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**ENFORCEMENT OF FEDERAL PRIVATE RIGHTS AGAINST
STATES AFTER *ALDEN v. MAINE*: THE IMPORTANCE OF
HUTTO v. FINNEY AND COMPENSATION VIA CIVIL
CONTEMPT PROCEEDINGS**

GORDON G. YOUNG*

I. INTRODUCTION

As described in initial news reports, last term's decisions in *Alden v. Maine*¹ and its companion cases² drastically changed American federalism. *Alden* caps a line of recent cases on state immunity from suit. Among other things, these cases seem to hold that private individuals cannot sue states to recover monetary compensation for the violation of rights created by Congress solely under Article I of the Constitution.³ One accomplished legal affairs reporter concluded that these

* Copyright © 2000 by Gordon G. Young. Professor of Law, University of Maryland School of Law. J.D., New York University School of Law; LL.M., Harvard University Law School. I am grateful for comments from David Bogen, Ruth Fleischer, Vicki Jackson, and Mark Strasser.

1. 119 S. Ct. 2240, 2267-68 (1999) (concluding that the states are free to refuse to open their own courts to a wide variety of suits brought against them by persons possessing rights under federal law).

2. *Alden's* companion cases deal with specialized exceptions to state immunity from suit. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2226-27, 2229-31 (1999) (holding (1) that Congress's exceptional powers, under Section 5 of the Fourteenth Amendment, to abrogate state immunity from suit extend only to circumstances in which abrogation is a reasonable way of protecting interests guaranteed by that Amendment and (2) finding that the state had not waived its immunity from suit); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank and United States*, 119 S. Ct. 2199, 2210-11 (1999) (holding that Congress's exceptional powers, under the Fourteenth Amendment, to abrogate state immunity from suit extend only to suits to protect interests guaranteed by that amendment). For a fuller discussion of Congress's power to abrogate state immunity under the Fourteenth Amendment and the limits on those powers that *Alden's* companion cases recognize, see *infra* note 8 and accompanying text.

3. The first of the recent cases is *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Among other things, *Seminole* concluded that Congress has no power, under Article I alone, to create rights enforceable in federal court against unconsenting states. *Id.* at 65-66, 72-73 (noting that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction"); see also Gordon G. Young, Comment, *Seminole Tribe v. Florida*, 56 MD. L. REV. 1411, 1428-33 (1997) (examining the possible implications of the *Seminole* holding on the development of state immunity jurisprudence). In this respect, *Seminole* overruled an earlier decision, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which allows Article I "abrogation" of states' immunity from federal court suits. *Seminole*, 517 U.S. at 66. As a consequence of *Seminole*, suits to enforce statutory rights created under Article I cannot be brought against an unconsenting state in federal court unless the rights have vested as life, liberty or property interests protected by the Fourteenth Amendment and Congress has

cases “flatly reject the notion that federal laws take precedence over state authority.”⁴ Others also saw the decisions as dire. By means of a droll hypothetical, Duke Law School professor, Walter Dellinger, explored just how far this line of cases might be pushed to undercut states’ obligations to follow federal law. Here is Professor Dellinger, as introduced by National Public Radio reporter Nina Totenberg a few days after *Alden* was decided:

NINA TOTENBERG reporting:

The court’s decisions granting new power to the states represent a vision of the American structure of government different from the one that’s prevailed for most of this century. . .

. . . .

The court’s rulings appear to give states such sweeping immunity that Duke law professor and former Solicitor General Walter Dellinger appeared before a group of reporters tongue-in-cheek to announce he was resigning his job in the private sector to run for governor of North Carolina. His one campaign pledge, he said, would be to repeal the state income tax and fund state education by establishing a state-run company to manufacture and sell Nike knock-offs [in violation of federal trademark and minimum wage laws].

. . . .

validly abrogated state immunity under that amendment. *See infra* notes 7, 20 and accompanying text. Because suits against officers seeking compensation from the state treasury for past state wrongs are also classified as against a state, these too cannot be permitted by Congress under its Article I powers. *See Edelman v. Jordan*, 415 U.S. 651, 664-69 (1974) (permitting federal courts to issue orders against state officers compelling prospective compliance with federal law but prohibiting orders against state officers to pay damages out of state funds for past violations of federal law); *see also infra* notes 52-55 and accompanying text.

In simple terms, what *Alden* adds to this line of cases is protection of states from suits in their own courts asserting federal law violations. *See Alden*, 119 S. Ct. at 2266 (holding that “[i]n light of history, practice, precedent, and the structure of the Constitution, . . . the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation”). More technically, *Alden* finds that, generally, there is no federal compulsion for a state court to hear suits brought against their sovereigns based on federal law, except perhaps that created by or under the Thirteenth, Fourteenth, or Fifteenth Amendments. For a more complete description of these cases and this doctrine, see *infra* notes 49-59 and accompanying text. *See also* Young, *supra* note 3, at 1428-45 (examining the possible ramifications of the *Seminole* holding on the development of state immunity jurisprudence). While, generally, state courts are not compelled by federal law to hear suits against their own sovereign unless the state waives its immunity or Congress enacts a valid law abrogating that immunity, there may be some circumstances in which such compulsion exists. *See supra* note 45 (dealing with possible exceptions for claims against the state involving takings of property or tax refunds).

4. Joan Biskupic, *Justices, 5-4, Strengthen State Rights*, WASH. POST, June 24, 1999, at A1.

Professor WALTER DELLINGER (Duke University): It will be very easy to make a considerable profit on these matters because we'll be paying \$1.25 an hour to those who work in our copying facilities. This may be bad news for the business community, but it's certainly good news for the taxpayers and citizens of the state of North Carolina.⁵

Are federal statutes, enacted under Congress's Article I powers, really no longer binding on the states as claimed by the first reporter mentioned above? That depends on whether, after *Alden*, there are consequences for a state's violating them. And, as it turns out, there are. Were Professor Dellinger Nike's lawyer in his hypothetical (or lawyer for the losing plaintiffs in *Alden*), his next step surely would be to sue the appropriate state officer in his official capacity to enjoin future violations of federal law. Supreme Court decisions continue to allow prospective suits of this sort, brought to subject states to federal control. To this extent, federal law remains supreme.⁶

Despite this, the *Alden* line of cases may dramatically change federalism. It may (or as I suggest below it may not) be what it seems: a complete protection for states against having to pay compensation for wrongs to private interests created by Congress solely under that body's Article I powers. If it is a flat prohibition, then in some real sense, when legislating under Article I, Congress cannot create private rights against the states.⁷ But this is not clear. There are two remain-

5. WEEKEND EDITION SATURDAY (NPR radio broadcast, June 26, 1999).

6. See *Ex parte Young*, 209 U.S. 123, 155-56 (1908) (“[I]ndividuals who, as officers of the State . . . threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.”); see also *Seminole*, 517 U.S. at 52-57 (generally recognizing the validity of federal court suits brought to force state officers' prospective compliance with federal law); *infra* notes 50-51, 54-56 and accompanying text (explaining the rationale for *Ex parte Young* actions).

