NOTES

CONGRESSIONAL INTENT TO PRECLUDE EQUITABLE RELIEF — *EX PARTE YOUNG* AFTER *ARMSTRONG*

The Supreme Court's recent decision in *Armstrong v. Exceptional Child Center, Inc.*[1] has raised concerns within the healthcare community[2] and beyond[3] that *Armstrong*'s limitation on courts' traditional equitable powers will have an inimical effect on federal statutes like the Medicaid Act[4] that have relied heavily upon enforcement through litigation. *Armstrong* concerned a claim by healthcare providers that a state health department's low reimbursement rates violated the Medicaid Act and were thus preempted by the Act.[5] The Court analyzed whether providers had a private right of action to bring the preemption claim via a variety of avenues: an implied right of action derived from the statute, an equitable right of action through courts' traditional equitable remedial powers, and a direct constitutional right of action under the Supremacy Clause.[6] The latter claim garnered the most attention, as the Supreme Court had not yet decided whether the Supremacy Clause confers such a right of action. Justice Scalia, writing for the *Armstrong* Court, concluded that it does not.[7]

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[1] 135 S. Ct. 1378 (2015).

[2] *See, e.g.*, Nicole Huberfeld, *The Supreme Court Ruling That Blocked Providers from Seeking Higher Medicaid Payments Also Undercut the Entire Program*, 34 HEALTH AFF. 1156 (2015); Jane Perkins, *Pin the Tail on the Donkey: Beneficiary Enforcement of the Medicaid Act over Time*, 9 ST. LOUIS U. J. HEALTH L. & POL'Y 207, 211–17, 230–31 (2016).

[3] *See, e.g.*, Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights?*, 114 MICH. L. REV. 893, 893–94 (2016) (reviewing SARAH STASZAK, NO DAY IN COURT (2015)); Steve Vladeck, Armstrong*: Is Utterly Disingenuous Statutory Interpretation Ever Worth It?*, PRAWFSBLAWG (Mar. 31, 2015, 8:27 PM), http://prawfsblawg.blogs.com/prawfsblawg/2015/03/armstrong-is-utterly-disingenuous-statutory-interpretation-ever-worth-it.html [https://perma.cc/HH9C-UJ9L].

[4] 42 U.S.C. §§ 1396–1396v (2012).

[5] 135 S. Ct. at 1378. *Armstrong* concerned a challenge by providers of habilitation services to Medicaid reimbursement rates set by the Idaho Department of Health and Welfare, which the providers alleged violated section 30(A) of the Medicaid Act. *Id.* at 1382. Section 30(A) requires plans to:

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

42 U.S.C. § 1396a(a)(30)(A). The issue, the providers alleged, was that the Department of Health and Welfare had set the rates lower than section 30(A) permitted. *Armstrong*, 135 S. Ct. at 1382.

[6] 135 S. Ct. at 1383–85, 1387.

[7] *Id.* at 1383–84. For more on this issue, see Henry Paul Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 NOTRE DAME L. REV. 1807, 1821–22 (2016); and Perkins, *supra* note 2, at 209–10.

But the heart of the *Armstrong* opinion was its consideration of the power of "federal courts of equity" to enforce federal law[8] — in particular, the doctrine also known as *Ex parte Young*,[9] which concerns courts' "ability to . . . enjoin unconstitutional actions by state and federal officers"[10] by means of their traditional equitable powers. The *Armstrong* Court determined that the plaintiff-respondent, Exceptional Child Center, could not rely on the equitable powers of the court to enforce the Medicaid Act provision at issue.[11] The Court applied a two-factor inquiry, noting (1) the existence of a congressionally provided "remedy," in this case a remedy of withholding Spending Clause funding, and (2) the "judicially unadministrable nature" of the provision at issue.[12] Given that both conditions were present, the Court held that equitable judicial enforcement was precluded.[13]

This holding has raised concerns about the availability of the *Ex parte Young* doctrine as a means to remedy violations of federal law by state actors. As Justice Sotomayor stressed in her *Armstrong* dissent, the *Ex parte Young* doctrine has served as a backstop enabling courts to review state actions that violate federal law "since the early days of the Republic."[14] In *Seminole Tribe v. Florida*,[15] before *Armstrong* the most recent formulation of the *Ex parte Young* doctrine, the Court held that the presence of a "detailed remedial scheme" indicated that courts "should hesitate" to exercise their equitable powers.[16] By contrast, under the *Armstrong* test, courts *cannot* exercise their equitable powers where: (1) there is a "remedy" provided by the Act (which need not be "detailed"); and (2) the provision is "judicially unadministrable."[17] Thus, *Armstrong* appears to set a significantly higher threshold for enabling judicial enforcement than that set forth in *Seminole Tribe* (already viewed by many as a deep incursion into courts' equitable powers under the *Ex parte Young* doctrine[18]).

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

[9] 209 U.S. 123, 155–56 (1908).

[10] *Armstrong*, 135 S. Ct. at 1384.

[11] *Id.* at 1385–87.

[12] *Id.* at 1385.

[13] *See id.* ("The sheer complexity associated with enforcing § 30(A), coupled with the express provision of an administrative remedy, § 1396c, shows that the Medicaid Act precludes private enforcement of § 30(A) in the courts.").

[14] *Id.* at 1390 (Sotomayor, J., dissenting).

[15] 517 U.S. 44 (1996).

[16] *Id.* at 74.

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

[18] *See, e.g.*, Vicki C. Jackson, Seminole Tribe*, the Eleventh Amendment, and the Potential Evisceration of* Ex Parte Young, 72 N.Y.U. L. REV. 495 (1997). *But see* David P. Currie, Ex Parte Young *After* Seminole Tribe, 72 N.Y.U. L. REV. 547 (1997) ("There is nothing startling in the notion that a statute providing some remedies for the violation of federal law impliedly precludes others." *Id.* at 548.).

Yet *Armstrong* was in many ways a peculiar case for an *Ex parte Young* claim. Because the case concerned a potential violation of a federal law that is largely entrusted to a federal agency for enforcement,[19] Justice Breyer pointed out in his concurrence that plaintiffs might instead have brought an Administrative Procedure Act (APA) challenge to the Federal Department of Health and Human Services (HHS) for refusal to enforce the provision.[20] This would avoid upsetting a "complex rate-setting area" administered by HHS.[21] The Court's inclination to limit judicial interference with agency-enforced administrative schemes is not unique to this case. Its impact has been felt across a range of doctrines — particularly relevant to *Armstrong*, the Court has sought to limit the availability of private rights of action that are not derived directly from the text of a statute.[22] Could it be, then, that the *Armstrong* opinion simply set forth two factors to determine whether a private right of action would interfere with an agency scheme, rather than seeking to replace the *Seminole Tribe* inquiry for all *Ex parte Young* claims?

