

Preserving Federalism or Perverting Constitutional Principles: A Conservative Critique of the Conservative Majority [*Federal Maritime Commission v. South Carolina State Ports Authority*, 122 S. Ct. 1864 (2002)]

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*Judges ought to know, that the poorest peasant is a man as well as the King himself — all men ought to obtain justice; since in the estimation of justice, all men are equal; whether the Prince complain of a peasant or a peasant complain of the Prince.*¹

I. INTRODUCTION

The United States system of governance is based on federalism.² Under our system, the federal and state governments share in the governance of the nation. The Eleventh Amendment regulates the interactions between the states and the national government. The states naturally desire to referee their own disputes and resolve them with state law, rather than federal law imposing itself on the state. While the federal government is charged with enforcing federal law, the Eleventh Amendment imposes limits on that enforcement. If the Eleventh Amendment were read expansively, some suggest that the Amendment protects state governments from *all* suits in federal court.³ However, a literal reading of the Eleventh Amendment recognizes the federal government's limited, but significant, power over the states.⁴ The Amendment still requires states to answer for violations

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1. *Chisholm v. Georgia*, 2 U.S. 419, 460 (1793) (Wilson, J.). Justice Wilson described the question the Court was deciding. He declared that the question, whether the states were amenable to the jurisdiction of the United States Supreme Court, was "important in itself, [but] will depend on others, more important still; and, may, perhaps, be ultimately resolved into one, no less radical than this 'do the people of the United States form a Nation?'" *Id.* at 453.

2. DANIEL FARBER, *CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* 749 (2d ed. 1998) (noting that "[o]ur constitutional system contemplates at least two levels of power, the national power and that of the individual states").

3. See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 *STAN. L. REV.* 1033, 1035 (1983) (stating that one interpretation of the Eleventh Amendment asserted that it "prohibits federal courts from exercising both party-based and subject matter-based jurisdiction over private citizens' suits against the states"). Fletcher argued that this widely accepted view was actually overbroad and inconsistent with history. *Id.*

4. *Id.* (stating that a narrow interpretation of the Amendment was "strikingly simple and remarkably congruent with the available evidence"). Fletcher also concluded that this narrow interpretation was consistent with an accurate reading of the proceedings surrounding the adoption of the Amendment. *Id.* at 1036.

of federal law.⁵ The United States Supreme Court's willingness to read the Amendment broadly comports with the Court's desire to restrict federal power while simultaneously enhancing the protections afforded the states.

Since the early 1990s, the Court has further limited Congress's ability to permit suits against the states.⁶ The extent to which the Court has extended the reach of the Eleventh Amendment is the subject matter of numerous scholarly articles.⁷ The framers of the Amendment never envisioned allowing the United States Supreme Court to take away all remedies from those wronged by the states.⁸ *Federal Maritime Commission v. South Carolina State Ports Authority*,⁹ represents a huge step in the Court's jurisprudence. The case symbolizes the ever increasing and vitriolic division in the Court. The "conservatives" and "liberals" are entrenched in a battle that neither side is willing to concede. The Court's analysis in the majority opinion is predominantly concerned with the Eleventh Amendment and, more broadly, the constitutional vagaries of sovereign immunity. Sovereign immunity invariably implicates discussions of the Tenth Amendment, thus, where appropriate this comment will analyze certain aspects of the Court's Tenth Amendment jurisprudence.

This paper cannot resolve all the questions concerning the United States Supreme Court's understanding of state sovereign immunity. The analysis will, however, present a critique of the Court's holding in this case and will attempt to show that the "conservative" majority has abandoned its traditional role and adopted an activist approach to this area of law.

The United States Supreme Court wrongly decided that state sovereign immunity applies when a federal administrative agency holds a hearing to investigate and prevent violations of federal law. By doing so, the Court misapplied precedent, failed to exercise judicial restraint

5. For a discussion of the different readings of the Amendment, see, for example, Richard H. Fallon, *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 444-57 (2002).

6. See generally Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203 (1978); Ronald D. Rotunda, *The Eleventh Amendment, Garrett, and Protection for Civil Rights*, 53 ALA. L. REV. 1183 (2002).

7. See *supra* notes 3-6; *infra* notes 62, 72, 116-17, 185, 190, 274.

8. The Constitution does not include any reference to state sovereign immunity, and the Eleventh Amendment, when read literally, only applies when a citizen of one state is suing a citizen of another state. See Fletcher, *supra* note 3, at 1068.

Because of the extension of the Eleventh Amendment's applicability, the Court created the unsustainable position that Congress could not provide a remedy to an injured party even though federal law was supreme. See generally *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 122 S. Ct. 1864 (2002) (*United States Reports* pagination not available at time of publication). This position created a discrepancy when a private company was subject to suit in federal court for violating federal law, while a state was protected from the artificial reach of the Eleventh Amendment. *Id.* This dilemma occurred even when both actors violated the same law. *Id.*

9. 122 S. Ct. 1864.

when it expanded its interpretation of the Eleventh Amendment beyond the words of the text, and failed to recognize the impact of its decision.

II. CASE DESCRIPTION

In *Federal Maritime*, the United States Supreme Court decided whether the Eleventh Amendment precluded Congress from requiring the Federal Maritime Commission (Commission) to adjudicate a private person's complaint that a state-run port has violated the Shipping Act of 1984 (Shipping Act).¹⁰ This decision, like many others in this area, split the Court five to four.¹¹

The dispute arose between a cruise line that offered gambling activities onboard its ships and the State of South Carolina.¹² When the cruise line was unsuccessful in its attempts to petition the state agency, the Company sought assistance under the Shipping Act.¹³ The battle began at Charleston Harbor when South Carolina Maritime Services, Inc. (Maritime Services) sought berthing space for its vessel, the M/V TROPIC SEA.¹⁴ Maritime Services offered gambling cruises to international waters and to the Bahamas from the port at Charleston.¹⁵ The South Carolina State Ports Authority (SCSPA) claimed its policy was to deny berthing space to gambling vessels.¹⁶ The SCSPA denied Maritime Services' five requests over the next several months.¹⁷

Subsequently, Maritime Services complained to the Commission, a federal administrative agency, that the SCSPA had violated the Shipping Act.¹⁸ Maritime Services alleged that the SCSPA violated the Shipping Act by "unreasonably refusing to deal" and discriminating against its vessel.¹⁹ Maritime Services claimed that the SCSPA allowed Carnival Cruise Lines' vessels, which also offered gambling, to berth at Charleston's harbor.²⁰ Additionally, Maritime Services argued that in order to avoid discrimination, the SCSPA should have granted the berthing privileges to the M/V TROPIC SEA.²¹ Maritime Services sought injunctive relief as well as reparations from the SCSPA.²²

10. 46 U.S.C. app. §§ 1701-1719 (2000 & Supp. 2002); *Fed. Mar.*, 122 S. Ct. at 1871.

11. *See infra* note 200.

12. *Fed. Mar.*, 122 S. Ct. at 1868.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

The SCSPA, as an “arm of the State” of South Carolina,²³ asserted sovereign immunity as a defense and moved to dismiss the complaint.²⁴ The complaint was referred to an administrative law judge (ALJ), and he agreed and granted the SCSPA’s motion.²⁵ However, the Commission reversed.²⁶ The SCSPA appealed to the Fourth Circuit, which reversed the Commission.²⁷ The Commission filed a petition for a writ of certiorari, which the United States Supreme Court granted.²⁸

III. BACKGROUND

Congress enacted the Shipping Act of 1984 and required the federal regulation of ocean borne transportation in the foreign commerce of the United States.²⁹ The Commission is charged with the administration of the Shipping Act.³⁰ The Commission has regulatory responsibilities over shipping in U.S. foreign commerce including oversight of public ports.³¹ The Shipping Act authorizes two proceedings to investigate alleged violations.³² The Act permits the Commission to conduct an investigation and bring suit.³³ The Act also allows a private citizen to file a complaint with the Commission,³⁴ which the Commission must adjudicate.³⁵ Finally, the Commission may award monetary relief to a private “person.”³⁶

The Act governs common carriers of passengers by water, marine terminals, and public ports.³⁷ The Act regulates these marine terminals and attempts to prevent conduct that is anti-competitive and inefficient.³⁸

Congress specifically provided a procedure where private persons “may file with the Commission a sworn complaint alleging a violation of this chapter and may seek reparation[s]” and other relief.³⁹ The parties must settle the dispute or file a written answer.⁴⁰ If the dispute

23. See *Ristow v. S.C. Ports Auth.*, 58 F.3d 1051, 1053-55 (4th Cir. 1994).

24. *Fed. Mar.*, 122 S. Ct. at 1869.

25. *Id.*

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

27. *Id.*

28. *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 122 S. Ct. 392, 392 (2001).

29. 46 U.S.C. app. § 1701 (2000).

30. *Id.* § 1710(c).

31. *Id.* § 1710(a).

