Jurisdiction, Congressional Power, and Constitutional Remedies

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Judicial implementation of the Constitution still operates through the forms of litigation. Indeed, constitutional law has become so entangled with ordinary private law that it is common to talk about constitutional remedies, as if the Constitution were a set of duties and the courts' job were to prevent governments from violating those duties and to undo the effects of any such violations. It is clear from the Constitution that Congress has significant authority to determine the types of lawsuits that may be brought before the courts, especially the federal courts, and the decrees that may be issued in those lawsuits. Hence we can inquire into the extent to which Congress controls constitutional remedies.

The first step in discussing this issue is to identify the different congressional powers that bear upon it. Those powers fall into two broad categories. Some specifically concern the federal judiciary; for the purposes of this discussion, I will call them *structural powers*. Others, which I will call *substantive powers*, are not related specifically to the federal courts.

In this schema, Congress has four kinds of powers, two structural and two substantive. One structural power concerns the cases that can be heard in the federal courts; the other concerns remedies that are available in those cases. While Congress's substantive capacity can be divided any number of ways, the division relevant here is between powers to enforce constitutional rules that apply to the states as such and powers that primarily implicate the regulation of private individuals. Special issues arise when Congress acts pursuant to Section 2 of the Fifteenth Amendment, for example, in order to require that the states comply with Section 1. While the enforcement powers are remedial in the sense that the Constitution requires that Congress act with a particular purpose, they are substantive in my sense because any remedy Congress creates can be sought in both state and federal court.[1] After fleshing out these distinctions I will make

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1. The Court's most recent treatment of substantive remedial powers is *City of Borne v. Flores*, 117 S. Ct. 2157 (1997), which involves Section 5 of the Fourteenth Amendment. Central to the Court's conclusion in *Boerne* was its resolve to take seriously the principle that Section 5 imposes real limits on Congress's power to regulate the states because it authorizes Congress to act in order to produce compliance and for no other purpose. *Boerne*'s requirement of congruence and proportionality contrasts with the Court's more permissive approach to the most important provision in which a congressional power is in theory proportioned to given purposes, the Necessary and Proper Clause, *see* Katzenbach v. McClung, 379 U.S. 294 (1964); M'Culloch v. Maryland, 17 U.S. 316 (1819).

some brief observations about structural powers and the nonremedial substantive powers. Then I will present my main claim, which is about Congress's enforcement authority. I suggest that it may well be the source of the anticipatory remedy familiar from *Ex parte Young*,[2] and that Congress therefore has substantial discretion as to whether that remedy should be available.

Congress has two main structural powers that relate to the federal judiciary's ability to implement the Constitution. First is Congress's authority to determine the jurisdiction of the federal courts by deciding which lawsuits Article III courts can hear. Congress exercises this authority by granting jurisdiction to the lower federal courts and by excepting cases from the appellate jurisdiction of the Supreme Court.[3] This power determines whether certain lawsuits shall be heard in federal court, and does not create or destroy causes of action. When Congress keeps a lawsuit out of federal court through the exercise of its jurisdictional powers, the suit remains in state court. This structural authority, therefore, is fundamentally about judicial federalism.[4]

The second structural power of Congress is its authority over federal judicial remedies. This encompasses the congressional power to determine what kind of decrees the federal courts can issue in lawsuits that are within their jurisdiction but that do not involve causes of action themselves created by Congress. Congress can do this when it constitutes inferior tribunals. (An interesting question is whether the Necessary and Proper Clause authorizes Congress to enact similar legislation with respect to cases in the Supreme Court's original jurisdiction.)

This power is structural and not substantive and hence is separate from any authority over remedies that Congress may have owing to its power over the applicable law. Congress exercises a structural power when it describes the circumstances under which injunctions will be available in diversity cases not involving federal substantive law.[5] In contrast, Congress exercises a substantive power when it creates a cause of action under the Post Office Clause and entitles the plaintiff to double damages. This distinction is important because Congress has considerably more discretion when exercising substantive rather than structural power. In particular, the structural power over judicial remedies must take as given the substantive rules (often referred to as rights) that are being

2. 209 U.S. 123 (1908).

3. U.S. CONST. art. I, § 8, para. 9 (power to constitute tribunals inferior to the Supreme Court); *id.* at art. III, § 2, para. 2 (power to make exceptions to the jurisdiction of the Supreme Court).

