

When State Dignity Trumps Individual Rights

Federal Maritime Commission v. South Carolina State Ports Authority

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Introduction

Sovereign immunity is the legal doctrine that forecloses litigation against the government without its consent. In *Federal Maritime Commission v. South Carolina State Ports Authority*¹ (FMC), the Supreme Court extended the doctrine to preclude suits by private parties against a state in a federal administrative agency. Justice Thomas wrote for a five-member majority that included Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy. Justice Breyer filed a dissenting opinion joined by Justices Souter, Ginsburg, and Stevens, who also filed a separate dissent. FMC was "the term's most important federalism case."²

The constitutional foundation for sovereign immunity rests in the Eleventh Amendment, which bars suits in federal court against a nonconsenting state by citizens of another state, and thereby limits the "Judicial power of the United States." By holding that the South Carolina State Ports Authority (Ports Authority) did not have to defend itself before the Federal Maritime Commission (Commission), the Supreme Court broadened the reach of sovereign immunity for the first time to cover adjudication by executive branch agencies, which are not ordinarily regarded as a component of the U.S. judicial power.

Here's how the case unfolded. South Carolina Maritime Services (Maritime), a private company, had repeatedly asked the Ports

¹122 S. Ct. 1864 (2002).

²Linda Greenhouse, *Justices Expand States' Immunity in Federalism Case*, N.Y. TIMES, May 29, 2002, at A1.

Authority for permission to berth a cruise ship at state-owned port facilities in Charleston, South Carolina. On each occasion, the Ports Authority denied permission, allegedly because the primary purpose of the cruise ship was gambling. Maritime filed a complaint with the Commission, arguing that the Ports Authority's refusal of berthing space violated the Shipping Act of 1984.³ The complaint asserted that the Ports Authority had implemented its policy in a discriminatory fashion by providing a berth to two Carnival Cruise Line vessels that also offered gambling.

As its remedy, Maritime asked the Commission to (1) seek a temporary restraining order and preliminary injunction in federal court that would prohibit the Ports Authority from discriminating against Maritime; (2) issue an order commanding the Ports Authority to stop violating the Shipping Act; and (3) direct the Ports Authority to pay reparations, plus interest and attorneys fees, to compensate Maritime for its losses.

After rejecting Maritime's charges, the Ports Authority filed a motion to dismiss the complaint on the ground that a South Carolina state agency is entitled to Eleventh Amendment immunity. The Commission's administrative law judge (ALJ) agreed that Maritime's complaint should be dismissed. He relied on *Seminole Tribe of Fla. v. Florida*,⁴ in which the Supreme Court held that Congress, enacting legislation authorized under Article I of the Constitution, cannot abrogate state sovereign immunity. The ALJ inferred from *Seminole*, "if federal courts . . . must respect States' 11th Amendment immunity and Congress is powerless to override the States' immunity under Article I of the Constitution, it is irrational to argue that an agency like the Commission, created under an Article I statute, is free to disregard the 11th Amendment or its related doctrine of State immunity."⁵

Maritime did not appeal the ALJ's dismissal of its case. But the Commission on its own motion reversed the ALJ decision, concluding that "the doctrine of state sovereign immunity . . . is meant to

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

⁴517 U.S. 44 (1996). *Seminole* overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which had held that Congress is empowered to abrogate state sovereign immunity when legislating under the Commerce Clause of Article I.

⁵*Quoted in Fed. Mar. Comm'n* at 1869.

cover proceedings before judicial tribunals, whether Federal or state, not executive branch administrative agencies like the Commission.”⁶ That conclusion, in turn, was reversed when the Ports Authority appealed to the U.S. Court of Appeals for the Fourth Circuit, which held that “any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states would not have passed muster at the time of the Constitution’s passage nor after the ratification of the Eleventh Amendment. Such an adjudication is equally as invalid today whether the forum be a state court, a federal court, or a federal administrative agency.”⁷

The Court of Appeals reasoned that the proceeding before the Commission “walks, talks, and squawks very much like a lawsuit” and that “[i]ts placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication.”⁸ Accordingly, the court instructed that the case be dismissed. The Commission then sought and obtained review by the Supreme Court, which affirmed the holding of the Court of Appeals. The high Court’s decision is the latest in a series of sovereign immunity opinions, split 5–4 along conservative-liberal lines, that have evolved during the Rehnquist era.

Indeed, the Court’s expanding doctrine of sovereign immunity is the most notable component of a Rehnquist-led reinvigorated jurisprudence of federalism. Because the constitutional pedigree for sovereign immunity is the Eleventh Amendment, I will begin with a discussion of that amendment and the major sovereign immunity cases that it spawned. Then I will summarize the majority and dissenting views in the *FMC* case, focusing mainly on disputes over constitutional text and the overriding purpose of state immunity. Finally, I will offer a few comments from a libertarian perspective on the legitimacy, value, and proper interpretation of the immunity doctrine.

In brief, I will argue that federalism—by which I mean a system of checks and balances based on dual sovereignty—was intended by the Framers as a method of protecting individual rights against excessive power in the hands of federal or state government. When

⁶*Id.*

⁷*S.C. State Ports Auth. v. Fed. Mar. Comm’n*, 243 F. 3d 165, 173 (4th Cir. 2001).

⁸*Id.* at 174.

sovereign immunity is invoked, purportedly to reinforce the doctrine of federalism, it belies the Framers' design and constricts rather than enlarges personal liberty. That proposition is especially pertinent when immunity is expanded to cover cases outside the textual bounds of the Eleventh Amendment.

More specifically, I offer these observations: First, the Constitution would be a more liberating document if the Eleventh Amendment, notwithstanding its common law roots, had never been ratified. Second, the scope granted to sovereign immunity by the Rehnquist Court has effectively denied redress for many injuries suffered by individuals at the hands of government. Third, the textualist approach to constitutional interpretation, supposedly favored by conservatives on the Court, provides no support for *FMC* or its precursors. Fourth, a proper understanding of the role of government dictates that sovereign immunity be construed narrowly, in accordance with the specific text of the Eleventh Amendment.

