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INTERPRETIVE ISSUES IN *SEMINOLE* AND *ALDEN*

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FOR students of constitutional interpretation, *Seminole Tribe of Florida v. Florida*[1] and *Alden v. Maine*,[2] two of the Court's most important recent Eleventh Amendment opinions, are gold mines. Each is a monumental opinion with lengthy and spirited debate between the majority and the dissents. Every significant method of constitutional interpretation (including textualism, original understanding, structure, precedent, doctrine, practice, and rhetoric) is employed by both the majorities and the dissents. Both the majorities and the dissents are able to advance solid and respectable arguments in favor of their positions. Arguably, these two cases could be used as texts for the study of virtually all of constitutional interpretation. Rather than attempting that however, I would like to focus on and analyze several discrete interpretive issues presented in these cases. I will concentrate primarily on *Seminole*, but I will also discuss *Alden*, especially where similar interpretive issues or arguments are raised.

I. THE ELEVENTH AMENDMENT, *SEMINOLE* AND *ALDEN*

At the outset, it is necessary to provide sufficient background to place the interpretive issues in context. Article III of the Constitution provides, in part, that "[t]he judicial Power shall extend to all Cases . . . between a State and Citizens of another State."[3] In one of its first significant opinions, *Chisholm v. Georgia*, the Supreme Court read Article III literally and concluded that a federal court did have jurisdiction over a suit against a state by a citizen of another state to enforce a debt against the state.[4] The Eleventh Amendment was drafted and ratified in great haste to overrule *Chisholm*. The amendment, which on its face addresses the type of fact situation before the Court in *Chisholm*, states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any For-

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1. 517 U.S. 44 (1996).
2. 527 U.S. 706 (1999).
3. U.S. CONST., art. III, § 2, cl. 1.
4. 2 U.S. 419, 479 (1793).

eign State."[5] Nearly one hundred years later, in *Hans v. Louisiana*, the Court held that the Eleventh Amendment did not create a new immunity from suit against states by citizens of other states but merely recognized that, prior to and as of the ratification of the Constitution, unconsenting states were immune from suit by citizens of any state including their own.[6] Consequently, the principles recognized by the Eleventh Amendment transcended its narrow language and prohibited a suit against a state by its own citizens, even if based on federal question jurisdiction.

In *Seminole Tribe of Florida v. Florida*, a 1996 five to four decision, Justice Rehnquist's opinion held that Congress did not have the power under the Indian Commerce Clause to abrogate state immunity from suit in federal court.[7] In a lengthy opinion, the Court concluded that the Eleventh Amendment recognized the "basic postulate" that sovereign immunity shields states from suits by citizens in federal court. Since this protection is of a constitutional stature, Congress may not abrogate it legislatively under any Article I power.[8] Justice Stevens dissented, arguing that existing precedent recognizes that the Eleventh Amendment creates only a presumption of sovereign immunity, which Congress has the power to abrogate.[9] In a lengthy and detailed dissent joined by Justices Ginsburg and Breyer, Justice Souter argued that the Eleventh Amendment provided immunity only against suits based on diversity of citizenship and that any sovereign immunity held by the states in federal suits was attributable to common law rather than the Constitution, thus such immunity could readily be abrogated by Congress.[10]

Three years later in *Alden v. Maine*, another five-to-four decision with the same split among the Justices, the Court held that the Congress could not, pursuant to its Article I powers, abrogate the immunity of states from suit by citizens in state court pursuant to a federal cause of action.[11] Writing for the majority and relying on original understanding, precedent and, most significantly, constitutional structure, Justice Kennedy concluded that state sovereign immunity whether in federal or state court, was and has been a crucial aspect of the sovereignty retained by the states from the very outset.[12] In the process, Justice Kennedy shifted the justification away from the Eleventh Amendment, which he viewed as merely recognizing the existence of the "essential postulates" of state sovereignty in a very specific context, to the Tenth Amendment, which protects them in a more comprehensive manner.[13] As in *Seminole*, Justice Souter's lengthy dissent took issue with the Court on virtually every point and maintained that sovereign immunity was not as well accepted at the fram-

5. U.S. CONST. amend. XI.
6. 134 U.S. 1, 20-21 (1890).
7. 517 U.S. 44, 47 (1996).
8. *Id.* at 72-73.
9. *Id.* at 76-77.
10. *Id.* at 100.
11. 527 U.S. 706, 712 (1999).
12. *Id.* at 713.
13. *Id.* at 713-14.

ing as the majority believed.[14] Justice Souter argued that the very concept of sovereign immunity is largely inconsistent with the nature of popular government, especially with regard to federally based causes of action against state governments.[15] Ultimately, Justice Souter and the three justices who joined his dissent expressed a very different conception of constitutional structure than did Justice Kennedy for the majority.

