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ALDEN V. MAINE AND THE JURISPRUDENCE OF STRUCTURE

ERNEST A. YOUNG*

Last term's decision in *Alden v. Maine*¹ is the latest chapter in the Rehnquist Court's effort to revive federalism doctrine as a meaningful limit on the power of the national government. The Court had already held, in *Seminole Tribe v. Florida*,² that the Constitution embodies a principle of state sovereign immunity that is not subject to abrogation by Congress.³ *Alden*, however, took a significant step beyond *Seminole Tribe* by announcing that this constitutional immunity applies even in state court lawsuits where the Eleventh Amendment is wholly inapplicable.⁴ The voting pattern was familiar: Justice Kennedy, joined by the Chief Justice and Justices O'Connor, Scalia, and Thomas in the majority; Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer in dissent.⁵ In both substance and line-up, *Alden* is typical of the "federalist revival" that some commentators have identified in the Rehnquist Court's jurisprudence.⁶

Alden ought to be a good case to stop and examine the interpretive methodology of the "federalist revival." Yet when the

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1. 119 S. Ct. 2240 (1999).

2. 517 U.S. 44 (1996).

3. See *id.* at 47.

4. See *Alden*, 119 S. Ct. at 2246.

5. See *id.*

6. See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2213 (1998); see also Kathleen M. Sullivan, *Dueling Sovereignities: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 80 (1995) (using the term "antifederalist revival" to describe the same phenomenon). For other examples, see *Printz v. United States*, 521 U.S. 898 (1997) (holding in favor of states with the same judicial line-up); *United States v. Lopez*, 514 U.S. 549 (1995) (same).

focus shifts from result to method, several curiosities arise. Most would agree that the current doctrinal emphasis on state's rights is driven in some sense by "conservative" ideology.⁷ One would therefore expect the new federalism cases to be dominated—methodologically speaking—by textualism and originalism, the two interpretive methods associated most commonly with conservatism.⁸ *Alden* disappoints any such expectation, however.

It is hard to see how a textualist could view *Alden* as anything other than a disaster. The Court's state sovereign immunity jurisprudence has always had a somewhat strained relationship to the text of the Eleventh Amendment. But *Alden* drops the textual fig leaf entirely, acknowledging that any principle of immunity applicable in state court can have no basis in the Eleventh Amendment.⁹ After all, that amendment governs only "[t]he Judicial power of the United States"¹⁰—not that of the state courts. Nor does the *Alden* majority purport to rest its holding on any other provision in the constitutional text. The abandonment of textualism is as clear and self-conscious as anyone could wish.

Instead, Justice Kennedy's opinion for the Court in *Alden* relies almost entirely on history. As such, it appears to rest on the originalism espoused by many textualists—most prominently Justice Scalia—as a necessary supplement to the not-always-

7. See, e.g., Erwin Chemerinsky, *The Rehnquist Court & Justice: An Oxymoron?*, 1 WASH. U. J.L. & POL'Y 37, 41 (1999); Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 616 (1995); Kathleen M. Sullivan, *The Jurisprudence of the Rehnquist Court*, 22 NOVA L. REV. 741, 758-61 (1998); see also Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1306-13 (1999) (arguing that federalism is not an inherently ideological idea, but that its actual manifestations have been driven by ideological predispositions of the justices).

8. See, e.g., Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373 (1998) (developing the link between textualism and the Rehnquist Court's substantive positions on federalism and separation of powers); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 625-27 (1994) [hereinafter Young, *Rediscovering Conservatism*] (discussing the common equation of originalism with judicial conservatism). I do not wish to deny, however, that both of these interpretive methods can be used to reach results that are hard to describe as "conservative" under anyone's definition of that term. See, e.g., AKHLI REED AMAR, *THE BILL OF RIGHTS* (1998).

9. See *Alden*, 119 S. Ct. at 2246.

10. U.S. CONST. amend. XI (emphasis added).

determinate text. But Justice Kennedy's originalism in *Alden* is of an altogether different stripe than that advocated by Justice Scalia, Judge Robert Bork, and others. These prominent originalists advocate reliance on the original *understanding* of constitutional *text*; everything depends on what the particular textual term at issue generally would have been understood to mean at the time it became part of the Constitution. The *Alden* opinion, by contrast, asks instead whether the Framers thought states should be suable in their own courts—a strictly intentionalist question wholly divorced from the interpretation of any particular text.

Read in context, however, the intentionalist aspects of *Alden* seem secondary to a different method entirely—one that focuses on the original understanding of overall structure rather than particular constitutional provisions. Justice Kennedy's argument in *Alden* is not so much that the Framers thought about the particular question whether the states would be immune in their own courts and answered that question in the affirmative. Rather, he argues that the Framers understood the constitutional structure to embody certain broad principles—"big ideas," if you will—drawn from the history of legal and political theory. Because Justice Kennedy is convinced that state sovereign immunity is one of those principles, any congressional action inconsistent with that principle must be constitutionally invalid. *Alden's* lack of any textual anchor at all makes this approach more explicit than before, but ultimately it seems the best explanation for a number of the Court's recent federalism cases.

In this Essay, I come neither to bury *Alden's* interpretive method nor to praise it. As the action in constitutional law shifts from issues of individual rights to government structure, it is only natural that structural modes of interpretation will take on a more prominent role in debates over interpretive methodology.¹¹ To the extent that *Alden* represents a relatively distinct form of the structural method, I hope to assess its strengths vis-à-vis other forms of constitutional argument and to

11. This is not to say that structural interpretation is confined to issues of separation of powers, federalism, and the like. See *infra* text accompanying notes 181-84 (discussing the use of structural interpretation in the definition of individual rights).

identify potential pitfalls that counsel caution. Specifically, I want to make three points about Justice Kennedy's structural jurisprudence of "big ideas."

First, the approach to structural argument taken by the *Alden* majority—and, interestingly, by the dissent as well—may be a useful addition to the Court's interpretive repertoire. By linking the Framers' original understandings of the Constitution's structure to broader aspects of political theory, the "big ideas" approach offers recourse to sources that may offer determinate answers when more familiar sources, such as text and specific history, run out. But the method also has potentially serious liabilities, arising from its tendency to press courts toward more complete theorization of constitutional issues. Although the federalism cases do not provide an adequate body of evidence to support firm conclusions, it seems likely that "big ideas" structuralism will frequently be helpful if used with appropriate awareness of these dangers.

