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COMMENT: *Federal Maritime Commission v. South Carolina Ports Authority*: Judicial Incursions into Executive Power

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COMMENT

Federal Maritime Commission v. South Carolina Ports Authority

JUDICIAL INCURSIONS INTO EXECUTIVE POWER*

I. INTRODUCTION

In a 2002 decision, *Federal Maritime Commission v. South Carolina Ports Authority*,[1] the Supreme Court affirmed the Fourth Circuit's dismissal of a judgment against a state port authority by an independent federal agency.[2] In so doing, the Court expanded the doctrine of state sovereignty, which has ballooned in scope and application in recent years,[3] into the area of executive action. Without passing on the nature of the power used by federal agencies when they adjudicate, the Supreme Court held that the constitutional principle of state sovereignty precludes an agency adjudication when a private citizen initiates proceedings against a state, even though the agency chose to adjudicate whether the state had violated a valid federal law.[4] This Comment will argue that the Court

[1] Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002).

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

[3] *See infra* Part II.A. *See also* Mark D. Falkoff, *Abrogating State Sovereign Immunity in Legislative Courts*, 101 COLUM. L. REV. 853 (2001) (arguing that the Supreme Court has broadened state immunity from suits by private individuals in a manner that "contravenes" the rule of law).

[4] *Fed. Mar. Comm'n*, 535 U.S. at 747. The Federal Maritime commission chose to clarify the application of the Shipping Act through adjudication rather than through an alternate method, such as rulemaking. *Id.* at 774-75 (Breyer, J., dissenting).

should not have extended the doctrine of sovereign immunity, itself of problematic provenance, to cover proceedings within an independent agency. Although the sovereign immunity doctrine may be relatively ineffectual to advance the goals of federalism,[5] the ability of the doctrine to erode legislative and executive programs for enforcement of federal laws is considerable. The Court should impose such impediments to federal programs only if it can articulate a less problematic constitutional basis for state sovereignty than it has or if it is willing to locate judicial power in the federal agencies when they adjudicate.

Part II of this Comment examines the historical evolution of the doctrine of state sovereign immunity in Supreme Court jurisprudence, describes the factual background of *Federal Maritime Commission* and describes the case's movement through the courts. Part III explores the hybrid nature of federal agency adjudication and asks whether an agency exercises judicial power when it adjudicates a claim by a private party. Part IV discusses general criticisms of the sovereign immunity doctrine. Part V looks at the principles underlying the Court's current vision of federalism, questions whether the sovereignty doctrine fits coherently within the Court's federalist jurisprudence, and suggests that the present conception of sovereign immunity is problematic from the federalist perspective. Finally, Part VI argues that, with respect to agency adjudication, the question of divisions of power between the federal branches of government should predominate over the question of sovereign immunity. The sovereignty analysis fits the issue of agency adjudication poorly because agency adjudication primarily serves the function of implementing and refining federal executive policy, as opposed to Article III courts which primarily serve to redress individual grievances. The Comment ultimately concludes that while the federalism concerns underlying the doctrine of sovereign immunity may justify circumscription of certain kinds of agency adjudicative procedures, they do not warrant an absolute bar against private complaints.

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[5] *See* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002) (arguing in part that the state sovereignty doctrine is a cumbersome mechanism for federalist reform).

II. THE BACKGROUND OF *FEDERAL MARITIME COMMISSION*

A. *Background of State Immunity from Suit*

The dispute in *Federal Maritime Commission* is the product of a largely contemporary resurgence of concern over the amenability of states to suit. The early Supreme Court initially showed little regard for the principle of state sovereignty. However, the issue was quickly framed by the court for the first time. In *Chisholm v. Georgia* the Court found that it had jurisdiction over a suit by a South Carolina citizen against the state of Georgia for the debt the state had incurred to him during the Revolutionary War.[6] The national outrage over this vulnerability of states to private suit led to the ratification in 1798 of the Eleventh Amendment, the text of which prohibits citizens of one state from bringing suit in federal court against another state.[7]

For almost one hundred years, the Eleventh Amendment appeared to apply only to negate the specific Article III, section 2 grant of diversity jurisdiction to federal courts over cases where a state was sued by a citizen of another state. The issue of jurisdiction became more complicated in 1890 with *Hans v. Lousiana*, which extended the Eleventh Amendment's prohibition of subject matter jurisdiction to citizens' suits against their own state.[8] Many observers have since regarded the *Hans* decision as an overbroad interpretation of the Eleventh Amendment.[9] Twenty years later the Court somewhat narrowed *Hans* with an exception it formulated in *Ex parte Young*.[10] In *Young*, the Court authorized citizens of one state to sue an *official* of another state, if not the state itself, when the official acted beyond his constitutional authority and when the plaintiff sought only injunctive relief.[11]

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[6] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

[7] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

[8] Hans v. Lousiana, 134 U.S. 1 (1890).

[9] For an in-depth treatment of the criticisms, see Edward A. Purcell, Jr., *The Particularly Dubious Case Of* Hans v. Louisiana*: An Essay On Law, Race, History, And Federal Courts*, 81 N.C. L. REV. 1927 (2003). *See also infra* note 20 and accompanying text.

[10] 209 U.S. 123 (1908).

[11] *Id.*

Over time the Court carved out further areas in which the Eleventh Amendment would not preclude suits against a state or its employees. For example, the Court permitted private suits against states when such suits were grounded in a law enacted pursuant to Congress's Fourteenth Amendment enforcement power,[12] which was seen to override the Eleventh Amendment because ratified afterward with the purpose of expanding federal power over the states.[13] However, the Court tried to reduce the possibility of a proliferation of suits by requiring an explicit congressional intent to abrogate state sovereign immunity and thereby to give citizens the right to sue a state under any given statute.[14]

The current Court undertook its project of expanding the doctrine of state sovereignty with *Seminole Tribe v. Florida*.[15] *Seminole Tribe* overruled an earlier decision holding that Congress could authorize suits for money damages under the Commerce Clause.[16] Justice Rehnquist, writing for the Court, held that Congress had no constitutional power to abrogate state sovereign immunity under any portion of the Commerce Clause.[17] *Seminole Tribe* unequivocally established the principle that Congress could not use Article I powers to circumvent the Eleventh Amendment's restrictions on Article III jurisdiction. In his dissent, Justice Stevens noted that the majority's holding would preclude Congress from providing a federal forum for a "broad range of actions against States," including bankruptcy, environmental law, and economic regulation.[18] He argued that the Court's holding contravened a consistent Supreme Court position established in *Hans* that Congress could create a cause of action against a state in any area within Congress's Article I powers.[19]

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[12] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (permitting suit, even for retrospective damages, based on law enacted pursuant to Fourteenth Amendment enforcement power).

[13] *See* Seminole Tribe v. United States, 517 U.S. 44, 59 (1996) (quoting *Fitzpatrick.*, 427 U.S. at 455) ("[T]he Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution.").

[14] Atascadeo State Hospital v. Scanlon, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.").

[15] 517 U.S. 44 (1996).

[16] Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

[17] *Seminole Tribe*, 517 U.S. 44 (1996).

[18] *Id.* at 77 (Stevens, J., dissenting).

[19] *Id.* at 76-77 (Stevens, J., dissenting).

The Court continued to expand the reach of the state sovereign immunity doctrine in *Alden v. Maine*, which held that Congress could not compel states to entertain suits against them by their own citizens within their own state courts.[20] In *Alden*, the Court developed the rationale underlying state sovereignty more fully than it had in any previous case. The Court pronounced that "the immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment" so that the literal language of the Eleventh Amendment was irrelevant in determining the scope of the immunity.[21]

Instead, the majority opinion in *Alden* characterized the sovereign immunity from suit retained by the states as pre-constitutional, its parameters defined in reference to the sovereignty of the British Crown.[22] The Court characterized any state's non-consensual appearance to defend against a private complaint as an affront to the state's dignity, and regardless of the forum, such "coercive process" was inimical to state sovereignty as imbedded in the Constitution.[23]

Although many commentators have described the Court's current state sovereignty jurisprudence as mystifying or suspicious,[24] state sovereign immunity has clearly taken root in the philosophies of a small majority of Justices sitting on the Court today and continues to play a large part in the Rehnquist Court's case selection.[25] The disposition of *Federal Maritime*

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[20] 527 U.S. 706 (1999).

