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Protecting Liberty Through Checks and Balances: Federal Maritime Commission v. South Carolina State Ports Authority

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PROTECTING LIBERTY THROUGH CHECKS AND BALANCES: *FEDERAL MARITIME COMMISSION V. SOUTH CAROLINA STATE PORTS AUTHORITY*

I. INTRODUCTION

When the thirteen original colonies formed "a more perfect Union"[1] by ratifying the Constitution of the United States, many questions were left unanswered as to the exact delineation of power between the federal government and the states. One such enigma was whether the common law doctrine of sovereign immunity would continue to bar suits by private individuals against states. The original 1787 draft of the Constitution did not expressly address the subject.[2] The Eleventh Amendment, which was ratified by the requisite number of states in 1798, constitutionally protected states from some such suits. The amendment reads:

> 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.[3]

On its face, the Eleventh Amendment appears to restrict the Article III grant of diversity jurisdiction to federal courts[4] or, at the most, to give states a complete defense in diversity suits brought by private parties.[5] Beginning with *Hans v. Louisiana*[6] in 1890, this

1. U.S. CONST. pmbl.
2. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 104 (1996).
3. U.S. CONST. amend. XI.
4. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.3, 398 (3d ed. 1999); *Seminole Tribe*, 517 U.S. at 54 ("[T]he text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts . . . .").
5. *See* Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 145 (1993) (disagreeing with the view that the Eleventh Amendment is merely a defense to liability and stating that it is only a jurisdictional requirement). *But see* CHEMERINSKY, *supra* note 4, § 7.3, at 399 (explaining that if Eleventh Amendment immunity is a restriction on subject matter jurisdiction, then it should not be waivable). Sovereign immunity might also be viewed as a third type of entity—an immunity that is waivable by statute but that neither deprives a federal court of jurisdiction nor must

Amendment has been read broadly. *Federal Maritime Commission v. South Carolina State Ports Authority*,[7] which extends sovereign immunity to adjudications in federal administrative agencies, is a recent example in this line of cases.

This Note discusses *Federal Maritime Commission* and its historical context. It also explores the deeply divided United States Supreme Court's reasons for refusing to abrogate sovereign immunity despite its unanimous agreement that the literal text of the Eleventh Amendment could not support its holding. Part II of this Note reviews the historical background of the Eleventh Amendment and the principle of sovereign immunity, describing the case law history. Part III summarizes the positions of the widely divergent majority and dissenting opinions. Finally, Part IV analyzes these different opinions and attempts to provide a rationale for *Federal Maritime Commission's* holding. This Note concludes that the Court's decision can be reconciled with the text of the U.S. Constitution and is a significant contribution to the preservation of our national liberty.

II. BACKGROUND

A. Eleventh Amendment History

The history of Eleventh Amendment jurisprudence has been discussed at length in several recent United States Supreme Court cases and cannot be understood outside of its historical context.[8] The Eleventh Amendment is related to, but not coterminous with, the doctrine of sovereign immunity.[9] Sovereign immunity predates the founding of the United States and is derived from the English common law.[10] The rationale behind sovereign immunity was that a court could not establish jurisdiction over the king because it was from him that a court derived its authority.[11] The United States's

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be raised as a complete defense by a state's attorney general.

6. 134 U.S. 1 (1890) (extending sovereign immunity to suits against a state by one of its own citizens).

7. 122 S. Ct. 1864 (2002).

8. CHEMERINSKY, *supra* note 4, at § 7.2, 390. *See also* Alden v. Maine, 527 U.S. 706, 722-24 (1999) (adopting the view that sovereign immunity derives from the history and structure of the Constitution).

9. *See Alden*, 527 U.S. at 713.

10. S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165, 167 (4th Cir. 2001).

11. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 234-35 (The University of Chicago Press 1979) (1765).

founding generation universally accepted this concept,[12] and it remains true today that a citizen may not sue the federal government without its consent.[13]

The States also claimed protection under this concept following the revolution.[14] During the ratification debates of the Constitution, several of our most prominent leaders discussed sovereign immunity's place in the new federal republic.[15] The most famous of these passages is found in THE FEDERALIST NO. 81, in which Alexander Hamilton explained:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.[16]

James Madison and John Marshall also spoke unequivocally on the importance and universal acceptance of sovereign immunity.[17]

Thus, sovereign immunity was well established at the time the States ratified the Constitution.[18] However, other than granting jurisdiction to federal courts in Article III, the Constitution did not address sovereign immunity.[19] Consequently, when the issue of state sovereign immunity came before the U.S. Supreme Court in 1793,[20] a four-member majority saw no place for the monarchical concept in a government "deriving its just powers from the consent of the governed."[21] The Court held that Article III "vests a

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12. *See Alden*, 527 U.S. at 715-18; *S.C. State Ports Auth.*, 243 F.3d at 167; THE FEDERALIST NO. 81, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

13. *See* Franconia Assoc. v. United States, 122 S. Ct. 1993, 2001 (2002).

14. *See S.C. State Ports Auth.*, 243 F.3d at 168-69; *see also* Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934) (explaining that states possess attributes of sovereignty and may not be sued without their consent unless there has been a surrender under the Constitution).

15. *Compare* Alden v. Maine, 527 U.S. 706, 716-19 (quoting Alexander Hamilton and other prominent founders in support of sovereign immunity), *with id.* at 772-81 (Souter, J., dissenting) (quoting James Wilson and others in opposition to sovereign immunity).

16. THE FEDERALIST NO. 81, *supra* note 12, at 487 (emphasis in original).

17. *See Alden*, 527 U.S. at 717-18.

18. *Id.* at 715.

19. *See* U.S. CONST. art. III, § 2 (extending the federal judicial power to certain controversies to which states are parties).

20. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

21. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see, e.g.*, *Chisholm*, 2 U.S. (2 Dall.) at 455 (asserting that sovereign immunity is derived from despotic notions of kingship in England, whereas the United States Constitution is

jurisdiction in the Supreme Court over a State, as a defendant, at the suit of a private citizen of another State."[22]

Only Justice Iredell dissented. Citing numerous authorities from the English common law, he contended that the preexisting rule was that a citizen may petition a sovereign for redress, but may not demand relief from a sovereign in one of its courts.[23] Secondly, Justice Iredell noted that no provision in the Constitution addressed the doctrine or attempted to limit it.[24] He concluded that, because nothing had taken sovereign immunity from the states, they must continue to have it.[25]

The majority holding seemed to have taken the country by surprise. In fact, courts have noted that *Chisholm v. Georgia* "fell upon the country with a profound shock."[26] A bill to amend the Constitution was introduced in the House of Representatives the day after the Court released the opinion,[27] and the requisite number of states ratified the Eleventh Amendment within a year.[28] The mere fact of its passage is evidence that American voters of the time strongly supported the concept of sovereign immunity.[29]

There is considerable debate over the exact intent and effect of the Eleventh Amendment.[30] As discussed above, the text itself appears to be limited in scope.[31] Consequently, Justice Souter argued that the Eleventh Amendment was intended to prohibit suits brought under the citizen-state diversity clauses of Article III, which name a state as a defendant, but not to bar federal question jurisdiction over private suits against states.[32]

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based on the principal that "a *State* [is] considered as subordinate to the people ... [b]ut [] every thing else [is] subordinate to the *State*").

22. *Chisholm*, 2 U.S. (2 Dall.) at 420.

23. *Id.* at 440-45.

24. *Id.* at 449-50.

25. *Id.* at 449.

26. Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1870 (2002) (quoting Alden v. Maine, 527 U.S. 706, 720 (1999)).

27. *Alden*, 527 U.S. at 721.

28. *See* CHEMERINSKY, *supra* note 4, at § 7.2 (discussing the history of the adoption of the Eleventh Amendment).

29. *See Alden*, 527 U.S. at 743.

30. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 109-10 (1996) (Souter, J., dissenting) (arguing that the Eleventh Amendment should be read to either "repeal[] the Citizen-State Diversity Clauses of Article III for all cases in which the State appears as a defendant," or to "strip[] the federal courts of jurisdiction in any case in which a state defendant is sued by a citizen not its own, even if jurisdiction might otherwise rest on the existence of a federal question in the suit"); *see also* CHEMERINSKY, *supra* note 4, at § 7.3 (listing three competing theories for interpreting the Eleventh Amendment).

31. *See supra* notes 4 and 5 and accompanying text.

32. *Seminole Tribe*, 517 U.S. at 109-11 & n.8 (Souter, J., dissenting). Article III, Section 2 of the United States Constitution provides, in part, that "[t]he judicial Power shall extend to ... Controversies ... between a State and Citizens of another State;

Similarly, the Eleventh Amendment's text only bars suits against a state by citizens of another state. However, in 1890, the Court held that sovereign immunity prevented a citizen from suing his own state without its consent.[33] Although the text itself could not have supported such a result, the Court reasoned that the Eleventh Amendment was not drafted to define the outer limits of sovereign immunity, but only to specifically overrule the holding in *Chisholm*.[34] Citing Alexander Hamilton,[35] as well as James Madison[36] and John Marshall,[37] the *Hans* court held that, because an action against a sovereign state was non-existent at the time the Constitution was ratified, it followed that there would have been no reason for the drafters of the Eleventh Amendment to have made provisions against this "unheard of" contingency.[38] The Court further noted that, because federal courts are provided with concurrent jurisdiction with state courts, federal courts could not have jurisdiction over claims against states barred by sovereign immunity in state courts.[39]

The *Hans v. Louisiana* decision has stirred up nearly as much controversy as *Chisholm* and continues to be criticized by some members of the Court.[40] Nevertheless, the Court later held state sovereign immunity extends to suits by Indian tribes,[41] foreign nations,[42] federal corporations,[43] admiralty proceedings,[44] suits exclusively based on federal rights,[45] and suits in a state's own courts.[46]

The Court has developed a number of exceptions to the sovereign immunity doctrine. The primary exception derives from the Fourteenth Amendment. In *Fitzpatrick v. Bitzer*[47] the Court held

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. . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

33. Hans v. Louisiana, 134 U.S. 1, 21 (1890).

34. *See Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 122 S. Ct. 1864, 1871 (2002); Alden v. Maine, 527 U.S. 706, 723 (1999) (discussing the history of the adoption of the Eleventh Amendment).