With this summary, I will devote the remainder of this paper to short examinations of several interesting interpretative issues raised in *Seminole* and *Alden*.

II. TEXTUALISM—DOES THE TEXT TAKE PRECEDENCE?

Most students of constitutional interpretation would agree that the text is at least the place to start when attempting to discern constitutional meaning.[16] Some would insist that, if the text is relatively clear, it should take precedence over any alternative meaning suggested by other interpretive methods.[17] The Eleventh Amendment cases are one of the most stunning examples, however, of other methodologies trumping the text. By its terms, the Eleventh Amendment prohibits federal court suits against a state by out-of-state citizens. In *Hans v. Louisiana*, however, the Court extended the immunity to suits by a state's own citizens against the state.[18] The majority in *Seminole* and *Alden* continued to endorse this reading and, moreover, in *Alden* the Court extended the immunity to suits based on federal causes of action in state courts as well, seemingly violating the text both with respect to the class of plaintiffs and the forums covered. In his dissent in *Seminole*, Justice Souter charged that the majority was making no serious attempt to construe the text.[19] He argued there were two straightforward readings of the text to choose from, although neither supported the Court's result.[20] Arguably, the amendment was designed to deprive federal courts of jurisdiction over suits based on diversity of citizenship.[21] Justice Souter argued this reading is bolstered by the Eleventh Amendment's precise tracking of Article III language.[22] In *Seminole*, Justice Rehnquist conceded that the text seems to support this reading.[23] Alternatively, Justice Souter noted that the text could be read as prohibiting any suit against a state by an out-of-state citizen in federal court, whether based on diversity or on federal question

14. *Id.* at 714.
15. *Id.* at 759, 762-94, 796-802.
16. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).
17. *See* SCALIA, *supra* note 16, at 37-47.
18. 134 U.S. 1 (1890).
19. *Seminole*, 517 U.S. at 110, 115, 119.
20. *Id.* at 110.
21. *Id.*
22. *Id.* at 110-111.
23. *Id.* at 54.

jurisdiction.[24] Neither reading supports the results in *Seminole* or *Alden*.

The Court in *Seminole* was hardly the first to conclude that the Eleventh Amendment should not be read literally. That approach dates to *Hans* and has been followed for one hundred years. Thus, the question presented is not whether a plain reading of the text may be trumped by other interpretive methods, but rather, whether the text should be given such primacy that a correct reading of the text (assuming for sake of argument that one of Justice Souter's suggested readings is correct) should override a century of precedent to the contrary. This presents a value choice with respect to the respective weight of two different but important methods of interpretation.

One might expect a strong textualist, such as Justice Scalia, to prefer the text to precedent in all but the most extreme cases. On the other hand, a Justice who believes strongly in precedent and stare decisis would be hard-pressed to reject a reading as well established and as heavily relied on as *Hans*, no matter how inconsistent with the best reading of the text. These cases present one of the most serious challenges in all of constitutional law to the preeminence of textualism. These cases are particularly notable since it might seem that the Justices in the majority, especially Justice Scalia, would generally be most receptive to a strong textualist approach. However, these Justices do have a response. The majority did not ultimately agree that *Hans* misinterpreted the text. Instead, it argued that the text of the Eleventh Amendment, like any constitutional text, must be read and understood in historical context.[25] In other words, the proper reading of the text, as Justice Scalia would no doubt argue, is the text as it was originally understood.[26] Using this approach, the majority argued that the framing generation understood the states to be sovereign entities protected by sovereign immunity against citizen suits.[27] The Court in *Chisholm v. Georgia*,[28] misunderstood this and was immediately rebuked by passage of the Eleventh Amendment.[29] Since the original understanding was one of near-complete sovereign immunity, there was little need to assert this but rather simply repeal the holding of *Chisholm* on its facts.[30] In *Alden*, Justice Kennedy, writing for the majority, pointed out that the Eleventh Amendment does not purport to erect an immunity against suits as such, but instead states that the judicial power shall not be "construed" to reach suits like the one brought in *Chisholm*.[31] Consequently, the amendment by its terms addressed misinterpretation of the prior understanding.[32] So the Court's response to Jus-

24. *Id.* at 110.
25. *Id.* at 68.
26. SCALIA, *supra* note 16, at 37-47.
27. *Seminole*, 517 U. S. at 68.
28. 134 U.S. 1 (1890).
29. *Seminole*, 517 U.S. at 69.
30. *Id.* at 69-70.
31. *Alden*, 527 U.S. at 723.
32. *Id.*

tice Souter's plain-meaning approach is to argue that the meaning is not at all plain when read in proper historical context.