Lower courts have diverged in answering this question. Under one reading (the agency-oriented approach), the *Armstrong* factors are applied exclusively to determine when Congress intended agency-enforced provisions to operate without judicial interference.[23] Under a second reading (the comprehensive approach), *Armstrong*'s consideration of congressional intent to preclude equitable relief does not focus on agency-enforced schemes, but rather provides a general two-factor test that replaces the *Seminole Tribe* inquiry for all *Ex parte Young* claims.[24] This Note will argue that the former reading, the agency-oriented approach, is the superior reading of *Armstrong*. Part I lays out the *Armstrong* factors for identifying congressional intent to preclude equitable relief and traces the two interpretations that have emerged in the lower courts. Part II engages in a close reading of the *Armstrong* factors, searching for indications that either reading is the "correct" reading.

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[19] *Armstrong*, 135 S. Ct. at 1389 (Breyer, J., concurring in part and concurring in the judgment).

[20] *See id.* at 1390.

[21] *Id.* at 1389.

[22] *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) (§ 1983 doctrine); Alexander v. Sandoval, 532 U.S. 275 (2001) (implied private right of action doctrine).

[23] *See, e.g.*, Coal. for Competitive Elec. v. Zibelman, No. 16-CV-8164, 2017 WL 3172866, at *5–7 (S.D.N.Y. July 25, 2017); Duit Constr. Co. v. Bennett, No. 4:13-cv-00458, 2016 WL 1259398, at *4 (E.D. Ark. Mar. 30, 2016); Smith v. Hickenlooper, 164 F. Supp. 3d 1286, 1291–93 (D. Colo. 2016); Safe Sts. All. v. Alt. Holistic Healing, LLC, No. 1:15-cv-00349, 2016 WL 223815, at *2–5 (D. Colo. Jan. 19, 2016); Friends of the E. Hampton Airport, Inc. v. Town of East Hampton, 152 F. Supp. 3d 90, 103–04 (E.D.N.Y. 2015), *aff'd in part, vacated in part*, 841 F.3d 133 (2d Cir. 2016).

[24] *See, e.g.*, Friends of the E. Hampton Airport, Inc. v. Town of East Hampton, 841 F.3d 133, 144–47 (2d Cir. 2016); Bellsouth Telecomms., LLC v. Louisville/Jefferson Cty. Metro Gov't, No. 3:16-CV-124, 2016 WL 4030975, at *3–6 (W.D. Ky. July 26, 2016); Exodus Refugee Immigration, Inc. v. Pence, 165 F. Supp. 3d 718, 728 (S.D. Ind. 2016), *aff'd*, 838 F.3d 902 (7th Cir. 2016).

Part III considers the significance of both interpretations, contextualizing each within the relevant case law and scholarship. Part IV argues for the adoption of the agency-oriented approach. Part V concludes.

I. TWO READINGS OF THE *ARMSTRONG* FACTORS

After determining that the Supremacy Clause did not establish a private right of action, the *Armstrong* majority turned to plaintiffs' equitable claims. Looking to *Seminole Tribe*, as well as several 42 U.S.C. § 1983 and implied private right of action cases,[25] the *Armstrong* Court considered several aspects of section 30(A) of the Medicaid Act, which it found to establish Congress's "intent to foreclose" equitable relief.[26] Specifically, the Court set forth a two-factor test for determining when Congress has chosen to limit courts' equitable powers.[27] The first factor is the presence of a statutory remedy. Stating that an "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others,"[28] the Court found that the withholding of Medicaid funds by the Secretary of HHS, the "sole remedy" provided by the Spending Clause legislation, fulfilled the first factor.[29]

While the provision of a statutory remedy "might not, *by itself*, preclude the availability of equitable relief,"[30] the Court viewed it as sufficient when combined with a second factor: judicial unadministrability. Pointing to the "judicially unadministrable nature" of the provision, the Court concluded that its "sheer complexity" and "judgment-laden" nature[31] indicated that Congress "wanted to make the agency remedy that it provided exclusive" in order to achieve "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking" and avoid "the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action."[32]

Two Justices weighed in on the majority's approach to interpreting congressional intent to preclude equitable relief. Supporting the majority's hesitance to allow judicial enforcement of a provision with "broad and nonspecific" language, particularly a rate-setting provision,[33] Justice Breyer reflected in his concurrence that such enforcement could

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[25] *E.g.*, *Gonzaga*, 536 U.S. at 292; *Sandoval*, 532 U.S. at 290.

[26] *Armstrong*, 135 S. Ct. at 1385 (quoting Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 647 (2002)).

[27] *See id.*

[28] *Id.* (quoting *Sandoval*, 532 U.S. at 290).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 292 (2002) (Breyer, J., concurring in the judgment)).

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

lead to "increased litigation, inconsistent results, and disorderly administration of highly complex federal programs that demand public consultation, administrative guidance and coherence for their success."[34] Justice Sotomayor's dissent dwelled instead, among other critiques, on the majority's failure to apply the *Seminole Tribe* inquiry, arguing that the Court had not identified "the sort of detailed remedial scheme we have previously deemed necessary to establish congressional intent to preclude resort to equity."[35]

The significance of the *Armstrong* Court's holding for the Medicaid providers seeking to enforce the Medicaid Act was clear: their claims could not move forward on equitable grounds. Less clear, however, was the precise nature of the test that *Armstrong* set forth for determining congressional intent to preclude equitable relief. This ambiguity may be discerned in the difference between Justice Breyer's reading of the majority opinion, with his emphasis on interference with agency rate setting, and Justice Sotomayor's concern that the majority had applied its own factors rather than engage in the *Seminole Tribe* inquiry. In line with these diverging emphases, some courts have viewed the *Armstrong* factors as seeking to answer one specific question — whether Congress meant for a statutory provision to be enforced exclusively by an agency — while other courts have engaged in this *Armstrong* inquiry where they might previously have applied the *Seminole Tribe* test, applying the factors in a more comprehensive manner to determine the availability of equitable remedies.

A. The Agency-Oriented Approach

Some lower courts have applied the *Armstrong* inquiry to determine whether the statutory provision at issue contemplates agency enforcement of an administrative scheme in a manner that would exclude judicial remedies.[36] Like Justice Breyer, these courts appear to focus on concerns that equitable remedies will undermine an agency's ability to properly administer such a scheme. Applying the first factor, courts adopting this approach have sought to identify statutory remedies that fall under the purview of agencies.[37] In *Coalition for Competitive Electricity v. Zibelman*,[38] the court noted the unique authority of the

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[34] *Id.* at 1389.

[35] *Id.* at 1390 (Sotomayor, J., dissenting).

[36] Coal. for Competitive Elec. v. Zibelman, No. 16-CV-8164, 2017 WL 3172866, at *5–7 (S.D.N.Y. July 25, 2017); Duit Constr. Co. v. Bennett, No. 4:13-ev-00458-KGB, 2016 WL 1259398, at *4 (E.D. Ark. Mar. 30, 2016); Smith v. Hickenlooper, 164 F. Supp. 3d 1286, 1291–93 (D. Colo. 2016); Safe Sts. All. v. Alt. Holistic Healing, LLC, No. 1:15-cv-00349, 2016 WL 223815, at *2–5 (D. Colo. Jan. 19, 2016); Friends of the E. Hampton Airport, Inc. v. Town of East Hampton, 152 F. Supp. 3d 90, 103–04 (E.D.N.Y. 2015), *aff'd in part, vacated in part*, 841 F.3d 133 (2d Cir. 2016).