7. By “in some real sense” I recognize that, near the boundary line, the distinction between laws creating private rights and those creating public duties blurs, and the proper nomenclature is debatable. Certainly one might choose to describe an obligation created for the benefit of a private party, but ultimately enforceable only by governmental suit (such as a criminal contempt proceeding), as a private right. But it would be a marginal and debatable classification.

As for the importance of which of Congress's powers to regulate is in play when it attempts to override or “abrogate” states' immunity from suit, Congress possesses the power, when legislating under the Fourteenth Amendment (and probably under the Thirteenth and Fifteenth Amendments) to subject states to liability to suit in federal court (and probably in state court as well). See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (concluding that “Congress may, in determining what is ‘appropriate legislation’ for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts” (footnote omitted)). The power that the Court recognized in Congress to do the same, when

ing possibilities for compensation. The first is congressional abrogation of state immunity under the Fourteenth Amendment. At least some statutory rights, created by Congress under its Article I powers, will become property interests protected by the Fourteenth Amendment.⁸ Under current law, Congress has power to abrogate states' immunity from suits brought to enforce such rights. But just how far the Fourteenth Amendment can be used for these purposes is less than

legislating under Article I (*Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 5 (1989)) was repudiated in *Seminole*, 517 U.S. at 65-66. *See supra* note 3.

8. *Alden's* two companion cases addressed this possibility, as did one Supreme Court case decided as this Article went to press. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999), decided the same day as *Alden*, one of the plaintiff's contentions was that the state had violated property rights created by Congress under its Article I powers to regulate commerce, thus allowing Congress to abrogate state immunity to protect property under Section 5 of the Fourteenth Amendment. *Id.* at 2224-25. As for the need for a basis of abrogation in the Fourteenth Amendment, *see supra* notes 6-7 and accompanying text. The *College Savings Bank* majority seemed to recognize that Congress possesses some power to abrogate state immunity under Section 5 of the Fourteenth Amendment, with respect to claims against states for deprivations of property created by Congress under Article I. 119 S. Ct. at 2224-25. It left open the possibility that Congress might abrogate state immunity to a trademark infringement suit, while distinguishing the unfair competition suit before it as in no sense involving a deprivation of property that could be regulated by Congress under the Fourteenth Amendment. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank and United States*, 119 S. Ct. 2199 (1999), the Court confronted a patent infringement claim against the State of Florida. The majority rejected Congress's attempt to expose states to such suits while recognizing that patent rights were property rights whose violation might allow congressional authorization of a suit against an offending state in an appropriate circumstance. *Id.* at 2206-09. Among other things it was (1) the lack of evidence of systematic and intentional violation of federally created property rights and (2) the lack of evidence that state law remedies were inadequate that caused the Court to find no deprivation of property cognizable under the Fourteenth Amendment and, thus, no power of Congress, under Section 5 of that amendment, to abrogate immunity as an appropriate way of enforcing the Amendment itself. Finally, in *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000), a majority of the Court found that the provisions of the Age Discrimination in Employment Act of 1967 purporting to abrogate state immunity were beyond Congress's powers of remediation under Section 5 of the Fourteenth Amendment:

A review of the ADEA's legislative record as a whole, then, reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age. Although that lack of support is not determinative of the § 5 inquiry, . . . Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field. In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. The ADEA's purported abrogation of the States' sovereign immunity is accordingly invalid.

Id. at 649 (citations omitted).

certain.⁹ This Article, however, focuses on another mechanism for compensation, based on the assumption that a Fourteenth Amendment protective cocoon will be unavailable at least for some rights created under Article I.¹⁰ This second mechanism is compensation by means of civil contempt actions for state violations of federal court injunctions. If this option is available, it would reach a great deal, though not all,¹¹ of the harm resulting from state violations of federal laws based on Article I.

Imagine that Nike, in the hypothetical above, or the losing plaintiffs in *Alden*, do procure a federal court injunction, as indeed they may under existing law, and that the state violates it. Will they go uncompensated for all of the harm that they suffer because of a violation of their federal rights, as fortified by the injunction? One Supreme Court case, *Hutto v. Finney*,¹² suggests strongly that a state must pay, via civil contempt or other similar proceedings, for most harm to federal rights protected by the injunction. This interpretation of *Hutto* is supported by a Court of Appeals opinion written by Judge Richard Posner.¹³ On this view, it would be meaningful to say that Congress can pursue its Article I objectives by the creation of (1) public regulatory schemes, enforceable by government¹⁴ or private

9. See *supra* note 8 and accompanying text (indicating that the Court will scrutinize congressional attempts to abrogate state immunity to determine that they are reasonably necessary to enforce the Fourteenth Amendments prohibitions against deprivations of property).

10. See *supra* note 8 (indicating serious limitations on Congress's power to abrogate under Section 5 of the Fourteenth Amendment). In addition to cases in which Congress, despite an attempt, is unable to abrogate under the Court's stringent requirements, abrogation is also unavailable in cases where Congress has passed no law attempting to abrogate. In both circumstances, by hypothesis, a federal right exists, but its assertion in court is frustrated by state immunity.

11. This doctrinal view would deny—in the absence of state waiver or congressional abrogation of state immunity—compensation for harm caused by states' violations of federal rights not prohibited by an injunction. Consequently, all harm suffered before a plaintiff procures an injunction and that suffered afterward, but not covered by the court order, would be lost.

12. 437 U.S. 678 (1978); see *infra* Part III.

13. *Wisconsin Hosp. Ass'n v. Reivitz*, 820 F.2d 863 (7th Cir. 1987); see *infra* notes 70-71 and accompanying text.

14. Suits by the federal government are not barred by state immunity. See *United States v. Mississippi*, 380 U.S. 128, 140-42 (1965). However, what counts as a suit by the federal government for purposes of state immunity is currently the subject of some dispute. Private individuals, meeting certain procedural requirements, have been allowed to sue on behalf of the United States to recover for certain fraud committed against the United States. The proceeds of such suits are shared by the United States and the private party initiating the suit, based on a statutory formula. See *False Claims Act*, 31 U.S.C. § 3729 (1994). These parties may be seen as deputized and paid private attorneys general, used to supplement limited federal enforcement resources. Currently before the Supreme Court

parties,¹⁵ (2) by private rights enforceable by individuals, or (3) by creation of both. Any private rights simply require a court order to make them fully effective against states.

The emergence of this strong reading of *Hutto* is not inevitable. *Hutto* may also be read in a weak way or be overruled. The Court's recent intense solicitude for the interests of states which violate federal law makes its limiting of *Hutto* a real possibility. As discussed later, such a turn would best be interpreted, not as a decision about states' immunity from suits, but as a return to an earlier Tenth Amendment jurisprudence, severely limiting the scope of Congress's substantive Article I powers to regulate states.¹⁶

is the question of whether such *qui tam* suits, when brought against states, will be treated as suits by the United States, and thus allowed to proceed despite state immunity. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 119 S. Ct. 2391 (1999) (granting certiorari, *inter alia*, to determine whether the *qui tam* suits against states are consistent with state immunity and reviewing *United States v. Vermont Agency of Natural Resources*, 162 F.3d 195 (2d Cir. 1998)).