[21] *Id.* at 713.

[22] *Id.* at 715.

[23] *Id.* at 749 (quoting *Ex parte* Ayers, 123 U.S. 443, 505 (1887)).

[24] *See, e.g.*, Louise Weinberg, *Of Sovereignty and Union: The Legends of* Alden, 76 NOTRE DAME L. REV 1113, 1118 (2001) ("[T]he *Alden/Seminole/Hans* dispensation is and has been both intellectually unfounded and unjust."); David L. Shapiro, *The 1999 Trilogy: What is Good Federalism?*, 31 RUTGERS L.J. 753, 753-54 (2000) (contending that *Alden* relied on "ambiguous" history and that the *Alden* line of cases had no textual support in the constitution); James G. Wilson, *The Eleventh Amendment Cases: Going "Too Far" with Judicial Neofederalism*, 33 LOY. L.A. L. REV. 1687, 1688-89 ("Eleventh Amendment doctrine contains . . . confusing outcomes that are even less comprehensible now that the doctrine has become so broad and dynamic.").

[25] Among the cases on the Court's docket in 2001 and 2002 were: *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (considering whether Congress had power under the Fourteenth amendment to abrogate the states' Eleventh Amendment immunity from suit by individuals under the Family and Medical Leave Act of 1993), *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533 (2002) (holding that federal supplemental jurisdiction statute does not toll claims reasserted in state court if the claims are barred by the Eleventh Amendment), *Jinks v. Richland Co.*, 538 U.S. 456 (2003) (considering whether the same tolling provision is an unconstitutional violation

Commission itself provides evidence that the Court has not exhausted its development of the doctrine. In *Federal Maritime Commission* the Court treats federal agency adjudication as another "forum," under the *Alden*[26] rubric, to which the literal language of the Eleventh Amendment is of little relevance and the tableau of an indignant state forced to entertain the petition of a private party looms large.[27]

B. *The Facts and History of* Federal Maritime Commission

The dispute underlying *Federal Maritime Commission* arose when South Carolina Maritime Services, Inc. (Maritime Services) filed a complaint with the Federal Maritime Commission against the South Carolina State Ports Authority (Ports Authority) for repeatedly denying permission to berth a cruise ship in the Port of Charleston.[28] In refusing to grant permission, the Ports Authority cited its own policy against giving berthing space to ships run primarily for gambling purposes.[29] Maritime Services' complaint alleged that the Ports Authority policy violated the Shipping Act because the Ports Authority had "unduly and unreasonably preferred" another shipping line, Carnival Cruise Ships, in violation of section 1709(d) of the Shipping Act. and the complaint also sought reparations under section 1710(a) of the act for loss of profits, and other losses.[30]

The Administrative Law Judge (ALJ) for the Federal Maritime Commission granted the Ports Authority's motion to dismiss on sovereign immunity grounds.[31] The Federal Maritime Commission decided, on its own motion, to review the

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of state sovereignty under the Tenth Amendment and the Necessary and Proper Clause), *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635 (2002) (permitting private suits against state for injunctive relief authorized under specific federal law), and *Paul D. Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002) (holding that state waived its Eleventh Amendment immunity when it consented to suit in state court and subsequently removed to federal court).

[26] 527 U.S. 706 (1999).

[27] *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 n.11 (2002) ("One . . . could argue that allowing a private party to haul a State in front of . . . an administrative tribunal constitutes a greater insult to a State's dignity than requiring a State to appear in an Article III court. . . .").

[28] Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 747-48 (2002).

[29] *Id.* at 747.

[30] *Id.* at 748.

[31] S.C. Mar. Servs., Inc. v. S.C. State Ports Auth., No. 99-21, 2000 WL 359791, at *2 (F.M.C. Mar. 23, 2000).

dismissal due to "the importance of the sovereign immunity question to the Commission's ability to determine whether state-operated ports are acting in compliance with the provisions of the Shipping Act."[32] Furthermore, the Federal Maritime Commission held that the adjudication did not trigger sovereign immunity.[33] The Federal Maritime Commission's decision noted that recent Supreme Court decisions expanding the doctrine of state sovereignty had not included adjudicative proceedings by administrative agencies within the "definition" of state sovereignty.[34] According to the Federal Maritime Commission, there was no compelling reason to extend the doctrine to cover "executive branch administrative agencies."[35] Although its decision expressed a belief that a Commission could order to a state to pay reparations for injury to a private complainant, the Federal Maritime Commission found that regardless of whether reparations were available, Commission findings that a state agency violated the Shipping Act were necessary to determine the parameters of the Act and to establish precedent for future violations.[36]

The Ports Authority appealed the ruling to the Fourth Circuit, which reversed and held that sovereign immunity did apply to agency adjudications.[37] The court enlisted *Seminole Tribe*'s vision of state sovereign immunity transcending the literal text of the Eleventh Amendment, and cited the statement in *Alden* that the "'indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties'" barred private proceedings against a state "'regardless of the forum.'"[38] It found that these prior cases compelled the view that sovereign immunity barred any privately initiated proceeding against a non-consenting sovereign.[39]

The court further held that the language of the Eleventh Amendment covering "judicial power" and "suit in

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[32] *Id.*

[33] *Id.* at *6.

[34] *Id.* at *3.

[35] *Id.* at *4.

[36] *S.C. Mar. Servs.*, 2000 WL 359791 at *6.

[37] S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165 (2001).

[38] *Id.* at 168-70 (quoting *Seminole Tribe*, 517 U.S. 44, 58 (1996), and *Alden*, 527 U.S. 706, 749 (1999)).

[39] *Id.* at 169.

law or in equity" was irrelevant to the principle of sovereign immunity, even if an agency did not exercise "judicial power" in the Article III sense or call its proceedings a "lawsuit."[40] The court then ruled that none of the six *Alden* exceptions to state sovereign immunity applied, and also refused to create a new exception for maritime matters.[41]

The Supreme Court granted certiorari and affirmed the Court of Appeals' judgment by a narrow vote of five to four.[42] In its affirmation, the Court began with a defense of dual sovereignty and stated that the principle of state sovereignty was prevalent at the time of the ratification of the Constitution and that the ratification "did not disturb States' immunity from private suits, thus firmly enshrining this principle in our constitutional framework."[43] The Court held that regardless of whether Federal Maritime Commission adjudications involved exercises of "judicial power,"[44] sovereign immunity extended to agency adjudication because the Federal Maritime Commission proceedings resembled civil litigation and inflicted the same degree of offense to the "dignity that is consistent with [states'] status as sovereign entities."[45] Furthermore, the "dignity and respect due sovereign entities" barred Congress from authorizing the Federal Maritime Commission to adjudicate a claim against the state at all, whether or not the relief sought was prospective or retrospective, injunctive or for reparations.[46]

III. FEDERAL AGENCIES AND JUDICIAL POWER

A. Supreme Court Case Law

Before appraising the Court's holding that agency adjudication of a private party claim against a non-consenting

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[40] *Id.* at 171-74.

[41] *Id.* at 176-78. The exceptions to state immunity are (1) when a state consents to a suit; (2) when the United States or another state brings suit against a state; (3) when a case is brought pursuant to Congress' Fourteenth Amendment enforcement power; (4) when a private party brings suit against municipal corporations or other "lesser entities" that are not an "arm of the state"; (5) when a private party sues state officers "in their official capacity to prevent ongoing violations of the law"; and (6) when private suits are brought against "state officers in their individual capacity for ultra vires conduct fairly attributable to the officers themselves." *Id.*

[42] *Fed. Mar. Comm'n*, 535 U.S. 743 (2002).