III. ORIGINAL UNDERSTANDING

A. How Much Proof of Original Understanding is Enough?

In his dissenting opinions in *Seminole* and *Alden*, Justice Souter argued that, just as the Court misunderstood or ignored the plain text, it also misunderstood the original understanding or context. Contrary to the Court's conclusion that the sovereign immunity of the states was overwhelmingly accepted by the framing generation, that it was an "essential postulate," as the Court has put it, in fact sovereign immunity was a controversial concept by no means universally accepted at the time.[33] In *Alden*, Justice Kennedy, writing for the majority in turn, replied that the Court's showing of support for sovereign immunity at the time of the framing of the Constitution was far stronger than Justice Souter's proof to the contrary.[34] Assuming that this was true, as it appears to be, the question then becomes to what extent should proof of conflicting views of the original understanding undermine reliance on such an understanding. It is given that history will rarely, if ever, be clear and undisputed. If we demand certainty, we will almost never be able to establish the original understanding with respect to any constitutional provision.

Ordinarily, a solid showing should suffice, even if there is some evidence to the contrary. But there may be reason for a higher burden of proof here. Arguably, the majority is not simply attempting to employ original understanding to define the meaning of the plain text but rather to contradict the plain meaning of the text, or at least to employ historical context to support a meaning that would otherwise be far from obvious. Consequently, Justice Souter argued that the proof of significant dispute as to the status of sovereign immunity destroys any claim that it was, in fact, an unstated essential postulate.[35] There is certainly some logic behind this argument. The recognition of "essential postulates," arguably in tension with the text itself, should require a fairly compelling showing. Even so, the majority may nevertheless have satisfied that heavy burden, although the dissent, as well as the historians it relies upon, may disagree.

B. Does Precedent Determine Original Understanding?

Just as the majority in *Seminole* relied heavily on precedent to deflect Justice Souter's textual argument, it further relied, to a certain extent, on precedent to bolster its views on the original understanding. The majority, especially in *Alden*, provided a fair amount of historical support for its claim that the framing generation considered state sovereign immunity from citizen suits in federal court to be an essential postulate of the sys-

33. *Seminole*, 517 U.S. at 131-59; *Alden*, 517 U.S. at 764-81.
34. *Alden*, 527 U.S. at 724.
35. *Alden*, 527 U.S. at 778-79, 789, 794; *Seminole*, 517 U.S. at 139, 149.

tem created by the constitution.[36] However, in response to Justice Souter's argument to the contrary, the Court in *Seminole* and *Alden* also relied on precedent, declaring that position was adopted by the Court over one hundred years earlier in *Hans*, and it is too late in the day to reopen the question.[37] Justice Souter responded that the original understanding is a matter of history, which simply can't be resolved by prior judicial decisions.[38] If subsequent historians make the case that the Court's earlier historical conclusions are incorrect, the Court should pay attention, and if need be, correct its errors. Justice Souter is certainly correct: the Supreme Court doesn't and can't have the last word on history. Historians will always continue to discover, revise, synthesize, and correct. The Court, however, is not attempting to have the final say on history but rather the final say on constitutional meaning, which of course, may heavily be influenced by history. Getting it right is important to the judicial process, but so is certainty and stability.[39] Stare decisis assumes that courts will make mistakes but that many of those mistakes are best left uncorrected. This should generally be true of historical interpretation as well as other forms of legal interpretation.

Presumably, some interpretations are so well settled or deeply entrenched that the court would not reverse them even if it were shown that they were based on clear historical error.[40] Whereas in the Eleventh Amendment area the Court still can marshal strong historical evidence in support of its position, the existence of conflicting evidence, even if supported by a significant portion of contemporary historians, should not necessarily cause the Court to revisit its earlier conclusions. The Court is not a participant in an on-going historical seminar. Justice Souter is correct that prior Supreme Court precedent is not a primary source of history, but it often must be the Court's primary source.