The reach of federal power is reduced when states are immunized from litigation brought by private citizens suing under federal statutes. That outcome is most appealing to those of us who believe in a federal government of delegated, enumerated, and, therefore, limited powers. But the correct means of accomplishing that end is to rein in federal powers directly, rather than misappropriate a potentially pernicious doctrine like sovereign immunity.

Background

The Eleventh Amendment provides that "[t]he 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." That provision, narrowly construed in accordance with its express text, bars suits against state governments in federal court brought by anyone other than citizens of the state sued, the federal government, or another state.⁹ For purposes of the Eleventh Amendment, "state" includes state agencies, like the Ports Authority, but not political subdivisions such as municipalities and school boards.¹⁰

⁹For a summary of case law interpreting the Eleventh Amendment in the wider context of federalism, see Ronald D. Rotunda, *The New States' Rights, the New Federalism, the New Commerce Clause, and the Proposed New Abdication*, 25 OKLA. CITY U. L. REV. 869 (2000).

¹⁰See, e.g., *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

States can and do waive their Eleventh Amendment immunity.¹¹ Moreover, the Amendment does not bar suits brought against state officials in their personal capacities, even if those officials are acting under color of state law. That is, if a state official acts as a representative of his state and violates the Constitution, he is not immune from damages or a federal court order to cease and desist his unconstitutional acts.¹² In practice, that means the state, through its officials, can be prevented from abridging constitutional rights, but the state cannot be compelled to reimburse an official for damages he is directed to pay out of his own pocket.¹³

Notwithstanding those avenues still open to private litigants, the Eleventh Amendment places meaningful restrictions on the ability of citizens to sue states for money damages. And those restrictions, expanded by the Supreme Court, now apply to cases that are not covered by the text of the Amendment. For example, in *Hans v. Louisiana*,¹⁴ the Court concluded that the Eleventh Amendment, by implication, extends state immunity to include suits in federal court by citizens of the *same* state. More important, in *Seminole*, the Court rejected the notion that sovereign immunity applies to suits involving diversity jurisdiction¹⁵ but not to suits involving federal question jurisdiction.¹⁶

That distinction is explained as follows: Federal courts are empowered to hear and decide cases if the subject matter concerns either

¹¹ See, e.g., *Ports Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990).

¹² *Ex parte Young*, 209 U.S. 123 (1908).

¹³ A state may, however, be required to pay the *future* costs of complying with an injunction issued against an official by a federal court. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). Further, the state may, on its own volition, agree to reimburse an official for past damages that a federal court directs the official to pay.

¹⁴ 134 U.S. 1 (1890).

¹⁵ *Seminole* involved a Florida citizen suing the state of Florida. Technically, therefore, the case did not fall within the text of the Eleventh Amendment. Nevertheless, citing *Hans*, the Court invoked a broader version of sovereign immunity that barred suits against a state by its own citizens. *Seminole* at 54.

¹⁶ *Seminole* also narrowed the *Ex parte Young* doctrine, which might otherwise have permitted suit against individual state officials to prohibit future violations of federal law. The Court reasoned that the Indian Gaming Regulatory Act, at issue in *Seminole*, prescribed a detailed but modest set of sanctions against a state. In contrast, an *Ex parte Young* action would expose a state official to a federal court's full remedial powers, thus rendering the prescribed sanctions largely irrelevant. *Seminole* at 74–75.

a federal question¹⁷—that is, one arising under the U.S. Constitution, a federal statute, or a treaty—or diversity jurisdiction¹⁸—that is, a suit between citizens of different states or between a state and a foreign citizen. By its text, the Eleventh Amendment applies to suits “against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” That would seem to immunize states against diversity lawsuits but not federal question lawsuits.¹⁹ Yet the Supreme Court held in *Seminole* that Congress cannot use its enumerated powers under Article I of the Constitution—specifically, the Commerce Clause in Article I, section 8—to circumvent state sovereign immunity. In other words, the Eleventh Amendment and sovereign immunity were construed to encompass federal question as well as diversity suits—an issue that we will revisit below.

There is, however, an important exception to *Seminole*’s holding concerning federal question lawsuits. When Congress enacts legislation, not under the Commerce Clause but under section 5 of the Fourteenth Amendment, private lawsuits brought against a state in federal court to enforce that legislation are sometimes not subject to sovereign immunity. In relevant part, the Fourteenth Amendment prohibits states from “depriv[ing] any person of life, liberty, or property, without due process of law; [or denying] to any person within its jurisdiction the equal protection of the laws.”²⁰ Section 5 of the Amendment authorizes Congress to enforce those prohibitions by appropriate legislation. Chronologically, the Fourteenth Amendment, which was designed to limit state power, trumps the earlier ratified Eleventh Amendment.

¹⁷ See U.S. CONST., art. III, § 2; 28 U.S.C. §1331.

¹⁸ See U.S. CONST., art. III, § 2; 28 U.S.C. §1332.

¹⁹ Chief Justice John Marshall apparently agreed. Twenty-six years after ratification of the Eleventh Amendment, he wrote in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382 (1821), that the judicial department “is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be a party.”

²⁰ The Fourteenth Amendment also bars a state from “abridg[ing] the privileges or immunities of citizens of the United States.” But the Supreme Court somehow eliminated that clause from the Constitution in the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873). See Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, CATO INST. POL. ANALYSIS, no. 326, NOV. 23, 1998.

Still, section 5 does not give Congress carte blanche to negate state immunity. In *City of Boerne v. Flores*,²¹ a case not directly involving sovereign immunity, the Supreme Court ruled that Congress exceeded its section 5 powers when it enacted the Religious Freedom Restoration Act (RFRA). That case arose when the historical Landmark Commission in Boerne, Texas, denied a permit to Archbishop Flores to enlarge his church. Flores sued under the RFRA, which provided that a state could not substantially burden the free exercise of religion unless it had a “compelling governmental interest” and adopted the “least restrictive means of furthering” that interest. The Court concluded that the RFRA was unconstitutional because it was an attempt by Congress to define the Free Exercise Clause. That job, said the Court, belongs to the Court itself.

