*Article VI — Private Rights of Action — Equitable Remedies to Enforce the Medicaid Act* — Armstrong v. Exceptional Child Center, Inc.

Mindful of the common law maxim "that where there is a legal right, there is also a legal remedy,"[1] the Supreme Court has often inferred a private right of action in the face of statutory or constitutional silence.[2] In recent decades, however, the Court has retreated from this general remedial approach, narrowing the availability of implied rights of action by drawing distinctions among various remedies and legal interests.[3] Last Term, in *Armstrong v. Exceptional Child Center, Inc.*,[4] the Court at once simplified and complicated the landscape — unifying[5] the disparate treatment of statutory damages and affirmative injunctions while hinting at yet another exception for the award of negative relief.[6] Though the Court claimed to rely exclusively on earlier decisions when resolving *Armstrong*, the outcome is difficult to explain as a straightforward application of precedent. The Court instead could have relied convincingly on common law reasoning that traces back to Justice Harlan's concurrence in *Bivens*. And even though the Court eschewed this mode of analysis, the common law nature of the Court's private-rights-of-action jurisprudence supports *Armstrong*'s attempt to unify the statutory context by ratcheting down the formerly permissive treatment of affirmative injunctions.

Medicaid is a federal–state program that subsidizes the states' provision of medical care to low-income individuals.[7] State participation in the program is voluntary, but states receiving federal funds must develop a state plan that complies with the terms of the Medicaid Act.[8]

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[1] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

[2] *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390–97 (1971); J.I. Case Co. v. Borak, 377 U.S. 426, 430–31 (1964).

[3] *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66–74 (2001); Alexander v. Sandoval, 532 U.S. 275, 279–93 (2001).

[4] 135 S. Ct. 1378 (2015).

[5] A neutral phrase like "unification" does not fully capture the often divisive nature of the Court's implied-rights-of-action jurisprudence and the value-laden debate over the *direction* of unification. With respect to equitable relief, Professor David Shapiro has noted that "arguments about [*Ex parte Young*] have become a proxy for a more important debate: To what extent, if any, should federal law (especially the Constitution) be available for use not only as a shield against state action but as a sword . . . ?" David L. Shapiro, Ex Parte Young *and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69, 94 (2011).

[6] A plea for affirmative relief makes a demand for damages or specific performance of a duty. *See* John Harrison, *Ex Parte* Young, 60 STAN. L. REV. 989, 1004–05 (2008). Negative relief, on the other hand, seeks to nullify a challenged action or law and makes no demand "other than to be let alone." *Id.* at 1006.

[7] Medicaid Act, 42 U.S.C. §§ 1396–1396v (2012).

[8] *Id.* § 1396a. If the state does not act in accordance with the requirements of the Medicaid Act, the Secretary of Health and Human Services may initiate a compliance action and withhold federal funds. *Id.* § 1396c.

Among other requirements, § 30(A) of the Act requires that such plans contain procedures to ensure that reimbursement rates for health care providers are consistent with "quality of care and are sufficient to enlist enough providers" in the geographic area.[9]

The State of Idaho administers a federally approved Medicaid plan, which includes residential habilitation services for individuals with developmental disabilities.[10] In 2005, Idaho's legislature revised the methodology for determining reimbursement rates for habilitation service providers, requiring state officials to consider the actual costs incurred by providers.[11] In 2009, after conducting various cost studies, state officials proposed that the applicable reimbursement rates be increased.[12] The proposed rates, however, were never implemented because the Idaho legislature did not appropriate the necessary funds.[13] Five providers of habilitation services (the "Providers") filed suit in the District of Idaho against two officials responsible for administering the state's Medicaid program, claiming that the prevailing reimbursement rates were too low to satisfy the conditions of § 30(A) and thus were preempted by the Act.[14] The Providers asked the court to issue an injunction ordering the state officials to increase the rates.[15]

The district court granted summary judgment for the Providers.[16] The court rejected the argument that the Providers lacked a valid cause of action, holding that Ninth Circuit precedent "clear[ly]" established that "providers have standing under the Supremacy Clause" to challenge a state law reducing reimbursement rates in violation of § 30(A).[17] On the merits, Chief Judge Winmill concluded that the state's continued use of the 2006 reimbursement rates violated § 30(A) because the rates did not incorporate "actual provider costs."[18]

The Ninth Circuit affirmed by unpublished disposition.[19] From the outset, the court maintained that the "Providers have an implied right of action under the Supremacy Clause" to enjoin the implementa-

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[9] *Id.* § 1396a(a)(30)(A).