32. *Id.* § 1710(a), (h).

33. *Id.*

34. *Id.* § 1710(a).

35. *Id.* § 1710(b).

36. *Id.* § 1710(g).

37. *Id.* § 1702(6), (14).

38. *Id.* § 1709 (listing the prohibited acts under this statute).

39. Brief for the United States at 3, *S.C. State Ports Auth. v. Fed. Mar. Comm’n*, 243 F.3d 165 (2001) (No. 01-46).

40. Brief for the Federal Maritime Commission at 2, *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 122 S. Ct. 1864 (2002) (No. 01-46).

is not settled, the Commission is required to adjudicate the complaint and to issue an order.⁴¹ The Commission may also begin an investigation *sua sponte*.⁴²

The Shipping Act imposes requirements on the Commission's adjudication of a complaint that are similar to the Federal Rules of Civil Procedure.⁴³ Despite the procedures of the statute, the Commission must rely on the federal district court for enforcement of subpoenas.⁴⁴ Ultimately, the Commission can rule in favor of injunctive relief, attorney's fees and other relief, but the Commission must petition the district court to enforce the order in the event of non-compliance.⁴⁵

A. *The Development of Sovereign Immunity*

State sovereign immunity from suit in federal court has a lengthy and controversial history. The United States Constitution states that the federal "judicial power shall extend to controversies between a State and citizens of another State."⁴⁶ In *Chisholm v. Georgia*,⁴⁷ a South Carolina citizen filed an assumpsit claim against the state of Georgia.⁴⁸ Georgia, before the United States Supreme Court, claimed sovereign immunity.⁴⁹ The Court, with a lone dissenter, denied Georgia's sovereign immunity claim because Article III of the Constitution granted jurisdiction to the federal courts.⁵⁰

The day after this controversial decision, the Senate considered a constitutional amendment to overrule it.⁵¹ The Eleventh Amendment to the United States Constitution was hastily adopted.⁵² The Amendment provides: "[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."⁵³

The text of this Amendment is so straightforward, that the United States Supreme Court did not significantly explore its interpretation until the late nineteenth century, nearly one hundred years af-

41. *Id.*

42. *Id.*

43. The Commission must set a date when it will issue its decision, within ten days of the Complaint; provide a hearing; and permit the parties to use standard discovery techniques such as depositions and interrogatories. See 46 U.S.C. app. §§ 1710(d), 1713(a).

44. Brief for the Federal Maritime Commission at 3, *Fed. Mar.* (No. 01-46).

45. *Id.* "The Attorney General at the request of the Commission may seek to recover the amount [of civil penalties] assessed in an appropriate district court of the United States." *Id.* (quoting 46 U.S.C. app. § 1713(e)).

46. *Chisholm v. Georgia*, 2 U.S. 419, 420 (1793) (quoting U.S. CONST. art. III, § 2).

47. *Id.*

48. *Id.* at 428.

49. See *id.* at 419-23.

50. See generally *id.* at 420.

51. Fletcher, *supra* note 3, at 1058-59.

52. *Id.* at 1059. Three months after the decision, the amendment was adopted. *Id.*

53. U.S. CONST. amend. XI.

ter its adoption.⁵⁴ Still, in 1890, a citizen of Louisiana sued his state in federal court.⁵⁵ He claimed that a recent amendment to Louisiana's constitution was "impairing the obligation of contracts" in violation of Article I, section ten of the federal Constitution.⁵⁶ The trial court, on jurisdictional grounds, refused to hear the case and the plaintiff was forced to appeal to the United States Supreme Court.⁵⁷ In *Hans v. Louisiana*,⁵⁸ the United States Supreme Court decided that the Eleventh Amendment was a jurisdictional bar to a citizen suing his own state in federal court, despite the fact that the Amendment only mentions citizens of *other* states.⁵⁹ The Court, quoting Alexander Hamilton from Federalist No. 81, stated that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*."⁶⁰ The *Hans* Court, wishing to extend state sovereign immunity, acknowledged that the text of the Amendment was no bar to such suits. The majority, however, relied on the "nature of sovereignty" and affirmed the judgment of the lower court and concluded that the Eleventh Amendment bars an individual from suing his own state.⁶¹ The *Hans* decision was momentous because it was the Court's first venture away from the text of the Amendment.

After *Hans*, it was doubtful that a private citizen could ever require a state to answer in federal court, even for violations of federal law.⁶² Thereafter, shareholders of a railroad alleged that a Minnesota state statute violated the Fourteenth Amendment.⁶³ Because of the *Hans* precedent, the shareholders did not sue the state, but instead the state's Attorney General.⁶⁴ The plaintiffs petitioned for a temporary restraining order prohibiting him from enforcing the statute.⁶⁵ Minnesota's Attorney General claimed that the Eleventh Amendment removed jurisdiction for the suit.⁶⁶ However, both the trial court and the circuit court rejected his argument, and he appealed to the United States Supreme Court.⁶⁷ In *Ex Parte Young*,⁶⁸ the Court affirmed, holding that "[t]he State has no power to impart to [the Attorney

54. The only possible exception might be *Osborn v. Bank of the United States*, 22 U.S. 738 (1824).

55. *Hans v. Louisiana*, 134 U.S. 1, 1 (1890).

56. *Id.* at 3 (quoting U.S. CONST. art. I, § 10, cl. 1).

57. *See id.*

58. *Id.*

59. *Id.* at 10.

60. THE FEDERALIST NO. 81 (Alexander Hamilton).

61. *Hans*, 134 U.S. at 16.

62. *See generally* Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102 (1996).

63. *Ex Parte Young*, 209 U.S. 123, 129 (1908).

64. *Id.*

65. *Id.* at 132.

66. *Id.*

67. *Id.*

68. *Id.*

General] any immunity from responsibility to the supreme authority of the United States.”⁶⁹ Hence, the Eleventh Amendment applied only to the states.⁷⁰ Injunctive relief against a state official was not barred.⁷¹ Consequently, *Ex Parte Young* provided a remedy for private citizens alleging unconstitutional state action.⁷²

Yet, *Edelman v. Jordan*⁷³ drastically reduced the scope of this previous decision.⁷⁴ The United States Supreme Court held that the Eleventh Amendment barred a suit against a state official that might result in retrospective, rather than prospective, relief.⁷⁵ The *Edelman* Court reasoned that this kind of award was likely to be paid out of the state’s treasury.⁷⁶ The Court, finding that the Eleventh Amendment applied, limited its prior holding in *Ex Parte Young* to prospective relief.⁷⁷ As a consequence, the *Edelman* Court removed a potential remedy for individuals seeking to hold the states accountable for violations of federal law.⁷⁸

Sovereign immunity provides the states with an almost insurmountable defense against suit.⁷⁹ Despite this protection, a state may waive its immunity and consent to suit.⁸⁰ In addition, Congress may abrogate Eleventh Amendment immunity and authorize a suit against the states under section five of the Fourteenth Amendment.⁸¹ In *Fitzpatrick v. Bitzer*,⁸² the Court reinvigorated Congress’s power to abrogate the Eleventh Amendment immunity.⁸³ The Court stated that the Eleventh Amendment was “necessarily limited by the enforcement provisions of [section] 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce ‘by appropriate legislation’ the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority.”⁸⁴ These same issues, far from being resolved, were once again at bar in *Atascadero State Hospital v. Scanlon*.⁸⁵

69. *Id.* at 160.

70. *See generally id.*

71. *See Monaghan, supra* note 62, at 126.

72. *See* Chris Carlisle, *State Sovereign Immunity Trumps the Supremacy Clause: Does Federal Law Apply to the States in the Wake of Alden v. Maine*, 23 *HAMLIN L. REV.* 177 (1999). This scholarly source explores all aspects of state sovereign immunity up to *Alden*. *Id.* It includes a detailed analysis of how *Ex Parte Young* may still be used. *Id.*

73. 415 U.S. 651 (1974).

74. *See generally id.*

75. *See id.* at 657-59.

76. *Id.* at 663.

77. *See id.* at 664.

78. *See id.* at 666-67.

79. *See generally* Monaghan, *supra* note 62.

80. *Clark v. Barnard*, 108 U.S. 436, 447 (1883).

81. *Edelman*, 415 U.S. at 670-74.

82. 427 U.S. 445 (1976).

83. *Id.* at 455.

84. *Id.* at 456.

85. 473 U.S. 234 (1985).

