civil rights statute, 42 U.S.C. § 1988, based on the ability of Congress to override the Eleventh Amendment pursuant to statutes adopted under Section 5 of the Fourteenth Amendment. *Id.* at 693–700. *See infra* Part III (examining scope of Congress's Section 5 power).

31. CHEMERINSKY, *supra* note 9, at 427–28 (quoting David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 162 (1984)).

32. Quern v. Jordan, 440 U.S. 332 (1979).

33. *Id.* at 334.

34. Green v. Mansour, 474 U.S. 64 (1985).

been denied benefits.[35] The Court distinguished *Quern* on grounds that the notice relief in *Green* was not ancillary to other prospective relief because the State had voluntarily conformed to federal law after the suit was brought, obviating the need for any prospective injunction.[36]

Despite this ambiguity, the Court has adopted an unmistakably broad reading of the prospective category outside the narrow notice-relief context. For example, in *Milliken v. Bradley*,[37] the Court upheld a school desegregation order requiring the expenditure of State funds for several remedial and compensatory education programs. The Court characterized the remedy as prospective for *Young* purposes and thus permissible:

> The decree to share the future costs of educational components in this case fits squarely within the prospective-compliance exception reaffirmed by *Edelman*. . . . That the programs are also "compensatory" in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment.[38]

As several scholars have noted, this remedial order could easily have been labeled retrospective and consequently barred like the back pay remedy in *Edelman*.[39] Thus, although the distinction is facially described as retrospective versus prospective, the Court has permitted federal district courts to order much injunctive relief requiring State expenditures, even when aimed at remedying past wrongs.

The key move in *Edelman* and its progeny—permitting injunctive relief notwithstanding significant State expenditures—has facilitated the steady expansion from strictly prohibitory injunctions, such as that in *Young* itself, to the type of broad affirmative/structural/prophylactic relief seen in more contemporary *Young* suits. Several scholars have noted—some with praise, others with lament—the phenomenon of broad judicial relief in institutional reform cases, of which *Young* suits are an important subset.[40] The "systematic

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35. *Id.* at 65–66.

36. *Id.* at 69–72.

37. Milliken v. Bradley, 433 U.S. 267 (1977) [hereinafter *Milliken II*].

38. *Id.* at 289–90.

39. *See, e.g.*, CHEMERINSKY, *supra* note 9, at 427 (explaining Court's distinction between retroactive and ancillary relief); David P.Currie, *Sovereign Immunity and Suits Against Governmnet Officers*, 1984 SUP. CT. REV. 149, 162 (1984) (noting that Court could have chosen to treat order as retrospective); Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 751–53 (1978) (noting that remedy could have been barred as retrospective relief).

40. *See* ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS

character"[41] of modern public law litigation and attendant structural relief means that the "relief ordered often does much more than just prevent or undo constitutional violations."[42] One scholar has noted: "[T]he trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement."[43] Even outside the institutional reform context, prophylactic injunctions—those that dictate a defendant's otherwise legal conduct when that conduct might contribute to the harm—are not unusual.[44]

Some examples convey the breadth of *Young* relief that has become prevalent in the last couple decades. In school desegregation cases, the Supreme Court repeatedly approved decrees that went beyond simply declaring invalid the previous separation by law of black and white students. The "black letter" law requires that such decrees—a subset of which arise in *Young* suits—(1) "relate[] to 'the *condition* alleged to offend the Constitution'"; (2) "be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct'"; and (3) "take into account the interests of state and local authorities in managing

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WHEN COURTS RUN GOVERNMENT *passim* (2003) (criticizing perceived judicial overreaching in institutional reform cases); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (describing emerging model of "public law litigation"); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 635 (1982) ("The variety and importance of the institutions involved, the range of issues that courts must address, and most important, the broad discretionary powers trial courts must exercise in framing remedial decrees set modern institutional suits substantially apart from other forms of litigation."); Frug, *supra* note 39, at 751–53 (describing breadth of institutional *Young* litigation); Donald Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1268 (1983) (describing breadth and features of "structural injunctions"); A.E. Dick Howard, *The State and the Supreme Court*, 31 CATH. U. L. REV. 375, 425–29 (1982) ("Public law today has increasingly taken on a systematic character. The paradigm lawsuit over constitutional issues today is . . . the class action seeking injunctive relief to significantly alter the way government carries out some function."); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 949–51 (1978) (discussing "substantial expansion" of federal courts' use of "institutional decrees"); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 661–64 (1978) (discussing "innovative and expansive remedies that federal courts have utilized with increasing frequency, especially against state governments").

41. Howard, *supra* note 40, at 425–26.

42. Mishkin, *supra* note 40, at 956.

43. Chayes, *supra* note 40, at 1284; *see also id.* at 1293 (observing that in public law litigation, "right and remedy are pretty thoroughly disconnected").

44. *See* Thomas, *Prophylactic Remedy*, *supra* note 5, at 302, 313–14 (citing several examples).

their own affairs."[45] *Milliken*, touched upon earlier, involved the question of appropriate remedies to redress the effects of de jure segregation in the Detroit public school system.[46] Liability extended not only to local school district officials but also to State officials, including the Governor of Michigan.[47] The Court in *Milliken I* did reject a decree providing for inter-district relief—a move that would have effectively consolidated fifty-four independent school districts with Detroit city schools and included large-scale pupil reassignment[48]—on grounds that the remedy would affect outlying districts that had not been shown to have committed any constitutional violation.[49] But on remand, the district court ordered other expansive relief, including reading skills programs, special in-service teacher training, changes in student testing, and counseling.[50] Although the absence of any of these remedies presumably would not violate Equal Protection requirements, the Court approved them as proper remedial measures.[51] It further held that the district court could order the State, under *Edelman*, to pay for the remedial educational programs.[52] The *Milliken II* Court

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45. *Milliken II*, 433 U.S. at 280–81 (quoting Milliken v. Bradley, 418 U.S. 717, 738, 746 (1974) [hereinafter *Milliken I*]).

46. *Id.* at 269.

47. *Id.* at 272 n.6. Although the desegregation decisions do not seem to spend much time parsing between local and State government officials (the latter of which can seek some Eleventh Amendment protection), I focus my discussion here on cases in which State officials were named defendants because those cases, in which the *Young* doctrine is implicated, necessarily incorporate any additional limits that the Eleventh Amendment may impose. Indeed, *Milliken II* directly addresses the constraints imposed by *Young*:

> The decree to share the future costs of educational components in this case fits squarely within the prospective-compliance exception reaffirmed by *Edelman*. That exception, which had its genesis in *Ex parte Young*, permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury.

Id. at 289 (citation omitted).

48. *Milliken I*, 418 U.S. at 741–43.

49. *Id.* at 745; *see also* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420–21 (1977) (rejecting citywide busing remedy based on lack of showing of "incremental segregative effect" of violations beyond certain schools). *But see* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 540–42 (1979) (upholding same citywide remedy based on chain of presumptions linking the broader harms to the adjudicated violation). *Milliken I* marked the first time since *Brown* that the Court overturned a district court's desegregation decree as going too far. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 783 (4th ed. 2000).

50. *Milliken II*, 433 U.S. at 282.

51. *Id.* at 288.

52. *Id.* at 289–90.

relied in part on *Swann v. Charlotte-Mecklenburg Board of Education*,[53] in which the Court approved broad equitable relief such as the targeted use of racial balancing goals, pupil reassignment, and busing.[54] Although State officials were added as defendants to the suit in *Swann*, the Supreme Court made no mention of Eleventh Amendment concerns.[55] The *Milliken II* Court applied the principle enunciated in *Swann* that once a right and violation have been shown, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[56] As one scholar has noted, "once a violation has been proven, *Milliken II* shows how sweeping the federal court's remedial powers can be."[57] This broad view is also reflected in federal courts of appeals decisions approving desegregation decrees against State defendants.[58]

Federal district courts have ordered broad injunctive relief against State entities and officials in a variety of other contexts as well.[59] Litigation involving conditions of State-run mental hospitals has resulted in expansive court-ordered decrees that noticeably exceed the dictates of any well-defined right. For example, in *Wyatt v. Stickney*,[60] a suit was brought on behalf of

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53. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

54. *Id.* at 8–9.

55. *See* Appendix to Brief for Petitioners at 372, 375, 464–76, 901–03, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (No. 281), *microformed on* U.S. Supreme Court Records and Briefs (Microform, Inc.) (containing individual orders and supplemental complaint adding State defendants to suit).

56. *Milliken II*, 433 U.S. at 281 (quoting *Swann*, 402 U.S. at 15). The Court suggested in *Swann* that decrees should be designed "to achieve the greatest possible degree of actual desegregation." *Swann*, 402 U.S. at 26. Professor Fiss has described *Swann* approvingly as "the most untailored remedy imaginable." Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 46 n.94 (1979).

57. Howard, *supra* note 40, at 429; *cf.* Nagel, *supra* note 40, at 709 ("Indeed, some courts have framed their constitutional analysis so that it is nearly impossible to discern whether any particular part of the court order represents a *constitutional* requirement or precisely how the decree might bear on the underlying constitutional violation.").

58. *See, e.g.*, Boston Chapter N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017, 1022–28 (1st Cir. 1974) (upholding district court's order—following finding of racial discrimination in the hiring of firefighters against state and local officials—enjoining use of written test and requiring future minority hiring preferences); United States v. Bd. of Sch. Comm'rs, 503 F.2d 68, 83 (7th Cir. 1974) (upholding against state and local officials those portions of extensive court-ordered desegregation decree that were limited to school district at issue).

59. Cases in these areas have also resulted in consent decrees, discussed *infra* Part III.B.

60. Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *on submission of proposed standards by defendants*, 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373, 387 (M.D. Ala. 1972), *aff'd in material respects sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). For further commentary on the *Wyatt* case, see Jack Drake, *Judicial Implementation and* Wyatt v. Stickney, 32 ALA. L. REV. 299 *passim* (1981); Hon. Frank M. Johnson, Jr., *The*

mentally-ill persons in Alabama who were civilly committed to a State hospital.[61] Plaintiffs alleged that the hospital conditions were inhumanely substandard and amounted to a violation of the patients' constitutional "right to treatment."[62] The district court agreed and then issued an extensive "remedial" order regulating details of building structure and operation, environmental conditions (including temperature of air and running water), hospital procedures (including specific staffing ratios), and individual patient treatment programs.[63] Indeed, Alabama's spending on mental institutions rose from $14 million in 1971 to $58 million in 1973, one year after the decree was rendered.[64] As one scholar described it, the "[f]ederal district court[] largely ... assumed the duties of administering a state mental health system."[65]

Federal courts have also taken an active role in reforming State prisons.[66] For example, in *Hutto v. Finney*, discussed earlier with respect to attorneys' fees, the Supreme Court upheld a prophylactic injunction against the Arkansas Department of Corrections, limiting punitive isolation to thirty days even though the practice itself was found not to violate the Eighth Amendment.[67] In *Pugh v. Locke*, an Eighth Amendment challenge to the Alabama prison system, the district court established, among other things, standards for the minimum number of square feet in a prisoner's cell, the number of minutes of daily outdoor exercise for prisoners in isolation, the number of urinals to be provided, and the requirement that each dietary supervisor have at least a bachelor's degree in dietetics.[68]

Notably, the examples cited above are limited to cases reviewed by the Supreme Court or federal courts of appeal. They do not account for the

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Role of the Federal Courts in Institutional Litigation, 32 ALA. L. REV. 271, 275–78 (1981); Mishkin, *supra* note 40, at 953–55.

61. *Wyatt*, 325 F. Supp. at 782.

62. *Id.* at 785.

63. *Id.* at 785–86.

64. Horowitz, *supra* note 40, at 1267.

65. Nagel, *supra* note 40, at 661.

66. *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318, 331–32 (M.D. Ala. 1976) (ordering improvements in prisoners' living conditions), *aff'd in relevant part sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *aff'd in relevant part sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978); Holt v. Sarver, 309 F. Supp. 362, 382–85 (E.D. Ark. 1970) (ordering improvements in prisoners' living conditions), *aff'd*, 442 F.2d 304 (8th Cir. 1971); *see also* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 19 (1998) ("The prison cases represented the collective actions of literally hundreds of federal judges, acting individually.").

67. Hutto v. Finney, 437 U.S. 678, 712 (1978) (Rehnquist, J., dissenting).

68. *Pugh*, 406 F. Supp. at 332–34; *see also Newman*, 559 F.2d at 288 (affirming *Pugh* district court standards on appeal).

numerous district court orders providing for broad relief that escape any appellate review.[69] During this time interval, the Supreme Court intervened in just a handful of cases to limit equitable relief.[70] Indeed, based on the minimal appellate review, "it is difficult to conclude that the federal courts have been swayed in any fundamental way from their pattern in exercising equity powers."[71]

3. Rehnquist Court Incursions (1990s–Present)

The Supreme Court has cut back significantly on desegregation remedies in recent years.[72] But those decisions, for the most part, dissolve previously valid decrees based on the passage of time, a record of compliance, and demographic changes rather than speak to the district courts' threshold remedial power.[73] Although those cases have had some limiting effect on the breadth of equitable relief permitted by lower courts in other contexts,[74] the

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69. *See* Horowitz, *supra* note 40, at 1268 (noting lack of appellate review at remedial stage).

70. The most notable of these cases outside the desegregation context is *Rizzo v. Goode*, 423 U.S. 362 (1976). In *Rizzo*, a federal district judge ordered broad injunctive relief against the Philadelphia police department based on a class action complaint alleging police abuses against minority citizens. *Rizzo*, 423 U.S. at 365. The Supreme Court reversed. *Id.* at 366. The Court relied on several factors, including principles of federalism and the lack of a pervasive pattern of discriminatory acts by the police. *Id.* at 373–80. But, given that *Milliken II* came the year after *Rizzo*, observers appear largely correct that *Rizzo* did not mark a sea change in equitable relief. *See Newman*, 559 F.2d at 286–88 (acknowledging Supreme Court's decision in *Rizzo* but nonetheless affirming much of district court's broad injunctive relief); Howard, *supra* note 40, at 427–29 (citing other observers); *see also* O'Shea v. Littleton, 414 U.S. 488, 499–503 (1974) (stating in dicta that equitable relief should be limited when unduly intruding into state criminal processes).

71. Howard, *supra* note 40, at 428–29.

72. *See infra* note 73 (citing recent cases); *see also* BREST ET AL., *supra* note 49, at 786–93 (describing Court's imposition of limits on judicial desegregation decrees); Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1624–25 (2003) ("Power once defined the school desegregation judge. . . . That power, however, no longer exists today.").

73. *See* Freeman v. Pitts, 503 U.S. 467, 495–96 (1992) (remanding for reconsideration of desegregation decree in operation since 1969 in light of good-faith compliance, demographic changes, and resegregation as "product not of state action but of private choices"); Bd. of Educ. v. Dowell, 498 U.S. 237, 248 (1991) (dissolving ten-year-old desegregation decree, noting the district's compliance "for a reasonable period of time"). *But see* Missouri v. Jenkins, 515 U.S. 70, 87–94 (1995) (limiting district court's power to enter intradistrict remedial decree providing for extensive capital, course, and extracurricular improvements when linked to inter-district goals of racial integration; emphasizing "rightful position" principle and tailoring of remedy to the violation).

74. *See, e.g.*, Cardenas v. Massey, 269 F.3d 251, 265 (3d Cir. 2001) (rejecting requested

Court has not intervened much outside the desegregation area: We still see relatively broad federal court relief against State governmental entities.[75] The shift has primarily been not in the prevalence of such remedies but in the source of the remedies: Instead of broadly construed constitutional rights, which the Rehnquist Court has truncated, more extensive congressional statutes provide the basis for broad judicial relief.[76]

Further, notwithstanding the Rehnquist Court's otherwise robust Eleventh Amendment jurisprudence, potential Eleventh Amendment concerns do not appear to loom large in the analyses in these cases (despite the fact that State officials, in addition to local officials, are often the objects of the decrees at issue).[77] Thus, there appears to be little in the case law—aside from the narrow exceptions discussed below—that limits the scope of relief available in a *Young* suit (assuming it qualifies as prospective under *Edelman*) beyond that available in any other suit for equitable relief against a local governmental entity.

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prophylactic relief mandating adoption of antidiscrimination policy regarding race, because it would not have prevented future harm to plaintiff who was no longer employed by State defendants).