[10] Inclusion, Inc. v. Armstrong, 835 F. Supp. 2d 960, 961 (D. Idaho 2011); *see also* 42 U.S.C. § 1396n(c). The residential habilitation program includes individually tailored support services, such as skills training, that are designed "to assist Medicaid participants in residing successfully" in their own homes rather than in an institution. *Armstrong*, 835 F. Supp. 2d at 961.

[11] IDAHO CODE ANN. § 56-118(1)–(2) (West 2011).

[12] *Armstrong*, 835 F. Supp. 2d at 962.

[13] *Id.*

[14] *See* Complaint at 8–9, *Armstrong*, 835 F. Supp. 2d 960 (No. 1:09-cv-00634).

[15] *Id.* at 10.

[16] *Armstrong*, 835 F. Supp. 2d at 964.

[17] *Id.* (citing Indep. Living Ctr. of S. Cal., Inc. v. Shewry, 543 F.3d 1050, 1065 (9th Cir. 2008)).

[18] *Id.*

[19] Exceptional Child Ctr., Inc. v. Armstrong, 567 F. App'x 496, 498 (9th Cir. 2014). Comprising the panel were Judge Tallman, Judge Bea, and District Judge Murphy, sitting by designation. *Id.* at 497.

tion of state legislation.[20] Turning to § 30(A), the Ninth Circuit affirmed the district court's determination that the rates had impermissibly "remained in place for 'purely budgetary reasons.'"[21]

The Supreme Court reversed.[22] Writing for the Court, Justice Scalia[23] held that the Supremacy Clause does not create a freestanding cause of action.[24] Rather, the "ability to sue to enjoin unconstitutional actions by state and federal officers" is an equitable, "judge-made remedy" that can be foreclosed by Congress.[25]

Relying on both text and history, Justice Scalia concluded that the Supremacy Clause establishes a mere "rule of decision."[26] Read simply, the clause "instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court."[27] And read in context, "imposing mandatory private enforcement"[28] of federal law would conflict with the enforcement regime established in Article I, which vests Congress with broad discretion to guide the implementation of its laws.[29] Finally, the "conspicuous absence" of any mention in the preratification historical record that the clause created such significant private rights "militate[d] strongly against" the Providers' position.[30]

Having dispensed with a claim to relief under the Supremacy Clause, the Court identified the longstanding *Ex parte Young*[31] right of action to enjoin unlawful executive acts as a "creation of courts of equity" that could be displaced by Congress through "express and implied statutory limitations."[32] According to the Court, two features of § 30(A) implicitly foreclosed equitable relief. First, similar to the stat-

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[20] *Id.* at 497. The panel acknowledged that four Justices in *Douglas v. Independent Living Center of Southern California, Inc.*, 132 S. Ct. 1204 (2012), "would have held otherwise," *id.* at 1212 (Roberts, C.J., dissenting), but nonetheless considered itself bound by Supreme Court precedent recognizing such a right, *Armstrong*, 567 F. App'x at 497 (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983)). Note that the Ninth Circuit overstated the holding in *Shaw* — at best, the Court's recognition that federal courts have jurisdiction over suits to enjoin preempted state regulation, *see Shaw*, 463 U.S. at 96 n.14, merely *suggested* a private right of action under the Supremacy Clause.

[21] *Armstrong*, 567 F. App'x at 498 (quoting *Armstrong*, 835 F. Supp. 2d at 963).

[22] *Armstrong*, 135 S. Ct. at 1388.