IV. PRECEDENT

A. How Does the Court Distinguish Dicta From the Holding of a Prior Case?

Perhaps no question is closer to the heart of common law adjudication, as well as the use of precedent in constitutional law, as the ability to distinguish dicta from the holding of a case, and yet, it is a question on which there continues to be some disagreement. *Seminole* finds the majority

36. *Alden*, 527 U.S. at 715-27. *See also Seminole*, 517 U.S. at 722-26.
37. *Seminole*, 517 U.S. at 54: *Alden*, 527 U.S. at 745-48.
38. *Seminole*, 517 U.S. at 107 n.5; *Alden*, 527 U.S. at 770 n.8.
39. *See, e.g.*, Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406, 408 (1932) (Brandeis, J., concurring).
40. For instance the court would not reverse *Brown v. Board of Education*, 347 U.S. 483 (1954), even if it were conclusively shown that the original understanding of the Fourteenth Amendment did not prohibit segregated schools. Likewise, the court would not reject the incorporation of the Bill of Rights, the legitimacy of substantive due process analysis or a relatively expansive reading of the Establishment Clause even if it could be shown conclusively that each of these is contrary to the correct original understanding.

and Justice Souter disputing what the holding was and what constituted mere dicta in *Hans* and subsequent Eleventh Amendment cases, specifically on the issue of whether the sovereign immunity recognized by the Eleventh Amendment is of constitutional or merely common law origin and stature. The majority cited language from several cases, most prominently *Principality of Monaco v. Mississippi*,[41] explaining that the sovereign immunity in question is a constitutional limitation on Article III jurisdiction.[42] Justice Souter responded that this language is mere dicta since the Court was not faced with the question of whether Congress could abrogate the immunity and consequently, it didn't matter whether it was of constitutional or common law origin.[43] The majority responded by citing several cases for the proposition that "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."[44] Justice Souter did not offer a competing principle for distinguishing holding from dicta. He could argue, however, that even under the majority's definition, the statements in question were dicta since the cases could have come out the same way even if the sovereign immunity in question was not constitutionally based. The majority might have responded by contending that the stated rationale of a case is to be taken seriously by subsequent courts even if it is not absolutely essential to the result, since it is presumably the justification upon which the prior court relied in reaching its decision. In other words, even if common law sovereign immunity may have lead to the same result, it is not irrelevant that prior courts clearly believed that they were relying on a constitutionally-based doctrine. It is quite possible that they would not have reached the same result on the basis of non-constitutionally grounded sovereign immunity even if they could have. The Court in *Seminole* quotes language from concurring opinions of Justices Kennedy and O'Connor that supports this approach.[45]

Justice Souter's primary argument in favor of the common law basis for sovereign immunity is that the holdings of several other lines of cases establish that, in the past, the Court itself has not taken seriously the language that the *Seminole* majority relied on so heavily. Thus, he argued that the Court would not have held that states could consent to federal jurisdiction in citizen suits if there was a complete constitutional bar against such jurisdiction.[46] Likewise, he noted that the Supreme Court could not hear appeals from federal question suits by citizens in state courts if sovereign immunity were a flat out constitutional prohibition.[47] Finally, he stated that the Court wouldn't have suggested that Congress

41. 292 U.S. 313, 321-23 (1934).
42. *Seminole*, 517 U.S. at 67; *Alden*, 527 U.S. at 727.
43. *Seminole*, 517 U.S. at 123-27.
44. *Id.* at 67.
45. *Id.* (quoting County of Allegheny v. ACLU, 492 U.S. 573 (1989) (Kennedy, J., concurring) and Sheet Metal Workers v. EEOC, 478 U.S. 421, 490 (1986) (O'Connor, J, concurring)).
46. *Seminole*, 517 U.S. at 126-28.
47. *Id.* at 128.

could abrogate sovereign immunity with a clear statement if, in fact, it was prohibited by constitutionally-based sovereign immunity.[48] These are powerful arguments, but there are answers to each of these points.

With respect to consent, it is not obvious why a state couldn't consent to a suit even if the bar is constitutional. Indeed, even if it is considered jurisdictional, there is no reason why the prohibition could not be waived given that the point of the immunity was to protect the state. As for Supreme Court review of state court suits, the Court has long distinguished these on the grounds that they are appeals and not suits and hence are not barred by the Eleventh Amendment.[49] Justice Souter finds this distinction unsatisfactory,[50] and perhaps it is, especially since the scope of the immunity extends well beyond the precise terms of the Eleventh Amendment. Still, it is a distinction long embedded in the case law. The Congressional abrogation cases seem inconsistent with the Court's present theory; however, they could simply be examples of the Court avoiding the constitutional issue in favor of a statutory alternative. In other words, the Court assumed, for the sake of argument, that Congress could abrogate immunity in cases where it hadn't done so, rather than definitively conclude that it couldn't until the issue could no longer be avoided. These cases may have sent out the wrong message creating false hopes in Congress but, even so, they still could be considered typical examples of the avoidance of constitutional issues where non-constitutional grounds exist.