4. The Court in *Tarble's Case*, 80 U.S. 397 (1871), suggests that some cases can be brought only in federal court. If that is so then the seemingly structural power over federal jurisdiction could have consequences that go beyond allocating cases between court systems. I am one of many *Tarble* skeptics. I think that Congress's power to exclude cases from state court comes only from its power to put them exclusively in federal court, and that the Constitution of its own force does not keep any case out of state court that could be brought in the federal system.

5. Section 16 of the Judiciary Act of 1789 provided that suits in equity could not be sustained when there was a plain, adequate, and speedy remedy at law. It applied in federal diversity cases that had no substantive federal component.

implemented; Congress's structural role is to choose means to enforce those rules. When exercising a substantive lawmaking power, Congress can determine the primary rule to which remedies are proportioned.

Congress's many substantive powers can also shape the role of the courts. It is, for example, with substantive and not structural power that Congress confers limited finality on the application of law to fact by nonjudicial federal officers. To put the point in more familiar terms, Congress creates "Article I courts," and may confer on them limited finality, with substantive powers. Congress can require that the courts give substantial deference to administrative decisions with respect to the adjudication of public benefits like Social Security, for example, because Congress, in establishing the program, can confide in the administrative decision makers discretionary power.[6]

In addition to granting some final decisional authority to nonjudicial officers, and thereby limiting judicial review, Congress with its substantive powers can create, decline to create, or limit causes of action. It can determine who is entitled to sue whom, for what, and for what remedy. To the extent that Congress can decide who is entitled to judicial relief and when, it can control the extent to which the courts decide legal questions with respect to particular disputes. If Congress takes some injury that formerly entitled the victim to no legal remedy and makes it legally actionable, disputes will come into court that previously had been resolved elsewhere. Perhaps the most important possible source of congressional power over causes of action for the purpose of the present discussion is Section 5 of the Fourteenth Amendment.

With that division of the topic in place, I have two overall observations. First, congressional power to allocate cases between state and federal court is not at issue right now. As I understand the proposals that have been debated in Congress and those that have been adopted, there is not much enthusiasm for leaving cases in state court. There has been such enthusiasm in the past, as in the movement in the 1820s to repeal Section 25 of the Judiciary Act of 1789.[7] Today, however, moving cases from federal to state court does not appear to be high on the congressional agenda. Through the Prison Litigation Reform Act, for example, Congress bars prisoners with nonphysical injuries from suing in state as well as federal court. That Act limits the cause of action created by the Civil Rights of Institutionalized Persons Act, rather than keeping cases out of

6. According to the Court, partial finality can be granted to administrative tribunals when agency adjudication is part of a federal regulatory scheme. *See e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 852-57 (1986). Although Justice Scalia maintains that doctrine has come loose from its moorings in sovereign immunity, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 65-69 (1989) (Scalia, J., concurring), it seems clear that the Court still finds Congress's power to create such tribunals in the legislature's substantive powers under Article I. That is why cases like *Schor* can be distinguished from, and do not purport to overrule, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), which held that a non-Article III tribunal could not finally adjudicate a claim under state law where the state law was not substantially entangled with a federal regulatory scheme.

7. *See* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 662-72 (rev. ed. 1947).

federal court.[8] Questions concerning the structural jurisdictional power have been much debated elsewhere, and I will not address them further.[9]

More central to the Article III questions that are the topic of this symposium is the exercise of congressional substantive power to establish nonjudicial finality in administrative adjudications and to create causes of action. It may seem inapposite to find substantive powers playing such a large role in what is supposed to be a structural area. Indeed, if we put aside Congress's authority to leave cases in state court, the issues that remain are not just about structure but specifically about separation of powers. They are about the power of the national legislature to allocate decisional authority between judicial and nonjudicial actors. It may seem strange that the allocation of authority among the branches of the national government should depend on decisions Congress makes concerning what appear to be ordinary questions of policy, such as the existence of causes of action to enforce substantive rules. This connection, however, between the substance of the law and the responsibilities of the branches makes perfect sense. It reflects the Constitution's structure and the original system created for its judicial implementation. Following *Marbury v. Madison*, the design and functioning of that system of implementation can be summarized in a simple statement: The measure of judicial involvement was private right.[10] In particular, the extent to which the judiciary reviewed actions and legal determinations of the executive depended on private right. An implication of that principle in more modern terms is that the rights-privilege distinction was fundamental to the structural allocation of responsibility and in particular to determining the judicial role.