[23] Justice Scalia was joined in full by Chief Justice Roberts and Justices Thomas and Alito. Justice Breyer joined Parts I, II, and III of the opinion.

[24] *Armstrong*, 135 S. Ct. at 1383–84.

[25] *Id.* at 1384.

[26] *Id.* at 1383.

[27] *Id.*

[28] *Id.* at 1384.

[29] *Id.* at 1383–84; *see also* U.S. CONST. art. I, § 8, cl. 18 (giving Congress authority to "make all Laws which shall be necessary and proper for carrying into Execution [its] Powers").

[30] *Armstrong*, 135 S. Ct. at 1383.

[31] 209 U.S. 123 (1908).

[32] *Armstrong*, 135 S. Ct. at 1384–85 (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 74 (1996)).

ute in *Alexander v. Sandoval*,[33] the express provision of one method of enforcing the requirements of the Act — the Secretary's withholding of Medicaid funds — indicated that Congress intended to foreclose other remedies.[34] Second, the "judicially unadministrable nature of § 30(A)'s text"[35] demonstrated, as in *Gonzaga University v. Doe*,[36] that Congress "wanted to make the agency remedy that it provided exclusive."[37] Taken together, the Court held that the Act displaced an equitable remedy to enforce § 30(A).[38]

Justice Breyer concurred in part and concurred in the judgment. In his view, the question of whether a statute allows for equitable relief could not be resolved by a "simple, fixed legal formula."[39] Nevertheless, expanding on the majority's displacement analysis, Justice Breyer concluded from § 30(A)'s "nonjudicial" subject matter[40] and the Act's robust administrative remedies that Congress intended to vest broad enforcement discretion in expert agencies.[41] Indeed, previous judicial forays into the ratemaking arena "demonstrate[d] that administrative agencies are far better suited to this task than judges."[42] Furthermore, the Secretary's statutory power to refuse federal funds and sue to compel compliance provided adequate remedies.[43]

Justice Sotomayor dissented.[44] She agreed with the basic premises of the majority opinion: the Supremacy Clause does not provide an implied right of action, and equitable remedies to enjoin unlawful executive action may be foreclosed by Congress.[45] But she parted from the majority along two lines. First, Justice Sotomayor criticized the majority for importing the displacement analysis previously applied to statutory damages into the context of equitable relief.[46] Unlike the majority's approach — which elided the damages/equity distinction and mirrored the skeptical approach embraced in *Sandoval* and *Gonzaga* —

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[33] 532 U.S. 275 (2001).

[34] *Armstrong*, 135 S. Ct. at 1385; *see also* 42 U.S.C. § 1396c (2012).

[35] *Armstrong*, 135 S. Ct. at 1385.

[36] 536 U.S. 273 (2002).

[37] *Armstrong*, 135 S. Ct. at 1385 (quoting *Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring in the judgment)).

[38] *Id.* Finally, writing for the plurality, Justice Scalia quickly dismissed the argument that a private right of action could be implied from the Medicaid Act itself. *See id.* at 1387 (plurality opinion) (citing *Sandoval*, 532 U.S. at 286–87).

[39] *Id.* at 1388 (Breyer, J., concurring in part and concurring in the judgment).

[40] *Id.* Ratemaking determinations generally involve balancing a range of policy considerations. *See id.*

[41] *Id.* at 1389–90.

[42] *Id.* at 1388.

[43] *Id.* at 1389.

[44] *Id.* at 1390 (Sotomayor, J., dissenting). Justice Sotomayor was joined by Justices Kennedy, Ginsburg, and Kagan.

[45] *Id.* at 1391–92.

