

BREYER, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 01–46

FEDERAL MARITIME COMMISSION, PETITIONER *v.*
SOUTH CAROLINA STATE PORTS
AUTHORITY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[May 28, 2002]

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

The Court holds that a private person cannot bring a complaint against a State to a federal administrative agency where the agency (1) will use an internal adjudicative process to decide if the complaint is well founded, and (2) if so, proceed to court to enforce the law. Where does the Constitution contain the principle of law that the Court enunciates? I cannot find the answer to this question in any text, in any tradition, or in any relevant purpose. In saying this, I do not simply reiterate the dissenting views set forth in many of the Court's recent sovereign immunity decisions. See, *e.g.*, *Kimel v. Florida Bd. of Regents*, 528 U. S. 62 (2000); *Alden v. Maine*, 527 U. S. 706 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44 (1996). For even were I to believe that those decisions properly stated the law—which I do not—I still could not accept the Court's conclusion here.

I

At the outset one must understand the constitutional nature of the legal proceeding before us. The legal body

conducting the proceeding, the Federal Maritime Commission, is an “independent” federal agency. Constitutionally speaking, an “independent” agency belongs neither to the Legislative Branch nor to the Judicial Branch of Government. Although Members of this Court have referred to agencies as a “fourth branch” of Government, *FTC v. Ruberoid Co.*, 343 U. S. 470, 487 (1952) (Jackson, J., dissenting), the agencies, even “independent” agencies, are more appropriately considered to be part of the Executive Branch. See *Freytag v. Commissioner*, 501 U. S. 868, 910 (1991) (SCALIA, J., concurring in part and concurring in judgment). The President appoints their chief administrators, typically a Chairman and Commissioners, subject to confirmation by the Senate. Cf. *Bowsher v. Synar*, 478 U. S. 714, 723 (1986). The agencies derive their legal powers from congressionally enacted statutes. And the agencies enforce those statutes, *i.e.*, they “execute” them, in part by making rules or by adjudicating matters in dispute. Cf. *Panama Refining Co. v. Ryan*, 293 U. S. 388, 428–429 (1935).

The Court long ago laid to rest any constitutional doubts about whether the Constitution permitted Congress to delegate rulemaking and adjudicative powers to agencies. *E.g.*, *ICC v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 494–495 (1897) (permitting rulemaking); *Crowell v. Benson*, 285 U. S. 22, 46 (1932) (permitting adjudication); *Commodity Futures Trading Comm’n v. Schor*, 478 U. S. 833, 852 (1986) (same). That, in part, is because the Court established certain safeguards surrounding the exercise of these powers. See, *e.g.*, *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935) (nondelegation doctrine); *Crowell*, *supra* (requiring judicial review). And the Court denied that those activities as safeguarded, however much they might *resemble* the activities of a legislature or court, fell within the scope of Article I or Article III of the Constitution. *Schechter Poultry*, *supra*, at 529–530; *Crow-*

BREYER, J., dissenting

ell, supra, at 50–53; see also *INS v. Chadha*, 462 U. S. 919, 953, n. 16 (1983) (agency’s use of rulemaking “resemble[s],” but is not, lawmaking). Consequently, in exercising those powers, the agency is engaging in an Article II, Executive Branch activity. And the powers it is exercising are powers that the Executive Branch of Government must possess if it is to enforce modern law through administration.

This constitutional understanding explains why both commentators and courts have often attached the prefix “quasi” to descriptions of an agency’s rulemaking or adjudicative functions. *E.g.*, *Humphrey’s Executor v. United States*, 295 U. S. 602, 629 (1935); 3 C. Koch, *Administrative Law and Practice* §12.13 (2d ed. 1997); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 *Harv. L. Rev.* 921, 954–958 (1965); Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 *Harv. L. Rev.* 863, 869–870 (1962). The terms “*quasi* legislative” and “*quasi* adjudicative” indicate that the agency uses legislative *like* or court *like* procedures but that it is not, constitutionally speaking, either a legislature or a court. See *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 472–473 (2001); *Freytag, supra*, at 910 (SCALIA, J., concurring in part and concurring in judgment).