35. *Hans*, 134 U.S. at 13; *see supra* note 16 and accompanying text.

36. *Hans*, 134 U.S. at 14.

37. *Id.*

38. *Id.* at 18.

39. *Id.*

40. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 102 (1996) (Souter, J., dissenting) (arguing that *Hans* was erroneously decided).

41. Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 783 (1991).

42. Monaco v. Mississippi, 292 U.S. 313, 330 (1934).

43. Smith v. Reeves, 178 U.S. 436, 449 (1900).

44. *Ex parte* New York, 256 U.S. 490, 497 (1921).

45. *Seminole Tribe*, 517 U.S. at 72-73.

46. Alden v. Maine, 527 U.S. 706, 754 (1999).

47. 427 U.S. 445 (1976).

that Congress could abrogate a state's sovereign immunity from private causes of action based on the enforcement power of Section 5 of the Amendment.[48] However, this exception is narrowly construed. Congress must clearly state its intention to abrogate state sovereign immunity in a statute passed pursuant to the Fourteenth Amendment.[49] Even then, the bar will only be lifted if the cause of action protects fundamental rights, and there is evidence that the statute or regulation was created because of widespread violation of that right.[50] The Court has recognized several other exceptions to sovereign immunity: (1) a state may consent to a lawsuit;[51] (2) sovereign immunity does not apply to suits brought by the federal government or other states;[52] (3) sovereign immunity does not protect municipalities or other units of local government;[53] (4) certain private suits against state officers for only injunctive or declaratory relief to remedy an ongoing violation of federal law are allowed under the *Ex parte Young* exception;[54] and (5) sovereign immunity does not bar actions for money damages against state officers in their individual capacity for wrongful or unconstitutional conduct.[55]

Federal administrative agencies may not sue states without statutory authority, but the United States Attorney General may bring an enforcement action against a state under the exception for suits brought by the federal government.[56] In order to qualify as a suit by the federal government, the United States must "exercise . . . political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States."[57]

In 1989, a divided U.S. Supreme Court, in *Pennsylvania v. Union Gas Co.*, appeared to find a new exception, holding that

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48. *Id.* at 456; *see also* Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363-65 (2001) (reaffirming the principle that Congress may abrogate state sovereign immunity pursuant to its enforcement power of Section 5 of the 14th amendment).

49. *Seminole Tribe*, 517 U.S. at 55 (citing Blatchford v. Native Village of Noatak, 501 U.S. 775, 786 (1991)).

50. *See Garrett*, 531 U.S. at 368 (narrowly limiting the circumstances under which Congress may abrogate pursuant to its power under Section 5 of the 14th amendment); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82 (2000).

51. *Alden*, 527 U.S. at 755.

52. *Id.* (citing Monaco v. Mississippi, 292 U.S. 313, 328-29 (1934)).

53. *Id.* at 756.

54. *Ex parte* Young, 209 U.S. 123, 155-60 (1908).

55. S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165, 170 (4th Cir. 2001).

56. *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1876 (2002) (explaining the process by which the Federal Maritime Commission may enforce its judgments).

57. Alden v. Maine, 527 U.S. 706, 756 (1999).

Congress could abrogate state sovereign immunity pursuant to the Commerce Clause in Article I of the Constitution.[58] However, only four justices held this position, and Justice White, providing the fifth vote in a concurring opinion, wrote that he only agreed with the result and not "with much of [the] reasoning."[59] At this point, it appeared that sovereign immunity was all but eviscerated. If Congress could abrogate sovereign immunity pursuant to any of its Article I powers, then there would seem to be no constitutional limits on Congress' power to abrogate sovereign immunity.[60] However, five years later, in *Seminole Tribe of Florida v. Florida*,[61] the Court overruled *Union Gas*, holding that the "background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government."[62] *Seminole Tribe* has been criticized on the grounds that it undermines the ability of the federal government to enforce federal law on states.[63] Because the Supremacy Clause of the Constitution empowers the federal government to make laws that bind the states,[64] and the Constitution vests power to enforce federal laws with the executive branch of government,[65] it would seem to follow that the federal government would be able to respond to private complaints about unlawful state activity by bringing suit on behalf of the private complainants.[66] States remain subject to federal laws and must comply with regulations passed pursuant to the Commerce Clause,[67] but the Court held in *Seminole Tribe* that the Eleventh Amendment and the principle of sovereign immunity act to prevent private enforcement suits against states.[68] However, neither principle prevents the federal government, itself, from bringing enforcement actions against nonconsenting states.[69]

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58. 491 U.S. 1 (1989).

59. *Id.* at 57 (White, J., concurring). This case and Justice White's concurrence was discussed in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59, 63-64 (1996).

60. *Union Gas Co.*, 491 U.S. at 42 (Scalia, J., concurring in part and dissenting in part). This point was noted in *Alden*, 527 U.S. at 737.

61. 517 U.S. 44 (1996).

62. *Id.*

63. *Id.* at 77 (Stevens, J., dissenting).

64. U.S. CONST. art. VI, para. 2.

65. U.S. CONST. art. II, § 1.

66. Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1883 (2002) (Breyer, J., dissenting).

67. Alden v. Maine, 527 U.S. 706, 754-55 (1999).

68. *Seminole Tribe*, 517 U.S. at 72 ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.").

69. *Alden*, 527 U.S. at 755-56.

In *Alden v. Maine*[70] the Court held, over Justice Souter's bitter dissent, that the principle of sovereign immunity also extended to private suits in state courts.[71] The Court found that the sovereign immunity principle in the Eleventh Amendment derived not only from the common law tradition but also from the structure and history of the Constitution.[72] Justice Kennedy, writing for the majority, methodically rejected every argument against state sovereign immunity and concluded that "history, practice, precedent, and the structure of the Constitution" conclusively show that the states were never required to give up their sovereign immunity in their own courts and that Congress does not have the power to abrogate it.[73] *Alden* reaffirmed that sovereign immunity, although derived from common law, is based on constitutional principles of federalism and state dignity and, thus, extends constitutional protection to states beyond the literal text of the Eleventh Amendment.[74]

B. Case History

It is within this context that the *Federal Maritime Commission* parties' litigation ensued. South Carolina Maritime Services (Maritime Services), a South Carolina corporation,[75] requested permission on five occasions to berth the cruise ship *M/V Tropic Sea* at the South Carolina State Ports Authority's (SCSPA) port facilities at the Port of Charleston, South Carolina.[76] Each time SCSPA denied the request on the grounds that South Carolina law prohibited gambling[77] and that it was SCSPA's policy to deny berthing to ships whose "primary purpose was gambling."[78] Maritime Services pointed out that Carnival Cruise Lines ships were allowed to berth even though they offered gambling activities on the ships.[79] SCSPA countered that Carnival Cruise Lines ships

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70. 527 U.S. 706 (1999).

71. *Id.* at 754.

72. *See id* at 741-54 (discussing the structural and historical roots of sovereign immunity as a constitutional principle).

73. *Id.* at 754.

74. *Id.* at 727; *see also* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 669 (1999) (reaffirming the view that sovereign immunity extends beyond the literal text of the Eleventh Amendment).

75. Brief for the Federal Maritime Commission at 4, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (No. 01-46).

76. *Id.* at 5.

77. Joint Appendix at 18, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (No. 01-46).

78. *Fed. Mar. Comm'n*, 122 S. Ct. at 1868.

79. *Id.*

were different in that they were equipped for overnight travel.[80] In contrast, the *M/V Tropic Sea* was not fitted for overnight travel but only for day "gambling cruises to nowhere."[81] SCSPA argued that the policy was not discriminatory because it only prohibited berthing to ships whose primary purpose was gambling.[82]

Maritime Services then filed a complaint with the Federal Maritime Commission (FMC),[83] alleging that SCSPA had violated the Federal Shipping Act of 1984[84] by unreasonably preferring Carnival Cruise Lines' ships over Maritime Services,'[85] and by unreasonably refusing to deal or negotiate with Maritime Services.[86] Maritime Services further alleged that SCSPA's actions caused it to lose profits, earnings, sales, and business opportunities.[87] Maritime Services' complaint prayed for the FMC to issue a cease and desist order and to award reparations, interest, and attorney's fees.[88] Maritime Services also requested that the FMC seek a temporary restraining order and preliminary injunction.[89]

The Federal Shipping Act of 1984 provides for two types of proceedings in which the FMC may address complaints of alleged violations. First, the FMC may conduct its own investigation and bring suit.[90] Secondly, the FMC may adjudicate complaints by private citizens under § 1710(a) and (b). The FMC opted to adjudicate Maritime Services' complaint under the latter provisions.[91]

Because the SCSPA is an arm of the State of South Carolina,[92] SCSPA moved to dismiss the adjudication proceeding before the FMC, asserting sovereign immunity as a complete defense.[93] SCSPA also claimed that the Johnson Act[94] expressly preserved state laws that regulate or prohibit gambling in state territorial

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80. Joint Appendix at 29, *Fed. Mar. Comm'n* (No. 01-46).

81. Brief for the South Carolina State Ports Authority at 4, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (No. 01-46).