In *Atascadero*, the petitioner sued for declaratory and injunctive relief as well as a monetary award.⁸⁶ He claimed that the state hospital denied him employment because of his disabilities.⁸⁷ Prior to this suit, Congress had passed the Rehabilitation Act of 1973,⁸⁸ and the petitioner claimed that the Eleventh Amendment was inapplicable because Congress was attempting to abrogate state sovereign immunity.⁸⁹ He also claimed that California, because it accepted federal funds, had waived its immunity under the Amendment.⁹⁰ Unfortunately for the petitioner, neither of these arguments was successful.⁹¹

The United States Supreme Court held that a waiver of immunity, if it was specifically applicable, could be effective.⁹² However, the Court declared that “the mere receipt of federal funds cannot establish that a State has consented to suit in federal court.”⁹³ The Court further held that in order for Congress to abrogate Eleventh Amendment immunity, it must make “its intention unmistakably clear in the language of the statute.”⁹⁴ With this decision, the Court significantly limited congressional abrogation while simultaneously enhancing the states’ power when faced with a possible waiver of its immunity.⁹⁵

In *Pennsylvania v. Union Gas Co.*,⁹⁶ the Court enhanced Congress’ power to authorize suits against the states.⁹⁷ In that case, the federal government sued to recover cleanup costs that were associated with a “superfund” site.⁹⁸ Union Gas then filed a third-party complaint against the State of Pennsylvania.⁹⁹ Union Gas claimed that Pennsylvania was liable under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).¹⁰⁰ Union Gas argued that Pennsylvania was an “owner [and] operator” of the site.¹⁰¹ The State asserted sovereign immunity and that the Eleventh Amendment precluded federal jurisdiction.¹⁰² Justice William Brennan, the author of the plurality opinion, held that Congress had power under the Commerce Clause to hold states liable for monetary damages de-

86. *Id.* at 236.

87. *Id.*

88. 29 U.S.C. § 701 (1998).

89. *Atascadero*, 473 U.S. at 240.

90. *Id.*

91. *Id.*

92. *Id.* at 246-47.

93. *Id.*

94. *Id.* at 242.

95. *See generally id.* at 247.

96. 491 U.S. 1 (1989).

97. *Id.* at 2.

98. *Id.* at 6.

99. *Id.*

100. 42 U.S.C. § 9607 (2002).

101. *Union Gas*, 491 U.S. at 6.

102. *Id.*

spite the protections of the Eleventh Amendment.¹⁰³ He asserted that CERCLA was meant to do exactly that.¹⁰⁴ Under *Union Gas*, Congress had real, although very temporary, powers necessary to abrogate a state's Eleventh Amendment immunity.¹⁰⁵

Finally, in *Seminole Tribe v. Florida*,¹⁰⁶ the Seminole Tribe filed a lawsuit against the State of Florida, and its Governor, in federal district court.¹⁰⁷ The tribe sought to force negotiations under the Indian Gaming Regulatory Act (IGRA).¹⁰⁸ IGRA authorized suit against a state in federal court.¹⁰⁹ The plaintiffs claimed that Congress was empowered to abrogate state sovereign immunity under the Indian Commerce Clause, just as it had been empowered to do so under the Interstate Commerce Clause.¹¹⁰ The plaintiffs relied on *Union Gas*.¹¹¹ The Tribe argued that Congress had abrogated Eleventh Amendment immunity when it implemented legislation that was enacted pursuant to the Indian Commerce Clause.¹¹² However, the Court refused to extend the plaintiff's claim to the Indian Commerce Clause and specifically overruled *Union Gas*.¹¹³

Chief Justice William Rehnquist announced that “[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.”¹¹⁴ The Chief Justice declared that “Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.”¹¹⁵

103. *Id.*

104. *See id.*

105. *Id.* at 13-14. Justice Brennan stated that

[o]ur conclusion that CERCLA clearly permits suits for money damages against States in federal court requires us to decide whether the Commerce Clause grants Congress the power to enact such a statute

. . . .

Though we have never squarely resolved this issue of Congressional power, our decisions mark a trail unmistakably leading to the conclusion that Congress may permit suits against the States for money damages.

Id. The problem with relying on *Union Gas* is that no true majority opinion was authored. It had concurrences in part, and the plurality opinion only dealt with narrow issues. *Id.* at 2. Perhaps this is why the Court was able to overrule the case such a short time later. *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996).

106. 517 U.S. 44.

107. *Id.* at 51-52.

108. 25 U.S.C. § 2710(d)(1)(C) (2002). This statute was enacted under the Indian Commerce Clause. U.S. CONST. art. I, § 8, cl. 3; *see Seminole Tribe*, 517 U.S. at 51-52.

109. *Seminole Tribe*, 517 U.S. at 51-52.

110. U.S. CONST. art. I, § 8; *Seminole Tribe*, 517 U.S. at 52.

111. *Seminole Tribe*, 517 U.S. at 60.

112. *Id.*

113. *Id.* at 66.

114. *Id.* at 72.

115. *Id.* at 73.

This decision hamstrung Congress's power to enforce federal law against the states.¹¹⁶ *Seminole Tribe* exacerbates the clash between the Court's sovereign immunity jurisprudence and the Supremacy Clause.¹¹⁷ Congress has power to "regulate commerce among the several states,"¹¹⁸ yet the fact that Congress cannot force a state to answer in federal court necessarily implies that federal law may not be supreme.¹¹⁹ The limitation on the supremacy of federal law, however, is not in the Constitution.¹²⁰ Since *Seminole Tribe*, the Court disbanded nearly every other congressional abrogation of state sovereign immunity.¹²¹

In summary, the Court's jurisprudence since *Chisholm* and through *Seminole Tribe* is complex. Several principles illustrate the evolution of these rules. First, a private party may sue a state official for relief in federal court¹²²; however, the Court has limited that relief to prospective, rather than retrospective, monetary relief.¹²³ Additionally, the United States is empowered to sue an unconsenting state in federal court.¹²⁴ Furthermore, a state may waive its immunity and thereby be subject to suit, and Congress can abrogate sovereign immunity when it is acting pursuant to its power under section five of the Fourteenth Amendment.¹²⁵ Finally, under *Seminole Tribe*, Congress cannot abrogate a state's immunity under any of its Article I powers.¹²⁶

Since *Seminole Tribe*, the Court cannot reconcile the conflict between the Supremacy Clause and the states' alleged immunity.¹²⁷ The Court removed nearly all private monetary remedies against a state in

116. See Jonathan R. Siegel, *Congress's Power to Authorize Suits Against States*, 68 GEO. WASH. L. REV. 44 (1999). "The Court intended *Seminole Tribe* to effect a fundamental shift in the balance of power between the state and federal governments, a shift that will affect vital individual and business interests." *Id.* at 45.

117. U.S. CONST. art. VI, § 1, cl. 2. See generally JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002).

118. U.S. CONST. art. I, § 8, cl. 3.

119. See NOONAN, *supra* note 117, at 4-5.

120. See *id.* at 5-6.

121. See *id.* at 1-2. Judge Noonan provides several germane examples where the Court has removed the Congress's ability to abrogate state immunity. See *infra* note 287 and accompanying text.

122. *Ex Parte Young*, 209 U.S. 123, 160 (1908).

123. *Edelman v. Jordan*, 415 U.S. 651, 664-65 (1974).

124. It is axiomatic that the United States, itself, can compel a state to answer in federal court. See *Alden v. Maine*, 527 U.S. 706, 755 (1999).

125. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451-52 (1976).

126. *Seminole Tribe v. Florida*, 517 U.S. 44, 73 (1996).

127. Carlisle, *supra* note 72, at 243. One scholar stated that

[t]he text of the Constitution itself expressly supports a conclusion that the states must hear all valid claims arising under federal law. The Supremacy Clause commands that federal law shall bind the judges in every state. An argument that contends this language is limited to federal courts is unpersuasive. Furthermore, the Constitution itself gives Congress the power to create federal courts. This supports a conclusion that state courts were expected to enforce federal law, otherwise if Congress had not created the federal district courts the Constitution and laws of the United States would be unenforceable. The Alden Court [struggling with this principle in light of *Seminole Tribe*]

federal court, unless the state consents.¹²⁸ The decisions discussed next only aggravated the situation between states and state citizens who alleged a violation of law.

B. *The Rehnquist Court's Extension of State Sovereign Immunity in Light of Seminole Tribe*

Following *Seminole Tribe*, the Court continued to expand state sovereign immunity principles into areas where there was previously no dispute. In *Alden*, state probation officers sued their employer, the State of Maine, for damages in federal court.¹²⁹ The men alleged that the state had violated provisions of the Fair Labor Standards Act (FLSA).¹³⁰ When the United States Supreme Court ruled in *Seminole Tribe* that Congress could not force the states to answer in federal court under Article I, the district court in *Alden* had no choice but to dismiss the action.¹³¹ Consequently, petitioners filed suit in state court because the FLSA permitted private actions against states in their own courts.¹³² The state trial court held that sovereign immunity protected the state from the reach of any court.¹³³ The Maine Supreme Judicial Court affirmed, and the petitioners appealed to the United States Supreme Court.¹³⁴ Seeking to resolve a conflict between the highest courts of Maine and Arkansas, the United States Supreme Court granted certiorari.¹³⁵ The Court held that “the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.”¹³⁶

The decision in *Alden* was remarkable, not only for the holding, but also for the fact that the Court explicitly acknowledged state sovereign immunity existing outside the literal bounds of the Eleventh Amendment.¹³⁷ Justice Anthony Kennedy wrote that “[t]he sovereign immunity of the States neither derives from, nor is limited by, the

defied this clear textual authority and created an exception to the Supremacy Clause that is not supported by its text or history.