The classic illustration of this point is the system of public law remedies that prevailed in the nineteenth century. The government could not be sued without a waiver of sovereign immunity, but a suit by the government could be defended against in court. When the executive brought an enforcement action against a

8. The Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-66, § 803(d), amends the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e (Supp. 1996), to provide that "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." § 7e, 110 Stat. 1321-72.

9. What has already been said on that issue is plenty. My contribution is John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997).

10. "The province of the courts is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803). By private rights I refer to the judicially enforceable claims of private individuals. While the classic model of a private right is one that governs the relation of two private people, *Marbury* involved a public office and a claim against a public official, the Secretary of State. We are nevertheless justified in taking *Marbury* as standing for the importance of private right because Chief Justice Marshall was so insistent about the point that Marbury's office was a vested legal right, *id.* at 167-68, and so concerned to contrast situations in which officers like Madison exercised political discretion with those in which they had nondiscretionary duties concerning the "absolute rights of individuals," *id.* at 171. Marshall did not suggest that Congress was required to give Marbury a private-style right to his office or to make mandamus available to enforce that right.

private person the private person could interpose any factual or legal defense, including one based on the Constitution. While the government could not be sued as such, officers could be sued for acts that would be wrongful if committed without official privilege.[11]

Officer suits were the ultimate mechanism for involving the judiciary in disputes between the government and private individuals, and hence for obtaining what today would be called judicial review. If a government officer harmed a private person and claimed official privilege as a defense, the plaintiff would be successful only if the officer would have been found to be a private wrongdoer absent official privilege. However, many injuries that arose from dealings with the government, such as breaches of contract or failure to pay legislatively bestowed privileges such as pensions, were not torts on the part of officers personally. Relief from such harms could flow only from the public treasury, and therefore only if the legislature waived sovereign immunity.[12] Hence private right, and in particular the distinction between rights and privileges, determined the allocation of final law-applying authority between the executive and judicial branches. Private right was at the center of the system.

A remedial system organized around the rules that apply to disputes between private individuals fits a particular conceptual structure of constitutional limitations. In that structure, constitutional limitations are rules about the power of the government, especially the legislature. These rules restrict the legislature's ability to depart, and therefore to authorize officers to depart, from the baseline of private entitlement set by the rules of property and contract. They do not, however, provide rules of conduct of the kind given by the private law itself, nor do they identify the individuals who are entitled to judicial enforcement of those rules of conduct.[13]

It is especially illuminating to see how the Fifth Amendment's Due Process Clause fits into the scheme in which the domain of the judiciary is defined by private right. The Due Process Clause can be puzzling. On one hand, it seems to comport with the notion that private right is the measure of judicial power, because it says that due process of law is to be used when someone is deprived of life, liberty, or property—the interests centrally protected by the private law.

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11. The nineteenth-century system of public law remedies is described lucidly in David A. Engdahl, *Immunity and Accountability For Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 5-21 (1972).

12. *See id.* at 20-21; David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 153-54.

13. This understanding of the Constitution was discussed, and was rejected in the Fourth Amendment context, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In that case the Court departed from the officer suit system, in which the private law determined whether an officer's conduct was wrongful and who could bring a suit based upon it. Instead, according to the Court, the Fourth Amendment itself provided rules of conduct and, apparently, rules identifying proper plaintiffs. The Court thus found that the Fourth Amendment is not simply a limitation on power, which is the kind of constitutional rule that comes up as a defense or otherwise at a later stage of pleading. Rather, it is a rule of primary conduct, albeit one specifically for government officers. The fundamental modern article on this subject is Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969).

If due process includes a judicial hearing, the clause reiterates the requirement of judicial involvement when those interests are at stake.