Under section 5, the Court explained, Congress can enforce a constitutional provision but cannot define it. The RFRA was not merely prophylactic or remedial. It was meant to delineate the scope of the Free Exercise Clause. In determining whether a section 5 statute is actually an enforcement provision or an effort at altering substantive law, the Court demanded a direct connection between the remedy chosen by Congress and alleged Fourteenth Amendment violations by the states. As the Court put it, “There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”²²

In the wake of the *Boerne* case, the Court rejected four attempts by Congress to use section 5 as a means to bypass sovereign immunity. The first case, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,²³ involved an alleged patent infringement by a state agency. The patentee sued in federal court, relying on the Patent Remedy Act, in which Congress had declared its intent to revoke the states’ Eleventh Amendment immunity. The Court held that the revocation was unconstitutional. Although the Fourteenth Amendment protects property, including patents, the state of Florida already provided an adequate remedial process through a takings or conversion claim. Because Congress had not identified a pattern of uncompensated patent infringements by the state, section 5 of

²¹ 521 U.S. 507 (1997).

²² *Id.* at 520.

²³ 527 U.S. 627 (1999).

the Fourteenth Amendment could not be used to remove Florida's immunity from suit in federal court.²⁴

The second case in the post-*Boerne* series was a companion case involving the same two Florida litigants.²⁵ College Savings Bank claimed that the state agency had printed misstatements about the bank's product in brochures and annual reports. The bank sued under section 43(a) of the federal Lanham Act, and the Court observed that Congress, in its Trademark Remedy Clarification Act, had subjected the states to such suits despite sovereign immunity. Still, said the Court, the Lanham Act claim had to be dismissed for lack of federal jurisdiction. Even if Florida had wrongly disparaged the bank's product, that did not intrude on any property right protected by the Fourteenth Amendment. One's right to be free from false advertising is not "property" in the Fourteenth Amendment context. Accordingly, any attempt by Congress to abrogate state immunity pursuant to section 5 of the Amendment was null and void.

²⁴Congress, in the Patent Remedy Act, did not cite the Takings Clause of the Fifth Amendment as its rationale for revoking state immunity. Presumably, if a state infringed a private patent, then pleaded immunity to a takings claim in federal court, the state would be in violation of the just compensation requirement of the Fifth Amendment. But Congress cited procedural Due Process, not the Takings Clause, when it enacted the Patent Remedy Act. Because Florida provided an adequate process, there was no Fourteenth Amendment Due Process violation for Congress to remedy.

That raises an interesting question, however, regarding takings claims and sovereign immunity. The federal government, under the Tucker Act, has waived its immunity from takings claims. Some states have not done so. Are those states immune from such claims absent a federal statute revoking their immunity? No, said Boston University law professor Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277 (1988). Beermann insisted, first, that the Eleventh Amendment does not proscribe federal question claims. *Id.* at 337. Second, he argued that the Takings Clause of the Fifth Amendment, applied to the states by the Fourteenth Amendment, overrides any immunity that might otherwise bar just compensation for a taking. *Id.* at 339. The Supreme Court has not conclusively resolved that question. But it has stated that the Takings Clause, "*of its own force*, furnish[es] a basis for a court to award money damages against the government." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987) (emphasis added).

²⁵*Coll. Sav. Bank v. Fl. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999).

The following year, in *Kimel v. Florida Board of Regents*,²⁶ the Court tackled the question whether the Eleventh Amendment bars private suits against the states under the Age Discrimination in Employment Act (ADEA). A fractured Court held that Congress's attempted abrogation of state immunity—although clearly stated in the ADEA—exceeded congressional authority to enforce the Equal Protection Clause under section 5 of the Fourteenth Amendment. Unlike race and religion, age is not a “suspect class” for Equal Protection purposes. That means states have more leeway to discriminate by age under the ADEA than they would have to discriminate by, say, race under Title VII of the 1964 Civil Rights Act (amended in 1972 to cover public employers). In *Kimel*, the Court held that the ADEA imposed restrictions on state governments that were disproportionate to any unconstitutional conduct targeted by the Act. Moreover, said the Court, the ADEA's legislative history showed that Congress never identified a pattern of age discrimination by the states. Accordingly, Congress could not use section 5 of the Fourteenth Amendment to quash state immunity from private suits under the ADEA.

The same fate soon awaited Congress's attempt to authorize private lawsuits against the states under the Americans with Disabilities Act (ADA). Thirteen months after *Kimel*, the Court decided *Board of Trustees of the Univ. of Alabama v. Garrett*²⁷—again holding that the Eleventh Amendment can trump a federal statute enacted under section 5. Applying the *Boerne* criteria, the Court reiterated that private individuals may not recover money damages against non-consenting states in federal court unless Congress (a) identifies a pattern of discrimination by the states that violates the Fourteenth Amendment, and (b) adopts a remedy that is congruent and proportional to the targeted violation. Those requirements were not met in *Garrett*. Disability, like age, is not a suspect class, so the Court employed so-called rational basis—that is, minimal—scrutiny²⁸ to

²⁶528 U.S. 62 (2000).

²⁷531 U.S. 356 (2001).

²⁸Rational basis scrutiny requires only that there be some reasonably conceivable set of facts, even if unstated, that might justify the state's policy. For example, said the Court, “it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees able to use existing facilities [even if] the ADA requires employers to ‘make existing facilities used by employees readily accessible to and usable by individuals with disabilities.’” *Id.* at 372.

determine if the state could justify its discrimination. Congress would be permitted to override state immunity only if the discrimination was irrational and pervasive. It was not.

Next term, beginning in October 2002, the Court will have yet another opportunity to hear a major state-immunity case.²⁹ This time the alleged discrimination is based on gender—a class that does not rise to “suspect” status like race and religion, but does receive from the courts an intermediate level of review that exceeds the rational basis scrutiny that is applied when discrimination is based on age (*Kimel*) or disability (*Garrett*). In *Nevada Dept. of Human Resources v. Hibbs*,³⁰ the Court will resolve whether Congress can set aside the Eleventh Amendment by means of the Family and Medical Leave Act. Passed in 1993, that Act was designed to address lingering gender discrimination in the workplace. Congress found that women were disproportionately burdened by having to take care of sick family members.

