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A Tempest in the Teapot: State Sovereign Immunity and Federal Administrative Adjudications in Federal Maritime Commission v. South Carolina State Ports Authority

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NOTE

A TEMPEST IN THE TEAPOT: STATE SOVEREIGN IMMUNITY AND FEDERAL ADMINISTRATIVE ADJUDICATIONS IN *FEDERAL MARITIME COMMISSION V. SOUTH CAROLINA STATE PORTS AUTHORITY*

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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 . . . .

—Eleventh Amendment[1]

[T]he bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit.

—Justice Kennedy, *Alden v. Maine*[2]

INTRODUCTION

As Justice Kennedy's understatement suggests, and the jurisprudence of the modern United States Supreme Court certainly confirms,[3] the scope of the states' immunity from private suits reaches beyond the text of the Eleventh Amendment[4] to encompass the "fundamental postulates implicit in the constitutional design."[5] On May 28, 2002, the Rehnquist Court continued its extension of the state sovereign immunity doctrine, holding in *Federal Maritime Commission v. South Carolina State Ports Authority*[6] that the Eleventh Amendment barred the Federal Maritime Commission (FMC), an administrative agency, from adjudicating a private party's complaint against a nonconsenting state.[7] Writing for the majority, Justice Thomas emphasized the overwhelming procedural similarities between the FMC's administrative adjudications and federal civil litigation,[8] concluding that the former equally affronted the "dignity that is consistent with [the states'] status as sovereign entities."[9] Furthermore, he stressed that the FMC and other administrative agencies remain free to investigate supposed violations of federal law by the states, even based upon information supplied by private parties, and to institute their own le-

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1 U.S. Const. amend. XI.

2 527 U.S. 706, 736 (1999).

3 *See id.*; Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002); Seminole Tribe v. Florida, 517 U.S. 44 (1996).

4 *See supra* note 1 and accompanying text.

5 *Alden*, 527 U.S. at 729.

6 122 S. Ct. 1864 (2002).

7 *See id.*

8 *See id.* at 1872–74 .

9 *Id.* at 1874.

gal action to enforce that law.[10] "The only step the FMC may not take[,] . . ." stated Justice Thomas, "is to adjudicate a dispute between a private party and a nonconsenting State."[11]

Notably, Justices Breyer and Stevens, in separate dissents joined by Justices Souter and Ginsburg, condemned the decision as irreconcilable with the text of the Constitution and reaffirmed their commitment to "continued dissent," so long as the majority followed its chosen jurisprudential path.[12] Immediate criticism of the decision arose from academic and journalist circles as well, accusing the majority of turning the state sovereign immunity doctrine "into an assault weapon against Congress"[13] and of partaking in the sort of broad interpretative leap that, "were it taken by liberal judges, conservatives would denounce as 'activist.'"[14] Furthermore, critics—echoing Breyer's dissent—warned of the holding's practical impact, namely on state employees whose health and safety are at risk and on hospital patients who wish to bring administrative complaints about substandard care.[15] More broadly, they claimed the decision might discourage federal agencies, from the Securities and Exchange Commission to the Environmental Protection Agency, from entertaining complaints by private citizens and organizations and thereby bolster states' confidence to openly disregard federal law.[16]

As Justice Breyer and his colleagues in dissent suggest, the holding in *Federal Maritime Commission* was not inevitable. In particular, the Court's seemingly key determination—that administrative proceedings constitute a functionally judicial and thus inappropriate forum in which to adjudicate complaints by private litigants against states—lacks any firm textual support in the Eleventh Amendment.[17] Even Justice Thomas referred to the "relatively barren historical record" on the issue, attributing the dearth of guidance to the Framers' inability to foresee the existence of the modern administrative state.[18] Instead, Thomas uncharacteristically relied on the Court of Appeals' function-

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10 *See id.* at 1878–79.

11 *See id.* at 1879 n.19.

12 *See id.* at 1889 (Breyer, J., dissenting).

13 Cass Sunstein, *A Narrowed Right to Challenge the States*, N.Y. TIMES, May 31, 2002, at A23.

14 *A Narrow View of Federal Power*, N.Y. TIMES, May 29, 2002, at A20 [hereinafter *Narrow View*]; *see Extreme View of States' Rights*, CHATTANOOGA TIMES FREE PRESS, June 1, 2002, at B6 [hereinafter *Extreme View*].

15 *See Fed. Mar. Comm'n*, 122 S. Ct. at 1888 (Breyer, J., dissenting); *see also Narrow View*, *supra* note 14 (noting that "the decision will make it harder for state workers to enlist the aid of federal agencies").

16 *See Extreme View*, *supra* note 14.

17 *See Fed. Mar. Comm'n*, 122 S. Ct. at 1883 (Breyer, J., dissenting) (noting that federal administrative agencies exercise the executive power of the United States, not the explicitly prohibited judicial power).

18 *Id.* at 1872.

alist analogy between the FMC's adjudicative procedures and federal civil litigation.[19] Nonetheless, while the majority's decision in *Federal Maritime Commission* may appear both tenuous and burdensome, it makes more sense when it is viewed as part of the Rehnquist Court's sweeping campaign to constrict Congress's power to impose[20] and enforce[21] regulatory standards. Such a perspective explains both the majority's holding and the dissent's apoplectic response in calling for "continued dissent,"[22] particularly as agencies may still bring enforcement actions on their own behalf.

This Note argues that, while Justice Breyer's call for "continued dissent" may be justified, it is also too little too late. Part I briefly explores the historical origins of the Eleventh Amendment and the Supreme Court's recent expansions of the state sovereign immunity doctrine, with particular emphasis on the Court's decisions in *Seminole Tribe v. Florida*[23] and *Alden v. Maine*.[24] Part II frames the arguments by the majority and dissenters in *Federal Maritime Commission*. Part III investigates the motives behind the dissents of Justices Breyer and Stevens, suggesting that their disagreement does not attack this particular holding so much as it does the past one hundred years of precedent supporting it. Part III also surveys the practical implications of the *Federal Maritime Commission* decision, proposing that a number of well-established exceptions to the state sovereign immunity doctrine may prove the dissenters' fears unfounded. Finally, Part III seeks to explain the decision as part of an overall attempt by the Rehnquist Court to place substantive and remedial constrictions on Con-

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19 *See id.* at 1873–74; S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165, 174 (4th Cir. 2001) (noting that the FMC proceeding "walks, talks, and squawks very much like a lawsuit").

20 The Court's recent Commerce Clause decisions illustrate this point. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (holding that the Violence Against Women Act exceeded Commerce Clause authority); United States v. Lopez, 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act exceeded Congress's Commerce Clause authority). Recent commandeering jurisprudence in the Court is also illustrative. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997) (federal statutory requirement that state law enforcement officers conduct handgun purchaser background checks held to be unconstitutional); New York v. United States, 505 U.S. 144 (1992) (federal statute's "take title" provision, requiring states to accept or regulate waste, lay outside Congress's enumerated powers).

21 *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (holding that an individual lacks standing to sue the government, absent suffering distinct and concrete harm, and that mere congressional conferral upon all persons of an abstract right to have the Executive observe procedures required by law is also insufficient for standing).

22 *See Fed. Mar. Comm'n.*, 122 S. Ct. at 1889 (Breyer, J., dissenting).

23 *See* Seminole Tribe v. Florida, 517 U.S. 44, 72–73 (1996) (holding that even though Article 1 of the Constitution gives Congress full authority to regulate commerce with Indian tribes, Congress cannot allow a tribe to sue a state in federal court).

24 *See* Alden v. Maine, 527 U.S. 706, 754 (1999) (holding that Congress lacks the constitutional authority to compel Maine state courts to hear workers' suits under the Fair Labor Standards Act).

gress's use of private suits to enforce and increase regulatory actions. This Note ultimately concludes that Justice Breyer and his colleagues in dissent should see that their true error lies not in failing to contain this particular tempest, but in failing ten years earlier to forecast a much larger jurisprudential storm that would leave in its wake a more robust vision of state autonomy, limited congressional power, and a particularly potent executive.

I
THE ELEVENTH AMENDMENT: ORIGINS AND RECENT DEVELOPMENTS

A. Historical Origins of the Eleventh Amendment

The Eleventh Amendment provides that the "[j]udicial 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 [s]tate. . . ."[25] Although the choice of words indicates careful deliberation,[26] since the late nineteenth century the Supreme Court has interpreted the Amendment with such expansive breadth that its current jurisprudence bears almost no relation to the Amendment's text.[27] Rather than adhere solely to textual directives, the Court has explained that "the scope of the States' immunity from suit is demarcated . . . by fundamental postulates implicit in the constitutional design."[28]

What were the origins of these fundamental postulates? How did they arise? As the Founders gathered in 1787 to draft the principles for the United States government, they were inescapably cognizant of the English common-law doctrine of sovereign immunity.[29] English law acknowledged that the king remained immune from suit in his own courts, absent his consent.[30] Derived from the unique character of the intended defendant,[31] the doctrine operated as a jurisdictional bar to preserve the sanctity of the royal seat and protect the sovereign

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25 U.S. CONST. amend XI.

26 *See* John V. Orth, *History and the Eleventh Amendment*, 75 NOTRE DAME L. REV. 1147, 1147–49 (2000) (noting explicit references to the parallel legal systems of "law" and "equity" as well as the distinction between those suits "commenced" and those "prosecuted," which refers to two different stages of litigation).

27 *See* Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1694–95 (1997).

28 *Alden*, 527 U.S. at 729.

29 *See* CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 4–5 (1972).

30 *See id.* at 5 (noting that the doctrine of sovereign immunity existed as early as the thirteenth century, during the reign of Henry III (1216–1272)); Orth, *supra* note 26, at 1155.

31 *See* Orth, *supra* note 26, at 1155.

from personal charges against his public acts.[32] Nonetheless, the doctrine lacked potency, particularly by the time of the American Revolution, as English jurists developed a "variety of procedures [to] redress . . . wrongs suffered by the subject at the hands of his sovereign."[33] Thus, the doctrine mostly determined the procedural guidelines for how relief could be obtained, but did not impair the subject's right to recover based on substantive law.[34]

Of course, the Founders did not merely adopt English law at the Constitutional Convention,[35] and from the face of the original document they produced, no manifest restrictions prevented the judiciary from adjudicating suits commenced by private citizens against states.[36] Similar uncertainty colors the Judiciary Act of 1789,[37] the congressional legislation creating the inferior federal courts and defining their jurisdiction; like Article III, it also neglects to state whether states are subject to suit by citizens of other states.[38] While gaps in the historical record may make it impossible today to determine how the

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32 *See* JACOBS, *supra* note 29, at 7–8.

33 *Id.* at 5–6 (including petition of right, suits for damages against subordinate officers, prerogative writs, and *monstrans de droit*, "whereby a subject might, in order to obtain possession or restitution of property claimed by the crown, [use] the record upon which the crown made claim [as a basis for] his own right"); *id.* at 165 n.6.

34 *See id.* at 6.

35 *See* Orth, *supra* note 26, at 1155. Professor Randall suggests that the time-honored American belief that the sovereign could not be sued absent his consent came to the colonies via the widely-known writings of Sir William Blackstone. *See* Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 26–27 (2002). Ultimately, Blackstone's distortion of English sovereign immunity became entrenched after repetition by Alexander Hamilton in *The Federalist* No. 81 and by James Madison and John Marshall at the Virginia ratification convention. *See* THE FEDERALIST No. 81 (Alexander Hamilton); Randall, *supra*, at 28. Nonetheless, Randall argues that the later writings of these Framers, as well as their conception of a strong centralized government, imply that their statements in *The Federalist* and at the ratification debates were merely part of a political strategy to calm Anti-Federalist fears about the solvency of the states and to secure ratification. *See* Randall, *supra*, at 70–85.