On the other hand, it is possible (and today tempting) to characterize the Due Process Clause as creating a "right" to a judicial hearing, so that the Clause could figure as the source of a lawsuit in which the remedy would be judicial process. Yet the idea of a legal, which is to say judicially enforceable, right to a judicial hearing is troublesome. Suppose that the Due Process Clause had been violated in the most complete way possible, by the elimination of all courts. If the Due Process Clause creates a cause of action, where would one sue to enforce the right to a judicial hearing? As that possibility suggests, the way to secure judicial process under defined circumstances is not simply to say that it is required, but actually to provide a system of courts that will give that process. The Due Process Clause, although it concerns the structure of government and the division of authority between the courts and the executive, presupposes but does not provide that structure; the Due Process Clause does not provide a claimant a forum in which to sue.

Seen in this light, the Clause fits neatly into the older system of public law remedies, in a way that avoids the difficulties associated with a judicially enforceable right to a judicial proceeding. Like other constitutional limitations in the old system, the Due Process Clause can operate through the sanction of nullity. Suppose the executive purported to deprive someone of life, liberty, or property through its own decision, and acted on that decision by, for example, seizing the property at issue. The Due Process Clause would nullify the purported executive decision. As is usually true with nullification, it would become effective through the form of another lawsuit, in this case an officer suit. The officer's defense of official privilege would be defeated by the failure to follow the required procedure. Such an officer suit presupposes a system of private right and the courts available to enforce private rights, but so does the Due Process Clause.

We should thus not be surprised that when discussing the relation between the executive and the judiciary we discover ideas of private right constantly appearing. Private right was, and to some extent remains, the conceptual foundation of the judicial role. Separation of powers, like so much else in the United States Constitution, rests on a foundation of private law that the Constitution assumes, but does not itself contain.

Thus far I have commented briefly on two of the four congressional powers that are implicated here. As indicated, the jurisdictional power proper—the power to leave cases in state court—is currently not much at issue. The same is not true about the remedial power, by which Congress controls the remedies available in federal court even when it has no power over the substantive law applicable in the case. After *Bivens*, the remedial power has become quite important. If my understanding of the post-*Bivens* cases is correct, the Court's assumption is that although the Constitution contains rules of conduct for federal officers and identifies people who are entitled to some kind of judicial

remedy for violations of those rules of conduct, the Constitution does not, by itself, resolve the question of the appropriate remedy.[14] In contemporary terminology, the Constitution creates a cause of action, while leaving open some remedial questions. The congressional power at issue under this analysis is the power to prescribe and limit the remedies available in federal court.[15] The extent of Congress's structural remedial power is quite important in the case in which Congress has power over the remedy but not over the cause of action.

I will neglect that issue, however, because I want to address situations in which Congress may have power not simply over the remedy but over the existence of the cause of action. This occurs when the constitutional provisions at stake are found in one of the amendments that has an enforcement clause. The Fourteenth Amendment fits this description; most constitutional litigation involving states, their subdivisions, and the officers of both, involves rules found in Section 1 of the Fourteenth Amendment.[16] If Congress's Section 5 powers include substantial authority to decide when and whether there are causes of action that enforce Section 1, then Congress has substantial authority to decide when and how the courts will be involved in construing Section 1.[17]

To illustrate the proper approach to the relationship between Section 1 and Section 5, I will address one of the issues raised by recent congressional discussions of whether to limit the power of a single federal judge to prevent the implementation of state laws.[18] I take as an example a kind of anticipatory action that is dear to the hearts of federal courts scholars: the *Ex parte Young*[19] action proper. By "proper" I mean, not actions to enjoin enforcement of state laws generally, but specifically actions to enjoin the state from commencing judicial proceedings against the plaintiff in the *Young* action. That was the

14. *See, e.g.*, Bush v. Lucas, 462 U.S. 367 (1982).

15. As far as I can see, Congress has no corresponding power, with respect to state courts, but the government's practice of removing cases against federal officers that are originally brought in state court, *see* 28 U.S.C. § 1442, keeps us from finding out what the state courts would do if required to determine the remedy under a cause of action created by the federal Constitution.

16. *E.g.* Texas v. Johnson, 491 U.S. 397 (1989); Griswold v. Connecticut, 381 U.S. 479 (1965); Brown v. Board of Educ., 347 U.S 483 (1954).