Seminole illustrates the difficulty of employing the holding/dicta distinction. The majority has strong language in support of its holding, which may not have been essential to earlier holdings but was probably at least well considered and important. Justice Souter has a variety of arguments as to why this language should not be taken at face value. On balance, I believe that the majority survives Justice Souter's attack on this point, but just barely. In any event, the case provides a sharp example of the degree to which the dicta and holding are flexible conceptions.

B. When Should Precedent Be Overruled?

Seminole also addressed the significant and recurring issue of when a precedent be should overruled. The *Seminole*[51] Court did overrule the Court's previous decision in *Pennsylvania v. Union Gas Co.*[52] That case held that Congress could abrogate a state's sovereign immunity against a citizen suit in a federal court under the interstate commerce clause.[53] *Seminole* presented the question of whether Congress could also abrogate state sovereign immunity under the Indian Commerce Clause. Since the

48. *Id.* at 128-29.
49. *Id.*
50. *Id.*
51. *Id.* at 66.
52. 491 U.S. 1 (1989).
53. *Id.* at 19-20.

Court readily concluded that the Indian Commerce and Interstate Commerce Clauses were indistinguishable for purposes of abrogation, it needed to consider whether *Union Gas* should be followed or abandoned.[54]

In concluding that *Union Gas* should be overruled, the Court relied on several factors. It began by noting that, while constitutional precedent should generally be followed, there should be some room for reconsideration given that correction of errors in constitutional cases by legislation was nearly impossible.[55] The Court then noted that one recognized ground for overruling was where a precedent had proved to be unworkable.[56] It maintained that this was such a case as only four Justices had joined Justice Brennan's plurality opinion in *Union Gas*, with Justice White adding the fifth vote for the holding but explicitly dissenting from the rationale.[57] That, of course, created confusion as to the meaning and application of the case, and the Court pointed out that such confusion has been reflected in subsequent lower court opinions.[58] A second consideration was the extent to which the rationale of the case in question is consistent with prior law.[59] The Court argued that *Union Gas* "deviated sharply" from prior precedent by holding that Congress could enlarge the Court's Article III jurisdiction since the Court had maintained that the state sovereign immunity recognized by the Eleventh Amendment was a limitation of Article III jurisdiction.[60] The Court further noted that *Union Gas* was a solitary departure from precedent in that the Court had not relied on it in the five years since it was decided.[61] It also maintained that *Union Gas* was poorly reasoned because it clearly misread prior precedent, especially *Fitzpatrick v. Bitzer*,[62] which turned on the fact that the Fourteenth Amendment was adopted subsequent to Article I, and thus could logically be understood as altering it.[63] Finally, the Court pointed out that the dissenters made no attempt to defend *Union Gas*,[64] which was indeed interesting and unusual considering the Court attacked that decision with such vigor. There is, however, an obvious explanation.

As noted above, the majority argued that *Union Gas* was a departure from the longstanding view, embodied in *Hans*, that sovereign immunity as recognized but not created by the Eleventh Amendment, limited the scope of Article III jurisdiction. The dissents of both Justice Stevens[65] and Justice Souter[66] disputed this conclusion at great length. They ar-

54. *Seminole*, 517 U.S. at 62-63.
55. *Id.* at 63.
56. *Id.*
57. *Id.* at 63-64.
58. *Id.* at 64.
59. *Id.*
60. *Id.*
61. *Id.* at 66.
62. 427 U.S. 445 (1976).
63. *Seminole*, 517 U.S. at 65-66.
64. *Id.* at 66.
65. *Id.* at 101-68.
66. *Id.* 101-68.

gued instead that whatever sovereign immunity may exist is of non-constitutional status and thus may be abrogated by Congress and, consequently, it is the *Seminole* majority and not *Union Gas* that is out of step with longstanding precedent.

Whether the Court was correct in overruling *Union Gas* turns on who is correct about the ultimate issue in the case—whether the sovereign immunity recognized by the Eleventh Amendment is of a constitutional nature. If it is, and if the prior case law has so established, then the criteria relied upon by the majority provide a strong argument for overruling. If not, then *Seminole* rather than *Union Gas* should probably be overruled.