The case before us presents a fairly typical example of a federal administrative agency’s use of agency adjudication. Congress has enacted a statute, the Shipping Act of 1984 (Act or Shipping Act), 46 U. S. C. App. §1701 *et seq.* (1994 ed. and Supp. V), which, among other things, forbids marine terminal operators to discriminate against terminal users. §1709(d)(4) (1994 ed., Supp. V). The Act grants the Federal Maritime Commission the authority to administer the Act. The law grants the Commission the authority to enforce the Act in a variety of ways, for example, by making rules and regulations, §1716 (1994 ed.), by

issuing or revoking licenses, §1718 (1994 ed., Supp. V), and by conducting investigations and issuing reports, see generally §1710 (1994 ed. and Supp. V). It also permits a private person to file a complaint, which the Commission is to consider. §1710(a) (1994 ed.). Interestingly enough, it does not say that the Commission must determine the merits of the complaint through agency adjudication, see §1710(g) (1994 ed., Supp. V)—though, for present purposes, I do not see that this statutory lacuna matters.

Regardless, the Federal Maritime Commission has decided to evaluate complaints through an adjudicative process. That process involves assignment to an administrative law judge, 46 CFR §502.146(a) (2001), a hearing, an initial decision, §§502.147, 502.223, Commission review, and a final Commission decision, §502.227, followed by federal appellate court review, 28 U. S. C. §2342(3)(B). The initial hearing, like a typical court hearing, involves a neutral decisionmaker, an opportunity to present a case or defense through oral or documentary evidence, a right to cross-examination and a written record that typically constitutes the basis for decision. 46 CFR §502.154 (2001). But unlike a typical court proceeding, the agency process also may involve considerable hearsay, resolution of factual disputes through the use of “official notice,” §502.156; see also 5 U. S. C. §556, and final decisionmaking by a Commission that remains free to disregard the initial decision and decide the matter on its own—indeed through the application of substantive as well as procedural rules, that it, the Commission, itself has created. See 46 CFR §§502.226, 502.227, 502.230 (2001); see also 46 U. S. C. App. §1716 (1994 ed.) (rulemaking authority); 46 CFR §§502.51–502.56 (2001) (same).

The outcome of this process is often a Commission order, say an order that tells a party to cease and desist from certain activity or that tells one party to pay money damages (called “reparations”) to another. The Commission

BREYER, J., dissenting

cannot itself enforce such an order. See 46 U. S. C. App. §1712(e). Rather, the Shipping Act says that, to obtain enforcement of an order providing for money damages, the private party beneficiary of the order must obtain a court order. §1713(d). It adds that, to obtain enforcement of other commission orders, either the private party or the Attorney General must go to court. §1713(c). It also permits the Commission to seek a court injunction prohibiting any person from violating the Shipping Act. §1710(g) (1994. ed., Supp. V). And it authorizes the Commission to assess civil penalties (payable to the United States) against a person who fails to obey a Commission order; but to collect the penalties, the Commission, again, must go to court. §§1712(a), (c) (1994. ed. and Supp. V).

The upshot is that this case involves a typical Executive Branch agency exercising typical Executive Branch powers seeking to determine whether a particular person has violated federal law. Cf. 2 K. Davis & R. Pierce, *Administrative Law Treatise* 37–38 (1994) (describing typical agency characteristics); cf. also *SEC v. Chenery Corp.*, 332 U. S. 194 (1947). The particular person in this instance is a state entity, the South Carolina State Ports Authority, and the agency is acting in response to the request of a private individual. But at first blush it is difficult to see why these special circumstances matter. After all, the Constitution created a Federal Government empowered to enact laws that would bind the States and it empowered that Federal Government to enforce those laws against the States. See *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 160 (1920). It also left private individuals perfectly free to complain to the Federal Government about unlawful state activity, and it left the Federal Government free to take subsequent legal action. Where then can the Court find its constitutional principle—the principle that the Constitution forbids an Executive Branch agency to determine through ordinary adjudicative processes whether

such a private complaint is justified? As I have said, I cannot find that principle anywhere in the Constitution.

II

The Court's principle lacks any firm anchor in the Constitution's text. The Eleventh Amendment cannot help. It says:

“The *Judicial* power of the United States shall not . . . extend to any suit . . . commenced or prosecuted against one of the . . . States by Citizens of another State.” (Emphasis added.)

Federal administrative agencies do not exercise the “[j]udicial power of the United States.” Compare *Crowell v. Benson*, 285 U. S. 22 (1932) (explaining why ordinary agency adjudication, with safeguards, is not an exercise of Article III power), with *Freytag v. Commissioner*, 501 U. S., at 890–891 (Tax Court, a special Article I court, exercises Article III power), and *Williams v. United States*, 289 U. S. 553, 565–566 (1933) (same as to Court of Claims). Of course, this Court has read the words “Citizens of another State” as if they also said “citizen of the same State.” *Hans v. Louisiana*, 134 U. S. 1 (1890). But it has never said that the words “[j]udicial power of the United States” mean “the executive power of the United States.” Nor should it.