36 *See* U.S. CONST. art. III, § 2, cl. 1. Article III states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . . [and] to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States, . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Jacobs notes the ambiguity inherent in the Article, which neither explicitly allows nor forbids the judiciary power to adjudicate cases in which a private citizen names a state as a defendant, and posits that the Framers may have intended the clause to "extend[ ] the judicial power only to cases in which [a] state was the plaintiff." JACOBS, *supra* note 29, at 19–20. He also notes that the convention records yield no answer to the question of the Founders' intent. *See id.* at 21–22.

37 An Act to Establish the Judicial Courts of the United States, ch. 20, § 13, 1 Stat. 73, 80–81 (1789).

38 *See* JACOBS, *supra* note 29, at 41–42 (noting that the Judiciary Act may clarify the original meaning of Article III, as many who deliberated upon and passed the Act also participated in the framing and ratifying of the Constitution).

Founders envisioned state sovereign immunity,[39] such ambiguity failed to deter the Supreme Court from immediately recognizing suits in which a private citizen named a state as defendant.[40]

The catalyst for the passage of the Eleventh Amendment was *Chisholm v. Georgia*,[41] in which the estate of a deceased South Carolina merchant brought an action against the State of Georgia to recover an unpaid war debt.[42] Georgia immediately invoked immunity, which the circuit court, including Supreme Court Justice James Iredell and District Judge Nathaniel Pendleton, sustained, dismissing the suit.[43] The Supreme Court reversed, holding by a four-to-one majority that Article III empowered citizens of one state to sue another state in federal court.[44] Reaction came quickly, in the form of a congressional resolution proposing the Eleventh Amendment in March of 1794.[45] Fueled by the Court's subsequent assertion of jurisdiction over suits against Virginia,[46] Massachusetts,[47] and Georgia,[48] all of the states nec-

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39 *See* Orth, *supra* note 26, at 1157.

40 *See* Oswald v. New York, 2 U.S. (2 Dall.) 401 (1792); Vanstophorst v. Maryland, 2 U.S. (2 Dall.) 401 (1791). These first cases fail to garner much attention since in *Vanstophorst* the defendant state failed to enter a formal protest on the ground of state sovereign immunity, and in *Oswald*, due to considerable motion-making by both parties, the case concluded after the decision in *Chisholm*. *See* JACOBS, *supra* note 29, at 43–46.

41 2 U.S. (2 Dall.) 419 (1793).

42 *See generally* Doyle Mathis, Chisholm v. Georgia: *Background and Settlement*, 54 J. AM. HIST. 19, 19–29 (1967) (detailing the factual background leading up to the suit).

43 *See* JACOBS, *supra* note 29, at 47.

44 *See Chisholm*, 2 U.S. (2 Dall.) at 419–20, 479–80. Interestingly, all of the Justices participating in the decision played key roles in the development and ratification of the Constitution. Justices Wilson and Blair, both in the majority, had served as delegates to the Constitutional Convention five years earlier. Chief Justice Jay, also in the majority, co-authored *The Federalist Papers* and, along with Justice Cushing in the majority and Justice Iredell, the lone dissenter, served as members of their state conventions. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 20 (1985); JACOBS, *supra* note 29, at 50–51. One commentator sees the cavalier dismissal of these opinions by the current Court as "surprising," particularly in light of the Rehnquist majority's emphasis on the Framers' intent. *See* Orth, *supra* note 26, at 1150–51 (citing Alden v. Maine, 527 U.S. 706, 724 (1999)).

45 *See* JACOBS, *supra* note 29, at 66–67. On January 15, 1794, the Senate passed the resolution by a vote of twenty-three to two. On March 4, the House of Representatives approved the same resolution by a vote of eighty-one to nine. *Id.*

46 *See* Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).

47 William Vassall initiated an equity suit in the Supreme Court against Massachusetts in 1793, alleging property losses he suffered as the result of being labeled a Loyalist. *See* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 352–59 (Maeva Marcus et al. eds., 1994). Vassall's suit never went forward, however, as Massachusetts refused to appear in Court while the state legislature and then-Governor John Hancock considered how the state should respond to the Court's subpoena. *Id.* at 365–67. Ultimately, the case carried over several Terms until it was dismissed in February 1797. *Id.* at 369.

48 In 1795, land speculators Alexander Moultrie and Isaac Huger filed a bill of equity in the Supreme Court against Georgia, seeking specific performance of a contract granting them a right of preemption on a land sale. *Id.* at 496, 506. The Court issued subpoenas to certain state officials, but again the state refused to answer until its legislature issued a

essary for ratification completed the process by February of 1795.[49] The new Amendment explicitly barred the federal judiciary from adjudicating suits brought against a state by citizens of another state (like *Chisholm*). However, as noted above, the scope of the Eleventh Amendment would expand considerably by the end of the next century.

B. Judicial Expansion of State Sovereign Immunity

1. Hans v. Louisiana

Like *Chisholm*, the seminal case of *Hans v. Louisiana* was a creditor's suit by a private citizen against one of the many southern states burdened by enormous postwar debt.[50] Unlike the plaintiff in *Chisholm*, however, Hans resided in the defendant state, Louisiana, thus placing him outside the explicit restrictions of the Eleventh Amendment's text.[51] Nonetheless, Louisiana claimed immunity.[52] While Justice Bradley, writing for the majority, recognized that the Amendment by its terms appeared inapplicable,[53] he nevertheless sustained the circuit court's dismissal, holding that the judicial power of the United States does not extend to suits instituted against a state by its own citizens under the federal question clause of Article III.[54]

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remonstrance to Congress. *Id.* at 508–09. The Court did not consider the case again until after the passage of the Eleventh Amendment, at which point it dismissed the action for lack of jurisdiction. *Id.* at 511.

49 *See* JACOBS, *supra* note 29, at 67. Jacobs argues that the extremely erratic certification of the states' ratification by Presidents Washington and Adams delayed recognition of the Amendment as part of the Constitution until 1798. *See id.* Nonetheless, jurists and commentators alike view the ratification of the Eleventh Amendment as swift and decisive. *See* Alden v. Maine, 527 U.S. 706, 724 (1999); CURRIE, *supra* note 44, at 18 n.101. Commentators offer two explanations for the rapid and widespread public support for the Amendment. Some suggest that the Amendment reaffirmed a common understanding prevalent at the time the states ratified the Constitution. *See, e.g.*, CHARLES GROVE HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835, at 138 & n.88 (1960). Others contend that the Amendment gained approval because states desired protection from their creditors. *See, e.g.*, Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 19 (1963). The current Court appears to adopt both views. *See Alden*, 527 U.S. at 724, 750.

50 134 U.S. 1 (1890); *see also* Orth, *supra* note 26, at 1156–57 (suggesting that if state indebtedness was relevant to the ratification of the Eleventh Amendment, then it may also have been relevant to the decision in *Hans*). Other commentators suggest that the holding in *Hans* stemmed from an interpretation of the Constitution consistent with the Anti-Reconstruction, Anti-Federalist vision then prevalent on the Supreme Court, "rather than an honest assessment of the history of Article III and the Eleventh Amendment." John E. Nowak, *The Gang of Five & the Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091, 1094 (2000).

51 *See Hans*, 134 U.S. at 10.

52 *Id.* at 3.

53 *See id.* at 10.

54 *See id.* at 9–10, 21; *see also* North Carolina v. Temple, 134 U.S. 22, 30 (1890) (reversing on similar grounds a circuit court's decree ordering the state to pay a debt owed to one of the state's citizens). Some commentators rightly question "the tenuous nature of the

In so doing, Bradley adopted the position that the ratification of the Eleventh Amendment not only rectified the error in *Chisholm*,[55] but also recognized a constitutional principle of sovereign immunity implicitly curtailing the judicial power of Article III.[56] This principle arose from "the presumption that no anomalous and unheard-of proceedings or suits [at the time of the nation's founding] were intended to be raised up by the Constitution."[57] Since "[t]he suability of a State [by its citizens] . . . was a thing unknown to the law" when the states ratified the Constitution, the *Hans* Court presumed that federal courts lacked the power to hear such suits.[58] While this argument ignores the permissive language of Article III, commentators suggest that it creates sound constitutional policy in light of the Eleventh Amendment since it equally deprives both a state's citizens and noncitizens of a federal judicial remedy.[59] Regardless, the *Hans* presumption in favor of a state's immunity from suit, and against "anomalous" proceedings, proved to be fertile ground for the Rehnquist Court's more tenuous expansions of the doctrine.[60]

2. Seminole Tribe v. Florida & Alden v. Maine

While *Hans* recognized a broader doctrine of state sovereign immunity than is evident from the text of the Eleventh Amendment, recent developments question Congress's authority to abrogate this immunity and thus subject states to suit under federal law.[61] Prior to

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'federal' claim of impairment of contract," suggesting the Court's decision could have rested on narrower grounds. RICHARD H. FALLON, JR., ET AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM SUPPLEMENT 145 (4th ed. Supp. 2002).

55 Justice Harlan, concurring, disagreed with Bradley's remarks that the decision in *Chisholm* was in error. Rather, Harlan thought that *Chisholm* was "based upon a sound interpretation of the Constitution as that instrument then was." *Hans*, 134 U.S. at 21 (Harlan, J., concurring). One commentator suggests that the reason Harlan nevertheless concurred in the opinion is that he believed "a remedy should be available to the plaintiff in the form of a suit against a state officer." Orth, *supra* note 26, at 1152. The Court made this course of action available to plaintiffs in 1908. *See Ex parte* Young, 209 U.S. 123, 168 (1908).

56 *See Hans*, 134 U.S. at 15–16; JACOBS, *supra* note 29, at 110.

57 *Hans*, 134 U.S. at 18.

58 *Id.* at 16.

59 *See* JACOBS, *supra* note 29, at 110. Jacobs also notes that none of the Framers appear to have contemplated that the federal question clause enabled a state to be sued in federal court by one of its citizens. *See id.*

60 *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1871–72 (2002); Alden v. Maine, 527 U.S. 706, 715–16 (1999); Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996).

61 Judge Fletcher of the Ninth Circuit offers three plausible explanations for the recent explosion of Eleventh Amendment jurisprudence: (1) the adoption of the Fourteenth Amendment; (2) the rulings of the Warren Court, as exemplified in *Brown v. Board of Education*, 347 U.S. 483 (1954); and (3) the expansion of federal statutory obligations imposed upon states. *See* William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843, 846 (2000).

its decision in *Seminole Tribe*, the Court had acknowledged this congressional vitiating power as arising from Section 5 of the Fourteenth Amendment,[62] as well as from the Commerce Clause.[63] The latter theory rested upon the premise that the ill-defined immunity outside the text of the Eleventh Amendment constituted a form of federal common law—a default rule that Congress could override by merely enacting legislation.[64] However, by rejecting this reasoning and distinguishing Congress's powers under the Fourteenth Amendment from its Article I powers—obviously enacted prior to the passage of the Eleventh Amendment[65]—the Court in *Seminole Tribe*, by a five-to-four vote, reaffirmed that the immunity recognized in *Hans* was of constitutional stature.[66] Thus, Congress lacked the power under Article I to circumvent the Eleventh Amendment limitations on federal jurisdiction.[67]

Coincidentally, *Seminole Tribe* instigated the Court's most significant and controversial Eleventh Amendment decision to date—*Alden v. Maine*—because it pressed plaintiffs to consider state courts as alternative forums for federal claims against states.[68] The *Seminole Tribe* decision compelled a federal district court to dismiss a suit pending against Maine by a group of state probation officers for alleged violations of the overtime provisions of the Fair Labor Standards Act

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62 *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (reasoning that the Fourteenth Amendment gave Congress the power to abrogate a state's constitutionally protected immunity because the Amendment, by its own terms, fashioned a major change in relations between the federal and state governments).

63 *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 14 (1989).

64 *See id.* at 25 (Stevens, J., concurring). The plurality opinion by Justice Brennan attempted to analogize the commerce power to the Section 5 power, but that reasoning attracted few supporters. *See* Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 11 (1999).