Id.

128. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).

129. *Alden*, 527 U.S. at 711.

130. 29 U.S.C. § 201 (2000); *Alden*, 527 U.S. at 711.

131. *Alden*, 527 U.S. at 712.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. See *Carlisle*, *supra* note 72, at 242-43. *Carlisle* further stated that [a]nother consequence of the *Alden* Court's misguided reliance on the flawed historical premise personified by *Hans* is that the scope of the Supremacy Clause had been limited as it has been applied to the states For the first time in the Constitution's history, . . . the state courthouse doors were closed to valid federal law claims.

Id.

terms of the Eleventh Amendment. . . . [Instead,] the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution."¹³⁸ This new rationale allowed the Court's conservative majority to expand the reach of Eleventh Amendment immunity, but also heightened the criticism of the Rehnquist Court's judicial activism.¹³⁹

The Court continued to expand the reach of the Eleventh Amendment and *Seminole Tribe in College Savings Bank v. Florida Prepaid Postsecondary Expense Board*¹⁴⁰ and the related case *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.¹⁴¹ In *College Savings Bank*, the petitioner was a bank in New Jersey.¹⁴² Florida Prepaid Postsecondary Education Expense Board (Florida Prepaid), conceivably an arm of the State,¹⁴³ developed a program designed to finance college educations through the sale of certificates of deposit.¹⁴⁴ The Savings Bank (the Bank) filed suit against Florida Prepaid.¹⁴⁵ The Bank alleged that Florida Prepaid was violating section 43(a) of the Lanham Act¹⁴⁶ because it made false statements about its own certificates of deposit financed tuition plan.¹⁴⁷

Justice Antonin Scalia, writing for the Court, began the opinion by declaring that there were two ways for an individual to require a state to answer in court.¹⁴⁸ First, Congress may create legislation under the enforcement power of the Fourteenth Amendment,¹⁴⁹ or secondly, a state may consent to suit.¹⁵⁰ Justice Scalia noted that Congress was attempting to abrogate the state's immunity with its Article I powers, which was invalid under *Seminole Tribe*.¹⁵¹ If Congress had not used its Fourteenth Amendment power, then the only way to save

138. *Alden*, 527 U.S. at 712-13.

139. See generally Fallon, *supra* note 5. The conservative majority is not accustomed to cries of judicial activism, but those cries have been more frequent and vocal in recent years. *Id.* at 429. For a scholarly discussion of *Alden* and its detrimental effects on Congressional Power, see 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-25, at 529-34 (3d ed. 2000). Another commentator noted that "the Supreme Court has failed to adequately explain how the immunities derive from the text of the Constitution [T]he texts of the Tenth and Eleventh Amendments simply do not provide for such immunities and constitutional structure, while a useful aid to interpretation, is not itself text." 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, 820 (1999).

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

141. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

142. *Coll. Sav. Bank*, 527 U.S. at 670.

143. See *Ristow v. S.C. Ports Auth.*, 58 F.3d 1051, 1053-55 (4th Cir. 1994).

144. *Coll. Sav. Bank*, 527 U.S. at 671.

145. *Id.*

146. 15 U.S.C. § 1125 (1999).

147. *Coll. Sav. Bank*, 527 U.S. at 671.

148. *Id.* at 670.

149. *Id.*

150. *Id.* (citing *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883)).

151. *Id.* at 671.

the suit was if Florida had waived its sovereign immunity by consenting.¹⁵²

The Bank admitted that the state had not affirmatively consented to suit, but it relied on “constructive waiver” that the United States Supreme Court had announced in an earlier decision.¹⁵³ The Bank asserted that Florida Prepaid had waived its immunity by holding itself out as an interstate marketer of securities.¹⁵⁴ The Court rejected this argument.¹⁵⁵ It determined that sovereign immunity is a constitutional right.¹⁵⁶ Justice Scalia stated that “constructive consent is not a doctrine commonly associated with the surrender of constitutional rights.”¹⁵⁷ Hence, the Court declared that a state’s consent must be explicit.¹⁵⁸

Since the Bank lost when trying to assert violations of federal law, it tried to sue Florida Prepaid for violation of the Bank’s patent in a subsequent suit.¹⁵⁹ The Bank claimed that Florida Prepaid’s tuition plan infringed on the Bank’s patent.¹⁶⁰ The Bank asserted that sovereign immunity could not bar this suit because Congress had abrogated the state’s immunity with its power under section five of the Fourteenth Amendment.¹⁶¹ The Bank also claimed that Congress can and should protect patents as a property right under the same section.¹⁶²

However, the Court disagreed.¹⁶³ Congress can abrogate Eleventh Amendment immunity under section five, but the Court claimed that it alone was empowered to determine the scope of Congress’s powers under the Amendment.¹⁶⁴ The Court maintained that its decision in *City of Boerne v. Flores*¹⁶⁵ required a narrow interpretation of section five.¹⁶⁶ Under the Court’s ruling, *Seminole Tribe* was control-

152. *Id.* at 683.

153. *Id.* at 671; *see also* *Parden v. Terminal R.R. Docks Dep’t*, 377 U.S. 184 (1964).

154. *Coll. Sav. Bank*, 527 U.S. at 671.

155. *Id.* at 683. In the Court’s holding, it overruled *Parden*. *Id.*

156. *See id.*

157. *Id.* at 681 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)).

158. *Id.* at 682.

159. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 631 (1999). Congress was expressly given power to regulate patents by the text of the Constitution. U.S. CONST. art. I, § 8.

160. *Fla. Prepaid*, 527 U.S. at 631.

161. *Id.* at 637; *see also* *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

162. *Fla. Prepaid*, 527 U.S. at 636-37. The Bank was claiming that Congress had power to regulate and protect patents under its enumerated powers. *Id.* at 632. Since Congress cannot abrogate sovereign immunity under Article I congressional power, the Bank is really asking the Court to conclude that Congress meant to abrogate the states’ immunity under its plenary power in section five of the Fourteenth Amendment. *Id.* at 630.

163. *Id.* at 638.

164. *See* *City of Boerne v. Flores*, 521 U.S. 507 (1997). For a more thorough explanation of the Court’s “congruent and proportional” analysis *see* *Board of Trustees University of Alabama v. Garrett*, 531 U.S. 356 (2001).

165. 521 U.S. 507.

166. *Fla. Prepaid*, 527 U.S. at 638-39.

ling, and since Congress was acting under its Article I powers, abrogation of immunity was impossible.¹⁶⁷ The *College Savings Bank* cases declared that Congress's enumerated powers,¹⁶⁸ which no court has ever attempted to limit, are just that - limited.

The previous decisions of the United States Supreme Court illustrated several evolving doctrines. States cannot be sued in their own courts, even for violations of federal law.¹⁶⁹ States could not be required to answer for violations of federal law where Congress was legislating pursuant to its enumerated powers.¹⁷⁰ Finally, any party alleging that a state consented to suit, and therefore state sovereign immunity would not apply, must prove that the consent was clear and explicit.¹⁷¹

IV. ANALYSIS

The issue before the United States Supreme Court in *Federal Maritime* was whether the Eleventh Amendment, and specifically principles of state sovereign immunity from suit, precluded Congress from requiring the Commission to adjudicate a private person's complaint that a state-run port has violated the Shipping Act of 1984.¹⁷² Further, the Court had to determine if the Eleventh Amendment was implicated by an administrative agency.¹⁷³ It is on this narrow issue that the "conservative" majority departs from the text and abandons its traditional role of acting with restraint.

A. *The Parties' Arguments*

The Commission asserted that while "the Eleventh Amendment and sovereign immunity principles confirm the State's immunity from constitutionally inappropriate exercises of *judicial* power, they do not bar the Commission's adjudication of a complaint against a state-run marine terminal [operator]."¹⁷⁴ The Commission also emphasized that it has "numerous [other] regulatory responsibilities" and "does not have an exclusively judicial role."¹⁷⁵ Furthermore, the Commission argued that it was not imbued with the "major indicia of judicial power."¹⁷⁶ In fact, the Commission does not possess the power to punish contempt.¹⁷⁷ Additionally, the Commission contended that its

167. *See id.* at 637-40.

168. U.S. CONST. art. I, § 8.

169. *See generally* Alden v. Maine, 527 U.S. 706 (1999).

170. *See Fla. Prepaid*, 527 U.S. at 637.

171. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Bd.* 527 U.S. 666, 682 (1999).

172. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 122 S. Ct. 1864, 1867-68 (2002).

173. *Id.* at 1868.