82. Joint Appendix at 29-30, *Fed. Mar. Comm'n* (No. 01-46).

83. *See* 46 U.S.C. app. § 1710(a) (1994 & Supp. V 1999).

84. *See id.* § 1701 *et seq.*

85. *See id.* § 1709(d)(4).

86. *See id.* § 1709(d)(10).

87. Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1868 (2002).

88. *Id.* at 1868-69.

89. Brief for South Carolina Ports Authority at 5, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (No. 01-46).

90. 46 U.S.C. app. § 1710(c) (1994 & Supp. V 1999).

91. *See* S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165-167 (4th Cir. 2001).

92. Ristow v. S.C. Ports Auth., 58 F.3d 1051, 1053-55 (4th Cir. 1995).

93. Joint Appendix at 30-31, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (No. 01-46).

94. 15 U.S.C. § 1175 (2000).

waters and "permitted states to regulate gambling on vessels, even for voyages outside of [state] territorial waters."[95] The case was assigned to the chief administrative law judge (ALJ) who found that Maritime Services' complaint was barred by state sovereign immunity and dismissed the case.[96] However, Judge Kline concluded that the FMC could continue to prosecute the case by either initiating its own investigation or referring the case to its Bureau of Enforcement.[97]

Maritime Services did not take an administrative appeal to the full commission, but the FMC decided, on its own motion, to review the ALJ's ruling, ultimately reversing and concluding that state sovereign immunity did not preclude it from prosecuting private complaints.[98] SCSPA appealed, and the Court of Appeals for the Fourth Circuit reversed the FMC's decision.[99]

C. The Court of Appeals for the Fourth Circuit

In a well-reasoned opinion for a unanimous panel,[100] Chief Judge Wilkinson traced the history of sovereign immunity and held that "Congress simply cannot[,] . . . under its Article I power[,] . . . subject an unconsenting state to an adversarial proceeding brought by a private party."[101] He based his reasoning on *Seminole Tribe of Florida v. Florida*, in which he found the principle that "state sovereign immunity transcends the type of relief sought,"[102] and *Alden v. Maine*, in which he found the principle that sovereign immunity "transcends the forum" of the suit.[103]

The panel rejected the FMC's first argument that because the FMC is not a court, it does not exercise the judicial power of the United States.[104] It relied primarily on *Freytag v. Commissioner of Internal Revenue*.[105] In *Freytag* the United States Supreme Court held that the Tax Court, an Article I court, exercises the judicial power of the United States, even though it is part of the executive

95. Joint Appendix at 29, Fed. Mar. Comm'n (No. 01-46).

96. Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1869 (2002).

97. Brief for the South Carolina State Ports Authority at 5, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (No. 01-46).

98. *Fed. Mar. Comm'n*, 122 S. Ct. at 1869.

99. *See* S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165 (4th Cir 2001).

100. The panel included Chief Judge Wilkinson, Judge Niemeyer, and Judge Howard.

101. *S.C. State Ports Auth.*, 243 F.3d at 178.

102. *Id.* at 169.

103. *Id.* (citing Alden v. Maine, 527 U.S. 706 (1999)).

104. *Id.* at 171.

105. 501 U.S. 868 (1991).

branch.[106] Therefore, although there are differences between the Tax Court and the adjudicative authority of the FMC, the Fourth Circuit held that "[t]he central lesson from *Freytag* is that adjudication by adversarial proceedings *can* exist outside the context of Article III."[107] Thus, an administrative adjudication exercises the judicial power for sovereign immunity purposes.[108] Finding no compelling evidence that states were required to surrender their sovereign immunity pursuant to the constitutional design, Chief Judge Wilkinson opined that administrative courts could not be used for an "end-run around the Constitution."[109]

Also rejecting the FMC's second argument that an administrative proceeding is not a lawsuit, Chief Judge Wilkinson observed the FMC's proceedings and concluded that "[t]he [FMC] proceeding . . . walks, talks, and squawks very much like a lawsuit."[110] Thus, even though an administrative agency cannot enforce its judgment, its order exerts a coercive force similar to that of a judgment so as to offend a state's sovereign dignity.[111] Finding no other grounds for relief in any of the exceptions to sovereign immunity,[112] the Fourth Circuit unanimously held that the FMC's decision must be reversed and remanded with directions to dismiss.[113]

The FMC petitioned for certiorari, which the U.S. Supreme Court granted. The United States submitted briefs in support of the S.C. State Ports Authority.[114] The National Association of Waterfront Employers,[115] the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO),[116] Senators Edward M. Kennedy and Russell D. Feingold,[117] and the United

106. *S.C. State Ports Auth.*, 243 F.3d at 171.

107. *Id.*

108. *Id.*

109. *Id.* at 172.

110. *Id.* at 174.

111. *Id.* at 175.

112. *S.C. State Ports Auth.*, 243 F.3d at 176-78.

113. *Id.* at 179.

114. Brief for the United States, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (No. 01-46); Reply Brief for the United States, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (No. 01-46).

115. Brief *Amicus Curiae* of the National Association of Waterfront Employers in Support of Petitioner, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (No. 01-46).

116. Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in Support of Petitioner, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (No. 01-46).

117. Brief for Senators Edward M. Kennedy and Russell D. Feingold as *Amici Curiae* in Support of Petitioner, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (No. 01-46).

States Maritime Alliance Limited and Carriers Container Council, Inc.[118] filed amicus briefs in support of the FMC, while Charleston Naval Complex Redevelopment Authority,[119] the National Governors Association and numerous other organizations,[120] and thirty-seven states and the territory of Guam joined the State of South Carolina in filing an amicus brief in support of SCSPA.[121]

III. *FEDERAL MARITIME COMMISSION V. SOUTH CAROLINA STATE PORTS AUTHORITY*

The question presented to the Supreme Court was "[w]hether the Eleventh Amendment . . . or principles of state sovereign immunity from suit preclude Congress from requiring the Federal Maritime Commission to adjudicate a private person's complaint that a state-run port has violated the Shipping Act of 1984."[122] First, the FMC argued that other appellate decisions had held sovereign immunity to be inapplicable to administrative proceedings because they "do not exercise the judicial power."[123] The Constitution expressly authorizes Congress to regulate maritime commerce[124] and to prohibit discrimination by ports.[125] Thus, the Shipping Act of 1984 (Shipping Act) provisions, having been in place since the act's original enactment in 1916, are clearly within the constitutional scope of congressional authority.[126] The effect of upholding the Fourth Circuit decision would be to find the statute unconstitutional as applied to private complaints against states because the Shipping Act commands the FMC to investigate and adjudicate complaints.[127] The FMC reasoned that, because Congress has the authority to regulate maritime commerce,[128] the mere form of the enforcement

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118. Brief for United States Maritime Alliance Limited and Carriers Container Council, Inc. as *Amici Curiae* in Support of Petitioner, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (No. 01-46).

119. Brief for *Amicus Curiae* Charleston Naval Complex Redevelopment Authority in Support of Respondent, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (No. 01-46).

120. Brief of the National Governor's Association, et al. as *Amici Curiae* Supporting Respondents, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (No. 01-46).

121. Brief of the States of Maryland, et al. as *Amici Curiae* in Support of Respondent South Carolina State Ports Authority, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (No. 01-46).

122. Brief for the Federal Maritime Commission at I, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (No. 01-46).

123. *Id.* at 11.

124. U.S. CONST. art. I, § 8, cl. 3.

125. U.S. CONST. art. I, § 9, cl. 6.

126. Brief for Petitioner at 12, 15, *Fed. Mar. Comm'n* (No. 01-46).

127. *See* 46 U.S.C. app. § 1710(b); S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165, 175-76 (4th Cir. 2001) ("[T]he [FMC] *must* hear all complaints filed with it . . . [and] [t]he FMC had no choice but to adjudicate this dispute.").

128. Brief for the Petitioner at 12, *Fed. Mar. Comm'n* (No. 01-46).

power should be irrelevant.[129] The FMC also reiterated its argument that an administrative proceeding is not a "suit in law or equity"[130] and asserted that the "public rights" doctrine adequately protects state sovereign immunity "by limiting the circumstances under which Congress may authorize non-Article III tribunals to adjudicate complaints."[131]

Relying on *Alden v. Maine*, SCSPA replied that sovereign immunity bars suits by private parties against states, "regardless of the forum."[132] SCSPA further contended that, if administrative tribunals, such as the FMC, could abrogate state sovereign immunity, they would have broader jurisdiction than Article I courts.[133] Reviewing the history, SCSPA noted that congressional statutes authorizing private suits against states did not exist until the Federal Employers' Liability Act (FELA) was enacted in 1964.[134] Although a 1964 U.S. Supreme Court case, *Parden v. Terminal Railway of Alaska Docks Department*,[135] seemed to allow congressional abrogation of sovereign immunity under FELA, the Court had overruled it in 1987.[136] SCSPA thus found a long line of precedent supporting state sovereign immunity in federal courts. Further analogizing to the doctrine of federal sovereign immunity, which is also not expressly provided for in the Constitution, SCSPA pointed out that the United States has successfully raised its sovereign immunity defense in administrative proceedings.[137] SCSPA also attempted to show that administrative proceedings do exercise judicial power and that sovereign immunity is offended not just by the enforcement of a judgment, but by the mere fact that it has been subjected without its consent to an adversarial proceeding.[138] Finally, SCSPA argued that neither the public rights

129. *See id.*

130. *Id.* at 23-25.

131. *See id.* at 34. The public rights doctrine permits Congress to authorize administrative agencies to adjudicate suits against the government that involve certain public rights. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 582-83 (1985) (stating that "the court has long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decision making authority in tribunals that lack the attributes of Article III courts"). Neither the Fourth Circuit nor the U.S. Supreme Court found merit in this argument. *See* S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165, 175 n.* (4th Cir. 2001).