Peripherally to this Article, but significantly, the case also raises the issue of whether *qui tam* suits, brought against either states or private defendants, are consistent with the unalterable constitutional standing requirements of Article III. *See Stevens*, 119 S. Ct. 2391 (on the Court's own initiative, directing the parties before it to file supplemental briefs addressing the following question: "Does a private person have standing under Article III to litigate claims of fraud upon the government?").

15. Private enforcement of public schemes takes a variety of forms. Traditionally, Congress has been able to create private interests, short of full blown property rights, to assure that public law schemes are suitably enforced. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 394-99 (1987) (allowing standing to those arguably within the zone of interests protected by the enabling act, while noting that the test is not particularly demanding and does not require a congressional purpose to benefit the would be plaintiff); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) (allowing broadcasters standing to challenge the statutory legality of grants of licenses to competitors, although they possessed no property right to exclude others). Sometimes these private interests conferring standing, yet not amounting to property rights, have been described as existing in favor of those explicitly or implicitly designated private attorneys general. *See Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942). The zone of interests and private attorneys general cases converge. *See Clarke*, 479 U.S. at 397 n.12 (equating those within the zone of interest with those who would be reliable private attorneys generals).

At one time, Congress's power to confer standing on any individual or group to redress any violation of law seemed possibly limitless. Congress could do so by either stating that a class of people (e.g., all citizens) is injured by a legal violation (illegal pollution anywhere) or by designating any group (e.g., all citizens) private attorneys generals to redress such violation. *See supra* paragraph. Recently, the Court has cut back on the once apparently endless power of Congress to grant standing on these theories and seems poised to cut back more. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that standing to enforce public law schemes does not exist simply because Congress recognizes an injury but, rather, requires the presence of some minimum harm as recognized by the Constitution).

16. *See infra* notes 28-31 and accompanying text.

Immediately below, in Part II, this Article describes the Supreme Court cases on federalism with a special emphasis on those dealing with state immunity from suit. In Part III, it turns to a discussion of *Hutto* which suggests that civil contempt and similar actions may offer an alternative, if imperfect, route to compensation. Finally, in Part IV, it discusses and evaluates the choices that confront the Court in harmonizing *Alden* and other state immunity cases with cases in the *Hutto* line.

II. RECENT SUPREME COURT CASES ON FEDERALISM

A. *Substantive Federal Power to Regulate States*

While the focus of this Article is state immunity from suit under federal law, it will be helpful to discuss briefly the substantive powers of Congress to regulate the states, both under the original Constitution and under the Reconstruction Amendments. This discussion is helpful for two reasons. First, as discussed more fully below, Congress can eliminate state immunity from suit when regulating states under the Fourteenth Amendment, but not when regulating under the Commerce Clause.¹⁷ Second, the Court's recent state immunity decisions might be seen as an attempt, by other means, to seriously limit a line of cases permitting Congress great freedom to regulate states under the Commerce Clause. Later in this Article, I suggest that *Alden* may have this effect.¹⁸ In particular, *Alden* may deny Congress the power to create meaningful private rights under powers granted it in the original Constitution, most notably the Interstate Commerce Clause.¹⁹

The civil rights amendments are unusual constitutional provisions, unmistakably contemplating federal regulation operating against states with respect to due process, equal protection, voting rights and guarantees against slavery.²⁰ But what was and is the power

17. See *supra* notes 7-8 and accompanying text.

18. See *infra* notes 28-34 and accompanying text (describing the line of decisions ending, for now, in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)).

19. See *supra* note 7 and accompanying text.

20. U.S. CONST. amend. XIII-XV. Each of these amendments is directed at limiting states, and each of them ends with a clause authorizing congressional enforcement. See U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude . . . shall exist within the United States . . . Congress shall have power to enforce this article by appropriate legislation."); U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . . The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by . . . any State on account of race, color, or previous condition of servitude. . . . The Congress shall have power to enforce this article by appropriate legislation.").

of Congress to regulate states under the original Constitution, particularly the commerce clause? An early opinion, *McCulloch v. Maryland*,²¹ can be seen as cutting in two different directions.

Implicit rules, principles, and policies are not always weaker than explicit ones. Consider the phrase “it goes without saying,” indicating that something is so clear that it does not need to be said. Some constitutional law fits this description well. *McCulloch v. Maryland*²² provides the earliest and most powerful example. It holds that state legislation that sufficiently threatens the existence or effectiveness of the United States is invalid because it is inconsistent with the constitutional enterprise as originally understood, not because it violates a specific provision of the document.²³ Possibly some federal regulation of states, analogously, is inconsistent with their sovereignty as implicit in the founding document and circumstances. Cutting the other way, the theory of representative democracy, discussed in *McCulloch*, might lead to the belief that the states are adequately protected against actions of the federal government by their representation in Congress while, in general, the citizens of the United States are not adequately represented in any single state legislature.²⁴ On this second view, a view still officially, if precariously, held by the Supreme Court as to most federal regulation of states,²⁵ there are few state sovereignty limits on Congress in regulating states under its Article I powers.

At least from 1936 until 1968, the entire Court seemed to view Congress’s Article I regulatory powers over states as no more limited than those over individuals.²⁶ When suggestions of special limits

21. 17 U.S. (4 Wheat.) 316 (1819).

22. *Id.*

23. *Id.* at 426-30.

24. *See id.* at 431 (“In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.”); *see also* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547-52 (discussing state sovereignty and noting “that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress” (footnote omitted)).

25. *See* *New York v. United States*, 505 U.S. 144, 160 (1992) (finding no occasion to revisit *Garcia*).

26. *See* *United States v. California*, 297 U.S. 175, 184 (1936) (“The sovereign power of the states is necessarily diminished to the extent of grants of power to the federal government . . .”). Thirty-two years later in *Maryland v. Wirtz*, 392 U.S. 183 (1968), two dissenters suggested that there might be some special protection for states from congressional regulatory powers. *See id.* at 204-05 (Douglas, J., dissenting) (noting that if Congress’s power under the commerce clause extends to permit federal regulation of “essential functions being carried on by the States,” then the federal government “could devour the essentials of state sovereignty”).

favoring states began to appear, they were most intelligible, not as interpretations of Article I's commerce clauses, but as notions that either the Tenth Amendment or some very basic yet implicit state sovereignty shielded states from the full force of general federal regulation.²⁷