[37] *See, e.g.*, *Coal. for Competitive Elec.*, 2017 WL 3172866, at *5–7.

[38] 2017 WL 3172866.

Federal Energy Regulatory Commission (FERC) in operating a complex energy regulation scheme,[39] holding that Congress "implicitly provided a 'sole remedy'" in the Federal Power Act by granting "broad enforcement authority" to FERC.[40] Similarly, the court in *Friends of the East Hampton Airport, Inc. v. Town of East Hampton*[41] held that Congress had precluded equitable relief in the Airport Airway Improvement Act (AAIA) because "Congress intended to place authority for the enforcement of the AAIA[] . . . exclusively in the hands of the Secretary of Transportation through a comprehensive administrative enforcement scheme."[42] With regard to plaintiffs' claims under the Airport Noise and Capacity Act (ANCA), however, the court noted the statute's lack of any provision for administrative enforcement proceedings, and thus held that plaintiffs' equitable claims could proceed.[43]

After identifying the presence of an agency remedy, courts adopting the agency-oriented approach have applied the "judicial administrability" factor to determine whether judicial enforcement would interfere with agency expertise and uniformity. *Safe Streets Alliance v. Alternative Holistic Healing, LLC*[44] and *Smith v. Hickenlooper*,[45] two Controlled Substances Act (CSA) preemption cases concerning Colorado's marijuana legalization law, applied this approach to address plaintiffs' claims to a private right of action to enforce federal law criminalizing the manufacture, distribution, or possession of marijuana; both found equitable claims to be precluded.[46] "The recognition of [the Attorney General's] sweeping prosecutorial discretion," the court in *Alternative Holistic Healing* stated, "addresses directly the second factor identified in *Armstrong* as suggesting an intent to foreclose equitable relief."[47] The court found this intent in "the 'judicially unadministrable nature' of the CSA,"[48] given the "risk of inconsistent interpretations and misincentives" that might undermine the DOJ's "conscious, reasoned decision" to allow some states to legalize marijuana.[49] Similarly, the *Smith* court

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[39] *Id.* at *6.

[40] *Id.* ("The FPA also requires every public utility to file with FERC rates for all sales subject to FERC's jurisdiction and empowers FERC to hold hearings to examine new or changed rates, to suspend rates, and to determine rates.").

[41] 152 F. Supp. 3d 90.

[42] *Id.* at 104.

[43] *Id.* at 105.

[44] No. 1:15-cv-00349, 2016 WL 223815 (D. Colo. Jan. 19. 2016).

[45] 164 F. Supp. 3d 1286 (D. Colo. 2016).

[46] *Alt. Holistic Healing*, 2016 WL 223815, at *2–5 ("[T]he authority to enforce these (and most other) substantive provisions of the CSA — *or not* — rests *entirely* with the United States Attorney General and, by her delegation, the Department of Justice." *Id.* at *4 (second emphasis added) (footnote omitted).); *Smith*, 164 F. Supp. 3d at 1291–93.

[47] 2016 WL 223815, at *5.

[48] *Id.*

[49] *Id.* (quoting Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1385 (2015)).

concluded that, "like the Medicaid Act, the CSA is designed to be implemented through a system of centralized enforcement."[50]

For Justice Breyer, the fact that *Armstrong* concerned a rate-setting provision was central to his conviction that equitable relief was precluded.[51] The lower courts adopting the agency-oriented approach in their *Armstrong* inquiries, none of which have concerned a rate-setting provision, have not acknowledged this distinction, nor have they appeared to find it meaningful. However, perhaps taking a cue from Justice Breyer's concurrence, cases like *Friends of the East Hampton Airport* have engaged in a searching inquiry to determine whether judicial enforcement would in fact disrupt the agency scheme, rather than cursorily finding equitable relief precluded where an agency was simply charged with enforcement.[52] Thus, as demonstrated in the lower courts, the agency-oriented approach to the *Armstrong* factors operates exclusively to prevent equitable enforcement in specific contexts in which such enforcement would effectively interfere with agency expertise and uniformity.

B. The Comprehensive Approach

Other courts appear to view *Armstrong* more broadly as establishing a test to replace the *Seminole Tribe* inquiry,[53] lending credence to Justice Sotomayor's concerns about the significance of the Court's failure to properly engage in that inquiry. These courts have applied *Armstrong* regardless of whether an agency is involved; even where the provisions at issue do contemplate agency enforcement, the courts' interpretation of the two factors has not been oriented toward determining whether judicial involvement would upset an agency-enforced regulatory scheme. Indeed, in *Bellsouth Telecommunications, LLC v. Louisville/Jefferson County Metro Government*,[54] one district court directly considered the question of whether the *Armstrong* factors replaced the *Seminole Tribe* inquiry, in the context of a claim that the Pole Attachments Act preempted a local ordinance governing access to utility

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[50] *Smith*, 164 F. Supp. 3d at 1292–93.

[51] *Armstrong*, 135 S. Ct. at 1389 (Breyer, J., concurring in part and concurring in the judgment) ("To find in the law a basis for courts to engage in such direct rate-setting could set a precedent for allowing other similar actions, potentially resulting in rates set by federal judges (of whom there are several hundred) outside the ordinary channel of federal judicial review of agency decision-making.").

[52] Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton, 152 F. Supp. 3d 90, 104 (E.D.N.Y. 2015), *aff'd in part, vacated in part*, 841 F.3d 133 (2d Cir. 2016).

[53] *See Friends of the E. Hampton Airport*, 841 F.3d at 144–47; Bellsouth Telecomms., LLC v. Louisville/Jefferson Cty. Metro Gov't, No. 3:16-CV-124, 2016 WL 4030975, at *3–6 (W.D. Ky. July 26, 2016); Exodus Refugee Immigration, Inc. v. Pence, 165 F. Supp. 3d 718, 728 (S.D. Ind. 2016), *aff'd*, 838 F.3d 902 (7th Cir. 2016).

[54] 2016 WL 4030975.

poles.[55] Tracing the development of *Ex parte Young* through *Seminole Tribe* and *Armstrong*,[56] the court pondered "whether *Armstrong* state[d] a new test for equitable jurisdiction cases" without reaching a definitive conclusion;[57] no particular concern with the role of federal agencies in enforcing federal law was discussed.

