Abstract

This Article compares the relatively broad federal court authority to enter relief against States under Ex parte Young with Congress’s more limited authority to enact enforcement legislation (namely civil rights statutes) against the States under Section 5 of the Fourteenth Amendment. By exploring these two bodies of law under the same rubric, the Article exposes the unsupportable nature of the Supreme Court’s jurisprudence in this area—a jurisprudence that grants considerable discretion to federal district court judges to order prophylactic relief for federal-law violations by States while narrowly limiting congressional power to prevent or remedy such conduct. The inconsistency is most stark in the consent decree context, where Supreme Court doctrine effectively permits district courts’ unchecked authority to enter and enforce prophylactic remedies against States. This inconsistent treatment is problematic from both federalism and separation-of-powers perspectives.

The tension is best resolved, I argue, not by reducing federal court authority under Ex parte Young but rather by recognizing the constitutionally mandated, institutionally justified, and democratically sanctioned role of Congress in fashioning remedial legislation under Section 5 of the Fourteenth Amendment. Toward that end, the Article suggests the deferential approach promulgated in the Supreme Court’s 2004 decision in Frew ex rel. Frew v. Hawkins for determining the enforceability of consent decrees against States as a model for evaluating Section 5 legislation. Such an approach would accord Congress the necessary discretion wielded by district court judges in resolving the complex and serious problems created by a State’s defiance of federal law.