Seminole raises one other issue with respect to overruling of precedent—whether Justice Souter should support the overruling of *Hans* in view of his lengthy and vigorous attack on the case. Quite beyond Justice Souter's argument that the majority in *Seminole* clearly misunderstood *Hans* as holding that the immunity recognized by the Eleventh Amendment is constitutional in nature, he argued that *Hans* itself was wrongly decided in that it: failed to understand that the Eleventh Amendment only repealed citizen state diversity jurisdiction and did not touch federal question jurisdiction,[67] failed to appreciate the hesitancy of the framing generation to adopt the common law wholesale,[68] and failed to understand how the concept of sovereignty was radically changed by the adoption of the constitution.[69] Justice Souter elaborated on each of these errors at great length. Considering that he arguably demonstrated that *Hans* was profoundly incorrectly decided in almost every respect, one might think that overruling would be in order. Justice Souter, however, rejected that option considering that *Hans* had been continuously relied on for better than one hundred years.[70] Instead, he would simply avoid expanding its holding as he believed the majority had done.[71] Justice Souter's conclusion is a testament to the power of stare decisis in constitutional litigation. Where, unlike *Union Gas*, a precedent, even if wrongly decided and heavily criticized, has withstood the test of time for over one hundred years and has been relied upon in literally thousands of federal court cases, overruling would simply be too disruptive no matter how misguided the case might be.

C. Can Precedent Legitimately Be Explained and Devalued by Extra-Judicial Sources?

There is one further interesting issue of precedent raised in *Seminole*. That is, to what extent may the result in a prior opinion be explained and devalued by an extra-judicial explanation? Justice Souter questioned

67. *Id.* at 116-23.
68. *Id.* at 131-41.
69. *Id.* at 141-59.
70. *Id.* at 159.
71. *Id.*

how *Hans* could have threatened settled constitutional principle by removing the federal forum in which citizens could sue their own states for violation of federally protected rights.[72] He answered that question by reference to extra-judicial historical material alleging that the Court in *Hans* withdrew federal jurisdiction to avoid the humiliation of the inability of the federal judiciary to enforce its judgments in southern states following the removal of federal troops at the end of reconstruction.[73] The majority in turn scolded Justice Souter complaining that "[i]ts undocumented and highly speculative extralegal explanation of the decision in *Hans* is a disservice to the Court's traditional method of adjudication."[74] Justice Souter, in turn, replied that his point was not to undermine a defensible decision but rather to explain an "utterly indefensible" one.[75] He cited speculation in *Puerto Rico v. Branstead*[76] as to the reasons behind the Court's holding in *Kentucky v. Dennison*[77] as a recent example of the same approach that had been joined by Justice Rehnquist, the author of the majority in *Seminole*, along with two other members of the majority.[78] Whether or not the Court has engaged in such analysis before, the majority surely had a good point. It would indeed undermine the very legitimacy of constitutional law and precedent if decisions could be impeached by extra-judicial conspiratorial-type explanations. Moreover, it would lead the Court into a morass of historical argument that would be distracting, complicated, and potentially misleading. The majority is certainly correct in suggesting that this is a road worth avoiding. That having been said, however, the point was fairly tangential to Justice Souter's arguments against *Hans*, which were based largely on traditionally-respected methods of legal analysis.

V. STRUCTURAL ARGUMENT

Along with text, original understanding, and precedent, constitutional structure is also considered a legitimate and significant method of constitutional interpretation. There is probably no perfect definition of constitutional structural argument. As I understand it, reliance on constitutional structure is a means by which constitutional meaning may be discerned by considering the structure of the text as a whole with an eye toward understanding the purposes sought to be achieved and the nature of the government created.[79] Justice Marshall's opinion in *McCulloch v. Maryland*[80] is often cited as the classic example of structural rea-

72. *Id.* at 120-21.
73. *Id.*
74. *Id.* at 68-69.
75. *Id.* at 122 n.17.
76. 483 U.S. 219 (1987).
77. 65 U.S. 66 (1860).
78. *Seminole*, 517 U.S. at 122 n.17.
79. *See* CHARLES L. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969).
80. 17 U.S. 316 (1819).

soning.[81] The structural method of interpretation often appears in cases in which the substantive issue also concerns the structure of the constitution such as separation of powers or federalism. Thus, it is not surprising that structural arguments loom large in Eleventh Amendment cases since they raise the most persistent issue of American constitutional law—the relationship between the states and the national government. Structural arguments play an important role in *Seminole* and *Alden*. The use of structural arguments in these cases draws attention to two interesting interpretive issues. First, where do structural arguments come from? Or to put it another way, what is the relationship between structural argument and other interpretive methodologies? Second, how should the Court choose between two competing structural arguments?