Under the comprehensive approach, the involvement of an agency in enforcement of the statute has not been necessary to trigger the *Armstrong* inquiry. In *Exodus Refugee Immigration, Inc. v. Pence*,[58] for instance, the court considered whether the Refugee Act of 1980 preempted an Indiana state directive to state agencies not to pay federal grant funds to local refugee resettlement agencies assisting Syrian refugees.[59] In applying *Armstrong* to determine whether the Refugee Act enabled equitable enforcement, the court did not consider the role of an agency in enforcing the provisions at issue; rather, it simply noted under the first *Armstrong* factor that, unlike section 30(A) of the Medicaid Act, the relevant provision featured no withholding-of-funds remedy.[60] Proceeding to the second *Armstrong* factor, the court determined that the provision was a "straight forward anti-discrimination provision" administrable by a court, before determining that it could move forward in considering an equitable claim for a preliminary injunction.[61]

Even where an agency is involved in enforcement of the provisions at issue, courts reading *Armstrong* in this way have approached the two factors of the *Armstrong* test quite differently than those proceeding under the agency-oriented interpretation: neither factor has been read to focus on the question of interference with an agency-enforced scheme. On appeal in *Friends of the East Hampton Airport*, for instance, the Second Circuit first reconsidered the district court's determination that ANCA did not contain a sufficient agency remedy.[62] Beyond the ability to withdraw funds, the court emphasized, the Federal Aviation Administration was also authorized "to seek and obtain legal remedies the Secretary considers appropriate."[63] While this statutory text could have been read to highlight precisely the type of agency-led enforcement contemplated in *Armstrong*, the court instead viewed the availability of mul-

[55] *Id.* at *3–6.
[56] *Id.*
[57] *Id.* at *5.
[58] 165 F. Supp. 3d 718.
[59] *Id.* at 728.
[60] *Id.*
[61] *Id.*
[62] Friends of the E. Hampton Airport, Inc. v. Town of East Hampton, 841 F.3d 133, 144–47 (2d Cir. 2016).
[63] *Id.* at 145 (quoting 49 U.S.C. § 47533(3) (2012)).

tiple remedies as an indication that the Act could also be privately enforced.[64] Turning to the second factor, the court rejected assertions from the defense that agency discretion should factor heavily into the administrability inquiry, finding that the straightforward language of the provision could easily be enforced in a private action.[65]

As compared with courts adopting the agency-oriented approach, then, courts adopting the comprehensive approach have not applied the *Armstrong* test only where there are potential concerns regarding agency expertise and uniformity, or even where an agency is involved; rather, courts have engaged in the inquiry more broadly to determine the availability of equitable claims. And as demonstrated above, the nature of the judicial administrability factor is particularly transformed from its formulation under the agency-oriented approach, focusing primarily on courts' capacity to enforce a given provision rather than considering the impact of judicial remedies on the uniformity of an administrative scheme. The case law applying the comprehensive approach appears to contradict somewhat Justice Sotomayor's concerns about the *Armstrong* opinion's harmful effect on the *Ex parte Young* doctrine, as courts in these cases have generally found that their equitable powers are not precluded. Yet the *Armstrong* case itself may serve to indicate the decision's as yet unrealized potential to limit equitable enforcement more broadly than *Seminole Tribe* — if the *Armstrong* Court had applied the *Seminole Tribe* factors instead of its own, it would likely have found that its equitable powers were not precluded.[66]

II. SOURCING THE *ARMSTRONG* FACTORS

As the previous Part demonstrates, lower courts have split in their interpretations of the *Armstrong* factors, indicating that there is some confusion over the proper application of this test. It may be necessary, then, to return to the majority opinion itself, examining the text more closely in order to clarify precisely *what* was going on in *Armstrong*. This Part will analyze each of the *Armstrong* factors for determining congressional intent to preclude equitable relief, tracing the provenance of each factor in an attempt to discern whether courts adopting one interpretation of the opinion have more accurately identified its meaning than those adopting the other interpretation.

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[64] *Id.* at 145–46.

[65] *See id.* at 146–47.

[66] The Medicaid Act likely lacked the "sort of detailed remedial scheme" required by *Seminole Tribe*. *See* Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1390 (2015) (Sotomayor, J., dissenting).

A. *Presence of a Statutory Remedy*

Although not directly cited in the *Armstrong* Court's discussion of the statutory remedy factor, *Ex parte Young* jurisprudence already featured such an inquiry. In *Seminole Tribe*, the Court found that a remedial scheme guiding the formation of a compact between the state of Florida and Indian tribes weighed against allowing an *Ex parte Young* action to move forward.[67] Unlike in *Armstrong*, the remedial scheme at issue in *Seminole Tribe* utilized agency enforcement only as a last resort, after both a federal district court and a mediator had failed to resolve Tribal-State Compact negotiations.[68] Stating that "a court should hesitate before casting aside those [statutory] limitations and permitting an action against a state officer based upon *Ex parte Young*,"[69] the Court denied an *Ex parte Young* action on the ground that enabling such an equitable remedy would undermine the provision by enabling courts to skirt the statutory procedures prescribed by Congress.[70]

In the *Armstrong* opinion, laying out the statutory remedy factor, the Court stated that "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."[71] This was not original language — the Court derived the statement from *Alexander v. Sandoval*,[72] an important implied right of action case. Statutory implied right of action claims draw an inference of congressional intent to allow private actions from an examination of the statutory text.[73] In *Sandoval*, the Court held that Title VI of the Civil Rights Act of 1964[74] did not provide an implied private right of action to enforce Department of Justice regulations promulgated pursuant to the Act against the Alabama Department of Public Safety.[75] In that case, the Court considered as one factor in its evaluation the methods that the Title VI provision provided for enforcement of the DOJ regulations,[76] stating "some remedial schemes foreclose a private cause of action to enforce even those statutes that admittedly create substantive private rights."[77] The Court concluded that a remedial scheme that empowers

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[67] Seminole Tribe v. Florida, 517 U.S. 44, 74–76 (1996).

[68] *Id.* at 74–75.

[69] *Id.* at 74.

[70] *See id.* This was perhaps a spurious claim that has been challenged by scholars. *See, e.g.*, Jackson, *supra* note 18, at 517–19.

[71] *Armstrong*, 135 S. Ct. at 1385 (quoting Alexander v. Sandoval, 532 U.S. 275, 290 (2001)).

[72] 532 U.S. 275.

[73] *See, e.g.*, *id.* at 286 ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." (citing Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 16 (1979))).

[74] Pub. L. No. 88-352, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 2000d–2000d-6 (2012)).

[75] *Sandoval*, 532 U.S. at 293.

[76] *See id.* at 289–90.

[77] *Id.* at 290.

agencies to enforce the statute by terminating program funding or "by any other means authorized by law,"[78] with detailed guidelines as to how such measures shall be taken, indicated that Congress did not intend for private litigation to enforce the provision.[79]

It may be useful to attempt to parse, then, whether the *Armstrong* Court's consideration of the Secretary of HHS's role in enforcing the Medicaid Act bore closer resemblance to the Court's considerations in *Sandoval* than to its analysis in *Seminole Tribe*. If so, in keeping with the agency-oriented reading of *Armstrong*, the Court's willingness to identify congressional intent to preclude equitable relief in the Secretary's ability to revoke Medicaid funding may serve a limited role in buttressing a certain type of federal legislation, rather than altering the *Seminole Tribe* requirement of a "detailed remedial scheme." Certainly, *Sandoval* reflects different concerns than *Seminole Tribe*, as it implicates a separation of powers issue concerning the relationship between the judicial and executive branches. Further, *Sandoval*'s inquiry also raises concerns about uniformity, distinct from the Court's primary concern in *Seminole Tribe* that the availability of equitable remedies would render the legislative remedial scheme "superfluous."[80]

Unfortunately, the analysis under this factor was extremely cursory. The *Armstrong* Court simply noted the presence of the remedy and pointed out that such a remedy alone might not be sufficient to indicate congressional intent to preclude equitable relief without the second factor.[81] The citation to *Sandoval* does appear to be telling, as the nature of the provision at issue in *Armstrong* aligns more closely with the provision considered in *Sandoval* than the Indian Gaming Regulatory Act provision invoked in *Seminole Tribe*. Yet the Court did not explicitly state that the presence of an *agency* remedy is particularly significant to this analysis. Therefore, the possibility remains that the *Armstrong* Court sought broadly to alter the *Seminole Tribe* inquiry such that the presence of a "sole remedy" could suffice, rather than requiring a "detailed remedial scheme."