[46] *Id.*

she argued that precedent demanded a more rigorous showing that Congress has "affirmatively manifest[ed]" its intent to displace "the federal courts' long-established practice of enjoining preempted state action."[47] Second, Justice Sotomayor reasoned that even under the majority's own standard, equitable relief should be available: The Act's administrative remedies were too narrow to foreclose an equitable cause of action.[48] And the ratemaking standard set out in § 30(A) was not "judicially unadministrable" — although the statutory text was "fairly broad,"[49] the provision "employed language quite similar" to another part of the Act that had been deemed judicially enforceable.[50]

As its private-rights-of-action doctrine has evolved, the Court has drawn distinctions among different remedies and legal interests. By unifying[51] the treatment of statutory damages and affirmative injunctions while suggesting a more permissive approach for negative relief, *Armstrong* appears to trade one distinction for another. Viewed through the lens of precedent and statutory interpretation, this outcome is difficult to justify. But as a matter of federal common lawmaking, *Armstrong* comports with a method of judicial reasoning that traces back to Justice Harlan's concurrence in *Bivens*. Even though the Court did not adopt this common law methodology, Justice Harlan's mode of analysis helps explain *Armstrong*'s attempt to retreat from the lenient approach for statutory affirmative injunctions.

First, a sketch of the doctrinal landscape is necessary to ground the analysis. For much of the latter half of the twentieth century, the Court's methodology was flexible in finding implied causes of action.[52] In recent decades, however, the Court has begun to constrict the availability of private rights of action by bifurcating its treatment of damages and injunctions. In suits for damages under federal statutes and the Constitution, the Court has applied a skeptical approach, requiring a "clear and unambiguous" statement of congressional intent before

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[47] *Id.* at 1392. The dissent noted that *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), was the only decision in which the Court "ha[s] ever discerned such congressional intent to foreclose equitable enforcement of a statutory mandate." *Armstrong*, 135 S. Ct. at 1392.

[48] *Armstrong*, 135 S. Ct. at 1393 (explaining that withholding federal funds from a state "will often be self-defeating" and the Act otherwise "provides no specific procedure that parties . . . may invoke in lieu of *Ex parte Young*").

[49] *Id.* at 1394.

[50] *Id.* at 1395. At the time § 30(A) was enacted, many federal courts of appeals had already found that the Boren Amendment, which required a state plan to provide reimbursement rates for disability services that are "adequate to meet the costs which must be incurred by efficiently and economically operated facilities," was "enforceable pursuant to § 1983." *Id.* at 1394–95; *see also* 42 U.S.C. § 1396a(a)(13)(A) (1994) (amended 1997).

[51] Although the *Armstrong* majority does not explicitly announce such a purpose, the opinion can be read as a unification project.

[52] *See* Cort v. Ash, 422 U.S. 66, 80–85 (1975); J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964).

finding a right of action.[53] Yet in suits for equitable relief, the approach has remained broad and permissive, with the Court almost taking for granted the availability of injunctions for violations of specific constitutional provisions.[54] To similar effect, *Ex parte Young* was read by many,[55] including at times the Court,[56] to authorize any injunctive relief against state officials for prospective violations of federal law and the enforcement of preempted state laws.

*Armstrong* chips away at the bifurcation between damages and injunctions, but introduces a new distinction between those *equitable* causes of action that may implicitly be displaced by Congress and others that require more explicit evidence of congressional intent. Suits like *Armstrong* seeking affirmative injunctive relief against the government may now be foreclosed pursuant to the same approach applied in the statutory damages context[57] — that is, upon finding the provision of alternate remedies or judicially unadministrable text.[58] But the majority, by not calling the Court's previous reading of *Ex parte Young* into question,[59] suggests that the displacement of negative injunctions demands a more robust showing of congressional intent. This affirmative-/negative-injunction distinction comports with the historically grounded view that "[a]nti-suit injunctions have been a

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[53] *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 290 (2002); *accord* Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001). The inquiry for implying a damages remedy for constitutional violations is slightly different. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396–97 (1971) (considering whether there are "special factors counselling hesitation" before awarding damages, *id.* at 396, or whether Congress has specified an alternative, "equally effective" mechanism for relief, *id.* at 397). Yet the Court's *Bivens* jurisprudence demonstrates the same skeptical approach to inferring a right of action for damages. Indeed, the "special factors" analysis often incorporates *Gonzaga*'s concern for judicially unadminstrable standards, *see* Wilkie v. Robbins, 551 U.S. 537, 555 (2007), and the "equally effective remedy" prong resembles *Sandoval*'s deference to alternative administrative remedies, *see* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001).