The Tenth Amendment cannot help. It says:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

The Constitution has “delegated to the United States” the power here in question, the power “[t]o regulate Commerce with foreign Nations, and among the several States.” U. S. Const., Art. I, §8, cl. 3; see *California v. United States*, 320 U. S. 577, 586 (1944). The Court finds within this delegation a hidden reservation, a reservation that,

BREYER, J., dissenting

due to sovereign immunity, embodies the legal principle the Court enunciates. But the text of the Tenth Amendment says nothing about any such hidden reservation, one way or the other.

Indeed, the Court refers for textual support only to an earlier case, namely *Alden v. Maine*, 527 U. S. 706 (1999) (holding that sovereign immunity prohibits a private citizen from suing a State in state court), and, through *Alden*, to the texts that *Alden* mentioned. These textual references include: (1) what Alexander Hamilton described as a constitutional “postulate,” namely that the States retain their immunity from “suits, without their consent,” unless there has been a “surrender” of that immunity “in the plan of the convention,” *id.*, at 730 (internal quotation marks omitted); (2) what the *Alden* majority called “the system of federalism established by the Constitution,” *ibid.*; and (3) what the *Alden* majority called “the constitutional design,” *id.*, at 731. See also *id.*, at 760–762 (SOUTER, J., dissenting) (noting that the Court’s opinion nowhere relied on constitutional text).

Considered purely as constitutional text, these words—“constitutional design,” “system of federalism,” and “plan of the convention”—suffer several defects. Their language is highly abstract, making them difficult to apply. They invite differing interpretations at least as much as do the Constitution’s own broad liberty-protecting phrases, such as “due process of law” or the word “liberty” itself. And compared to these latter phrases, they suffer the additional disadvantage that they do not actually appear anywhere in the Constitution. Cf. generally *Harmelin v. Michigan*, 501 U. S. 957, 985–986 (1991). Regardless, unless supported by considerations of history, of constitutional purpose, or of related consequence, those abstract phrases cannot support today’s result.

III

Conceding that its conception of sovereign immunity is ungrounded in the Constitution's text, see *ante*, at 6–7, 22, n. 18, the Court attempts to support its holding with history. But this effort is similarly destined to fail, because the very history to which the majority turned in *Alden* here argues against the Court's basic analogy—between a federal administrative proceeding triggered by a private citizen and a private citizen's lawsuit against a State.

In *Alden* the Court said that feudal law had created an 18th-century legal norm to the effect that “no lord could be sued by a vassal in his own court, but each petty lord was subject to suit in the courts of a higher lord.” 527 U. S., at 741. It added that the Framers' silence about the matter had woven that feudal “norm” into the “constitutional design,” *i.e.*, had made it part of our “system of federalism” unchanged by the “plan of the convention.” *Id.*, at 714–717, 730, 740–743. And that norm, said the *Alden* Court, by analogy forbids a citizen (“vassal”) to sue a State (“lord”) in the “lord's” own courts. Here that same norm argues against immunity, for the forum at issue is federal—belonging by analogy to the “higher lord.”

And total 18th-century silence about state immunity in Article I proceedings would argue against, not in favor of, immunity.

In any event, the 18th-century was not totally silent. The Framers enunciated in the “plan of the convention,” the principle that the Federal Government may sue a State without its consent. See, *e.g.*, *West Virginia v. United States*, 479 U. S. 305, 311 (1987). They also described in the First Amendment the right of a citizen to petition the Federal Government for a redress of grievances. See also *United States v. Cruikshank*, 92 U. S. 542, 552–553 (1876); cf. generally Mark, *The Vestigial Constitution: The History and Significance of the Right to Peti-*

BREYER, J., dissenting

tion, 66 Ford. L. Rev. 2153, 2227 (1998). The first principle applies here because only the Federal Government, not the private party, can—in light of this Court’s recent sovereign immunity jurisprudence, see *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44 (1996)—bring the ultimate court action necessary legally to force a State to comply with the relevant federal law. See *supra*, at 6. The second principle applies here because a private citizen has asked the Federal Government to determine whether the State has complied with federal law and, if not, to take appropriate legal action in court.