65 *See Seminole Tribe*, 517 U.S. at 65–66. Vázquez questions the conclusion in *Seminole Tribe* and *Fitzpatrick* that as the Fourteenth Amendment fundamentally altered federal-state relations, it thereby authorized Congress to abrogate state immunity via its Section 5 enforcement power. *See* Vázquez, *supra* note 27, at 1750. Specifically, he argues that the alteration did not necessarily establish congressional power to subject states to suit in federal courts. *See id.* Moreover, even if the shift did grant Congress such power, the Fourteenth Amendment may be construed to incorporate Congress's Article 1 powers for abrogation purposes, just as that amendment's Due Process Clause incorporated the Bill of Rights. *See id.* Regardless, recent Supreme Court decisions have set such high standards for congressional invocation of Section 5 authority to abrogate states' immunity that few regulatory programs are likely to be eligible. *See, e.g.*, Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (Trademark Remedy Clarification Act does not qualify).

66 *See Seminole Tribe*, 517 U.S. at 64 (stating that the Eleventh Amendment stands for "the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III").

67 *See id.* at 72–73.

68 *See* Roger C. Hartley, *The* Alden *Trilogy: Praise and Protest*, 23 HARV. J.L. & PUB. POL'Y 323, 336–37 (2000).

(FLSA).[69] Amendments to the FLSA granted employees the right to sue states in their own courts for alleged violations of the Act.[70] As a result, the plaintiffs refiled their claim in state court, contending that the Eleventh Amendment, as a forum allocating device, merely protected states from suits in federal court.[71] The state trial court, however, dismissed the suit on the grounds of sovereign immunity, and a divided Maine Supreme Judicial Court affirmed.[72]

Justice Kennedy, writing for the same majority as in *Seminole Tribe*, upheld the Maine court's decision, holding that Congress lacked the authority "to subject nonconsenting States to private suits for damages in state courts."[73] Once again, the text of the Eleventh Amendment, particularly its reference to the federal judiciary, proved completely irrelevant.[74] Instead, the Court emphasized the principle from *Hans* that "the sovereign immunity of the States neither derives from, nor is limited by . . ." the Amendment's terms.[75] Rather, the Court stated, sovereign immunity is inherent in the system of federalism and derives from the history and structure of the Constitution.[76] On this view, the Tenth Amendment and the federalist system substantiate the governing role of the states and their status as sovereign entities.[77] The Court interpreted the Founders' silence on the matter as further proof of a well-established principle, unaltered by the Constitution, that a sovereign enjoys immunity from suit in its own courts.[78] In Justice Kennedy's view, the Eleventh Amendment merely clarified specific aspects of this immunity and corrected the *Chisholm* decision.[79] A broad immunity was necessary, however, to prevent the "'indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. . . .'"[80] Otherwise, the Court reasoned, states would "face the prospect of being thrust, by federal fiat and against [their] will, into the disfavored status of a debtor . . . ."[81]

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69 *See* Mills v. Maine, No. 92-410-P-H, 1996 U.S. Dist. LEXIS 9985 (D. Me. July 3, 1996), *aff'd*, 118 F.3d 37 (1st Cir. 1997).

70 *See* Fair Labor Standards Amendments of 1974, 29 U.S.C. §§ 201–219 (2000).

71 *See* Alden v. State, 715 A.2d 172, 173 (Me. 1998).

72 *See id.* at 173, 176.

73 Alden v. Maine, 527 U.S. 706, 712 (1999).

74 *See* James E. Pfander, *Once More unto the Breach: Eleventh Amendment Scholarship and the Court*, 75 NOTRE DAME L. REV. 817, 821 (2000) (suggesting that in *Alden* the Court continued to abandon any purposive approach to its interpretation).

75 *Alden*, 527 U.S. at 713.

76 *See id.* at 730.

77 *See id.* at 713–14.

78 *See id.* at 741.

79 *See id.* at 722–23.

80 *Id.* at 749 (quoting *In re* Ayers, 123 U.S. 443, 505 (1887)).

81 *Id.*

Criticisms of the decision were numerous, and supporters few.[82] The dissent, led by Justice Souter, criticized the majority's opinion for being steeped in indeterminate historical data. In particular, the dissent emphasized the lack of evidence that "the Tenth Amendment constitutionalized a concept of sovereign immunity as inherent in the notion of statehood"[83] or that the structure of the Constitution predicted a federalist system immunizing states from federal claims in any court.[84] Furthermore, while the majority emphasized that states retain a good-faith duty to comply with federal law and that these obligations could still be enforced prospectively in suits against state officers,[85] critics argued that the decision further threatened the federal government's ability to provide and enforce remedies for federal rights.[86] Unbeknownst to the dissent, the decision also laid the groundwork for the Rehnquist Court's further remedial constrictions, via the immunity doctrine, on Congress's ability to use private suits to initiate and enforce administrative regulatory actions.

II
CASE DISCUSSION: *FEDERAL MARITIME COMMISSION V. SOUTH CAROLINA STATE PORTS AUTHORITY*

A. The Dispute and Agency Response Rejecting the Sovereign Immunity Defense

The dispute in question arose when South Carolina Maritime Services, Inc. ("Maritime Services") applied on five occasions to the South Carolina State Ports Authority (SCSPA) to berth a cruise ship, the M/V *Tropic Sea,* at the Port of Charleston facilities.[87] Maritime Services sought the berthing space as a port of call for gambling cruises, some destined for the Bahamas and others merely traveling in international waters before returning to Charleston.[88] The SCSPA denied the re-

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82 *See, e.g.*, Nowak, *supra* note 50, at 1094 (arguing that "Justice Kennedy's opinion is based on nothing but the Gang of Five's view of how the federal system should work").

83 *Alden*, 527 U.S. at 761 (Souter, J., dissenting).

84 *See id.* at 798–803 (Souter, J., dissenting).

85 *See id.* at 754–57; *see also* Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the* Alden *Trilogy*, 109 YALE L.J. 1927, 1935 (2000). The Court also stressed that sovereign immunity only bars suits in the absence of consent, thus mitigating the rigors of the doctrine. *See Alden*, 527 U.S. at 755. In fact, "[m]any states, on their own initiative, have enacted statutes consenting to a wide variety of suits." *Id.*

86 *See, e.g.*, Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 964 & n.38 (2000).

87 *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1868 (2002); *see also* Elizabeth Herlong Campbell, *U.S. Supreme Court Reinforces the Armor of the States' Sovereign Immunity:* Federal Maritime Commission v. South Carolina State Ports Authority, 14 S.C. LAW. 48, 50 (2002) (detailing the background of the case from the viewpoint of SCSPA's co-counsel).

88 Campbell, *supra* note 87, at 50.

quests, citing an established policy of refusing berths in the Port of Charleston to any vessel whose primary purpose was gambling.[89]

Subsequently, Maritime Services filed a complaint with the Federal Maritime Commission (FMC) alleging that the SCSPA had violated the Shipping Act, which commands the FMC to adjudicate the grievances of private citizens.[90] Specifically, the complainant contended that the SCSPA unreasonably refused to deal with,[91] and discriminated against,[92] Maritime Services by giving berths to two Carnival Cruise Line vessels that offered gambling activities to passengers.[93] Consistent with the remedies afforded under the Shipping Act,[94] Maritime Services urged the FMC to seek injunctive relief in federal district court, direct the SCSPA to pay reparations, interest, and attorneys' fees, and issue a cease-and-desist order.[95]

Pursuant to the FMC's Rules of Practice and Procedure,[96] the Commission referred Maritime Services' complaint to an administrative law judge (A.L.J.), who subsequently granted the SCSPA's motion to dismiss on the grounds of Eleventh Amendment immunity.[97] The A.L.J. reasoned that if "'Congress is powerless to override the States' immunity under Article 1 of the Constitution, it is irrational to argue that [the FMC], created under an Article 1 statute, is free to disregard the [Eleventh] Amendment or its related doctrine of State immunity from *private* suits.'"[98] Nonetheless, the A.L.J. noted that the FMC could still conduct its own formal investigation of Maritime Services' allegations and enforce on its own behalf any violations of the Shipping Act in federal district court.[99] However, the Commission reviewed the A.L.J.'s dismissal *sua sponte* and reversed, holding that "'[t]he doctrine of state sovereign immunity . . . cover[s] proceedings

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89 *Id.*

90 *See* 46 U.S.C. app. § 1710(a), (b) (2000).

91 *See id.* § 1709(b)(10) (prohibiting common carriers from "unreasonably refus[ing] to deal or negotiate").

92 *See id.* § 1709(d)(4) ("No marine terminal operator may give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person").

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

94 *See* 46 U.S.C. app. § 1710(g), (h)(1) (2000).

95 *See Fed. Mar. Comm'n*, 122 S. Ct. at 1868–69.

96 *See* 46 C.F.R. § 502.223 (2002).

97 *See Fed. Mar. Comm'n*, 122 S. Ct. at 1869; S.C. Mar. Servs., Inc. v. S.C. State Ports Auth., No. 99-21, 2000 WL 126799 (Fed. Mar. Comm'n Jan. 5, 2000). A previous decision by the Fourth Circuit had conclusively determined that the SCSPA was an arm of the State of South Carolina, *see* Ristow v. S.C. Ports Auth., 58 F.3d 1051, 1053–55 (4th Cir. 1995), and no party in this case contested that determination. *See Fed. Mar. Comm'n*, 122 S. Ct. at 1870 n.6.

98 *Fed. Mar. Comm'n*, 122 S. Ct. at 1869 (quoting *S.C. Mar. Servs., Inc.*, 2000 WL 126799, at *6).

99 *See id.* at 1869 (citing *S.C. Mar. Servs., Inc.*, 2000 WL 126799).

before judicial tribunals, whether Federal or state, not executive branch administration agencies like the Commission.'"[100]

B. The Fourth Circuit's Reaction

The SCSPA filed a petition for review and the Fourth Circuit, with Chief Judge Wilkinson writing for a unanimous panel, reversed the FMC's judgment and remanded the case with instructions to dismiss.[101] Focusing on the Supreme Court's decisions in *Seminole Tribe*[102] and particularly *Alden v. Maine*[103] (which held that state sovereign immunity from private suits applies in fora outside the federal judiciary), the court noted that "a state's sovereign immunity is not so fleeting as to depend upon the forum in which the state is sued."[104] Thus, the court held invalid "any proceeding where a federal officer *adjudicates* disputes between private parties and unconsenting states . . . whether the forum be a state court, a federal court, or a federal administrative agency."[105]

Further, the court rejected the Commission's contention that sovereign immunity was inapplicable since the administrative adjudication was not a "suit in law or equity,"[106] but merely a form of regulation in which the agency endeavors to effectuate congressional intent.[107] The court stated that the precise nature of the agency adjudication process suggests that the A.L.J. occupies a role "'functionally comparable'" to that of an Article III judge.[108] In particular, the Shipping Act and the Code of Federal Regulations employ a significant number of procedures in the A.L.J. context similar to those used in federal litigation, including the following: the filing of formal complaints by private parties;[109] the utilization of depositions, written interrogatories, and discovery procedures;[110] the use of the subpoena power by the A.L.J. to compel the production of documents and the attendance of witnesses;[111] and the power of the A.L.J. to determine the scope of the proceeding, rule upon orders of proof, act upon petitions to intervene, fix the time for the filing of documents, and "dispose of any other matter that normally and properly arises in the

100 *Id.* (quoting S.C. Mar. Servs., Inc. v. S.C. State Ports Auth., No. 99-21, 2000 WL 359791, at *4 (Fed. Mar. Comm'n Mar. 23, 2000)).
101 *See* S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165, 179 (4th Cir. 2001).
102 517 U.S. 44 (1996).
103 527 U.S. 706 (1999).
104 *S.C. State Ports Auth.*, 243 F.3d at 167.
105 *Id.* at 173 (emphasis added).
106 U.S. CONST. amend. XI.
107 *See S.C. State Ports Auth.*, 243 F.3d at 173.
108 *Id.* at 174.
109 *See* 46 U.S.C. app. § 1710(a) (2000).
110 *See id.* § 1711(a); 46 C.F.R. § 502.147 (2002).
111 *See* 46 U.S.C. app. § 1711(a).

course of [the] proceedings."[112] Thus, the court upheld the applicability of the state sovereign immunity doctrine because, regardless of its placement within the Executive Branch, the FMC's adjudicative proceeding "walks, talks, and squawks very much like a lawsuit."[113]

C. The Supreme Court Affirms the Fourth Circuit

1. *Majority Opinion*

The Supreme Court affirmed the Fourth Circuit's decision after granting the FMC's petition for certiorari.[114] Justice Thomas began his opinion[115] by noting that "[d]ual sovereignty is a defining feature of our Nation's constitutional blueprint" and that the states "entered the Union 'with their sovereignty intact.'"[116] One element of that sovereignty included the states' immunity from private suits, which was memorialized in, but not based on or defined by, the Eleventh Amendment.[117]

Thus, Justice Thomas considered "whether the sovereign immunity enjoyed by States as part of our constitutional framework applies to adjudications conducted by the FMC."[118] The FMC contended—as it had ruled earlier on review—that sovereign immunity only shields states from exercises of judicial power, not agency adjudications.[119] Justice Thomas conceded, arguendo, that the FMC did not exercise the judicial power of the United States, and he admitted that history provided little help in determining whether the Framers believed that the sovereign immunity doctrine applied to formal administrative adjudications, as such proceedings were unprecedented in the late eighteenth and early nineteenth centuries.[120] However, under the *Hans* presumption—that the Constitution was not intended to endorse proceedings against the states that were "anomalous and unheard of when the constitution was adopted"[121]—the Court "attribute[d] great significance to the fact that States were not subject to private suits in administrative adjudications at the time of the founding or for many years thereafter."[122]

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112 46 C.F.R. § 502.147.