Meanwhile, as the Court consistently expands the doctrine of sovereign immunity by contracting Congress’s powers under section 5 of the Fourteenth Amendment, a separate chapter in the history of federalism has unfolded. Under the Fair Labor Standards Act (FLSA), passed in 1938, Congress authorized private parties to sue their employers in federal or state court for minimum wages and overtime. Until the FLSA was amended in 1966, “employer” excluded states and state agencies. Two years after the amendment, the more expansive definition was tested in *Maryland v. Wirtz*.³¹ The Supreme Court held that the FLSA’s application to state entities was permissible under the Commerce Clause. Justice Douglas, in dissent, warned that the Court had seriously compromised state sovereignty.

Douglas’s view prevailed, temporarily, when the Court overruled *Wirtz* in *National League of Cities v. Usery*.³² “One undoubted attribute of state sovereignty,” wrote then Justice Rehnquist, “is the States’ power to determine the wages which shall be paid to those whom

²⁹ See Linda Greenhouse, *Justices to Hear a Major State-Immunity Case*, N.Y. TIMES, June 25, 2002, at A21.

³⁰ No. 01-1638.

³¹ 392 U.S. 183 (1968).

³² 426 U.S. 833 (1976).

they employ.”³³ That modest limitation on Congress’s authority under the Commerce Clause didn’t last long. In 1985, the Court reconsidered *Usery* and overruled it as well.

The new view, set out in *Garcia v. San Antonio Metropolitan Transit Authority*, was that “the attempt to draw the boundaries of state regulatory immunity in terms of ‘traditional government function’ is not only unworkable but is also inconsistent with established principles of federalism.”³⁴ Instead, the Court relied on “[t]he structure of the federal Government itself . . . to insulate the interests of the States.”³⁵ Justice Blackmun, for a five-member majority, explained that the states are equally represented in the U.S. Senate, and numerous federal laws operate to benefit the states. The dissenters vigorously disputed Blackmun’s structural rationale and predicted that *Garcia* would someday be reversed.

After 17 years, *Garcia* has not been reversed. But private FLSA rights of action against the states for money damages have effectively been abolished. First, in *Seminole*, the Court said that the Eleventh Amendment trumped the Commerce Clause. That meant private parties could no longer pursue their FLSA claims against a state in *federal* court. Then, in *Alden v. Maine*,³⁶ the Court held for the first time that states are immune from private FLSA suits in *state* courts also. Acknowledging that the text of the Eleventh Amendment would not support such a holding, the *Alden* Court turned instead to the Constitution’s structure and history as well as the Court’s own precedent enlarging the sovereign immunity doctrine.

Justice Souter, in dissent,³⁷ rejected the majority’s version of constitutional history and challenged the Court’s assertion that state immunity vests even when the state is not itself the source of the law at issue. He insisted that no substantial—let alone dominant—body of thought at the time of the Constitution’s framing conceived of sovereign immunity as an inherent right of statehood. According to Souter, the majority’s newly formed concept of federalism ignored the time-honored authority of Congress to enforce federal rights in

³³*Id.* at 845.

³⁴469 U.S. 528, 531 (1985).

³⁵*Id.* at 551.

³⁶527 U.S. 706 (1999).

³⁷*Id.* at 760–814 (Souter, J., dissenting).

state court. Without a private right of damages in either federal or state court, the Secretary of Labor alone would have to enforce the FLSA; and that enforcement, concluded Souter, would not prove adequate.

Adequate or not, that was the law as the Supreme Court considered this year's *FMC* case, to which we turn next. *FMC* is but the latest aggrandizement of the sovereign immunity doctrine. From this point forward, according to the Court, that doctrine embraces adjudication before federal administrative agencies, not just courts. In fleshing out the Court's *FMC* opinion, I will discuss the dispute over constitutional text and the meaning of "the Judicial power of the United States." Then I will examine the overriding purpose of sovereign immunity, the constitutionalization of common law, and remedies for state misbehavior.

Constitutional Text and Judicial Power

Justice Thomas, author of the *FMC* majority opinion, has been an outspoken proponent of textualism and originalism as approaches to constitutional interpretation. So too has Justice Scalia and, to a lesser extent, Chief Justice Rehnquist—both of whom joined the *FMC* majority. In a nutshell, textualism assigns overriding importance to the meaning of the words in the Constitution. Originalism is the variant of textualism that looks not to the contemporary meaning of the words but to their meaning at the time they were incorporated in law. If the meaning of the constitutional text is unambiguous, textualists adopt that meaning unless it would lead to absurd consequences. Only if the meaning is unclear will textualists consult the structure, purpose, and history of the Constitution.³⁸

The text of the Eleventh Amendment is crystalline. In essence, it says that federal courts shall not entertain lawsuits against a state by citizens of another state. When the Constitution was ratified in 1789, Article III, which addresses the "judicial Power of the United

³⁸Structure relates, first, to the internal relationship among the various provisions of the Constitution and, second, to the overall design or framework of government that the Constitution establishes. Purpose refers to the Framers' values and objectives when they enacted a particular provision. History involves the law or practices that preceded enactment, as well as early post-enactment interpretations. See Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 822–23 (1999).

States,” provided that federal courts had jurisdiction over “Controversies between . . . a State and Citizens of another State.” Four years later in *Chisholm v. Georgia*,³⁹ the Supreme Court held that Article III took precedence over common law sovereign immunity. The Court rejected the notion that Article III pertained only to federal litigation in which the state was the plaintiff. In *Chisholm*, the executor for a South Carolina merchant sued Georgia for the value of clothing supplied during the Revolutionary War. The states’ broader concern, however, was their exposure to liability in federal court on all of their war debts, which were substantial.

Moving quickly to overturn *Chisholm*, Congress proposed and the states ratified the Eleventh Amendment in 1795. Because it was crafted for the limited purpose of reversing *Chisholm*, says Justice Thomas, “the Eleventh Amendment does not define the scope of the States’ sovereign immunity; it is but one particular exemplification of that immunity.”⁴⁰ That argument effectively concedes that the text of the Eleventh Amendment will not support the *FMC* holding. Thus, Thomas departs from the textualist approach, for which he is well known, and resorts to structure, purpose, and history, notwithstanding the unambiguous meaning of the Amendment.