174. Brief for the Federal Maritime Commission at 8, *Fed. Mar.* (No. 01-46).

175. *Id.*

176. *Id.*

177. *Id.*

“orders are reviewed by the courts of appeals under the standards applicable to administrative agency decisionmaking, rather than the standards of review applied to district court rulings.”¹⁷⁸

The Commission finally maintained that its adjudication was not a “suit in law or equity” that might place it in the reach of the Amendment.¹⁷⁹ It was rather “a form of executive enforcement of the law” and its “adjudication of complaints [was] an integral part” of its oversight and enforcement of duly created congressional legislation.¹⁸⁰

The SCSPA countered that it was an arm of the state and that the historical protections of the Eleventh Amendment precluded it from being haled into court to answer the complaint of a private citizen.¹⁸¹ The SCSPA relied heavily on the Court’s holdings in *Seminole Tribes* and *Alden*.¹⁸² The SCSPA insisted that the dignity of the states would be offended were it required to answer private complaints before an executive branch administrative agency.¹⁸³

B. *Majority Opinion*

Writing for the *Federal Maritime* majority, Justice Clarence Thomas declared that because administrative adjudications were “all but unheard of in the late 18th and early 19th centuries,” the Eleventh Amendment prohibition was applicable to any adjudication in which the state was compelled to answer.¹⁸⁴ Justice Thomas wrote that

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 court, 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.¹⁸⁵

The majority held that its recent decision in *Alden* controlled this dispute.¹⁸⁶

C. *Dissenting Opinion*

Justice John Paul Stevens declared in his dissent that the decision in *Alden* was wrongly decided, and even if it were correct, it was not applicable to this dispute.¹⁸⁷ He argued that the history and the struc-

178. *Id.*

179. *Id.* (citing U.S. CONST. amend. XI).

180. *Id.* at 9.

181. *Fed. Mar.*, 122 S. Ct. at 1869.

182. *Id.*

183. *Id.* at 1874.

184. *Id.* at 1866.

185. Erwin Chemerinsky, *Court Continues to Focus on Sovereign Immunity*, 38 TRIAL 66 (2002) (quoting *Fed. Mar.*, 122 S. Ct. at 1874).

186. *See Fed. Mar.*, 122 S. Ct. at 1872-76.

187. *See id.* at 1879-80 (Stevens, J., dissenting).

ture of the Constitution prevented the Court from logically reaching its holding in *Alden*.¹⁸⁸

Justice Stevens observed that the Eleventh Amendment was known to have been a response to the Court's holding in *Chisholm*.¹⁸⁹ He claimed, however, that *Chisholm* decided two issues of jurisdiction: subject matter and personal.¹⁹⁰ Justice Stevens asserted that the text of the Eleventh Amendment reversed only one portion of the *Chisholm* Court's holding.¹⁹¹ The Amendment limited only subject matter jurisdiction, rather than personal jurisdiction, over the states.¹⁹² The "basis for the present text of the [A]mendment . . . [was] cast in the terms that we associate with subject matter jurisdiction."¹⁹³ The Amendment did not remove personal jurisdiction in all federal courts.¹⁹⁴ Furthermore, Justice Stevens declared that the court's extension of the state's dignity analysis was without textual support and was contradicted by the legislative history of the Eleventh Amendment.¹⁹⁵ He wrote that "Chief Justice Marshall early on laid to rest the view that the purpose of the Eleventh Amendment was to protect a State's dignity."¹⁹⁶

Justice Stephen Breyer explained in dissent, that the Commission was a typical administrative agency exercising typical executive branch powers while attempting to ascertain if a person had violated federal law.¹⁹⁷ Furthermore, Justice Breyer opined that the Court had previously declared that suits brought by the federal government were distinguishable from suits brought by private parties.¹⁹⁸ He also pointed out that there was little difference between a suit brought by the federal government and one brought by an arm or agent of the federal government.¹⁹⁹

D. Commentary

The United States Supreme Court wrongly decided that state sovereign immunity applies when a federal administrative agency holds a hearing to investigate and prevent violations of federal law. By doing

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

189. *Id.* at 1879-80 (Stevens, J., dissenting).

190. *Id.* (Stevens, J., dissenting); see also Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1566 (2002).

191. *Fed. Mar.*, 122 S. Ct. at 1880 (Stevens, J., dissenting).

192. *Id.* (Stevens, J., dissenting).

193. *Id.* at 1879-81 (Stevens, J., dissenting); see Nelson, *supra* note 190, at 1603.

194. See *id.* at 1880 (Stevens, J., dissenting); see also Nelson, *supra* note 190, at 1566-71.

195. *Fed. Mar.*, 122 S. Ct. at 1880 (Stevens, J., dissenting).

196. *Id.* (Stevens, J., dissenting) (citing *Cohens v. Virginia*, 19 U.S. 264, 347-50 (1821)). Previously, Justice Stevens stated that the dignity rationale was "embarrassingly insufficient." *Seminole Tribe v. Florida*, 517 U.S. 44, 97 (1996).

197. *Fed. Mar.*, 122 S. Ct. at 1883 (Breyer, J., dissenting).

198. See *id.* at 1881-82 (Breyer, J., dissenting).

199. *Id.* at 1881 (Souter, J., dissenting).

so, the Court misapplied precedent, failed to exercise judicial restraint when it expanded its interpretation of the Eleventh Amendment beyond the words of the text, and failed to recognize the impact of its decision.

The majority in *Federal Maritime*, “the conservatives,”²⁰⁰ used an activist technique in reaching their decision.²⁰¹ The following section will examine the text of the Eleventh Amendment in order to analyze whether the dispute between the Commission and the SCSPA falls within the literal scope of the Amendment. Normally a “conservative” judge will begin with the text of the amendment.²⁰² In fact, this kind of “text-first” procedure is supported by the theory of judicial restraint and by prior decisions of the United States Supreme Court.²⁰³ The next section will explore previous decisions of the court, and will demonstrate how far each has departed from the text. Additionally, this comment will show that the precedents on which the majority relied were wrongly decided. Finally, the last section will analyze the text of the Eleventh Amendment to determine if the Commission’s exercise of power exceeded the limits of that Amendment.

1. The Court’s Departure From the Text

Justice Thomas, the author of the majority opinion in *Federal Maritime*, declared that *Chisholm* was wrongly decided.²⁰⁴ The Eleventh Amendment, of course, overruled *Chisholm*.²⁰⁵ Although the majority acknowledged that *Chisholm* was wrongly decided, it does not recognize the importance of the Eleventh Amendment’s text. The words of the Amendment are ignored and replaced with other “principles” of state sovereign immunity.

200. See *id.* The Justices in the majority were Justice Clarence Thomas, Chief Justice William Rehnquist, Justice Antonin Scalia, Justice Anthony Kennedy, and Justice Sandra Day O’Connor. I have termed these Justices as “the conservatives.” While some might argue that O’Connor and Kennedy fall somewhere in the middle, in the area of federalism, the two “middle-of-the-roaders” have consistently voted with Justices Scalia, Thomas, and Rehnquist. Any label of “conservative” is rarely accurate one hundred percent of the time. Yet, these five justices have been vocal in their support for textualism and original intent. See generally Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court’s Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213 (1996); Christopher E. Smith & Avis Alexandria Jones, *The Rehnquist Court’s Activism and the Risk of Injustice*, 26 CONN. L. REV. 53 (1993).

201. For an explanation of the conservative majority’s tendency to reach “activist” decisions in federalism cases, see, for example, Fallon, *supra* note 5, at 429.

202. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23-41 (1997). It is important to note that Justice Scalia, who is the strongest proponent of “textualism,” abandons his own judicial philosophy in the area of federalism and state sovereignty. This inconsistency drives the theme of this comment.

203. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 338 (1997) (holding that rules of construction and interpretation are only appropriate when the meaning of the text is ambiguous); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

204. *Fed. Mar.*, 122 S. Ct. at 1870. Justice Thomas stated that “[w]e have since acknowledged that the *Chisholm* decision was erroneous.” *Id.*; see also *Alden v. Maine*, 527 U.S. 706, 721-22 (1999).

205. *Fletcher*, *supra* note 3, at 1058-59.