113 *See S.C. State Ports Auth.*, 243 F.3d at 174.

114 Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1870 (2002).

115 Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy joined Justice Thomas. *See id.* at 1867.

116 *Fed. Mar. Comm'n*, 122 S. Ct. at 1870 (citing Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991)).

117 *See id.* at 1870–71.

118 *Id.* at 1871.

119 *See* Brief for Petitioner at 17–25, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (No. 01-46).

120 *See Fed. Mar. Comm'n*, 122 S. Ct. at 1871–72.

121 *Id.* at 1872 (quoting Hans v. Louisiana, 134 U.S. 1, 18 (1890)).

122 *Id.*

In order to decide whether the *Hans* presumption definitively applied, Justice Thomas analyzed FMC adjudications "to determine whether they are the type of proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union."[123] Like the Fourth Circuit,[124] Justice Thomas discerned significant similarities between the roles of the A.L.J. and an Article III judge as well as the rules regulating the proceedings they oversee.[125] He reasoned that because

> the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, [it is unimaginable] that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency. . . . The affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court. In both instances, a State is required to defend itself in an adversarial proceeding against a private party before an impartial federal officer.[126]

Furthermore, to deny states immunity from administrative proceedings would create a paradox, permitting Congress to use its Article I powers to adjudicate private claims against the states in front of administrative tribunals while prohibiting it, under *Seminole Tribe*, from using those same powers to abrogate state sovereign immunity in Article III judicial proceedings.[127]

Finally, Justice Thomas rejected the federal government's attempt to distinguish FMC administrative proceedings from Article III courts on the ground that the Commission's orders are not self-executing and thus pose no threat to the financial integrity of the states.[128] Such a distinction, he said, was "without a meaningful difference."[129] Absent sovereign immunity, either the state defends itself before the FMC or loses the right to argue the merits of its position in its appeal of the Commission's determination.[130] If the state ignores the FMC's order, the Commission can impose penalties for noncompliance and request that the Attorney General recover the fine in fed-

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123 *Id.*

124 *See* S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165, 174 (4th Cir. 2000).

125 *See Fed. Mar. Comm'n*, 122 S. Ct. at 1872–74. Justice Thomas also noted that where FMC adjudications are not covered by a specific Commission rule, the FMC's Rules of Practice and Procedure provide that the ALJ will follow the Federal Rules of Civil Procedure. *Id.* at 1874 (citing 46 C.F.R. § 502.12 (2001)).

126 *Id.* at 1874–75 (citations omitted).

127 *Id.* at 1875.

128 *See id.* at 1875–78.

129 *Id.* at 1875.

130 *Id.* at 1875–76.

eral district court.[131] Justice Thomas concluded that such coercion, regardless of its toll upon the state's treasury, affronts the dignity of the state and thus violates the sovereign immunity doctrine.[132]

2. *Dissenting Opinions*

Justice Breyer, joined by three other Justices, dissented.[133] Arguing that federal administrative agencies can adjudicate complaints by private persons against states, Justice Breyer emphasized that agencies definitively exercise Article II executive powers regardless of any resemblance their processes might bear to the activities of legislatures or courts.[134] Furthermore, unlike typical court proceedings, an FMC adjudication allows extensive use of hearsay, determines factual disputes through official notice, and permits the agency to completely disregard the A.L.J.'s initial decision—as occurred in the instant case.[135] In addition, the agency cannot enforce its own orders but must rely on an enforcement order by an Article III court.[136]

In sum, Justice Breyer maintained that agencies do not exercise the judicial power of the United States when adjudicating the merits of private complaints. Thus, the text of the Constitution and in particular the Eleventh Amendment, which refers only to the "Judicial power," fails to provide support for the majority's conclusion that states are immune from agency proceedings.[137] In fact, the only textual support offered by Justice Thomas was the Court's prior decision in *Alden v. Maine* and its highly abstract references therein to a "constitutional design," a "system of federalism," and the "plan of the convention."[138] In Justice Breyer's view, the majority's holding could not stand absent historical or constitutional support.[139]

Rather, opined Justice Breyer, an analysis of the constitutional history actually illustrates the frailty of the majority's analogy between an administrative adjudication triggered by a private complaint and a private lawsuit against a state.[140] Particularly incriminating is the feu-

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131 *Id.* at 1876 (citing 46 U.S.C. app. § 1712(a) (1994 & Supp. V)). State sovereign immunity does not extend to actions brought by the United States. *See id.*

132 *See id.* at 1879.

133 Justices Stevens, Souter, and Ginsburg joined Justice Breyer's opinion. *See id.* at 1881.

134 *See id.* at 1882 (Breyer, J., dissenting) (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–30 (1935); INS v. Chadha, 462 U.S. 919, 953 n.16 (1983)). The adjudication in question, Breyer noted, involved "a typical Executive Branch agency exercising typical Executive Branch powers." *Id.* at 1883.

135 *See id.* at 1882–83 (citing 46 C.F.R. §§ 502.156, 502.226, 502.227, 502.230 (2001)).

136 *Id.* at 1883 (citing 46 U.S.C. app. § 1712(e) (1994 & Supp. V)).

137 *See id.* at 1883–84.

138 *See id.* at 1884 (citing 527 U.S. 706 (1999)).

139 *Id.*

140 *See id.*

dal analogy, relied on in *Alden v. Maine*, that forbids a citizen ("vassal") to sue a state ("lord") in the "lord's" own courts, but permits the citizen to sue in the courts of the "higher lord"—here, the federal government.[141] Furthermore, the Framers believed that the federal government could sue a state without the state's consent.[142] Justice Breyer contended that the Framers did not conceive of sovereign immunity applying beyond the federal courts and in fact anticipated some form of administrative regulation of the states by the Executive ("higher lord").[143] Thus, the mere absence of explicit instructions from the Framers and the dearth of administrative experience in the eighteenth century do not preclude adjudications of private complaints against states in agency proceedings.[144]

Justice Breyer also countered the majority's claim that agency proceedings constitute a form of coercion by a private party against a state, thus offending the latter's "dignity."[145] First, private citizens cannot compel a state to comply with the law since any suit brought by a private party to enforce an agency order would be subject to the sovereign immunity defense.[146] That is, only the federal government can make the SCSPA obey the requirements of the Shipping Act. Furthermore, as a practical matter, other privately initiated pressures which do not merit sovereign immunity protection or affront the states' dignity—such as complaints to Congress to enact legislation or requests to an agency to engage in rulemaking—may compel states to comply with federal law.[147] In addition, states can always protect their dignity by seeking judicial review of the initial agency decision, a proceeding in which the agency, not a private party, serves as the respondent.[148]

Finally, Justice Breyer examined the practical consequences of the majority's decision and determined that they did not justify extending sovereign immunity to administrative proceedings.[149] For example, while the decision still permits agencies to bring enforcement actions against states, it requires that the agency rely more heavily upon its own resources to investigate the merits of complaints.[150] "The natural result is less agency flexibility, a larger federal bureaucracy, less fair procedure, and potentially less effective law enforce-

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141 *Id.* (citing *Alden*, 527 U.S. at 741).
142 *Id.* at 1885.
143 *Id.*
144 *See id.*
145 *See id.* at 1886–87.
146 *See id.* at 1886 (citing 46 U.S.C. app. § 1713 (1994)).
147 *See id.* at 1886–87.
148 *See id.* at 1887 (citing 28 U.S.C. § 2342(3)(B)(iv), 2344 (1994)).
149 *See id.* at 1888–89.
150 *Id.* at 1888.

ment," particularly of laws designed to protect worker health and safety and regulate improper medical care.[151] In tandem with the Court's previous restrictive interpretations of the Constitution's structural constraints,[152] Justice Breyer argued that the majority's holding "restricts far too severely the authority of the Federal Government to regulate innumerable relationships between State and citizen . . . [and therefore] reaffirms the need for continued dissent."[153]

In addition to joining Justice Breyer's dissent, Justice Stevens wrote separately to further criticize the Court's decision in *Alden v. Maine*[154]—a predicate for the majority's holding—as supported by neither history nor the structure of the Constitution.[155] Justice Stevens also objected to the majority's reliance on the "dignity" rationale,[156] suggesting that the Eleventh Amendment was a response to the decision in *Chisholm v. Georgia*,[157] and merely restricts the federal district courts' jurisdiction under the state-citizen diversity clause of Article III.[158] Thus, Justice Stevens argued that if the Framers' true concern was the protection of the states' dignity, then surely they would have immunized the states from process as well.[159]

III
CASE ANALYSIS—A TEMPEST IN THE TEAPOT

A. "What's Past Is Prologue"[160]—*Federal Maritime Commission* as an Extension of the Court's Recent Sovereign Immunity Jurisprudence

As Justice Breyer and his counterparts in dissent suggest, the holding in *Federal Maritime Commission* was not inevitable. First, like almost all of the Supreme Court's significant sovereign immunity jurisprudence since *Hans v. Louisiana*,[161] the decision lacks any firm textual support in the Eleventh Amendment, which literally limits only

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151 *Id.*

152 *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); Seminole Tribe v. Florida, 517 U.S. 44 (1996).

153 *Fed. Mar. Comm'n*, 122 S. Ct. at 1889 (Breyer, J., dissenting).

154 527 U.S. 706 (1999).

155 *Fed. Mar. Comm'n*, 122 S. Ct. at 1879–80 (Stevens, J., dissenting).

156 *See id.* at 1880–81.

157 *See* 2 U.S. (2 Dall.) 419 (1793).

158 *See Fed. Mar. Comm'n*, 122 S. Ct. at 1880 (Stevens, J., dissenting). The drafters of the Amendment specifically left *Chisholm*'s personal jurisdiction holding undisturbed. *See id.*

159 *See id.* Lacking immunization from process renders states susceptible to suit in federal court, but not to actions by private parties.

160 WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc. 1, l. 249 (David Lindley ed., Cambridge Univ. Press 2002) (1610) [hereinafter THE TEMPEST].

161 134 U.S. 1 (1890).

the "Judicial power of the United States"[162] and not the Executive Branch. As Justice Breyer noted, independent agencies, such as the Federal Maritime Commission, are generally considered to exercise executive branch powers, regardless of the resemblance their activities bear to the traditional functions of legislatures and courts.[163] Accordingly, commentators often describe administrative adjudications as "quasi judicial,"[164] distinguishing the proceedings as another means of executing the laws.