B. Judicial Administrability

The second factor that the *Armstrong* Court considered with regard to congressional intent to foreclose equitable relief was the "judicially unadministrable nature" of the provision,[82] a consideration not explored in *Seminole Tribe*. A judicial administrability inquiry, which considers courts' institutional competence to adjudicate disputes concerning a

[78] 42 U.S.C. § 2000d-1.
[79] *Sandoval*, 532 U.S. at 290–91.
[80] Seminole Tribe v. Florida, 517 U.S. 44, 75 (1996).
[81] Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1385 (2015).
[82] *Id.*

given statutory text, is a heavily functional analysis.[83] As demonstrated in other contexts,[84] it may take into account considerations such as courts' ability to apply a bright-line rule or metric, the predictability of courts' interpretations, the extent of need for judicial factfinding, and the cost and likelihood of increased litigation.[85] Often, such an inquiry reflects separation of powers concerns — for instance, in political question doctrine cases, the Court has incorporated a similar "judicial manageability" consideration to determine whether constitutional provisions should be enforced by the judiciary or left to the other branches of government.[86] However, the Court has not clarified, in engaging in these types of judicial manageability or administrability inquiries, precisely *which* considerations should be taken into account, or *how* they should be weighed,[87] creating some ambiguity as to which considerations are determinative of the separation of powers assessment.

The *Armstrong* Court was similarly unclear in its elaboration of the "judicial administrability" factor. The Court's analysis appears, however, to focus exclusively on the agency's role, with statements such as "[e]xplicitly conferring enforcement of this judgment-laden standard upon the Secretary alone establishes, we think, that Congress 'wanted to make the agency remedy that it provided exclusive.'"[88] The majority here referenced Justice Breyer's concurrence in *Gonzaga University v. Doe*,[89] which concerned a claim under the nondisclosure provisions of the Family Educational Rights and Privacy Act of 1974[90] (FERPA).

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[83] *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 258 ("The administrability problem arises because there is no reliable metric for identifying a constitutionally excessive delegation.").

[84] *See, e.g.*, Baker v. Carr, 369 U.S. 186, 217 (1962) (political question doctrine); *see also* Vieth v. Jubelirer, 541 U.S. 267, 277–78 (2004) (plurality opinion) (same).

[85] *See Vieth*, 541 U.S. at 277; *Baker*, 369 U.S. at 217; *see also* Manning, *supra* note 83, at 258; Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 820 (1983) (arguing that "considerations of judicial administrability" involve determining "what interpretation of the statute will provide greater predictability, require less judicial factfinding, and otherwise reduce the cost and frequency of litigation under the statute").

[86] *See Baker*, 369 U.S. at 217 (listing among its different considerations for a finding of a political question, most of which focus on deference to another branch of government, "a lack of judicially discoverable and manageable standards for resolving it").

[87] *See* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006). As Professor Fallon highlights, this inquiry considers intelligibility; "practical desiderata" such as analytical bite, determinacy, ability to generate predictable and consistent results, administrability without overreaching the courts' empirical capacities, and capacity to structure awards of remedies; and further normative determinants of fitness of adjudication. *Id.* at 1285–94. Ultimately, Fallon concludes, "the Justices make substantially open-ended judgments about whether it would be better, all things considered, to allow litigation to proceed or instead to decree a category of disputes nonjusticiable." *Id.* at 1296.

[88] Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1385 (2015) (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 292 (2002) (Breyer, J., concurring in the judgment)).

[89] 536 U.S. at 292 (Breyer, J., concurring in the judgment).

[90] 20 U.S.C. § 1232g (2012).

The *Gonzaga* plaintiff alleged that although FERPA did not contain a private right of action, the statute could be enforced via a private right of action provided by § 1983.[91] Section 1983 claims rely on a federal statute granting a right of action against state officials whose actions violate federal or constitutional law.[92] The *Gonzaga* Court rejected these claims, finding that Congress intended to preclude such relief.[93] In his concurrence, Justice Breyer wrote of Congress's interest in maintaining "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking."[94] Several circuits have folded Justice Breyer's *Gonzaga* analysis into their § 1983 inquiries, reasoning that interpreting broad and nonspecific statutory language "would involve making policy decisions for which [courts have] little expertise and even less authority."[95]

While neither factor explicitly endorses either approach, then, a close reading of the *Armstrong* factors weighs in favor of the agency-oriented approach. The Court relied heavily on § 1983 and implied right of action cases that focus on the role of agency enforcement in precluding private rights of action. Further, in setting forth its vague "judicial administrability" factor, the Court did not provide any guidance outside of an analysis centered on the impact of judicial enforcement on uniformity of an agency-administered scheme. These characteristics would seem to indicate that the Court intended lower courts to follow this thread. However, although the agency-oriented reading appears to be more plausible, the Court's focus on the role of the agency does not definitively preclude the comprehensive approach. In the next Part, therefore, this Note will seek to contextualize *Armstrong* within relevant jurisprudential trends as another means to determine the appropriate interpretation of the *Armstrong* factors.

III. THE *ARMSTRONG* READINGS AND RELEVANT DOCTRINE

Widening the lens on these two approaches, this Note will next consider how the Court may have sought to expand upon existing jurisprudential trends with its new inquiry. The comprehensive approach aligns with trends in the *Ex parte Young* doctrine that have sought to limit equitable remedies both generally and within specific contexts; the agency-oriented approach evokes trends across a wide range of doctrines that have focused on congressional delegation of authority to agencies

[91] 536 U.S. at 277.

[92] 42 U.S.C. § 1983 (2012).

[93] 536 U.S. at 286.

[94] *Id.* at 292 (Breyer, J., concurring in the judgment). Justice Breyer also discussed with concern "the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action." *Id.*

[95] Sanchez v. Johnson, 416 F.3d 1051, 1060 (9th Cir. 2005); *see also* Westside Mothers v. Olszewski, 454 F.3d 532, 543 (6th Cir. 2006).

that intentionally excludes excessive judicial interference. A consideration of these trends sheds light on the Court's intent in *Armstrong*, indicating the plausibility, as well as the implications, of adopting either reading.

A. The Agency-Oriented Approach

The agency-oriented approach to the *Armstrong* factors appears most salient when the case is viewed in the context of jurisprudential trends that have sought to prevent judicial interference with agency-enforced administrative schemes, with opinions in which "[t]he Court presents the judiciary as the bull in the legal china shop, that may clumsily interfere with the attainment of legal ends more likely to be secured by other means."[96] Increasingly, as scholars have pointed out, the Court has recognized that judicial enforcement can interfere with agencies' uniform enforcement of certain complex statutory schemes;[97] scholarly work in the fields of health care and disability law has lent credence to this view.[98] The vision of a statutory scheme negatively impacted by excessive judicial interference has been particularly pronounced in the Court's *Chevron* doctrine,[99] but has permeated jurisprudence that touches upon administrative law, ranging from field preemption[100] to standing doctrine[101] to, most importantly for the purposes of this Note, private rights of action.