Thomas justifies that departure from the plain meaning of the text by asserting a right to sovereign immunity that predated the Eleventh Amendment. Yet that assertion is belied by the 4-to-1 decision in *Chisholm*—rendered by a Court on which several of the Framers sat. Yes, *Chisholm* was later overturned by the Amendment itself. But in 1793, four out of five members of the Supreme Court concluded that, before the Eleventh Amendment, the law and the Constitution expressly granted federal court jurisdiction to lawsuits in which the defendant was a state and the plaintiff was a citizen of a different state.

To be sure, the Court’s conservative *FMC* majority did not suddenly discover an expansive version of sovereign immunity lurking within the emanations and penumbras of the Eleventh Amendment. There were numerous precedents, ranging from *Hans* in 1890 to *Alden* in 1999. Still, Thomas availed himself of those precedents without apparent discomfort—even assuming “[f]or purposes of

³⁹ 2 U.S. (2 Dall.) 419 (1793).

⁴⁰ *Fed. Mar. Comm’n* at 1871.

this case . . . that in adjudicating complaints by private parties under the Shipping Act, the FMC does not exercise the judicial power of the United States,"⁴¹ which means that the Commission failed the textual litmus test for Eleventh Amendment immunity.

That didn't matter, insisted Thomas. If the Framers of the Amendment considered it offensive to a state's dignity to be compelled to defend itself in a private lawsuit in federal court, they would also have found it unacceptable

to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC [I]t would be quite strange to prohibit Congress from exercising its Article I powers to abrogate state sovereign immunity in Article III judicial proceedings [as the Court did in *Seminole*], but permit the use of those same Article I powers to create court-like administrative tribunals where sovereign immunity does not apply.⁴²

Indeed, the Supreme Court had previously held that the Tax Court, a special Article I entity, exercised a "portion of the judicial power of the United States,"⁴³ And the Supreme Court had also ruled that administrative law judges, like Article III judges, are "entitled to absolute immunity from damages liability for their judicial acts."⁴⁴ In that same case, the Court noted that administrative adjudications and judicial proceedings shared many common features. "[F]ederal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process."⁴⁵

Although history and logic seem to have impressed Justice Thomas, he did not find it conclusive. In fact, he acknowledged that "[i]n truth, the relevant history does not provide direct guidance for our inquiry."⁴⁶ Still, Thomas reasoned that "[t]he Framers, who envisioned a limited Federal Government, could not have anticipated the vast growth of the administrative state."⁴⁷ He adds that

⁴¹ *Id.* at 1871.

⁴² *Id.* at 1874–75 (internal citations and quotation marks omitted).

⁴³ *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 890–91 (1991).

⁴⁴ *Butz v. Economou*, 438 U.S. 478, 514 (1978).

⁴⁵ *Id.* at 513.

⁴⁶ *Fed. Mar. Comm'n* at 1872.

⁴⁷ *Id.*

“the Constitution was not intended to raise up any proceedings against the States that were anomalous and unheard of when the Constitution was adopted.”⁴⁸ Evidently, Thomas subscribes to Justice Scalia’s rule of constitutional interpretation: When there is “disagreement as to how . . . original meaning applies to new and unforeseen phenomena . . . the Court must follow the trajectory of the [Constitution], so to speak, to determine what it requires.”⁴⁹

In this instance, however, there’s a rather obvious answer to the Scalia-Thomas rule: The growth of the administrative state was an “unforeseen phenomena” because it was patently unconstitutional.⁵⁰ In plotting the “trajectory” of the Constitution, one would have thought that unconstitutional developments would be excluded. In fact, when Justice Breyer, in his *FMC* dissent, became a late convert to textualism—citing the Eleventh Amendment’s limiting phrase, “the Judicial power of the United States,” and stressing that federal administrative agencies do not exercise that power⁵¹—Justice Thomas quite properly admonished him for adopting “a textual approach in defending the conduct of an independent agency that itself lacks any textual basis in the Constitution.”⁵²

⁴⁸ *Id.* (internal quotation marks omitted).

⁴⁹ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 45 (1997).

⁵⁰ Article I, section 1 of the Constitution states that “All legislative Powers herein granted shall be vested in . . . Congress.” The so-called non-delegation doctrine flows from that provision. It holds that Congress may not delegate its legislative authority to other entities, such as administrative agencies in the executive branch. A major purpose of the non-delegation doctrine was to ensure that legislative, executive, and judicial powers be kept separate, so that each branch of government could serve as a check on possible abuse of authority by the other branches. Although Congress was not permitted to delegate its core legislative power, the Supreme Court long ago allowed Congress some leeway in assigning a partial policy role to the executive branch. The key requirement was that Congress first legislate “an intelligible principle to which the person or body authorized to [act] is directed to conform.” *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). For a while, the intelligible principle requirement was sensibly enforced. *See, e.g.,* *ALA Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935). But the post-New Deal explosion of the regulatory state effectively nullified the intelligible principle requirement along with its parent, the nondelegation doctrine.

⁵¹ *Fed. Mar. Comm’n* at 1883 (Breyer, J., dissenting).

⁵² *Id.* at 1871 n.8.

In one breath, Justice Breyer criticizes the majority for reaching a decision lacking “any firm anchor in the Constitution’s text.”⁵³ In the next breath, his born-again textualism somehow morphs into support for a living Constitution “designed to provide a framework for government across the centuries, a framework that is flexible enough to meet modern needs.”⁵⁴ Our constitutional system requires, says Breyer, “structural flexibility sufficient to adapt substantive laws and institutions to rapidly changing social, economic and technological conditions.”⁵⁵

That said, Justice Thomas appears to be no more consistent. His resort to “constitutional design”⁵⁶ and “plan of the convention”⁵⁷ in the face of explicit text leaves even his admirers somewhat perplexed. For example, Catholic University law school dean Douglas Kmiec, a self-described “pretty strong advocate of federalism” and unabashed Thomas fan, says that the *FMC* ruling is even harder to justify than previous enlargements of sovereign immunity. “I would have thought the words ‘judicial power’ in the 11th Amendment would have been a bright-line boundary,” he observes, “but apparently that is not the case.”⁵⁸

With the majority of the Court selectively espousing textualism and condemning the living-document school, and the dissenters espousing the living-document school except when it serves their interests to espouse textualism, it is little wonder that court watchers are more than a little confused. They need not be. The text of the Constitution, as set out in the Eleventh Amendment, tightly circumscribes the sovereign immunity doctrine. And even if the text were ambiguous, which it is not, an analysis of the purpose of sovereign immunity leads us to the same end.