The *Federal Maritime* majority's reasoning goes far beyond any steps taken in the past to reinforce state's rights and limit federal power. Under the Court's decision, almost no one asserting a violation of federal law by a state or state agency can use the protections of the Administrative Procedures Act. Instead, a person injured by a state must persuade the federal government to sue the state or state agency. As Justice Breyer, pointed out, this decision will actually inflate the size of the federal government.²⁰⁶

If the federal government was petitioned by a citizen to address a state violation of federal law, surely the government would have to do something to investigate these claims. This is axiomatic, but this is precisely the purpose behind congressional authorization of administrative agencies. However, the majority fails to recognize that either the violation of federal law will remain unremedied or the federal government will have to create departments to prosecute these kinds of lawsuits.²⁰⁷

Hans, upon which the majority heavily relied, was the first major case purporting to decide what the Eleventh Amendment actually meant and how it should be applied when a state is party to a suit in federal court.²⁰⁸ The narrow issue of whether a state can be sued by one of its own citizens was the focus of the court's inquiry.²⁰⁹ The text of the Eleventh Amendment only refers to citizens of another state or a foreign state.²¹⁰ The Court in *Hans* concluded that the text of the Amendment also applied to citizens of the state being sued.²¹¹ In essence, the Amendment does not encompass the totality of the concept of state sovereign immunity.²¹² Justices Thomas and Scalia, as well as Chief Justice Rehnquist, have reiterated the principle laid down in *Hans* in several cases during the last decade.²¹³ They stated, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms."²¹⁴ This seductively simple statement is astonishing in its

206. See *Fed. Mar.*, 122 S. Ct. at 1882 (Breyer, J., dissenting); *accord* *Printz v. United States*, 521 U.S. 898, 959 (1997) (Stevens, J., dissenting) ("In the name of State's rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies.").

207. See generally NOONAN, *supra* note 117, at 12-15.

208. *Hans v. Louisiana*, 134 U.S. 1, 9 (1890).

209. *Id.* at 10.

210. U.S. CONST. amend. XI ("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.").

211. *Hans*, 134 U.S. at 10.

212. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 69-71 (1996).

213. See, e.g., *id.*

214. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 122 S. Ct. 1864, 1871 (2002) (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)). With this sweeping reinterpretation of the Eleventh Amendment as precedent, what would stop the Court from announcing that another amendment does not mean what it says?

impact. This statement declares that the words and the text of the Constitution, even when clear and concise, do not mean what they say. *Hans* dealt with a very narrow issue, but the holding was overbroad. It announced that the Constitution embodied a principle of sovereign immunity not found in the text, and one that cannot be shown as a consensus in the drafting of the Constitution.²¹⁵ While a strictly literal reading of the entire Constitution is rarely appropriate, interpretation and exploration of its meaning is only necessary when the text has a vague or unclear meaning.²¹⁶ The *Federal Maritime* majority thus relied on misapplied precedent.

The second major case that the “conservatives” used as a foundation for their decision was *Alden*.²¹⁷ The *Alden* majority, led by Justice Kennedy, did not rely on the *Hans* presumption to define the reaches of sovereign immunity. Kennedy, instead, argued that the residue of the states’ immunity actually resided in the Tenth Amendment.²¹⁸ He said that “[a]ny doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power.”²¹⁹ Because the Amendment reserved power to the states, that was proof of the states’ sovereignty.²²⁰

However, this position is untenable because there is no evidence that states ever possessed an unqualified immunity from suit.²²¹ Justice Souter, in his dissent, argued that the framers envisioned that sovereign immunity was nothing more than a common law creation.²²² Justice Souter noted that some common law rights were incorporated into the Constitution, such as the right to a jury trial and the “prohibition on unreasonable searches and seizures.”²²³ Sovereign immunity was never enacted into the new Constitution; the words never appeared in the text. Consequently, Justice Souter correctly declared that state sovereign immunity stems from the common law and is

215. *Hans*, 134 U.S. at 16. Justice Souter stated that “[a]round the time of the Constitutional Convention, then, there existed among the States some diversity of practice with respect to sovereign immunity.” *Alden v. Maine*, 527 U.S. 706, 772 (1999) (Souter, J., dissenting).

216. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 337 (1997) (holding that rules of construction and interpretation are only appropriate when the meaning of the text is ambiguous); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

217. See *Fed. Mar.*, 122 U.S. at 1870.

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

219. *Id.*

220. *Id.*

221. *Id.* at 764 (Souter, J., dissenting) (“There is almost no evidence that the generation of the Framers thought sovereign immunity was fundamental in the sense of being unalterable.”).

222. *Id.* at 762, 764 (Souter, J., dissenting).

223. *Id.* at 762 n.1 (Souter, J., dissenting).

therefore “defeasable by statute” like any other common law right that a court may overrule when a statute displaces it.²²⁴

If sovereign immunity was not a fundamental right inherent in the design of the convention or in the minds of the founders, one must wonder where this notion began. Justice Souter offered two theories for this extra textual creation of state sovereign immunity. He claimed that sovereign immunity existed before the Constitutional Convention, but it resided only in the King.²²⁵ He wrote that

[t]he American Colonies did not enjoy sovereign immunity, that being a privilege understood in English law to be reserved for the Crown alone; “antecedent to the Declaration of Independence, none of the colonies were, or pretended to be, sovereign states” Several colonial charters, including those of Massachusetts, Connecticut, Rhode Island, and Georgia, expressly specified that the corporate body established thereunder could sue and be sued.²²⁶

The second theory offered by Justice Souter is grounded in natural law and stems from the King’s power to make law. “[I]f the prince gives the subject leave to enter an action against him, upon such contract, in his own courts, the action itself proceeds rather upon natural equity, than upon municipal laws.”²²⁷ Additionally, William Blackstone commented on the nature of the King’s sovereignty when he wrote “for the end of such action [a suit against the sovereign King himself] is not to compel the [sovereign] to observe the contract, but to persuade him.”²²⁸

The varying principles of sovereignty existing at the time of the Constitutional Convention left the states without any guidance as to whether each possessed any aspects of sovereignty under the new Constitution. Justice Souter explained that many attendees at the various ratifying conventions had differing opinions on whether the new states should possess sovereign immunity from suit.²²⁹ In any case, there was certainly no consensus.²³⁰ If there was no agreement about whether sovereign immunity actually protected the states from suit, and there is no evidence that immunity is anything more than a common law right, then no theory of judicial decisionmaking can justify the Court’s abandonment of the Eleventh Amendment text.

The *Alden* majority based its justification for finding state sovereign immunity applicable despite the text of the Eleventh Amendment on the power of the Tenth Amendment. However, the Bill of Rights, including the Tenth Amendment, was ratified only two years

224. *Id.* (Souter, J., dissenting).

225. *See id.* at 762-766 (Souter, J., dissenting).

226. *Id.* at 764. (Souter, J., dissenting).

227. *Id.* at 766. (Souter, J., dissenting).

228. 1 WILLIAM BLACKSTONE, COMMENTARIES *243.

229. *Alden*, 527 U.S. at 772 (Souter, J., dissenting).

230. *Id.* (Souter, J., dissenting).

before the *Chisholm* decision.²³¹ If the Tenth Amendment had granted or reserved sovereign immunity to the states, then “one would be certain to find such a development mentioned somewhere in the *Chisholm* writings.”²³² Actually, not one of the *Chisholm* opinions mentions the Tenth Amendment.²³³ The lone dissenter considered sovereign immunity from suit as a common law right, not a constitutional right or doctrine.²³⁴ If sovereign immunity is found in the Tenth Amendment, as Justice Kennedy suggests, then the Eleventh Amendment would have been unnecessary. Furthermore, the Tenth Amendment recognizes the ability of the federal government to make and pass laws that govern the states, and thus should not be read to allow states to avoid answering for violations of superior law.

Many more questions are raised than are answered by the majority in *Alden*. A correct reading of the Court’s decision in *Alden* does not lead to the conclusion that the *Federal Maritime* majority has jumped through so many hoops to support. One of the failures of *Alden* as precedent for the *Federal Maritime* decision, is that it does not address the question of whether constitutional immunity principles apply when the adjudication is not a judicial proceeding. If the history and text of the Amendment clearly declare that states are not subject to the jurisdiction of courts in a federal or state forum, then the Amendment never addresses whether sovereign immunity applies when an agency, not a court, is adjudicating a dispute.

2. The Eleventh Amendment Only Applies to the Exercise of Judicial Power

The Shipping Act’s validity was previously tested and unquestioned in *Federal Maritime*.²³⁵ SCSPA has admitted that “the Commission retains the authority to regulate its [SCSPA] activities generally.”²³⁶

Before the United States Supreme Court decided *Federal Maritime*, the courts of appeals had held that the Eleventh Amendment did not apply in proceedings before executive branch agencies.²³⁷ In *Federal Maritime*, however, the United States Supreme Court ruled that Congress could not authorize the commission to adjudicate com-

231. *Id.* at 781 (Souter, J., dissenting).

232. *Id.* (Souter, J., dissenting).

233. *Id.* (Souter, J., dissenting).