17. This issue is raised by the Prison Litigation Reform Act. Congress's power to enact the provision dealing with prisoners who allege harm without physical injury may depend upon the extent of Congress's Section 5 authority. While the question is important, I will not use it as my test-bed for discussing Section 5 because it is too complicated for present purposes. In order to analyze it properly we would need to know the extent of congressional authority to create causes of action resting on Section 1 of the Fourteenth Amendment, as well as congressional authority with respect to causes of action that come from state law, the elimination of which by official privilege may be limited by the self-executing effect of Section 1. In the constitutional tort context, we would need to discuss both the Fourteenth Amendment equivalent of *Bivens* actions and the persistence of officer suits for ordinary torts.

18. For example, Senator Smith of New Hampshire recently pointed to the district court's decision enjoining implementation of the California Civil Rights Initiative before it could go into effect, Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996), *vacated in part*, 110 F.3d 1431 (9th Cir. 1997), when he introduced a constitutional amendment that would impose term limits on federal judges. 143 CONG. REC. S3723 (daily ed. Apr. 25, 1997).

19. 209 U.S. 123 (1908).

situation in *Young* itself. *Young* held that the plaintiff railroads and railroad officers were entitled to an injunction against the initiation of enforcement proceedings because of a constitutional defect in the statute.[20] *Ex parte Young* litigation has come to include proceedings to enjoin other kinds of state action, including the administration of programs of public benefit. The most famous *Ex parte Young* lawsuit in this century (more famous even than *Roe v. Wade*[21] which is in the narrow category) is *Brown v. Board of Education*.[22]

To further narrow the field, I will not conduct a complete analysis of Congress's power to curtail or eliminate the *Young* action against state officers.[23] In particular, I will not discuss the case law or deal in any serious way with the history of the Reconstruction Amendments.[24] Instead, I will explain how Section 1 of the Fourteenth Amendment can be read so that it does not of itself authorize injunctive proceedings to restrain enforcement of state law. This reading implies that such proceedings require legislative authorization from Congress under Section 5.[25]

Young is commonly taken to stand for the proposition that under certain circumstances the Constitution creates a cause of action to enjoin proceedings to enforce laws that are constitutionally void. For the purposes of this discussion, it is useful to break the idea of a cause of action down into component parts. In order to prevail in a coercive proceeding the plaintiff must demonstrate both that the defendant's conduct was wrongful (inconsistent with a duty resting on the defendant) and that the plaintiff is within the category of persons entitled to

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20. The constitutional defect was one that we would today associate with procedural, not substantive, due process. The problem was that the penalties for noncompliance made it so risky to violate the rates and litigate their constitutionality that the railroads were deprived of the judicial hearing on reasonableness to which they were entitled. *See id.* at 145-48.

21. 410 U.S. 113 (1973).

22. 347 U.S. 483 (1954).

23. In order to avoid the complexities associated with the new property, which may be even more severe than those associated with the old property (constitutional torts being a form of old property litigation), I want to focus on the *Young* context itself. It would be no small matter if Congress had the authority to eliminate or substantially limit such pre-enforcement proceedings, as the invocation of *Roe* indicates. Moreover, a discussion of that power will enable us to look at the conceptual structure of the Fourteenth Amendment.

24. The formulation I used in the version of this essay presented at the Association of American Law Schools Meeting asked whether, as an original matter, Congress has power to eliminate the *Young* cause of action against state officers. That way of putting it implied that I meant to make a claim about the understanding that generally prevailed when the Reconstruction Amendments were adopted. Professor Meltzer in his comments accurately noted that the original-understanding credentials of my argument are thin. *See* Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies,* 86 GEO. L.J. 2537, 2551 n.82. My research on the understanding of this problem during Reconstruction has not progressed to the point at which I could confidently make a claim about the original understanding, although the reading I suggest here is consistent with that research so far.

25. In addition to avoiding a discussion of the case law, I will avoid asking whether *Young* was right the day it was decided. That question differs from the question of the constitutional as opposed to statutory origins of the *Young* action because it is possible that the case's result, although rested on the Constitution, could have been rested on then-existing statutes such as R.S. 1979 (42 U.S.C. § 1983 (1988)). I want to discuss the situation in which Congress has made clear its intent to limit the availability of such proceedings.

judicial relief because of the wrongful conduct. For example, in ordinary tort action, the plaintiff must show both that the defendant's conduct breached a duty and that the plaintiff is someone to whom the duty runs.