A. Where Do Structural Arguments Come From?

The Court's primary argument in both *Seminole* and *Alden* is structural in nature although it isn't always identified as such. The Court was able to shift from the Eleventh to the Tenth Amendment fairly easily from *Seminole* to *Alden* because in both cases the basic argument was more structural than textual. When the Court relied on "essential postulates," it was basically falling back on constitutional structure. It was saying that there are large themes apparent in the constitutional structure, in this instance a high degree of state sovereignty with respect to citizen suits, which must be taken seriously even if not specifically embodied in the text. The question then becomes how does the Court or any other constitutional interpreter know that this is so. In its purest form, a structural argument or understanding might be derived simply from reading the full text and contemplating its purpose. The argument might be derived in the abstract. Generally, however, the Court will look to other sources as well, to discern or at least validate arguments of constitutional structure. That seems to have been the case in *Seminole* and *Alden*. In *Seminole*, Justice Rehnquist relied on precedent, specifically *Principality of Monaco v. Mississippi*, for the proposition that there are "essential postulates" behind the constitution including the primacy of state sovereignty.[82] That does not mean that his ultimate argument is one of precedent rather than structure, but rather, that an earlier Court had made the structural argument first.

Since Justice Kennedy relied on structural argument more explicitly and in much greater detail in *Alden* than Justice Rehnquist did in *Seminole*, I will concentrate primarily on the former case. Writing for the Court, Justice Kennedy made it clear time and again that constitutional structure is central to his thesis that the States continue to enjoy constitutionally-based sovereign immunity against suits by citizens in federal, and in some circumstances, state courts as well. At the very outset of his opinion, he noted that:

81. Black, *supra* note 79, at 13.
82. *Seminole*, 517 U.S. at 68.

> [A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.[83]

Later in the opinion, he explained that the precedent confirms "sovereign immunity derives not from the Eleventh Amendment but from the structure of the Constitution itself"[84] and "the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design."[85] In a lengthy opinion, Justice Kennedy relied on text, original understanding, practice, and precedent to support his structural argument and ultimately set forth a free-standing structural argument emphasizing the myriad ways in which the removal of sovereign immunity would undermine state sovereignty.[86] Much of Justice Souter's lengthy dissent seems to be based on the proposition that there must be some independent source for the Court's structural argument other than structure itself. Near the outset of his opinion, Justice Souter contended that the Court was apparently basing its reasoning on natural law rather than common law.[87] Justice Kennedy, in turn, took sharp issue with such a charge, suggesting that Justice Souter's argument is the result of "analytical confusion or rhetorical device."[88] Nevertheless, Justice Souter devoted much of his opinion to a thorough and interesting attempt to demonstrate that neither the original understanding nor the precedent supports a natural law justification for state sovereign immunity incapable of abrogation. This seems to be largely beside the point. A structural argument such as the one Justice Kennedy made need not be derived from some source independent of constitutional structure such as original understanding, precedent, or natural law as Justice Souter seemed to assume. Rather, it is a valid constitutional argument capable of standing on its own two feet. It may be a more persuasive argument if confirmed or supported by other methodologies such as text, precedent, and original understanding as Justice Kennedy tried to do; or it may be a weaker argument if undermined by these sources, however, it is not ultimately dependent on them for its validity.

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83. *Alden*, 527 U.S. at 713.
84. *Id.* at 728.
85. *Id.*
86. *Id.* at 748-53.
87. *Id.* at 763.
88. *Id.* at 734.

B. How Does the Court Choose Between Competing Structural Arguments?

Beyond the question of where structural arguments come from is the issue of how the Court determines whether a structural argument is correct. After contending at great length that there is no support for a conception of sovereign immunity based on natural law, Justice Souter did concede that the Court had presented an independent structural argument.[89] He challenged that argument directly by presenting his own competing structural argument.[90] In a nutshell, Justice Kennedy argued that the text of the Constitution, especially in historical context, shows that states continue to possess significant attributes of sovereignty that are inconsistent with being subjected to suit absent consent.[91] Justice Kennedy explained that by subjecting states to suit in their own courts, Congress would violate this residual sovereignty by showing a lack of respect for the states, threatening their financial integrity, and commandeering their judicial system, hence the allocation of state governmental priorities and blurring the lines of political accountability.[92] For Justice Kennedy constitutional structure contains the "unique insight that freedom is enhanced by the creation of two governments not one."[93]

Justice Souter responded by presenting a very different conception of constitutional structure. For Justice Souter, the Court's conception of state sovereignty is deeply flawed in that it is reminiscent of royal prerogative rather than a republican government.[94] Rather, the federal structure assumed that each government is sovereign with respect to its own objects and matters of national law are the object of and within the power of the federal government.[95] Hence, it is not constitutionally inappropriate for Congress to require state courts to enforce federal law. Justice Kennedy might well agree with Justice Souter's structural proposition that each government is sovereign over its own object but simply disagree as to what the appropriate objects are in this case. Just as Justice Souter argued that the federal government is sovereign with respect to national matters as expressed through national law, Justice Kennedy would likely respond that the state government is sovereign with respect to the operation of its judicial system and, as such, should not be required to entertain suits to which it has not consented.