75. *See, e.g.*, Armstrong v. Davis, 275 F.3d 849, 871–72 (9th Cir. 2001) (upholding extensive, system-wide injunction based on allegations that California's policies and practices for parole and parole revocation proceedings violated Americans with Disabilities Act and Rehabilitation Act); *see also* SANDLER & SCHOENBROD, *supra* note 40, at 10–11 ("[A]cademic interest may have waned, but the incidence and effect of institutional reform litigation have not."). *But see* Lewis v. Casey, 518 U.S. 343, 356–60 (1996) (rejecting as overly broad district court's order aimed at improving management of prison library rather than legal wrong of denying prisoners' access to courts and other measures not directed at illiterate prisoners); *id.* at. 392 (Thomas, J., concurring) (same). Congress has intervened to a limited extent in the prison reform area. *See* Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626(a)(1)(A) (2000) (limiting injunctive relief in prison reform cases to that "necessary" to cure constitutional violation).

76. *See* SANDLER & SCHOENBROD, *supra* note 40, at 10–11 ("The Supreme Court's opinions [limiting constitutional remedies] in any event have been utterly overshadowed by congressional enactments over the past thirty years that make it easy to prove a statutory case against state and local defendants.").

77. One possible explanation for the lack of concern for State sovereign immunity is that most of the aforementioned cases involve constitutional claims based on violations of rights arising under the Fourteenth Amendment and, as such, the sovereign immunity defense is arguably weaker or inapplicable. Jesse H. Choper & John C. Yoo, *Who's So Afraid of the Eleventh Amendment: The Limited Impact of the Court's Sovereign Immunity Rulings*, 105 COLUM. L. REV. (forthcoming 2005) (manuscript at 16 & n.93, on file with authors). However, while affirming Congress's power to abrogate State immunity pursuant to Section 5, the Supreme Court has not stated that the Eleventh Amendment does not apply to any suit alleging a direct violation of substantive Fourteenth Amendment rights. More relevant, as the Supreme Court's decisions in *Milliken II* and *Hutto* demonstrate (in addition to numerous federal courts of appeals decisions before and after), courts have generally assumed that the Eleventh Amendment does in fact apply in such suits but, nevertheless, have upheld broad remedies against State entities.

Nevertheless, the Rehnquist Court has placed some direct limits on the *Young* doctrine in the last ten years. These limits come from two cases: *Seminole Tribe v. Florida*[78] and *Idaho v. Coeur d'Alene Tribe.*[79] In *Seminole Tribe*, an Indian tribe brought suit in federal court against Florida and its governor to compel compliance with the Indian Gaming Regulatory Act (IGRA), under which States have a duty to negotiate in good faith with a tribe with the end goal of forming a compact governing gaming activities.[80] The State defendants moved to dismiss the suit on the ground that it violated Florida's Eleventh Amendment immunity.[81] In the better known part of its opinion, the Supreme Court agreed that the State enjoyed sovereign immunity under these facts and, overruling *Pennsylvania v. Union Gas Co.*,[82] that Congress could not abrogate that immunity pursuant to its Article I powers.[83] The case still left the question of whether the statutory duty could nevertheless be enforced against the governor (as opposed to the State) pursuant to the *Young* doctrine. After all, the tribe sought prospective injunctive relief in order to end an ongoing violation of federal law, meeting the elements normally necessary to overcome the Eleventh Amendment bar. However, the Court denied relief under *Young*. The Court stated that where, as in IGRA, Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting a *Young* action.[84] According to the Court, IGRA's intricate enforcement procedures showed that Congress intended not only to define, but also to limit significantly, the duty to negotiate.[85] The Court found that IGRA mandates only a modest set of regulations where an agreement is not reached through negotiation or mediation.[86] In contrast, the Court reasoned, a *Young* action would expose a State official to a federal court's full remedial powers, including contempt sanctions.[87] Enforcement through *Young* would render IGRA's intricate enforcement scheme superfluous, the Court

78. Seminole Tribe v. Florida, 517 U.S. 44 (1996).

79. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997).

80. *Seminole Tribe*, 517 U.S. at 51–52.

81. *Id.* at 52.

82. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (holding that Congress may authorize suits against States pursuant to its Article I powers).

83. *Seminole Tribe*, 517 U.S. at 59–63.

84. *Id.* at 74–75.

85. *Id.*

86. *Id.*

87. *Id.* at 75.

hypothesized, as tribes would opt to proceed via *Young* instead.[88] The Court was not moved by the fact that it had just held this very scheme unavailable.

In *Coeur d'Alene*, an Indian tribe, alleging ownership in the beds and banks of a lake and its tributaries lying within the boundaries of its reservation, brought a federal-court action against Idaho and various State officials.[89] The tribe sought, *inter alia*, a declaratory judgment establishing its entitlement to the exclusive right to quiet enjoyment of the submerged lands, a declaration of the invalidity of all Idaho laws purporting to regulate those lands, and an injunction prohibiting defendants from taking any action in violation of the tribe's right in the lands.[90] The Supreme Court held that the suit was barred by the Eleventh Amendment and rejected application of the *Young* doctrine to the State officials.[91] The Court acknowledged that the tribe did allege an ongoing violation of its property rights under federal law and did seek prospective injunctive relief—ordinarily sufficient to invoke the *Young* doctrine.[92] The Court, however, found this case exceptional because the tribe's suit was the functional equivalent of a quiet title action implicating special sovereignty interests.[93] The Court found the suit especially troubling because the tribe's requested relief would have divested the State of its property interest and control over vast areas of submerged lands, historically considered uniquely "sovereign lands."[94]

These two cases have generated substantial commentary, a vast majority of which has characterized the cases as constituting a narrowing trend with serious potential to limit the *Young* doctrine.[95] I disagree. There are numerous reasons

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88. *Id.*

89. *Coeur d'Alene*, 521 U.S. at 265.

90. *Id.*

91. *Id.* at 281–82.

92. *Id.*

93. *Id.*

94. *Id.* at 283.

95. *See, e.g.*, Barsalou & Stengel, *supra* note 10, at 456 (asserting that Court's recent jurisprudence has narrowed *Young*); Vicki C. Jackson, Seminole Tribe, *The Eleventh Amendment, and the Potential Evisceration of* Ex Parte Young, 72 N.Y.U. L. REV. 495, 498, 510, 530 (1997) (criticizing *Seminole Tribe*); John P. LaVelle, *Sanctioning a Tyranny: The Diminishment of* Ex Parte Young, *Expansion of* Hans *Immunity, and Denial of Indian Rights in* Coeur d'Alene Tribe, 31 ARIZ. ST. L.J. 787, 867 (1999) ("The Rehnquist Court's *Coeur d'Alene Tribe* decision thus represents a manifestation of profound injustice—the very kind of injustice, in fact, that the doctrine of *Ex parte Young* was designed to protect against."); Nathan C. Thomas, Note, *The Withering Doctrine of* Ex Parte Young, 83 CORNELL L. REV. 1068, 1070–71 (1998) (arguing that "the *Seminole* decision added a new inquiry that narrowed the doctrine's application" and that "*Coeur d'Alene*'s intimation of a new approach in *Ex parte Young* cases further limits the effectiveness of the doctrine[]"); Leading case, *Ex Parte Young* Doctrine, 111

why these two cases are not indicative of a broader trend. First, the Court's assumption that contempt sanctions would apply in *Seminole Tribe* reveals the Court's broad conception of *Young*.[96] Second, *Seminole Tribe*'s holding as to *Young*'s applicability reflects more a concern about separation of powers, respecting Congress, than federalism (though that is somewhat ironic given the Court's striking of the congressional scheme as unenforceable in the prior part of the opinion).[97] Thus, the applicability and scope of *Young* relief remain unaffected in the heartland of non-statutory or constitutional claims. Third, *Seminole Tribe*'s concern with deferring to Congress's intricate remedial schemes has not yet carried over to any cases involving other detailed federal statutes. In *Board of Trustees v. Garrett* (discussed *infra* Part III.C), for example, the Court expressly assumes when rejecting monetary relief against the State that *Young* relief would still be available to enforce Title I of the Americans with Disabilities Act.[98] Fourth, shifting to *Coeur d'Alene*, only the Chief Justice joined the portion of Justice Kennedy's lead opinion that sought to make further inroads on *Young*.[99] Indeed, Justice O'Connor, joined by Justices Scalia and Thomas, wrote separately to expressly reject Justice Kennedy's stricter approach, concluding that it "unnecessarily recharacterizes and narrows much of our *Young* jurisprudence."[100] Combined with the four dissenters, a total of seven justices thus eschewed a further constriction of *Young* doctrine.[101] Finally, the two cases appear more concerned with limiting

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HARV. L. REV. 269, 278 (1997) ("The Court's decision in *Coeur d'Alene* carved a new and very narrow exception to *Young* for submerged lands."). *But see* David P. Currie, *Response:* Ex Parte Young *After* Seminole Tribe, 72 N.Y.U. L. REV. 547, 547, 551 (1997) ("Not to worry; *Ex parte Young* is alive and well and living in the Supreme Court." (footnote omitted)); Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 44–46 ("I do not read the Court's action as evidence that *Ex parte Young* is on its deathbed." (footnote omitted)); Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 128–32 (1996) (arguing that *Seminole Tribe* does not disturb *Young* doctrine).

96. *See* Jackson, *supra* note 95, at 516–17 (criticizing Court's assumption that relief available in *Young* action would be greater than that available under statute or that parties sought such broader relief).

97. Leonard, *supra* note 21, at 264–65 & n.375.

98. *See* Bd. of Trs. v. Garrett, 531 U.S. 356, 374 n.9 (2001) ("Title I of the ADA . . . can be enforced . . . by private individuals in actions for injunctive relief under *Ex parte Young*."). The Supreme Court has thus far declined the invitation to obviate *Young* in the enforcement of other federal statutes, such as the Clean Water Act. *See* NRDC v. Cal. Dep't of Transp., 96 F.3d 420, 424 (9th Cir. 1996) (O'Scannlain, J., concurring) (requesting Supreme Court's attention to question of availability of *Young* for federal statutory claims).

99. *Coeur d'Alene*, 521 U.S. at 263.

100. *Id.* at 291–97 (O'Connor, J., concurring).

101. *See also* LaVelle, *supra* note 95, at 867 (describing objections of seven justices to Justice Kennedy's approach).

the availability of *Young* in relatively unique situations (detailed statutory schemes benefiting Indians and quiet title actions brought by Indians against a State) than with reducing the type or scope of *Young* relief in the ordinary case, such as those discussed *supra* Part II.A.2.

For those unconvinced by these arguments, two more recent cases—which have received much less attention thus far—buck the perceived trend and largely render the concerns moot: *Verizon Maryland Inc. v. Public Service Commission*[102] and *Frew*. In *Verizon*, the State regulatory commission ordered Verizon, the local phone company (incumbent local-exchange carrier), to compensate its competitors for certain calls made by its customers.[103] Verizon then sued the commission and its individual members in federal court.[104] Verizon alleged that the commission's order was in violation of the federal telecommunications law and a related FCC ruling.[105] Verizon sought both declaratory relief that the order was unlawful and injunctive relief against its enforcement.[106] The lower courts dismissed the suit, stating that the *Young* doctrine did not permit suit against the individual State officials.[107] The Supreme Court unanimously reversed.[108] The Court stated that 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.[109] The Court stated that Verizon's requested relief clearly satisfied that inquiry.[110] Although the requested declaration would speak to the past as well as the future, the Court pointed out that the State's past liability was not at issue.[111] The Court also rejected the argument that the federal statute at issue constituted an exclusive remedial scheme, like the one held in *Seminole Tribe* to exclude *Young* actions.[112]

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102. Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635 (2002).

103. *Id.* at 639.

104. *Id.* at 640.

105. *Id.*

106. *Id.*

107. *Id.*

108. Justice Kennedy concurred separately to re-emphasize his narrower approach from *Coeur d'Alene*. *Verizon*, 535 U.S. at 648–49 (Kennedy, J., concurring). Not even the Chief, however, joined him.

109. *Id.* at 645.

110. *Id.*

111. *Id.* at 646.

112. *Id.* at 647.

Verizon is seen by many observers as signaling an end to any potential anti-*Young* momentum from *Seminole Tribe* and *Coeur d'Alene*.[113] I save discussion of *Frew* until Part II.C *infra*, but suffice it to note that in it, the Court—via a 9–0 opinion written by Justice Kennedy—implicitly endorsed a broad conception as to the permissible scope of *Young* relief. As Professor Currie has observed, "*Ex parte Young* is alive and well and living in the Supreme Court."[114]

B. Consent Decrees

Despite my assertions that the scope of permissible injunctive relief under *Young* has generally increased over time, one could reasonably read the Rehnquist Court's limitations on equitable authority as indicative of a new trend designed to narrow the scope of district court injunctions against State entities. But to the extent the Supreme Court has otherwise limited the scope of a district court's equitable authority in recent years, consent decrees have remained a relatively undisturbed bastion of broad relief sanctioned by federal courts. Even more than a district court's traditional injunctive relief, consent decrees provide a fitting analogue to Congress's Section 5 remedial power. This section discusses the general nature of consent decrees and how the Supreme Court has treated them, followed by a discussion of consent decrees specifically involving State officials, focusing on the *Frew* case from the 2003 term.

Consent decrees—a subcategory of equitable relief—are special because of their hybrid nature: part contract and part court order. Like a contract, a consent decree embodies a voluntary agreement among the parties.[115] According to the Court: "The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation."[116] Consent decrees typically disclaim any concession of liability,[117] although a decree can include some

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113. *See, e.g.*, Helen D. Silver, Verizon Maryland, Inc. v. Public Service Commission of Maryland*: Reaffirming* Ex Parte Young *and the Necessity of Finding Regulatory Hand-Back Schemes To Be a Gift or Gratuity*, 52 EMORY L.J. 1519, 1540–47 (2003) (noting that Court's decision in Verizon "dispels many doubts as to the continuing validity of *Ex parte Young*").

114. David P. Currie, *Response:* Ex Parte Young *After* Seminole Tribe, 72 N.Y.U. L. REV. 547, 547 (1997) (footnote omitted).

115. Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 521–22 (1986).

116. *Id.* at 522 (quoting United States v. Armour & Co., 402 U.S. 673, 681 (1971)).

117. Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees*

admissions[118] or can even follow a judicial determination of liability.[119] Like a typical injunction, a consent decree is also an enforceable judicial order that is "subject to the rules generally applicable to other judgments and decrees."[120] For example, the court retains the power to modify a consent decree in certain circumstances over the objection of a signatory,[121] and noncompliance with a consent decree is enforceable by citation for contempt of court.[122] As the Supreme Court has stated, "A federal court is more than 'a recorder of contracts' from whom parties can purchase injunctions; it is 'an organ of government constituted to make judicial decisions.'"[123]

Consent decrees are common in some of the same areas ("structural" or "institutional reform" cases) where broad injunctions have been ordered.[124]

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and the Fairness of Negotiated Institutional Reform, 1984 DUKE L.J. 887, 895 (1984).

118. *See Firefighters*, 478 U.S. at 512 (noting city's "express admission" that it had engaged in discrimination).

119. *See* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 372–74 (1992) (upholding consent decree entered after finding of liability). It is not clear to me what impact, if any, the judicial determination or concession of liability might have on the scope of relief available under a consent decree. On the one hand, one could argue that such a determination justifies broader boundaries since it has been established that the State has actually been in violation of federal law. On the other hand, perhaps the terms of the decree must then be based on the adjudicated or admitted violations rather than the complaint, which would tend to narrow the scope of permissible relief. The Court's test in *Firefighters*—in which there was no adjudication but the defendant admitted at least some liability—does not distinguish between the various scenarios. The consent decree in *Frew* was entered without any determination or concession of liability.

120. *Id.* at 378.

121. *See* Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431, 441 (2004) (acknowledging district court's modification power under Rule 60(b)(5)); *Rufo*, 502 U.S. at 384–91 (rejecting higher "grievous wrong" standard for modification of consent decrees in institutional reform context in favor of more flexible standard under Federal Rule of Civil Procedure 60(b)(5), but still requiring that party seeking modification bear burden of establishing that significant change in facts or law warrants revision of decree and that proposed modification is suitably tailored to changed circumstances); *Firefighters*, 478 U.S. at 518 (citing United States v. Swift & Co., 286 U.S. 106, 114 (1932)) ("[T]he court retains the power to modify a consent decree in certain circumstances over the objection of a signatory.").

122. *See* Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 518 (1986) (citing United States v. City of Miami, 664 F.2d 435, 440 & n.8 (5th Cir. 1981) (Rubin, J., concurring)) ("[N]oncompliance with a consent decree is enforceable by citation for contempt of court."); *cf.* Spallone v. United States, 493 U.S. 265, 276 (1990) (recognizing inherent power of courts to enforce compliance with their consent decrees).