[54] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 372 (2010); Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952); *see also* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 3–7, 41–42, 196, 223 (1991) (describing the prevalence of injunctive remedies in many areas of public law litigation, including suits challenging school segregation and legislative malapportionment).

[55] *See* Shapiro, *supra* note 5, at 74.

[56] *See, e.g.*, Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 1632, 1639 (2011); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983).

[57] *See Armstrong*, 135 S. Ct. at 1385.

[58] *See Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring in the judgment); *Sandoval*, 532 U.S. at 290.

[59] *See Armstrong*, 135 S. Ct. at 1384. Five members of the Court, and four members of the *Armstrong* majority, have asserted that *Ex parte Young* authorizes merely negative, antisuit injunctions. *See* Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S. Ct. 1204, 1213 (2012) (Roberts, C.J., dissenting) (concluding that *Ex parte Young* provides for "the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law" (quoting *Stewart*, 131 S. Ct. at 1642 (Kennedy, J., concurring))). Professor John Harrison offers an identical reading of the case. *See* Harrison, *supra* note 6, at 990.

staple of equity for centuries,"[60] and the doctrinal concern that it is unclear whether negative injunctions are even amenable to the displacement inquiries of *Sandoval* and *Gonzaga*.[61] At the same time, while *Armstrong* hints at this distinction in the statutory realm, it does not explicitly engage with the constitutional context. The Providers sought an affirmative injunction under a statute; apart from the rejected Supremacy Clause interest, their lawsuit did not implicate constitutional provisions.[62] Therefore, although the majority lumped all "unlawful executive action" together and suggested that the same affirmative-/negative-injunction distinction applies to constitutional cases,[63] it is not clear what showing must be made before foreclosing equitable remedies to enforce constitutional provisions. The table below summarizes the post-*Armstrong* landscape:

| | | Legal Interest | |
|---|---|---|---|
| | | Statutory | Constitutional |
| Remedy | Damages | Rarely implied (e.g., *Gonzaga*; *Sandoval*) | Rarely implied (e.g., *Bivens*; *Malesko*) |
| | Affirmative Injunctions | Lower bar for displacement (e.g., *Armstrong*) | Not expressly considered (e.g., *Brown*) |
| | Negative Injunctions | Higher bar for displacement (e.g., *Verizon Maryland, Inc. v. Public Service Commission of Maryland*;[64] *Shaw*) | Not expressly considered (e.g., *Citizens United*; *Free Enterprise Fund v. PCAOB*[65]) |

This table, reflecting an ad hoc, "crazy-quilt pattern of statutory, constitutional, and pragmatic considerations,"[66] suggests a simple explanation: implied rights of action are all federal common law.[67] Justice Harlan's concurrence in *Bivens* provides the archetypal model for

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[60] Harrison, *supra* note 6, at 990.

[61] Take *Ex parte Young*, for instance. There, the railroads did not seek to privately enforce a statute; they aimed to invalidate it on constitutional grounds. *Ex parte* Young, 209 U.S. 123, 131 (1908). Given the negative relief sought, it is not clear how (1) Congress could have specified an alternative enforcement mechanism, *see Sandoval*, 532 U.S. at 290, or (2) the judicially unadministrable nature of a provision's text would immunize it from constitutional challenge, *see Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring in the judgment).

[62] *See Armstrong*, 135 S. Ct. at 1382.

[63] *See id.* at 1385.

[64] 535 U.S. 635 (2002).

[65] 130 S. Ct. 3138 (2010).

[66] Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 12 (1975) (footnotes omitted).