132. Brief of the South Carolina Ports Authority at 14, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (No. 01-46) (quoting Alden v. Maine, 527 U.S. 706, 709 (1999)).

133. *Id.* at 13-14.

134. *Id.* at 18-19 (citing Parden v. Terminal Ry. of Ala. Docks Dep't., 377 U.S. 184 (1964)); *see also* Alden v. Maine, 527 U.S. 706, 744 (1999) (reviewing the history of statutes authorizing private suits against states in administrative agencies).

135. 377 U.S. 184 (1964).

136. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 683 (1999).

137. Respondent's Brief at 28, *Fed. Mar. Comm'n* (No. 01-46).

138. *Id.* at 38.

doctrine nor any of the exceptions to the sovereign immunity defense applied to the case.[139]

A. Majority Opinion

1. The Hans Presumption

Justice Thomas, writing for the majority,[140] first briefly reviewed the history of sovereign immunity and concluded that the Eleventh Amendment stands "not so much for what it says, but for the presupposition of our constitutional structure which it confirms."[141] Turning to the first issue of whether an administrative proceeding falls within the meaning of the text of the Eleventh Amendment, he noted that, since *Hans v. Louisiana*,[142] sovereign immunity has been applied to a variety of cases that are not strictly suits in law or equity.[143] "[A]ttribut[ing] great significance" to the fact that states were not subject to private suits in administrative proceedings from the time the Constitution was ratified until recently,[144] Justice Thomas applied the *Hans* presumption that "the Constitution was not intended to 'rais[e] up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'"[145] He compared the rules governing pleadings, discovery, and the role and powers of the ALJ in administrative proceedings with the Federal Rules of Civil Procedure, concluding that the similarities were "overwhelming."[146] Therefore, he found that administrative proceedings should be considered judicial in nature for the purposes of the Eleventh Amendment and should trigger sovereign immunity.

Justice Thomas concluded that state sovereign immunity barred the FMC from prosecuting private suits against nonconsenting states.[147] Such suits would be "an impermissible affront to a State's dignity."[148] Furthermore, he agreed with the Fourth Circuit's reasoning that because Congress cannot abrogate a state's sovereign immunity in Article III proceedings, it should not have the power to evade this obstacle through the use of Article I administrative proceedings.[149]

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139. *See id.* at 41-50.

140. Justice Thomas' majority opinion was joined by Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Scalia.

141. Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1871 (2002).

142. 134 U.S. 1 (1890).

143. *Fed. Mar. Comm'n*, 122 S. Ct. at 1871; *see supra* notes 38-44 and accompanying text.

144. *Fed. Mar. Comm'n*, 122 S. Ct. at 1872.

145. *Id.* (quoting *Hans*, 134 U.S. at 18).

146. *Id.* at 1873-74.

147. *Id.* at 1874.

148. *Id.*

149. *Id.* at 1875.

2. *Administrative Adjudications Indistinguishable from Judicial Proceedings*

Justice Thomas next considered and rejected two arguments that attempted to distinguish administrative adjudications from judicial proceedings for state sovereign immunity purposes. He first addressed the United States' contention that administrative proceedings should be distinguished because the FMC's orders are not self-executing.[150] In other words, the FMC has no power to enforce its own order. Instead, it must bring an enforcement action in a federal district court.[151]

However, Justice Thomas found this to be a "distinction without a meaningful difference."[152] He observed that a state must appear before the FMC in order to contest the merits of the complaint against it because, if it did not do so, it would be barred from raising the merits in either the enforcement action or an appeal.[153] Secondly, the FMC may impose monetary penalties that would accrue daily.[154] Thus, he concluded that a state lacks meaningful choice to refrain from participating in the proceeding, and the administrative proceeding exerts sufficient coercive force to be considered an adjudication.[155]

In dissent, Justice Breyer had contended that, because the states have consented to suits brought by the federal government, the enforcement action by the United States Attorney General does not violate sovereign immunity.[156] He noted that the FMC cannot enforce its own orders, and the United States must bring a separate action in federal court to enforce the FMC's award to the private complainant. In response, Justice Thomas opined that the U.S. Attorney General's enforcement action does not retroactively convert the entire action into one brought by the federal government, particularly because the FMC is required to adjudicate complaints brought by private parties.[157] He reasoned that this procedure would fail as an exception for suits brought by the federal government because it would not meet the requirement that the United States must exercise political responsibility for a complaint in order to bring it within the ambit of the exception.[158]

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150. *Fed. Mar. Comm'n*, 122 S. Ct. at 1875.
151. *Id.*
152. *Id.*
153. *Id.* at 1875-76.
154. *Id.* at 1876.
155. *Id.* at 1876.
156. Fed. Mar. Comm'n, 122 S. Ct. at 1883 (Breyer, J., dissenting).
157. *Id.* at 1876.
158. *Id.* at 1877; *see* Alden v. Maine, 527 U.S. 706, 756 (1999) ("Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.").

He concluded that the FMC adjudication exerted sufficient coercive power to invoke the sovereign immunity bar on suits against states.

Addressing the FMC's second argument that administrative proceedings do not present the same threat to a state's financial integrity as do suits in Article III courts, Justice Thomas declared that, while protecting state treasuries is an important concern, the central function of state sovereign immunity is "'to accord the States the respect owed them' as joint sovereigns."[159] Therefore, he found that the applicability of sovereign immunity does not depend on the type of relief sought.[160] Moreover, the language of the statute[161] makes it clear that the FMC's so-called "unenforceable" reparation orders could, and likely would, be enforced against a state in an action brought by the U.S. Attorney General.[162]

3. *Compelling Federal Interest and Injunctive Relief Arguments*

Justice Thomas concluded the majority opinion by addressing the two final arguments of the FMC, using the Court's holding in *Seminole Tribe of Florida v. Florida*.[163] First, the FMC contended that the Congress's constitutional delegation of power to regulate maritime commerce demands that the federal government have authority to regulate that commerce, including the authority to authorize private suits against states to enforce violations.[164] Justice Thomas responded that the Court has held that sovereign immunity extends to suits in maritime commerce and suits based on the Commerce Clause.[165] As stated in *Seminole Tribe*, "Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."[166]

Thus, sovereign immunity retains its vitality even when there is a compelling federal interest for uniformity.[167] However, it remains true that a federal agency may conduct its own investigation of a state's alleged violation of federal law, either on the agency's own initiative or based on a private complaint.[168] Additionally, a federal

159. *Fed. Mar. Comm'n*, 122 S. Ct. at 1877 (quoting Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993)).

160. *Id.* (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 58 (1996)).

161. *See* 46 U.S.C. app. § 1712(a) (1994 & Supp. V 1999) ("Whoever violates . . . a Commission order is liable to the United States for a civil penalty.").

162. *Fed. Mar. Comm'n*, 122 S. Ct. at 1877-78.

163. 517 U.S. 44 (1996).

164. *Fed. Mar. Comm'n*, 122 S. Ct. at 1878.

165. *Id.*

166. *Id.* (quoting *Seminole Tribe*, 517 U.S. at 72).

167. *Id.*

168. *Id.* at 1878-79.

agency may bring suits in its own name in federal district court.[169] Therefore, Justice Thomas reasoned that the Court's holding does not eviscerate the federal government's ability to prevent state violations of federal law.[170]

Lastly, Justice Thomas rejected the FMC's argument that, even if a reparation order were barred by sovereign immunity, the FMC should still be able to issue injunctive relief, such as a cease-and-desist order.[171] Relying on *Seminole Tribe*, Justice Thomas reiterated that the type of relief sought is irrelevant to the applicability of sovereign immunity.[172]

4. *State Dignity*

In closing, Justice Thomas conceded that the federal system is, at times, inefficient and inconvenient.[173] Nevertheless, he opined that the primary purpose of the federal government is not to achieve efficiency, but to preserve freedom.[174] "By guarding against encroachments by the Federal Government on fundamental aspects of state sovereignty, such as state immunity, we strive to maintain the balance of power embodied in our Constitution and thus to 'reduce the risk of tyranny and abuse from either front.'"[175] He concluded that, although private suits against states in federal agencies were not envisioned at the time our nation was born, the Court's holding with respect to such suits is the most faithful to the constitutional design.[176]

B. *Dissenting Opinions*

1. *Justice Stevens*

Justice Stevens wrote a brief dissent emphasizing two main points. First, he noted that basing sovereign immunity on state dignity is "embarrassingly insufficient."[177] He pointed out that former Chief Justice John Marshall had rejected this rationale in the early case of *Cohens v. Virginia*.[178]

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169. *Id.* at 1879.
170. *Fed. Mar. Comm'n*, 122 S. Ct. at 1879.
171. *Id.*
172. *Id.* (citing *Seminole Tribe*, 517 U.S. at 58).
173. *Id.*
174. *Id.*
175. *Id.*
176. *Fed. Mar. Comm'n*, 122 S. Ct. at 1879.
177. *Id.* at 1880 (Stevens, J., dissenting).
178. *Id.*; 19 U.S. (6 Wheat) 406-07 (1821) ("That [the Eleventh Amendment's] motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment.").