In the establishment and navigation of its *Chevron* doctrine, the Court has elaborated most explicitly on its view that courts should not unduly interfere with agencies empowered by Congress to enforce administrative schemes in the interest of uniformity and expertise. Under the *Chevron* doctrine, courts presume that Congress intended to

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[96] Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1129 (1987).

[97] *See, e.g.*, *id.* at 1127–29; *cf.* Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1286 (2008) (tracing this trend to earlier twentieth-century cases).

[98] *See, e.g.*, JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983); Abigail R. Moncrieff, *The Supreme Court's Assault on Litigation: Why (and How) It Might Be Good for Health Law*, 90 B.U. L. REV. 2323, 2362–71 (2010) (describing the shift from judicial to executive enforcement and its advantages); *see also* Lawrence Gostin, *The Formulation of Health Policy by the Three Branches of Government*, *in* SOCIETY'S CHOICES: SOCIAL AND ETHICAL DECISION MAKING IN BIOMEDICINE 335, 339–40 (Ruth Ellen Bulger et al. eds., 1995); Timothy Stoltzfus Jost, *Health Law and Administrative Law: A Marriage Most Convenient*, 49 ST. LOUIS U. L.J. 1, 16–30 (2004).

[99] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516.

[100] *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244–45 (1959) (reasoning that allowing states "to control conduct which is the subject of national regulation would create potential frustration of national purposes," *id.* at 244, because "[i]t is essential to administration of the Act that these determinations be left in the first instance to the National Labor Relations Board," *id.* at 244–45).

[101] *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387–88 (2014).

delegate to the relevant agency the discretion to interpret ambiguous statutory language.[102] In the *Chevron* opinion, which concerned the Environmental Protection Agency's interpretation of provisions of the Clean Air Act relating to the establishment of air quality standards, Justice Stevens expressed in the majority opinion that because the agency implemented the relevant provisions "in a technical and complex arena . . . those with great expertise and charged with responsibility for administering the provision would be in a better position to do so."[103] Later *Chevron* decisions by the Court have noted congressional delegation to agencies of power over "administration and enforcement" of federal laws in determining that agency interpretations are controlling.[104]

As described in the previous Part, this thread has been picked up in private right of action cases such as *Gonzaga* and *Sandoval*, impacting jurisprudence concerning the availability of private rights of action for agency-enforced statutes. By casting an increasingly skeptical eye upon private rights of action not explicitly provided in federal laws enforced by agencies, the Court has expressed a preference for uniform agency enforcement. The appropriate challenge to such enforcement, the Court indicated in *Douglas v. Independent Living Center of Southern California, Inc.*,[105] is an "arbitrary and capricious" claim under the APA.[106] Otherwise, as Justice Breyer wrote for the *Douglas* Court, judicial enforcement could "subject the States to conflicting interpretations of federal law by several different courts (and the agency), thereby threatening to defeat the uniformity that Congress intended by centralizing administration of the federal program in the agency."[107]

These concerns were front and center in the *Armstrong* opinion. The majority cited heavily to this case law, relying particularly on Justice Breyer's *Gonzaga* concurrence to determine under its application of the "judicial administrability" factor that Congress's interest in "achieving 'the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking,' and avoiding 'the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action'" weighed against allowing equitable enforcement.[108] And Justice Breyer's *Armstrong* concurrence, likely influential given his outsized role in setting forth this vision in *Gonzaga*

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[102] *See* Scalia, *supra* note 99, at 516.

[103] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863, 865 (1984).

[104] *E.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999) (citation omitted).

[105] 565 U.S. 606 (2012).

[106] *Id.* at 614–15.

[107] *Id.* at 615.

[108] Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1385 (2015) (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 292 (2002) (Breyer, J., concurring in the judgment)).

and *Douglas*, cautioned against the threat of "increased litigation, inconsistent results, and disorderly administration of highly complex federal programs that demand public consultation, administrative guidance and coherence for their success," a threat posed by equitable enforcement of section 30(A) of the Medicaid Act.[109]

Thus, the *Armstrong* factors would align under this reading with an attempt by the Court on multiple fronts to cabin administrative law, establishing a regime in which agencies are empowered to determine the best course of action in enforcing certain types of statutory law. As Chief Justice Roberts pointed out in his *Douglas* dissent, limits to implied right of action and § 1983 jurisprudence "would serve no purpose if a plaintiff could overcome the absence of a statutory right of action simply by invoking a right of action under the Supremacy Clause to the exact same effect."[110] Similarly, then, the *Armstrong* factors would serve to ensure that equitable remedies also reflect these trends in the Court's § 1983 and implied right of action jurisprudence and beyond. Addressing the final method by which plaintiffs might effectively interfere with an agency-enforced statutory scheme, the *Armstrong* Court would have completed its jurisprudential caulking of such schemes to ensure that courts could no longer interfere by enforcing private rights of action which Congress had not intended.

As a final note concerning this approach, it is crucial to avoid conflating the interpretive deference of *Chevron* with the judicial enforcement question addressed in *Armstrong*. With its *Chevron* doctrine, the Court has enabled agency interpretation to largely preclude courts' traditional statutory interpretation powers where a regulatory provision is broad enough that multiple reasonable interpretations are possible.[111] Yet, as Justice Sotomayor's *Armstrong* dissent highlighted, the availability of equitable remedies need not interfere with agency interpretation. First, citing *Chevron* and *Skidmore v. Swift & Co.*,[112] Justice Sotomayor stated that where a court sought to enforce vague statutory language by means of its equitable powers, "appropriate deference" would be granted to a federal or state agency determination.[113] Second, Justice Sotomayor pointed out, where a question "presents a special demand for agency expertise," a court can rely on the doctrine of primary jurisdiction to obtain the agency's views on the matter.[114] Because courts can "defer to the federal agency when necessary," Justice Sotomayor concluded, it

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[109] *Id.* at 1389 (Breyer, J., concurring in part and concurring in the judgment).
[110] *Douglas*, 565 U.S. at 619 (Roberts, C.J., dissenting).
[111] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).
[112] 323 U.S. 134 (1944).
[113] *Armstrong*, 135 S. Ct. at 1395 (Sotomayor, J., dissenting).
[114] *Id.* (citing Rosado v. Wyman, 397 U.S. 397, 406–07 (1970); Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 673 (2003) (Breyer, J., concurring in part and concurring in the judgment)).

is not necessary to preclude judicial enforcement on the grounds that a provision's language is broad and nonspecific.[115] Even under the agency-oriented interpretation, then, the question of whether judicial enforcement can coexist with agency enforcement of a statutory provision is separate from the question of interpretive ability.