Second, although *Alden's* structural jurisprudence represents a significant departure from textualism and the more widely accepted versions of originalism, that does not mean that broad structural principles should be eschewed by "conservative" jurists. Rather, Justice Kennedy's approach in *Alden*, and in a number of other opinions, represents a different kind of "conservatism"—one that emphasizes continuity with the past and the organic development of social institutions over the primacy of text.¹² Appreciating the difference between this approach and Justice Scalia's more explicitly articulated views may enhance our understanding of the perspectives and fault lines within the Court's current conservative majority.

Third, the jurisprudence of "big ideas"—like any other interpretive methodology—can be done well or poorly. Just as textualists and originalists are concerned primarily with limiting the range of discretion available to unelected judges in constitutional cases, an adherent of "big ideas" must also take pains to handle them in ways that constrain as well as illuminate. In particular, a judge interpreting the constitutional structure in

12. See, e.g., Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); Young, *Rediscovering Conservatism*, *supra* note 8.

light of first principles must be careful to take those principles as he finds them—complete with their historical qualifications—rather than picking and choosing among different aspects of those principles so as essentially to *construct* what he had always hoped to find.

Part I of this Essay briefly describes the case law leading up to *Alden* as well as the *Alden* majority's basic analysis.¹³ That history describes a gradual but escalating deviation from the Eleventh Amendment's text. The story culminates with the *Alden* majority's decision to jettison the text entirely. In Part II, I argue that *Alden*'s methodology fits neither of the approaches—textualism or originalism—usually identified with a conservative Court.¹⁴

Part III develops Justice Kennedy's approach to structural argument in more detail.¹⁵ For purposes of comparison, I describe initially two alternative models of structural argument: the structural aspects of the "New Textualism" espoused by Justice Scalia and others, and the more open-ended structuralism of Professor Charles Black. I next trace Justice Kennedy's emphasis on broad structural principles from *Alden* back through his important concurrences in *U.S. Term Limits, Inc. v. Thornton*¹⁶ and *United States v. Lopez*.¹⁷ I also suggest that other recent federalism opinions, including Justice O'Connor's opinion in *New York v. United States*¹⁸ and even Justice Scalia's opinion in *Printz v. United States*,¹⁹ are best described as driven by "big ideas" rather than more conventional modes of argument.

In Part IV, I argue that Justice Kennedy's approach may be a useful element of the Court's interpretive arsenal, but that attention must also be paid to the method's potential liabilities.²⁰ I also contend that this sort of structuralism is perfectly consistent with judicial conservatism, properly conceived. Finally, in

13. See *infra* notes 23-81 and accompanying text.

14. See *infra* notes 82-152 and accompanying text.

15. See *infra* notes 153-246 and accompanying text.

16. 514 U.S. 779 (1995).

17. 514 U.S. 549 (1995).

18. 505 U.S. 144 (1992).

19. 521 U.S. 898 (1997).

20. See *infra* notes 247-90 and accompanying text.

Part V, I criticize the particular application of structural principles in *Alden*.²¹ Interestingly, there is no disagreement on interpretive method between Justice Kennedy's opinion for the majority in *Alden* and Justice Souter's dissent. I conclude, however, that Justice Souter's is the more careful approach to structural principle because it is more faithful to the historical constraints that traditionally have cabined the concept of sovereign immunity. A comparison of Justice Souter's use of "big ideas" structuralism in *Alden* with Justice Kennedy's use of the same method suggests criteria for evaluating the use of this method in other cases.

I. HOW DID WE GET HERE? THE TROUBLED RELATIONSHIP OF THE CASES AND THE TEXT

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."²² The troubled relationship between that text and the Court's state sovereign immunity doctrine is a long story, and I will attempt only a brief outline here.

A. *What Had Gone Before*

The Court's 1890 decision in *Hans v. Louisiana*²³ is probably the best place to start. In *Hans*, the Court held that the Eleventh Amendment barred a suit against the State of Louisiana by Hans, a citizen of that state, to recover on certain state bonds.²⁴ Because Hans was a Louisiana citizen, federal jurisdiction was based on the federal nature of the question, which arose under the Contract Clause of the Constitution.²⁵

Not being a "[c]itizen[] of another State," Hans argued that he was "not embarrassed by the obstacle of the Eleventh Amendment," and the Court agreed that "if there were no other reason or ground for abating his suit, it might be maintainable."²⁶ The

21. See *infra* notes 291-333 and accompanying text.

22. U.S. CONST. amend. XI.

23. 134 U.S. 1 (1890).

24. See *id.* at 10.

25. See *id.*

26. *Id.*

Court found another reason, however: a generalized principle of sovereign immunity based on scattered comments from the Framers and the immunity doctrines of English common law.²⁷ As the Court explained later in *Monaco v. Mississippi*:²⁸

Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention."²⁹

Monaco implemented this understanding by holding that the states' immunity extends to suits by foreign sovereigns, and not simply by their "citizens" or "subjects."³⁰ Furthermore, the Court extended the immunity beyond suits "in law or equity" to cover suits in admiralty.³¹ Consequently, the Amendment's text was well on its way to becoming irrelevant. As the Court concluded in *Alden*, "[t]hese holdings reflect a settled doctrinal understanding . . . that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."³²

Hans's potentially dramatic effect on the enforceability of federal law against state actors was mitigated by a number of doctrines, some which predated *Hans* itself and others which may have developed in response to that decision. On the same day as *Hans* was decided, the Court refused to extend any sort

27. *See id.* at 12-15.

28. 292 U.S. 313 (1934).

29. *Id.* at 322-23 (1934) (footnote omitted) (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)).

30. *See id.* at 330; *see also* *Blatchford v. Native Village*, 501 U.S. 775, 785-86, 788 (1991) (extending the immunity to suits brought by Indian tribes); *Smith v. Reeves*, 178 U.S. 436, 448-49 (1900) (extending immunity to suits by federal corporations).

31. *See Ex parte New York*, 256 U.S. 490, 500 (1921). Admiralty suits have traditionally been viewed as distinct from suits brought "in law and equity." *See, e.g., American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 544 (1828).

32. *Alden v. Maine*, 119 S. Ct. 2240, 2254 (1999) (citations omitted).

of sovereign immunity to local governments.³³ Another response was to reaffirm the traditional exception to sovereign immunity for suits against the sovereign's officers.³⁴ A third was to hold, despite the jurisdictional language of the Eleventh Amendment itself, that state sovereign immunity is subject to waiver.³⁵ Finally, and most controversially, the Court held that under certain circumstances state sovereign immunity was subject to abrogation when Congress expressed a clear intention to subject the states to federal suit.