[43] *Id.* at 751-52.

[44] *Id.* at 754.

[45] *Id.* at 759-60.

[46] *Id.* at 769.

state is unconstitutional, it is useful to probe deeper into the nature of agency adjudication and what kind of constitutional powers an agency brings to bear in adjudicating a complaint. Federal agencies clearly operate outside of Article III to some extent, but the issue of whether some portion of their power is derived from the grant of "judicial power" in the Constitution has not yet been settled conclusively.[47]

Federal agencies may act in either of two ways: by formulating and issuing rules or by issuing orders as a result of adjudicatory proceedings.[48] In the orthodox formulation, federal agencies derive their rule-making power through a congressional delegation of legislative power.[49] Congress allocates to agencies the power to adjudicate certain claims within the agency's competence, but to a greater extent than delegation of legislative power, the allocation of judicial power by Congress triggers a constitutional separation-of-powers problem.[50] Ultimately, Congress cannot give agencies an adjudicatory power that "diminishes the 'essential attributes'" of the judiciary, but when agency orders are made subject to judicial review, many proceedings which would otherwise take place in Article III courts may be committed to agency adjudication.[51] Finally, an agency like the Federal Maritime Commission may be characterized as exercising an executive power to enforce a law enacted by Congress when it adjudicates.[52]

The Supreme Court itself has vacillated when identifying contexts in which "cases and controversies" may be heard in federal tribunals outside the federal judiciary, but it has always permitted some adjudicative proceedings to be conducted outside of Article III courts. In *American Insurance Co. v. Canter*[53] the Court held that Congress may create non-Article III courts for proceedings in federal territories, which utilize, rather than judicial power, a power "conferred by

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[47] PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW: CASES AND MATERIALS 148 (1996) ("[T]he jurisprudence of article III remains in flux.").

[48] JACOB A. STEIN ET AL., 4-31 ADMINISTRATIVE LAW § 31.01 (2004).

[49] *See generally* A.C. AMAN, JR. & W.T. MAYTON, ADMINISTRATIVE LAW, § 1.1 (1st ed. 1993).

[50] *Id.* § 5.1, at 121.

[51] *Id.* at § 5.1, at 135-37 (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986)).

[52] SHANE & BRUFF, *supra* note 47, at 142.

[53] 26 U.S. 511 (1828).

Congress" in execution of its "general powers."[54] *Murray's Lessee v. Hoboken Land & Improvement Co.*[55] established a "public rights" doctrine that allowed Congress to assign adjudicatory powers to non-Article III tribunals for private actions against the federal government "in connection with the performance of the constitutional functions of the executive or legislative departments."[56] The "public rights" doctrine continued to play a significant role in determining the legitimacy of legislative courts for many years.[57] In *Commodity Futures Trading Commission v. Schor*[58] the Court began characterizing agency adjudication as "quasi-judicial"; it set up a balancing test to determine whether "delegation of adjudicative functions to a non-Article III body" is constitutional "by reference to the purposes underlying the requirements of Article III."[59] *Schor* signaled a retreat from the public rights doctrine, which the Court then returned to in *Granfinanciera, S.A. v. Nordberg*,[60] holding that a person has a right to a jury trial in certain bankruptcy proceedings, which may not be adjudicated by a non-Article III court.[61] This line of cases has "failed to produce a comprehensive set of principles for determining when a non-Article III tribunal will be held to be an unconstitutional divestment of judicial power."[62] The Court has shown little interest in "doctrinaire reliance on

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[54] *Id.* at 546.

[55] 59 U.S. 272 (1856).

[56] Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50, 67-68 (1982) (interpreting *Murray's Lessee*) (quoting Crowell v. Benson, 285 U.S. 22 (1932)).

[57] *See, e.g.*, Crowell v. Benson, 285 U.S. 22 (1932) (permitting non-Article III tribunal, the U.S. Employees' Compensation Commission, to fact-find through adjudication of employee's claims against their employers for workplace injuries under a Federal Act as an "adjunct" of an Article III court when there is sufficient oversight); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985) (holding that a "public rights" adjudication chosen by Congress to resolve disputes between private parties under a federal act need not entail full Article III review).

[58] 478 U.S. 833 (1986).

[59] *Id.* at 847 (citations omitted).

[60] 492 U.S. 33 (1989).

[61] Although bankruptcy courts are Article I courts rather than agencies, the concerns raised in *Federal Maritime Commission* have been applied to them as well. *See* Tennessee Student Assistant Corp. v. Hood, 124 S.Ct. 1905 (2004) (holding that adversary bankruptcy proceedings based on in rem jurisdiction don't implicate state sovereign immunity); *In re* Nelson, 301 F.3d 820 (7th Cir. 2002) (holding that sovereign immunity bars adversary proceedings initiated by private parties against states in bankruptcy court despite Congressional abrogation when in personam jurisdiction).

[62] Judge James L. Dennis, *Judicial Power and the Administrative State*, 62 LA. L. REV. 59, 73 (2001).

formal categories" but nevertheless insisted that administrative adjudication could not impinge on "the role of the independent judiciary within the constitutional scheme of tripartite government."[63] The general tenor of these decisions is that administrative agencies exercise power that overlaps with, but is distinct from, the power of federal courts, and that an agency adjudication that does not meet some minimal judicial safeguards may not stand.[64]

The Article III cases discussing agency adjudication demonstrate that the Court regards the use of an agency as a forum for adjudication as something like necessary evils, important enough to the function of the executive to exist but potentially destructive enough to watch over closely.

The next subpart will explore the relationship between agency adjudication and the separation of powers guarantees of Article III, and why the Court has chosen to rest in a zone of uncertainty.

B. "Judicial Power" and the Separation of Powers Doctrine

An administrative agency's adjudication of claims implicates the structural separation of powers in the U.S. Constitution. As the previous subpart has shown, the interplay between the function of agencies and the assumption of judicial power has been contentious. Several models of the implications of agency adjudication for separation of powers have been proposed, and in balancing the interests of litigants and the structural independence of the judiciary the Court has created precedent that does not uniformly embrace any of them.

According to the "Simple Model" – the least cumbersome and least adaptable formulation of "judicial power" – Congress may not validly assign Article III powers to any adjudicative bodies other than the federal courts.[65] As may be expected, the rigid exclusivity of federal courts propounded by the "Simple Model" tends to scare off most writers, and the desirability of administrative agencies typically dissuades attempts to justify

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[63] *Thomas*, 452 U.S. at 582-83, 587; *Schor*, 478 U.S. at 848, 850.

[64] For agency adjudications, *Chevron U.S.A. Inc. v. Nat'l Res. Def. Counsel*, 467 U.S. 837 (1984) provides the standard of review. *See* ABA, *A Blackletter Statement of Administrative Law*, 54 ADMIN. L. REV. 17, 38 (2002). Typically, courts must defer to administrative agency interpretations of law unless, among other things, a court has spoken on the issue first or a constitutional issue predominates. *Id.*

[65] Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233 (1990).

the model.[66] Even so, Judge Frank Easterbrook proffers a sympathetic interpretation of the Simple Model, one which he asserts coheres with agency adjudication as it is practiced.[67] According to Judge Easterbrook, agencies "mak[e] the decision" and courts "ensur[e] its conformity to law" – the difference "between execution and (ultimate) review."[68] An agency makes a decision and issues an order, but no exercise of "judicial power" exists until the order is brought before a court for enforcement or review.[69]

Judge Easterbrook's optimism notwithstanding, the Court has declined to adopt the "Simple Model" or any other formalist view of separation of powers in the agency adjudication context.[70] This refusal to insist on a strict separation of powers between the judicial branch and the executive branch has met with academic approval.[71]

The presumption that *some* judicial function may be delegated to courts corresponds to the principle that some legislative power may be delegated to the executive branch. The Supreme Court has come to view the strict "non-delegation" doctrine – the insistence that Congress may not grant authority to the executive branch to exercise Article II "legislative powers" – as judicially unsound.[72] The prevailing

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[66] Richard H. Fallon, Jr, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 919-21 (1988) ("[A]rticle III literalism [is] untenable...." because of (1) "extra-textual evidence concerning the framers' intent and the original understanding" of the article; (2) a frustration of the policy concerns underlying current administrative procedures; and (3) entrenched practice and case law precedent supporting administrative adjudication.).