Subsequently, the Court has vacillated as to whether, and in what circumstances, states themselves can be regulated by federal laws. In 1976, in *National League of Cities v. Usery*,²⁸ the Court first held that states could not be regulated under the commerce clause when acting traditionally as states.²⁹ Nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*,³⁰ the Court reversed course and held that, except in exceptional circumstances, Congress can regulate states under the commerce clause in the same way that it regulates individuals.³¹ To be concrete, in the first case the Court rejected, and in the second accepted, the application of federal minimum wage laws to states.³² In both of these cases, the voting margin was one justice.³³ In *Garcia*, three dissenters seemed committed to overturning the decision.³⁴

27. See *Fry v. United States*, 421 U.S. at 542, 547 n.7 (1975) (noting that the Tenth Amendment makes explicit the constitutional policy that "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."); *Wirtz*, 392 U.S. at 205 (Justices Douglas and Stewart dissenting, on the ground that principles, explicitly guaranteed by the Tenth Amendment, limit what would otherwise be Congress's power to regulate under the commerce clause). Later cases such as *New York v. United States*, 505 U.S. 144 (1992) and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) indicate that the Tenth Amendment and Eleventh Amendment make explicit protections that were implicit in the original Constitution. See *Seminole*, 517 U.S. at 54 (concluding that state sovereign immunity from suit existed implicitly in the original Constitution and that the Eleventh Amendment cleared up a misunderstanding as to its existence). As to limits on federal powers to regulate states, *New York v. United States* makes clear that the current majority sees the limits as originally implicit and predating the textual amendment designed to make their existence, if not their precise content, explicit:

The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

505 U.S. at 156-57.

28. 426 U.S. 833 (1976).

29. *Id.* at 845, 852.

30. 469 U.S. 528 (1985).

31. *Id.* at 555-57.

32. See *Usery*, 426 U.S. at 851-52; *Garcia*, 469 U.S. at 555-56.

33. See *Usery*, 426 U.S. at 856 (5-4 decision); *Garcia*, 469 U.S. at 557 (5-4 decision).

34. See *Garcia*, 469 U.S. at 577 (Powell, J., dissenting) ("The Court's action reflects a serious misunderstanding, if not an outright rejection, of the history of our country and

Since *Garcia*, the pendulum has swung away from *Garcia* and back toward *National League of Cities*, as the Court has grown increasingly to favor states' rights. Though it has never overruled *Garcia*, it has narrowed it somewhat. In two recent cases, a majority identified particular, and narrow, types of federal legislation that violate states' rights. The first is legislation that forces states to enact a specified matter as state law³⁵ and the second is legislation that forces state officers to administer federally enacted regulatory schemes.³⁶ While the limits on substantive regulation of states have moved in the direction of allowing less regulation, the Court has also narrowed, even more dramatically, the possibility of remedies for violations of regulations that do remain substantively valid. *Idaho v. Coeur d'Alene Tribe*,³⁷ *Seminole v. Florida*,³⁸ and *Alden* form this body of case law. It is this body of immunity law that now presses, with special force, the question of the kinds of relief that can be granted in favor of an individual and against a state for violation of federal court orders.

B. State Immunity from Suit

The history of a federal constitutional immunity of states and state officers from suits is equally long and even more confusing than the flip-flopping story of decisions dealing with the validity of federal substantive regulation of states. Below, I outline the most basic features of this body of law. While state immunity from suit is often described as Eleventh Amendment immunity,³⁹ that amendment turns out to play only a supporting role for the constitutional protections

the intention of the Framers of the Constitution." (footnote omitted)); *id.* at 580 (Rehnquist, J., dissenting) ("I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."); *id.* at 589 (O'Connor, J., dissenting) (sharing Justice Rehnquist's belief that "this Court will in time again assume its constitutional responsibility").

35. See *New York v. United States*, 505 U.S. 144, 188 (1992) (striking down a federal statute that forced states to either take title to low level radioactive waste or to regulate pursuant to the direction of Congress).

36. See *Printz v. United States*, 521 U.S. 898, 933 (1997) (holding that Congress may not compel state law enforcement officers to perform background checks on prospective gun purchasers pursuant to the Brady Handgun Violence Prevention Act).

37. 521 U.S. 261 (1997) (limiting an exception to state immunity). For a fuller description of this case, see *infra* notes 59-60 and accompanying text.

38. 517 U.S. 44 (1996). For a detailed discussion of *Seminole*, see *infra* notes 46-61 and accompanying text. See also Young, *supra* note 3.

39. See generally Young, *supra* note 3, at 1413, 1413 n.13 (surveying state immunity cases and explaining the differences between and the confusion often associated with *Hans* immunity and Eleventh Amendment immunity).

that the states' rights majority finds implicit in the original document.⁴⁰ The Eleventh Amendment reads as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted *against one of the United States by Citizens of another State*, or by Citizens or Subjects of any Foreign State.⁴¹

Read literally, this provision prohibits citizens of any state, *A*, from suing any other state, *B*, in federal court. On such a reading, it has no application to (1) *any* suits in state court, or (2) suits brought by citizens of *A* against their own state, even if in federal court. Even as to suits in federal court by citizens of state *A* against state *B*, which are literally covered by the Amendment, broader context offers strong arguments that the provision does not apply to the extent that such a suit is brought to enforce federal law.⁴²

Strangely, while state immunity has expanded, the Eleventh Amendment itself has played an increasingly smaller role, as the Court found another source of the protections for states against suits under federal law. As early as 1890 the Court found an immunity connected with the Eleventh Amendment, but obviously originating elsewhere, which protected states from suits brought against them in federal court by their own citizens, even if brought to enforce federal law.⁴³ Somewhat simplified, this year's *Alden* decision extends that implicit immunity to suits against states in their own courts.⁴⁴ More precisely, *Alden* concludes that there is no general federal compulsion for a state's courts to hear suits brought against that state based on federal

40. See *infra* note 46 and accompanying text.

41. U.S. CONST. amend. XI (emphasis added).

42. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 281-89 (1985) (Brennan, J., dissenting) (concluding that the Eleventh Amendment was simply designed to close the federal court to suits where jurisdiction was based on party status but not to suits where the cause of action arose under federal law); see also John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 2004 (1983) (concluding that "[i]t is time for the Supreme Court to acknowledge that the eleventh amendment applies only to cases in which the jurisdiction of the federal court depends solely upon party status"); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment and State Sovereign Immunity*, 98 YALE L.J. 1, 44-51 (1988) (concluding that neither the original Constitution nor the Eleventh Amendment conferred on states' immunity from suits to enforce federal law, but recognizing the possibility that states possessed a federal common law immunity that would yield to legislation enforcing federal rights via authorization of suits against states).

43. See *Hans v. Louisiana*, 134 U.S. 1, 19-21 (1890).

44. See *Alden v. Maine*, 119 S. Ct. 2240, 2246 (1999) (holding "that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts").

law.⁴⁵ *Seminole* and *Alden* together explain all of this from the states' rights majority's perspective. In their view, states have a sovereign immunity from suits that was implicitly guaranteed under the original Constitution,⁴⁶ another example of something significant "going without saying" under the Constitution.⁴⁷ From the states' rights majority's perspective, the Eleventh Amendment simply repaired the Supreme Court's one narrow mistake as to the existence of this immunity, so that, after its enactment, states were in the position originally intended.⁴⁸ Specifically, states were in the position of having no federal obligation to suffer suits brought against them by individuals, even those brought to enforce federal law against them in their own courts or in federal courts.