234. See *Chisholm v. Georgia*, 2 U.S. 419, 430-32 (1793) (Iredell, J.).

235. See Brief for the Federal Maritime Commission at 10, *Fed. Mar. v. S.C. State Ports Auth.*, 122 S. Ct. 1864 (2002) (No. 01-46). See generally *Reno v. Condon*, 528 U.S. 141 (2000); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

236. Brief for the Federal Maritime Commission at 10, *Fed. Mar.* (No. 01-46).

237. See *Tenn. Dep’t of Human Servs. v. United States Dep’t of Educ.*, 979 F.2d 1162, 1166 (6th Cir. 1992). See generally *Delaware Dep’t of Health & Soc. Serv. v. United States Dep’t of Educ.*, 772 F.2d 1123 (3d Cir. 1985) (in dictum).

plaints against a publicly operated port.²³⁸ The impact of the Court's decision is to "prevent the Commission from administering the Shipping Act as Congress designed it by forbidding the agency from hearing privately initiated complaint proceedings against state-run marine terminals."²³⁹

The Commission noted its role in federal regulation of ports when it stated that its "jurisdiction over complaint cases brought against ports is one of the agency's primary means of regulating ports. Accordingly, the Commission has in the past rebuffed attempts to restrict its jurisdiction over public port authorities."²⁴⁰ Because the Commission relies so heavily on private complaints, this decision will hamstring a properly formed administrative agency from regulating state-run marine terminals.

Congress sought to vest executive officers with the power to resolve disputes between private entities and marine terminal operators.²⁴¹ In fact, Congress determined that administrative adjudications are an essential part of the regulation of shipping and transportation.²⁴² The Eleventh Amendment, however, applies to "proceedings before tribunals exercising judicial power."²⁴³ The Constitution never protected states from *executive* authority, and a justification for finding that authority is not found in the *Federal Maritime* opinion.²⁴⁴

Solicitor General Theodore Olsen clarified the issue when he stated that "[t]he Eleventh Amendment and principles of state sovereign immunity from suit apply exclusively to the exercise of judicial power in a lawsuit against an unconsenting state."²⁴⁵ Congress required the Commission to oversee "state-run marine terminals, and to adjudicate private complaints alleging that such terminals have failed to comply with those requirements."²⁴⁶ Nowhere in the enabling legislation has Congress required, or even suggested, that the Commission exercises judicial power. The Commission is simply another executive branch administrative agency that is pursuing its regulatory scheme in the manner provided by Congress.²⁴⁷

238. See *Fed. Mar.*, 122 S. Ct. at 1879.

239. Brief for the Federal Maritime Commission at 11, *Fed. Mar.* (No. 01-46).

240. *Id.*

241. *Id.* at 12.

242. *Id.*

243. *Id.*

244. *Id.* (emphasis added). The Amendment applies to the exercise of judicial power. In fact, those are some of the first words of its text. However, the petitioner argued that no matter how broadly one interprets the Eleventh Amendment, it can never be extended to include protections from executive authority. Neither *Chisholm*, nor *Hans*, nor the founding fathers, has ever advocated such a leap. See *infra* note 286 and accompanying text.

245. Brief for the Federal Maritime Commission at 17, *Fed. Mar.* (No. 01-46).

246. *Id.*

247. See 42 U.S.C. §§ 1701-1710 (2000 & Supp. 2002).

The Eleventh Amendment precludes jurisdiction over a state when a private citizen attempts to sue an unconsenting state.²⁴⁸ The benchmark cases, which have looked at the meaning and scope of the Amendment, “confirm its function as a prohibition against constitutionally inappropriate exercises of *judicial power*.”²⁴⁹

In *Hans*, the issue turned on an interpretation of Alexander Hamilton’s views, which were expressed in The Federalist No. 81. Hamilton argued “that the States would enjoy . . . immunity from suits in federal court to which they did not consent, except when ‘there is a surrender of this immunity’ in the plan of the convention.”²⁵⁰ Hamilton and the Constitution make it clear that when referring to sovereign immunity, the immunity is from an exercise of “judicial power.”

In *Seminole Tribe*, the Court found that “[t]he Eleventh Amendment restricts the *judicial power* under Article III.”²⁵¹ In a whole series of opinions, the United States Supreme Court has limited the scope of the Eleventh Amendment to the exercise of judicial power.²⁵² The text of the Eleventh Amendment and the prior jurisprudence of the Court demonstrate that immunity from suit applies only when judicial power is exercised. Additionally, there has never been any indication that states are immune from executive branch authority.²⁵³ In all previous cases where the Court found that the Eleventh Amendment was applicable, the Court also found that the adjudicatory entity was exercising Article III judicial power.²⁵⁴

248. U.S. CONST. amend. XI.

249. Brief for the Federal Maritime Commission at 17, *Fed. Mar.* (No. 01-46).

250. *Id.* (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)). Hamilton was referring to Article III, section 2 of the Constitution. It is also interesting to note that Hamilton accepted that sovereign immunity could be surrendered “in the plan of the convention.” THE FEDERALIST NO. 81 (Alexander Hamilton). There is another argument to be made that when the Constitution granted specific powers to Congress, it was taking away the state’s sovereign immunity in the areas where Congress was legislating pursuant to its enumerated powers. The argument would further conclude that by ratifying the Constitution with Congress’s enumerated powers present, the states were by that ratification, “surrendering” their immunity. See also William J. Rich, *Taking “Privileges or Immunities” Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153 (2002) (explaining that the Fourteenth Amendment’s Privileges or Immunities Clause reaffirmed federal supremacy, which made federal laws enforceable against the states).

251. *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) (emphasis added). “The Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts’ jurisdiction under Article III. The text of the Amendment itself is clear enough on this point.” *Id.* at 64.

252. See *Bd. of Trs. v. Garrett*, 531 U.S. 356, 363 (2001) (“The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court.”); *Alden v. Maine*, 527 U.S. 706 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ.*, 527 U.S. 666, 669 (1999) (stating that the Eleventh Amendment “repudiated the central premise of *Chisholm* that the jurisdictional heads of Article III superseded the sovereign immunity that the States possessed before entering the Union”); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (“[T]he judicial authority in Article III is limited by this sovereignty.”); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (“In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III.”).

253. Brief for the Federal Maritime Commission at 20, *Fed. Mar.* (No. 01-46).

254. *Id.*

Since the Amendment applies to judicial power, one must consider whether the Commission is exercising that power. In *Freytag v. Commissioner of Internal Revenue*,²⁵⁵ the United States Supreme Court considered whether the Tax Court could exercise judicial power.²⁵⁶ The United States Supreme Court focused on the Tax Court's "exclusively judicial role [which] distinguishes it from other non-Article III tribunals that perform multiple functions."²⁵⁷

The Commission, however, has specified duties other than adjudication of complaints. The Shipping Act specifies that the Commission carries out its power "through rulemaking as well as adjudication. [The Commission] may launch investigations on its own initiative, and has numerous regulatory responsibilities apart from its obligation to adjudicate complaints."²⁵⁸ The Commission, unlike a court exercising judicial power, cannot punish contempt.²⁵⁹ An essential element of a court's exercise of judicial power is the ability to enforce its orders. Furthermore, the Commission lacks the authority to enforce its subpoenas.²⁶⁰

The Commission has an interest, given by Congress, in its regulatory scheme.²⁶¹ Executive branch agencies, like the Commission, possess an inherent interest in their enabling legislation as well as the interpretation of that grant of authority. This interest "is advanced through the agency's status as a party in proceedings to review its orders in the courts of appeals."²⁶² An Article III court is never a party to an appeal of its decisions.²⁶³

Another difference between a court exercising judicial power and an executive branch agency becomes apparent when considering the standard of review that applies to both entities' decisions. The opinions of courts exercising judicial power are governed by "the same standard of review" that applies to all federal courts.²⁶⁴ The Commission's orders, however, are reviewed using the exact same standards as

255. 501 U.S. 868 (1991).

256. *See id.* at 888-91.

257. *Id.* at 892.

258. Brief for the Federal Maritime Commission at 21, *Fed. Mar.* (No. 01-46); *see also* 42 U.S.C. app. §§ 1704-1706 (2002).

259. *Freytag*, 501 U.S. at 891 (holding that the Tax Court "has authority to punish contempts by fine or imprisonment"); *accord* *United Mine Workers v. Bagwell*, 512 U.S. 821, 831 (1994) (stating that the power of contempt is a judicial power "necessary to the exercise of all others") (quoting *United States v. Hudson*, 11 U.S. 32, 34 (1812)).

260. Brief for the Federal Maritime Commission at 22, *Fed. Mar.* (No. 01-46). "The Commission cannot enforce its subpoenas — but must request that the Attorney General seek district court enforcement in the event of noncompliance." *Id.*; *see also* 46 U.S.C. app. § 1713(c).

261. Brief for the Federal Maritime Commission at 22, *Fed. Mar.* (No. 01-46).

262. *Id.*; *see also* 28 U.S.C. § 2348.