Justice Kennedy and Justice Souter each set forth compelling arguments based on constitutional structure. Each conception leads to a different result. They are engaged in the oldest, most fundamental, and arguably, most intractable argument in American constitutional law—what is the proper relationship between the federal government and the

89. *Id.* at 798.
90. *Id.* at 796-803.
91. *Id.* at 728.
92. *Id.* at 748-53.
93. *Id.* at 758.
94. *Id.* 801-03.
95. *Id.* at 798-99.

States. Justice Souter invoked a nationalistic conception of federal structure under which the federal government may trump states rights or immunities whenever it is within its constitutionally-authorized domain. This is a conception championed by Hamilton[96] and Marshall,[97] supported by the passage of the Civil War Amendments and brought into full bloom by the constitutional revolution of 1937 and consequent judicial deference. Justice Kennedy described a constitutional structure in which state sovereignty retains inviolable protection against federal intrusion, at least in certain specific instances. This vision is more consistent with some of the views of Jefferson[98] and to a lesser extent Madison;[99] one which has been influential through much of our constitutional history, lost significant ground in the mid-Twentieth century, but regained some momentum with the "New Federalism" of the past three decades.[100]

The question is: who is correct, and how can we tell? The answer is, both are correct, at least in the abstract. Each conception of federal structure has a textual, theoretical, and historical pedigree and finds significant support in practice and precedent. Both make sense. If Justice Souter's conception is given complete free reign, especially in view of the enormous expansion of federal power over the past two centuries, there will be little, if anything, left of state sovereignty. If Justice Kennedy's conception is taken to the extreme, the States will be able to effectively block significant national objectives. Neither vision is completely acceptable. Both are essential. That means that in a specific situation, as this one, a choice must be made though it need not and should not be a global rejection of the other alternative.

That leads back to the prior discussion of structural argument and other interpretive methodologies. In a specific case in which two competing structural visions, each with a solid pedigree, lead to opposite conclusions, the preferable alternative is probably the one best supported by other accepted methods of interpretation.[101] Much of the opinions of both Justice Kennedy and Justice Souter seem intended to try to convince the reader that its vision is most consistent with text, original understanding, precedent, and practice. Justice Kennedy was able to convince four other members of the Court and therefore carried the day. I tend to

96. THE FEDERALIST NO. 1, 6-9, 11-13, 15-17, 21-22, 23-26, 59-62, 65-85 (Alexander Hamilton).

97. *See, e.g.*, *McCulloch*, 17 U.S. at 410.

98. *See* Thomas Jefferson, Kentucky Resolution of 1798 and 1799 *reprinted in* 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 540 (2ed., J.B. Lippincott Co. 1901). *See generally* H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689 (1994) (an insightful discussion of the long-term constitutional significance of the Kentucky and Virginia Resolutions).

99. *See* James Madison, Virginia Resolutions of 1798, *reprinted in* ELLIOT, *supra* note 98, at 528. *But Cf.* THE FEDERALIST NO. 39 (James Madison).

100. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995); United States v. Printz, 521 U.S. 898 (1996); New York v. United States, 505 U.S. 144 (1992).

101. *See, e.g.*, Richard Fallon, *A Constructive Coherence Theory of Interpretation*, 100 HARV. L. REV. 1189 (1987).

agree that his arguments are more persuasive, especially the support he draws from original understanding. Justice Souter's arguments, though formidable, convinced only three other justices, but probably have greater support in the academic community. Like baseball, the federalism debate is never over; there is always next year. The structural visions set forth by Justices Kennedy and Souter have been debated in judicial and other forums for over two hundred years. And there is every reason to believe that the debate is only just beginning.

VI. CONCLUSION

I have made no attempt to discuss and evaluate the full arguments presented by the majorities and dissents in *Seminole* and *Alden*. Rather, I have tried to focus on several interesting, discrete interpretive issues raised by these cases. In so doing, I hope to have revealed the intricacy and complexity of legal argumentation as well as the degree to which constitutional interpretation so often requires hard choices between legitimate, well-developed, and highly-persuasive arguments and counter arguments leading to opposite conclusions. Accepted methodologies of interpretation provide us with the tools to assess and evaluate these arguments but, in the end, the hard choice is inevitably ours.