[67] Frank H. Easterbrook, *"Success" and the Judicial Power*, 65 IND. L.J. 277, 278 (1990).

[68] *Id.* at 281.

[69] *Id.* ("All of this is consistent with the Simple Model, without posing the slightest threat to administrative agencies, bankruptcy judges, and other officers who decide cases but lack tenure.").

[70] In fact, the Court allowed the issue of the relationships between the branches to grow ambiguous and the grounds for constitutionality of administrative agencies uncertain. *See* Harold. H. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491 (1987); *see also* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

[71] *See, e.g.*, M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603 (2001); *see also* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 994 (2001) ("At the time of the constitutional framing, 'separation of powers' did not mean what it means to neoformalist scholars and judges today. The framers were functionalist in their orientation, emphasizing checks and balances more than stringent separation of functions.").

[72] Mistretta v. United States, 488 U.S. 361 (1989).

rule is that the legislature must provide an "intelligible principle" to limit expansion of executive power into the legislative sphere.[73] Although debate about the non-delegation doctrine refers specifically to the separation of powers between the legislative and executive branches, the general understanding of boundaries between branches of government implicates the judicial branch as well. A formalist construction of the roles of the branches places the operation of administrative agencies in jeopardy, and the importance of agencies to the function of the federal government in the twentieth century has led courts to indistinct and evasive treatment of what powers may be shared between the branches and what constitutional mechanisms allow the exercises of power to bleed between branches.

Conceivably, some risk of a more formalistic construction of judicial power exists on the court. In 2001, Justice Thomas, the architect of the *Federal Maritime Commission* opinion, exhibited a nostalgia for the non-delegation doctrine's concern with the constitutional formulation of separation of powers.[74] Justice Thomas portentiously suggested that on some "future day" he would be willing to reevaluate the Court's retreat from the delegation doctrine.[75] Many agree with Justice Thomas that the non-delegation doctrine may have salubrious effects, especially a stricter accordance with the language and origins of the constitution.[76] Additionally, the dissent's insistence in *Federal Maritime Association* that agencies do not exercise judicial

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[73] *Id. See also* Cass Sunstein, *Nondelegation Canons,* 67 U. CHI. L. REV. 315, 318 (2000).

[74] Whitman v. American Trucking Associations, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

> Although this Court since 1928 has treated the "intelligible principle" requirement as the only constitutional limit on congressional grants of power to administrative agencies, the Constitution does not speak of "intelligible principles." Rather, it speaks in much simpler terms: "*All* legislative Powers herein granted shall be vested in a Congress." . . . I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than "legislative."

Id. at 487 (citations omitted).

[75] *Id.*

[76] *See, e.g.,* Gary Lawson, *Delegation and Original Meaning,* 88 VA. L. REV 327 (2002) ("[T]hose who reject a meaningful nondelegation doctrine . . . should not pretend to speak in the name of the Constitution.").

power could itself be read as demanding a less ad hoc, functional understanding of Article III.[77]

However, the Court has countenanced the limited delegation of powers to executive agencies by other governmental agencies because of necessity, and even if the compromise is not tidy it has been permitted in order to facilitate agency administration. Part VI will argue that the special needs of the administrative state should have been considered and balanced against federalism concerns in *Federal Maritime Commission*. Before that, however, the next two Parts will examine the doctrine of sovereign immunity and its role in the vision of federalism currently prevailing in the Court.

IV. THE SOURCE AND NATURE OF SOVEREIGN IMMUNITY

Justice Thomas, writing for the *Federal Maritime Commission* majority, contends that the Founders meant to reserve immunity to the states as part of the constitutional plan, but that with *Chisholm*, state sovereignty fell "into peril" and the Eleventh Amendment was passed to cure the error.[78]

This account of the nature of sovereign immunity represents the majority's resolution of a debate over the meaning of the Eleventh Amendment that four justices[79] and many scholars contest.

Some scholars regard the Eleventh Amendment as implicitly distinguishing between two sources of federal judicial power: (1) power over parties (diversity jurisdiction); and (2) power over federal issues ("arising under" jurisdiction). They emphasize that the text of the Eleventh Amendment only withdraws the judicial power over parties and therefore conclude that the ratifiers intended for the federal judiciary to retain jurisdiction over issues arising under federal law.[80] Under this "diversity theory" view, Congress may authorize suits under any substantive area over which Congress has constitutional power.[81]

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[77] *Fed. Mar. Comm'n*, 535 U.S. 743, 777 (2002) (Breyer, J., dissenting) (stating that executive agencies do not exercise judicial power).

[78] 535 U.S. at 754.

[79] *See Seminole Tribe*, 517 U.S. 44, 81-83 (1996) (Stevens, J. dissenting); *id.* at 101-02 (Souter, J. dissenting).

[80] Fallon, *supra* note 5, at 443.

[81] *Id.*

The diversity view has a long pedigree, from Chief Justice Marshall to Justice Souter.[82] Justice Thomas's opinion in *Federal Maritime Commission* does not explicitly reject this view, conceding that to the text of the Eleventh Amendment merely "address[es] the specific provisions of the Constitution that had raised concern during the ratification debates and formed the basis of the *Chisholm* decision."[83] But the opinion insists that the Eleventh Amendment's literal text "does not define the scope of the State's sovereign immunity, it is but one particular exemplification of that immunity."[84] In the Court's current formulation, state sovereign immunity predates the Eleventh Amendment, the *Chisholm* decision, and even the Constitution itself. Thus, the text and the structural significance of the Eleventh Amendment ultimately have very little significance.

The Court's reasoning on the issue has drawn fire from many quarters. The first objection is that it inverts the priority of congressional action over common law. The principle of state sovereignty mobilized by the Court may be seen as a common law principle because it predates the ratification of the Constitution.[85] As such it would seem to be subject to modification by congressional action, but the Court views it as "embedded" in the constitution. Moreover, the logic that the Constitution requires a legislative respect for state immunity from private suit does not meet with universal approval. The view that the Constitution mandates state sovereign immunity has been vigorously challenged by scholars who see the principle as antiquated, monarchical, and anti-American.[86]

Another criticism of the state sovereignty principle regards the doctrine as a political tactic useful to the court –

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[82] The Marshall court, in dealing with the Eleventh Amendment in the wake of Chisholm, did not arrive at any notion of state sovereignty from it but regarded the restriction on judicial power as one of personal jurisdiction, not of federal questions. *See* John Gibbons, *Chief Justice John Marshall and Federalism*,16 ST. JOHN'S J. LEGAL COMMENT. 351, 367 (2002) ("Marshall never read the Eleventh Amendment as placing any limits on the power of Congress to authorize the federal courts to vindicate federally protected rights against the states."). *See also* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1561, 1565-66 (2002)); *Seminole Tribe*, 517 U.S. at 101-02 (Souter, J., dissenting).

[83] *Fed. Mar. Comm'n*, 535 U.S. at 753 (quoting *Alden*, 527 U.S. at 723).

[84] *Id.*

[85] Vicky C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988).

[86] *See, e.g.*, Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1021 (2001).

mainly for its symbolic value – as a rationale for dismantling federal enforcement programs.[87] The concern that state sovereignty serves as a dubious bully pulpit for the federalist program of the court has been echoed in the press. A New York Times article published soon after the decision in *Federal Maritime Commission* argued that the court went too far by using an extra-textual constitutional rationale to extend sovereign immunity to adjudication, putting a hunger for federalist reform before judicial integrity.[88]

Another line of objection challenges the "dignity of the states" language adopted by the Court since *Seminole Tribe.*[89] The precise value safeguarded by the "dignity" of the states is unclear. If the idea is that states should be protected from unwarranted federal regulatory or legislative interference, the concept is difficult – does otherwise constitutional federal law present the state with an indignity? If the liability of the state and the cost to the state of defending against a complaint itself does not injure the state's dignitary interest, what additional insult is added when the state is named as a defendant in an action authorized by the federal government and brought by a private party?