Second, Justice Thomas's inability to rely on the text of the Eleventh Amendment and its "relatively barren historical record"[165] forced him to support the majority's holding by uncharacteristically employing a functionalist analogy between the FMC's adjudicative procedures and federal civil litigation.[166] Yet again, however, Justice Breyer exposed the tortuous alignment of the analogy, noting that unlike federal courts, FMC proceedings permit the use of hearsay, the determination of factual disputes through official notice, and allow the agency to disregard the initial decision of the A.L.J.[167] Furthermore, unlike Article III courts, the FMC lacks enforcement power, ironically forcing it to seek implementation of its orders from the same judicial power to which it was analogized by the majority.[168]

Such inconsistencies suggest that *Federal Maritime Commission* merely continues the Supreme Court's "hodgepodge of confusing and intellectually indefensible" Eleventh Amendment case law.[169] However, in many respects the decision is a sensible extension of the Court's sovereign immunity jurisprudence over the last one hundred years. In particular, both *Hans* and *Alden* explicitly hold that the scope of state immunity exceeds the text of the Eleventh Amendment, which merely delineates one aspect of a constitutionally vital doctrine.[170] Furthermore, *Seminole Tribe*—reaffirming the constitutional-

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162 U.S. CONST. amend. XI.

163 *See Fed. Mar. Comm'n*, 122 S. Ct. at 1881–82 (Breyer, J., dissenting); *see also* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472–73 (2001); Freytag v. Comm'r, 501 U.S. 868, 910 (1991) (Scalia, J., concurring).

164 *See, e.g.*, 3 CHARLES H. KOCH JR., ADMINISTRATIVE LAW AND PRACTICE § 12.13, at 177–79 (2d ed. 1997).

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

166 *See id.* at 1872–75.

167 *See id.* at 1882–83 (Breyer, J., dissenting).

168 *See id.* at 1883 (Breyer, J., dissenting).

169 John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1891 (1983).

170 *See* Alden v. Maine, 527 U.S. 706, 713 (1999) (stating that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment"); Hans v. Louisiana, 134 U.S. 1, 10 (1890) (noting that although the plaintiff resided in the defendant state, the principles of sovereign immunity embedded in the Eleventh Amendment forbade the suit regardless of the apparent inapplicability of the Amendment's text).

ity of the immunity recognized in *Hans*—dictates that Congress may not abrogate state immunity via its Article I powers.[171] This limitation applies regardless of whether Congress exercises absolute jurisdiction over the issue in question.[172] Most important, however, is the *Hans* presumption that "no anomalous and unheard-of proceedings . . . were intended to be raised up by the Constitution . . . ."[173] If states remain immune from actions unknown at the time of ratification, then they should be equally impervious to agency adjudications initiated by private parties, which became prevalent only in the twentieth century.

Federal Maritime Commission's position at the crossroads of the Supreme Court's sovereign immunity jurisprudence helps to explain the angle of the dissent's attacks. Justice Breyer, for example, focuses primarily on the dearth of textual and historical justifications for the majority's decision rather than on its practical implications, which he only hypothesizes.[174] Similarly, Justice Stevens criticizes the Court's prior decision in *Alden v. Maine* and its "'embarrassingly insufficient'" reliance on the "dignity" rationale.[175] While both of the dissenters' targets are important predicates for the majority's holding, they remain abstractly removed from the issue of whether or not to preclude agency adjudications of private complaints against states. Evidently, both Justice Breyer and Justice Stevens are content to rehash issues decided in prior cases rather than deal with the matter at hand.[176] Or more accurately, perhaps they must rehash these issues in order to achieve their desired result; the majority's argument collapses only if *Hans*, *Seminole Tribe*, and *Alden* fall.

Thus, in *Federal Maritime Commission* one sees the Court replaying an old and familiar scene. While the majority contends that state sovereign immunity is a fundamental principle embedded in the structure of the Constitution, the dissent adheres to a pre-*Hans* view of state immunity as explicitly set forth in the text of the Eleventh Amendment.[177] That is, the dissent maintains that one hundred years

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171 *See* Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996).

172 *Seminole Tribe*, for example, involved Congress's power under the Indian Commerce Clause. *See id.*

173 *Hans*, 134 U.S. at 18.

174 *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1881–89 (2002) (Breyer, J., dissenting).

175 *See id.* at 1879–81 (Stevens, J., dissenting) (quoting *Seminole Tribe*, 517 U.S. at 94).

176 As the majority noted, "[Justice Breyer's] quarrel is not with our decision today but with our decision in *Seminole Tribe* . . . ." *Id.* at 1878 n.18.

177 *See id.* at 1884 (Breyer, J., dissenting) ("[U]nless supported by considerations of history, of constitutional purpose, or of related consequence, th[e] abstract phrases [of the Eleventh Amendment] cannot support today's result.").

of precedent, beginning with *Hans*, is in error.[178] The dissent assumes that states should be liable for violations of federal law and that federal supremacy prevails over state sovereignty and independence.[179] The true drama of the dissent lies not in their systematic exposure of the decision's practical implications, but rather in their demand that over one hundred years of precedent should fall.

B. "The Isle Is Full of Noises"[180]—Practical Implications & Loopholes

The Court's decision in *Federal Maritime Commission* extends the state sovereign immunity doctrine and the holding of *Seminole Tribe*[181] into administrative fora, barring federal agencies from using adjudicative procedures to determine the merits of private party complaints against a nonconsenting state.[182] The holding applies regardless of the relief sought by the private plaintiff, prohibiting the administrative tribunal from granting monetary relief and issuing cease-and-desist and other injunctive orders against the state for infractions of federal law.[183] In addition, lower federal courts appear willing to stretch the Court's reasoning beyond the specific facts of the case and apply it to other agencies, statutes, and adjudicative schemes.[184] In this regard, *Federal Maritime Commission* constitutes a potent weapon for enhancing states' rights.

Nonetheless, the majority in *Federal Maritime Commission* explicitly identified a number of well-established exceptions to the state sover-

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178 Numerous scholars adopt the dissent's position. *See, e.g.*, William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1287–91 (1989) (refuting one scholar's claim that the Eleventh Amendment was not a well-reasoned rebuttal of *Hans*); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61, 70 (1984) (noting that "the rationale of *Hans v. Louisiana*, if not the result, should be regarded as an enforced error—a choice that was neither required nor fruitful"). In addition, for many years at least four Justices have taken such a stance. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 76 (Stevens, J., dissenting), 100 (Souter, Ginsburg, and Breyer, JJ., dissenting); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 301–03 (1985) (Brennan, Marshall, Blackmun, and Stevens, JJ., dissenting) (arguing that the Eleventh Amendment only bars jurisdiction in suits against an unconsenting state brought under the state-citizen diversity clause in Article III, but does not restrict suits against an unconsenting state brought under admiralty or federal question jurisdiction).

179 *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.3 at 396–98, 402 (3d ed. 1999).

180 THE TEMPEST, *supra* note 160, act 3, sc. 2 l. 27.

181 Seminole Tribe v. Florida, 517 U.S. 44 (1996).

182 *See* 122 S. Ct. at 1874.

183 *See id.* at 1879.

184 *See, e.g.*, R.I. Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31 (1st Cir. 2002) (applying sovereign immunity to whistleblower proceedings under the Solid Waste Disposal Act); Nelson v. La Crosse County Dist. Attorney, 301 F.3d 820, 838 (7th Cir. 2002) (holding that Eleventh Amendment immunity applies to adversarial proceedings in bankruptcy).

eign immunity doctrine that may constrict the decision's reach.[185] These common-law devices, the Court argued, ensure the effective enforcement of federal law against states while preserving states' dignity and their treasuries.[186] Consequently, the Court reasoned, the decision places few, if any, practical constraints on the ability of federal agencies to regulate state action.[187] This section explores the sovereign immunity exceptions the Court identified in *Federal Maritime Commission* and investigates other loopholes to the doctrine that may promote the effective enforcement of federal law by both federal agencies and private parties.

1. *Federal Enforcement*

Perhaps the most entrenched exception to Eleventh Amendment immunity is that states remain subject to direct suit by the United States government and its agencies.[188] Thus, immunity will not bar "the very common enforcement paradigm in which the federal agency itself, or the U.S. Attorney, brings the complaint."[189] Justice Thomas recognized this exception in *Federal Maritime Commission*: federal agencies may continue to initiate proceedings against states based on their independent determinations—even if the information regarding the infraction and the request to investigate originate from a private party.[190] Thus, he surmises, the decision will have very little effect on the efficient enforcement of federal law.[191]

Yet, as Justice Breyer suggested, if federal agencies must always prosecute on their own behalf and cannot rely on the use of "private Attorneys General,"[192] it seems plausible that "potentially less effective law enforcement" may result if the government must always deploy its own resources for a prosecution to occur.[193] For example, consider

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185 *See Fed. Mar. Comm'n*, 122 S. Ct. at 1878–79 (noting that the FMC remains free to, inter alia, institute its own administrative proceedings against a state-run port).

186 *See id.* at 1879.

187 *See id.* at 1878–79.

188 *See* United States v. Mississippi, 380 U.S. 128, 140–41 (1965); United States v. Texas, 143 U.S. 621, 644–45 (1892). Similarly, the immunity cannot be asserted in a suit brought by another state. *See* Kansas v. Colorado, 206 U.S. 46, 83 (1907).

189 PETER L. STRAUSS ET AL., ADMINISTRATIVE LAW: CASES AND COMMENTS 1113 (10th ed. 2003).

190 *See Fed. Mar. Comm'n*, 122 S. Ct. at 1878–79.

191 *See id.*

192 *See* Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14 (1942) (stating that private litigants' standing is limited to their serving as "representatives of the public interest"); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940) (holding that the Communications Act of 1934 confers standing on financially injured individuals to appeal the FCC's issuance of a broadcasting license); *see also* Associated Indus. of N.Y. State, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943) (introducing the term "private Attorney Generals [sic]"), *vacated as moot*, 320 U.S. 707 (1943).

193 *See Fed. Mar. Comm'n*, 122 S. Ct. at 1888 (Breyer, J., dissenting).

cases commenced in federal district courts during the twelve-month period ending March 31, 2002.[194] Of those concerning environmental matters, the federal government brought suit in only twelve percent.[195] Similarly, of the 2,009 cases filed under the Fair Labor Standards Act, the United States brought only six percent, and of the 19,859 employment civil rights cases filed (under the Americans with Disabilities Act and the Age Discrimination in Employment Act), the United States merely brought two to three percent.[196] Thus, while the majority emphasized the presence of agency enforcement, the federal government litigates only a small fraction of cases with public and private remedies, suggesting that private parties play a crucial role in federal law enforcement. Furthermore, the majority's position assumes that the interests of private parties and the federal government are aligned. If a federal agency—under its virtually unreviewable discretion to prosecute[197]—refuses a request to institute an enforcement action, then regulatory beneficiaries may be left without any remedy against the state.[198]

Nonetheless, these numbers are insufficient and may be misleading in several respects. First, they fail to distinguish suits against states, a prime concern of this Note, from those against other defendants. Second, they only reflect adjudications in federal court, not before administrative tribunals where the agency functions as investigator, prosecutor, and judge.[199] However, they do suggest that private parties have made significant contributions to the enforcement of federal law and thus could serve a similar function in administrative courts.

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194 *See* STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, Table C-2, http://www.uscourts.gov/caseload2002/tables/c02mar02.pdf (last visited Apr. 3, 2003) (disregarding suits where the United States was the defendant).

195 *See id.*

196 *See id.*

197 *See* United States v. Nixon, 418 U.S. 683, 693 (1974) (citations omitted) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."). Moreover, an agency's decision not to enforce is "presumptively unreviewable." Heckler v. Chaney, 470 U.S. 821, 832 (1985).

198 *See* STRAUSS, *supra* note 189, at 1113–14.