For those who wish to understand this immunity, two related questions must be answered. First, what counts as a suit against a state? And, second, how can federal law continue to be supreme if immunity prevents suits against states which violate that law?

45. Of course state law—statutory and constitutional—can choose to open state courts to federal claims of any sort, except the few that are exclusively cognizable in federal court. As for Congress's special power under the Fourteenth (and possibly the Thirteenth, and Fifteenth) Amendment to abrogate state immunity, see *supra* notes 7, 20. Additionally, there may be special cases in which state courts are obligated to hear federal claims against states despite the lack of a statute specifically abrogating state immunity. See *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987) (raising the possibility that the "just compensation" component of the Fifth Amendment itself, or as incorporated by the Fourteenth Amendment against states, is an unusual provision requiring that governments provide judicial remedies against themselves to compensate for taking of property); *Reich v. Collins*, 513 U.S. 106, 110-11 (1994) (indicating that, in some circumstances, a state must allow a judicial-style proceeding for a refund of taxes illegally collected).

46. The *Seminole* Court offered the following explanation:

Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." That presupposition, first observed over a century ago in *Hans v. Louisiana*, has two parts: first, that each State is a sovereign entity in our federal system; and second, that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." . . . For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States."

Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996) (internal quotation marks omitted) (internal citations omitted).

47. See *supra* notes 22-23 and accompanying text.

48. See *Young*, *supra* note 3, at 1424-25 (noting that "the *Seminole* Court perceives the Eleventh Amendment as merely a correction of *Chisholm's* mistaken view that the Constitution permits federal courts to hear suits against states brought by citizens of other states" (footnote omitted)).

The answer to the first question is that all suits against unconsenting states as named parties are suits against states, barred by immunity unless Congress has abrogated that immunity under its Fourteenth Amendment powers. Also barred are some suits naming only state officers as defendants.⁴⁹ The answer to the second is that the Supreme Court has made supremacy of federal law meaningful by allowing federal courts to hear most, but not all, suits brought against state officers, in their official capacities, to stop them from enforcing state policy that violates federal law.⁵⁰ It has done so by means of a fiction that regards these suits as not against a state, when, obviously, they are.⁵¹ Any suit that stops an officer from obeying the command of a state constitution, the state legislature, or a duly authorized state agency, is functionally against the state. State policy needs arms and

49. *Edelman v. Jordan*, 415 U.S. 651, 665 (1974) (citing, with approval, an opinion of a United States court of appeals: "It is one thing to . . . [require a state officer to comply with federal law in the future.] It is quite another to order . . . [him] to use state funds to make reparation for he past. The latter would appear to us to fall afoul of the Eleventh Amendment We agree with Judge McGowan's observations." (citations omitted)).

50. *Compare Ex parte Young*, 209 U.S. 123, 155-56 (1908) ("[I]ndividuals, who, as officers of the State . . . threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."), *with Seminole*, 517 U.S. at 73-76 (accepting, but slightly limiting, the ability of federal courts to enjoin state officers to comply with federal law).

51. The Court explained the creation of the fiction:

[T]he injunction in *Young* was justified, notwithstanding the obvious impact on the State itself, on the view that sovereign immunity does not apply because an official who acts unconstitutionally is "stripped of his official or representative character," . . . This rationale, of course, created the "well-recognized irony" that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment. Nonetheless, the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to "the supreme authority of the United States." As JUSTICE BRENNAN has observed, "*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.

The Court also has recognized, however, that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States. This is the significance of *Edelman v. Jordan*. We recognized that the prospective relief authorized by *Young* "has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely a shield, for those whom they were designed to protect." *But we declined to extend the fiction of Young to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States.*

Penhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 104-05 (1984) (emphasis added) (internal citations omitted); see also PETER W. LOW & JOHN C. JEFFRIES, JR., *CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES* 871 (2d ed. 1994) (characterizing *Ex parte Young* as resting "on a fictional tour de force").

legs for its execution. In many, but not all circumstances, federal courts have been permitted to enjoin state agents who have been duly authorized under state law to take action that violates federal law.⁵²

But which suits against state officers in their official capacities, designed to thwart unconstitutional state policy, are acknowledged to be against states and thus barred? And which are allowed to go forward cloaked in the fiction that they are not suits against states? This question lies at the heart of the present Article, which deals with compensation for those injured by a violation of federal court orders. At least until recently, there has been a reasonably clean line between those official capacity suits against state officers that were permitted and those that were not.⁵³ Suits against officers in their official capacities, brought to compel future compliance with valid federal laws, were allowed to proceed.⁵⁴ These actions, usually for a negative injunction, but sometimes for a mandatory one, tightly controlling future behavior, were called *Ex parte Young* suits, after the exemplar of the category.⁵⁵ Note that these suits—for example desegregation suits and others seeking institutional restructuring—often required great expenditures of state money.⁵⁶ Still they were allowed.

52. See, e.g., *Edelman*, 415 U.S. at 664-69 (permitting federal courts to issue orders against state officers compelling prospective compliance with federal law but not to compel them to pay damages out of the state funds for past violations of federal law).

53. The reasonably clean line was that between prospective suits against state officers to enjoin future violations of federal law and suits against officers seeking to compel payments from the state treasury to compensate plaintiffs for past violations of federal law. The first was allowed; the latter barred. See *infra* notes 54-55, 58 and accompanying text. However, the line was always only reasonably clean. See *Milliken v. Bradley*, 433 U.S. 267 (1977) (struggling with the validity of a lower court order, which, in some respects, was retrospective and compensatory and in others future-oriented and aimed at assuring continuing compliance with federal law); *Edelman*, 415 U.S. 661 (stating that the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not, in many instances, be that between day and night).

54. See *Edelman*, 415 U.S. at 664.

55. *Ex parte Young*, 209 U.S. 123 (1908) (enjoining a state officer from enforcing state law violative of the federal Constitution); see *Seminole*, 517 U.S. at 55 (describing suits seeking such relief against state officers as “brought under *Ex Parte Young*”); *Edelman*, 415 U.S. at 667 (referring to relief permitted “under *Ex Parte Young*”).