B. The Comprehensive Approach

As compared with the agency-oriented approach, the comprehensive approach does not appear to evince a particular concern with judicial interference with agency-enforced statutory schemes. Rather, this reading of the *Armstrong* factors is grounded more thoroughly in the *Ex parte Young* doctrine, which has focused on federalism concerns about federal courts' interference with state action. As scholars have recognized, if the *Armstrong* factors extend to all *Ex parte Young* claims, replacing the *Seminole Tribe* inquiry with a broad two-factor inquiry concerning the presence of a statutory remedy and judicial administrability, this reading limits more comprehensively the parameters of the *Ex parte Young* doctrine.[116] This reading of *Armstrong* impacts jurisprudence concerning *Ex parte Young* enforcement of federal statutes (as opposed to constitutional law),[117] *Ex parte Young* enforcement of affirmative injunctions (as opposed to so-called antisuit injunctions),[118] and, most explicitly, presumptions regarding congressional intent and the availability of equitable relief.[119]

First, *Armstrong* appears to mark a shift from presuming congressional acceptance of background equitable remedies to presuming congressional preclusion of such remedies. As Justice Sotomayor argued in her dissent, given the "long history"[120] of equitable actions, Congress "should generally be presumed to contemplate such enforcement unless it affirmatively manifests a contrary intent."[121] Were the Court to take this view, the *Armstrong* factors would likely require a clearer indication of Congress's intent to preclude equitable relief than the vague exhortation that the provision must not be "judicially unadministrable," a standard that relies almost entirely on judicial discretion. Instead, the

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[115] *Id.*

[116] *See The Supreme Court, 2014 Term — Leading Cases*, 129 HARV. L. REV. 181, 211–20 (2015) [hereinafter *Leading Cases*] (arguing that *Armstrong* heightens the requirements for providing equitable relief); Steve Vladeck, *Is* Ex Parte Young *Doomed?*, PRAWFSBLAWG (Oct. 2, 2014, 12:23 PM), http://prawfsblawg.blogs.com/prawfsblawg/2014/10/is-ex-parte-young-doomed.html [https://perma.cc/BXK9-97WK].

[117] *See* Monaghan, *supra* note 7, at 1827.

[118] *Leading Cases*, *supra* note 116, at 211 (citing John Harrison, Ex Parte Young, 60 STAN. L. REV. 989, 1004–05 (2008)).

[119] *See Armstrong*, 135 S. Ct. at 1392 (Sotomayor, J., dissenting).

[120] *Id.* (quoting *id.* at 1384–85 (majority opinion)).

[121] *Id.* (Sotomayor, J., dissenting) (citing Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)).

Court was skeptical of the dissent's assertion that the legislative history indicated an awareness of the background equitable remedies, stating that an intent to allow such remedies would not have engendered "legislative silence but rather express specification of the availability of private enforcement (if that was what Congress intended)."[122] Thus, in applying the *Armstrong* test for preclusion of equitable remedies, a court would be compelled to adopt a lens that requires little of Congress in order to identify a congressional intent to preclude equitable relief, or in fact may require evidence of congressional intent to *allow* such relief.

Second, *Armstrong* can be characterized as evincing skepticism toward any equitable remedies that require action from a government official. Revisiting *Ex parte Young* in a 2008 article, Professor John Harrison asserted that the case is incorrectly relied upon to support affirmative equitable injunctions — rather, Harrison argued, it represents merely the availability of antisuit injunctions, a long-established equitable remedy.[123] Building upon this argument, a recent law review case comment suggests that *Armstrong*'s less permissive view of equitable remedies is a reaction to the affirmative nature of the injunction sought by plaintiffs.[124] By not explicitly revising the *Ex parte Young* doctrine, the comment posits, the *Armstrong* majority perhaps called for a divergent approach to negative injunctions (injunctions to prevent action) sought by *Ex parte Young* plaintiffs and affirmative injunctions (injunctions to induce action) sought by *Armstrong* plaintiffs.[125] Despite the Court's lack of acknowledgement of such an attempt to distinguish *Armstrong* from *Ex parte Young*, a concern with affirmative injunctions could be discerned from the Court's impenetrable "judicial administrability" factor. While a negative injunction claim requires a fairly straightforward remedy, more questions arise when a court's equitable injunction requires an official to act. Therefore, the *Armstrong* Court's concerns about how a court would administer a provision like section 30(A) may indeed reflect a desire for a more cautious approach to equitable remedies — cabining *Ex parte Young* antisuit injunctions as a distinct arena for the more liberal application of equitable powers.

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[122] *Id.* at 1387 (majority opinion).

[123] Harrison, *supra* note 118, at 990 ("*Ex parte Young* approved the use against a state officer of a standard tool of equity, an injunction to restrain proceedings at law."). Harrison viewed a later case, *Edelman v. Jordan*, 415 U.S. 651 (1974), as the Court's first unambiguous extension of *Ex parte Young* equitable powers to affirmative injunctions. *See* Harrison, *supra* note 118, at 1009. Professor David Shapiro has pushed back against this limited interpretation of *Ex parte Young*, arguing that the *Ex parte Young* Court "speaks not in terms of the prospective defendant bringing suit to assert an anticipated defense to an enforcement action but rather of the plaintiff's objective of *preventing a constitutional wrong* analogous to a traditional trespass on, or seizure of, the plaintiff's property." David L. Shapiro, Ex Parte Young *and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69, 86 (2011) (emphasis added).

[124] *Leading Cases*, *supra* note 116, at 216–17.

[125] *Id.*

Third, *Armstrong* can be read to limit more broadly the utilization of *Ex parte Young* equitable powers in the context of state violations of federal statutory law (not limited to laws enforced by an agency remedial scheme). There has been some debate as to whether *Ex parte Young* should apply in such a context.[126] *Shaw v. Delta Airlines*[127] and other decisions have indicated that it does;[128] yet the *Armstrong* Court's treatment of section 30(A) may indicate that courts applying their equitable powers in enforcing federal statutory law should adopt a more restrained approach than in enforcing constitutional law. As Professor Henry Paul Monaghan (discussing *Armstrong*) points out, "[t]he remedial consequences of violations of federal statutes can be seen to present issues different from violations of the Constitution, and Congress, it could be argued, should have a major role in shaping affirmative remedies for federal statutory violations."[129] In particular, the carefully delineated doctrines for determining congressional intent to enable private enforcement of federal statutes would seem to indicate that the Court does desire a more restrained approach to the use of equitable powers for such laws.[130] This would appear to be the case even when, as in *Armstrong*, plaintiffs allege federal preemption of state law and their claims are thus "basically constitutional in nature."[131] Therefore, by rejecting this characterization and setting a low bar for identifying congressional intent to preclude equitable relief, the Court under this reading limits federal statutory *Ex parte Young* equitable claims that would not apply to constitutional *Ex parte Young* equitable claims.

Under the comprehensive approach to the *Armstrong* factors, then, the primary concerns relate to the separation of powers between Congress and the courts, shifting power away from courts by limiting

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[126] *See* Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 39 ("There is a long tradition of judicial provision of specific relief . . . against government action that violates statutory requirements — even when the statute in question fails expressly to authorize such relief."); Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 239–40 (1991) (arguing that *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), should not be "read to permit any federal immunity holder automatic access to federal courts for declaratory and injunctive relief").

[127] 463 U.S. 85.