[67] Courts and scholars generally characterize implied rights of action as judge-made common law. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964); Monaghan, *supra* note 66, at 24.

common law judicial reasoning in the implied-rights-of-action landscape. The common law judge is guided as much by pragmatism as by precedent, continually searching for the *best* rule to govern a particular realm of law.[68] As such, in resolving the question of inferring a damages remedy for constitutional violations, Justice Harlan surveyed the Court's implied-rights-of-action jurisprudence to determine which legal rule made sense in terms of coherence, uniformity, and institutional competency.[69] In his view, a refusal to recognize a damages action for constitutional violations would create two discontinuities in the doctrine. First, given the permissive approach toward inferring statutory remedies at the time,[70] it would have been anomalous to apply a more stringent test for constitutional remedies, which presumably rank at least as high "on a scale of social values."[71] Second, considering the traditional authority to issue equitable injunctions, it would be incongruous to "divest[] federal courts" of the power to grant a less intrusive remedy at law.[72] Justice Harlan therefore ratcheted up a damages remedy for constitutional violations in the interest of unifying the doctrine across legal interests and remedies.

The Court, however, has largely[73] abandoned Justice Harlan's unfettered style of analysis. Although *Armstrong* is a common law decision in that its *subject matter* is federal common law — reconceiving the equitable cause of action as a "judge-made remedy" that can be displaced by Congress[74] — it did not utilize the common law *methodology* that was the hallmark of previous opinions in this area. Justice Scalia grounded his analysis in a narrow, historically based interpretation of *Ex parte Young* and its key precedent.[75] Justice Sotomayor, meanwhile, adopted a static view of the doctrine: because prior cases assumed the availability of injunctive remedies to enforce a federal statute, the displacement analysis for statutory rights of action could

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[68] *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 507 (2008) (noting that when the Court sits "in the position of a common law court," its decisions often "smack[] m[ore] of policy and [less] of principle").

[69] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 407 (1971) (Harlan, J., concurring in the judgment) (concluding that the "range of policy considerations" at his disposal was "at least as broad as . . . those a legislature would consider"). Similar concerns about coherence, uniformity, and institutional competence run throughout the Court's federal common law jurisprudence. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 727–29 (1979); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964).

[70] *Bivens*, 403 U.S. at 402 (Harlan, J., concurring in the judgment) (citing *Borak*, 377 U.S. 426).

[71] *Id.* at 410.

[72] *Id.* at 404.

[73] Note, however, that Justice Scalia once made a similar call for unifying the doctrine. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

[74] *See Armstrong*, 135 S. Ct. at 1384.

[75] *See id.* at 1383–84.

not be transferred to a "background equitable principle[]."[76] Neither opinion grappled with what makes sense for the doctrine.

Nonetheless, the common law methodology in *Bivens* is instructive and provides one lens through which to evaluate both *Armstrong* and future cases.[77] Justice Harlan's reasoning supports the *Armstrong* Court's attempt to unify — albeit in the opposite direction — the treatment of damages and injunctions in the statutory realm. Four decades later, the calculus with respect to the Court's institutional competence has changed: the expansive authority to imply statutory remedies upon which Justice Harlan based his a fortiori argument is now quite constricted.[78] A permissive approach to injunctions thus gives rise to two new aberrations in the present doctrine. Indeed, considering that many injunctive remedies are more intrusive than damages,[79] it is anomalous to apply a more permissive test to the more extraordinary remedy.[80] Moreover, if the Court now refuses to infer a damages remedy — the most basic relief at law — to vindicate countermajoritarian constitutional interests,[81] then it would be strange to adopt a more permissive approach toward *any* remedy in the statutory context, where the judiciary risks intruding on the legislative function of majoritarian policymaking.[82] To eliminate these inconsistencies from the doctrine, the Court justifiably ratcheted down the permissive approach to injunctions.

And yet, by suggesting a carve-out whereby negative injunctions may be implied under a permissive standard, the Court did not perfectly unify across remedies. The next question facing the Court, then, is whether its ostensible unification project should extend to negative injunctions. *Armstrong* might be viewed in two different respects. On the one hand, the recent trend has been toward the constricting of available relief. While the Court previously inferred a right of action for damages, affirmative injunctions, and negative injunctions with

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[76] *See id.* at 1392 (Sotomayor, J., dissenting).