Purpose of Sovereign Immunity

In *FMC*, the federal government suggested that sovereign immunity should not apply to Commission proceedings because they do

⁵³ *Id.* at 1883 (Breyer, J., dissenting).

⁵⁴ *Id.* at 1885 (Breyer, J., dissenting).

⁵⁵ *Id.* at 1889 (Breyer, J., dissenting).

⁵⁶ *Id.* at 1879.

⁵⁷ *Id.* at 1870.

⁵⁸ Quoted in Marcia Coyle, *States Get New Shield from Suits*, NAT’L L.J., June 3, 2002, at A1.

not represent the same threat to the financial integrity of the states as do private lawsuits in court. For example, if the Commission were to issue a reparation order, as Maritime requested in the *FMC* case, and the state chose not to pay, that order could be enforced only by the private beneficiary in federal court, not by the federal government. Under those circumstances, because the state need not consent to the private suit, it would not be exposed to reparations.

The Supreme Court agreed that “state sovereign immunity serves the important function of shielding state treasuries,”⁵⁹ but the Court rejected the government’s assertion that Commission proceedings could not deplete a state’s coffers. If the state willfully and knowingly disobeyed a Commission-issued reparation order or injunction, the Commission could impose a civil penalty of up to \$25,000 per day enforceable in court by the Justice Department. States are not immunized from suit when the plaintiff is the federal government.

That counterargument depends, however, on the notion that sovereign immunity legitimately exists to protect state treasuries. It does not—despite the Court’s assertion to the contrary. Liberal societies traditionally place greater value on compensating injured parties and deterring state misbehavior than they do on safeguarding government bank accounts. Surely, if the government were to act illegally, it would be more equitable to spread the cost of any injury among all taxpayers than to compel the unfortunate injured party to bear the cost alone. In fact, the Supreme Court acknowledged that principle in the takings context when it stated that “[t]he Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁶⁰

If the states’ financial integrity is not the primary purpose of sovereign immunity, what is? “[T]he doctrine’s central purpose,” said the Court, “is to accord the States the respect owed them as joint sovereigns.”⁶¹ The Court continued, “Sovereign immunity does not merely constitute a defense to monetary liability or even to all

⁵⁹ *Fed. Mar. Comm’n* at 1877.

⁶⁰ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

⁶¹ *Fed. Mar. Comm’n* at 1877 (internal quotation marks omitted).

types of liability. Rather, it provides an immunity from suit.”⁶² Thus, the preeminent reason for immunity is to extend to the states the dignity that their sovereign status entails.

The government’s answer to the “states’ dignity” rationale is that no state is compelled to appear before the Commission. That’s because the Commission’s orders are not self-enforcing. They can only be enforced by a federal court, in which case the usual rules regarding immunity would apply. The Supreme Court rejects that contention. Absent immunity, notes the Court, the states would have to defend themselves against private parties in Commission actions, or else compromise their later defense in court. A party sanctioned by the Commission may not litigate the merits of its position in a federal court enforcement suit. At that point, the only relevant issue is whether the Commission order “was properly made and duly issued.”⁶³

Moreover, if the dignity of the states is the paramount justification for sovereign immunity, what can explain the numerous exceptions that have been carved out? Municipalities, which are creations of the state, can be sued without the state’s consent. The federal government or another state can sue a nonconsenting state. A state can be sued in an enforcement action under section 5 of the Fourteenth Amendment, or when the defendant is an official of the state rather than the state itself. None of those exceptions has had a palpable effect on the ability of states to perform their sovereign functions.

The dignity rationale appears to be based more on tradition than necessity. State immunity—grounded in respect for sovereign dignity and derived from English common law—has existed in one form or another throughout American history. Yet that begs the central question, says University of Southern California law professor Erwin Chemerinsky. Is the tradition one that should continue? After all, he notes, “Slavery, enforced racial segregation, and the subjugation of women were also deeply embedded traditions.”⁶⁴

⁶²*Id.*

⁶³*Id.* at 1876.

⁶⁴Erwin Chemerinsky, *Symposium: Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity: Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1223 (2001).

A doctrine derived from the English law premise that “the King can do no wrong” is an “anachronistic relic [that] should be eliminated from American law,” continues Chemerinsky.⁶⁵ America rejected monarchy, disavowed royal prerogatives and, in their place, established a system of enumerated and separated powers, checks and balances that recognized this fundamental reality: Governments and government officials can and will do wrong. They must be held accountable; and sovereign immunity is antithetical to that goal.

Chemerinsky has it right. “Sovereign immunity is inconsistent with a central maxim of American government: no one, not even the government, is above the law. The effect of sovereign immunity is to place the government above the law and to ensure that some individuals who have suffered egregious harms will be unable to receive redress for their injuries.”⁶⁶ In essence, by enlarging the scope of the Eleventh Amendment beyond any conceivable reading of its text, our courts have allowed a common law doctrine to trump the laws duly enacted by the federal legislature. Never mind that the “Framers feared judicial power over substantive policy and the ossification of law that would result from transforming common law into constitutional law.”⁶⁷

Because the common law of sovereign immunity has been constitutionalized, attempts by Congress to override sovereign immunity by statute will usually be invalidated. Consequently, the common law rights of state government will supersede the statutory rights of individuals. That astonishing—some might say, “un-American”—development flies in the face of the Supremacy Clause of Article VI. There, the Constitution provides that “the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” The hierarchy laid out in Article VI places the laws of the United States above the laws of any state—even above a state constitution. Yet, sovereign immunity, which is mostly a state common law doctrine, is accorded a status above that of a federal statute. As for individuals, they are relegated by judicial ukase to the bottom of the pecking order.

⁶⁵ *Id.* at 1201–02.

⁶⁶ *Id.* at 1202.