The dissent within the Court has railed against the program of expanding sovereign immunity since its inception. In *Kimel v. Florida Board of Regents*, which declared unconstitutional a congressional attempt to authorize suits against state employers under the Age Discrimination in Employment Act of 1967 (ADEA), Justice Stevens, joined by three other Justices, charged that the current doctrine of sovereign immunity "is so profoundly mistaken and so fundamentally inconsistent with the Framers' conception of the

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[87] *See, e.g.*, Fallon, *supra* note 5, at 482 ("[T]he best explanation involves path dependence. . . . [T]he Court has learned to deploy sovereign immunity to symbolize and protect federalism [because it is] practiced and adept in the use of its screwdriver and as prone to mishap when it wields a hammer.").

[88] *See* Cass Sunstein, *A Narrowed Right to Challenge the States*, N.Y. TIMES, May 31 2002, at A23. Sunstein complained that the Supreme Court "has turned state sovereign immunity into an assault weapon against Congress" and that the *Federal Maritime Commission* decision had no historical grounding, the principal of immunity was unjustified, and "through its own overreaching, the court is diminishing the power of the president and Congress."

[89] Michael Greve identifies three problems with the "dignity" concept underlying sovereign immunity: 1) the word "dignity" has an indistinct meaning; 2) it has an unclear constitutional foundation (and potential conflict with federalism); and 3) it has only an instrumental, rather than intrinsic, value. Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL. 93, 97-98 (2002).

constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this court."[90]

This discussion is relevant to *Federal Maritime Commission* in that it suggests that the sovereign immunity doctrine is most tenuous and vulnerable to the extent that it covers federal causes of action. This vulnerability increases when the federal right is not a cause of action per se, but a statutory right to be heard created by the executive intended to clarify the scope of a statute like the Shipping Act that clearly falls within the federal government's regulatory power.

V. FEDERALIST PERSPECTIVES IN THE COURT

A. *Dual Federalism and Its Tools*

An inquiry into the rationale of *Federal Maritime Commission* must take into account the specific theory of federalism propounded by the majority on the Court. Although the truism that the Court has been developing a federalist jurisprudence since the beginning of the 1990s is beyond dispute, "federalism" is not a monolithic philosophy.[91] In its broadest formulation, federalism is merely the recognition that states share power with the federal government. The federalist revival represents the Court's return from a post New-Deal judicial tolerance for an expansive role for the federal government.[92] "Dual federalism," a term increasingly used by the Court,[93] may be traced back to Edwin Corwin's post New-Deal critique of the new judicial landscape.[94] Due to the expansion of the role of the federal government and irretrievable alterations in jurisprudence, the Court's federalist revival has not, and could not, signal a return to its pre-New

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[90] 528 U.S. 62, 97-98 (2000) (Stevens, J., dissenting).

[91] *See* Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301, 1311 (identifying five components of federalism within which there are a range of federalist positions, i.e., judicial restraint, respect for policies that are important to the states, respect for separation of powers, protection of voting rights, and "ideological neutrality")

[92] *See, e.g.*, Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223 (2001).

[93] *See., e.g.*, Printz v. United States, 521 U.S. 898, 918 (1997); Gregory v. Ashcroft, 501 U.S. 452, 457 (1991); Tafflin v. Levitt, 493 U.S. 455, 458 (1990).

[94] Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 23 (1950).

Deal federalism.[95] However, the Court has endeavored to prevent the federal government from overwhelming the preferences of the states by focusing attention on the Constitution's inherent structural limitations on federal power. The phrase "dual federalism" signals that federal courts must be solicitous of state autonomy, because when the states surrendered powers to federal government, they retained a residuum of "inviolable sovereignty."[96]

The Court majority's dual federalism relies on a Madisonian model of double security.[97] Federal government and state governments exercise powers distinct from one another in order to prevent either from dominating the other.[98] Within each level of government, the separation of powers between executive, legislative, and judicial branches forms another buffer against abuse of power.[99] Ideally, this horizontal and vertical division works to protect citizens from the tyranny of government both between and within levels. However, by characterizing states as remaining co-equal sovereigns in areas where they did not cede specific powers to the federal government, the Court has placed particular emphasis on the federal axis and placed a premium on retained state sovereignty.[100]

In order to strengthen the structural protections against federal power, the Court has developed a version of federalism which aligns itself with various cannons of construction, including textualism and historical originalism and, more often than not, with political conservatism.[101] Inevitably, some of the approaches that federalists on the Court use will fit uncomfortably with one another.[102] In order to achieve the

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[95] *See generally* Robert Post, *Federalism in the Taft Court Era: Can it Be "Revived"?*, 51 DUKE L.J. 1513 (2002).

[96] *Printz*, 521 U.S. at 918.

[97] *See* William H. Pryor Jr., *Madison's Double Security: in Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1170-71 (2002).

[98] *Id.*

[99] *Id.*

[100] *See, e.g.*, *Printz*, 521 U.S. at 918-19 (reciting textual and structural indicators that the Constitution established a system of dual sovereignty).

[101] *See, e.g.*, Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1602 (2000) (noting the common perception that these positions are interrelated).

[102] For example, as William N. Eskridge, Jr. notes in *Textualism, the Unknown Ideal*, 96 MICH. L. REV. 1509 (1998) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997)), Justice Scalia's textualist approach to statutory interpretation sometimes contrasts with his originalist, but not

overall goal of balancing federal and state legal interests the Court must apply different measures to different problems.

However, not all doctrines used by federalists are equally well-related to the overarching goals of federalism. To some extent, the Court's effort to limit Congress' legislative reach to its enumerated powers is a "principled ground" of federalism.[103] However, it is possible to distinguish the doctrine of state sovereignty, which is not as clearly related to the structure of the Constitution and invites greater charges of political activism.[104]

Originalism, the search for the original meaning of the Constitution, usually as gleaned from an inquiry into the intent of the Founders, forms a predominant rationale for the majority in the state sovereignty cases.[105] Justice Thomas, the most "thoroughgoing originalist,"[106] and Justice Scalia have espoused originalist views more than other Justices, but in the area of state sovereignty a slim Court majority consistently subscribes to the notion that a perdurable sovereignty arose in the states as a result of the ratifiers' intention to make states immune from private suits without consent.[107]

The virtue of looking at the Framers' intent when the text of the Constitution is unclear comes from the conviction that a fixed and knowable quantum of meaning resides within

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necessarily formalist views of constitutional construction. "In Scalia's approach to issues of constitutional federalism or separation of powers, there is usually little or no analysis of specific constitutional provisions but much emphasis on general principles drawn from the overall structure of the document and its history." *Id.* at 1517.

[103] Scott Fruehwald, *The Principled and Unprincipled Grounds of the New Federalism: A Call for Detachment in the Constitutional Adjudication of Federalism*, 53 MERCER L. REV. 811, 815 (2002).

[104] *See generally id.* (arguing that, although federalism works beneficially to insure state and local governments' role in providing representation to diverse populations, the Rehnquist court's reasoning in the *Alden* line of cases is "unprincipled because it is based on a general conception of state sovereignty that is not in the Constitution's text").

[105] *See* Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of 'This Constitution,'* 72 IOWA L. REV. 1177, 1244 (1987); *see also* Michael C. Dorf , *Integrating Normative and Descriptive Constitutional Theory: The Case Of Original Meaning*, 85 GEO. L.J. 1765 (1997) (exploring explicit and implicit rationales for originalist constitutional arguments).

[106] Dorf, *supra* note 105, at 1813.