Secondly, he reiterated Justice Brennan's argument in *Atascadero State Hospital v. Scanlon*.[179] Essentially, Justice Brennan's argument was that *Chisholm v. Georgia*[180] held that the Court had both personal and subject matter jurisdiction over the State of Georgia, and that the legislative history of the Eleventh Amendment revealed that it was intended to overrule the subject matter jurisdictional holding, but to allow the Court to retain personal jurisdiction over the states.[181] He argued that this would undermine the state "dignity" rationale and would be consistent with Justice Marshall's statement in *Cohens v. Virginia*.[182]

2. *Justice Breyer*

a. *Constitutional Nature of Agency Courts*

Justice Breyer's lengthy dissent, joined by Justices Stevens, Souter, and Ginsburg, decried the majority for basing its holding on a doctrine not supported by the literal text of the Constitution.[183] He began by noting that an administrative agency is "independent" and belongs neither to the legislative nor the judicial branch of the federal government.[184] Instead, agencies belong to the executive branch and were created to execute and enforce legislative mandates.[185] In Justice Breyer's view, the FMC adjudication is merely an "internal adjudicative process" by which complaints are evaluated before proceeding to federal court.[186] Because Congress is constitutionally permitted to delegate rulemaking and adjudicative authority to agencies, and the Court has read certain safeguards into the law to prevent abuses of that authority, he saw no reason to treat agency adjudications as exercises of judicial power, however close a resemblance there may be.[187]

Furthermore, Justice Breyer downplayed this resemblance by pointing out that the FMC may allow hearsay evidence, resolve factual disputes through "official notice," and decide the matter based on rules that it has created.[188] Noting that any order issued by the FMC must be enforced in an Article III court, he found the agency proceeding to more closely resemble the executive power to enforce the laws rather than the judicial power to resolve disputes.[189] Because Congress has the power to legislate pursuant to

179. *See* 473 U.S. 234, 259-90 (1985) (Brennan, J., dissenting).
180. 2 U.S. (2 Dall.) 419 (1792).
181. *See Atascadero*, 473 U.S. at 259-90.
182. *Fed. Mar. Comm'n*, 122 S. Ct. at 1880-81.
183. *Id.* at 1881.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 1881-82.
188. *Fed. Mar. Comm'n*, 122 S. Ct. at 1882.
189. *Id.* at 1883.

the Commerce Clause, he reasoned that it makes little sense to tie the hands of the executive branch in enforcing these laws against states.[190]

b. *Lack of Anchor in the Constitution*

Justice Breyer next attacked the Court's conclusion that sovereign immunity is a constitutional principle. He asserted that the Eleventh Amendment's text only prohibits private actions against states brought in Article III courts.[191] He also responded to the Court's holding in *Freytag v. Commissioner of Internal Revenue*,[192] which found that the Tax Court, an Article I court, exercised Article III power,[193] by distinguishing administrative proceedings from the Tax Court or the Court of Claims.[194] Because administrative agencies are not "courts" created by Congress but extensions of the executive power, he reasoned that the *Freytag* holding should be inapplicable.[195]

Turning to the Tenth Amendment, Justice Breyer denied that sovereign immunity could have been "reserved to the States" for a situation like this because the commerce power has been delegated to Congress and the federal government is empowered to enforce its mandates.[196] Thus, he found no reason why sovereign immunity should be preserved as a constitutional principle.[197] He criticized the majority's argument regarding constitutional design, noting that the principles are abstract and that phrases such as "constitutional design," "system of federalism," and "plan of the convention" are not used in the Constitution itself.[198]

c. *Argument from History*

Concluding that the concept of sovereign immunity has no basis in the text of the Constitution, Justice Breyer next attacked the majority's argument by citing history. He first criticized the majority for attaching significance to the 18th century silence on sovereign immunity in administrative proceedings.[199] Because the federal government may sue a state[200] and the First Amendment grants citizens the right to petition the federal government for

190. *Id.* at 1883-84.
191. *Id.* at 1883.
192. 501 U.S. 868 (1991).
193. *See supra* notes 105-07 and accompanying text.
194. *Fed. Mar. Comm'n*, 122 S. Ct. at 1883.
195. *Id.*
196. *Id.* at 1883-84.
197. *Id.*
198. *Id.* at 1884.
199. *Id.* at 1885.
200. *Fed. Mar. Comm'n*, 122 S. Ct. at 1885 (citing West Virginia v. United States, 479 U.S. 305, 311 (1987)).

redress,[201] he reasoned that a private citizen should be able to petition the federal government for relief against a state.[202] The executive branch is vested with the authority to enforce the laws,[203] and administrative agencies are given broad discretion in choosing either adjudication or rulemaking to accomplish their purposes.[204] The executive power should be as broad as the legislative power. Thus, he argued that the 18th century silence regarding agency adjudications of private complaints should argue in favor of their validity for Eleventh Amendment purposes.[205] He urged that the absence of agency adjudications in the early years of United States history should not prevent the Constitution from being "flexible enough to meet modern needs."[206]

d. Preservation of State Dignity

Justice Breyer next turned to the majority's finding that state dignity required sovereign immunity.[207] He again noted that agency proceedings are not the same as Article III adjudications.[208] Secondly, he argued that agency proceedings do not exert sufficient compulsion upon states to merit Eleventh Amendment protection.[209] A private party cannot force a state to comply with a law, and orders of the FMC are not self-executing, whether entered upon a private complaint or that of the federal government.[210] Therefore, the involvement of the federal government is necessary to give authority to the action, regardless of whether a private party or the FMC files the original claim.[211] Next, he pointed out that if a state seeks judicial review, its opponent in federal court is not the private party, but rather the federal agency.[212] Thus, the *Alden v. Maine* requirement that the United States exercise political responsibility is satisfied because the federal government exercises its discretion in deciding whether to initiate its own administrative proceeding or to initiate an enforcement proceeding in federal court.[213]

Conceding that the administrative adjudication of a private complaint may exert some practical pressure on a state to respond and comply, Justice Breyer argued that this pressure is an

201. *Id.*
202. *Id.*
203. U.S. CONST. art. II, § 1.
204. *Fed. Mar. Comm'n*, 122 S. Ct. at 1885.
205. *Id.*
206. *Id.*
207. *Id.* at 1885-86.
208. *Id.* at 1886.
209. *Id.*
210. *Fed. Mar. Comm'n*, 122 S. Ct. at 1886.
211. *Id.*
212. *Id.* (citing 28 U.S.C. § 2344 (2000)).
213. *Id.*

insufficient affront to the state's dignity to warrant protection.[214] Citizens may exert the same pressure by complaining to Congress or seeking a rulemaking proceeding in a federal agency.[215] A citizen may also request that a federal agency declare that a state is not in compliance with a federal statute or regulation, thus exerting political pressure on a state.[216] Therefore, he saw no reason why states should be entitled to special constitutional protection in this instance.[217]

Justice Breyer next addressed the problem that the relevant statutes cited to in *Federal Maritime Commission* appeared to preclude meaningful judicial review.[218] He pointed out that the Constitution requires judicial review, and a state might be entitled to judicial review of an FMC order regarding a private complaint.[219] However, this question was not properly before the court.[220]

e. Practical Consequences

Justice Breyer also argued against the majority's holding from a practical policy standpoint. The Court's decision, he postulated, unduly burdens federal agencies by removing a necessary tool from their arsenal.[221] Because agencies must now expend extra resources to investigate and decide whether to prosecute each private complaint, the result will be more bureaucracy and less efficient, fair, and speedy enforcement of important federal objectives.[222]

Finally, Justice Breyer asserted that the majority's holding undermines the necessary structural flexibility inherent in the constitutional design. He argued that a representative government will suffer if it is stifled by the judiciary.[223] He based his reasoning in New Deal theory, stating that the Court should interpret the Constitution broadly in order to give the federal government flexibility in accomplishing its aims.[224] It should reject "formalistic" and "restrictive" interpretations that inhibit Congress from enacting social and economic legislation as it sees fit.[225]

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214. *Id.* at 1887.
215. *Id.*
216. *Fed. Mar. Comm'n*, 122 S. Ct. at 1887.
217. *Id.*
218. *Id.*
219. *Id.* at 1887-88.
220. *Id.* at 1888.
221. *Id.*
222. *Fed. Mar. Comm'n*, 122 S. Ct. at 1888 (citing Printz v. United States, 521 U.S. 898, 959 (1997)) (Stevens, J., dissenting) (commenting that states' rights decisions have the effect of actually increasing federal bureaucracy in order to implement their policies).
223. *Id.* at 1888-89.
224. *Id.* at 1889.
225. *Id.*

IV. ANALYSIS

A. Majority Opinion

As noted above, the crux of the disagreement between the majority and dissenting opinions seems to center on the text of the Eleventh Amendment. The FMC noted that the effect of the Court's decision was to declare a section of the Shipping Act[226] unconstitutional as applied[227]—a result not required by the express terms of the Constitution. On its face, the Eleventh Amendment simply cannot support the broad principle of sovereign immunity upheld by the Court.[228] The Constitution provides that the decisions of the people should be embodied in statutes duly enacted by the legislature.[229] When the Court merely substitutes its judgment for that of the legislature without finding grounds for its decision in the Constitution, it violates the separation of powers principle.[230] Therefore, the Court should refuse to strike down legislation unless clearly in conflict with the Constitution.[231]

When viewed in this light, the dissent rightly points out that the Court must not merely recite that it has "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms."[232] Justice Thomas grounded his holding in constitutional history, and a review of the cases from *Chisholm v. Georgia*[233] and *Hans v. Louisiana*[234] to *Alden v. Maine*[235] does reveal a strong presumption in favor of a broad understanding of state sovereign immunity.[236] However, as Justice Souter pointed out, a mere common law tradition may be defeasible by statute.[237] Thus, it is necessary for the Court to find some justification within the actual text of the Constitution for holding that the principle of sovereign immunity extends beyond the express provisions of the Eleventh Amendment.

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226. 46 U.S.C. app. § 1701 *et. seq.* (1994 & Supp. V 1999).

227. *See supra* notes 126-27 and accompanying text.

228. *See* U.S. CONST. amend. XI.

229. U.S. CONST. art. I, § 1.

230. *See* FCC v. Beach Communications Inc., 508 U.S. 307, 313-16 (1993).