⁶⁷ *Seminole Tribe of Fla. v. Florida* 517 U.S. 44, 165 (1996) (Souter, J., dissenting).

Article VI is not the only constitutional provision that is incompatible with sovereign immunity. In Article I, section 9, the Framers provided that “No Title of Nobility shall be granted by the United States.” One purpose of that prohibition was to establish a government obligated to follow the rule of law as established by the people. Indeed, the First Amendment guarantees “the right of the people . . . to petition the Government for a redress of grievances.” According to University of Illinois law professor James Pfander, “the Petition Clause guarantees the right of individuals to pursue judicial remedies for government misconduct.”⁶⁸ That right, says Pfander, is “historically calculated to overcome any threshold government immunity from suit.”⁶⁹ The Fifth and Fourteenth Amendments prevent states from depriving any person “of life, liberty, or property, without due process of law.” Chemerinsky points to numerous cases in which the Supreme Court recognized that due process requires a judicial forum in which individuals can obtain redress for losses at the hands of government.⁷⁰

In *Alden*, the majority suggested that redress for injuries was available through one or more of the various exceptions to the sovereign immunity doctrine that the Court has fashioned.⁷¹ For instance, the Commission could itself have initiated an investigation into Ports Authority and sued the state of South Carolina. But practicing attorneys are skeptical of that alternative. Eric Glitzenstein of Washington, D.C.’s Meyer & Glitzenstein calls the prospect of agency action “laughable.” Agencies “depend heavily on private parties,” he says. “That’s why Congress crafted those laws to permit private actions.”⁷² David Vladek of Public Citizen Litigation Group adds that it’s “a leap of faith completely unwarranted” to think that agencies “have

⁶⁸James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 906 (1997).

⁶⁹*Id.* at 980.

⁷⁰Chemerinsky at 1215. See, e.g., *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491–95 (1991); *Webster v. Doe*, 486 U.S. 592, 599–600 (1988); *United States v. Mendoza-Lopez*, 481 U.S. 828, 835 (1987); *Johnson v. Robison*, 415 U.S. 361, 368–70 (1974); *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 244 n.6 (1968) (Harlan, J., concurring).

⁷¹*Alden v. Maine*, 527 U.S. 706, 755–57 (1999).

⁷²*Quoted in Coyle*, *supra* note 58.

the ability to investigate and bring enforcement proceedings against the states. . . . It turns a blind eye to the serious lack of resources of these agencies.”⁷³

Although injunctive relief may be available when state officials are sued under the fiction of *Ex parte Young*, that relief is limited to preventing future violations. It does not compensate for past injuries. Nor are suits for money damages against individual officers likely to be successful. Some officers—for example, judges and legislators—are themselves immune from suit. Other officers have qualified immunity unless they violate a clearly established right about which a reasonable officer should have known.⁷⁴ Finally, suits that circumvent sovereign immunity under section 5 of the Fourteenth Amendment have been sharply curbed in recent years by the Supreme Court.

Without adequate recourse for harms caused by the state, the dual principles of government accountability and popular sovereignty are trivialized. The first words of the Constitution, “We the People,” are stripped of meaning. Lincoln’s model of a government “of the people, by the people, and for the people” is discredited. And James Madison’s cautionary words in *Federalist* 46 are flouted: “The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes [but] the ultimate authority . . . resides in the people alone.”

The states should be “subservient to the people who created them,” says Evan Caminker, law professor at the University of Michigan. Instead, the Supreme Court, by means of its sovereign immunity jurisprudence, has “exalt[ed] states as having a status superior to individuals. . . . [T]he prioritization of states’ dignitary interest over individuals’ competing interest in compensation for injuries . . . expresses a message that individuals are subordinate to states rather than the other way around.”⁷⁵

Yale law professor Akhil Reed Amar agrees. He argues that popular sovereignty and constitutional government mandate that victims

⁷³ *Id.*

⁷⁴ *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

⁷⁵ Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81, 86 (2001).

of unconstitutional acts by government must be accorded a means of relief.⁷⁶ Amar amasses historical evidence that the Framers did not intend to immunize states from constitutional claims.⁷⁷ The Eleventh Amendment, he concludes, should be limited in accordance with its text to foreclosing common law suits against states in federal courts by citizens of another state.

Justice Stevens, in his *FMC* dissent, also offers an interesting historical perspective on the Eleventh Amendment.⁷⁸ *Chisholm*, the holding of which was overturned by the Amendment, had decided two issues relevant to federal court jurisdiction. First, federal courts had *personal* jurisdiction authorizing them to serve process on the state of Georgia. Second, the courts had *subject matter* jurisdiction because, according to Article III of the Constitution, the judicial power extended to suits “between a State and Citizens of another State.” Both of those jurisdictional components had to be satisfied before a federal court could decide *Chisholm*.

The House of Representatives’ draft of the Eleventh Amendment overruled the first jurisdictional component, but not the second: “[N]o state shall be liable to be made a party defendant, in any of the judicial courts . . . established under the authority of the United States.” That draft, which would have nullified service of process, was not adopted. In its place, the Senate version, almost verbatim, became the Eleventh Amendment: “The Judicial Power of the United States shall not extend to any Suits in Law or Equity commenced or prosecuted against any one of the United States by Citizens of another State or by Citizens or Subjects of any foreign State.” The Senate version said nothing about immunizing a state from federal court process, but it expressly overruled Article III’s subject-matter jurisdiction on the basis of diversity of citizenship.

From that, Stevens reasonably deduces, “If the paramount concern of the Eleventh Amendment’s framers had been protecting the so-called ‘dignity’ interest of the States, surely Congress would have endorsed the first proposed amendment granting the States immunity from process, rather than the later proposal that merely delineates the subject-matter jurisdiction of courts.”⁷⁹ Perhaps the Framers

⁷⁶ Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1491–95 (1987).

⁷⁷ *Id.* at 1444–55.

⁷⁸ *Fed. Mar. Comm’n* at 1880 (Stevens, J., dissenting).