[107] *See, e.g., Alden*, 527 U.S. 706, 734 (1999) ("[T]he contours of sovereign immunity are determined by the Founders' understanding, not by the principles or limitations derived from natural law."); *Fed. Mar. Comm'n*, 535 U.S. 743, 760 (2002) ("If 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, . . . they would [not] have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency. . . .").

the Constitution and its history.[108] Scalia frames his originalism as an imperfect but necessary choice over a rootless "nonoriginalism."[109] The system is binary: One either clings to authorial intent in constitutional interpretation, or launches oneself into subjectivity and indeterminacy.

Even so, positing a unitary intent of the Founders poses a danger when history suggests no consensus.[110] One difficulty with the state sovereign immunity cases as originalist decisions is that the Eleventh Amendment construction offered by the conservative wing of the Court, having no direct textual moorings, may be seen to constitute a sort of judicial overreaching.[111] Because of the difficulty of proving a consistent intent among ratifiers of the Eleventh Amendment, an absolutist formulation of that intent with regard to the state sovereignty question loses the virtue of certainty and descends into the kind of evil which originalism is intended to circumvent.[112] If constitutional principles come not from structure, history, text, or a unitary intention but from unfalsifiable notions about what the Founders' silence on the sovereignty issue must have meant, the sanctity of originalism slips into the kind of uncertainty about the origins of constitutional principals which Rehnquist, Scalia, and Thomas find so distasteful in other contexts, such as Substantive Due Process.[113]

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[108] "[T]here are right and wrong answers to legal questions. . . . [there are] clear, eternal principles recognized and put into motion by our founding documents." Hon. Justice Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1 (1996).

[109] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-63 (1989).

[110] *See Alden*, 527 U.S. at 768-78 (Souter, J., dissenting) (Justice Souter's account of "the spectrum of opinion expressed at the ratifying conventions").

[111] At least one writer goes so far as to accuse the Rehnquist court of a hypocritical judicial activism. William Marshall says that judicial activism *per se* is often justifiable, but the conservative credo of, among other things, judicial restraint, masks a result-oriented approach with a partisan basis. William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1244 (2002) ("Originalism is a doctrine of convenience and, even then, not consistently applied.").

[112] The materials used to justify originalist decisions are far-ranging. Some commentators have pointed to the Court's increasing reliance on extralegal sources, especially important in the state sovereignty decisions. *See, e.g.*, John J. Hasko, *Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*, 94 LAW LIBR. J. 427 (2002). Hasko provides a good sketch of the controversy over whether the Federalist Papers, a set of documents increasingly cited by courts and the cornerstone of the sovereignty decisions, have any validity as legal documents. *Id.* at 434-37.

[113] Justice Souter suggests that a natural law rationale informs the originalist formulation in *Alden*. 527 U.S. at 763.

The upshot of this brief meditation on the use of originalism by the Court is that the image of a unitary intent among the states at the country's founding is rather speculative, and draws attention away from a discussion of federalism policy even as it draws charges of being politically driven. Beyond being speculative, it may even be counterfactual.[114] In the context of federal agency adjudication, as Part VI will argue, it eclipses more immediate concerns about whether federal agencies, as executive actors, exercise judicial power under the constitution.

The presumption used by the court that the sovereign states did not intend, in ratifying the constitution, to become subject to proceedings the founders would consider "anomalous and unheard of"[115] converts an inference about federalism boundaries into an unbudgeable demarcation. In the context of federal agencies, as discussed above in Part III, the court has eschewed bright lines. To the end of ultimately weighing the value of applying an absolutist conception of sovereign immunity to agencies, the next subpart will briefly discuss the federalism values at stake for the court in the state sovereignty context.

B. Preferring States

Although the current Court does not adopt a strict "state's rights" approach to decentralized government, its has notably deferred to states in many areas.[116] State sovereignty has come to the fore as an area in which the Court has limited the ability of the federal government to affect states by authorizing private suits.[117] In *Federal Maritime Commission*, the Court's decision arguably fails to take the federal interest in implementing federal policies into full account. The Court characterizes the federal government, through agency adjudication, as attempting to take for itself a power that is

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[114] *See Seminole Tribe*, 517 U.S. 44, 104-06 (1996) (Souter, J., dissenting) (arguing that there was no consensus on sovereign immunity in the ratification debate); Mark R. Killenbeck, *In (re) Dignity: The New Federalism in Perspective*, 57 ARK. L. REV. 1, 33 (2004) (arguing that the early sovereign immunity decisions were a novel response to the political conditions of their times, such as debt to the states, rather than an application of established principles).

[115] *Fed. Mar. Comm'n*, 535 U.S. 743, 755 (2002) (quoting *Hans*, 134 U.S. 1, 18 (1890)).

[116] *See* Pryor, *supra* note 97 at 1177.

[117] *See supra* Part II.A.

part of the domain of states. Specifically, the federal government, by authorizing adjudication of private disputes against states, deprives the state of its power to determine for itself whether it will consent to such a challenge.

A problem arises in that dual federalism posits a system of checks between branches, as well as between levels of government, and state sovereign immunity can sometimes cut short the federal government's power in areas that it unquestionably controls. The federal government clearly has the power to regulate maritime commerce; not only is the commerce power an enumerated one, but federal maritime regulation has a venerable history of legitimacy in the Court. The Federal Maritime Commission was established to help effectuate the administration of federal regulation of maritime commerce, and its Commissioners are appointed and removable by the President.[118] The state sovereign immunity doctrine, taken as an absolute, restricts federal power to entertain private complaints and thereby administer the Shipping Act in the manner the federal government chooses.

In response to this, the Court argues that the federal government may still enforce the Shipping Act through administrative proceedings, but only by instituting an action itself.[119] This argument flows from *Alden* and *Seminole Tribe.* The sovereign immunity decisions ostensibly do not restrict the federal government's power to police states' violations of federal law through litigation, but only its ability to do so without sufficient public accountability, by allowing the suits to take place under the names of private parties.[120] Expense, whether to the government or the state, does not affect the sovereign immunity analysis.[121] Neither does the Constitution's grant of plenary regulatory power over an area impact a state's immunity.[122] In short, the principle of sovereign immunity, as

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[118] *See* JACOB A. STEIN ET AL., 1-4 ADMINISTRATIVE LAW § 4.04(2)(c) (2004).

[119] *Fed. Mar. Comm'n*, 535 U.S. 743, 768 (2002).

[120] "Rather than hiding behind the cloak of lawsuits by private parties, the federal government can authorize and prosecute its own cases against state governments. Congress can then openly acknowledge its responsibility for the rising tax burden and inefficiency caused by that litigation at both the federal and state levels." Pryor, *supra* note 97, at 1180 (2002); *see also Alden*, 527 U.S. 706, 756 (1999) (stating that the United States may bring a suit against a state, since such a suit "require[s] the exercise of political responsibility for each suit prosecuted against a State").

[121] *Fed. Mar. Comm'n*, 535 U.S. at 765-66.

[122] "'[T]he background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is

derived from the plan of the Constitution under a dual federalism rubric, shields the states from federal encroachment whenever private parties initiate any proceeding against an unwilling state.

VI. THE LOGIC OF *FEDERAL MARITIME COMMISSION*

In general terms, the conflict between the majority and minority in *Federal Maritime Commission* may be reduced to the question of: (1) whether an elaborate agency adjudication may sufficiently resemble a trial so that the adjudication of private complaints against the state is tantamount to creating a private right of action in federal courts, or (2) whether the role of an agency is sufficiently different from that of a court that the agency does not exercise "judicial power" when it adjudicates. This Part will argue that the Court's resolution of this conflict is flawed because the issue of state sovereignty should not arise *before* the issue of judicial power and the role of agencies has been settled.