The Court's first abrogation case was *Fitzpatrick v. Bitzer*,³⁶ decided in 1976. *Fitzpatrick* held that Congress could subject the states to suit in federal court, notwithstanding the Eleventh Amendment, when acting pursuant to Congress's power to enforce the Reconstruction Amendments.³⁷ "When Congress acts pursuant to § 5," the Court said, "not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority."³⁸ The more controversial step came thirteen years later in *Pennsylvania v. Union*

33. See *Lincoln County v. Luning*, 133 U.S. 529, 530-31 (1890).

34. See *Ex parte Young*, 209 U.S. 123 (1908). Although *Ex parte Young* has been described as a "fiction," see *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 272 (1997) (plurality opinion) (Kennedy, J.); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-25, at 177 (2d ed. 1988) (describing the distinction between suits against states and suits against officers as "unsatisfactory and conceptually unruly"), its origins are as old as sovereign immunity itself, see, e.g., *Coeur d'Alene*, 521 U.S. at 308 (Souter, J., dissenting).

35. The waiver doctrine actually predates the expansion of Eleventh Amendment immunity in *Hans*. See, e.g., *Clark v. Barnard*, 108 U.S. 436, 447 (1883). Initially, this waiver doctrine covered both ordinary waiver by express consent to suit, see *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985), and constructive waivers arising from a state's decision to engage in activity regulated by federal law, see *Parden v. Terminal Ry.*, 377 U.S. 184, 196 (1964). However, the Court overruled *Parden* and rejected the constructive waiver doctrine last term in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219, 2228 (1999).

36. 427 U.S. 445 (1976). The abrogation question was not litigated earlier because Congress apparently made no explicit attempt to subject the states to suit by statute until after the Court's 1964 decision in *Parden*. See *Alden*, 119 S. Ct. at 2261.

37. See *Fitzpatrick*, 427 U.S. at 456.

38. *Id.*

Gas Co.,³⁹ which recognized a similar abrogation power when Congress acts under its general Commerce Clause authority. Writing for four Justices, Justice Brennan found the commerce power indistinguishable from Congress's power under Section 5:

Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable.⁴⁰

Justice White provided the fifth vote for this holding in notoriously cryptic fashion, stating that "I agree with the conclusion reached by [Justice Brennan] . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning."⁴¹

Justice White's eccentric performance in *Union Gas* left Congress's abrogation power—under the Commerce Clause, at least—on shaky ground. In subsequent decisions, the Court avoided reliance on *Union Gas* by holding that Congress had not expressed its intent to abrogate with sufficient clarity.⁴² In *Seminole Tribe v. Florida*,⁴³ however, *Union Gas*'s shaky ground fell in altogether. Noting that *Union Gas* never enjoyed "an expressed rationale agreed upon by a majority of the Court,"⁴⁴ the *Union Gas* dissenters—reinforced by the arrival of Justice Thomas—held that

39. 491 U.S. 1 (1989).

40. *Id.* at 19-20 (plurality opinion) (Brennan, J.).

41. *Id.* at 57 (White, J., concurring in the judgment in part and dissenting in part).

42. See, e.g., *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 101 (1989) (plurality opinion) (White, J.). The Court had taken the same approach in several cases prior to *Union Gas*, assuming that the abrogation power might exist but not reaching the question because Congress had not invoked it with sufficient clarity. See *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 475-76 & n.5 (1987); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 252 (1985).

43. 517 U.S. 44 (1996).

44. *Id.* at 63.

Congress lacks any power to abrogate state sovereign immunity when it acts pursuant to its Article I powers.⁴⁵

Seminole Tribe set the stage for last term's decisions in *Alden* and *College Savings Bank*⁴⁶ by appearing to leave open at least two routes around state sovereign immunity. First, Chief Justice Rehnquist's majority opinion in *Seminole Tribe* expressly reaffirmed the Court's earlier holding in *Fitzpatrick*—also authored by then-Justice Rehnquist—that Congress may abrogate state sovereign immunity when it acts pursuant to its enforcement power under Section 5 of the Fourteenth Amendment.⁴⁷ The two *College Savings Bank* decisions would deal with the contours of that remaining abrogation power.⁴⁸ Second, *Seminole Tribe* did little to cast doubt on the assumption that Eleventh Amendment doctrine implicates only the *federal* courts; the Amendment's text, after all, discusses only the "Judicial power of the United States."⁴⁹ This assumption was to crumble in *Alden*.⁵⁰

45. See *id.* at 66. *Seminole Tribe* actually involved an exercise of Congress's authority under the Indian Commerce Clause of Article I, rather than the Interstate Commerce Clause. See *id.* at 62. But the Court found that "the plurality opinion in *Union Gas* allows no principled distinction . . . to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause." *Id.* at 63. The *Seminole Tribe* dissenters did not challenge this equation, although Justice Souter's dissent did note that the case for congressional abrogation authority was even clearer for Indian affairs than for commerce generally. See *id.* at 147-48 (Souter, J., dissenting).

46. The *College Savings Bank* case actually yielded two separate decisions owing to the different routes by which different pieces of the litigation made their way to the Court. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court held that Congress had not validly abrogated the states' sovereign immunity in the Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. §§ 271(h), 296(a) (1995). See *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2210-11 (1999). In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the Court held that Congress likewise lacked power to abrogate the States' sovereign immunity pursuant to the Trademark Remedy Clarification Act, 15 U.S.C. § 1122 (1994). See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2233 (1999).

47. See *Seminole Tribe*, 517 U.S. at 65-66.

48. See generally Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 13-17 [hereinafter Young, *State Sovereign Immunity*] (describing the *College Savings Bank* holdings). The Court further limited the scope of Congress's Section 5 power this term in *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000).