⁷⁹ *Id.*

objected to the House draft because it foreclosed process even if the federal government were itself the plaintiff. If so, they could have modified the draft to that extent. But they did not. Instead, they left personal jurisdiction intact and crafted the text of the Eleventh Amendment to cover just one aspect of subject-matter jurisdiction—diversity of citizenship—leaving states exposed to federal court litigation whenever a controversy arose under the Constitution, a treaty, or a federal statute.

A Proper Understanding of Sovereign Immunity

Despite the clear text of the Eleventh Amendment and compelling historical evidence of the Amendment's narrow purpose, most conservative legal analysts celebrate the Rehnquist Court's sovereign immunity jurisprudence. They insist that sovereign immunity, by respecting the dignity of the states, promotes federalism, a centerpiece of the Constitution. Perhaps so. But only if federalism equates to states' rights—in which case, because states occasionally enact repressive laws, federalism will sometimes constrict rather than enlarge personal liberty.⁸⁰ Yet if federalism ever stood for states' rights, that notion was dispelled in 1868 when the Fourteenth Amendment was ratified. Designed to guard against state repression, the Fourteenth Amendment fundamentally altered the relationship between the federal and state governments. Clearly, the touchstone of the new federalism was dual sovereignty, not states' rights. Dual sovereignty entails checks and balances intended to promote liberty by limiting excessive power in the hands of either state or federal government.

⁸⁰In that regard, it is interesting to contrast Justice Thomas's *FMC* opinion with his provocative concurrence a month later in *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002), the Cleveland school choice case. *FMC* promoted an extratextual reading of the sovereign immunity doctrine, supposedly to advance states' dignitary interests. Ironically, that version of federalism subordinates individual rights to states' rights—a principle that Thomas appeared to rebuff in *Zelman*. There, he argued that actions by the federal government to incorporate rights against the states through the Fourteenth Amendment "should advance, not constrain, individual liberty." *Id.* (LEXIS at *66; S. Ct. pagination not available) (Thomas, J., concurring). One would think, therefore, that Thomas would favor actions by the federal government to ensure that an individual right, like the right of redress for injury, could be asserted against the states. But that is not his position in *Fed. Mar. Comm'n*.

Oddly, Justice Thomas in *FMC* seems to adopt the concept of federalism as dual sovereignty—but then, although citing dual sovereignty, he resolves the immunity issue as if states’ rights were all that mattered. Dual sovereignty, Thomas writes, represents the “constitutionally mandated balance of power between the States and the Federal Government [that] was adopted by the Framers to ensure the protection of our fundamental liberties.”⁸¹ So far so good. Inexplicably, he follows that accurate characterization with this non sequitur: “By guarding against encroachments by the Federal Government on fundamental aspects of state sovereignty . . . we strive to maintain the balance of power embodied in our Constitution and thus to reduce the risk of tyranny and abuse from either front.”⁸² Somehow Thomas equates sovereign immunity with a reduced risk of government abuse.

At root, state sovereign immunity is incompatible with dual sovereignty federalism. The federal government cannot fully redress state violations of individual rights if it cannot abrogate state immunity from private litigation. That said, even opponents of sovereign immunity comprehend that the Eleventh Amendment is incontrovertibly part of our Constitution. And it does confer limited immunity on the states. Specifically, the Eleventh Amendment immunizes states against private suits in federal court when jurisdiction is based on diversity of citizenship. But that is all it does. The Supreme Court, not the text of the Eleventh Amendment, has extended sovereign immunity to include nondiverse citizens (*Hans*), federal question jurisdiction (*Seminole*), suits in state court (*Alden*), and now private actions before federal administrative agencies (*FMC*). At the same time, the Court has steadily circumscribed Congress’s power to abrogate sovereign immunity under section 5 of the Fourteenth Amendment (*Florida Prepaid*, *College Savings Bank*, *Kimel*, and *Garrett*).

Essentially, the court has constitutionalized the common law of sovereign immunity, thereby forbidding Congress to create many private causes of action against the states. In its defense, the Court has engaged in that process with the best of intentions—to rein in an unrestrained Congress that has made a mockery of the doctrine of enumerated powers and limited government. In establishing a

⁸¹ *Fed. Mar. Comm’n* at 1879 (internal quotation marks omitted).

⁸² *Id.* (internal quotation marks omitted).

pervasive regulatory and redistributive state, Congress has stretched the Commerce Clause, the General Welfare Clause and the Necessary and Proper Clause beyond recognition. The federal government can now regulate virtually anything and everything. It can exact tribute from anyone for almost any purpose, then dispense the proceeds to anyone else. At last, the Rehnquist Court has taken a few ministeps to curtail Congress's seemingly boundless power. That curtailment is long overdue. But it has been accomplished in the wrong manner.

Here's how Chapman University law professor John C. Eastman summarizes the Court's treatment of federalism and sovereign immunity:

[T]he Court's enthusiasm for federalism has sometimes caused it to forget the other half of the founders' vision, namely, that the federal government was to be supreme within the spheres assigned to it. Several of the decisions . . . interpret the Eleventh Amendment in a way that is arguably contrary to that vision. That is not necessarily to disagree with the outcome of these cases, only with their reasoning. In *Seminole Tribe*, for example, the correct holding from the view of the framers would have been that Congress had exceeded the scope of its authority under the Indian Commerce Clause. . . . By relying instead on a nontextual reading of the Eleventh Amendment, the Court essentially erected an artificial barrier to an artificial power—producing the correct outcome in the case but creating real analytical problems for future cases where a power clearly given to Congress was at issue.⁸³

In pursuit of legitimate ends—limited federal government—the Supreme Court has adopted illegitimate means—sovereign immunity that denies to individuals full recourse for injuries they may have suffered at the hands of the states. Yes, the Court should press ahead with a full and vigorous frontal assault to restore a federal government of delegated, enumerated, and thus limited powers. In doing so, however, the Court must not forget that preservation of personal liberty is the quintessential ingredient of the American experience. In a free society, the “dignity” of state governments cannot be permitted to trump the rights of individual Americans.

⁸³John C. Eastman, *Restoring the 'General' to the General Welfare Clause*, 4 CHAP. L. REV. 63 n.4 (2001).

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Until a more apprehensive electorate repeals the Eleventh Amendment, the reach of state sovereign immunity must extend no further than the Amendment's unambiguous text.