Justice Thomas begins his analysis in *Federal Maritime Commission* with the presumption that a federal agency does not exercise judicial power when it adjudicates a claim such as the one brought by Maritime Services, Inc. against the South Carolina State Ports Authority:

> For purposes of this case, we will assume, *arguendo*, that in adjudicating complaints filed by private parties under the Shipping Act, the FMC does not exercise the judicial power of the United States. Such an assumption, however, does not end our inquiry as this Court has repeatedly held that the sovereign immunity enjoyed by the states extends beyond the literal text of the Eleventh Amendment.[123]

The reasoning underlying *Federal Maritime Commission* suggests that an analysis of whether courts exercise judicial power becomes unnecessary because state sovereignty itself is not a jurisdictional matter. According to Justice Scalia, the text of the Eleventh Amendment gives no guidance as to whether sovereign immunity applies when a state is haled before an administrative tribunal because the Court has "held that the Eleventh Amendment represents just a reflection of the fact that the States retained that sovereign

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an area . . . that is under the exclusive control of the Federal Government.'" *Id.* at 767 (quoting *Seminole Tribe*, 517 U.S. 44, 72 (1996)).

[123] 535 U.S. at 754.

immunity that they had before the formation of the Federal Republic."[124] As understood by the Court, this is the legacy of *Alden*. States continue to possess whatever immunities they regarded themselves as retaining at the time of the ratification of the Constitution, except that portion of sovereignty that the plan of the Constitution clearly took from them. The fact that the Framers could not envision the growth of the administrative state merely supports the view that the states could not have intended to cede their sovereignty with respect to things like administrative adjudication.[125]

In *Federal Maritime Commission*, Justice Thomas recapitulates the *Alden* language that "[t]he founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'"[126] In its earliest use of this language, which dates back to the nineteenth century, the Court originally addressed itself to the purpose of the Eleventh Amendment, and directed its comments exclusively to "judicial tribunals."[127] Justice Thomas goes on to say:

> [I]f 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, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC.[128]

Later in the opinion, Justice Thomas concludes that the similarities between Federal Maritime Commission adjudicative proceedings and civil litigation are

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[124] Transcript of oral argument, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002) (No. 01-46), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/01-46.pdf.

[125] The Harvard Law Review annual summary of leading cases characterizes the *Federal Maritime Commission* decision as uncontroversial. The result follows naturally from the convergence of principals derived from *Hans*, *Alden*, and *Seminole Tribe*, including: (1) the centrality of state sovereignty to the constitutional scheme; (2) the broad scope of state sovereign immunity exceeding the literal text of the Eleventh Amendment; (3) Congress's inability to abrogate sovereign immunity in pursuance of Article I powers; and (4) states' presumptive immunity from proceedings not envisioned by the ratifiers of the constitution. Leading Cases, *Constitutional Structure*, 116 HARV. L. REV. 210, 218 (2002). The writers find it "unsurprising that the dissenters focused on issues decided in prior cases." *Id.*

[126] *Fed. Mar. Comm'n*, 535 U.S. at 760 (quoting *Alden*, 527 U.S. 706, 748 (1999)).

[127] *Ex Parte Ayers*, 123 U.S. 443, 505 (1877).

[128] *Fed. Mar. Comm'n*, 535 U.S. at 760.

"overwhelming" enough to trigger the "*Hans* presumption" that the Constitution does not confer power on the government to authorize "anomalous and unheard of" private proceedings against a nonconsenting State in order to evade state sovereignty.[129] Federal Maritime Commission adjudication "walks, talks, and squawks . . . like a lawsuit."[130] This leaves open the question of whether an agency adjudication that "walks" less like a lawsuit triggers the sovereign immunity doctrine.[131] Does the fact that a private complainant names the state as a party in any adjudicatory proceeding always offend the dignity of the state, regardless of the similarity of the proceeding to a trial? If yes, then the Court's particularized comparison of the Federal Maritime Commission adjudication to civil litigation means nothing. If no, then the text of the Eleventh Amendment matters, and gives a guideline: Presumably when the administrative law proceeding rises to such a level of adjudicatory sophistication that it becomes tantamount to a judicial proceeding, judicial power in the constitutional sense has come into play.

As this Comment's prior discussion of judicial power in the context of non-Article III proceedings suggests, the isolation of judicial power in agency adjudications is no mean task.[132] And yet the Court has granted agencies significant latitude in adjudicating claims despite the lack of clarity as to how the test of Article III limits judicial power to the federal courts. Justice Breyer, in his dissent, cautions that the *Federal Maritime Commission* "decision threatens to deny the Executive and Legislative Branches of Government the structural flexibility that the Constitution permits and which modern government demands."[133] Breyer's observation points to the significance of the decision and yet does not fully address the difficulty that the majority faces, given the sovereign

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[129] *Id.* at 755-59.

[130] *Id.* at 751; S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165, 174 (2001).

[131] At least one observer has raised the possibility that the generality of the *Federal Marine Commission* decision will seriously undermine federal environmental whistleblower statutes, in that any agency adjudication that begins with a state employee's complaint might be barred even if the agency later intervenes in the adjudication. Catherine Gainey, Note, *Does Sovereign Immunity Bar Administrative Proceedings Pursuant to Federal Environmental Statutes?*, 27 HARV. ENVTL. L. REV. 227 (2003).

[132] *See supra* Part III.

[133] *Fed. Mar. Comm'n*, 535 U.S. at 786 (Breyer, J., dissenting).

immunity of states against private suits in courts, in determining how the interests of states might be undermined.

Justice Thomas dismisses Justice Breyer's charge that state sovereignty could only apply when a tribunal exercises "the judicial power of the United States" and that agency adjudication does not fall within Article III with a deprecatory comment about a perceived inconsistency in Breyer's position. "[I]t is ironic that Justice Breyer adopts such a textual approach in defending the conduct of an independent agency that itself lacks any textual basis in the constitution."[134] It is true that Justice Breyer draws the contours of "judicial power" very strictly, arguing that precedent establishes that agencies exercise Article II rather than Article III powers when adjudicating.[135] According to Breyer, if adjudicatory activities are "safeguarded," they are permissible, and only "quasi-judicial."[136] As Part III.A. above argued, this is not clear. In fact, it is just this rigid formalism between judicial power and the power of other branches that the Court has eschewed in its "judicial powers" cases. Even so, the question of judicial power is highly significant. Separation of powers, like the division of state and federal power, is a basic structural requirement of the Constitution and, unlike state sovereign immunity, the identity of judicial power with the federal courts is textually supported.[137]

The Court wrongly disregarded the dissent's better structural reasoning: The issue of state sovereignty under the Eleventh Amendment is not triggered until a court recognizes that an agency's adjudication of a private complaint is an exercise of judicial rather that executive or legislative power. Turning to sovereignty first disregards the crucial importance of determining what an agency does, or rather, what type of constitutional power it exercises. Sovereign immunity clearly does not protect a state from legislation or executive enforcement of legitimate federal law. Part of the problem undoubtedly stems from the imprecise use of juridical

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[134] *Id.* at 754 n.8.

[135] *Id.* at 773-74 (Breyer, J., dissenting).

[136] *Id.*

[137] "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1, cl. 1.

terminology in agency decision-making.[138] But in any event, as there is no clear intrinsic moment at which the dignity of the states is harmed outside of Article III courts, the Court should try to articulate of the precise character of the affront to the state.

The dignity of the state is not impermissibly injured merely because a private party brings a claim; if the government joins and seeks the same relief as the party, there is no sovereign immunity bar.[139] Nor, apparently, would the dignity rationale prevent an agency from investigating a complaint, issuing an injunction against a state, and then intervening as a party in the adjudication.[140] The majority claims that the proceedings in question violate the dignity of the states, and trigger the *Hans* presumption that sovereign immunity applies, because of the similarities between the Federal Maritime Commission proceedings and those of a trial, including similar pleading rules, discovery procedures, and the similarity of the role of an ALJ to a trial judge.[141] The opinion concedes that there is a "valid distinction between the authority possessed by the FMC and that of a court" in that the agency cannot enforce its own orders but must bring them before a court for enforcement.[142] However, this is a "distinction without a meaningful difference" to the Court because the appearance of the state before the agency is still "coerced," since the state loses the ability to litigate the merits of an order in the court where enforcement is sought, and is also barred from arguing the merits of an appeal of an Federal Maritime Commission determination.[143] It seems, then, that the real injury suffered by the state is in the procedure courts use to review the agency determination.