123. *Firefighters*, 478 U.S. at 525 (quoting 1B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.409[5], at 331 (1984)).

124. *See* Schwarzschild, *supra* note 117, at 888 (noting that consent decrees "are now common in every variety of lawsuit over public policy, including environmental cases, litigation over the rights of the institutionalized, school and housing desegregation suits, and equal employment litigation" (footnotes omitted)).

Consent decrees, however, can be even more expansive than other equitable judicial relief. To be valid, a consent decree must simply (1) "resolve a dispute within the court's subject-matter jurisdiction," (2) "'[come] within the general scope of the case made by the pleadings,'" and (3) "further the objectives of the law upon which the complaint was based."[125] Although much turns on application, the phrasing appears to permit relief broader than that in *Milliken II* and certainly does not reflect the specific mandate to tailor the remedy to the harm embodied in the more recent desegregation cases.[126] Indeed, the Supreme Court has made clear that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial."[127]

For example, in *Rufo*, inmate-plaintiffs and jail official-defendants agreed to a consent decree to resolve the inmates' claim that jail conditions violated the Constitution.[128] The decree required single bunking in jail cells.[129] Defendants then sought to modify the decree in light of a subsequent Supreme Court decision clarifying that double celling is not unconstitutional in all cases.[130] The Court stated that, because the controlling law did not forbid single celling, the parties were free to agree to that condition:

> [Parties can] settle the dispute over the proper remedy for the constitutional violations that had been found by undertaking to do more than the Constitution itself requires (almost any affirmative decree beyond a directive to obey the Constitution necessarily does that), *but also more than what a court would have ordered absent the settlement.*[131]

Accordingly, the Court held, the district court did not necessarily err in entering the consent decree.[132] The Court concluded that modification would only be warranted if there had been a misunderstanding of the governing law at the time the decree was enacted.[133]

A consent decree's breadth is further enhanced by the class action nature of litigation often giving rise to such relief, as most consent decrees provide for

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125. *Firefighters*, 478 U.S. at 525 (alteration in original) (quoting Pac. R.R. v. Ketchum, 101 U.S. 289, 297 (1880)).

126. *See supra* Parts II.A.2 and II.A.3 (summarizing developments in *Young* doctrine since 1970s).

127. *Firefighters*, 478 U.S. at 525.

128. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 374–75 (1992).

129. *Id.* at 375.

130. *Id.* at 376.

131. *Id.* at 389 (emphasis added).

132. *Id.*

133. *Id.* at 389–91.

some type of class-wide relief that often affects people who are not parties to the suit.[134] For example, the Court in *Firefighters*, in approving entry of a consent decree based on a class action alleging racial discrimination in employment, held that the decree may include race-conscious relief that benefits individuals who are not actual victims of that discrimination.[135]

Although the law ordinarily permits federal district courts to enter broad consent relief, that does not necessarily mean that courts enjoy the same power when State (as opposed to private or local governmental) entities are the subject of the consent decree. The Eleventh Amendment and the *Young* doctrine could, in theory, pose certain additional constraints. Nevertheless, in addition to *Rufo*, in which State officials were among the named defendants,[136] broad consent decrees have been entered against State officials in many lower court cases.[137] The Supreme Court recently tackled this issue directly in *Frew ex rel. Frew v. Hawkins*, the subject of the next section.

C. Frew ex rel. Frew v. Hawkins

In *Frew*, the Court had to determine whether a federal court could hold State officials to the terms of a consent decree arising out of a suit challenging Texas's

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134. Schwarzschild, *supra* note 117, at 889.

135. *Firefighters*, 478 U.S. at 516–25.

136. *See Rufo*, 502 U.S. at 372–73 & n.2 (noting lower court determination that state official was proper party to lawsuit).

137. *See, e.g.*, Jeff D. v. Kempthorne, 365 F.3d 844, 854 (9th Cir. 2004) (upholding consent decree relating to state-run mental health facility); *see infra* notes 209–14 and accompanying text; Johnson v. Florida, 348 F.3d 1334, 1339 (11th Cir. 2003) (upholding consent decree relating to state-run mental health facility providing for, *inter alia*, specific "community living" arrangements well beyond federal law standards); Sweeton v. Brown, Nos. 90-1800, 90-1807, 1991 U.S. App. LEXIS 22211, at *26 (6th Cir. Sept. 17, 1991) (listed in table at 944 F.2d 805) (upholding consent decree relating to state-prison parole procedures); Thompson v. Enomoto, 915 F.2d 1383, 1390–91 (9th Cir. 1990) (upholding modified consent decree relating to prison conditions for death-row inmates; summarily rejecting Eleventh Amendment defense based on *Ex parte Young*); Duran v. Carruthers, 885 F.2d 1485, 1490 (10th Cir. 1989) (upholding over 100-page consent decree relating to many aspects of prison operation; explicitly rejecting Eleventh Amendment defense that decree extended too far beyond federal law); Kozlowski v. Coughlin, 871 F.2d 241, 244 (2d Cir. 1989) (upholding consent decree relating to prison visitation); Tonya K. v. Bd. of Educ., 847 F.2d 1243, 1249 (7th Cir. 1988) (upholding consent decree relating to school compliance with federal statute governing treatment of handicapped children, including attorneys' fees provision despite uncertainty of legal requirement); Wis. Hosp. Ass'n v. Reivitz, 820 F.2d 863, 868 (7th Cir. 1987) (rejecting Eleventh Amendment defense to Medicaid-related decree); *cf.* R.C. v. Hornsby, No. 88-H-1170-N, at 1 n.1 (M.D. Ala. 1991) (acknowledging in consent decree that "each party has been able to obtain favorable outcomes that might have been beyond his reach if the case had been decided by the Court instead of resolved through negotiations").

compliance with a portion of the federal Medicaid law.[138] As a participant in the Medicaid program, Texas must meet certain federal requirements, including a requirement that it have an Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program for children.[139] The *Frew* plaintiffs, mothers of EPSDT eligible children, claimed that the Texas program did not meet federal EPSDT standards.[140] They sought injunctive relief against State officials in federal court.[141] The district court certified a class of over one million indigent children in Texas.[142] After two years of negotiations but before trial, the State officials submitted to a detailed, eighty-page consent decree approved by the district court.[143] In contrast with the federal statute's brief and general mandate, the decree imposed comprehensive obligations and procedures and required State officials to implement many specific proposals.[144]

Two years later, plaintiffs alleged that the State was not complying with the terms of the decree and moved to enforce several of its provisions.[145] The district court agreed with the plaintiffs, and rejected the State officials' argument that the Eleventh Amendment rendered the decree unenforceable.[146] The Fifth Circuit reversed, holding that the Eleventh Amendment prevented enforcement of the decree because the decree violations did not also constitute violations of the Medicaid Act.[147]

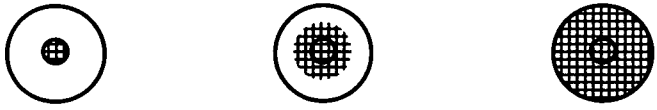
The Supreme Court reversed 9–0, finding the consent decree enforceable under *Ex parte Young* even if the decree violations were not violations of federal law.[148] The Court started by recognizing the intersection of the Eleventh Amendment and the rules governing consent decrees.[149] The State officials argued that this intersection endangered Eleventh Amendment protections in the following way: (1) *Ex parte Young* provides an exception to the general rule of State immunity from suit. (2) Consent decrees allow State officials to bind the State to significantly more commitments than federal law requires. (3) Permitting the enforcement of such decrees threatens to expand the *Young* exception, and thereby

138. Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431, 433 (2004).
139. 42 U.S.C. §§ 1396a(a)(43), 1396d(r) (2000).
140. *Frew*, 540 U.S. at 434 (2004).
141. *Id.*
142. *Id.*
143. *Id.* at 434–35.
144. *Id.* at 435.
145. *Id.*
146. *Id.* at 435–36.
147. Frazar v. Gilbert, 300 F.3d 530, 543–48 (5th Cir. 2002).
148. *Frew*, 540 U.S. at 436–40.
149. *Id.* at 437.

circumvent Eleventh Amendment protections, since it would give courts jurisdiction over not just federal law, but also everything else to which State officials had agreed.[150] The Court, however, was not convinced. The Court concluded (somewhat facilely on the assumption that the decree was properly entered) that the consent decree constituted "a remedy consistent with *Ex parte Young* and *Firefighters*."[151] Thus, the Court held that its enforcement did not violate the Eleventh Amendment.[152] The Court relegated the State's federalism and state separation-of-powers concerns to Federal Rule of Civil Procedure 60(b)(5), which permits a party to move for modification if a decree is no longer equitable.[153]

The Court's relatively terse opinion merits some further scrutiny. Although the State only contested the enforcement of the decree, as opposed to the validity of its entry, the entry-enforcement distinction seems immaterial in light of the Court's conclusion, based on *Hutto v. Finney,* that "[o]nce entered, a consent decree may be enforced."[154] In other words, whether *Ex parte Young* permits enforcement of a consent decree is the exact same question as whether *Young* permits a district court to approve that relief in the first place. The Court, however, provides little guidance as to when a district court has exceeded its authority under *Young* to approve a consent decree.

A pictorial representation may help convey the potential differences between the scope of federal law, ordinary *Young* relief, and consent decrees:[155]



(1) (2) (3)

In each diagram, the inner circle represents the scope of federal law and the outer circle represents the permissible scope of a consent decree under *Firefighters*. The crosshatched area represents the expanding scope of permissible *Young* relief. *Frew* seems to have placed it closer to that in diagram (3).

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150. *Id.* at 438.

151. *Id.* at 439.

152. *Id.*

153. *Id.* at 441 ("When a federal court has entered a consent decree under *Ex parte Young*, the law's primary response to these concerns has its source not in the Eleventh Amendment but in the court's equitable powers and the direction given by the Federal Rules of Civil Procedure.").

154. *Id.* at 440.

155. I credit Gregory Rapawy, a former colleague, for helping to conceptualize the problem through the use of concentric circles.

The Court explicitly rejected the State's position that only decree terms coinciding with federal law were enforceable under *Young* [diagram (1)].[156] The Court's cursory analysis, largely lumping together *Young* and *Firefighters*, could be read to support the broad proposition that if a suit alleging an ongoing violation of federal law seeks prospective injunctive relief and if the resulting consent decree satisfies the *Firefighters* criteria, then the decree is enforceable against State officials under *Young* [diagram (3)]. In theory, a future case could still find a consent decree consistent with *Firefighters* but beyond *Young* [diagram (2)],[157] but the Court does not indicate how such analysis might proceed nor do the lower courts thus far seem eager to figure it out.[158]

Notably, aside from a single example,[159] the Supreme Court did not in its opinion compare the challenged provisions of the consent decree with the applicable Medicaid provisions. Such a comparison, however, reveals the striking breadth of the *Frew* decision. In relevant part, the Medicaid statute requires that the State plan provide for the following:

> (A) informing all persons in the State who are under the age of 21 [and qualify for Medicaid] of the availability of early and periodic screening, diagnosis, and treatment [EPSDT] services as described in

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156. Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431, 438 (2004).

157. Surely this would happen if the consent decree provided for retrospective money damages. But here I am referring more to *scope* of relief rather than *type* of relief issues. For example, the Court could have held (but did not) that *Young* limits the scope of permissible prospective relief in consent decree cases to the relief available in more traditional injunctive relief cases, notwithstanding the *Firefighters* test.

158. *See infra* notes 209–14 and accompanying text (describing case upholding consent decree relating to State-run mental health facility).

159. Justice Kennedy provides this lone example to "illustrate[] the nature of the difference" between the decree and the statute:

> The ESPDT statute requires States to "provid[e] or arrang[e] for the provision of . . . screening services in all cases where they are requested," and also to arrange for "corrective treatment" in such cases. 42 U.S.C. §§ 1396a(a)(43)(B), (C). The consent decree implements the provision in part by directing the Texas Department of Health to staff and maintain toll-free telephone numbers for eligible recipients who seek assistance in scheduling and arranging appointments. Consent Decree ¶¶ 241–42, Lodging of Petitioners 63–64. According to the decree, the advisors at the toll-free numbers must furnish the name, address, and telephone numbers of one or more health care providers in the appropriate specialty in a convenient location, and they also must assist with transportation arrangements to and from appointments. *Id.*, ¶¶ 243–45, Lodging of Petitioners 64. The advisers must inform recipients enrolled in managed care health plans that they are free to choose a primary care physician upon enrollment. *Id.* ¶ 244, Lodging of Petitioners 64.

Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431, 435 (2004) (alterations and citations in original).

> [§ 1396d(r)] and the need for age-appropriate immunizations against vaccine-preventable diseases,
>
> (B) providing or arranging for the provision of such screening services in all cases where they are requested,
>
> (C) arranging for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services, and
>
> (D) reporting to the Secretary [annually in a manner established by the Secretary] the following information relating to [EPSDT] services provided under the plan during each fiscal year:
>
> > (i) the number of children provided child health screening services,
> >
> > (ii) the number of children referred for corrective treatment (the need for which is disclosed by such child health screening services),
> >
> > (iii) the number of children receiving dental services, and
> >
> > (iv) the State's results in attaining the participation goals set for the State under [§ 1396d(r)].[160]

Section 1396d(r) defines EPSDT services, in relevant part, as follows:

> medical checkups according to a properly prescribed schedule and at other intervals when needed, "which shall at a minimum include—
>
> > (i) a comprehensive health and developmental history (including assessment of both physical and mental health development),
> >
> > (ii) a comprehensive unclothed physical exam,
> >
> > (iii) appropriate immunizations . . . according to age and health history,
> >
> > (iv) laboratory tests (including lead blood level assessment appropriate for age and risk factors), and

160. 42 U.S.C. § 1396a(a)(43) (2000).

> (v) health education (including anticipatory guidance)"[161];
>
> dental services including checkups according to a properly prescribed schedule and treatment, "which shall at a minimum include relief of pain and infections, restoration of teeth, and maintenance of dental health"[162]; and
>
> the full range of healthcare services allowed by the federal Medicaid statute, including but not limited to case management.[163]

From this single page of basic federal statutory mandates, the district court approved provisions amounting to a nearly eighty-page consent decree. Here are some of the provisions that the Supreme Court's decision effectively deems proper relief within a federal court's *Ex parte Young* authority, compared to the closest federal law mandate:

Issue	Consent Decree Provisions	Federal Law
Medical and dental screens	▪ Recipients entitled to regular medical and dental checkups[164] ▪ State must conduct additional outreach for missed checkups[165] ▪ State must provide dental "scans" and tooth sealants to recipients[166]	Provide or arrange for checkups on periodic basis; provide basic dental services listed above[167]

161. 42 U.S.C. § 1396d(r)(1)(B) (2000).

162. 42 U.S.C. § 1396d(r)(3)(B) (2000).

163. 42 U.S.C. § 1396d(r)(5) (2000).

164. Consent Decree ¶¶ 2–3, Frew v. McKinney, No. 3:93CV65 (E.D. Tex. Feb. 16, 1996) [hereinafter Decree].

165. Decree ¶¶ 35–37.

166. Decree ¶¶ 154–59.

167. 42 U.S.C. §§ 1396a(a)(43)(B), (C), 1396d(r)(1), (3) (2000).

Issue	Consent Decree Provisions	Federal Law
Outreach	▪ Outreach unit staffing requirements[168] ▪ Oral outreach must "effectively inform recipients about the benefits of preventive health care, that services are free of charge, how to locate a provider who is willing to provide services to EPSDT recipients, how to schedule appointments and how to schedule transportation assistance"[169] ▪ Outreach information must be "reasonably interesting," "sensitive to . . . different cultural backgrounds," and presented in an encouraging and convenient manner[170] ▪ Requiring certain written materials, including bilingual "reminder letters" subject to numerous detailed specifications[171] ▪ Outreach units must adhere to numerous guidelines, for example use of "highly visual" materials about dental issues including photographs of healthy mouths and common dental problems[172] ▪ Requiring preparation of materials for inter-agency healthcare handbooks[173] ▪ Requiring implementation of media marketing plan[174]	Inform eligible persons of the availability of EPSDT services[175]

168. Decree ¶ 32; *see also* Frew v. Gilbert, 109 F. Supp. 2d 579, 589 (E.D. Tex. 2000) ("The decree elaborates in detail the defendants' obligations to conduct outreach efforts aimed at increasing participation and the receipt of needed services." (citing Decree ¶¶ 10–74)).