49. U.S. CONST. amend. XI. Some commentators after *Seminole Tribe* did question this assumption. See Carlos Manuel Vazquez, *What Is Eleventh Amendment Immu-*

B. Alden and the States' Immunity in Their Own Courts

The *Alden* litigation began when state employees in Maine sued their employer under the Fair Labor Standards Act (FLSA), which was made applicable to state governments by amendments in 1974.⁵¹ The employees, who sought compensation and liquidated damages under the FLSA, brought their suit initially in federal court, but that suit was dismissed in the wake of *Seminole Tribe*.⁵² The employees then turned to state court, only to have their suit dismissed again on the basis of sovereign immunity.⁵³ The Supreme Judicial Court of Maine affirmed the dismissal, holding that the provision of the FLSA purporting to subject the states to suit in their own courts was unconstitutional.⁵⁴

The United States Supreme Court affirmed. Justice Kennedy's majority opinion began by squarely confronting the Eleventh Amendment's inconvenient text:

[T]he fact that the Eleventh Amendment by its terms limits only "[t]he Judicial power of the United States" does not resolve the question. To rest on the words of the Amendment alone would be to engage in the type of ahistorical literalism we have rejected in interpreting the scope of the States' sov-

nity?, 106 YALE L.J. 1683, 1702-03 (1997) (noting language in *Seminole Tribe* indicating that the majority saw the amendment as recognizing a broad-based immunity from suit, rather than constituting a mere forum-selection clause); see also Ellen D. Katz, *State Judges, State Officers, and Federal Commands After Seminole Tribe and Printz*, 1998 WIS. L. REV. 1465, 1468 (making a similar observation).

50. See *Alden v. Maine*, 119 S. Ct. 2240, 2266 (1999). A third route around *Seminole Tribe*—suits against state officers for injunctive relief under *Ex parte Young*—remains open. But see Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495 (1997).

51. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §§ 6(a)(3)(d), 88 Stat. 55, 58-59 (codified as amended at 29 U.S.C. §§ 203(d), 203(e)(2)(C) (1995)).

52. See *Mills v. Maine*, 118 F.3d 37, 55-56 (1st Cir. 1997) (affirming the district court's dismissal of the suit).

53. See *Alden v. State*, 715 A.2d 172 (Me. 1998), *aff'd*, 119 S. Ct. 2240 (1999); see also Katz, *supra* note 49, at 1530 n.318 (collecting similar cases barring FLSA suits against the states in federal court).

54. See *Alden*, 715 A.2d at 173-74.

foreign immunity since the discredited decision in *Chisholm v. Georgia*.⁵⁵

Sovereign immunity, the majority made clear, "derives not from the Eleventh Amendment but from the structure of the original Constitution itself."⁵⁶

Having concluded that the Eleventh Amendment itself could not resolve the question of a state's immunity in its own courts, the majority considered and rejected arguments that other constitutional provisions foreclosed such immunity.⁵⁷ Because the Supremacy Clause covers "only those federal Acts that accord with the constitutional design," Justice Kennedy said, that clause "merely raises the question whether a law is a valid exercise of the national power."⁵⁸ Nor could the Necessary and Proper Clause support subjecting states to suit as an incidental means of implementing Congress's Article I powers. Quoting the Court's prior holding in *Printz*, the Court reasoned that a law that violates principles of state sovereignty is not "proper" within the meaning of that clause.⁵⁹

55. *Alden*, 119 S. Ct. at 2254.

56. *Id.* For similar statements in the prior case law, see, for example, *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267-68 (1997) (acknowledging "the broader concept of immunity, implicit in the Constitution, which we have regarded the Eleventh Amendment as evidencing and exemplifying"); *Seminole Tribe v. Florida*, 517 U.S. 44, 69 (1996) ("[W]e long have recognized that blind reliance upon the text of the Eleventh Amendment is 'to strain the Constitution and the law to a construction never imagined or dreamed of.'" (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890))); *Ex parte New York*, 256 U.S. 490, 497 (1921) ("That a State may not be sued without its consent is a fundamental rule of jurisprudence . . . [.] [T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one brought by citizens of another State . . . because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification." (citations omitted)).

57. See *Alden*, 119 S. Ct. at 2263-66. The Court also rejected arguments that the case was controlled by prior decisions sustaining suits against state governments in state courts. See *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991); *Nevada v. Hall*, 440 U.S. 410 (1979).

58. *Alden*, 119 S. Ct. at 2255.

59. *Id.* at 2256 (quoting *Printz v. United States*, 521 U.S. 898, 923-24 (1997)). The quoted passage from *Printz* relied on academic commentary reading "proper" as imposing a limit on Congress's Article I powers. See Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

Justice Kennedy's affirmative case for a nonabrogable state sovereign immunity in state courts began with the Constitution's preratification history, as well as with early congressional practice and the Court's early immunity decisions. The ratification debates focused on whether Article III, by providing for federal jurisdiction over suits between states and individuals from out of state, would provide an end-run around state sovereign immunity.⁶⁰ Based on this focus, the Court inferred that immunity in the states' own courts must have been taken as given.⁶¹

The Court relied heavily upon statements in *The Federalist* to confirm sovereign immunity as one of the Constitution's background presuppositions.⁶² This presupposition was corroborated, the Court found, by the absence of any early federal legislation purporting to authorize suits against nonconsenting states in their own courts, as well as frequent judicial recognition of the states' general immunity in those courts.⁶³

The majority relied as well upon the political reaction to *Chisholm v. Georgia*⁶⁴ that culminated in the Eleventh Amendment. In *Chisholm*, the Court held that Article III had, in fact, abrogated any preexisting immunity the States might have had, and accordingly exercised jurisdiction over a private lawsuit against the State of Georgia to collect a debt.⁶⁵ The "profound shock" engendered by that decision, as well as the swift adoption of the constitutional amendment reversing the court's holding, indicated to the Court majority that *Chisholm* itself must have

60. See *Alden*, 119 S. Ct. at 2252.

61. See *id.*

62. See *id.* at 2256-57. In particular, the Court quoted at length from *The Federalist* No. 81, in which Alexander Hamilton wrote that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States" THE FEDERALIST NO. 81, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961). But see *Seminole Tribe v. Florida*, 517 U.S. 44, 144 (1996) (Souter, J., dissenting) (offering a different reading of *The Federalist* No. 81). Although the dissent was able to point to contrary statements in the historical record, the majority rejected this evidence as atypical of the original understanding. See *Alden*, 119 S. Ct. at 2252-53. For the dissent's evidence, see *id.* at 2276-79 (Souter, J., dissenting).

63. See *Alden*, 119 S. Ct. at 2252-53.

64. 2 U.S. (2 Dall.) 419 (1793).