199 *See* Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289 (1997) (noting that benefactory agencies typically employ informal "inquisitorial" adjudicative models, where the A.L.J. not only decides the case but also has the authority and responsibility to investigate the facts and develop the record). Statistics concerning federal agency adjudications remain elusive, even for individual agencies. To gain a better understanding of such adjudications, one needs further statistical analysis, specifically the number of agency adjudications where a state was the defendant, and of those, how many were initiated by private parties (prior to the prohibition of such actions in *Federal Maritime Commission*).

Furthermore, such responsibility in the hands of private parties would save precious federal resources.[200]

2. *Suits Against Local Governments*

Another factor diluting the potency of *Federal Maritime Commission* is the Court's longstanding position that Eleventh Amendment immunity does not extend to local governments and municipalities.[201] Those institutions remain subject to suit by private parties in both state and federal court, although sufficient connections between a state and a local government may immunize the latter from suit.[202] For example, the Court held that the Eleventh Amendment barred recovery against a county program funded almost exclusively by the state's coffers.[203] Yet such circumstances are rare—the majority of social services, including police and fire protection, education, and sanitation, are all funded largely with local resources.[204] In this respect, suits against local governments and municipalities may be the most important exception to Eleventh Amendment immunity.

3. *Intervention Rights*

Federal involvement in a privately initiated suit against a state may similarly mitigate the practical implications of *Federal Maritime Commission.* A recent First Circuit decision, for example, suggests that federal intervention in an agency's adjudicative proceeding could remove a state's sovereign immunity bar.[205] In *Rhode Island Department of Environmental Management v. United States*, state employees alleged that their employer had retaliated against them for reporting what the employees believed to be a violation of the Solid Waste Disposal Act (SWDA).[206] Under the Act's whistleblower provision,[207] the employees initiated four separate administrative proceedings, each seeking monetary and injunctive relief and conducted in accordance with the formal hearing provisions of the Administrative Procedure Act.[208] The A.L.J. rejected the state's claims that sovereign immunity precluded the actions.[209] However, before the A.L.J. could determine the

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200 This is apparently a popular goal, given the current political climate disfavoring the expansion of most administrative agencies. *See* Andrew J. Ruzicho & Louis A. Jacobs, 25 EMP. PRACS. UPDATE, Dec. 2002, at 6.

201 *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Lincoln County v. Luning, 133 U.S. 529, 530 (1890).

202 *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101–02 (1984).

203 *See id.* at 123–24.

204 *See* CHEMERINSKY, *supra* note 179, § 7.4, at 406.

205 *See* R.I. Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31, 53–54 (1st Cir. 2002).

206 *See id.* at 38.

207 *See* Solid Waste Disposal Act, 42 U.S.C. § 6971 (2000).

208 *See R.I. Dep't of Envtl. Mgmt.*, 304 F.3d at 37–39 (citing 5 U.S.C. § 554 (2000)).

209 *See id.* at 38 n.2.

merits of all four claims, the state brought an action in federal district court to enjoin the proceedings.[210] The district court granted the injunction on sovereign immunity grounds, barring any further prosecution of the employees' claims before the Department of Labor.[211]

The First Circuit affirmed, noting that "although [*Federal Maritime Commission*] involved a different administrative agency, a different federal statute, and a different scheme of administrative adjudication, we see no basis for distinguishing [its] central holding."[212] Nonetheless, while the court rejected the appellants' numerous attempts to circumvent the sovereign immunity bar, it made one "important observation."[213] Under federal regulations, the Secretary of Labor could intervene in the A.L.J. proceedings as a party or amicus.[214] According to the court, the federal government so joining the suit "after it has been initiated by otherwise-barred private parties . . . cures any Eleventh Amendment or sovereign immunity defect, and the private parties may continue to participate in the suit."[215] The court of appeals thus modified the district court's ruling, allowing the Secretary to take such action.[216]

Thus, at least under the SWDA's administrative scheme to protect whistleblowers, *Rhode Island* offers some hope for private party plaintiffs seeking recourse for state violations of federal law. First, the decision reaffirms that states cannot enjoin the investigative arms of agencies from receiving complaints from private parties, conducting investigations, and determining liability based on those complaints.[217] Second, it suggests that upon a determination by the investigative arm of an agency that the complaint of a private party has merit, the agency will possess considerable incentives to intervene in the subsequent hearing before the A.L.J. and cure the sovereign immunity defect.[218] Such action permits the private party—at least partially—to maintain its prosecutorial role.

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210 *See* Rhode Island v. United States, 115 F. Supp. 2d 269, 272 (D.R.I. 2000).

211 *See id.* at 273–79.

212 *See R.I. Dep't of Envtl. Mgmt.*, 304 F.3d at 46.

213 *See id.* at 53.

214 *See id.* (citing 29 C.F.R. § 24.6(f)(1) (2000)).

215 *See id.* (citing Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904, 913 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999); Seneca Nation of Indians v. New York, 178 F.3d 95, 97 (2d Cir. 1999) (per curiam)).

216 *See id.* at 53–54.

217 *See id.* at 54 n.13; *see also* Ohio Envtl. Prot. Agency v. U.S. Dep't of Labor, 121 F. Supp. 2d 1155, 1167–68 (S.D. Ohio 2000) (permitting the agency to continue its investigation in order to decide whether to participate as a party in subsequent proceedings).

218 *See, e.g., Ohio Envtl. Prot. Agency*, 121 F. Supp. at 1168 (ordering that once a private party files a complaint against the state under one of the "federal whistleblower environmental statutes, the Department of Labor must, after full investigation, determine whether the claim has merit and whether the agency itself will join the action").

Nevertheless, the usefulness of agency intervention as co-plaintiff in the agency's own hearings remains limited. First, at least two district courts have rejected the distinction drawn in *Rhode Island* and *Ohio Environmental Protection Agency* between the investigatory and adjudicative phases of OSHA proceedings for purposes of sovereign immunity.[219] Thus, the possibility exists that in some courts all administrative proceedings against states relating to a private complaint, including investigations, may be enjoined via sovereign immunity principles. An additional complication is that, like traditional federal enforcement actions, intervention drains resources from the federal budget and renders Congress unable to reap the full potential of "private attorneys general."[220] More fundamentally, using agency intervention to counteract sovereign immunity subjects federally created private party rights to the agenda of the current administration. Whistleblowers under the SWDA, for example, may subject themselves to retaliatory attacks from state employers who know that an environmentally hostile administration and Secretary of Labor care little about protecting such informants. Ultimately, the scenario could deteriorate to the point where federal law and the rights of parties Congress intended to protect are left completely lifeless.

4. *Ex parte Young*

In addition to agency intervention, another and perhaps more worthwhile course of action may exist for private parties seeking relief in administrative courts for state infractions of federal law. In 1908, in *Ex parte Young*, the Supreme Court held that the Eleventh Amendment does not bar suits seeking prospective equitable relief to discontinue an ongoing violation of federal law by state officers.[221] The *Ex parte Young* doctrine permits federal courts to order future compliance by state officials (even when doing so will cost the state money), yet the doctrine forbids courts from awarding retroactive damages to be paid by state treasuries.[222] Thus, hypothetically, the probation officers in *Alden v. Maine*[223] could have obtained an injunction against the answerable state official directing the future payment of overtime as required by the Fair Labor Standards Act, although the officers could not have recovered the unpaid overtime to which they were

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219 *See* Conn. Dep't of Envtl. Prot. v. OSHA, 138 F. Supp. 2d 285, 296 (D. Conn. 2001); Florida v. United States, 133 F. Supp. 2d 1280, 1289–90 (N.D. Fla. 2001).

220 *See* Ruzicho & Jacobs, *supra* note 200, at 5–6.

221 *See* 209 U.S. 123, 159–60 (1908). The Court based its holding on the premise that state officers acting contrary to the Constitution or federal law act illegally, and thus strip themselves of their official capacity and consequently, any derivative immunity. *See id.*

222 *See* Edelman v. Jordan, 415 U.S. 651, 665–69 (1974); CHEMERINSKY, *supra* note 179, § 7.5 at 418.

223 527 U.S. 706 (1999).

due.[224] Although criticized as a fictional distinction between a state and its officers,[225] Professor Chemerinsky notes that without it "federal courts often would be powerless to prevent state violations of the Constitution and federal laws."[226]

Might *Ex parte Young* serve a similarly important role in the administrative context? Commentators note that the cruise line's requested cease-and-desist order in *Federal Maritime Commission* appears "analogous to [those] situations in which *Ex parte Young* has applied."[227] The Supreme Court, however, completely omitted any reference to the doctrine,[228] holding that "the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment."[229] The underlying cause of this omission, of course, was that the Fourth Circuit had previously found the *Ex parte Young* exception irrelevant to the case because the cruise line brought the complaint for both legal and equitable relief against the State Ports Authority, not its officers.[230] As a result, *Federal Maritime Commission* offers little help in determining the utility of the *Ex parte Young* doctrine in administrative hearings.

The First Circuit, in *Rhode Island Department of Environmental Management v. United States*, also averted the issue, holding that it could not properly consider applying the *Ex parte Young* exception to Rhode Island's immunity because the appellants failed to sustain such an argument and the record proved inconclusive.[231] Nonetheless, the court suggested that if the individual appellants satisfied the *Ex parte Young* predicates (i.e., named their managers at the Department in their complaints and sought prospective equitable relief), then "the complaint might not be barred by sovereign immunity."[232] Similarly, a federal district court in Florida recently hinted at the suitability of administrative whistleblower claims for injunctive relief against individuals named in their official capacity, analogizing such proceedings to

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224 STRAUSS, *supra* note 189, at 1114. The officers in *Alden*, however, did not request prospective relief because by the time the case reached the Supreme Court, the State of Maine had brought itself into compliance with the FLSA's wage and hour requirements. *See* Mills v. Maine, 118 F.3d 37, 41 (1st Cir. 1997).

225 *See, e.g.*, CHARLES ALAN WRIGHT ET AL., 13 FEDERAL PRACTICE AND PROCEDURE § 3524, at 151–54 (2d ed. 1984).

226 CHEMERINSKY, *supra* note 179, § 7.5, at 415.

227 William Funk, *Supreme Court News*, ADMIN. & REG. L. NEWS, Summer 2002, at 25.

228 *See id.*

229 *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1879 (2002) (quoting Seminole Tribe v. Florida, 517 U.S. 44, 58 (1996)).

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

231 *See* R.I. Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31, 52 (1st Cir. 2002).

232 *Id.*

traditional lawsuits.[233] These decisions, along with the Supreme Court's recent reliance upon *Ex parte Young* to defeat an Eleventh Amendment claim in federal court,[234] signify a revival of the *exception.* Accordingly, Justice Breyer's fears regarding the majority's holding in *Federal Maritime Commission* may prove unfounded.

Without a clear signal from the Supreme Court—or any federal court—such conjectures about the viability of the *Ex parte Young* doctrine will remain uncertain. Yet they should not, particularly in light of the Court's emphasis in *Federal Maritime Commission* on the similarities between traditional lawsuits and administrative adjudications.[235] That is, if the state sovereign immunity doctrine applies equally in both the judicial and administrative spheres, then so should the means of circumventing it.[236] Hence, *Ex parte Young* will likely remain a viable option for private parties in administrative proceedings seeking an injunction against a state officer to end a continuing violation of federal law. This would not only protect private parties (particularly whistleblowing employees), but would also ensure that the federal government retains the flexibility and resources necessary to monitor and remedy state violations of the Constitution and federal laws.

5. *Congressional Actions*

a. *Abrogation*

Another factor mitigating the Court's decision in *Federal Maritime Commission* is Congress's limited ability to abrogate state sovereign immunity. While *Seminole Tribe* precludes Congress from abrogating state immunity via any statute passed under Article I of the Constitution,[237] Congress may do so by adopting laws pursuant to its Fourteenth Amendment enforcement powers.[238] Yet to pursue the latter

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233 *See* Florida v. United States, 133 F. Supp. 2d 1280, 1291–92 (N.D. Fla. 2001). The court declined to rule on the issue since the question had yet to be addressed in the administrative forum. *See id.* at 1292 n.17.