56. See *Edelman*, 415 U.S., at 667-68. The Court in *Edelman* stated:

Later cases [after *Ex parte Young*] from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*. In *Graham v. Richardson*, 403 U.S. 365 (1971), Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), New York City welfare officials were enjoined from following New York State procedures which authorized the termination of benefits paid to welfare recipients without prior hearing. But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official

On the other side of the line, those prohibited by immunity were (1) suits naming an unconsenting state as defendant,⁵⁷ and (2) all suits seeking payment from the state treasury to compensate for past wrongs, without state consent. Suits in category (2) are exemplified by those brought to redress torts and breaches of contract. Note that such suits were forbidden despite the naming of a state officer in his official capacity, instead of the state, as the party defendant.⁵⁸

This line—between the forbidden compensation suits and the permitted ones seeking prospective relief—remains fairly clean, although it has been blurred slightly by the recent *Coeur d'Alene* case. *Coeur d'Alene* holds that, in addition to suits aimed at making state officers compensate individuals out of state funds, a small set of other suits against state officers implicate state sovereignty to such a degree that they will be classified as against a state and thus barred by immunity.⁵⁹ Despite this and some very troubling statements from two of the states' rights Justices,⁶⁰ *Ex parte Young* suits remain generally available to those injured by states' violations of federal law. The focus of this Article is what, ultimately, does such an injunction mean? Can federal courts, in civil contempt proceedings, force a state to compensate private parties for the harm resulting from a state's violation of the injunction which protected them?

Alden and *Seminole* make this question crucial because, before they were decided, alternative avenues of relief were open or arguably open to plaintiffs seeking damages against states. *Seminole* eliminates one such avenue by reversing an earlier case that permitted Congress to abrogate states' immunity from suits that assert rights created

conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*. . . .

Id. (footnote omitted) (internal citations omitted).

57. *See id.* at 663.

58. *See Seminole*, 517 U.S. at 72; *see also supra* note 3.

59. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 285-88 (1997) (holding that certain suits against state officers to quiet title to land and which implicate major state interests are outside of the exception to state immunity and thus barred).

60. Parts of Justice Kennedy's opinion (otherwise for the majority), joined only by Chief Justice Rehnquist, advocated making the availability of an *Ex parte Young* remedy depend upon a balancing test which included as one factor the availability of relief in state courts. *Id.* at 270-88 (Opinion of Kennedy, J.). For the disagreement of Justices O'Connor, Scalia, and Thomas on this point see *id.* at 288, stating that *Ex parte Young* suits are presumptively within the federal courts jurisdiction, and not barred by principles of federalism including immunity.

under Article I.⁶¹ So congressional action is no longer a means for providing compensation for such rights-holders, although it remains viable for federal laws written to enforce Fourteenth Amendment rights. A remaining possibility was suing in state courts, which arguably had a federal obligation to be open to compensate holders of rights created under Article I.⁶² *Alden* closes this avenue of redress against states for violation of rights based solely on Article I. As a result, the possibility of compensation for harm resulting from a state's violation of an injunction protecting such rights takes on a new importance. It is one of the last two possible avenues for compensation short of constitutional amendment. The first remaining possibility is that some rights created under Article I, when vested, will fall under the protection of the Fourteenth Amendment and the power of Congress to do away with state immunity in enforcing that amendment.⁶³ My topic is the other possible avenue for relief: an Ex parte *Young* injunction followed by civil contempt proceedings.

III. *HUTTO V. FINNEY* AND LOWER COURT CASES: FACTS AND AMBIGUITIES

A. *Hutto's Endorsement of Compensation for Private Victims of State Defiance of Federal Injunctions*

In *Hutto v. Finney*,⁶⁴ the Supreme Court considered objections by the State of Arkansas to the decision of the United States Court of Appeals for the Eighth Circuit affirming a federal district court's award of attorneys' fees against the state for bad faith violation of the district court's earlier prison reform orders.⁶⁵ While part of the award was made under a civil rights attorneys' fee statute, which was found to abrogate the state's Eleventh Amendment immunity,⁶⁶ a portion of the award was based solely on the powers of federal courts to enforce

61. See *supra* note 3 and accompanying text.

62. See RICHARD H. FALLON, JR., ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1076 (4th ed. 1996) (raising the question, answered affirmatively later in *Alden*, as to whether state courts are generally free to refuse to hear federal law suits brought against their sovereigns).

63. See *supra* note 8 and accompanying text.

64. 437 U.S. 678 (1978).

65. See *id.* at 680-85 (considering the court of appeals decision to uphold \$20,000 in attorneys' fees to be paid out of Department of Correction funds).

66. See *id.* at 693-96 (concluding that the \$2500 in attorneys' fees, levied by the court of appeals pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, is not barred by the Eleventh Amendment).

their own orders.⁶⁷ This portion served not only to deter violations of the original court order but to compensate private parties (in this case prisoners' attorneys) for harms caused by the violations subsequent to the injunction⁶⁸ (in this case unreimbursed fees for work that would not have been done if the original order had been honored). The Supreme Court found that the portion of the fees not covered by the statute was allowable as in the nature of a civil contempt award. Emphasizing that the Ex parte *Young* line of cases permits official-capacity injunctive suits to stop continuing violations of federal law the Court continued:

Once issued, an injunction may be enforced. Many of the court's most effective enforcement weapons involve financial penalties. A criminal contempt prosecution for "resistance to [the court's] lawful . . . order" may result in a jail term or a fine.

. . .

The principles of federalism that inform Eleventh Amendment doctrine surely do not require federal courts to enforce their decrees only by sending high state officials to jail. The less intrusive power to impose a fine is properly treated as ancillary to the federal court's power to impose injunctive relief.

In this case, the award of attorney's fees for bad faith served the same purpose as a remedial fine imposed for civil contempt.

. . .

Instead of assessing the award against the defendants in their official capacities, the District Court directed that the fees are "to be paid out of Department of Correction funds."⁶⁹

In a post-*Hutto* court of appeals case, reading *Hutto* correctly as ranging beyond claims seeking attorneys' fees, the court saw *Hutto* as supporting its decision that state funds must be used to compensate a hospital injured by a state's failure to honor a consent decree that it

67. *See id.* at 689-93 (considering whether the district court's award of attorneys' fees for the State's failure to comply with the court's injunction is barred by the Eleventh Amendment).

68. *Id.* at 691 n.17 ("That the award had a compensatory effect does not in any event distinguish it from a fine for civil contempt, which also compensates a private party for the consequences of a contemnor's disobedience." (citation omitted)).

69. *Id.* at 690-92 (alteration in original) (internal citations omitted) (footnote omitted). Of the material omitted from the above quotation, some suggests that there may be limits on forcing state officers to compensate private parties from state funds for violation of federal court orders intended to protect those private parties.

agreed to in federal district court.⁷⁰ For the unanimous panel Judge Richard Posner stated:

[T]he district court [below] found that the state had violated the consent decree. If this finding is correct, the Eleventh Amendment is no bar to ordering the state to reimburse the hospitals at the higher rate they seek, for the period . . . during which the consent decree was in effect. Against a state that violates a valid federal court decree the court has the power to issue any order necessary to enforce the decree, including an order to pay. *Hutto v. Finney*. . . . Whether one calls such an order one of civil contempt or, as we would prefer out of comity to characterize it, an equitable supplement to the consent decree, it is within the power of the federal court to make.⁷¹