65. See *id.* at 428-29.

violated a widely held belief that the states were not subject to suit.⁶⁶ The majority thus explained the Amendment's limited text as directed to the precise holding of *Chisholm* (permitting a diversity suit against a state) without signifying the *limits* of the founding generation's understanding of the states' immunity.⁶⁷ "The Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle," Justice Kennedy said.⁶⁸ "[I]t follows that 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."⁶⁹

Perhaps the most important support for state immunity, however, came from "the essential principles of federalism and . . . the special role of the state courts in the constitutional design."⁷⁰ Justice Kennedy began with "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."⁷¹ Though this indignity is bad enough when the suit is in a federal court, it is even worse in the state's own courts: "[T]o press a State's own courts into federal service," Justice Kennedy argued, is "to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals."⁷² As a practical matter, such "commandeering" would permit courts and private litigants to disrupt the basic resource allocation decisions of state governments.⁷³ Finally, the Court rejected the

66. See *Alden*, 119 S. Ct. at 2250-51 (quoting 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 96 (rev. ed. 1926)). The dissent, on the other hand, argued that the four justices in the *Chisholm* majority—several of whom had been prominent Framers themselves—could hardly have decided as they did if the founding generation had generally understood the states to possess a nonabrogable form of sovereign immunity. See *id.* at 2279 (Souter, J., dissenting).

67. See *id.* at 2252.

68. *Id.* at 2254.

69. *Id.*

70. *Id.* at 2263.

71. *Id.* at 2264 (quoting *Ex parte Ayers*, 123 U.S. 443, 505 (1887)).

72. *Id.*

73. See *id.* In so doing, the Court said, abrogation of state immunity would blur lines of political accountability for those allocation decisions. See *id.* at 2265. This concern is similar to the political accountability arguments in *New York v. United States*, 505 U.S. 144, 168-69 (1992), and *Printz v. United States*, 521 U.S. 898, 930 (1997).

suggestion that Congress might have broader control over state sovereign immunity in the state's own courts than Congress has in the federal courts.⁷⁴ Echoing its anticommandeering precedents, the Court rejected any suggestion that "Congress may in some cases act only through instrumentalities of the States."⁷⁵

Finally, the Court carefully distinguished between its immunity doctrine and a rule exempting states from the coverage of federal statutes. Recognition of state sovereign immunity, the Court insisted, would not "confer upon the State a concomitant right to disregard the Constitution or valid federal law."⁷⁶ Congress retains the power to abrogate state immunity when it acts pursuant to the Section 5 power, as well as means—such as conditional grants of federal funding⁷⁷—to induce state consent to suit in other cases.⁷⁸ States remain subject to suits by the federal government or by other states, and both their individual officers and their political subdivisions may be sued by individuals.⁷⁹ In light of these principles, the Court concluded that "a federal power to subject nonconsenting States to private suits in their own courts is unnecessary to uphold the Constitution and valid federal statutes as the supreme law."⁸⁰

Notwithstanding these efforts to downplay the significance of the Court's holding, *Alden* is an important extension of the immunity doctrines announced in *Seminole Tribe*. Although *Seminole Tribe* (and arguably *Hans* before it) recognized a con-

74. See *Alden*, 119 S. Ct. at 2265.

75. *Id.* The Court rejected an argument, based on *Testa v. Katt*, 330 U.S. 386 (1947), that state courts cannot refuse to hear federal claims on the basis of sovereign immunity. See *Alden*, 119 S. Ct. at 2265-66; see also Katz, *supra* note 49, at 1528-38 (developing this argument). Where a case does not fall within the federal judicial power because of state sovereign immunity as expressed in the Eleventh Amendment, the Court said, *Testa's* obligation to hear federal claims does not apply. See *Alden*, 119 S. Ct. at 2265-66.

76. *Id.* at 2266.

77. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987). See generally Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995) (arguing that "the *Lopez* majority should reinterpret the Spending Clause" to prevent end-runs around the limits on federal power that the Court has recognized).

78. See *Alden*, 119 S. Ct. at 2267.

79. See *id.*

80. *Id.* at 2268. I have argued elsewhere that these alternatives may actually leave the states worse off than if they were simply subject to suit by individuals. See Young, *State Sovereign Immunity*, *supra* note 48, at 58-65.

stitutional immunity extending beyond the Eleventh Amendment's text, that immunity had been focused, like the amendment itself, on the *federal* judicial power. *Alden*, however, extended this immunity to an area—proceedings in state court—with which neither the amendment nor the historical debates that preceded it had been concerned.⁸¹ In the comments that follow, I argue that the interpretive dynamics of this leap can tell us some important things about the current Court.

II. *ALDEN'S* ABANDONMENT OF TEXTUALISM AND ORIGINALISM

Justice Kennedy's majority opinion in *Alden* is startling in its candor: "[T]he scope of the States' immunity from suit is demarcated not by the text of the [Eleventh] Amendment alone but by fundamental postulates implicit in the constitutional design."⁸² One might omit the word "alone" from this statement, for it comes in the course of acknowledging that nothing in the Amendment itself really bears on the case. Nor does the Court's opinion seriously suggest any other textual ground for the decision.⁸³ In other words, the Court saw no need to ground its decision in any constitutional text.

Alden's abandonment of textualism is striking, particularly in light of the well-known commitment to textualist methodology shared by several members of the majority, especially Justice Scalia.⁸⁴ "What I look for in the Constitution," Justice Scalia has said, "is precisely what I look for in a statute: the original mean-

81. See Young, *State Sovereign Immunity*, *supra* note 48, at 20 (suggesting that the Court could have distinguished *Seminole Tribe* if it had chosen to rule the other way in *Alden*).

82. *Alden*, 119 S. Ct. at 2254.

83. There is a passing reference to the Tenth Amendment, *see id.* at 2247, 2259, but the majority does not seriously dispute—at least in this case—the settled interpretation that the Tenth Amendment has little independent significance beyond affirming the theory of limited federal powers. *See id.* at 2259.

84. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997) (avowing allegiance to textualism in statutory interpretation); Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1121 (1998) (describing Justice Thomas as "the Supreme Court's most thoroughgoing textualist"); *see also* William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1301 n.3 (1998) (noting general agreement but subtle differences between the textualism of Justices Thomas and Scalia).

ing of the text.”⁸⁵ The departure is worth exploring for at least three reasons. First, many scholars have considered the “increasing acceptance” of textualism at the Supreme Court as “one of the most important developments in recent years.”⁸⁶ It is therefore appropriate to ask whether *Alden* represents a waning of the Court’s commitment to textualism in constitutional interpretation. Second, and more important, we may learn something about the nature of textualism itself as we try to define what is textualist in *Alden* and what is not. Finally, careful attention to the *Alden* Court’s departures from textualism can put us well on the way to identifying and understanding the methodology that the Court *did* employ.

