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SECTION: Points of View

HEADLINE: Finding the Right Words
With no guiding text, better to diffuse power than to concentrate it.

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In last month's Federal Maritime Commission v. South Carolina State Ports Authority, the Supreme Court ruled that state sovereign immunity extends to administrative agency adjudications. In one sense this was just another of the Court's agonizingly close 5-4 federalism decisions. But Federal Maritime contains some interesting byplay between Justices Clarence Thomas and Stephen Breyer that raises fundamental issues of constitutional interpretation.

First, the bare facts. The Court barred the Federal Maritime Commission from hearing a complaint brought by a cruise ship operator against the South Carolina Ports Authority. The cruise line alleged that the state violated federal law by refusing to allow the operator's ship to dock at a state port.

The 11th Amendment provides that the "judicial power of the United States" does not extend to suits brought by private parties against states. Writing for the majority, Thomas assumed that adjudications such as the one conducted by the FMC are not, strictly speaking, exercises of the "judicial power" of the United States. Nevertheless, because the familiar states' rights-friendly majority already had determined that "the sovereign immunity of the States extends beyond the literal text of the Eleventh Amendment," Thomas took the Court's task as determining whether the sovereign immunity "embedded in the constitutional structure" extends to agency adjudications.

The pre-eminent purpose of state immunity is to accord states the dignity they are due as sovereign entities. Finding the similarities "overwhelming" between the procedures used in agency adjudications and federal court litigation, the majority concluded that if it is impermissible to affront a state's dignity by requiring the state to respond to private lawsuits in court, it follows that immunity extends to agency adjudications.

Leading the dissenters' nationalist charge, Breyer chastised the majority for reaching a decision lacking "any firm anchor in the Constitution's text." Thomas fired back: "[I]t is ironic that Justice Breyer adopts such a textual approach in defending the conduct of an independent agency that itself lacks any textual basis in the Constitution."

Thomas is making a broad point here—that independent regulatory agencies like the FMC, and unlike executive agencies like the Departments of Commerce and Health and

Human Services, are constitutional orphans. By law, these agencies—including the Federal Trade Commission, the Federal Communications Commission, and the Securities and Exchange Commission—are multimember bipartisan bodies. The commissioners, appointed by the president and confirmed by the Senate, serve fixed staggered terms. And, according to the leading case of Humphrey's Executor v. United States (1935), the president may not remove commissioners at will, as he may with respect to the heads of executive branch departments.

To put the matter politely, the independent agencies, which engage in lawmaking and adjudicative functions, do not fit neatly into the tripartite, separated powers structure trumpeted in civics classes as a bulwark of our liberty.

I don't mind saying that I share Breyer's discomfort that the Federal Maritime majority's view lacks grounding in the Constitution's text, which speaks of the "judicial power." But, frankly, I am even more uneasy about the reasoning that he employs in his counterattack.

At the heart of Breyer's argument is the notion that independent agencies like the FMC are more appropriately considered to be part of the executive branch than of the other two branches. His view is that, in exercising both their adjudicative and rule-making powers, these agencies are "engaging in an Article II, Executive Branch activity," exercising powers "that the Executive Branch of Government must possess if it is to enforce modern law through administration." According to Breyer, 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." (Breyer's emphasis.)

Independent, But Legal?

The problem is that the Court has never directly ruled on the constitutionality of the independent agencies. To the extent the Court has spoken on the subject, it has done so in a way that belies Breyer's characterization of them.

In Humphrey's Executor, after considering such indexes of independence as bipartisan membership and fixed staggered terms, the Court determined that President Franklin Roosevelt could not dismiss an FTC commissioner on the basis of mere policy disagreements. In doing so, the Court stated:

"Such a body cannot in any proper sense be characterized as an arm or eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute must be free from executive control."

There's more. The Court characterized the FTC—which the other independent agencies resemble in all material respects—as "wholly disconnected from the executive department" and "created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments." It's not easy to square this language, which the Court has never repudiated, with Justice Breyer's

position that independent agencies are “more appropriately considered to be part of the Executive Branch.”

Humphrey’s Executor has been subject to much criticism—to which I subscribe—for giving apparent constitutional sanction to the independent agencies without much analysis. One of the early condemnations of the independent agency creations was issued in 1937 by the President’s Commission on Administrative Management, which stated that these “miniature independent governments . . . do violence to the basic theory of the American Constitution that there should be three branches and only three.” And dissenting in FTC v. Ruberoid Co. (1952), Justice Robert Jackson bemoaned the fact that the independent agencies “have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.”

Had Breyer confronted the implications of the FMC’s cloudy constitutional status more frontally, then perhaps his distress about the lack of textual grounding for state immunity from agency adjudications would be more compelling. Instead, ignoring the nettlesome ghost of Humphrey’s Executor, he criticized the majority for ignoring new understandings “underlying constitutional interpretations since the New Deal.” And he applauded flexible interpretations that “led the New Deal Court to find in the Constitution authorization for new forms of administration, including independent administrative agencies.”

This overt reliance on what Yale Law School’s Bruce Ackerman has termed the “new constitutional foundations” of New Deal jurisprudence strongly echoes the words of many of that era’s judicial decisions validating the independent agencies. For example, rebuffing a constitutional challenge in FCC v. Pottsville Broadcasting Co. (1940), Justice Felix Frankfurter enthusiastically embraced the idea of the independent agencies acting under vague delegations:

“There will be no withdrawal from these experiments . . . whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrongdoing which under our new social and industrial conditions cannot practically be accomplished by the old and simple procedure of legislatures and courts as in the last generation.”

Generally, I am much more comfortable with an interpretative model that is more closely text-based than a “living Constitution” approach that espouses “adaptability” from generation to generation. I recognize, however, along with Thomas and Breyer, that sometimes it is appropriate to look beyond constitutional text in aid of interpretation. Indeed, federalism and separation-of-powers principles derive much of their force from the Constitution’s structure rather than its explicit language.

Forced to Choose

The fundamental purpose of both federalism and separation of powers is to diffuse power between and among the federal and state governments and the branches of the federal government. Forced to choose between the two nontextual positions debated in Federal

Maritime, I see less of a threat to the liberty interests sought to be protected by the power-diffusing principles in Thomas' position. For his is based on maintaining the states' vitality as separate power centers in relation to the federal government, while Breyer's rests upon notions touting grants of authority to entities whose most notable feature is a blending of executive, legislative, and judicial powers.

So call me old-fashioned if you want. But an argument that, in the end, draws support from talk of "new forms of administration" that blend governmental powers worries me more than one grounded in talk about maintaining a healthy balance of power between the federal government and the states.

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