169. Decree ¶ 52.

170. Decree ¶ 14.

171. Decree ¶ 17.

172. Decree ¶ 38; *see also id.* ¶¶ 25–64 (setting forth guidelines for outreach).

173. Decree ¶¶ 68–71.

174. Decree ¶ 73.

175. 42 U.S.C. § 1396a(a)(43)(A) (2000).

Issue	Consent Decree Provisions	Federal Law
Training of health care providers	▪ Requiring EPSDT training at State professional schools and other ongoing professional training relating to, inter alia, mental health services, new issues, and cultural sensitivity[176] ▪ Requiring training for pharmacists[177] ▪ Provision of training scholarships and training of all managed-care providers and staff about EPSDT requirements including terms of the decree[178]	Train subprofessional staff[179]
Managed care/ Migrant workers	▪ Mandating ninety-day deadline for checkups of new managed care enrollees and accelerated services to migrant children[180] ▪ Requiring door-to-door and priority outreach for migrant farmworkers[181]	n/a
Toll-free telephone services	▪ Detailed requirements as to operation of toll-free assistance, including inter alia the linkage of transportation and scheduling assistance; a well-trained, knowledgeable, polite staff; prompt service; non-English speaker arrangements; and bar on tape recordings during work hours[182]	Inform and arrange for provision of EPSDT services[183]
Case management services	▪ Requiring complete plan for "sufficient" case management services in every county, including methods to encourage acceptance of case management[184]	Provide case management services when necessary for treatment[185]
Transportation	▪ Requiring "comprehensive" annual assessments of the transportation program studies[186] ▪ Increase mileage reimbursement rate[187] ▪ Modifying transportation regulations to permit ongoing relationship with a medical provider[188]	Arrange for provision of EPSDT services[189]

176. Decree ¶¶ 107–20.
177. Decree ¶¶ 124–30.
178. Decree ¶¶ 131, 194.
179. 42 U.S.C. § 1396a(a)(4)(B) (2000).
180. Decree ¶¶ 190, 192.
181. Decree ¶¶ 181–83.
182. Decree ¶¶ 242–47.
183. 42 U.S.C. §§ 1396a(a)(43)(A), (B) (2000).
184. Decree ¶¶ 248, 264–65.
185. 42 U.S.C. §§ 1396d(a)(19), 1396d(r)(5), 1396n(g)(2) (2000).
186. Decree ¶¶ 223–29.
187. Decree ¶ 232.
188. Decree ¶ 238.
189. 42 U.S.C. §§ 1396a(a)(43)(B) (2000); *see also* 42 C.F.R. §§ 431.53, 440.170 (2004)

Issue	Consent Decree Provisions	Federal Law
Monitoring/ reporting requirements	▪ Reporting requirements relating to, inter alia, outreach;[190] dental checkups;[191] managed care performance;[192] checkups of abused children;[193] data on those receiving all scheduled checkups beyond HCFA requirements;[194] statistics measuring program's statewideness[195]	Make reports required by the Secretary; report number of children receiving EPSDT services[196]
Outcome measures	▪ Creation of health outcome indicators, target goals for each indicator, and related reporting requirements[197]	n/a
Corrective plans	▪ Mandating plans for counties that lag behind statewide average for checkups[198] ▪ Mandating plans for improving outcome indicators noted above with deadlines[199]	Inform, arrange, provide EPSDT services for "all" eligible persons[200]
Other miscellaneous provisions	▪ Requiring State to develop capacity to conduct epidemiologic studies[201] ▪ Requiring simplified paperwork[202] ▪ Recruitment of professional schools, family-planning agencies, and school districts[203]	n/a

The discrepancy between the scope of Medicaid requirements and the scope of consent relief, apparent from the chart, leads to a few additional observations. As the Fifth Circuit indicated, the Medicaid statute states only that the State plan must "provide for" the advertising, providing, and arranging of EPSDT services, not that the State must actually provide services in every

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(establishing transportation requirements).

190. Decree ¶¶ 60–61.

191. Decree ¶ 171.

192. Decree ¶ 191.

193. Decree ¶ 212.

194. Decree ¶ 284.

195. Decree ¶¶ 277–80.

196. 42 U.S.C. §§ 1396a(a)(6), (43)(D) (2000).

197. Decree ¶¶ 288–89, 293–95.

198. Decree ¶ 281.

199. Decree ¶ 296.

200. 42 U.S.C. § 1396a(a)(43) (2000); *see also* 42 U.S.C. § 1396a(a)(1) (2000) (establishing "statewideness" requirement).

201. Decree ¶ 9.

202. Decree ¶ 90.

203. Decree ¶¶ 102, 139–41.

case.[204] Similarly, although the district court proffers a three-pronged definition of "effective" outreach, its interpretation places a greater burden on the State than the statutory requirement that the State plan just be "designed to" be effective.[205]

Other decree provisions are far less tailored. For example, the statute makes no mention of migrant workers. Several decree provisions, in contrast, create special requirements expressly for that population. Further, the statute says nothing about the training of medical professionals (just staff) while the decree speaks extensively to training of doctors, dentists, pharmacists, and others in a host of areas. And the transportation provisions go far beyond the minimal statutory requirement that the State "arrange" for the provision of EPSDT services.

One might argue that the broad approval of such relief under the *Young* doctrine can be explained as a reaction to the State's shameless attempt to duck enforcement of a consent decree. Although the State's unseemly behavior may have had some effect on the eventual outcome, the Court did not have to go down the path it chose to reach the same result. In fact, the plaintiffs' lead argument before the Court was that under *Lapides v. Board of Regents of the University System*,[206] the State had waived its Eleventh Amendment immunity when State officials initially agreed to entry of the consent decree.[207] Not only is this argument eminently reasonable, it seems analytically cleaner and would avoid any ancillary expansion of equitable relief in the context of *Young*. But the Court explicitly and unanimously chose not to address that argument and decided the case on *Young* grounds instead.[208] The literature chronicling the narrowing (if not death) of *Young* relief in the Rehnquist Court thus appears to have been premature at best.

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204. *See* Frazar v. Gilbert, 300 F.3d 530, 544 (5th Cir. 2002) ("Congress did not intend that a court can require that a state participating in the Medicaid program must always provide every EPSDT service to every eligible person at all times.").

205. *See* Frew v. Gilbert, 109 F. Supp. 2d 579, 598, 673 (E.D. Tex. 2000) (measuring EPSDT program effectiveness in terms of performance rather than design).

206. Lapides v. Bd. of Regents, 535 U.S. 613 (2002).

207. Brief for Petitioners at 18–34, Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431 (2004) (No. 02-628).

208. *See Frew*, 540 U.S. at 436–37 ("We agree that the decree is enforceable under *Ex parte Young*, and so we do not address the waiver argument."). One potential obstacle to the waiver argument was that, unlike in *Lapides*, the State itself was no longer party to the suit. But that distinction does not seem determinative. *See* Gunter v. Atl. Coast Line R.R. Co., 200 U.S. 273, 286 (1906) (finding that State, though not named party, waived its immunity by subjecting its rights to determination via defendant State officials represented by State attorney general).

Lower courts have already begun to confirm the broad nature of the *Frew* ruling. In *Jeff D. v. Kempthorne*,[209] a class of indigent minors diagnosed with severe emotional and mental disabilities had entered into a consent decree with State officials after alleging, *inter alia*, that they had been placed in State facilities with known sexual predators in violation of their constitutional rights.[210] The consent decree (from 1983) required State officials, among other things, to end placement of the minors with adults, to prepare a needs assessment of children's mental health programs, and to provide facilities and staff for various community-based mental health programs to serve those not needing in-patient care.[211] After a long history of compliance disputes and supplements to the decree, the class brought an action in federal court to enforce the decree.[212] The Ninth Circuit reaffirmed the continuing validity of the decree under *Firefighters* and *Rufo* and rejected the State's Eleventh Amendment defense by relying on *Frew*.[213] Following the Supreme Court's lead, the Ninth Circuit's analysis of whether the decree terms fell within the scope of permissible relief under *Young* amounted to all of one sentence: "[T]he relief embodied in the consent decrees is within the scope of *Ex parte Young*, as it entails prospective injunctive relief requiring compliance by state officials."[214] Other federal courts of appeals have also approvingly cited *Frew* in enforcing consent relief against State entities.[215]

D. Summary

Part II of this Article helps to establish a few key points: (1) *Ex parte Young* doctrine is grounded in a longstanding fiction designed to circumvent State sovereign immunity; (2) the scope of permissible *Young* relief, notwithstanding a basic limitation on retroactive damages and a few recent exceptions, has generally increased over time; (3) the outer bounds of prospective injunctive relief in a *Young* suit seem to coincide with a district

209. Jeff D. v. Kempthorne, 365 F.3d 844 (9th Cir. 2004).

210. *Id.* at 847.

211. *Id.* Interestingly, although the Ninth Circuit had previously invalidated portions of the consent decree that were unrelated to remedies for the alleged substantive injuries, the Supreme Court reinstated the decree as entered by the district court. Evans v. Jeff D., 475 U.S. 717, 742–43 (1986).

212. *Kempthorne*, 365 F.3d at 848–49.

213. *Id.* at 851–54.

214. *Id.* at 854.

215. *See, e.g.*, Barcia v. Sitkin, 367 F.3d 87, 102 (2d Cir. 2004) (enforcing consent decree governing New York State Department of Labor's administrative hearing procedures).

court's ordinarily broad equitable authority (that is, Eleventh Amendment immunity does not seem to impose additional constraints on the scope of prospective injunctive relief); and (4) despite recent limitations on traditional equitable relief, consent decrees—even those involving State officials, as in the *Frew* decree—remain a source of broad judicially sanctioned relief arising from *Young* suits. The special category of *Young*-based consent decrees—with its potentially expansive scope of State obligations designed to cure and prevent possible federal law violations—holds the most promise as a vehicle for comparing Section 5 authority and for revealing the tension in the Supreme Court's jurisprudence.

III. The Narrowing Scope of Congress's Section 5 Power

Shifting gears from the Supreme Court's permissive treatment of the consent decree in *Frew*, I turn to the Court's jurisprudence on the scope of Congress's enforcement power under Section 5 of the Fourteenth Amendment.

A. Text and Early History

The starting point for Congress's Section 5 authority is the text of the Fourteenth Amendment. Section 1 of the Fourteenth Amendment, in relevant part, provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[216]

Section 5 then states:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.[217]

Thus, the issue is the scope of Congress's authority to "enforce" the terms of Section 1 of the Fourteenth Amendment against State and local governmental entities. Although I do not attempt an original historical analysis or undertake a complete discussion of the original meaning of Section 5,[218] it

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216. U.S. CONST. amend. XIV, § 1.

217. U.S. CONST. amend. XIV, § 5.

218. For more thorough discussions of the historical understanding of Section 5 of the Fourteenth Amendment, see Ruth Colker, *The Supreme Court's Historical Errors in* City of Boerne v. Flores, 43 B.C. L. REV. 783, 793–817 (2002); James W. Fox, Jr., *Re-readings and*

would be helpful here briefly to describe the circumstances of the Amendment's framing.

The Fourteenth Amendment, enacted in 1868 as part of the Reconstruction Amendments, was designed to extend federal-law protection and to alter the balance of State-federal power in the area of civil rights.[219] The language of the Amendment was revised from an earlier draft, which read: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."[220]

Whatever meaning can be discerned from the change, the framers do not appear to have intended to give Congress unbridled substantive power through Section 5.[221] Although Section 1 sets forth its substantive commands in general fashion, there is little support for the view that Congress was supposed to enjoy free reign in determining what the protected rights—and thus the scope of its enforcement authority—would be. For example, faced with charges that the Amendment "would give Congress power to legislate about matters previously reserved to the states and thereby result in a consolidation of power and the destruction of the federal system as Americans had known it . . . [p]roponents . . . made it clear that they did not intend such vast power for Congress."[222] Similarly, during the drafting debates over the Civil Rights Act of 1875, when opponents objected that early versions went beyond the requirements of Section 1, no member of Congress responded that Section 5 provided the legislature plenary power to determine the substantive rights at issue. Rather, supporters argued that the bill merely enforced rights already established by the Fourteenth Amendment.[223] Moreover, in the *Civil Rights Cases*,[224] the Court struck down part of the Civil Rights Act of 1875, effectively rejecting Congress's attempt under the Fourteenth Amendment to

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Misreadings: Slaughter-House, *Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67, 91–108 (2002); Michael P. Zuckert, *Congressional Power Under the Fourteenth Amendment—The Original Understanding of Section Five*, 3 CONST. COMMENT. 123 (1986). *See also* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 164 n.79 (1997) (collecting sources).

219. *Ex parte* Virginia, 100 U.S. 339, 345–46 (1879).

220. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

221. *See* McConnell, *supra* note 218, at 174–75 ("The supporters of the Fourteenth Amendment never seriously entertained the 'substantive' interpretation of Section Five.").

222. WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 114 (1988).

223. McConnell, *supra* note 218, at 175.

224. The Civil Rights Cases, 109 U.S. 3 (1883).

prohibit private discrimination in public accommodations.[225] The Court relied heavily on the "state action" requirement of Section 1.[226] Although the case does not necessarily mean Congress can never enforce Section 1 (which prohibits only state conduct) by regulating private conduct,[227] it does indicate some early understanding of limits on the scope of Section 5 authority.

However, it is still likely that Congress was understood at the time to wield significant "interpretive" authority under Section 5. Professor McConnell points to extensive congressional debates between 1866 and 1875 over the substantive reach of the various Civil Rights Acts.[228] Such debates, he argues, would have been irrelevant unless Congress understood its role to be something more than just an enforcer of the judicial interpretation of the Fourteenth Amendment.[229] Professor Kaczorowski also shows how the broad legislative power exercised by the framers of the Fourteenth Amendment in enacting the Civil Rights Act of 1866, as well as other antebellum legislation, suggests both significant definitional and enforcement authority for Congress under Section 5.[230]

Even absent any interpretive role, the enforcement role was not limited to the Court's construction of the bounds of the Fourteenth Amendment. Professor Caminker reports that the debates on the analogous enforcement clause of the Thirteenth Amendment "clearly indicate" the phrase "appropriate legislation" was chosen with Chief Justice Marshall's especially deferential standard from *McCulloch v. Maryland*[231] in mind.[232] Finally, the Supreme Court in *Ex parte Virginia*[233]—the first case interpreting the scope of Section 5 authority and thus indicative of its early understanding—used broad terms in describing Congress's power:

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225. *See id.* at 26 ("[I]t is clear that the law in question cannot be sustained by any grant of legislative power made to Congress by the Fourteenth Amendment.").

226. *See id.* at 10–11 ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.").

227. *See* United States v. Morrison, 529 U.S. 598, 664–65 (2000) (Breyer, J., dissenting) (proffering a narrower view of the precedential limitations of *The Civil Rights Cases*).

228. McConnell, *supra* note 218, at 176.

229. *Id.*

230. *See* Robert J. Kaczorowski, *Congress's Power To Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 280–83 (2005) ("The provisions of the Civil Rights Act demonstrate that the framers of the Fourteenth Amendment exercised plenary power to define and enforce the civil rights of U.S. citizens.").

231. McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

232. Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1159–65 (2001).

233. *Ex parte* Virginia, 100 U.S. 339 (1879).

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.[234]

The Court emphatically distinguished the federal judicial power from congressional power under the Fourteenth Amendment: "It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. . . . It is the power of Congress which has been enlarged[.] Congress is authorized to *enforce* the prohibitions by appropriate legislation."[235]

B. Section 5 Jurisprudence in the Civil-Rights Era (1960s–1980s)

Brown v. Board of Education[236] marked a sea change in anti-discrimination law. As a result, the most important developments in Section 5 jurisprudence occurred during the modern civil-rights era. Two major pieces of legislation help to frame this discussion: the Civil Rights Act of 1964 (1964 Act) and the Voting Rights Act of 1965 (1965 Act). The 1964 Act prohibited, *inter alia*, racial discrimination in public accommodations.[237] The constitutional debates surrounding enactment of the 1964 Act centered upon the issue of whether the statute should be enacted as an exercise of Section 5 of the Fourteenth Amendment or the Commerce Clause.[238] Congress chose to rely on both. The Court first considered the validity of the 1964 Act in *Heart of Atlanta Motel, Inc. v. United States*.[239] The Court upheld the 1964 Act but relied solely on the Commerce Clause, reserving judgment on whether it might also be permissible under Section 5.[240]

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234. *Id.* at 345–46.

235. *Id.* at 345.