It is likely that *Young*, at least as it is written and as the Justices in the majority understood it, stands for the proposition that while the Constitution made Attorney General Young's conduct wrongful, the rules about who can sue were taken from private law. It is the private law that identifies legally cognizable injury and distinguishes bystanders from plaintiffs. When *Young* was decided, those plaintiff-identifying principles probably came from substantive federal equity and hence ultimately from the general law.[26]

If this reading is correct, then *Young* stands for the principle that the Constitution's effect is not limited to the nullification of state law norms of which the Constitution disapproves. Justice Peckham, writing for the Court, seems to have thought that the attempt to enforce state-law norms offensive to the Constitution is itself a wrongful act by the officer, like negligent operation of a motor vehicle.[27] The Court in *Young* then fit this new principle into pre-existing equitable rules about the availability of injunctions. It follows from this reading that although the Constitution goes beyond nullification, it does not provide all the elements of a cause of action.

Regardless of the source of the plaintiff-identifying rules, if Attorney General Young had brought a lawsuit to enforce the rate regulations of which the Constitution disapproved, the Court would have thought he was committing a wrongful, not just a pointless, act. The first question in rethinking *Young*, and hence in rethinking the role of Congress in authorizing anticipatory litigation to forestall enforcement proceedings, is whether this is a plausible reading of Section 1 of the Fourteenth Amendment. Does Section 1 impose such a duty on government officers?

One quite natural reading of the text suggests that it does not. Section 1 is a rule applied to the states, which can be characterized as corporate entities. Section 1 does not on its face apply to individuals, even individuals who work for a state. The standard implication for a government officer from a constitutional rule of conduct is that a government officer, in violating the rule, is not acting for the government at all. *Young* affirms this, employing the normal formulation according to which the officer is stripped of official capacity.[28]

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26. A classic illustration of this approach at work is *Frothingham v. Mellon*, 262 U.S. 447 (1923), in which the Court did not reach the question whether the Maternity Act was in excess of Congress's enumerated powers because Frothingham could not show that an injunction against its enforcement would relieve the monetary injury of which she was entitled to complain. Frothingham lacked a cause of action (or standing to sue in the earlier sense of that phrase) because she could not show that Secretary Mellon's complained-of action caused the kind of pocketbook injury recognized by the private law.

27. Justice Peckham, for the majority, evidently concluded that an enforcement action by Young would be an actionable injury, equivalent to a trespass. *See Young*, 209 U.S. at 153. In characterizing the enforcement of an invalid statute as "illegal," he went beyond saying that the statute itself was legally ineffective. *See id.* at 159.

28. "If the act which the state attorney general seeks to enforce be a violation of the Federal

An additional step is required to say that someone who is stripped of official capacity is nevertheless subject to a rule that applies only to people who claim to act under an official capacity. While that step is by no means impossible, it is not a natural inference from a rule that by its terms applies only to the government. Rules about the power of government and rules about the action of individuals are distinct both logically and substantively.

The history of the Fourteenth Amendment provides a classic illustration of the difference between rules concerning government power and rules regulating the conduct of individuals. The Civil Rights Act of 1866,[29] the first legislation passed pursuant to a Reconstruction amendment enforcement clause, reflected that distinction. Section 1 of the Act addressed the content of state law and purported to nullify the Black Codes, state legislation that qualified the civil rights of freed slaves.[30] It imposed on such laws the sanction of nullity. Section 2 regulated the conduct of state officers, criminalizing the enforcement of laws nullified by Section 1.[31] In doing this, Section 2 enforced the rule of Section 1, making compliance with that rule more likely.

The conclusion about the self-executing effect of Section 1 is the same if we abandon the *Young* structure, in which an individual officer is treated as a wrongdoer, and simply consider Section 1 of the Fourteenth Amendment as a rule for the states as such. Such a rule, in order to be judicially enforceable in a coercive proceeding like *Young*, must impose a duty of conduct on the states; the sanction of nullification is not enough. In this situation, however, the rule that imposes the duty pulls in the opposite direction from the rule of nullification, because the former attributes to the state an act that the latter says is not that of the state because it is not authorized. While this arrangement is logically possible, and indeed was adopted by Congress in the 1866 Act, it is hard to pull this reading out of a single provision precisely because its two components differ as to whether the action at issue can be attributed to the state. This structure is too complex to attribute to a simple statement concerning what the state is to do.