231. United States v. Morrison, 529 U.S. 598, 607 (2000).

232. Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1871 (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991)).

233. 2 U.S. (2 Dall.) 419 (1793).

234. 134 U.S. 1 (1890).

235. 527 U.S. 706 (1999).

236. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 72-73 (2000); *Alden*, 527 U.S. at 713; Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 669 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 634 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996); *Blatchford*, 501 U.S. at 779; Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985); *Hans*, 134 U.S. at 18.

237. *Alden*, 527 U.S. at 764 (Souter, J., dissenting).

Although Justice Thomas denied it,[238] the Court's holding is essentially a Tenth Amendment argument. The Court's argument, which uses constitutional history, builds on the precedent established in several recent cases, most notably *Seminole Tribe of Florida v. Florida*[239] and *Alden*. In *Alden* Justice Kennedy made it clear that the Court's holding was based in the Tenth Amendment: "Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power."[240]

The Court may be loathe to use the Tenth Amendment to support its holding because this amendment has proved to be a poor defense against federal encroachment on areas traditionally reserved to the states, particularly in regards to the commerce[241] and taxing powers.[242] However, the Tenth Amendment was one of ten amendments that the American people selected from twelve proposed ones[243] as part of a compromise to allow the Constitution to be ratified.[244] Therefore, the Tenth Amendment should be no less enforceable than any other of the amendments comprising the Bill of Rights.[245]

Then, it follows that the Court's argument from history, as buttressed by the Tenth Amendment, runs as follows: a) the states possessed sovereign immunity at the time the Constitution was ratified;[246] b) under the Tenth Amendment, the states retained all powers not expressly or impliedly delegated to the federal government by the Constitution;[247] c) nothing in the original Constitution delegated the power to abrogate state sovereign immunity to the United States;[248] d) although Article III could be read to include the federal power to authorize private suits against

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238. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 122 S. Ct. 1864, 1878 n.18 (2002).

239. 517 U.S. 44 (1996).

240. *Alden*, 527 U.S. at 713-14.

241. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-49 (1985) (rejecting the traditional government function exception to the reach of the Commerce Clause); United States v. Darby, 312 U.S. 100, 124 (1941) ("[The Tenth] [A]mendment states but a truism that all is retained which has not been surrendered."); *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 29-32 (1937) (stating that the Tenth Amendment does not prevent Congress from regulating local industries).

242. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 315, 429-31 (1819) (finding that states did not retain power to tax federal entities after ratification).

243. J.W. PELTASON, UNDERSTANDING THE CONSTITUTION 127 (Holt, Rinehart and Winston 1979) (1949).

244. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833).

245. *See* New York v. United States, 505 U.S. 144, 155-59 (1992) (discussing the point that if the Constitution does not delegate a power to the federal government, then it is retained by the states).

246. Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991).

247. U.S. CONST. amend. X.

248. Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1870 (2002); Alden v. Maine, 527 U.S. 706, 716 (1999).

states, a theory the *Chisholm v. Georgia* majority adopted,[249] the prevailing understanding was that Article III applied only to existing causes of action and that the Eleventh Amendment effectively repealed any extension of Article III jurisdiction by *Chisholm*;[250] and e) therefore, the federal government has never been granted power to abrogate sovereign immunity, except by the Fourteenth Amendment's enforcement power,[251] and thus the states must continue to possess this right.

Based on this line of reasoning, the critical factor in determining whether sovereign immunity applies is not whether the Eleventh Amendment expressly prohibits it, but whether the states possessed the immunity prior to the ratification of the Tenth Amendment. The Eleventh Amendment merely confirms that sovereign immunity is a state right protected by the Constitution through the Tenth Amendment.[252] Justice Kennedy has convincingly demonstrated that the states retained sovereign immunity at the time the American people ratified the Bill of Rights.[253] Thus, sovereign immunity is established as a constitutional principle not bounded by the text of the Eleventh Amendment.[254] This is in line with the Court's broad reading of the Bill of Rights.[255] Because the Eleventh Amendment also serves to preserve rights from the federal government, it should also be read broadly.

When viewed in this light, the admittedly "embarrassingly insufficient" state dignity rationale is unnecessary.[256] Furthermore, grounding the sovereign immunity principle in both the Tenth and Eleventh Amendments resolves the problems raised by the fact that administrative proceedings do not exercise the judicial power and are not "suits in law or equity."[257] Because a quasi-judicial proceeding under the executive power was "anomalous and unheard of" at the time the Tenth and Eleventh Amendments were ratified,[258] Congress does not have the power to create a right for private suits against states because, prior to the Fourteenth

249. 2 U.S. (2 Dall.) 419 (1793).

250. *See* Hans v. Louisiana, 134 U.S. 1, 11-15 (1890).

251. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

252. Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779-82 (1991).

253. *Alden*, 527 U.S. at 716-18.

254. S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165, 169 (4th Cir. 2001).

255. Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1889 (2002) (Breyer, J., dissenting).

256. *Id.* at 1880 (Stevens, J., dissenting).

257. *See S.C. State Ports Auth.*, 243 F.3d at 173 (discussing the issue of whether administrative proceedings exercise judicial power).

258. *Fed. Mar. Comm'n*, 122 S. Ct. at 1872 (quoting Hans v. Louisiana, 134 U.S. 1, 18 (1890)).

Amendment, neither the states nor the people had ever delegated this power to Congress.[259]

However, because the FMC is an executive agency and the Constitution vests the executive branch with broad enforcement powers, one should consider the question of whether an administrative proceeding is sufficiently similar to an Article III adjudication as to trigger the sovereign immunity principle. Justice Thomas provides a lengthy list of similarities between the FMC's Rules of Practice and the Federal Rules of Civil Procedure.[260] Justice Breyer counters by arguing that administrative proceedings allow hearsay evidence, resolve factual disputes through "official notice," and use different rules of decision.[261] However, sovereign immunity applies to jurisdiction over private suits brought against states.[262] The fact that administrative proceedings have somewhat more lenient evidentiary rules and decision-making processes is irrelevant because these rules apply only after jurisdiction is established.

Administrative proceedings can exert the same subpoena power to compel a state to appear.[263] They are presided over by an ALJ, who has substantially similar powers to that of a federal judge.[264] As the Fourth Circuit noted, an adjudicative body need not derive its authority from Article III in order to qualify as an "adjudication by adversarial proceeding[]."[265] Moreover, administrative agency orders are often enforceable in federal court, and in the enforcement action, states can no longer contest the merits.[266] Hence, even though administrative proceedings technically do not exercise the Article III judicial power, they do exert judicial power against states, at the behest of private complainants, for the purposes of the Eleventh Amendment.[267]

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259. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59-66 (1996) (overruling Penn v. Union Gas Co., 491 U.S. 1 (1989), which had held that Congress could abrogate state sovereign immunity pursuant to constitutional provisions other than the Fourteenth Amendment). Congress can abrogate state sovereign immunity pursuant to Section 5 of the Fourteenth Amendment only with a "clear legislative statement." *Id.* at 55.

260. *Fed. Mar. Comm'n*, 122 S. Ct. at 1873-74; *see also* Brief for *Amicus Curiae* Charleston Naval Complex Redevelopment Authority in support of Respondent, Fed. Mar. Comm'n v. S.C. State Ports Auth. at 12-17, 122 S. Ct. 1864 (2002) (No. 01-46).

261. *Fed. Mar. Comm'n*, 122 S. Ct. at 1882 (Breyer, J., dissenting).

262. Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993).

263. S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165, 173 (4th Cir. 2001).

264. *Fed. Mar. Comm'n*, 122 S. Ct. at 1873-74.

265. *S.C. State Ports Auth.*, 243 F.3d at 171.

266. *Fed. Mar. Comm'n*, 122 S. Ct. at 1877 n.17.

267. *S.C. State Ports Auth.*, 243 F.3d at 171.

The executive branch is charged with the duty to enforce the laws and may utilize adjudication to accomplish its objectives,[268] but this is no reason to circumvent sovereign immunity through administrative adjudications created pursuant to Article I of the Constitution. The fact remains that either the U.S. Attorney General or a federal agency may still initiate a suit against a state if administrative adjudications cannot.[269] Although, as a matter of policy, an agency may be able to work more efficiently by prosecuting private suits,[270] policy considerations should not prevail over the text of the Constitution. Thus, if the executive power cannot prosecute a private suit in federal court, there is no reason why it should be able to do so in its own administrative courts either.[271]

Considerations of comity and justice militate against allowing agencies to have the authority to prosecute suits that are barred in federal courts. In agency proceedings, the agency's attorney prosecutes the case before an agency ALJ.[272] These hearings are required to be impartial,[273] but the agency may disregard the ALJ's decision and proceed on its own motion.[274] Therefore, an agency decision has a greater potential to be biased. Additionally, great deference is given to administrative decisions when appealed.[275] The reviewing court may not substitute its judgment for that of the agency on questions of fact,[276] and administrative decisions are reviewed under the deferential "substantial evidence" rule.[277] Furthermore, the reviewing court is limited to the record on appeal, just as if it was an appeal from a district court.[278] Thus, the affront to state dignity and a state's financial integrity are potentially greater in administrative proceedings than in federal courts. Moreover, if a state acted pursuant to a duly enacted state law, then the result of an administrative agency decision against a state would be to deny citizens of that state the right to a democratic decision on that issue, seemingly without due process of law. Thus, the policy reasons for sovereign immunity in Article III courts apply just as forcefully in administrative proceedings, if not more.

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268. *Fed. Mar. Comm'n*, 122 S. Ct. at 1881 (Breyer, J., dissenting) (quoting Crowell v. Benson, 285 U.S. 22 (1932).