236. Brown v. Bd. of Educ., 345 U.S. 972 (1953).

237. *See* 1964 Act § 201, 42 U.S.C. § 2000a (2000) (bearing section title "Prohibition against discrimination or segregation in places of public accommodation").

238. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 494 (2000) [hereinafter Post & Siegel, *Equal Protection*].

239. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

240. *See id.* at 250 ("[S]ince the commerce power is sufficient for our decision here we have considered it alone."). Two justices, however, expressed their view that the Court should have also found the 1964 Act to be a valid exercise of Congress's Section 5 power. *See id.* at 279–80 (Douglas, J., concurring) ("I would prefer to rest on the assertion of legislative power

Although the Court never squarely addressed the extent of Section 5 authority to prohibit private discrimination during this period, it recognized a robust role for Section 5. Concurring opinions by six Justices suggested that Congress had the power to punish private actors who conspired to interfere with Fourteenth Amendment rights.[241] More important, outside the realm of private discrimination (where the Court deemed that the Commerce Clause and Section 2 of the Thirteenth Amendment provided ample enforcement authority[242]) the Court in *Katzenbach v. Morgan*[243] asserted a broad interpretation of Congress's Section 5 authority. As Professors Post and Siegel observe, *Morgan* "advanced an institutionally differentiated approach to Section 5" that, drawing upon the work of Archibald Cox, amounted to "judicial review of Section 5 power in deferential terms resembling its approach to federalism questions under the Commerce Clause."[244]

In *Morgan*, Section 4(e) of the Voting Rights Act of 1965, providing that no person who has successfully completed sixth grade in a school in which the predominant language is other than English shall be disqualified from voting

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contained in § 5 of the Fourteenth Amendment."); *id.* at 292–93 (Goldberg, J., concurring) ("[I]n my view, Congress clearly had authority under both § 5 of the Fourteenth Amendment and the Commerce Clause to enact the Civil Rights Act of 1964.").

241. *See* United States v. Guest, 383 U.S. 745, 782 (1966) (Brennan, J., concurring in part and dissenting in part) ("A majority of the members of the Court expresses the view today that § 5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy." (footnote omitted)). Nevertheless, the Court's majority opinion expressly reserved the question. *Id.* at 755.

242. Post & Siegel, *Equal Protection*, *supra* note 238, at 501.

243. Katzenbach v. Morgan, 384 U.S. 641 (1966).

244. Post & Siegel, *Equal Protection*, *supra* note 238, at 500 & n.274 (citing Archibald Cox, *The Supreme Court, 1966 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 119 (1966)). Professors Post and Siegel draw an analogy between *Morgan*'s view of the Section 5 power and the Court's later Thirteenth Amendment jurisprudence, in which Congress's enforcement power expanded much more than the underlying self-enforcing, substantive provision. *Id.* at 495–96, 500; *see also* Caminker, *supra* note 232, at 1131 (reaching similar conclusion). A similar analogy can be drawn with the Fifteenth Amendment:

> As against the reserved powers of the States, Congress may use *any rational means* to effectuate the constitutional prohibition of racial discrimination in voting. The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved power of the States. . . . "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) (emphasis added) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

under any literacy test, was applied to prohibit enforcement of New York election laws requiring the ability to read and write English as a voting condition.[245] The Court found that the 1965 Act, as applied, was a proper exercise of Congress's Section 5 powers.

The Court first rejected the argument that Section 5 legislation can only be sustained if the judicial branch determines that the prohibited state conduct is also prohibited by the provisions of the Fourteenth Amendment that Congress sought to enforce.[246] The Court relied on Section 5's language, history, and precedent, specifically quoting *Ex parte Virginia* and its reliance on the broad statement of congressional power in *McCulloch v. Maryland*.[247] It reasoned that the contrary position "would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of Section 1 of the Amendment."[248] Therefore, the fact that the Court had previously held that English literacy requirements did not necessarily violate equal protection[249] did not render the statute outside Section 5 authority.

The Court then determined that Section 4(e) of the 1965 Act qualified as "appropriate" legislation. The Court attributed to Congress the aim of securing for the Puerto Rican community in New York nondiscriminatory treatment in public services (such as schools and housing) and found Section 4(e) sufficiently related to that aim.[250] The Court said it was "not for us to review the congressional resolution of [the] factors," including "the risk or pervasiveness of the discrimination in governmental services" or "the adequacy or availability of alternative remedies."[251] The Court made no reference to the Congressional Record but for a single footnote.[252] The Court said it could come to the same result by inquiring whether Section 4(e) was legislation aimed at elimination of invidious discrimination in establishing voter

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245. *Morgan*, 384 U.S. at 643–44.

246. *See id.* at 648 ("Neither the language nor history of § 5 supports such a construction.").

247. *Id.* at 648–51.

248. *Id.* at 648–49.

249. *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50–54 (1959) (sustaining North Carolina English literacy voting requirement against challenges based on Fourteenth and Seventeenth Amendments).

250. *Morgan*, 384 U.S. at 649–50.

251. *Id.* at 652–53.

252. *Id.* at 653 n.12.

qualifications.[253] In doing so, the Court came up with several hypothetical rationales, concluding that "it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement . . . constituted an invidious discrimination in violation of the Equal Protection Clause."[254]

Later during this period, the Court also invoked Section 5 to justify federal affirmative action statutes. In *Fullilove v. Klutznick*,[255] plaintiffs challenged on Equal Protection grounds a congressional requirement that ten percent of federal funds granted for local public works projects must be used by the local grantee to purchase services from minority-owned businesses.[256] The Supreme Court upheld the statute.[257] Chief Justice Burger's plurality opinion specifically relied on Congress's Section 5 power.[258] According to the plurality, although Congress had made no factual findings, Congress had before it ample historical evidence "from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination."[259] In several subsequent cases through the 1980s, various members of the Court referred to congressional power under Section 5 in opinions supporting federal affirmative action programs or invalidating state programs.[260]

The Court addressed a separate but related question as to Section 5 power and federalism implications in 1976: whether Congress could abrogate a State's Eleventh Amendment immunity via Section 5 legislation. In *Fitzpatrick v. Bitzer*,[261] the Court said yes, relying in part on language from *Ex parte*

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253. *Id.* at 653–54.

254. *Id.* at 655–56.

255. Fullilove v. Klutznick, 448 U.S. 448 (1980).

256. *Id.* at 455.

257. *Id.* at 492.

258. *Id.* at 472.

259. *Id.* at 478.

260. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1110 n.18 (7th ed. 2004) (collecting cases and opinions). Indeed, in distinguishing *Fullilove*, Justice O'Connor, joined by Chief Justice Rehnquist—both of whom later adopted a much narrower view of Section 5 authority—stated that:

> Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989).

261. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

Virginia that the Fourteenth Amendment was "intended to . . . [effect] limitations of the power of the States and enlargements of the power of Congress."[262] Although the Rehnquist Court—discussed next—denied Congress's power to abrogate State sovereign immunity pursuant to its Article I powers in *Seminole Tribe*, it reaffirmed *Bitzer*'s recognition of a Section 5 abrogation power.[263]

C. Rehnquist Court Limitations (1990s–Present)

Although the prior sections provide context, the more critical issue for purposes of this Article is the current state of the law on Congress's Section 5 authority. In 1995, the Court struck down a federal affirmative action program as violating Equal Protection and applied the same level of (strict) scrutiny that it applied to state programs.[264] Thus, the Court backed away from its prior indications that Section 5 imbued Congress with greater authority than States when it came to remedying past discrimination via racial preferences. Then, from 1997 to 2002, the Court decided six cases involving the scope of Congress's Section 5 power and rejected the exercise of that power as overly broad in all six cases. More important, the Court revamped the doctrine and applied it in a manner that afforded relatively little discretion to Congress when fashioning Section 5 enforcement legislation.

The story starts with *City of Boerne v. Flores*.[265] Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA) in direct response to *Employment Division, Department of Human Resources v. Smith*,[266] in which the Supreme Court upheld against a free exercise challenge a neutral state law of general applicability criminalizing peyote use as applied to Native American Church members. In so ruling, the Court declined to apply the established balancing test that first asked whether the law at issue substantially burdened a religious practice and, if so, then asked whether the burden was justified by a

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262. *Id.* at 454–56 (quoting *Ex parte* Virginia, 100 U.S. 339, 345 (1879)).

263. Seminole Tribe v. Florida, 517 U.S. 44, 59 (1996).

264. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."); *see also* Saenz v. Roe, 526 U.S. 489, 508 (1999) ("Congress has no affirmative power [under Section 5] to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation.").

265. City of Boerne v. Flores, 521 U.S. 507 (1997).

266. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

compelling government interest.[267] RFRA, applicable to both the federal government and the States, essentially sought to overrule *Smith* and codify the prior balancing inquiry (with the gloss of a "least restrictive means" test).[268]

In *Boerne*, the Court held that RFRA exceeded the scope of Congress's Section 5 authority. The Court reasoned that Section 5 power "to enforce" is only preventive or remedial, and that it is inconsistent with any suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.[269] The Court acknowledged that the line between measures that remedy or prevent unconstitutional actions and those that make a substantive change in the governing law is not easy to discern and that Congress must have wide latitude in determining where it lies.[270] However, the Court stated, there must be a "congruence and proportionality" between the injury to be prevented or remedied and the means adopted to that end.[271] Lacking such a connection, the Court instructed, legislation may become substantive in operation and effect.[272] The Court also relied on the principle of separation of powers, stating that the Fourteenth Amendment deprived Congress of any power to interpret and elaborate on its meaning.[273]

Applying these principles, the Court found RFRA to be "so out of proportion to a supposed remedial or preventive objective that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[274] In addition to noting the lack of evidence in the legislative record of widespread religious discrimination, the Court found RFRA to be overly broad on a provision-by-provision basis.[275] It observed that RFRA's restrictions applied to every government agency and official and to all statutory or other law, whether adopted before or after its enactment; that RFRA had no termination date or termination mechanism; and that RFRA added a demanding "least restrictive means" test not used in even the pre-*Smith* jurisprudence.[276] Based on the above, the Court concluded that RFRA constituted a sweeping substantive change in constitutional protections as opposed to appropriate enforcement legislation.

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267. *Id.* at 883–89.
268. *City of Boerne*, 521 U.S. at 516–17.
269. *Id.* at 519.
270. *Id.* at 519–20.
271. *Id.* at 520.
272. *Id.* at 523–24.
273. *Id.*
274. *Id.* at 532.
275. *Id.* at 530–32.
276. *Id.* at 532–34.

Although *Boerne* used some narrowing language, it did not in and of itself necessarily signal a crippling blow to Congress's Section 5 authority. After all, the facts in *Boerne* were especially egregious in terms of Congress expressly seeking to redefine substantive constitutional law. Moreover, the holding did not engender much opposition from the more liberal justices.[277] However, the next five cases applying *Boerne*'s "congruence and proportionality" test—all decided by a 5–4 margin—have made clear that the Court has reduced Congress's Section 5 authority in no small way:

(1) *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*:[278] In *Florida Prepaid*, the Court held that the Patent and Plant Variety Protection Remedy Clarification Act—abrogating the States' sovereign immunity for patent infringement suits—was invalid because it was beyond the scope of Congress's Section 5 authority to enforce the guarantees of the Fourteenth Amendment's Due Process Clause. Applying *Boerne*, the Court stated that "for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."[279] The Court first found that Congress identified no pattern of unremedied patent infringement by States (just eight suits in 110 years), let alone a pattern of due process violations, as Congress barely considered the availability of constitutionally adequate state remedies.[280] The Court further found, in light of the lack of legislative support, that the Act's provisions—not limited to cases involving intentional infringement or arguable constitutional violations but applicable to all kinds of patent infringement and for an indefinite duration—were too out of proportion to a remedial or preventive objective to be valid Section 5 legislation.[281]

(2) *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*:[282] In *College Savings Bank*, issued along with *Florida Prepaid*, the Court held that the Trademark Remedy Clarification Act—subjecting States to federal court suit for false and misleading advertising—was

277. Justice Ginsburg joined the majority opinion. Justice Stevens also joined the majority, but concurred on a separate theory. Justices Souter, Breyer, and O'Connor all dissented on other grounds.

278. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

279. *Id.* at 639.

280. *Id.* at 640–44.

281. *Id.* at 647.

282. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

beyond the scope of Congress's Section 5 authority. The Court rejected the argument that Congress acted to remedy and prevent due process violations because neither of the asserted interests furthered by the Act—a right to be free from a business competitor's false advertising or a right to be secure in one's business interests—qualifies as a protected property right.[283]

(3) *Kimel v. Florida Board of Regents*:[284] In *Kimel*, the Court held that the Age Discrimination in Employment Act of 1967 (ADEA)—prohibiting employment discrimination based on an individual's age and abrogating State sovereign immunity—exceeded Congress's Section 5 authority. The Court acknowledged that the Section 5 power "includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[285] However, the Court concluded that the Act failed *Boerne*'s "congruence and proportionality" test. It reviewed the Act's legislative record and concluded that Congress had virtually no reason to believe that State and local governments were unconstitutionally discriminating against their employees on the basis of age.[286] The Court found the substantive requirements that the Act imposes on State and local governments disproportionate to any unconstitutional conduct that the Act conceivably could have targeted.[287] The Court relied heavily on the fact that age is not a suspect classification under the Fourteenth Amendment's Equal Protection Clause, and, thus, States need not match age distinctions and legitimate interests they might serve with great precision.[288] Judged against the backdrop of the Equal Protection Clause's rationality review, the Court found the Act's broad restriction on the use of age as a discriminating factor to be too disproportionate under *Boerne* because it prohibited substantially more State employment decisions than would likely be held unconstitutional.[289] The Court rejected the argument that the Act's "bona fide occupational qualification" defense—permitting age classifications either if there is "a substantial basis for believing that *all or nearly all employees* above an age lack the qualifications required for the position" or if "it is *highly impractical* for the employer to insure by

283. *Id.* at 672–75.
284. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).
285. *Id.* at 81.
286. *Id.* at 89–91.
287. *Id.* at 83.
288. *Id.* at 84–85.
289. *Id.* at 86.

individual testing that its employees will have the necessary qualifications for the job"—sufficiently tailored the Act.[290]

(4) *United States v. Morrison*:[291] In *Morrison*, the Court held that 42 U.S.C. § 13981, part of the Violence Against Women Act (VAWA)—providing a federal civil remedy for the victims of private gender-motivated violence—exceeded Congress's Section 5 authority. The Court conceded that the "voluminous" congressional record supported the contention that there is a "pervasive" bias in various State justice systems against victims of gender-motivated violence.[292] Even assuming gender-based State discrimination, however, the Court, relying on the early *Civil Rights Cases*, stated that the Act's civil remedy provisions—directed not at State actors but at private individuals who have committed criminal acts motivated by gender bias—were not appropriate Section 5 remedies.[293] The Court also critiqued the uniform, nationwide nature of the remedies given that Congress's findings were limited to just certain States.[294]

(5) *Board of Trustees of the University of Alabama v. Garrett*:[295] In *Garrett*, the Court held that Title I of the Americans with Disabilities Act (ADA)—prohibiting employers from discriminating against qualified individuals on the basis of disability and abrogating State sovereign immunity—exceeded Congress's Section 5 authority. In applying *Boerne*'s "congruence and proportionality" test, the Court stated that the first step is to identify with some precision the scope of the constitutional right at issue.[296] The Court noted that the Fourteenth Amendment's Equal Protection Clause afforded only a minimal rationality review to claims of disability discrimination.[297] Equal protection, the Court reasoned, does not require States to make special accommodations for the disabled, so long as their treatment is rational.[298] The Court then found that the legislative record failed to identify a pattern of irrational employment discrimination by States against the disabled.[299] The Court discounted instances of employment discrimination by local governmental units as well as instances of State discrimination against the

290. *Id.* at 87–88 (quoting W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 422–23 (1985)).
291. United States v. Morrison, 529 U.S. 598 (2000).
292. *Id.* at 619–20.
293. *Id.* at 625–26.
294. *Id.* at 626–27.
295. Bd. of Trs. v. Garrett, 531 U.S. 356 (2001).
296. *Id.* at 365.
297. *Id.* at 366 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985)).
298. *Id.* at 367.
299. *Id.* at 368–72.

disabled in non-employment activities in the extensive record, explaining they were irrelevant because the statute addressed only State discrimination in employment.[300] Finally, the Court concluded that the Act's remedial standards went too far beyond the constitutional floor.[301] For example, while the Court found it entirely rational (and therefore constitutional) for a State employer to conserve scarce financial resources by hiring employees able to use existing facilities, the Act requires employers to make such facilities readily accessible to and usable by disabled individuals.[302] Even with the "undue hardship" exception to the Act's "reasonable accommodation" requirement, the Court found the accommodation duty to far exceed constitutional requirements.[303]

Despite this increasingly strict interpretation of Section 5 authority, the Court has upheld Section 5 legislation in its two most recent decisions: *Nevada Department of Human Resources v. Hibbs*[304] and *Tennessee v. Lane*.[305] In *Hibbs*, the Court held that the Family and Medical Leave Act of 1993—entitling an employee to take up to twelve weeks of unpaid leave for the onset of a serious illness in the family and abrogating State sovereign immunity—was a valid exercise of Congress's Section 5 authority.[306] In *Lane*, the Court held that Title II of the Americans with Disabilities Act—prohibiting exclusion of individuals on the basis of disability from public services and abrogating State sovereign immunity—constituted a valid exercise of Congress's Section 5 authority, as applied to the class of cases implicating the fundamental right of access to the courts.[307]

Nevertheless, the Court analyzed the remedial legislation in both cases under the same "congruence and proportionality" rubric and by no means discounted its prior post-*Boerne* line of cases. The Court distinguished *Hibbs* based on the fact that gender-based claims get heightened scrutiny under the Equal Protection Clause, thereby making it easier for Congress to establish a sufficient record of unconstitutional discrimination and affording Congress more leeway as to remedy.[308] The Court limited *Lane* to the narrow class of

300. *Id.* at 369–71.