B. Ambiguities in *Hutto*

On careful reading, *Hutto* is a strong, but not unalloyed, endorsement of use of the federal contempt power to compensate those injured by states' refusals to comply with federal court injunctions enforcing federal law on behalf of private beneficiaries. In approving the attorneys' fees, the Court made some observations that, at the least, made *Hutto* an easier decision by eliminating some factors that might have strengthened the state's claims to immunity. These factors, while themselves ambiguous to some degree, cast light on how the Court might narrow *Hutto*, thus expanding state immunity:

70. See *Wisconsin Hosp. Ass'n v. Reivitz*, 820 F.2d 863 (7th Cir. 1987).

71. *Id.* at 868 (citation omitted). Judge Posner further explained the rationale underlying the court's decision:

We do not suggest that by consenting to the original decree the defendants waived the state's rights under the Eleventh Amendment. The decree did not engage the Eleventh Amendment. The decree settled a genuine, noncollusive case that was within the exception to the Eleventh Amendment that *Ex parte Young* created, and it was a proper settlement that didn't violate anybody's rights. Compare *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986). Nor did the order that we have called an equitable supplement expand the scope of the decree, as in *Lelsz v. Kavanagh*, 807 F.2d 1243, 1252 (5th Cir. 1987). If it did, the expanded portion might be within the scope of the Eleventh Amendment. But all the order did was coerce (or attempt to coerce) compliance with the decree; and, as we have said, if a decree is valid an order enforcing it is not barred by the Eleventh Amendment. A fine for contempt, payable by the defendants in their official capacities (and therefore by the state itself, as we said), would have been within the power of the district court. See *Hutto*, 437 U.S. at 690-92.

Id.

(1) compensation was not the sole motive for awarding the fees, but, as with civil contempt awards, the compensation also served as a penalty for failure to follow a federal court's order;⁷²

(2) while the district court provided some compensation in making the award, it said that it would "make no effort to adequately" compensate for harm done as a result of the violation of the court order;⁷³

(3) there was no contention that the award was "so large or so unexpected that it [would interfere] with the State's budgeting process," indicating that the Eleventh Amendment "may counsel moderation in determining the size of the award or in giving the State time to adjust its budget before paying the full amount of the fee";⁷⁴ and

(4) the state did not claim that the award "was larger than necessary to enforce the court's prior orders."⁷⁵

In considering what these observations may portend, it is important to observe that the Court did not say that any of them were necessary to the validity of a compensatory award. It simply made it clear that the absence of the factors mentioned made approving the award an easier decision. As a result, there are two main ways that a court adhering to *Hutto* could apply it to future, more difficult, cases, although there are many possible nuanced positions in between. Below I will present the alternatives and in the next section evaluate them.

The first reading (below, the "strong reading of *Hutto*") would be a presumptive full compensation model. It would assume that beneficiaries of Ex parte *Young* injunctions, ignored by a state in bad faith, would be fully compensated, absent some especially potent problems of federalism. On this reading, the cautionary statements in *Hutto* would be analyzed as follows. The first factor—requiring that the court's contempt order be partially punitive⁷⁶—adds nothing. All civil contempt awards that compensate also have punitive motives designed to compel observance of federal court orders.

The second factor—that the fee award was only partially compensatory⁷⁷—can be dismissed as not necessary to the decision. The *Hutto* Court makes clear that it was not reviewing a fully compensatory

72. See *Hutto*, 437 U.S. at 691-93.

73. See *id.* at 691.

74. *Id.* at 692 n.18 (citing *Edelman v. Jordan*, 415 U.S. 651, 666 n.11 (1974)).

75. *Id.*

76. See *supra* note 72 and accompanying text.

77. See *supra* note 73 and accompanying text.

award⁷⁸ and so if its statements were somehow taken as forbidding such awards, they are dicta. More significantly, the Court does not seem to have issued such dicta. Its observation that the award was not fully compensatory may be seen as postponing a decision concerning the general validity of civil contempt orders aimed at awarding full compensation in favor of those protected by an injunction and against a state which violates it.

After *Hutto*, it remains possible that full compensation is the norm, but that a state might establish some sort of justification as to why its sovereignty interests permit it to inflict injury in violation of a federal injunction and without compensation to the party protected by the federal court order. One such justification could take into consideration the third factor⁷⁹ cited by the *Hutto* Court, that the award in that case was not unexpected or massive. Perhaps some awards against states might be disallowed or limited upon the state's demonstrating surprising or devastating harm to its fiscal well-being, although this possibility raises difficulties discussed below.⁸⁰

Finally, the fourth factor—that the contempt order do no more than is necessary to enforce the prior order⁸¹—could be read to include presumptive full compensation in the notion of “enforcement” of an injunction. From this perspective, a fully compensating award, by definition, would not be larger than necessary to “‘enforce’ the court’s prior orders.” The assumption of compensation makes this view a private rights model.

However, a weak reading of *Hutto*—a public rights view—is also possible. This weak reading will occur if the Court ultimately gives more bite to the cautionary factors as they come into play in future cases. On this view, it is always future deterrence that is the paramount factor in making an award. Once harm is done, whether from the initial violation of a federal right or from one or more violations of federal court injunctions protecting such a right, the court must estimate what monetary penalty will bring the state into compliance, and then, secondarily, it may use such amount to compensate injured beneficiaries of the original court order. If already leaning in this way, one might read the first cautionary factor in *Hutto* as suggesting that deterrence is primary and that compensation is secondary. Likewise, the second factor, that the court did not attempt to provide full compensation for the harm done, may be read as consistent with the

78. *Hutto*, 437 U.S. at 691.

79. See *supra* note 74 and accompanying text.

80. See *infra* notes 88-89 and accompanying text.

81. See *supra* note 75 and accompanying text.

existence of nothing resembling a private right to compensation. The third factor—the absence of either a budgetary surprise or a massive award—does leave a lot to future definition. It is consistent, however, either with the view that these considerations limit even the courts' power to deter future violations or perhaps that they are problems that normally exist only when a court has gone far beyond what is necessary to insure future compliance.

Finally, on this model, the fourth factor—a court's not going beyond what is necessary to "enforce" its prior order—means not going beyond what is necessary to insure a reasonable likelihood of future compliance, regardless of whether compensation has been achieved. In short, despite a state's great recalcitrance and its multiple violations of a federal injunction, followed in each case by judicial reiteration, an injured party is never entitled to full compensation for any of the violations. On this model, the focus, after each violation, is on coercing the state to honor the injunction in the (then) future, whether what is necessary is a fine less than, equal to or greater than the injured party's harm. The fact that the sum exacted is paid to the injured party is secondary to the primary focus on coercion.