234 *See* Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 122 S. Ct. 1753 (2002); *see also* MCI Telecomm. Corp. v. Bell Atl.-Pa., 271 F.3d 491, 508 (3d Cir. 2001) (noting that the court continues to view *Ex parte Young* as generally applicable whenever a plaintiff seeks prospective relief against individual state officers for a continuing violation of federal law).

235 *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1872–74 (2002).

236 However, the Supreme Court has held that where Congress has created a detailed remedial scheme for the enforcement of a federal statutory right against a state, a federal court cannot obtain jurisdiction via application of *Ex parte Young* over an action which seeks a remedy beyond that which Congress made available. *See* Seminole Tribe v. Florida, 517 U.S. 44, 74 (1996). If one is to rely on the present analogy, then such a congressionally imposed limitation would also apply in the administrative context.

237 *See id.* at 72–73.

238 *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999). However, such abrogation is improper where the statute exceeds the scope of the Fourteenth Amendment's protection. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531

option Congress must make its intention "unmistakably clear in the language of the statute,"[239] and the provision must create the necessary "congruence and proportionality between the injury to be prevented . . . and the means adopted to that end."[240]

While some commentators suggest that these strict standards may disqualify the majority of regulatory programs,[241] if one relies on the analogy between judicial and administrative proceedings, then abrogation of state sovereign immunity in the administrative arena appears proper. While such a scheme leaves those federal rights created pursuant to Article I unprotected,[242] it could nevertheless prove to be a powerful tool in guaranteeing state compliance with many federal laws. State employers discriminating on the basis of race, for example, could be subject to privately initiated administrative proceedings pursuant to Title VII of the Civil Rights Act of 1964, which applies to the states through Congress's Section 5 powers.[243] Environmental whistleblowers could be given similar recourse, as Congress enacted such protections to safeguard First Amendment rights made applicable to the states through the Fourteenth Amendment.[244]

b. *"Gift" or "Gratuity" Waivers*

A final exception to the state sovereign immunity doctrine is voluntary state waiver of its immunity and consent to suit in a particular forum.[245] Could such a waiver somehow mitigate the ruling in *Federal Maritime Commission* by allowing private parties to initiate agency adjudicative proceedings against states? Explicit waiver by a state of its im-

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U.S. 356, 364 (2001) (holding that nonconsenting states cannot be sued under Title I of the Americans with Disabilities Act, which accords more protection to disabled persons than the Equal Protection Clause).

239 Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000) (citations omitted).

240 City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

241 *See, e.g.*, STRAUSS, *supra* note 189, at 1115.

242 The most glaring example is the anti-discrimination and negotiation protections afforded by the Shipping Act. *See* 46 U.S.C. app. § 1709(b)(10), (d)(4) (2000). Since Congress passed the Act pursuant to its Article I maritime powers, it could not abrogate state sovereign immunity. Similarly situated are the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Fair Labor Standards Act. *See* Ruzicho & Jacobs, *supra* note 200, at 3.

243 *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (holding that recovery under the Civil Rights Act is not precluded by the Eleventh Amendment).

244 *Rhode Island Department of Environmental Management v. United States* suggested such an approach. *See* 304 F.3d 31, 51 (1st Cir. 2002) (citing Pickering v. Bd. of Educ., 391 U.S. 563, 574–75 (1968), which held that the "First and Fourteenth Amendments protect the right of public employees to speak on matters of public concern"). The First Circuit rejected the appellants' claims, however, on the grounds that Congress did not express a clear intention to abrogate the states' immunity. *See id.*

245 *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670, 675 (1999) (citing Clark v. Barnard, 108 U.S. 436, 447–48 (1883)); *see also* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985) ("[I]f a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action.").

munity to suit in a specific adjudication or by statute, of course, always remains a viable option. However, courts have rejected the notion that a state explicitly waives its immunity by "voluntarily [partaking] in any facet of a federal adjudicative proceeding," such as answering a complaint or conducting discovery.[246] The Supreme Court has placed similar constraints on constructive waivers, holding that mere participation in a federally regulated activity—such as accepting the requirements of the federal Medicaid Act in exchange for funds—no longer constitutes consent to suit in federal court.[247] That is, Congress may not coerce a state into relinquishing its immunity by threatening to exclude it from participating in an "otherwise lawful activity."[248]

A recent decision from the Third Circuit, however, suggests that one form of congressionally initiated constructive waiver may remain a viable option.[249] Congress, pursuant to its powers under Article 1, may "require a state to waive immunity in order to engage in an activity in which the state may not engage absent congressional approval, or in order to receive a benefit to which the state is not entitled absent a grant or gift from Congress."[250] These "gift" or "gratuity" waivers are valid provided that Congress makes clear its intent to require a waiver of immunity, and the state unambiguously and voluntarily accepts.[251] Furthermore, the activity or benefit must not be an "otherwise lawful" pursuit for the state; rather, it must be an activity in which states can engage only with the express leave of Congress.[252] Because the state, through the "gratuity," effectively exercises federal power, Congress may attach to its grant any conditions it chooses, including the surrender of the state's sovereign immunity.[253] Thus, the Third Circuit found that a public utility knowingly waived its sovereign immunity by voluntarily accepting a congressional "gift" of the power to regulate local telecommunications competition under the Telecommunica-

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246 *R.I. Dep't of Envtl. Mgmt.*, 304 F.3d at 48–49 (distinguishing Lapides v. Bd. of Regents, 122 S. Ct. 1640, 1643 (2002) (holding that a state waives its Eleventh Amendment immunity by removing a case from state to federal court)).

247 *See Coll. Sav. Bank*, 527 U.S. at 687; Fla. Dep't of Health & Rehabilitative Servs. v. Fla. Nursing Home Ass'n, 450 U.S. 147, 150 (1981) (per curiam).

248 *Coll. Sav. Bank*, 527 U.S. at 687.

249 *See* MCI Telecomm. Corp. v. Bell Atl.-Pa., 271 F.3d 491 (3d Cir. 2001).

250 *Id.* at 505. Four other circuits have upheld this version of constructive waiver. *See* Bell Atl. Md., Inc. v. MCI Worldcom, Inc., 240 F.3d 279, 292 (4th Cir. 2001) (*vacated on other grounds by* Verizon Md., Inc. v. Public Serv. Comm'n of Md., 122 S. Ct. 1753 (2002), in which the Court did not reach the question of waiver, finding that *Ex parte Young* permitted the suit to go forward); AT&T Communications v. BellSouth Telecomm. Inc., 238 F.3d 636, 645–46 (5th Cir. 2001); MCI Telecomm. Corp. v. Ill. Bell Tel. Co., 222 F.3d 323, 340 (7th Cir. 2000); MCI Telecomm. Corp. v. Pub. Serv. Comm'n, 216 F.3d 929, 937 (10th Cir. 2000).

251 *See MCI Telecomm. Corp.*, 271 F.3d at 505–06.

252 *Id.* at 510.

253 *Id.*

tions Act of 1996, where the state could only assume that role with congressional authorization.[254]

Similarly, "gift" or "gratuity" waivers could play an important yet limited role in the context of administrative proceedings. For example, under the Supremacy Clause,[255] the Supreme Court has held that Congress, according to its enumerated powers, may expressly or impliedly preempt state law by either defining the scope of the preemption or "occupying the field" of legislation.[256] As a result of Congress's Commerce Clause power to regulate maritime affairs (as well as interstate commerce),[257] any state legislation attempting to govern ocean-borne commerce could be preempted by federal laws such as the Shipping Act.[258] Congress could not simply abrogate the Eleventh Amendment immunity of state terminal operators. Yet it could "gift" to a state the optional power to regulate or arbitrate unreasonable and discriminatory practices by private marine terminal operators,[259] which due to prior federal preemption is clearly not an "otherwise lawful" activity. If the state accepts the "gratuity" voluntarily, Congress could then demand in exchange that the state relinquish its sovereign immunity in federal administrative fora, thus allowing private parties to initiate proceedings against unreasonable state-run terminals. On the other hand, a state wishing to preserve its sovereign immunity could decline the offer,[260] and the regulatory power would simply revert to the Federal Maritime Commission.

Both Congress and the states possess incentives to broker such a deal. A state would assume a role in the federal regulatory scheme, allowing it some economic control over its own ports and waters via the opportunity to conduct arbitrations among feuding terminals, carriers, and other competitors. The surrender of its Eleventh Amendment immunity might be a small price to pay for such power over local trade and industry, although in doing so it might forfeit a competitive advantage its own maritime operators have over private facilities.[261] The federal government would preserve its investigative

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254 *See id.* at 513.

255 *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . .").

256 *See, e.g.*, Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 222 (1995) (holding that an express preemption provision in the Airline Deregulation Act of 1978 precluded state regulation of air carriers); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n., 461 U.S. 190, 222–23 (1983) (holding that the Atomic Energy Act impliedly preempted state law).

257 *See* U.S. CONST. art. I, § 8, cl. 3 ("To regulate Commerce with foreign Nations, and among the several States. . . .").

258 Shipping Act of 1984, 46 U.S.C. app. §§ 1701–19 (2000).

259 *See MCI Telecomm. Corp.*, 271 F.3d at 510.

260 *See id.* at 511.

261 *See* S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165, 178 (4th Cir. 2001), *aff'd*, 122 S. Ct. 1864 (2002).

resources because private party disputes would be subject to arbitration by the state in the first instance, not regulation by the Federal Maritime Commission. Similarly, the Commission would save prosecutorial resources, given that state infractions of federal law could be litigated in federal agency adjudications by private parties due to the state's waiver of its sovereign immunity. In sum, the potential advantages to both states and the federal government render "gift" or "gratuity" waivers an important exception to the state sovereign immunity doctrine.

C. "Rounded with a Sleep"[262]—*Federal Maritime Commission* as Part of the Rehnquist Court's Agenda to Constrict Congress's Ability to Impose and Enforce Regulatory Standards

As discussed, a number of factors suggest that the holding in *Federal Maritime Commission* will do little to hinder the effective enforcement of federal law. As the Court recognizes, the United States government may directly bring,[263] or intervene in,[264] actions against states. In addition, local governments continue to exist outside the sovereign immunity shield,[265] as do state officials sued for prospective injunctive relief.[266] Coupled with Congress's ability to abrogate states' immunity under the Fourteenth Amendment,[267] and to entice states to waive their immunity by offering "gifts" of federal regulatory power,[268] the "striking feature" of the sovereign immunity doctrine becomes its apparent worthlessness as a means of promoting federalism.[269] Thus, assuming the popular analogy between judicial and administrative adjudications holds fast, the Court's endorsement of the state sovereign immunity doctrine in agency adjudications also appears to possess little value.

Yet it is imperative to view the holding in *Federal Maritime Commission* from outside the sovereign immunity paradigm. Doing so reveals that the Court's recent Eleventh Amendment jurisprudence is just one part of an extensive conservative plan to constrict Congress's ability to impose and enforce regulatory standards against states. Other lines of federalist jurisprudence, while perhaps less aggressive in over-

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262 THE TEMPEST, *supra* note 160, act 4, sc. 1 l. 258.

263 *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1878–79 (2002).

264 *See* R.I. Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31, 53 (1st Cir. 2002).

265 *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280–81 (1977); Lincoln County v. Luning, 133 U.S. 529, 530 (1890).

266 *See Ex parte* Young, 209 U.S. 123, 159–60 (1908).

267 *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999).

268 *See* MCI Telecomm. Corp. v. Bell Atl.-Pa., 271 F.3d 491, 510 (3d Cir. 2001).

269 *See* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 459 (2002).

ruling prior holdings and reformulating modes of analysis,[270] have imposed considerable substantive and remedial limitations on congressional power. This section provides a brief sampling of these additional restraints, both to place *Federal Maritime Commission* in its proper context and to explain how a decision that appears so ineffective—particularly after a survey of the exceptions and loopholes to the sovereign immunity doctrine—could generate such an apoplectic response from liberal justices and scholars.