301. *Id.* at 372.

302. *Id.*

303. *Id.*

304. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

305. Tennessee v. Lane, 541 U.S. 509 (2004).

306. *See Hibbs*, 538 U.S. at 735 ("In sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation.").

307. *Lane*, 541 U.S. at 533–34.

308. *Hibbs*, 538 U.S. at 735.

cases involving the fundamental right of access to courts, hardly a broad grant of authority to Congress.[309] These cases do not yet mark any fundamental shift in the Court's approach to assessing the validity of Section 5 legislation.

IV. Analyzing the Tension: An Indefensible Inconsistency

The few scholars who have juxtaposed a district court's equitable authority with Congress's Section 5 power have found no tension and, in fact, have found a commendable consistency between the two bodies of jurisprudence.[310] I disagree. My analysis here proceeds as follows: First, I argue that the contexts—district court relief against States (including, more specifically, consent decrees) and Section 5 legislation—are similar enough to warrant critical comparison. Second, drawing upon Parts II and III, I show that the Supreme Court has placed more exacting scrutiny on the exercise of remedial power by Congress than by federal district courts, especially in the consent decree context. Third, I argue that this disparate treatment is misguided on several grounds and, accordingly, that the Supreme Court should rethink its Section 5 framework.

A. Comparing Young*-Based Consent Decrees with Section 5 Legislation*

Before comparing the Supreme Court's treatment of district-court relief (specifically consent decrees) ordered in response to alleged federal-law violations by States with its treatment of Section 5 legislation promulgated in response to federal-law violations by States, it is worth thinking more about why the two contexts are similar enough to merit such comparison. For starters, enforcement efforts by district courts and Congress alike often involve detailed, complex measures requiring expert advice. Relief in both contexts—*Young*-based suits and Section 5 legislation—can be prophylactic, in that it can extend beyond the scope of the underlying federal law. As one scholar has observed, such judicial decrees are "*pro tanto* legislative

309. *Lane*, 541 U.S. at 533–34. Moreover, Justice Scalia's dissent in *Lane* marks the emergence of the narrowest view ever articulated by the Supreme Court as to the permissible scope of Section 5 legislation. Essentially, Justice Scalia takes the position that Section 5's command to Congress "to enforce" the rights of the Fourteenth Amendment literally means that Congress can only punish conduct that would itself violate the Fourteenth Amendment. *Id.* at 2008–10 (Scalia, J., dissenting).

310. *See supra* note 5 (describing previous scholarly work in area); *infra* note 352 (addressing argument that same limiting principles are at play in both equitable relief and Section 5 cases).

acts."[311] In addition, both contexts implicate important federalism-related concerns: the State government is regulated and subjected to federal remedial standards in either situation. Further, the underlying federal law in both contexts is often terse and open-ended. For example, in *Frew*, the relevant portions of the Medicaid statute constituted just a few paragraphs; similarly, Section 5 legislation is based on Section 1 of the Fourteenth Amendment, which speaks in few and relatively undefined words.

However, there are some important differences. I save discussion of those differences that militate in favor of a broader scope for Section 5 relief for Part IV.C. For now, I focus on two apparent differences that might lead one to think that broad relief is justified only in the *Young* context but not with respect to Section 5 legislation. First, a district court typically imposes *Young* relief only after it has adjudicated a federal-law (often constitutional) violation.[312] Second, that relief is typically limited to the specific parties before the district court.

As to the first, the current Section 5 jurisprudence already requires—as a sort of threshold step—that Congress have established a record of constitutional violations in order to pass muster.[313] Because the Court has increasingly held that legislative record to adjudicative standards,[314] Section 5 legislation often follows congressional "adjudication" of such violations. Indeed, in *Morrison*, the Court expressly assumed the existence of prior constitutional violations based on the record of pervasive bias in the State judicial system against victims of gender-motivated violence.[315] More strikingly, once one considers the consent decree context, whatever is left of the seeming distinction vanishes completely. A district court can enter and enforce a consent decree against a State simply based on the allegations in the complaint, without any trial or formal court proceedings beyond a fairness hearing. Nor does the State have to admit liability. For example, in *Frew*, the consent decree was entered and

311. Chayes, *supra* note 40, at 1297, 1302.

312. *Cf.* Leonard, *supra* note 21, at 263 ("[T]he distinction between cases where the federal violation is alleged and already proved is one of degree and not quality, but certainly the interests of the national government in protecting its powers are exceptionally great once a violation is proved.").

313. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83–84 (2000) (imposing threshold requirement in context of Age Discrimination in Employment Act); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672 (1999) (imposing threshold requirement in context of Trademark Remedy Clarification Act).

314. *See* Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 11–17 (2003) (criticizing Court's "judicialization" of congressional lawmaking).

315. United States v. Morrison, 529 U.S. 598, 619–20 (2000).

enforced without any determination of federal-law violations.[316] Therefore, enforceable *Young* relief need not in fact be premised on any adjudicated violation of federal law.

As to the second, at least in structural reform and class action cases (those typically resulting in the broadest relief against State entities), a district court's injunctive relief can affect a number of parties, even those not directly responsible for the violations.[317] For example, in prison reform suits, injunctive relief can reach across entire statewide prison systems.[318] Again, the consent decree context further dilutes the distinction, as such relief is often sought on a class-wide, statewide basis. As the State noted in *Frew*, a consent decree "can reach far beyond the parties to the suit, significantly affecting a State's fisc, available public services, and financial burdens on citizens through increased taxes."[319] Therefore, Section 5 legislation—though perhaps of a somewhat different degree—is not of a different kind.

One could argue, however, that my reliance on the consent decree context—despite these added similarities—is misplaced: Consent decrees are a different animal deserving uniquely broad deference because the parties themselves (including the State) agree to the terms, thereby significantly tempering any federalism concerns. This argument fails to recognize that a host of federalism concerns persist with respect to consent relief.

First, intra-State separation of powers issues and the nature of institutional reform can create a disconnect between the terms of a consent decree and a State legislature's will.[320] The State entity consenting to the decree may not be the same State entity whose autonomy is ultimately affected, raising accountability and other federalism concerns.[321] For example, a bureaucratic

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316. Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431, 439–40 (2004).

317. *See, e.g.*, Chayes, *supra* note 40, at 1284 ("[T]he trial judge has increasingly become the creator and manger of complex forms of ongoing relief, which have widespread effects on persons not before the court.").

318. *See supra* note 66 (collecting prison reform cases).

319. Respondents' Brief at 45, Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431 (2004) (No. 02-628).

320. *See* Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 34 ("If prison officials believe their budget is too small, they may consent to a judgment that requires larger prisons, and then take the judgment to the legislature to obtain the funds . . . ."); Horowitz, *supra* note 40, 1294–95 ("Nominal [government official] defendants are sometimes happy to be sued and happier still to lose."); Alan Effron, Note, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 COLUM. L. REV. 1796, 1802 (1988) ("The consent of the state governmental entity to federal equitable relief does not necessarily alleviate the federalism concerns associated with any of th[e] factors [associated with other equitable injunctive relief].").

321. *See, e.g.*, Effron, *supra* note 320, at 1805–06 (criticizing assumption "that the state

executive branch official may want to bind his agency to stringent terms to force larger budget allocations by a more reluctant State legislature. Further, one State official may be able to bind successor State officials to terms to which they would not have agreed.

Second, even assuming a collective will, a State's initial consent is very different than a State's voluntary compliance: the consent is typically obtained under the duress of costly litigation. It is beyond belief that a State would voluntarily choose to bind itself to extensive obligations absent the heavy-handed threat of litigation and liability.

Third, the State cannot ordinarily back away from any of the terms for the duration of the decree, as federal courts have the power of contempt to force compliance.[322] Under certain special circumstances, a State may be able to seek modification of the terms of the decree,[323] but the power of modification is a double-edged sword: a federal court also has the power under certain circumstances to modify the decree over the objections of a signatory State,[324] thereby further diluting its voluntary character. In any case, the State is often subject to continuous and intrusive judicial supervision that frequently results in further litigation.[325]

Fourth, doctrinally speaking, the Supreme Court in *Frew* explicitly avoided reliance on a "waiver" rationale despite the plaintiffs' argument that the State had willingly agreed to the decree.[326] The Court thus necessarily

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entity consenting to the decree is identical to the one whose autonomy would thereby be infringed").

322. *See supra* note 122 and accompanying text (stating and supporting proposition that federal courts can use contempt citations to enforce consent decrees).

323. *See supra* note 121 and accompanying text (stating and supporting proposition that federal courts can modify consent decrees).

324. *See* United States v. United Shoe Mach. Corp., 391 U.S. 244, 249 (1968) (permitting modification of consent decree by plaintiff to strengthen terms of decree against defendants' interests). Indeed, the *United Shoe* Court applied a more relaxed standard for such modification than the then-governing "grievous wrong" standard from *Swift* for defendants seeking to escape the impact of consent decrees. *See id.* (holding that where "time and experience [had] demonstrated" that the decree had failed, *Swift* did not preclude the trial court from modifying the decree to achieve the decree's purposes). Lower courts have relied on *United Shoe* even when the defendant signatory to the decree is a State entity. *See, e.g.*, Holland v. N.J. Dep't of Corr., 246 F.3d 267, 270 (3d Cir. 2001) (stating that "it is settled that a court does have inherent power . . . to modify a decree," which includes "broad equitable power to fashion a remedy in its exercise of its . . . modification powers" and power "to extend the effective time period of a consent decree").

325. *See* Effron, *supra* note 320, at 1807 ("Particularly in the context of institutional or structural litigation, the entering of a consent decree all too often represents only a new beginning of litigiousness.").

326. *See* Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431, 436–37 (2004) ("[W]e do not

assumed that the Eleventh Amendment bar applied and approved the broad consent relief, notwithstanding constitutionally based State immunity concerns. Indeed, consent decrees against States arguably present greater sovereignty concerns than Section 5 legislation, since such legislation faces no Eleventh Amendment bar. Alternatively, one could also argue that Congress's exercise of Section 5 authority is not unlike a consent decree because the States have already given their "consent" to Section 5 legislation through ratification of the Fourteenth Amendment.

For these reasons, the fact that the State agrees to the terms of a consent decree does not make such decrees inapt for present comparative purposes.

B. Comparing the Supreme Court's Approaches to the Different Contexts

Parts II and III lay out the doctrinal development of equitable judicial relief (including consent decrees) against States and of Section 5 legislation, respectively, and Part IV.A establishes a meaningful basis for comparing these different modes of remedying violations of federal law. So what can be concluded after comparing the different modes? There are three main possibilities. First, for the reasons proffered but rejected in Part IV.A, the Supreme Court might uniformly afford district courts under *Young* greater discretion than Congress under Section 5. Second, the Supreme Court could review Section 5 legislation in the same manner that it reviews a district court's traditional injunctive order in a *Young* case. Third, the Supreme Court might grant Congress the notably wider latitude that it grants a district court in entering a consent decree against a State for federal-law violations. This section seeks to reveal which scenario (as a descriptive matter) is the existing state of the law, and the next section discusses which (as a constitutional and normative matter) is the most justifiable approach.

The Supreme Court's "black letter" statements as to the permissible scope of relief in the respective contexts are a good starting point. To recap briefly: In traditional injunctive relief cases, the Court has said that—besides the *Young* limitation on retrospective relief—"[o]nce a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad."[327] This includes prophylactic measures.[328] Although the scope of the

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address the waiver argument.").

327. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971); *Milliken II*, 433 U.S. at 281. *See generally supra* Part II.A.

328. Thomas, *Prophylactic Remedy*, *supra* note 5, at 302.

remedy must be related to the scope of the harm,[329] the Supreme Court's review of whether the district court's relief is proper is only for abuse of discretion.[330] With respect to consent decrees, the Court ultimately requires only that the terms "further the objectives of the [federal] law upon which the complaint was based," with or without adjudication of the alleged violation.[331] Beyond limiting retrospective damages, it is unclear whether *Young* in any way narrows the scope of enforceable consent decrees.[332] In the Section 5 context, the Court now first requires a prior record of constitutional violations.[333] The Court also requires that legislation be "congruent and proportional" to the injury to be prevented or remedied.[334] The Court states, however, that Congress can prohibit "a somewhat broader swath of conduct" than what is forbidden by the Fourteenth Amendment.[335]

The formulations of the traditional injunctive relief standard and the new Section 5 standard seem relatively compatible, both requiring a degree of tailoring between the injury and the relief, though equitable relief is subject only to abuse of discretion review. The consent decree test, however, is far less restrictive than both: the test essentially lacks any tailoring requirement. This fairly lax approach is especially striking when juxtaposed with the Court's approach to Section 5 legislation. Analysis of how the Court actually applies the aforementioned standards on review makes clear that the Section 5 tailoring requirement is the most stringent of all.

There are two related parts to the inquiry in all of these cases: (1) the Court's determination/review of the scope of the federal-law violation (i.e., the harm) and (2) the Court's own tailoring analysis (i.e., the fit between harm and relief). As to the first part, the Supreme Court has largely stayed true to the "abuse of discretion" standard of review in *Young* cases with respect to a district court's assessment of the scope of the harm or alleged federal-law violation to be redressed. Before reviewing the scope of a *Young* remedial order, the Court rarely questions whether the district court correctly adjudicated

329. *See Milliken II*, 433 U.S. at 281–82 (explaining "[t]he well-settled principle that the nature and scope of the remedy are to be determined by the violation").

330. *See, e.g.*, Spallone v. United States, 493 U.S. 265, 274 (1990) (concluding that lower court's imposition of contempt sanctions was abuse of discretion).

331. Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986).

332. *See supra* Part II.C (discussing Court's analysis in *Frew*).

333. *E.g.*, City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

334. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81–82 (2000).

335. *Id.* at 81.

the extent of the underlying violation, if one has even been adjudicated at all.[336] The Court is especially deferential with respect to consent decrees, permitting such decrees as long as there is an allegation of a related federal-law violation.[337]

However, the Court has not been so deferential in its review of the basis for Section 5 legislation, effectively subjecting Congress to de novo review. In the Section 5 context, the Court reviews the legislative record of past violations much like an intermediate appellate court reviewing a lower court record. For example, in *Garrett*, the Court culled through the extensive Congressional record as well as Justice Breyer's thirty-nine-page appendix relating to legislative findings of past discrimination against the disabled.[338] The Court then came to its independent conclusion that the record was inadequate because the evidence did not prove sufficient irrational discrimination (as opposed to just disparate impact) in the workplace (as opposed to other contexts) by State entities (as opposed to local governmental units).[339] In coming to that conclusion, the Court seemingly paid no deference to Congress's initial assessment that there was sufficient illegal discrimination against the disabled to justify the ADA.

As to application of the tailoring requirement, the difference between the contexts is even starker. For Section 5 legislation—even if the Court determines there is a sufficient record of constitutional violations after its de novo review of the legislative record[340]—the Court's tailoring ("congruence and proportionality") analysis is rigorous. The Court routinely parses the legislation at issue and compares it, on a provision-by-provision basis, with the judicial standard for the underlying constitutional right that Congress sought to protect. For example, in *Florida Prepaid*, the Court concluded that the patent legislation strayed too far beyond due process standards because the act would also apply to unintentional violations and cases where alternate State remedies might be available.[341] The Court did not try to assess what percentage of State

336. This deference could be attributed to several reasons depending on the case: the Supreme Court might not want to wade into the factual complexities of the liability determination (given its time and other limitations as an appellate court of last resort) or, as a practical matter, the "liability" part of the case may already be final. In any event, the Court rarely reexamines the liability part of the case despite its relation to the remedial inquiry.

337. Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 522–23 (1986).

338. Bd. of Trs. v. Garrett, 531 U.S. 356, 369–71 (2001).

339. *Id.*

340. *See* United States v. Morrison, 529 U.S. 598, 619–20 (2000) (assuming unconstitutional discrimination in State's treatment of victims of gender-motivated violence).

341. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 643

violations had been unintentional (the one at issue in *Florida Prepaid* itself certainly was not). Nor did the Court defer to Congress's reasonable assumption that, in light of the history of federal law enforcement in this area, state-law remedies were inadequate to remedy State infringements.[342] Based on its own inquiry, the Court concluded that the means-end fit was constitutionally inadequate.

Likewise, in *Kimel*, the Court scrutinized the provisions of the ADEA in light of the Court's rational basis standard for age discrimination claims. The Court found that the statutory standard prohibiting employment discrimination based on an individual's age stretched too far beyond the goal of stopping unconstitutional or irrational age discrimination.[343] The Court carefully considered the ADEA's "bona fide occupational qualification" defense, but found the defense—notwithstanding its narrowing effect—insufficiently tailored for Section 5 purposes.[344] In *Garrett*, which had a much more extensive legislative record of discrimination than did *Kimel*, the Court similarly embarked on a close comparison of Title I of the ADA to the judicial rational-basis standard for disability discrimination. It found the ADA's "reasonable accommodation" requirement inadequately tailored to the goal of preventing unconstitutional State discrimination against the disabled in employment. The Court evaluated but rejected as insufficient the narrowing effect of the ADA's "undue hardship" exception.[345] Some have observed—accurately in my view—that the Court's review of Section 5 legislation in these cases amounts to "strict scrutiny."[346]

In sharp contrast, when presented with the enforceability of broad judicial relief against a State in *Frew*, the Court effectively refrained from any tailoring analysis. The Court concluded—in all of one paragraph—that the consent decree constituted "a remedy consistent with *Ex parte Young* and *Firefighters*."[347] As chronicled in detail *supra* Part II.C, there were plenty of opportunities for the Court to comment on the "fit" between the decree and the Medicaid statute. Nevertheless, the Court limited itself to a single cursory example of the relationship between the decree terms and the federal-law

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(1999).

342. *Id.* at 649 (Stevens, J., dissenting).

343. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000).

344. *Id.* at 64.

345. Bd. of Trs. v. Garrett, 531 U.S. 356, 372 (2001).

346. *Id.* at 387 (Breyer, J., dissenting) (citing Post & Siegel, *Equal Protection*, *supra* note 238, at 477).

347. Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431, 439 (2004).

mandate.[348] State sovereignty concerns were relegated to the possibility of future modification of the decree at the district court's discretion under the Federal Rules of Civil Procedure.[349] Although the Court may be more concerned with tailoring of district court injunctive relief now than in the past,[350] that concern has not spilled over to consent decrees. Indeed, the Court has consistently rejected arguments that a district court has exceeded its authority in entering or enforcing a consent decree against State or other governmental entities.[351]

C. Why the Court Needs to Harmonize Its Section 5 Jurisprudence

The above comparison of the Court's approach to the different remedial contexts shows that judicial prophylactic relief against a State entity—especially in a consent decree—is, in many significant ways, afforded greater leeway than Section 5 prophylactic legislation.[352] But is this how things should be?

Before proceeding, let me make clear that I do not advocate decreasing the remedial discretion afforded federal district courts to achieve greater

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348. *See supra* note 159 and accompanying text (quoting Justice Kennedy's example).

349. *Supra* note 153 and accompanying text; *cf.* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384–91 (1992) (rejecting higher "grievous wrong" standard for modification of consent decrees in institutional reform context in favor of more flexible standard under Rule 60(b)(5), but still requiring that party seeking modification bear burden of establishing that significant change in facts or law warrants revision of decree and that proposed modification is suitably tailored to changed circumstances).

350. *See supra* Part II.A.3 (describing Rehnquist Court incursions on federal courts' Section 5 authority).

351. *See Frew*, 540 U.S. at 437–42 ("Enforcing the agreement does not violate the Eleventh Amendment."); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) (enforcing consent decree entered in employment discrimination case against city).

352. Professor Thomas, who has considered the two general contexts under a single remedial rubric, finds the same limiting principles at play in both equitable relief and Section 5 cases. Thomas, *Prophylactic Remedy*, *supra* note 5, at 335–39, 349–52; Thomas, *Remedial Rights*, *supra* note 5, at 724–39. I agree that that the contexts are similar and that, at least to a certain extent, similar principles should apply. I would even agree that Supreme Court doctrine purports to apply similar principles in the two contexts. But Professor Thomas fails to consider consent decrees, which, in many ways, have more in common with Section 5 legislation than does traditional equitable judicial relief. Based on the above analysis, I cannot agree that the Supreme Court's actual application of the limits in the Section 5 context has been at all consistent with limits on all equitable relief. Especially when viewed through the unique lens of the consent decree cases—most recently *Frew*—I think it becomes clear that the Court keeps Congress on a much shorter leash than it does federal district courts.

consistency.[353] As established in Part II, such discretion is well justified as a matter of established legal tradition and precedent. *Frew* demonstrates the continued vitality of that tradition, at least in the consent decree context. All nine justices agreed that the extensive decree at issue in *Frew* was consistent with both *Firefighters* and *Ex parte Young*, and thus constituted proper, judicially enforceable relief.[354] Broad equitable discretion is also well justified as a matter of sound legal policy. A federal judge—armed with intimate factual knowledge of the dispute and the conduct of the parties—should have the flexibility necessary to shape effective relief. Such flexibility is especially necessary in more complex litigation involving institutional-type reform.[355] Moreover, in the consent decree context, parties are much more likely to reach settlement and avoid costly litigation if permitted to enter into flexible yet judicially enforceable decrees.[356] Thus, rather than limit broad judicial equitable relief, this Article proposes broadening Section 5 authority based on the existing scope of consent relief.[357]

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353. Much as there are two ways to cure an equal protection violation—extend the benefit previously denied to the discriminated group or simply deny the benefit to all groups—there are two ways to alleviate the anomaly that district courts receive greater discretion than Congress in remedying federal law violations: increase congressional authority or decrease district court authority. In both situations, I think the first alternatives are generally the preferred solutions.

354. *Frew*, 540 U.S. at 438–39.

355. *See, e.g.*, Chayes, *supra* note 40, at 1308 ("The solutions can be tailored to the needs of the particular situation and flexibly administered or modified as experience develops with the regime established in the particular case."); Thomas, *Prophylactic Remedy*, *supra* note 5, at 332 & n.134 ("Professors Fiss and Chayes argued that untailored prophylactic remedies were needed to provide the courts with the necessary flexibility to achieve social justice in public law cases.").

356. *See, e.g.*, Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 381 (1992) (observing that long duration and public impact of institutional-reform consent decrees necessitate flexibility).

357. Although I am the only one to use the present comparative framework to make the point, several other legal scholars agree that the Supreme Court has overly constricted Congress's Section 5 authority. *See* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 148 (2002) (asking "why Congress should be confined to the remedial. The Fourteenth Amendment assigns Congress the role of enforcing its guarantees. The amendment assigns no role to the court."); Caminker, *supra* note 232, at 1131 (arguing that Section 5 power should be interpreted according to rational basis test applied to ordinary Article I legislation); Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique, Morrison, and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 134 n.105 (rejecting argument that "Congress's power should be adjudged by the same standards that govern the ability of lower courts to fashion remedies for constitutional or statutory violations"); McConnell, *supra* note 218, at 156 ("My thesis is that when Congress interprets the provisions of the Bill of Rights for purposes of carrying out its enforcement authority under Section Five, it is not bound by the institutional constraints that in many cases lead the courts to adopt a less intrusive interpretation from among the textually and historically

There are several reasons—in addition to doctrinal and jurisprudential consistency—why Congress acting under Section 5 should be given the same wide latitude to regulate State entities as a federal district judge entering a consent decree against a State.[358] They are grouped as follows: (1) text, (2) institutional capacity, (3) democratic legitimacy, and (4) safeguards of the political process.

1. Text

The text of the Constitution supports greater authority for Congress to regulate States in a remedial capacity than for federal courts to do so. A good starting point—especially when appealing to the current Court—is the Eleventh Amendment. The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[359] The Eleventh Amendment, embodying the principle of State sovereign immunity, supports a narrow reading of Article III and places express constitutional limits on federal judicial power with respect to States. The Eleventh Amendment has been construed not only to limit diversity suits against States, but also federal question suits.[360] Moreover, the Supreme Court has held that the Eleventh Amendment prevents Congress from granting federal courts jurisdiction to enforce Article I legislation against the States.[361]

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plausible meanings of the clause in question."); Post & Siegel, *Equal Protection*, *supra* note 238, at 444 ("We argue that neither separation-of-powers nor federalism values require the kind of stringent judicial supervision of Section 5 antidiscrimination legislation that some interpretations of the Court's recent decisions might be read to authorize.").

358. Not everyone agrees. For example, Professors Hamilton and Schoenbrod, in defending the recent line of Section 5 cases, seek to justify a narrower role for Congress under Section 5. They argue that:

> The Supreme Court should not give Congress more latitude in determining whether it has exceeded its remedial power under Section 5 than the Court grants lower courts in determining whether they have exceeded their remedial power. . . . Indeed, there are reasons to suppose that Congress, in formulating legislative remedies under Section 5, should be held to a higher standard of justification than are trial court judges in formulating judicial remedies.

Hamilton & Schoenbrod, *supra* note 5, at 486. The following reasons demonstrate why, in my view, their position is untenable.

359. U.S. CONST. amend. XI.

360. Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996).

361. *Id.* at 72–73.

Despite these limits, the Court recognizes a powerful exception to State sovereign immunity through the *Ex parte Young* doctrine. As discussed in Part II, *Young* affords federal courts subject matter jurisdiction with broad equitable authority to coerce States to comply with federal law. *Young*—deemed a "fiction" by the very Court that sustains it[362]—even allows federal district courts to enforce not only the federal Constitution but also federal statutes.[363] There is an obvious tension between the otherwise stringent limits on judicial power imposed by the Eleventh Amendment and the broad non-constitutional exception afforded district courts to enforce federal law against the States.[364]

Although I am not arguing that *Young* doctrine should be circumscribed[365]—it serves too important a purpose—the fact Section 5 authority trumps Eleventh Amendment immunity is noteworthy.[366] In contrast to the Court-manufactured *Young* exception, Section 5 gives Congress an explicit textual command "to enforce" the guarantees of the Fourteenth Amendment against the States, and thus does not confront any such constitutional impediment.

Further, as several scholars have argued persuasively, Section 5's mandate—in light of the open-ended language of Section 1, the nature of the congressional debates on the early Civil Rights Acts, and the historical dialogue between the Supreme Court and Congress with respect to the scope of anti-discrimination legislation—may also afford Congress some role in interpreting the substantive scope of Fourteenth Amendment guarantees.[367] One scholar has noted: "In the

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362. Pennhurst State Sch. v. Halderman, 465 U.S. 89, 105 (1984).

363. *See, e.g.*, Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431, 436–40 (2004) (enforcing federal Medicaid Act); Bd. of Trs. v. Garrett, 531 U.S. 356, 374 n.9 (2001) ("Title I of the ADA . . . can be enforced . . . by private individuals in actions for injunctive relief under *Ex parte Young*.").

364. *See* Laura S. Fitzgerald, *Beyond* Marbury*: Jurisdictional Self-Dealing in* Seminole Tribe, 52 VAND. L. REV. 407, 410–13 (1999) (arguing that nowhere does Court explain how Article III (as interpreted through Eleventh Amendment) could provide such stringent limits on Congress's power to grant subject matter jurisdiction in lawsuits alleging federal-law violations by States, while leaving intact Court's own power to do so under *Ex parte Young*); Leonard, *supra* note 21, at 325 (noting contradiction between increase in State sovereign immunity and *Ex parte Young* under the Rehnquist Court).

365. *See supra* notes 353–57 and accompanying text (reviewing advantages of using injunctive relief and consent decrees to resolve disputes).

366. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 454–56 (1976) ("[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." (citation omitted)); Seminole Tribe v. Florida, 517 U.S. 44, 65–66 (1996) (reaffirming principle that Section 5 power trumps State sovereign immunity).

367. *See* Colker, *supra* note 218, at 817–18; McConnell, *supra* note 218, at 172, 176; Post & Siegel, *Equal Protection*, *supra* note 238, at 446. I will not repeat here the well-reasoned support provided in those articles.

face of this 'textually demonstrable constitutional commitment . . . to a coordinate . . . branch of government,' the courts should be hesitant to second-guess congressional determinations about the scope of enumerated rights."[368] Recognizing such an interpretive role for Congress would necessarily increase the scope of Section 5 power, because Congress would, to some extent, be defining the very rights it simultaneously was seeking to protect through remedial legislation.[369]

But even if one does not read the relevant text or history to permit an interpretive role, Congress still has broad enforcement discretion by Section 5's own terms. Indeed, the Section 5 enforcement command is limited only by the condition that Congress act through "appropriate" legislation. As Professor McConnell has observed, the term "appropriate" has its origins in the "latitudinarian construction" of congressional power in *McCulloch v. Maryland*.[370] He argues that the "framers' use of this term suggests an awareness that the question whether legislation serves to 'enforce' the [Fourteenth] Amendment is not clear-cut, and an intention on their part to allow Congress considerable discretion."[371] This view is consistent with the Court's view in *Morgan* (now largely abandoned) that Section 5 "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[372]

In sum, in light of the fact that State sovereign immunity poses no obstacle, the fact that Congress has a clear constitutional mandate "to enforce" the Fourteenth Amendment (which may or may not include some interpretive power), and the fact that such enforcement need only be by "appropriate" legislation, Congress acting pursuant to Section 5 should have greater remedial authority against States than federal district courts mandating traditional equitable relief under *Young*—perhaps authority more akin to the consent relief context.

2. Institutional Capacity

Congress's special role is buttressed by functional institutional considerations. Congress—at least for bigger, less localized problems—is likely better equipped

368. McConnell, *supra* note 218, at 188 (alterations in original) (footnote omitted) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

369. *Cf.* Mishkin, *supra* note 40, at 955–60 (noting fluidity in institutional reform cases between right and remedy).

370. McConnell, *supra* note 218, at 188; *see also* Caminker, *supra* note 232 *passim* (suggesting that *McCulloch* conception of congressional power be applied to Section 5 legislation).

371. McConnell, *supra* note 218, at 188.

372. Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

than district courts to gather the facts necessary to justify a prophylactic remedy.[373] The type of facts that are most relevant to the policy assessments essential in properly identifying systemic problems and developing prophylactic solutions are better classified as "legislative" facts.[374] Congress exercises its fact-finding powers in a manner different than a court; after all, Congress is not an adjudicative body that creates trial-type records. In addition to being free of constraints such as evidentiary rules and a record created by interested litigants, Congress has greater investigatory resources to cast a wider net. Moreover, Congress is not bound by the institutional restraint that courts show when evaluating more democratic bodies.

If Congress, based on its superior fact-finding powers,[375] comes to the conclusion that a prophylactic remedy is necessary, why should the Court disturb that conclusion? Certainly, the Court should be more reluctant to disturb that

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373. Even the Chief Justice himself, who holds Congress to adjudicatory standards when it comes to sufficiency of evidence in the recent Section 5 cases, has in other contexts recognized the importance of deference to the legislature—given its unique capabilities—with respect to its investigatory methods and related conclusions:

> The Court's criticism of the statistics relied on by the District Court conveys the impression that a legislature in enacting a new law is to be subjected to the judicial equivalent of a doctoral examination in statistics. Legislatures are not held to any rules of evidence such as those which may govern courts or other administrative bodies, and are entitled to draw factual conclusions on the basis of the determination of probable cause which an arrest by a police officer normally represents.

Craig v. Boren, 429 U.S. 190, 224 (1976) (Rehnquist, J., dissenting).