Of course these two principles apply only through analogy. (The Court’s decision also relies on analogy—one that jumps the separation-of-powers boundary that the Constitution establishes.) Yet the analogy seems apt. A private citizen, believing that a State has violated federal law, seeks a determination by an Executive Branch agency that he is right; the agency will make that determination through use of its own adjudicatory agency processes; and, if the State fails to comply, the Federal Government may bring an action against the State in federal court to enforce the federal law.

Twentieth-century legal history reinforces the appropriateness of this description. The growth of the administrative state has led this Court to determine that administrative agencies are not Article III courts, see *Crowell v. Benson*, 285 U. S., at 49–53, that they have broad discretion to proceed either through agency adjudication or through rulemaking, *SEC v. Chenery Corp.*, 332 U. S., at 203 (“[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency”), and that they may bring administrative enforcement proceedings against States. At a minimum these historically established legal principles argue strongly against any effort to analogize the present pro-

ceedings to a lawsuit brought by a private individual against a State in a state court or to an Eleventh Amendment type lawsuit brought by a private individual against a State in a federal court.

This is not to say that the analogy (with a citizen petitioning for federal intervention) is, historically speaking, a perfect one. As the Court points out, the Framers may not have “anticipated the vast growth of the administrative state,” and the history of their debates “does not provide direct guidance.” *Ante*, at 9. But the Court is wrong to ignore the relevance and importance of what the Framers did say. And it is doubly wrong to attach “great” legal “significance” to the absence of 18th- and 19th-century administrative agency experience. See *ante*, at 10. Even if those alive in the 18th century did not “anticipat[e] the vast growth of the administrative state,” *ante*, at 9, they did write a Constitution designed to provide a framework for Government across the centuries, a framework that is flexible enough to meet modern needs. And we cannot read their silence about particular means as if it were an instruction to forbid their use.

IV

The Court argues that the basic purpose of “sovereign immunity” doctrine—namely preservation of a State’s “dignity”—requires application of that doctrine here. It rests this argument upon (1) its efforts to analogize agency proceedings to court proceedings, and (2) its claim that the agency proceedings constitute a form of “compulsion” exercised by a private individual against the State. As I have just explained, I believe its efforts to analogize agencies to courts are, constitutionally speaking, too frail to support its conclusion. Neither can its claim of “compulsion” provide the necessary support.

Viewed from a purely legal perspective, the “compulsion” claim is far too weak. That is because the private

BREYER, J., dissenting

individual lacks the legal authority to compel the State to comply with the law. For as I have noted, in light of the Court's recent sovereign immunity decisions, if an individual does bring suit to enforce the Commission's order, see 46 U. S. C. App. §1713 (1994 ed.), the State would arguably be free to claim sovereign immunity. See *Seminole Tribe of Fla.*, *supra*. Only the Federal Government, acting through the Commission or the Attorney General, has the authority to compel the State to act.

In a typical instance, the private individual will file a complaint, the agency will adjudicate the complaint, and the agency will reach a decision. The State subsequently may take the matter to court in order to obtain judicial review of any adverse agency ruling, but, if it does so, its opponent in that court proceeding is *not* a private party, but the agency itself. 28 U. S. C. §2344. (And unlike some other administrative schemes, see, *e.g.*, *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U. S. __, __ (2002) (SOUTER, J., concurring) (slip op., at 3–5), the Commission would not be a party in name only.) Alternatively, the State may do nothing, in which case either the Commission or the Attorney General must seek a court order compelling the State to obey. 46 U. S. C. App. §§1710, 1713 (1994 ed. and Supp V). The Commission, but not a private party, may assess a penalty against the State for noncompliance, §1712; and only a court acting at the Commission's request can compel compliance with a penalty order. In sum, no one can legally compel the State's obedience to the Shipping Act's requirements without a court order, and in no case would a court issue such an order (absent a State's voluntary waiver of sovereign immunity, see *Atascadero State Hospital v. Scanlon*, 473 U. S. 234, 238 (1985)) absent the request of a federal agency or other federal instrumentality.