1. *Substantive Constrictions*

In 1995, the Supreme Court embarked on a journey to curb Congress's substantive regulatory powers, which at that time had remained unchecked since the early days of the New Deal.[271] By invalidating a federal statute prohibiting the possession of firearms in school zones, the Court in *United States v. Lopez* restricted the scope of Congress's authority to regulate interstate commercial activities.[272] Specifically, the Court signaled that it would no longer accept at face value Congress's assertions of power under the Commerce Clause.[273] Thus, the Court refused to uphold a statute that regulated education and crime—matters traditionally monitored by the states—where Congress failed to offer any hard evidence that guns in schools affected interstate commerce.[274] More recently, the Court overturned the Violence Against Women Act on the grounds that gender-motivated crimes were not economic activity and thus did not fall under Congress's commercial regulatory powers.[275] Although neither decision overruled any precedent or seriously modified the Court's analysis of Commerce Clause issues,[276] both sent a clear signal that the Court would police Congress's attempts to regulate activities traditionally reserved to the states, particularly where the commercial nature of the activity was in question.

Other decisions regarding Congress's power to directly regulate—or commandeer—state and local governments sent similar

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270 *See id.* Fallon explains the Court's boldness in its recent sovereign immunity jurisprudence as stemming from the Court's repeated invocation of sovereign immunity as a symbol of federalism and the conservative Justices' hostility to suits for money damages against state governments. *See id.* at 482–83.

271 The last time the Court invalidated a federal statute on the ground that it was beyond Congress's power under the Commerce Clause was in *Carter v. Carter Coal Co.*, decided in 1936. *See* 298 U.S. 238 (1936).

272 *See* United States v. Lopez, 514 U.S. 549 (1995).

273 *See id.* at 562–63.

274 *See id.*

275 *See* United States v. Morrison, 529 U.S. 598, 607–19 (2000) (affirming the Fourth Circuit's decision to strike down 42 U.S.C. § 13981).

276 *See* Fallon, *supra* note 269, at 475–77 (maintaining that the Court's recent Commerce Clause decisions reflect no dramatic advance toward a more robust constitutional federalism).

signs. Whittling away at the principle expressed in *Garcia v. San Antonio Metropolitan Transit Authority*—that the judiciary lacks the ability to identify state activities immune from federal regulation[277]—in 1992 the Court distinguished one such area of state autonomy when it held that the federal government could not compel a state legislature to regulate on behalf of federal objectives.[278] In 1997, the Court broadened the noncommandeering principle to encompass the states' executive departments, holding unconstitutional provisions in the Brady Handgun Violence Protection Act that required state and local law enforcement officers to participate, albeit temporarily, in the administration of a federally enacted regulatory scheme.[279]

City of Boerne v. Flores echoed similar federalism concerns—and placed further substantive restrictions on Congress's ability to impose regulatory standards—by invalidating the Religious Freedom Restoration Act (RFRA).[280] Congress passed the Act under Section 5 of the Fourteenth Amendment to reaffirm the right to free exercise of religion.[281] The Court held that Congress has no power under the Fourteenth Amendment to substantively interpret constitutional provisions—such as declaring the meaning of free exercise or defining fundamental rights—that could bind states.[282] Rather, Congress possesses solely remedial powers under Section 5, which must only be exercised in a closely tailored fashion to meet a very clear violation of Section 1.[283] As noted by Professor Tribe, this restriction successfully burdens Section 5 legislation "with something between intermediate and strict scrutiny."[284] Further, it effectively forces Congress to enact important legislation that clearly fits within the goals of the Fourteenth Amendment under its other powers,[285] some of which may suffer from similar circumscriptions under the Court's recent federalism jurisprudence.

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277 469 U.S. 528, 546–47 (1985).

278 New York v. United States, 505 U.S. 144, 188 (1992).

279 *See* Printz v. United States, 521 U.S. 898, 933 (1997).

280 *See* 521 U.S. 507 (1997).

281 An earlier decision by the Court had severely restricted rights under the Free Exercise Clause, insulating generally applicable laws from free exercise attack. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990). Congress, after intense backlash, adopted the RFRA, instigating the *Flores* case. *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb to bb-4 (2000).

282 *See Flores*, 521 U.S. at 519.

283 *See id.* at 519, 532–33.

284 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5–16, at 959 (3d ed. 2000).

285 An example of such legislation is the Civil Rights Act of 1964 (codified as amended in scattered sections of 5, 28, and 42 of the United States Code).

2. *Remedial Constrictions*

While the bark of federalism may lie in the Court's attempts to curb Congress's substantive powers, its true bite may reside elsewhere. Just as the Court has limited Congress's power to create substantive federal rights, it has also restricted which entities Congress can authorize to enforce those rights. One such remedial constriction, of course, is the Court's expansion of the Eleventh Amendment. However, state sovereign immunity is just one of the more robust limitations that the Court has placed on potential federal litigants.

Contemporary standing doctrine constitutes one such example, which is best exemplified by the Court's decision in *Lujan v. Defenders of Wildlife*.[286] Under the Endangered Species Act's "citizen suit" provision entitling "any person" to bring suit,[287] the plaintiffs claimed an injury-in-fact arising out of the failure of both the Secretary of Commerce and the Secretary of the Interior to comply with the Act's consultation requirement.[288] The Court held that "congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law" is not sufficient to confer standing.[289] In creating this abstract right, said the majority, Congress exceeded the standing requirements of Article III.[290] Rather, the alleged injury must be particularized and not undifferentiated, and the substantive or procedural rights in question designed to protect some threatened concrete interest of the plaintiff.[291] Thus, Congress could not broadly empower the citizenry to bring suit, thereby circumventing the environmental enforcement efforts of the current executive and transforming the federal courts into "'continuing monitors of the wisdom and soundness of Executive action.'"[292]

Professor Fallon notes another line of decisions whereby the Court has promoted federalism and protected local treasuries by constricting Congress's remedial powers.[293] Section 1983 of Title 42 of the United States Code creates a legal entitlement of relief against any "person who, under color" of state law, deprives another of his federal

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286 504 U.S. 555 (1992).

287 *See* Endangered Species Act, 16 U.S.C. § 1540(g)(1) (2000) (providing that "any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter").

288 *See Lujan*, 504 U.S. at 558–59 (citing 16 U.S.C. § 1536(a)(2)).

289 *Id.* at 573.

290 *See id.* at 574–76.

291 *See id.*; *cf.* Fed. Election Comm'n v. Akins, 524 U.S. 11, 23–25 (1998) (holding that one of a large class of citizens who enjoys a statutorily created "right" to information has standing; the injury-in-fact is the particular citizen's inability to obtain information).

292 *Lujan*, 504 U.S. at 577 (quoting Allen v. Wright, 468 U.S. 737, 760 (1984)).

293 *See* Fallon, *supra* note 269, at 463.

rights.[294] Although the complexities of Section 1983 actions are beyond the scope of this Note, they perform a vital function "as the 'basic vehicle' for federal court review of alleged state and local violations of federal law."[295] Interestingly, however, while municipalities are generally considered "persons" under Section 1983,[296] recent decisions by the Court "establishing standards of municipal liability make it exceedingly difficult to prove that local governments are causally responsible, and thus directly liable, for wrongs committed by their officials."[297] The Court has placed similar limitations on suits against officers under Section 1983, creating varying levels of official immunity so as to protect the treasuries of those state and local governments that indemnify their employees.[298]

3. *Revisiting the Implications*

When viewed amongst some of the substantive and remedial constrictions placed upon Congress's ability to impose and enforce regulatory actions, the impetus behind the Supreme Court's holding in *Federal Maritime Commission* becomes clear. Specifically, precluding agency adjudications of private complaints against states furthers a number of federalism principles that the Court has endorsed over the last ten years. First, although not a per se substantive limitation on congressional power, the majority's repeated references to state "dignity" advance the notion that the states themselves are sovereign entities, and are thus due a significant amount of autonomy from the federal government. Second, as with the limitations on standing and Section 1983 actions, the decision limits Congress's ability to empower private citizens to prosecute state infractions of federal law. Only the supreme power of the federal government should be able to hold states responsible for such violations. Hence, like *Lujan*, the decision promotes the power of the executive over Congress, the judiciary, and the private citizenry, to ensure that the laws are faithfully executed.

Ultimately, the holding in *Federal Maritime Commission* must be seen as just one part of the Court's crusade to protect the states from congressional action. Only when viewed on this macro scale do the majority's reasoning and the dissent's seething response make sense. Adhering to the federalist principles they have promoted over the last ten years, Justice Thomas and his colleagues in the majority easily rea-

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294 42 U.S.C. § 1983 (2000).

295 CHEMERINSKY, *supra* note 179, § 8.1, at 450. "Over [ten] percent of the federal court docket consists of § 1983 suits." *Id.* (citation omitted). In particular, § 1983 creates the cause of action for nearly all of the federal courts' constitutional rulings arising from the actions of local governments and municipalities. *See id.* at 450–51.

296 *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 662–63 (1978).

297 Fallon, *supra* note 269, at 463.

298 *See id.* at 464.

son that agencies cannot adjudicate private complaints against the states—holding otherwise would offend their vision of state autonomy, limited congressional power, and a robust executive. The dissent reacts vehemently, yet not out of a fear that the decision itself will severely curtail the efficient enforcement of federal law; a number of factors, such as the *Ex parte Young* doctrine and federal intervention, soften the Eleventh Amendment's initial sting. Rather, it is as if the dissent, confronted with a true agency case and a clear infringement of a federally created right, suddenly appreciates the extent to which the majority is blatantly promoting its vision. In this respect, Justice Breyer's call for "continued dissent"[299] signals more than continued resistance to the majority's state sovereign immunity decisions—it provokes a jurisprudential war along a much broader ideological spectrum.

CONCLUSION

In *Alden v. Maine*, Justice Kennedy stated that "the bare text of the [Eleventh] Amendment is not an exhaustive description of the States' constitutional immunity from suit."[300] Rather, state sovereign immunity operates as a fundamental yet elusive principle embedded in the structure of the Constitution and subject to generous interpretations by the Supreme Court. The holding in *Federal Maritime Commission* offers one example of the doctrine's inherent ambiguity: the Court deployed a functionalist analogy between the FMC's adjudicative procedures and federal civil litigation to preclude agency adjudications of private complaints against states. As demonstrated, this correlation is suspect at best, particularly in light of the stark differences between the two proceedings and the FMC's clear exercise of executive, not judicial, power. Yet the decision clearly embraces the state sovereign immunity principle kindled in *Hans* and stoked in *Alden* and *Seminole Tribe* that "no anomalous and unheard-of proceedings . . . were intended to be raised up by the Constitution."[301] In this respect, one must admire the majority for its consistency and admonish the dissent for its blatant departure from the doctrine of stare decisis.

Furthermore, a number of well established and potential exceptions to the state sovereign immunity doctrine will undoubtedly lessen the impact of the Court's holding. While further statistical data must be gathered to discern the exact impact that the adjudication by agencies of private complaints against states could have on the enforcement of federal law, for now it appears that such actions are not

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

300 527 U.S. 706, 736 (1999).

301 Hans v. Louisiana, 134 U.S. 1, 18 (1890).

critical. Certainly, the agencies themselves can and do serve as the prosecutors in such actions, and the Court has long held that local governments and municipalities, the primary providers of social services, fall outside of the Eleventh Amendment's shield. Intervention by the federal government could also remove the states' sovereign immunity bar, as could congressional abrogation of the states' immunity where appropriate, and the use of "gift" waivers. Most importantly, it appears that private parties will continue to be able to seek prospective equitable relief to discontinue ongoing violations of federal law by state officers.

Yet *Federal Maritime Commission* stings, and Justice Breyer howls in pain. This is because the decision, while practically anodyne, reaffirms the significant and ongoing shift in the Court's jurisprudence towards a dogma the dissent abhors—robust state autonomy, limited congressional power, and a particularly potent executive. It is typical Greek theater, as the players in the dissent, already doomed by the heartless gods, nevertheless play out their roles with gusto. The pot, it seems, has boiled over, and the dissent gets burned.