In brief, it seems entirely possible that the self-executing force of Section 1 is limited to nullification. Congress can add to nullification in order to make the rule more practically effective. While this arrangement is different from the one the Court has found at the federal level in the *Bivens* cases, the state-federal context itself is different because of the role of Congress. By authorizing enforcement by the national legislature, the Reconstruction Amendments clearly contemplate an important role for Congress. These Amendments were designed to deal with situations in which recalcitrant state-level majorities defy the

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Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of the Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." 209 U.S. at 159-160.

29. Act of April 9, 1866, ch.31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (1994).

30. *Id.* at § 1.

31. *Id.* at § 2.

national consensus; therefore they give to the political representative of the national consensus the task of deciding how much additional enforcement is needed. The amendments were drafted on the assumption that it is Congress's job to make some very important decisions under them.

One natural objection to this conclusion is that it neglects substantive considerations. If anticipatory remedies such as injunctions and declarations are not available, constitutional issues can be raised only as defenses, which means only by violating the law. One who violates the law, raises the Constitution as a defense, and loses is punished. If people must run that risk in order to raise a constitutional question, they may avoid the prohibited conduct altogether, with the result that a possibly unconstitutional rule will be complied with and never tested in court. Certainly the Court in *Ex parte Young* was concerned that the railroads would not assert their right to a judicial hearing on the reasonableness of the rates, because if they did so in a defensive posture and lost the penalty would be very high.[32] In similar fashion, someone who suspects but is not certain that the First Amendment prevents that application of a law might not take the chance if required to violate the law in order to litigate.

Possible litigation postures influence the cash value, as it were, of constitutional limitations. In a sense, how much freedom of speech individuals have depends upon the judicial fora available for the invocation of the Constitution. How much freedom of speech is permitted, one might think, is properly the subject of substantive theory of free speech. If the purposes of the First Amendment would be defeated by the absence of *Young*-style injunctions, then the First Amendment tells us whether such injunctions should be available.

To say that questions of remedy and institutional implementation affect the practical impact of substantive rules is not to say, however, that it is improper to have a theory of implementation that is significantly independent of substantive considerations. Questions of institutional role and power do not simply reduce to questions of substance, and not all the factors that affect the way in which the First Amendment is institutionally implemented relate to the distinctive concerns of the First Amendment.[33] Certainly the Constitution seems to work this

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32. *See Young*, 209 U.S. at 145-48.

33. This point about the relationship between structure and substance, I think, supplies the answer to Professor Jackson's question whether my proposed reading of Sections 1 and 5 is consistent with *City of Boerne*. Vicki C. Jackson, *Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2464 n.95 (1998). As she points out, the Court in that case reasoned that there must be limits on Congress's remedial power under Section 5, because if there were not then the legislature would in effect have the power to rewrite Section 1. The Court in *City of Boerne* was concerned with the situation in which Congress seeks to use its remedial power in effect to extend the scope of Section 1, by adopting a deliberately overbroad substantive rule that nullifies both innocent and improper state laws. The use of that broad brush must be limited if Section 1 is to mean what it means and not what Congress says it means.

At issue here is Congress's power to control the litigation contexts in which Section 1 comes into court, not the substantive rules that the court is to apply. Whether Congress can use the litigation-context aspect of its Section 5 power in effect to change the practical significance of Section 1 is a question distinct from that of the scope of the power to enact new substantive rules under Section 5. As

way. It is mainly about structure and includes many provisions that affect the application of substantive rules. But the structure has its own logic. That logic can supply answers to many of the questions that we formulate in terms of constitutional remedies.

I suggest, the proper way to formulate the question concerning Congress's power over litigation contexts is to ask about the extent to which Section 1 is self-executing. The answer to that question will tell us how much control Congress has over the practical significance of Section 1. One's views as to whether there is a special judicial role in enforcing the Constitution will of course influence one's answer to the question of Sections 1's self-executing effect. If *Marbury* stands for the proposition that the courts must be able to supply constitutional remedies that they deem adequate, rather than just the proposition that courts are not bound by legislative resolutions of constitutional questions, then *Marbury* is authority for the proposition that the self-executing scope of substantive constitutional rules is quite broad.