IV. THE FUTURE OF *HUTTO*

What will the current Court's approach be to the issues raised by *Hutto*? Up to the time of the Court's recent cases on state immunity, it found itself pulled in opposite directions by what it saw as the competing claims of supremacy of federal law and of state sovereignty interests. As described above, the compromise that it reached partially addressed functional interests of the states and partly their symbolic, dignitary interests. The functional protections were aimed at protecting a state from undue, and often unpredictable, fiscal difficulties. Specifically, states were protected from having to pay damages from their treasuries to compensate individuals for their past wrongs, regardless of whether the named defendant was the state itself or was an officer sued in his official capacity.⁸²

The symbolic protections were those forbidding the naming of a state as a party, regardless of the relief sought.⁸³ This compromise, admitted to involve a fiction, permitted suits against federal officers to compel future compliance with federal law.⁸⁴ To this considerable extent federal supremacy won out, but with the original face-saving pre-

82. See *supra* note 58 and accompanying text.

83. See *supra* note 57 and accompanying text.

84. See *supra* notes 50-52 and accompanying text.

tense, now abandoned even as pretense,⁸⁵ that such suits are not against states, when of course, they are.

Once *Seminole* and *Alden* eliminated other possibilities for compensation for violation of rights created under Article I,⁸⁶ the question became whether federal courts can protect holders of such rights from harm caused by state violations. The strong view of *Hutto* does allow such protection. Despite the Court's aversion to forcing states to compensate, that view has many virtues as a compromise position. It protects both the functional and the dignitary interests of states as identified in the Supreme Court's state immunity jurisprudence, while at the same time offering protection to federal rights holders and according dignity to federal court orders.

First, as to the functional interests of states, *Hutto* sees concern with "[excessively] large or unexpected" awards against states.⁸⁷ An injunction ameliorates surprise and difficulties of adjustment to federal law by giving states notice of what is expected. After an injunction issues, the state either can stop the offending conduct or make the fiscal preparations necessary to pay for the harm caused by its violation. Indeed injunctions could be designed to provide notice at any appropriate level of state government. *Hutto* also may be seen as raising concern about the size of an award against a state, whether or not the making of the award or its size surprises the state. It is debatable whether legitimate questions of federalism are raised by the size of an award against a state for a clear violation of a federal court order, particularly if the order was not overturned on appeal after it was violated.⁸⁸ But even if one thinks that large awards are problematic, it

85. See *supra* note 51.

86. See *Alden v. Maine*, 119 S. Ct. 2240, 2246 (1999) (holding that Article I, operating alone, does not grant Congress the authority to create rights enforceable against unconsenting states in state courts); *Seminole Tribe v. Florida*, 517 U.S. 44, 65-66, 72-73 (1996) (holding that Article I, operating alone, does not grant Congress the authority to create rights enforceable in federal court against unconsenting states). However, it is possible, in some circumstances, for Congress to create rights under Article I that become property rights which, in some circumstances, will be the legitimate objects of Congress's Fourteenth-Amendment power to abrogate state immunity. See *supra* note 8.

87. See *Hutto v. Finney*, 437 U.S. 678, 692 n.18 (1978).

88. There is normally a duty to obey court orders, even those later overturned on appeal. See *Walker v. City of Birmingham*, 388 U.S. 307, 313-19 (1967) (surveying decisions regarding compliance with injunctions). *Walker*, however, makes it clear that exceptions may be made for compelling circumstances. *Id.* at 318-19 (noting exceptions such as "where a procedural requirement . . . [is] sprung upon an unwary litigant when prior practice didn't give him fair notice of its existence" (citation omitted)). The states' rights majority might see the position of states as compelling in this regard, relieving them of the normal obligation to obey an erroneous order until it is overturned. Taking the strong view of state immunity by reading *Hutto* as not allowing fully compensatory civil contempt

might still be possible to limit them so that, as in *Hutto*, they are paid from funds allocated to the department of the state government in which the violation occurred.⁸⁹ While this compromise position might still pinch a state hard, it is not the same as requiring a state to compensate out of general treasury funds.

Second, the requirement of a court order serves the symbolic or dignitary state interests that are so important to the states' rights majority. Third, the requirement of a court order is not just any symbol in service of those dignitary interests. One can argue forcefully that, if the courts are open to *Ex parte Young* suits, then dignitary interests of the federal courts require that those courts be able to force states violating court orders to compensate victims who were intended by Congress to be rights holders. This is not an argument that such suits would be advisory opinions if compensation were ruled out,⁹⁰ for violation of court orders could have consequences other than state payment of damages, as Justices Rehnquist and White suggested in *Hutto* itself.⁹¹ Any of these, such as the possibility of enforcement by a criminal contempt proceeding or a civil damage suit brought against the officer in his personal capacity, would suffice to make the order nonadvisory.

But Article III has many requirements going beyond prohibition of advisory opinions.⁹² Federal courts should be able to treat victims of state action, who win injunctions under federal law, as proteges, offering them assurance that no further harm will be inflicted without compensation. At the very least, this should be true if (1) Congress intends the parties to be full beneficiaries of federal rights and not just private attorneys-general, (2) Congress acts in accordance with substantive constitutional law in creating the right and, perhaps, (3) the size of the award or other unusual circumstances do not pose

proceedings against states, goes beyond carving out a states rights exception to *Walker*. It relieves states of some of the normal consequences of disobeying a contempt order, even after the time for appeals has run or after it has been affirmed by a United States court of appeals or by the Supreme Court.

89. See PETER H. SCHUCK, *SUING GOVERNMENT* 103-09 (1983) (discussing the pros and cons of imposing liability on governmental entities from particular agencies, at one end of the continuum, to the state itself at the other).

90. For a discussion of what are advisory opinions and why they are prohibited, see FALLON ET AL., *supra* note 62, at 93-98.

91. See *Hutto* 437 U.S. at 716 (Justices Rehnquist and White, dissenting).

92. For example, that the federal courts not be used as puppets by Congress, see *United States v. Klein*, 80 U.S. (13 Wall) 128 (1871), or that courts not be assigned nonjudicial duties ranging beyond the rendering of advisory opinions. See also *Morrison v. Olson*, 487 U.S. 654, 680-85 (1988) (suggesting that a statute authorizing close court supervision of the Independent Counsel would be constitutionally suspect).

some sort of catastrophic harm to the interests of states in a balanced federalism.

This is not to say the Court will read *Hutto* as strongly as Judge Posner did in the *Reivitz* case.⁹³ But denying compensation for violations of court orders that enforce federal laws written under Article I would not be understood best as a decision about state immunity from suit. In reality, it would be a substantive trip backwards to *National League of Cities* and beyond, denying the creation of private rights against states, even when they stop acting most like states and enter the marketplace. It would suggest that Congress cannot, in pursuit of Article I objective, create private rights that are good against states.

On this view, as versus states, Nike's Ex parte *Young* action would be brought, not by a rights holder, but by a self-interested private attorney general, allowed to proceed to keep the world safe for all trademark holders. Violations of any injunction would be attended by criminal contempt penalties or by civil contempt proceedings that are not aimed in any substantial way at providing compensation to the injured plaintiff. If that is the Court's regrettable course, it would be preferable for it to be clear that it is revisiting *Garcia* and making a statement about the scope of Congress's regulatory powers over states and not about the options available to an Article III court when confronted with violations of its orders protecting rights holders.

93. See *supra* Section III.B (discussing a "weak reading" of *Hutto* after discussing a "strong reading").