In *Alden* this Court distinguished for sovereign immunity purposes between (a) a lawsuit brought by the Fed-

eral Government and (b) a lawsuit brought by a private person. It held that principles of “sovereign immunity” barred suit in the latter instance but not the former, because the former—a suit by the Federal Government—“require[s] the exercise of political responsibility for each suit prosecuted against a State.” 527 U. S., at 756. That same “exercise of political responsibility” must take place here in every instance prior to the issuance of an order that, from a legal perspective, will compel the State to obey. To repeat: Without a court proceeding the private individual cannot legally force the State to act, to pay, or to desist; only the Federal Government may institute a court proceeding; and, in deciding whether to do so, the Federal Government will exercise appropriate political responsibility. Cf. *ibid.*

Viewed from a practical perspective, the Court’s “compulsion” claim proves far too much. Certainly, a private citizen’s decision to file a complaint with the Commission can produce practical pressures upon the State to respond and eventually to comply with a Commission decision. By appearing before the Commission, the State will be able to obtain full judicial review of an adverse agency decision in a court of appeals (where it will face in opposition the Commission itself, not the private party). By appearing, the State will avoid any potential Commission-assessed monetary penalty. And by complying, it will avoid the adverse political, practical, and symbolic implications of being labeled a federal “lawbreaker.”

Practical pressures such as these, however, cannot sufficiently “affront” a State’s “dignity” as to warrant constitutional “sovereign immunity” protections, for it is easy to imagine comparable instances of clearly lawful private citizen complaints to Government that place a State under far greater practical pressures to comply. No one doubts, for example, that a private citizen can complain to Congress, which may threaten (should the State

BREYER, J., dissenting

fail to respond) to enact a new law that the State opposes. Nor does anyone deny that a private citizen, in complaining to a federal agency, may seek a rulemaking proceeding, which may lead the agency (should the State fail to respond) to enact a new agency rule that the State opposes. A private citizen may ask an agency formally to declare that a State is not in compliance with a statute or federal rule, even though from that formal declaration may flow a host of legal consequences adverse to a State's interests. See, *e.g.*, 42 U. S. C. §300g-3 (1994 ed. and Supp. V) (Environmental Protection Agency may declare that a State is in noncompliance with federal water quality regulations). And one can easily imagine a legal scheme in which a private individual files a complaint like the one before us, but asks an agency staff member to investigate the matter, which investigation would lead to an order similar to the order at issue here with similar legal and practical consequences.

Viewed solely in terms of practical pressures, the pressures upon a State to respond before Congress or the agency, to answer the private citizen's accusations, to oppose his requests for legally adverse agency or congressional action, would seem no less powerful than those at issue here. Once one avoids the temptation to think (mistakenly) of an agency as a court, it is difficult to see why the practical pressures at issue here would "affront" a State's "dignity" any more than those just mentioned. And if the latter create no constitutional "dignity" problem, why should the former? The Court's answer—that "[s]overeign immunity concerns are not implicated" unless the "Federal Government attempts to coerce States into answering the complaints of private parties in an adjudicative proceeding," *ante*, at 18, n. 16—simply begs the question of *when* and *why* States should be entitled to special constitutional protection.

The Court's more direct response lies in its claim that

the practical pressures here are special, arising from a set of statutes that deprive a nonresponding State of any meaningful judicial review of the agency's determinations. See *ante*, at 15–18. The Court does not explain just what makes this kind of pressure constitutionally special. But in any event, the Court's response is inadequate. The statutes clearly provide the State with full judicial review of the initial agency decision should the State choose to seek that review. 28 U. S. C. §2342(3)(B)(iv) (1994 ed.). That review cannot “affront” the State's “dignity, for it takes place in a court proceeding in which the Commission, not the private party, will oppose the State. §2344.

Even were that not so, Congress could easily resolve the resulting problem by making clear that the relevant statutes authorize full judicial review in an enforcement action brought against a State. For that matter, one might interpret existing statutes as permitting in such actions whatever form of judicial review the Constitution demands. Cf. *Crowell v. Benson*, 285 U. S., at 45–47. Statutory language that authorizes review of whether an order was “properly made and duly issued,” 46 U. S. C. App. §1713(c), does not *forbid* review that the Constitution *requires*. But even were I to make the heroic assumption (which I do not believe) that this case implicates a reviewing court's statutory inability to apply constitutionally requisite standards of judicial review, I should still conclude that the Constitution permits the agency to consider the complaint here before us. The “review standards” problem concerns the later enforceability of the agency decision, and the Court must consider any such problem later in the context of a court order granting or denying review. *Ashwander v. TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) (“It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case”).