A. A Tough Day for Textualists, or, Did Justice Scalia Really Sign This Thing?

There may be no clear and concise definition of textualism. One might say that textualism “accords to constitutional language overriding importance in questions of interpretation,”⁸⁷ or that “the primary characteristic of textualism is its attention to the fact of textuality itself.”⁸⁸ But the very conciseness of these definitions keeps them from taking us very far.⁸⁹ Instead, textualism seems to have defined itself primarily in opposition to other tendencies in statutory and constitutional interpretation. Two of these tendencies stand out: the “common law” tendency to emphasize prior interpretations of enactments, as embodied in judicial

85. SCALIA, *supra* note 84, at 38.

86. 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); see also William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 621 (1990) (recognizing that “new textualism” challenges the traditional approach of “considering any contextual evidence”); Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 684 (1985) (recognizing the “revival of textualism,” but arguing that “textualism suffers from the same flaws exposed by the attacks on originalism and interpretivism”).

87. Rappaport, *supra* note 86, at 822.

88. George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 324 (1995).

89. See, e.g., *id.* at 330 (suggesting that “[t]he recognition that critics such as Derrida and Foucault are textualists demonstrates not only the breadth of the category, but also its refusal to be defined or circumscribed by any one interpretive philosophy or ideology”).

precedents, over the text of the enactments themselves,⁹⁰ and the intentionalist search for the subjective purpose of an enactment's drafters rather than the objective intent reflected in the enactment's text.⁹¹

Justice Scalia decried the first tendency—the common law method of decision in statutory and constitutional cases—in his recent and influential Tanner Lectures at Princeton University.⁹² An approach that starts with “the logic that those [Supreme Court] cases expressed, with no regard for how far that logic, thus extended, has distanced us from the original text and understanding,” Justice Scalia said, “is preeminently a common-law way of making law, and not the way of construing a democratically adopted text.”⁹³ The evolutionary nature of common lawmaking, Justice Scalia argued, is contrary to the “whole purpose” of having a constitution, which “is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away.”⁹⁴ More importantly, common lawmaking is *judicial* lawmaking, which is in fundamental tension with the democratic ideal.⁹⁵

Given the textualist aversion to common law decision making, one might have seen *Alden*'s candid abandonment of the Elev-

90. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 33 (1982) (“One corollary of the textual approach is a disregard of precedent.”); see also Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23 (1994) (arguing that adherence to stare decisis is unconstitutional when precedents are inconsistent with the original understanding of the constitutional text). For examples of the common law tendency, see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884-91 (1996); Young, *Rediscovering Conservatism*, *supra* note 8, at 688-97.

91. See Taylor, *supra* note 88, at 327 (“One of the defining insights of textualism is that it directs attention to the text rather than the text’s author.”); Eskridge, *supra* note 86, at 666 (suggesting that the new textualism’s “main contribution has been to debunk the formalist claims of intentionalist interpretation”).

92. See SCALIA, *supra* note 84, at 3.

93. *Id.* at 39-40; see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (making a similar argument).

94. SCALIA, *supra* note 84, at 40.

95. See *id.* at 10 (describing “the uncomfortable relationship of common-law lawmaking to democracy”). I do not mean to imply that I share Justice Scalia’s aversion to common law constitutionalism; in fact, I have argued for just such an approach elsewhere as the most persuasive, and most “conservative,” approach to constitutional interpretation. See Young, *Rediscovering Conservatism*, *supra* note 8, at 688-97. I seek here only to highlight methodological tensions within the *Alden* majority.

enth Amendment's text foreshadowed by a remarkable exchange in *Seminole Tribe*. In response to the dissent's argument that the best reading of the Amendment's text would not apply to federal question cases, Chief Justice Rehnquist replied that the text was a "straw man" in this context.⁹⁶ An obviously amused Justice Souter responded that, far from being a "straw man," "plain text is the Man of Steel" compared to the amorphous "postulates which limit and control" relied upon by the majority.⁹⁷

Seminole Tribe was a common law decision, and not simply because the ultimate source of the majority's background principle of sovereign immunity was the English common law. The best argument for the majority's result was that, although it could not be drawn from the Eleventh Amendment's plain text, it was dictated by a long series of prior judicial decisions interpreting that text. Although the point was not free of dispute,⁹⁸ the majority insisted that its result was compelled by *Hans* and that it was simply too late in the day to overturn that century-old precedent.⁹⁹ This is classic common law constitutionalism, as it accords primacy to judicial precedents over the unmediated text.¹⁰⁰ That Justices Scalia and Thomas joined the *Seminole Tribe* majority only makes the decision more puzzling.

Alden, unlike *Seminole Tribe*, is not really a case of common lawmaking resting on arguments from precedent. Rather, as Justice Kennedy's opinion cheerfully admitted, the issue whether Congress could subject the States to suit in their own courts was "a question of first impression."¹⁰¹ As I have already discussed,

96. *Seminole Tribe v. Florida*, 517 U.S. 44, 69 (1996) (Souter, J., dissenting).

97. *Id.* at 116 n.13 (Souter, J., dissenting). The Court conceded that if the text alone were at issue, the dissent's position that the Amendment barred only suits where federal jurisdiction rested on state-citizen diversity would be correct. *See id.* at 69-70; *see also* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 40 (1989) (Scalia, J., dissenting) (making a similar concession).

98. *See Seminole Tribe*, 517 U.S. at 116-17 (Souter, J., dissenting) (arguing that neither *Hans* nor any of its progeny had decided the abrogation question, because none of those cases involved any affirmative effort by Congress to override state sovereign immunity).

99. *See id.* at 68-71; *see also* *Union Gas*, 491 U.S. at 34-35 (Scalia, J., dissenting) (coming to a similar conclusion).

100. *See generally* Strauss, *supra* note 90, at 904-05 (discussing the primacy of doctrine in common law constitutional interpretation); Young, *Rediscovering Conservatism*, *supra* note 8, at 691 (same).