[128] *See* Meltzer, *supra* note 126, at 39 n.182 (listing cases); *see also* Henry Paul Monaghan, *The Supreme Court, 1995 Term — Comment: The Sovereign Immunity "Exception*,*"* 110 HARV. L. REV. 102, 128 (1996) ("The law reports are . . . full of suits against public officials to enforce federal statutory rights.").

[129] Monaghan, *supra* note 7, at 1827–28 (footnote omitted).

[130] *See id.* at 1828 (arguing that "to extend *Young* beyond constitutional violations is a stretch . . . for me, and it calls into question the Court's entire implied-right-of-action jurisprudence in the nonconstitutional context").

[131] *See* Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1391 (2015) (Sotomayor, J., dissenting) (quoting Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 272 (1977)).

their ability to utilize equitable powers in enforcing federal statutes,[132] and the federalism balance between the federal and state governments, limiting state liability for violations of federal statutes and affirmative injunctions that compel action by state officials. Uniformity and expertise — so central to an interpretation of *Armstrong* that reads the decision to intervene only when an agency is intended solely to handle enforcement — appear to be only tangential concerns in this context.

IV. An Argument for the Agency-Oriented Approach

As Parts II and III have demonstrated, *Armstrong* presents enough ambiguity in its language to support both the agency-oriented and the comprehensive approaches, and both have the potential to operate within (and expand upon) a larger jurisprudential framework. The comprehensive approach to the *Armstrong* factors is certainly plausible; indeed, as this Note highlights, lower courts and scholars have adopted this reading of *Armstrong*. Yet an in-depth analysis of *Armstrong* appears to indicate that the agency-oriented approach aligns more closely with the Court's intent, yields a more "administrable" test, and cabins the *Armstrong* test to a more limited scope of cases. Thus, as this Part will argue, the agency-oriented approach is likely the superior reading.

Several considerations indicate the Court's intent to adopt the agency-oriented approach. First, as discussed in Part II, the Court chose in elaborating the *Armstrong* factors to cite its *Sandoval* and *Gonzaga* opinions, while neglecting to directly address the relationship between its two-factor inquiry and the "detailed remedial scheme" inquiry of *Seminole Tribe*. In particular, the Court chose to cite heavily from Justice Breyer's *Gonzaga* concurrence, which focused directly on the concerns underlying the agency-oriented approach. Next, Justice Breyer's critical vote in a 5–4 decision should not be understated. It is significant, then, that his concurrence portrayed the *Armstrong* inquiry as expressly oriented toward concerns of agency expertise and uniformity (and that his focus on rate-setting would apparently seek to limit the opinion's impact even further). Finally, *Armstrong* was directly preceded by *Douglas*, in which the Court had instructed plaintiffs to bring an APA claim against the Secretary of HHS.[133] When similar plaintiffs returned seeking another means to enforce the Medicaid provision that did not incorporate HHS, it is understandable that the Court would seek to bring equitable remedies in line with its other jurisprudence concerning agency enforcement. For these reasons, an inclination toward the

[132] Of course, while the opinion is framed as rejecting "a reading that *limits* Congress's power to enforce" its laws, *id.* at 1384 (majority opinion), one might argue conversely that requiring Congress to explicitly provide for the availability of private remedies could in effect limit the enforcement, and thus efficacy, of legislation against the will of Congress.

[133] Douglas v. Indep. Living Ctr. of S. Cal., Inc., 565 U.S. 606, 614–16 (2012).

agency-oriented approach can likely be discerned from the *Armstrong* Court.

The agency-oriented approach also triumphs under a functional consideration of *Armstrong*. As this Note has demonstrated in Parts I and II, because the Court did not provide sufficient guidance in setting forth its inquiry, its vague language concerning a "sole remedy" and "judicial administrability" can render the inquiry difficult to implement. Under the agency-oriented approach, however, the inquiry is less challenging because it is tethered to one underlying question: whether judicial enforcement will interfere with an agency scheme. The comprehensive approach does not possess such an anchor, and courts attempting to engage in the inquiry have therefore interpreted the two factors in significantly different ways. Courts' inquiries concerning the "judicial administrability" factor have tended to focus on their competency to interpret and enforce statutory language, rather than the issue of interference.[134] There are two possible downsides to this approach to the "judicial administrability" factor: the inquiry may be toothless, resulting in harmful interference with an agency scheme or, conversely, it may be invoked to abdicate judicial responsibility for adjudicating *Ex parte Young* claims. Where, under the agency-oriented approach, the *Armstrong* factors appear to offer more guidance and a limited scope, then, such a reading is preferable.

Finally, from a normative perspective, the agency-oriented approach (particularly when cautiously applied) represents a potentially more limited incursion on courts' equitable powers under the *Ex parte Young* doctrine. As Justice Sotomayor interpreted the majority opinion, because the Court neglected to engage in the *Seminole Tribe* inquiry and instead asserted its own two factors, the opinion "threatens the vitality of our *Ex parte Young* jurisprudence."[135] The potential impacts of the comprehensive approach traced in section III.B reflect these concerns — that an altered *Ex parte Young* doctrine will broadly impact equitable claims invoking federal law or seeking affirmative injunctions, or will even require Congress to state an intent to *allow* equitable relief when it legislates. While concerns about courts' enervated equitable powers also persist under the agency-oriented approach, those concerns are limited to specific contexts in which an agency-enforced scheme will be threatened by judicial interference.

V. CONCLUSION

This Note has attempted to trace the two readings adopted by courts in applying the *Armstrong* factors for determining Congress's intent to

[134] *See, e.g.*, Friends of the E. Hampton Airport, Inc. v. Town of East Hampton, 841 F.3d 133, 144–47 (2d Cir. 2016).

[135] *Armstrong*, 135 S. Ct. at 1392 (Sotomayor, J., dissenting).

foreclose equitable remedies — one that addresses a particular concern about court enforcement of legislation that is better left to agencies, and one that operates more generally to limit the availability of equitable relief for private actors. This Note has argued, based on the above analysis of the *Armstrong* opinion and its place in the Court's related jurisprudence, for an agency-oriented reading of these factors. Under this interpretation, the *Armstrong* test applies only to determine whether equitable enforcement interferes with an agency-enforced administrative scheme. As this Note has described, then, the *Armstrong* factors align with the wide range of *Chevron*-type doctrines that seek to limit courts' interference with statutory schemes enforced by agencies, as opposed to trends seeking to broadly limit the availability of *Ex parte Young* claims.

If the agency-oriented approach to the *Armstrong* factors prevails in the courts, then plaintiffs whose *Ex parte Young* claims do not implicate agency schemes can expect a *Seminole Tribe* inquiry, rather than an *Armstrong* inquiry. Where agency schemes are implicated, courts should engage in a searching *Armstrong* inquiry that considers whether judicial enforcement truly interferes with agency enforcement. If the comprehensive approach prevails, then plaintiffs may encounter a less amenable environment for *Ex parte Young* claims of all kinds, and claims that might have survived *Seminole Tribe* may fail under *Armstrong*. In either case, *Armstrong* will serve to limit the availability of *Ex parte Young* remedies. The limitation imposed under the agency-oriented approach, at least, reflects more than simply a hostility to such equitable enforcement, but rather a component of an earnest (and hopefully restrained) navigation of the proper balance between courts' and agencies' efforts to enforce the law.