263. U.S. CONST. art. III §§ 1-3.

264. Brief for the Federal Maritime Commission at 22, *Fed. Mar.* (No. 01-46).

all other Executive Branch administrative agencies.²⁶⁵ Furthermore, the safeguards put into place by the Administrative Procedures Act unequivocally prevent the overextension of agency adjudications into Article III judicial power.²⁶⁶

3. The Eleventh Amendment Only Applies to a “Suit in Law or Equity”

Since the Commission is not exercising “judicial power,” a further consideration must be whether the agency adjudication can be considered a “suit” under the Amendment. Chief Justice Marshall, over a century ago, declared that a suit is “the prosecution of some demand in a Court of justice.”²⁶⁷ If the framers used a specific word when constructing the Amendment, that choice must have meaning.²⁶⁸ Because the framers chose the word “suit,” the Eleventh Amendment “confirms state immunity in terms limited to the meaning of ‘suit.’”²⁶⁹ Therefore “that meaning does not extend to the type of adjudication heard by the Commission.”²⁷⁰

In *Upshur County v. Rich*,²⁷¹ the United States Supreme Court held that “a proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions . . . is purely *administrative* in its character, and *cannot, in any just sense, be called a ‘suit.’*”²⁷² The thrust of this discussion has been to show that the United States Supreme Court has expanded the text of the Eleventh Amendment outside its limits. However, no court has taken the extreme step of expanding the reach of the Amendment beyond the word “suit,” at least not until *Federal Maritime*.²⁷³

265. Pursuant to the Hobbs Administrative Orders Judicial Review Act, 28 U.S.C. § 2341 (2002), any person with standing can ask a court to review an agency determination through a petition for review. See Brief for the United States at 4, *S.C. State Ports Auth. v. Fed. Mar. Comm’n*, 243 F.3d 165 (2001) (No. 01-46); see also *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1994); *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607 (1966) (applying substantial evidence standard to the Commission’s findings of fact). See generally *United States v. Mead*, 533 U.S. 218 (2001) (defining the standards of review for an administrative agency’s statutory interpretations).

266. See, e.g., *Crowell v. Benson*, 285 U.S. 22 (1932) (explaining that agency adjudications do not implicate the Article III *exercise of judicial power* when proper safeguards are in place to limit and control agency decisionmaking).

267. *Cohens v. Virginia*, 19 U.S. 264, 407 (1821).

268. See *Chevron*, 467 U.S. at 838-39.

269. Brief for the Federal Maritime Commission at 23, *Fed. Mar.* (No. 01-46).

270. *Id.*; see *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 267 (1997) (“The Amendment, in other words, enacts a sovereign immunity from suit.”).

271. 135 U.S. 467 (1890).

272. *Id.* at 477 (emphasis added).

273. Brief for the Federal Maritime Commission at 24, *Fed. Mar.* (No. 01-46) (stating that “[no court] has ever expressed an intention to expand the scope of sovereign immunity beyond the meaning of the word ‘suit’”).

Furthermore, the purposes behind an administrative investigation and a “suit” in a court of law are vastly different.²⁷⁴ An agency investigation is simply an attempt to discover whether parties are adhering to the regulations that the agency has promulgated. For example, the Commission described its role this way:

[a] private cause of action against an arm of the state brought before an administrative agency, because it invokes the remedial powers of the Executive branch, is in many respects more analogous to a Federal investigation than it is to a suit brought by a private party before a Federal or state court.²⁷⁵

In fact, the courts of appeals have determined that the Shipping Act does not permit the filing of a lawsuit alleging violations of the Act.²⁷⁶ Additionally, the Commission “is charged with the *administration* of the Act,” combined with “a statutorily-mandated concern for safeguarding and regulating transportation in the Nation’s oceanborne foreign commerce.”²⁷⁷ Congress has delegated its responsibility of regulating shipping and navigation to the Commission. It is doubtful that anyone could make a credible argument that Congress does not have the power to regulate in these areas. If Congress has the power to regulate shipping, and it has delegated that duty to the Commission, then the Court ought to justify its decision to interfere with the Commission’s well-established oversight. Most students of the law learn that Congress has power to prevent the abuse of navigation.²⁷⁸ The SCSPA’s decision to discriminate against Maritime Services violates a federal law that prohibits discriminatory behavior in interstate shipping and navigation.²⁷⁹ One of the failures of the *Federal Maritime* majority opinion is that there is virtually no remedy left to Maritime Services.

According to the text of the Eleventh Amendment, in order for state sovereign immunity to attach, the dispute must involve the judicial power of the United States derived from Article III, and it must be a “suit in law or equity.”²⁸⁰ In the Commission’s adjudication, none of these requirements were met.

Finally, another compelling reason exists that justifies criticism of the Court’s holding. This reason is what Judge John T. Noonan, Jr.

274. See generally Christina Bohannon, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 N.Y.U. L. REV. 273 (2002).

275. Brief for the Federal Maritime Commission at 24, *Fed. Mar.* (No. 01-46).

276. See *id.* at n.8. “The Commission’s jurisdiction over complaints alleging statutory violations is exclusive.” *Id.* See generally *Gov’t of Guam v. Am. President Lines*, 28 F.3d 142 (D.C. Cir. 1994); *D.L. Piazza Co. v. W. Coast Line, Inc.*, 210 F.2d 947 (2d Cir. 1954).

277. Brief for the Federal Maritime Commission at 24, *Fed. Mar.* (No. 01-46).

278. See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

279. See 46 U.S.C. § 1709 (2000).

280. U.S. CONST. amend. XI.

calls the “law’s task of giving justice to persons.”²⁸¹ Judge Noonan recently wrote a detailed criticism of the Court and its examination of state sovereign immunity.²⁸² In his book, he details the fallacies and failures of the Court’s decisions. He describes the Court’s sovereign immunity analysis in this way:

[p]romoting the common law doctrine of sovereign immunity to constitutional status, the current Supreme Court has used it to shield the states from damages for age discrimination, disability discrimination, and the violation of patents, trademarks, copyrights, and fair labor standards. Not just the states themselves, but every state-sponsored entity . . . has been insulated from paying damages in tort or contract.²⁸³

Sovereign immunity, as Noonan puts it, has metastasized.²⁸⁴ Except for an academic and theoretical approach to this complex constitutional issue, the Court has not considered the very real and personal impacts of its decisions. The Court has used every tool at its disposal to enhance the protection afforded to the states.²⁸⁵ Worse than any leaps in logic or the Court’s judicial activism is “a principle without a rationale for its existence or a rationale to guide its expanded application.”²⁸⁶

The impact of this decision, while it may seem sterile and remote, will be found in the streets and neighborhoods of America. At the heart of this dispute, and all those that preceded it, was a real person alleging a violation of law. Judge Noonan summed it up clearly:

[i]n the constitutional balance reached by the court, the fifty states weigh more heavily than the very large numbers potentially affected adversely by the court’s decisions - for example, the 4.5 million employees of the fifty states and state related entities; the over 5 million holders of patents; the 10 million holders of trademarks, the 100 million holders of copyright Only a small fraction of these persons will actually be injured as a consequence of the court’s rulings; but small fractions of such large numbers point to the magnitude of the problems the court has created.²⁸⁷

The United States Supreme Court should not decide cases in a vacuum. The Court, when it removes remedies from citizens who are legitimately alleging a violation of law, should consider the impact of its decisions. Millions of Americans are left without relief. State employers are free to violate employment discrimination laws.²⁸⁸ States

281. NOONAN, *supra* note 117, at back cover (2002). Judge Noonan is a senior judge of the United States Court of Appeals for the Ninth Circuit, and he is Robbins Professor of Law Emeritus at the University of California, Berkeley. *Id.* He currently holds the Maguire Chair in Ethics at the Kluge Center of the Library of Congress. *Id.*

282. *See generally id.*

283. *Id.* at front cover.

284. *Id.*

285. *See generally* Smith & Jones, *supra* note 200.

286. NOONAN, *supra* note 117, at 10.

287. *Id.* at 12-13.

288. *See generally* Alden v. Maine, 527 U.S. 706 (1999).

can violate patents held by private individuals,²⁸⁹ and a state can manipulate and control a public port as well as impose its policies without regard for the impact on commerce that moves in navigable waters.²⁹⁰

V. CONCLUSION

The United States Supreme Court has perverted our system of federalism by ignoring the text of the Constitution. The “conservatives” cannot justify their departure from the text. Because of the Court’s overreaching decision, the states now have more power to violate federal law. Any private individual asserting a violation of federal law will probably fail to recover from a state. The *Federal Maritime* majority has discarded the shackles of judicial restraint and chosen to expand the text of the Constitution beyond its reasonable limits. It has refused to support its decision with text or history. The majority misstates its own previous holdings and has thrown away the last vestiges of stare decisis and the value of precedent. Anyone who has read the articles and treatises authored by members of the “conservative” majority should be offended when, in other contexts, they refer to the value of reading the text of the Constitution. This majority has created a discrepancy, some might say hypocrisy, between what it offers as its judicial philosophy and how it actually decides cases. Perhaps, the “conservative” majority will recognize its error and return the country to an honest system of federalism – one in which the states cannot exercise veto power over federal law.

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

290. See generally *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 122 S. Ct. 1864 (2002).