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[138] *See* William D. Araiza, *Agency Adjudication, The Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE. L. REV. 351, 404 (2000) (suggesting that agency adjudications are not court-like activities, but hybrid creatures, and the project of courts "attempt[ing] to superimpose . . . traditional conceptions of judicial action onto agency adjudication" should be abandoned).

[139] *See* Rhode Island Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31, 53-54 (1st Cir. 2004); Seneca Nation of Indians v. New York, 178 F.3d 958, 97 (2d Cir. 1999); Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F. 3d 904, 913 (8th Cir. 1997).

[140] Connecticut Dep't of Envtl. Protection v. Safety and Health Administration, 356 F.3d 226, 234 (2d Cir 2004).

[141] *Fed. Mar. Comm'n*, 535 U.S. 743, 756-60 (2002).

[142] *Id.* at 762.

[143] *Id.*

Professor Gordon G. Young has argued that while Article III jurisprudence has sought to ensure that litigants are not deprived of a forum lacking constitutional guarantees of fairness, the doctrine of state sovereign immunity seeks to secure the absence of any forum whatsoever to litigate private claims against states.[144] This gives up the game too easily. One lesson of *Schor* and other cases in which the court has upheld administrative adjudication against charges that the executive tribunal usurped the judicial function of the courts is that the government's management of complex administrative programs is a weighty interest whose "practical consequences" must be balanced against the purposes of Article III, namely, the independence of the judiciary and the right of litigants to impartial judges.[145] In other words, "bright line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries.[146] The needs of an administrative state exert a gravity that curves the space of structural constitutional principles when it comes to separation of powers.[147] There is no reason for the needs of the federal executive to meet an unyielding wall when the structural principal is federalism.

The preexisting caselaw governing agency use of judicial power provides a rubric, if a slightly unsettled one, for determining the boundaries of agencies' adjudicatory authority in a way that safeguards the state as a litigant in the ultimate judicial enforcement action. To the extent that an agency's use of adjudication in private claims against a state constitutes a proceeding that would be barred by sovereign immunity if brought in a court, it should be regarded as an unconstitutional encroachment on judicial power. The state as a litigant is doubtless entitled to special safeguards when federalism values are at stake. Under this approach, it might be said that agency

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[144] Gordon G. Young, Federal Maritime Commission v. South Carolina State Ports Authority*: Small Iceberg or Just the Tip?*, 47 ST. LOUIS L.J. 971, 1012-13 (2003). Professor Young also concludes that under the immunity jurisprudence preceding *Federal Maritime Commission,* the symbolic injury to a state of being named in a private action for reparations outweighs the policy-making opportunities of agency adjudication. *Id.* at 1011-12.

[145] *See Schor*, 478 U.S. 833, 848-51 (1986).

[146] *Id.* at 857.

[147] "In determining the extent to which a given congressional [authorization to a non-article III tribunal violates Article III], the court has declined to adopt formalistic & unbending rules. Although such rules might lend a greater degree of coherence . . . [t]hey might also unduly constrict Congress' ability to take needed & innovative action pursuant to its article I powers." *Id.* at 851 (citations omitted).

adjudications constitute an affront to the dignity of the state, but not until they take on an "inherently judicial function."

The best approach for the court to follow is to balance the administrative needs of the federal government with protection of states through process, which is to say, by guaranteeing procedural safeguards. This may be done without drawing agency proceedings themselves into the net of the doctrine of sovereign immunity. Justice Breyer offers the sound suggestion that the Constitution might be read to require full review of an agency order rendered against a state in a subsequent enforcement action when the agency is not a party in the initial adjudication.[148] Other potential curbs might include a limitation of the remedy a state may seek in an enforcement action when the agency's order was issued pursuant to a private party's claim, by, for example, not enforcing reparations but permitting injunctive relief.

The Court could begin to articulate a level at which an administrative adjudication of a private party's complaint against a state, even when authorized by valid regulations, assumes such "essential attributes of judicial power" that a court could not approve any order issued through the adjudication. This rule might be based on the rationale that the court could not approve a proceeding that it itself would have conducted but for the Eleventh Amendment's jurisdictional bar.

The final piece of the puzzle is to answer why it matters whether the agency adjudication is barred by sovereign immunity or limited, perhaps drastically, by procedural safeguards. Part of the answer must remain speculative. Although the ultimate consequences of applying state sovereign immunity to administrative agencies are still not clear, *Federal Maritime Commission* has already impacted a number of agency proceedings, most notably those seeking to enforce whistle blowing statutes.[149] The primary difference,

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[148] *Fed. Mar. Comm'n*, 535 U.S. at 784-85 (Breyer, J., dissenting).

[149] *See, e.g.*, Rhode Island Dep't of Envtl. Mgmt. v. U.S., 304 F.3d 31 (1st Cir. 2002) (holding that whistleblower complaint under Solid Waste Disposal act was barred by sovereign immunity when brought by private party against state); Connecticut Dep't of Envtl. Prot. v. Occupational Safety and Health Admin., 138 F. Supp. 2d 285, (D. Conn. 2001) (holding that filing by private party of OSHA whistleblower complaint against state was barred by sovereign immunity); Cannamela v. Georgia Dep't of Nat'l Res., No. 02-106, 2003 WL 22312735 (Dep't of Labor Adm. Rev. Bd. Sept. 30, 2003) (finding that proceeding before Department of Justice Administrative Law Judge based on private whistleblowing complaint under CERCLA and SWDA was barred by sovereign immunity). *But see* Tennessee v. United States

however, is that judicial review of procedures is a more flexible posture than a dismissal for sovereign immunity. A court can preclude a specific remedy, or construe the statute establishing the agency procedures as requiring different constitutional protections for states – and thereby preserve the general scheme of enforcement with special limitations for agencies. The characterization of certain types of adjudication as being barred by sovereign immunity skews the debate, coloring adjudication in general as an invalid scheme for regulatory policymaking when states are likely to be among the parties violating federal law. It leaves a great deal of uncertainty, and even apprehension, about what measures of formal and informal adjudication might stand.[150]

Most importantly, however, the decision shows a doctrinal disregard for the value of agencies and the difference between the constitutional character of agency adjudication and judicial trials. The central role of courts is to decide disputes between parties.[151] The fundamental role of agencies is to clarify and administer the statutes that enable them. Although there is value in a federal system in curbing the excessive zeal of federal agencies that may impact negatively on states, their independence from the courts is a byproduct of the fact that they are necessary for the administration of federal law in a mature and developed federal system.

VII. CONCLUSION

The application of state sovereignty to the area of administrative adjudication underscores the willingness of the current Court to put the principle of federalism first even in contexts which the Federalists themselves could not have envisioned. The court has recognized that agencies, non-existent at the birth of the country, now serve a salutary and even necessary function which has been preserved through decades of complicated Constitutional inquiry into the nature

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Dep't of Transp, 326 F.3d (6th Cir. 2003) (finding DOT's statutory process was not adjudication barred by sovereign immunity).

[150] *See* Young, *supra* note 144, at 1023 (expressing reservations about the future applications of *Federal Maritime Commission* even though generally supportive of the reasoning of the decision).

[151] *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 499 (1975) ("The Article III judicial power exists only to redress or otherwise protect against injury to the complaining party . . . ."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is solely to decide the rights of individuals . . . .").

of an agency's relationship to judicial power when it hears private claims. The fact that a claim is against a state could and should have been evaluated in terms of the appropriate scope of the involvement of the federal branches of government in their relationships with states. Although the interests of federalism may counsel against an unlimited ability of agencies to hear private claims, it should not have imposed an absolute bar through the doctrine of sovereign immunity. By invalidating the Federal Maritime Commission's ability to monitor state compliance with the Shipping Act, the Court has arrogated to the judiciary the power to control means of administration of the law, thereby impeding the executive and legislature from arriving at fair and efficient means of implementing legitimate congressional programs.

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