BREYER, J., dissenting

V

The Court cannot justify today's decision in terms of its practical consequences. The decision, while permitting an agency to bring enforcement actions against States, forbids it to use agency adjudication in order to help decide whether to do so. Consequently the agency must rely more heavily upon its own informal staff investigations in order to decide whether a citizen's complaint has merit. The natural result is less agency flexibility, a larger federal bureaucracy, less fair procedure, and potentially less effective law enforcement. See *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U. S. 633, 654–656 (1990); cf. also Shapiro, 78 Harv. L. Rev., at 921 (“One of the most distinctive aspects of the administrative process is the flexibility it affords in the selection of methods for policy formulation”). And at least one of these consequences, the forced growth of unnecessary federal bureaucracy, undermines the very constitutional objectives the Court's decision claims to serve. Cf. *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”); *id.*, at 976–978 (BREYER, J., dissenting).

These consequences are not purely theoretical. The Court's decision may undermine enforcement against state employers of many laws designed to protect worker health and safety. See, e.g., 42 U. S. C. §7622 (1994 ed.) (Clean Air Act); 33 U. S. C. §1367 (1994 ed.) (Clean Water Act); 15 U. S. C. §2622 (Toxic Substances Control Act); 42 U. S. C. §6971 (1994 ed.) (Solid Waste Disposal Act); see also *Rhode Island Dept. of Environmental Management v. United States*, 286 F.3d 27, 36–40 (CA1 2002). And it may inhibit the development of federal fair, rapid, and efficient, informal non-judicial responses to complaints, for example, of improper medical care (involving state hospitals). Cf. generally Macchiaroli, *Medical Malpractice*

Screening Panels: Proposed Model Legislation to Cure
Judicial Ills, 58 Geo. Wash. L. Rev. 181 (1990).

* * *

The Court's decision threatens to deny the Executive and Legislative Branches of Government the structural flexibility that the Constitution permits and which modern government demands. The Court derives from the abstract notion of state "dignity" a structural principle that limits the powers of both Congress and the President. Its reasoning rests almost exclusively upon the use of a formal analogy, which, as I have said, jumps ordinary separation-of-powers bounds. It places "great significance" upon the 18th century absence of 20th century administrative proceedings. See *ante*, at 10. And its conclusion draws little support from considerations of constitutional purpose or related consequence. In its readiness to rest a structural limitation on so little evidence and in its willingness to interpret that limitation so broadly, the majority ignores a historical lesson, reflected in a constitutional understanding that the Court adopted long ago: An overly restrictive judicial interpretation of the Constitution's structural constraints (unlike its protections of certain basic liberties) will undermine the Constitution's own efforts to achieve its far more basic structural aim, the creation of a representative form of government capable of translating the people's will into effective public action.

This understanding, underlying constitutional interpretation since the New Deal, reflects the Constitution's demands for structural flexibility sufficient to adapt substantive laws and institutions to rapidly changing social, economic, and technological conditions. It reflects the comparative inability of the Judiciary to understand either those conditions or the need for new laws and new administrative forms they may create. It reflects the Framers' own aspiration to write a document that would "consti-

BREYER, J., dissenting

tute” a democratic, liberty-protecting form of government that would endure through centuries of change. This understanding led the New Deal Court to reject overly restrictive formalistic interpretations of the Constitution’s structural provisions, thereby permitting Congress to enact social and economic legislation that circumstances had led the public to demand. And it led that Court to find in the Constitution authorization for new forms of administration, including independent administrative agencies, with the legal authority flexibly to implement, *i.e.*, to “execute,” through adjudication, through rulemaking, and in other ways, the legislation that Congress subsequently enacted. See, *e.g.*, *Yakus v. United States*, 321 U. S. 414 (1944); *Crowell v. Benson*, 285 U. S., at 45–47.

Where I believe the Court has departed from this basic understanding I have consistently dissented. See, *e.g.*, *Kimel v. Florida Bd. of Regents*, 528 U. S., at 92 (STEVENS, J., dissenting in part and concurring in part); *Alden v. Maine*, 527 U. S., at 760 (SOUTER, J., dissenting); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S., at 693 (BREYER, J., dissenting); *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. 627, 648 (1999) (STEVENS, J., dissenting); *Seminole Tribe of Fla. v. Florida*, 517 U. S., at 100 (SOUTER, J., dissenting). These decisions set loose an interpretive principle that restricts far too severely the authority of the Federal Government to regulate innumerable relationships between State and citizen. Just as this principle has no logical starting place, I fear that neither does it have any logical stopping point.

Today’s decision reaffirms the need for continued dissent—unless the consequences of the Court’s approach prove anodyne, as I hope, rather than randomly destructive, as I fear.