269. *Id.* at 1877 (Breyer, J., dissenting).

270. *Id.* at 1888.

271. *See S.C. State Ports Auth.*, 243 F.3d at 172.

272. 46 C.F.R. § 502.223 (2001).

273. *See* 5 U.S.C. § 554(d) (2000).

274. *Fed. Mar. Comm'n*, 122 S. Ct. at 1869.

275. *See* Marsh v. Or. Natural Res. Council, 490 U.S. 360, 375-76 (1989); Santa Fe Energy Prods. Co. v. McCutcheon, 90 F.3d 409, 413 (9th Cir. 1996).

276. Fund for Animals, Inc. v. Rice, 85 F.3d 535, 542 (11th Cir. 1996); *see also* 5 U.S.C. § 706 (2000) (providing the standard of review for federal administrative decisions).

277. Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992).

278. *Fed. Mar. Comm'n*, 122 S. Ct. at 1875-76.

B. *Dissenting Opinions*

1. *Justice Stevens' Arguments*

Justice Stevens rightly pointed out that the "state dignity" rationale, standing alone, is an insufficient ground for supporting sovereign immunity.[279] He also argued that the Eleventh Amendment only overruled *Chisholm v. Georgia's* subject matter jurisdiction holding, "leav[ing] intact *Chisholm's* personal jurisdiction holding[] that the Constitution does not immunize States from a federal court's process."[280] However, as noted by the Fourth Circuit, Congress should not be able to grant broader jurisdiction to administrative proceedings than to Article III courts.[281] This would make no sense because Article III courts review administrative decisions. The anomalous result would be that federal courts would have no jurisdiction over appeals of private suits against states from administrative proceedings, unless a state consents to waive its immunity in order to appeal.

2. *Justice Breyer: States Surrendered Sovereign Immunity by Ratification*

Justice Breyer argued that the states surrendered sovereign immunity in ratifying the Constitution by virtue of the Commerce Clause.[282] However, this argument is undermined by the fact that the Eleventh Amendment was quickly passed soon after the Constitution's ratification for the specific purpose of preserving sovereign immunity.[283] Thus, any surrender of rights under the Commerce Clause was rendered ineffective by the Tenth and Eleventh Amendments. Additionally, the fact that the states delegated power to Congress in order to regulate commerce does not automatically mean that the states agreed to give Congress power to abrogate sovereign immunity. Because general federal question jurisdiction did not exist in federal courts until 1875,[284] private suits against states could have only been brought in state courts. As *Alden v. Maine* confirmed, Congress has no power to abrogate a state's sovereign immunity in a state's own courts.[285] Thus, it is incomprehensible how the states could have agreed to grant Congress the power to create a private right to sue a state simply by ratifying the Constitution.

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279. *Id.* at 1880.

280. *Id.*

281. S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165, 172 (4th Cir. 2001).

282. *Fed. Mar. Comm'n*, 122 S. Ct. at 1884.

283. Alden v. Maine, 527 U.S. 706, 724 (1999).

284. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 69-70 (1996).

285. *Alden*, 527 U.S. at 754.

Because Congress was not given the power to abrogate sovereign immunity via the Commerce Clause, it has no power to create such a right by establishing administrative adjudications. "[W]ould the founders have countenanced a system by which Congress could have avoided all the strictures of sovereign immunity by creating different tribunals where state sovereign immunity was completely inapplicable? To ask the question is to answer it."[286]

3. *Administrative Agencies are not Federal Courts*

Justice Breyer argued that the words "judicial power of the United States" cannot mean "the executive power of the United States."[287] Once again, the fallacy in his argument is that he improperly places the burden of proof on a state to prove that it has sovereign immunity.[288] Congress can abrogate sovereign immunity only upon a showing of "compelling evidence" that the "constitutional design" requires it.[289] As shown above, the Eleventh Amendment, like the ten amendments before it, serves to limit the power of the federal government, not that of the states.[290] The Tenth and Eleventh Amendments, working together to support sovereign immunity, limit Congress' power to abrogate it. Therefore, the fact that a right cannot be found within the actual text of the amendment does not mean that it does not exist. For this reason, sovereign immunity need not be limited to courts exercising "the judicial power."

4. *Vagueness of the Majority Holding*

Justice Breyer criticized the majority for basing its holding on vague terms such as "constitutional design," "system of federalism," and "plan of the convention."[291] This argument is again sufficiently answered if the Court were willing to ground its reasoning in the Tenth Amendment. Justice Souter attempted to counter the Tenth Amendment argument in his dissent in *Alden v. Maine* by showing that the early colonies did not have sovereign immunity as they did allow private parties to sue them in certain situations.[292] However, the fact that some states consented to private suits does not mean that, in doing so, they also consented to allow

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286. *S.C. State Ports Auth.*, 243 F.3d at 172.

287. *Fed. Mar. Comm'n*, 122 S. Ct. at 1883.

288. *See* Brief of the States of Maryland, et al. as *Amici Curiae* in Support of Respondent South Carolina State Ports Authority at 11, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (No. 01-46).

289. *S.C. State Ports Auth.*, 243 F.3d at 172 (citing *Alden*, 527 U.S. at 731).

290. *See supra* notes 245-50 and accompanying text; United States v. Cruikshank, 92 U.S. 542, 552 (1875).

291. *Fed. Mar. Comm'n*, 122 S. Ct. at 1884.

292. 527 U.S. at 764.

the federal government to abrogate their sovereign immunity as the federal government saw fit. As noted previously, the rapidity with which the American people accomplished the arduous task of ratifying a constitutional amendment is compelling evidence that they considered sovereign immunity to be an important right—one which should be protected by the Constitution itself.[293]

5. Abrogation through Petition for Redress

Justice Breyer's next argument—that the principle that the federal government may sue a state, coupled with the First Amendment right to petition for redress, serves to abrogate sovereign immunity—is unconvincing.[294] The right to petition for redress was originally directed toward abuses by the federal government and not the states.[295] Although the right to petition has been incorporated and applied to the states through the Fourteenth Amendment,[296] Justice Thomas has recently indicated that the Establishment Clause of the First Amendment, incorporated by the Fourteenth Amendment, applies with less force against states than against the federal government.[297] Consequently, the First Amendment right to petition may be treated similarly. However, even if the majority does not accept this view, the incorporation doctrine should have no effect on sovereign immunity.

The federal government continues to enjoy the privilege of sovereign immunity without any explicit constitutional protection.[298] At the time *Chisholm v. Georgia* was decided, a petition for redress was not the same as a suit.[299] Although the right to petition has since been extended to include the right to appeal to the legislature or judiciary,[300] it does not trump sovereign immunity because of the *Hans v. Louisiana* presumption against "anomalous and unheard of" proceedings.[301] If the right to petition does not apply to sovereign immunity in federal courts, then there appears to be no reason to extend it to administrative proceedings in the executive branch either.

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293. *Id.* at 724.

294. *Fed. Mar. Comm'n*, 122 S. Ct. at 1885.

295. *Cruikshank*, 92 U.S. at 552.

296. *See* Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 543-44 (1963).

297. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2481-82 (2002) (Thomas, J., concurring).

298. *See* Franconia Assocs. v. United States, 122 S. Ct. 1993, 2001 (2002); Walker v. Thomas, 678 F. Supp. 164, 165 (E.D. Mich. 1987).

299. Chisholm v. Geogia, 2 U.S. (2 Dall.) 419, 437 (1793).

300. Wilmorite, Inc. v. Eagan Real Estate, Inc., 454 F. Supp. 1124, 1131 (N.D.N.Y. 1977).

301. Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1872 (2002) (quoting Hans v. Louisiana, 134 U.S. 1, 18 (1890)).

Secondly, a right to petition does not automatically result in a grant of every possible remedy. As Justice Iredell pointed out in *Chisholm*, citizens have always had a common law right to petition for redress.[302] As constitutionalized, this right is not absolute.[303] The right to petition for redress is generally not distinguished from other First Amendment rights, such as freedom of speech, in its constitutional analysis.[304] Allowing suits against states based on this right to petition would also allow similar suits based on other Bill of Rights provisions, eviscerating the Eleventh Amendment.[305]

Moreover, the Eleventh Amendment was ratified after the First Amendment. Thus, if the American people intended the First Amendment to authorize private suits against states, they rejected this view by ratifying the Eleventh Amendment. Because general federal question jurisdiction existed only in state courts at the time both amendments were ratified,[306] federal claims against states could have only been brought in a state's own courts, and Congress had no power to abrogate state sovereign immunity in state courts.[307] Thus, the First Amendment right to redress could not have created a private right in abrogation of state sovereign immunity, even if the Eleventh Amendment is limited to prohibit only suits named in its literal text.

Although it could be argued that, by ratifying the Fourteenth Amendment, the American people re-embraced the right to petition, thus abrogating state sovereign immunity, it is difficult to see how the Fourteenth Amendment could have reinstated, in the name of due process, a right which did not exist at the time of its ratification. More importantly, Congress must clearly express its intention to abrogate state sovereign immunity and must do so pursuant to the enforcement power of Section 5 of the Fourteenth Amendment to protect fundamental rights.[308] This was not done in this case.

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302. *Chisholm*, 2 U.S. (2 Dall.) at 437-45; *see also* United States v. Cruikshank, 92 U.S. 542, 551 (1875) ("The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States.").

303. *See* Kemp v. State Bd. of Agric., 803 P.2d 498, 505 (Colo. 1990) ("There is no more of an absolute right to petition than there is to engage in speech.").

304. *See, e.g.*, McDonald v. Smith, 472 U.S. 479, 482 (1985) (stating that the right to petition is "cut from the same cloth as the other guarantees of [the First] Amendment").