374. As originally defined by Professor Davis, "legislative facts"—distinguished from "adjudicative facts" relating to the details of a particular case—are those facts that "inform[] a court's legislative judgment on questions of law and policy." Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402, 404 (1942); *see also* Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 931 (1980) [hereinafter Davis, *Facts in Lawmaking*] (referring to legislative facts as those used in lawmaking, broadly defined to include legislative enactments, judicial decisions, and administrative regulation).

375. Substantial academic literature as well as judicial precedent supports the view that Congress is better than courts at determining legislative facts. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997) ("We owe Congress's findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." (quotations omitted)); Metro Broad., Inc. v. FCC, 497 U.S. 547, 572 (1990) ("The 'special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue.'" (alteration in original) (quoting Fullilove v. Klutznick, 448 U.S. 448, 502–03 (1980) (Powell, J., concurring)); Davis, *Facts in Lawmaking*, *supra* note 374, at 941 (noting limitations of trial courts in finding legislative facts); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1169–70 & n.4 (2001) (collecting cases); Kathleen M. Sullivan, *Rediscovering a Principled Commerce Power*, 28 PEPP. L. REV. 589, 590 (2001) ("Congress is a better fact finder.").

conclusion than one reached by a less able district court.[376] Indeed, this is the logic behind the principle of separation of powers, applied in its basic functional sense. In short, Congress has a greater capacity to identify the facts amounting to constitutional violations, and Congress thus deserves greater deference as to that threshold issue.

As Professors Post and Siegel have observed, the Supreme Court has misguidedly applied a very court-centric view of equal protection to Congress in the Section 5 context.[377] At its heart, the Equal Protection Clause is concerned with invidious discrimination.[378] But:

> [T]here is a significant gap between conduct that will be found unconstitutional under standards and procedures that courts have devised for use in adjudicatory proceedings, and conduct that might be found unconstitutional by a factfinder applying judicial standards but not subject to the same institutional constraints as courts. Because the considerations of "judicial restraint" that shape and guide rational basis review are specifically designed to prevent courts from intruding on legislative discretion, they ought not to prevent Congress from applying the prohibition against invidious discrimination in a procedurally different and more comprehensive way than a court.[379]

In other words, the Supreme Court should not hold Congress's determinations of what constitutes unconstitutional discrimination to court-constructed tests such as rational basis scrutiny. There is no justification for imposing on Congress a judicial framework that has led to "underenforcement of the equal protection clause by the federal courts."[380]

In addition to its institutional advantages over courts when it comes to detecting violations, Congress is also in a better position than courts when it

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376. Although they agree with the premise, Professors Hamilton and Schoenbrod come to the opposite conclusion—that is, Congress's greater capacity to gather relevant facts and to reach factual conclusions needed to justify a prophylactic remedy militates in favor of a more stringent, Court-enforced proportionality requirement in Section 5 cases (and thus less congressional latitude). *See* Hamilton & Schoenbrod, *supra* note 5, at 486 ("Indeed, there are reasons to suppose that Congress, in formulating legislative remedies under Section 5, should be held to a higher standard of justification than are trial court judges in formulating judicial remedies."). Their reasoning seems exactly backwards: should not the better-situated actor be afforded greater discretion?

377. Post & Siegel, *Equal Protection*, *supra* note 238, at 459–73; *cf.* McConnell, *supra* note 218, at 156, 185–89 (making similar argument, based on Congress's greater democratic legitimacy, that Congress should be able to choose broader test than Supreme Court as to scope of Free Exercise authority).

378. Post & Siegel, *Equal Protection*, *supra* note 238, at 462–63.

379. *Id.* at 467.

380. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218 (1978).

comes to devising remedial standards. A single federal judge—even when enacting consent relief largely fashioned by the litigants or a court-appointed expert—has limited resources to contemplate and develop the type of broad, structural relief required in complex cases.[381] While this problem is mitigated in the consent decree context because the parties themselves help to devise the remedy, the district court is largely rendered a passive participant because even the underlying facts on which the remedy is based may never have been adjudicated. In contrast, Congress will spend years developing Section 5 legislation based on committee reports and extensive hearings involving interested parties and experts. Although somewhat ironic given the Supreme Court's Eleventh Amendment holding in the case, perhaps it is not surprising that the Court in *Seminole Tribe* relied on deference to the congressionally crafted remedial scheme at issue in denying the availability of judicially-implied remedies under *Ex parte Young* doctrine.[382]

3. Democratic Legitimacy

A distinct but related separation-of-powers concern arises from the perception that a district court, in issuing broad remedial decrees, is engaging in policymaking and thus usurping the legislature's designated role in policymaking through a democratic forum. Apart from the aforementioned concerns of institutional capacity and expertise, some object to broad decrees as exceeding both prudential (and perhaps also Article III) limits due to their legislative character and the fact that such decisions impose such extensive costs and burdens. Such changes, they argue, should instead flow through the legislative process to ensure democratic legitimacy.[383] Congress certainly is not subject to any such separation of powers criticisms. Congress, after all, is the consummate democratic policymaking body in our system of government.

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381. *See* Horowitz, *supra* note 40, at 1288, 1297, 1303–04 ("The courts have a comparative advantage when it comes to adjudicating rights; they have none when it comes to enforcing complex remedies.").

382. *See* Seminole Tribe v. Florida, 517 U.S. 44, 74 (1996) (concluding that enactment of complex remedial scheme demonstrated Congress's intent to preclude state law remedies).

383. *See* Thomas, *Prophylactic Remedy*, *supra* note 5, at 304 n.12 (collecting sources of criticism); *see also* ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 12, 223–28 (2003) (critiquing the anti-democratic nature of structural reform—including consent—decrees issued by courts).

4. Safeguards of the Political Process

Another argument against the status quo of lesser congressional deference relies on the federalism safeguards of the political process: States are adequately protected through the political process in Congress from unnecessarily intrusive legislation.[384] Because members of Congress ultimately represent constituents of their respective States, they will not agree to legislation that unnecessarily impinges on the sovereignty of their respective States.[385] Moreover, since most modern Section 5 legislation applies on a nationwide basis, there is little danger that the legislation would burden only a certain group of minority States that could not effectively block it. Although this concept has been developed most in arguing for restrained judicial review of Congress's Article I powers, the same logic applies in the Section 5 context. As Professor Choper has written:

> These considerations strongly support the Court's [prior] position which afford[ed] Congress extensive flexibility to define constitutional liberty under the enforcement clauses [such as Section 5]—a much more spacious latitude than the Court itself assumes in reviewing state (and private) action under § 1 of [the Fourteenth A]mendment[] unaided by congressional legislation. [With respect to the exercise of Congress's Section 5 authority], there should be no judicial review at all.[386]

Therefore, federalism concerns simply do not resonate in the Section 5 context to anywhere near the same degree that they do for comparable judicial relief.

V. Remedying the Tension: Frew *as a Model for Section 5 Review*

For all the reasons discussed above, Congress acting under Section 5 merits at least the discretion accorded a federal district judge acting under *Young* in

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384. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 171–259 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954).

385. *See* CHOPER, *supra* note 384, at 176–79 (explaining in detail mechanism by which congressional influence protects States); Weschler, *supra* note 384, at 546 (explaining States' power to negate proposed legislation through their congressional representatives).

386. CHOPER, *supra* note 384, at 199–200. I only mean to present the basic argument here, as there is substantial academic literature both supporting and critiquing the political process theory and exploring its nuances. *See, e.g.*, Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 *passim* (2001) (critiquing the position). Even if one does not subscribe to the stronger formulation of abdicating all judicial review in such cases, as Professor Choper proposes, the argument provides at least some support for judicial restraint in review of Section 5 legislation.

fashioning prophylactic relief to prevent and remedy federal-law violations. But under what standard then should the Supreme Court review Section 5 legislation? Fortunately, the consent decree context not only helps illustrate the problem with the Court's Section 5 jurisprudence but also suggests a solution.

Although my goal in this Article is not to develop fully an alternate framework, the Court's recent decision in *Frew* may provide the contours for a new mode of analysis in Section 5 cases. To remind the reader, the Court in *Frew* did little more than apply the traditional *Firefighters* test to determine the enforceability of a consent decree against the State. In other words, the Court merely asked whether the detailed, eighty-page decree "resolve[d] a dispute within the court's subject-matter jurisdiction," "c[a]me within the general scope of the case made by the pleadings," and "further[ed] the objectives of the law upon which the complaint was based."[387] With little further analysis, the Court found the relief to be consistent with both *Firefighters* and *Young*, and deemed the decree enforceable notwithstanding the Eleventh Amendment.[388]

Applying *Frew*'s inquiry to Section 5 legislation, the Court could simply ask whether the legislation "furthered the objectives" of the underlying Fourteenth Amendment right sought to be enforced ("the law upon which the complaint was based") and "came within the general scope of the" legislative record ("the case made by the pleadings"). Much like Professor Caminker's suggested means-end test modeled on the "rational relationship" inquiry established by *McCulloch v. Maryland*,[389] the approach in *Frew*—when applied to Section 5 legislation—would afford Congress an appropriate level of discretion and provide the Court a mode of review with which it is already familiar.

Applying that approach to the recent Section 5 cases would almost surely have resulted in a different outcome in several of the cases. It is hard to argue that the Patent Remedy Act (*Florida Prepaid*) did not at least "further the objectives" of the due process guarantee (specifically, protection against deprivation of patent rights); that the Age Discrimination in Employment Act (*Kimel*) did not at least "further the objectives" of the equal protection guarantee (specifically, prohibition of irrational discrimination based on age);

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387. Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) (quotations and alteration omitted).

388. Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431, 439–40 (2004). *Frew* does leave open the possibility that the *Young* circle is smaller than the *Firefighters* circle for consent decrees that govern State officials, but the Court does not indicate how that analysis would differ nor have the lower courts thus far adopted such a view. *See supra* notes 155–58 and accompanying text (explaining concentric circle model of *Young* doctrine's scope).

389. Caminker, *supra* note 232.

or that Title I of the Americans with Disabilities Act (*Garrett*) did not at least "further the objectives" of the equal protection guarantee (specifically, prohibition of irrational discrimination based on disability). And in all of those cases, there was at least some legislative record or findings of abuse of the relevant rights.

But this test is not a blank check to Congress. For example, the Trademark Remedy Act (*College Savings Bank*) may not have passed muster under the *Frew* approach. If neither of the asserted interests furthered by the Trademark Remedy Act—a right to be free from a business competitor's false advertising or a right to be secure in one's business interests—qualifies as a constitutionally protected property interest, the Act cannot fairly be construed as "furthering the objectives" of the due process guarantee. The civil remedy provision of the Violence Against Women Act (VAWA) (*Morrison*) presents a tougher call. On the one hand, by protecting victims of gender-motivated violence in light of biased State law enforcement and judicial systems, VAWA could be said to "further the objectives" of the equal protection guarantee (specifically, prohibition of illegitimate discrimination based on gender). On the other hand, because VAWA applies to victims of private (as opposed to State-sponsored) violence, one could reasonably argue that it does not sufficiently "further the objectives" of equal protection, which only applies to State discrimination. Even the *Frew*-based inquiry may thus leave some close questions as to the validity of Section 5 legislation.

Of course, the ultimate result would not change in the Supreme Court's two most recent pronouncements in the Section 5 area: *Hibbs* (Family Medical Leave Act) and *Lane* (Title II of the Americans with Disabilities Act). In both of these cases, as discussed earlier, the Court actually upheld Section 5 legislation but adhered to its "congruence and proportionality" test. The Court attempted to distinguish *Hibbs* based on the fact that gender-based claims get heightened scrutiny under the Equal Protection Clause. But it is difficult to reconcile the result in *Hibbs* with that in *Garrett* based upon the "congruence and proportionality" test. The legislative record in both cases contained significant evidence of discrimination (gender and disability, respectively). Notwithstanding heightened scrutiny for gender claims, it is quite unclear whether the record of discrimination in *Hibbs*—once that record is limited to State actors (the only relevant perpetrators according to *Garrett*) and the specific context of sick leave as opposed to parental leave (in light of *Garrett*, where the Court considered only employment as opposed to other sectors)—contains any more concrete examples of constitutional violations than the record in *Garrett*. As the number of violations seems to be the relevant

quantity to justify Congress's exercise of Section 5, the differing results defy clear explanation.[390]

The Court resorted to a more novel tactic in *Lane*, considering Title II of the ADA only as applied to the class of cases implicating the fundamental right of access to the courts. As the dissent notes, one might read the majority's "as applied" approach to Section 5 analysis as not only inconsistent with the approach used in *Florida Prepaid* (where the Court did not limit application of the statute to just intentional, uncompensated patent infringements), but as essentially boiling down to "a test of whether the Court can conceive of a hypothetical statute narrowly tailored enough to constitute valid prophylactic legislation."[391]

The confusion caused by the Court's questionable application in *Hibbs* and its novel approach in *Lane* can easily be avoided. The *Frew*-based inquiry provides a simpler, more coherent, and analytically cleaner way to achieve the same results, as both the FMLA and Title II of the ADA clearly "further the objectives" of the equal protection guarantee.

VI. Conclusion

This Article attempts to bring into sharper focus the unjustifiable nature of the Supreme Court's recent Section 5 jurisprudence through the lens of consent decrees against State entities, a species of a district court's remedial powers pursuant to *Ex parte Young*. Given that the inconsistency in the Court's treatment of these different modes of relief is patent as well as indefensible for the reasons argued in this Article, one might ask what then explains the Court's tolerance of that inconsistency. After all, the inconsistency—particularly in permitting the enforcement of broad judicial decrees against States—contradicts the conventional wisdom that the Rehnquist Court's paramount objective has been the protection of States' rights. But the inconsistency becomes much less surprising if one considers two other, more dominant trends

390. Vikram David Amar, *The New "New Federalism": The Supreme Court in* Hibbs *(and* Guillen*)*, 6 GREEN BAG 2d 349, 351–53 (2003) (characterizing as "perplexing" Court's analysis in *Hibbs*).

391. Tennessee v. Lane, 541 U.S. 509, 551 (2004) (Rehnquist, C.J., dissenting).

that distinguish the Rehnquist Court: the limitation of congressional power[392] and the rise of judicial supremacy.[393]

The Court's "congruence and proportionality" framework has permitted it to stake out an exclusive role in constitutional interpretation and to constrict the scope of Congress's Section 5 authority in a manner not seen since Reconstruction. This development fits well within the ambit of both larger trends, reinforcing the Supreme Court's authority while diminishing congressional power. At the same time, the Court appears willing to cede remarkable discretion to federal district courts to bind State entities. That development also tends to reflect the trend towards judicial supremacy—even at the expense of State sovereignty—as federal district courts are judicial actors that must ultimately follow the bidding of the Supreme Court.[394] Moreover, district courts construing and enforcing a statute pose far less a threat to the Supreme Court's central role (at least from the Court's perspective) than Congress construing and enforcing a substantive constitutional right. While this explanation makes for a telling story of the Court's underlying motivations, the Court's actions—whatever its motivations—have led to a particularly inconsistent and unsound jurisprudence when it comes to the weighty problem of redressing State violations of federal law.

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392. *See, e.g.*, Printz v. United States, 521 U.S. 898, 935 (1997) (striking down Brady Handgun Violence Prevention Act based on the Tenth Amendment); United States v. Lopez, 514 U.S. 549, 567 (1995) (striking down Gun-Free School Zones Act as exceeding Congress's authority under the Commerce Clause); *see also* Neal Devins, *Congress As Culprit: How Lawmakers Spurred On The Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 435 (2001) (offering explanation for Court's perceived move to limit congressional authority).

393. *See, e.g.*, Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 241 (2002) ("[M]y emphasis is on the Supreme Court's view in recent years that it alone among the three branches has been allocated the power to provide the full substantive meaning of all constitutional provisions."); Stephen G. Bragaw & Barbara A. Perry, *The "Brooding Omnipresence" in* Bush v. Gore*: Anthony Kennedy, The Equality Principle, and Judicial Supremacy*, 13 STAN. L. & POL'Y REV. 19, 21 (2002) ("The [*Bush v. Gore*] majority also envisions a Court that brooks no coequal interpreter of the Constitution, a tribunal that is the supreme arbiter of state and national conflict.").

394. It is worth noting that judicial supremacy arguments may ring a bit hollow when the law that provides the baseline for the district court's remedial power is federal statutory law rather than the Constitution. Although the Supreme Court has the final say as to the Constitution's meaning, Congress has the final say on the content of the statute. From that perspective, federal district court judges are in the same second-best position when they are enforcing federal statutory law as Congress is when it is enforcing the Fourteenth Amendment. Nevertheless, broad discretion in enforcing the underlying law ultimately helps aggrandize judicial authority, irrespective of the baseline.