[77] Even though the Court has mostly rejected policy-based federal common lawmaking, the Court's private-rights-of-action jurisprudence can still be assessed in terms of coherence, uniformity, and institutional competency.

[78] *See, e.g.*, *Malesko*, 534 U.S. at 75 (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action . . . .").

[79] The Court has repeatedly emphasized the intrusiveness of certain "structural injunctions" in the standing context. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 761 (1984) (refusing to grant standing for plaintiffs who sought an injunction to "restructur[e] . . . the apparatus established by the Executive Branch to fulfill its legal duties"); O'Shea v. Littleton, 414 U.S. 488, 500 (1974) (same).

[80] Such a juxtaposition flips the usual interplay between law and equity where equitable remedies are available only when remedies at law are inadequate. *See, e.g.*, *O'Shea*, 414 U.S. at 499.

[81] *See Malesko*, 534 U.S. at 74; Schweiker v. Chilicky, 487 U.S. 412, 429 (1988).

[82] *See* Cannon v. Univ. of Chi., 441 U.S. 677, 746 (1979) (Powell, J., dissenting) ("By creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve.").

relative unity, the *Sandoval* and *Gonzaga* Courts introduced a stricter inquiry for damages, and now the *Armstrong* Court has arguably imported the same skeptical approach into the realm of affirmative relief. Viewed through the lens of history, *Armstrong* might be understood as one link in a long chain rather than a paradigm shift in itself.

On the other hand, there are reasons to suspect that the bifurcation between affirmative and negative relief is a more permanent fixture in the private-rights-of-action landscape. First, Justice Harlan's common law methodology supports such a distinction. The primary anomaly in the present doctrine arose from the permissive treatment of a more intrusive remedy, but negative injunctions do not direct any affirmative act of the state. Instead, they simply seek to "enforce[] a conclusion of invalidity, making a purported law into a non-law."[83] Second, a request for negative relief may not be amenable to the stricter standard applied to damages — indeed, when a litigant seeks to invalidate rather than enforce a statute, *Sandoval*'s inquiry as to whether Congress has provided an alternative means for enforcing the statute[84] makes little sense. Finally, several members of the Court have acknowledged that cases involving negative relief "present quite different questions."[85] Plaintiffs asserting a principle of invalidity seek to vindicate the basic interest "to be let alone,"[86] whereas parties requesting an affirmative injunction aim to compel the state to act for their benefit.[87] As such, one might infer that the skeptical inquiry for statutory damages is "not transferable to the [negative injunction] context."[88]

At bottom, interpretations of *Armstrong* and its ostensible unification project may turn on one's ideological priors. As Professor David Shapiro recognizes, "arguments about [*Ex parte Young*] have become a proxy for" debates about the extent to which the Constitution should "be available for use not only as a shield against [invalid] state action but [also] as a sword" with which to seek affirmative relief.[89] *Armstrong* appears to be the latest round of the debate.

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[83] *See* Harrison, *supra* note 6, at 1005; *see also id.* at 1004–06.

[84] *See* Alexander v. Sandoval, 532 U.S. 275, 290 (2001).

[85] Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S. Ct. 1204, 1213 (2012) (Roberts, C.J., dissenting).

[86] *See* Harrison, *supra* note 6, at 1006.

[87] Indeed, objects of regulation traditionally receive greater solicitude from the Court than beneficiaries of regulation. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 561–62 (1992).

[88] *See Armstrong*, 135 S. Ct. at 1392 (Sotomayor, J., dissenting). Justice Sotomayor argued that *Sandoval*'s skeptical inquiry is not transferable to the entire "*Ex parte Young* context," *see id.*, and cited a string of cases to demonstrate that the Providers' request for affirmative relief "falls comfortably" within the *Ex parte Young* doctrine, *id.* at 1391. All of those decisions, however, involved pleas for negative relief. *See id.* (citing, among others, Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819)).

[89] Shapiro, *supra* note 5, at 94.