101. *Alden v. Maine*, 119 S. Ct. 2240, 2260 (1999).

the *Alden* majority is even more candid than the *Seminole Tribe* Court in disavowing any reliance on the text of the Eleventh Amendment or any other constitutional provision. Instead, the argument is almost wholly a direct appeal to history: Would the founding generation, the Court asks, have believed that Congress had the power to subject the States to suit in their own courts?¹⁰²

The turn to originalist history, of course, is hardly surprising in a federalism case. Indeed, the more surprising aspect of the recent federalism cases generally is the virtual unanimity with which the Justices have accepted the primacy of historical argument.¹⁰³ Nor is heavy reliance on history necessarily inconsistent with textualism. For many textualists, allegiance to the constitutional text rests on a theory of constitutional positivism: "All power stems from the sovereign people, and the authority of the Constitution comes from their act of sovereign will in creating it."¹⁰⁴ On this understanding, the Constitution should be interpreted in accord with what the people understood themselves to be consenting to—that is, according to the commonly understood meaning of the text at the time of ratification.¹⁰⁵ Historical evidence obviously plays a large role in recovering that meaning.¹⁰⁶

102. See, e.g., *id.* at 2248 (observing that "[t]he leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity"); *id.* at 2253 (asserting that "[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239 n.2 (1985))).

103. See Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 757-58 (2000) (noting that the Justices frequently agree on interpretive method in particular substantive areas, despite the absence of consensus on a general interpretive approach applicable to the Constitution as a whole); see also *Atascadero State Hosp.*, 473 U.S. at 247-48 (Brennan, J., dissenting) (adopting an originalist approach in the Eleventh Amendment context).

104. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1132 (1998); see also Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797, 807 (1993) (stating that "positivism is likely to be most appealing to those least inclined to sympathy with the existing constitution order").

105. See McConnell, *supra* note 104, at 1132.

106. See Taylor, *supra* note 88, at 332 (emphasizing that prominent textualists "all allow for historical inquiry into the contemporaneous meaning of textual terms. It is therefore inadequate . . . to define [textualism], writ large, as necessarily implying a

The *Alden* majority's use of history, however, seems to fall squarely within the second interpretive tendency to which textualism stands opposed: the "intentionalist" quest for the subjective purpose of a document's framers rather than the objective meaning reflected in the text itself.¹⁰⁷ Textualism's rejection of subjective intention has been most frequently discussed in the context of statutory construction. Justice Scalia, for example, has declared that "legislative intent' divorced from text" is a subterfuge: "[I]t is simply incompatible with democratic government . . . to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated."¹⁰⁸

Intentionalism remains equally anathema when textualists shift to *constitutional* interpretation. For example, Judge Robert Bork has carefully distinguished his commitment to the "original understanding" of words and phrases in the constitutional text from the specific intent approach:¹⁰⁹

It is important to be clear about this. The search is not for a subjective intention. . . . When lawmakers use words, the law that results is what those words ordinarily mean. . . . All that counts is how the words used in the Constitution would have been understood at the time. The original understanding is thus manifested in the words used and in secondary materials, such as debates at the conventions, public discussion,

separation from historical context").

107. See generally *id.* at 330-33 (describing "Original Meaning versus Original Intent").

108. SCALIA, *supra* note 84, at 17, 22; see also Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988) ("The words of the statute, and not the intent of the drafters, are the 'law.'"). But see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1197-98 (1987) (pointing out that textualists may also choose to rely exclusively on contemporary meaning). Alexander Hamilton advocated a similar approach in an early memorandum to President Washington: "[W]hatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual & established rules of construction." ALEXANDER HAMILTON, *OPINION ON THE CONSTITUTIONALITY OF AN ACT TO ESTABLISH A BANK* (1791), reprinted in 8 THE PAPERS OF ALEXANDER HAMILTON 111 (Harold C. Syrett et al. eds., 1965).

109. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 162 (1990) (rejecting the "requirement that the judge know what the specific intention of the lawgiver was regarding the case at hand").

newspaper articles, dictionaries in use at the time, and the like.¹¹⁰

What the textualist must *not* do, however, is "appeal to the author as an independent authority outside the text who resolves and settles interpretive issues."¹¹¹

By now the *Alden* Court's departure from textualism—and any form of originalism consistent with textualism¹¹²—should be clear. Unlike cases like *U.S. Term Limits, Inc. v. Thornton*,¹¹³ in which the principal opinions focused on the original meaning of the Qualifications Clauses of Article I, or Justice Thomas's concurrence in *United States v. Lopez*,¹¹⁴ which sought the original meaning of the Commerce Clause, the *Alden* majority was not concerned with the original understanding of terms found in the constitutional text. There is no effort, for instance, to use historical evidence to determine what the words of the Eleventh Amendment would have been understood to mean at the time that the Amendment was adopted.

Instead, Justice Kennedy's historical discussion in *Alden* is directed toward establishing "the founding generation's intent to preserve the States' immunity from suit in their own courts."¹¹⁵ The point, again, is not to ask what the Constitution's actual

110. *Id.* at 144; see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989) (emphasizing that judges are bound by the "original meaning of constitutional text," not the intent of the drafters); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 725-27 (1988) ("The relevant inquiry must focus on the *public* understanding of the language when the Constitution was developed.").

111. Taylor, *supra* note 88, at 334. But see Eskridge, *supra* note 84, at 1314 (suggesting that in the context of constitutional interpretation, original "intent" and original "understanding" turn out to be "essentially the same"). While Professor Eskridge may be correct that the intent/meaning distinction blurs in many cases, the distinction remains sharp in cases like *Alden* where the intentionalist disavows any reliance on any particular text.

112. Some originalists, of course, are not textualists. See, e.g., Edwin Meese III, *Toward a Jurisprudence of Original Intention*, 11 HARV. J.L. & PUB. POL'Y 5, 5 (1988) (advocating reliance on the Framers' subjective intentions as well as the constitutional text). But most prominent originalists—such as Judge Bork and Justice Scalia—claim allegiance to both textualism and originalism. See BORK, *supra* note 109, at 9, 143; SCALIA, *supra* note 84, at 24.

113. 514 U.S. 779 (1995).

114. 514 U.S. 549, 584-93 (1995) (Thomas, J., concurring).