305. This should not mean that states are immune from suit for any bad faith violations of federal rights, such as racial discrimination. Private suits against state officials for injunctive relief are still allowed under *Ex Parte Young*, 209 U.S. 123 (1908), and the federal government may sue a state directly. Alden v. Maine 527 U.S. 706, 755 (1999); *see also* Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 122 S. Ct. 1753, 1761 (2002) (reaffirming that state officers may be sued in federal court to enjoin violations of federal law).

306. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 69-70 (1996).

307. *Alden*, 527 U.S. at 754.

308. *See supra* notes 47-50 and accompanying text.

6. Need for Constitutional Flexibility

Further criticizing the Court for "attach[ing] 'great' legal 'significance' to the absence of 18th—and 19th-century administrative agency experience," Justice Breyer argued that the Constitution was designed to be "flexible enough to meet modern needs."[309] It is true that the founders intended the Constitution to retain its vitality over time. However, they also provided it with a built-in adaptation mechanism by providing for constitutional amendments.[310] Indeed, it was through this very process that sovereign immunity's constitutionally protected status was confirmed. The fact that administrative agencies were unanticipated at the time of America's founding should not give judges a common law right to fashion remedies as they see fit. If Congress lacked the power to abrogate state sovereign immunity and there is no record of its even attempting to do so until the 1960s,[311] then sovereign immunity should retain its protected status through the Tenth and Eleventh Amendments until the American people choose to change it through the amendment process.

7. Insufficient Affront to State Dignity

Justice Breyer also argued that the basic purpose of sovereign immunity, which the majority defines to be the "preservation of a State's 'dignity,'"[312] is not transgressed sufficiently by administrative proceedings to warrant its application. He points out that a private individual does not have the legal means to compel state compliance with the law.[313] However, this is also true in federal or state court. In fact, a private individual may not sue the federal government in any court without its consent,[314] so there is no reason why this argument should have compelling force against application of sovereign immunity in agency proceedings.

Secondly, the fact that a state's opponent on appeal is not the private individual, but rather the agency itself, does not help because the appellate court cannot review the case de novo.[315] Review is limited to the record of the administrative proceeding in which the state's opponent was the private individual.[316] Moreover, an appellate court may overturn an agency decision only if it finds that the agency's decision was arbitrary or capricious or not

309. Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1885 (2002).
310. *See* U.S. CONST. art. V.
311. *Alden*, 527 U.S. at 744.
312. *Fed. Mar. Comm'n*, 122 S. Ct. at 1885-86.
313. *Id.* at 1886.
314. Franconia Assocs. v. United States, 122 S. Ct. 1993, 2001 (2002).
315. *Fed. Mar. Comm'n*, 122 S. Ct. at 1876 n.15.
316. *Id.* at 1876 (citing United States v. Interlink Sys., Inc., 984 F.2d 79, 83 (2d Cir. 1993)).

supported by substantial evidence.[317] Under the substantial evidence rule, the fact that the agency could have reached more than one conclusion on the facts of the case is not sufficient grounds for reversal.[318] Thus, even though the state's opponent on appeal is the federal agency, the situation is unlike a suit brought by the agency itself because a state's chances of prevailing are limited by a deferential standard of review and the record of the agency proceeding below.

It also cannot truly be said that the federal government exercises political responsibility, as required by *Alden v. Maine*, by prosecuting private suits.[319] Although a court proceeding is necessary to compel state compliance, "the FMC does not even have the discretion to refuse to adjudicate complaints brought by private parties."[320] Additionally, the FMC can impose a civil penalty of up to $25,000 per day against a state that is in noncompliance with one of its nonreparation orders.[321]

Justice Breyer argued that, because an administrative proceeding is not a court, it could not exert sufficient force against a state to "affront" a state's dignity.[322] But

> [o]ne . . . could argue that allowing a private party to haul a State in front of such an administrative tribunal constitutes a greater insult to a State's dignity than requiring a State to appear in an Article III court presided over by a judge . . . nominated by the President of the United States and confirmed by the United States Senate.[323]

Although other actions, such as legislation or a rule promulgated because of a private party's complaint, also exert practical pressures on a state, these measures are within the scope of the constitutional design while abrogation of state sovereign immunity is specifically prohibited in certain circumstances.

8. Practical Consequences of the Majority's Holding

Justice Breyer further argued that *Federal Maritime Commission* v. *South Carolina State Ports Authority*'s holding may have practical consequences that adversely affect a federal agency's ability to bring enforcement actions.[324] However, this is not a

317. 5 U.S.C. § 706(2) (2000).
318. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989).
319. *Fed. Mar. Comm'n*, 122 S. Ct. at 1886.
320. *Id.* at 1877.
321. *Id.* at 1877-78.
322. *Id.* at 1885-86.
323. *Id.* at 1874-75 n.11.
324. *Id.* at 1888.

question for the judiciary. The separation of powers principle inherent in the Constitution requires that policy judgments be made by the people, through their representatives in the legislature, and not by unelected and unaccountable magistrates.[325] "If the FMC needs more resources to ensure compliance by state agencies, Congress may of course authorize additional funds."[326] The protection of our liberty, as embodied in the Constitution, is more important than mere practical bureaucratic efficiency. Moreover, the United States conceded that the Court's ruling "should have little practical effect on the FMC's enforcement of the Shipping Act."[327]

Justice Breyer argued that the Court's decision in *Federal Maritime Commission* threatens the necessary structural flexibility of the federal government by unnecessarily limiting the powers of Congress and the President.[328] However, even a functional approach requires some constitutional basis. The earliest case in which a state entity was subjected to an administrative proceeding did not occur until 1918.[329] Although agency adjudications were subsequently held to be constitutional,[330] there is no evidence that the Constitution intended the federal government to be able to exercise this power against unconsenting states.[331]

9. *Policy of Preservation of Liberty*

Justice Breyer closes with a comment that appears to state the basis for his entire position: the Constitution's structural requirements should be construed narrowly while its liberty protections should be construed broadly.[332] It is true that an overemphasis on "black letter" requirements can serve to hamstring the federal government's implementation of necessary measures.[333] However, this dichotomous, interpretive policy misses the primary purpose of the Constitution. The founding generation believed that liberty could not be safeguarded by merely a paper document. To remedy the problems generated under the Articles of Confederation, leaders such as Alexander Hamilton and James Madison studied the

325. Vance v. Bradley, 440 U.S. 93, 97 (1979).

326. S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165, 178 (4th Cir. 2001).

327. *Fed. Mar. Comm'n*, 122 S. Ct. at 1879 (citation omitted).

328. *Id.* at 1888.

329. *Id.* at 1872 (citing California Canneries Co. v. S. Pac. Co., 51 I.C.C. 500 (1918)).

330. *Id.* at 1881 (Breyer, J., dissenting).

331. *See id.* at 1872.

332. *Id.* at 1888-89.

333. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407-08 (1819).

history of prior republics in order to strike a balance that would preserve both liberty and stability.[334]

At the Constitutional Convention, most of the debates centered around the structure of the proposed union.[335] The framers found that liberty is best protected by separating powers and matching them against each other so that power cannot be centralized in any one individual or group.[336] Under this principle, tyranny is thwarted because each power jealously guards against encroachments by the others.[337] Many of the Constitution's framers actually thought provisions enumerating rights were unnecessary because the national power was limited to specifically delegated powers while all others were assumed to be retained by the states or the people.[338] This principle was later constitutionalized by the Ninth and Tenth Amendments.[339]

The constitutional structure, then, is not simply a nuisance that impedes efficiency.[340] Instead, it serves the long-term purpose of preventing centralization of power in the hands of a few. It is for this purpose that "[s]tates, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government."[341] State sovereign immunity preserves the vitality[342] and financial integrity of states,[343] which in turn benefits the people by preventing the centralization of authority. Because allowing the federal government to circumvent its limitations through the

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334. *See generally* THE FEDERALIST NO. 9 (Alexander Hamilton), NOS. 18, 19, 20 (James Madison with Alexander Hamilton) (surveying the structure and history of the ancient republics of Greece and Italy and the confederacies in Germany, the Netherlands, and Poland to conclude that inadequacies in government structure caused the ensuing havoc).

335. *See* New York v. United States, 505 U.S. 144, 163-66 (1992) (discussing various proposals for the structure for the federal government at the Constitutional Convention); *see also* DAAN BRAVEMAN ET AL., CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM § 5.01 (4th ed. 2000) (explaining that the founders focused mostly on the structure of government in drafting the Constitution).

336. *See* Gregory v. Ashcroft, 501 U.S. 452, 457-60 (1991) (explaining that dual sovereignty is an essential element of our federal system).

337. *See* THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

338. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 310 (Regnery Gateway Inc. 1986) (1859).

339. U.S. CONST. amends. IX and X. The Ninth Amendment provides: "The enumeration of the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

340. Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1879 (2002).

341. *Id.* at 1870.

342. Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (explaining that sovereign immunity "accords the States the respect owed them as members of the federation").

343. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 48 (1994) (reaffirming that protecting state treasuries is the "most salient factor in Eleventh Amendment determinations").

creation of Article I courts would increase its control over states,[344] the Court properly found it unconstitutional and dangerous to liberty.

V. CONCLUSION

The U.S. Supreme Court correctly decided that the FMC's adjudication of Maritime Services' private suit against SCSPA was barred by the Eleventh Amendment principle of sovereign immunity. The Court wisely looked beyond the literal text of the amendment to the history and structure of the Constitution itself, as well as to the principle enshrined in the Tenth Amendment, to uphold a principle that, although possibly creating some short-term practical difficulties, ultimately serves to preserve the balance of power between the federal government and the states and, thus, the liberty of the people.

Timothy J. Newton

344. S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165, 168 (4th Cir. 2001).