115. *Alden v. Maine*, 119 S. Ct. 2240, 2260 (1999).

words mean, but rather what the Framers anticipated the Constitution's *consequences* to be with regard to the states' pre-existing immunities. This is intentionalism pure and simple. For the textualist, as Richard Epstein has written, "[t]he dominant loyalty is to the text as written and not to the framers' views of the consequences it entailed."¹¹⁶

Most originalists have long denied, for instance, that they are bound to reject the result in *Brown v. Board of Education* because the Framers of the Fourteenth Amendment probably did not expect that the Equal Protection Clause would require desegregated public schools.¹¹⁷ What matters is that the original meaning of "equal protection"—as understood in 1868—was broad enough to encompass the equality principle implemented so forcefully in *Brown*. "The text itself," Judge Bork has concluded, "demonstrates that the equality under law was the primary goal."¹¹⁸ Although the Framers of the Fourteenth Amendment may also have harbored an *expectation* that segregation would not be affected, that expectation is immaterial: "[E]quality, not separation, was written into the text."¹¹⁹

The critical point is that, for the textualist originalist, historical evidence has no meaning apart from an inquiry into the meaning of a particular textual provision. Justice Souter thus protested in his *Alden* dissent that:

The Framers' intentions and expectations count so far as they point to the meaning of the Constitution's text or the fair implications of its structure, but they do not hover over the instrument to veto any application of its principles to a world that the Framers could not have anticipated.¹²⁰

116. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 28 (1985); see also Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 359 (1992) (arguing that the inquiry is "not what the drafters thought their rule would accomplish (a dead end version of private meaning we could call 'expectationism'), but what their rule is").

117. See, e.g., BORK, *supra* note 109, at 76-77 (finding *Brown* to be "a great and correct decision" despite the fact that "those who ratified the [Fourteenth] amendment did not think it outlawed segregated education or segregation in any aspect of life").

118. *Id.* at 82.

119. *Id.*

120. *Alden*, 119 S. Ct. at 2291 (Souter, J., dissenting).

Even prior to *Alden*, however, the Court's Eleventh Amendment precedents had abandoned any such textual inquiry.¹²¹ As Ellen Katz has observed, "[t]he Court's repeated departures from the [Eleventh] Amendment's language when construing its scope suggest that the justices, including the Court's most ardent textualists, may deem the Amendment's text unpersuasive evidence of the framers' intent."¹²² After *Alden*, of course, there is no more room for speculation: Justice Kennedy's disavowal of any textual inquiry is as candid as it is unequivocal. The question remains, then, exactly what *is* the Court interpreting?

B. Is a Textualist Alternative Possible?

Before addressing that question directly, I want to consider a potential objection, that is, that the *Alden* opinion cannot tell us anything important about the limits of textualism because the Court simply missed a viable textualist resolution of the case. Michael Rappaport has suggested that there is, in fact, a viable textualist approach to the state sovereign immunity cases based on the meaning of the word "state" in the Constitution.¹²³ Other commentators—Deborah Jones Merritt, as well as Gary Lawson and Patricia Granger—have argued that federalism doctrine generally can be rested on the Guarantee Clause or the Necessary and Proper Clause, respectively.¹²⁴ My conclusion is that in each of these cases, the particular textual term serves as a shorthand for structural considerations rather than a font of meaningful *textual* analysis.

Professor Rappaport feels strongly that the Court's state sovereignty jurisprudence must have some textual basis in the Constitution, and he finds one in the meaning of the word "state" as used in the original document. "In 1789," he argues, "the principal meaning of the term in this context was an inde-

121. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 69 (1996) (disparaging the dissent's argument from text).

122. Katz, *supra* note 49, at 1478.

123. See Rappaport, *supra* note 86, at 821, 830-68.

124. See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988); Lawson & Granger, *supra* note 59.

pendent nation or country that had complete sovereignty."¹²⁵ This conclusion derives from traditional "original meaning" sorts of sources, such as usage in other important documents and leading legal commentaries of the era.¹²⁶ Rappaport then develops the state immunities recognized in the Court's current federalism jurisprudence—especially the anticommandeering principle and state sovereign immunity from suit—from his view of what would be necessary to preserve such sovereignty in the context of our present federal system.¹²⁷

The primary question for Rappaport is whether the term "state" itself is really doing any of the interpretive work in his analysis. One clue to the answer is Rappaport's failure to consider in any systematic way the particular constitutional provisions in which the word "state" appears. Instead, it seems sufficient for him simply to note that the Constitution frequently refers to "states," so it necessarily presumes the existence of entities that fit that description.¹²⁸ That is fine so far as it goes—indeed, this

125. Rappaport, *supra* note 86, at 830.

126. *See id.* at 832-33. Rappaport also relies on intratextual comparisons to particular places in the Constitution where "state" appears in a context that clearly contemplates a governmental entity with complete sovereignty. *See id.* at 833; *see also infra* text accompanying notes 158-59 (discussing "intratextualism").

127. *See* Rappaport, *supra* note 86, at 838-49. For state sovereign immunity in federal court, Rappaport also relies upon the meaning of the "judicial [p]ower" in the Vesting Clause of Article III. *See id.* at 869-74. This seems unpersuasive. For instance, if federal "judicial [p]ower" cannot include suits against the states under Article III, then the Eleventh Amendment would be superfluous. *But see* Alden v. Maine, 119 S. Ct. 2240, 2251 (1999) (arguing that the Eleventh Amendment was made necessary only by the wrong turn supposedly taken by the Court in *Chisholm*). Moreover, Rappaport would have a hard time explaining the several instances in which the federal courts do exercise their Article III "judicial [p]ower" over unconsenting states—such as suits brought by the United States, *see, e.g.,* United States v. Texas, 143 U.S. 621, 644-45 (1892), or appellate jurisdiction over private lawsuits against a state government brought initially in state court, *see, e.g.,* McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 27 (1990). In any event, Rappaport makes clear that when a suit is in state court, as in *Alden*, any constitutional immunity must derive from the term "state" itself. *See* Rappaport, *supra* note 86, at 873-74.

128. Indeed, many of the constitutional provisions where the word "state" appears have little direct bearing on most federalism controversies. Perhaps the largest class of these provisions involve procedures for federal elections. *See, e.g.,* U.S. CONST. art. I, § 2 (elections for House of Representatives); *id.* art. II, § 1 (electoral college). The Commerce Clause and the Tenth and Eleventh Amendments all mention "State[s]," but these clauses are not set up in such a way that the term does much work. In

approach is basically similar to Justice Kennedy's approach in *Alden*.¹²⁹ But there is nothing particularly "textualist" about it. Rappaport is not construing particular provisions—he is arguing about the structure of the government that those provisions presuppose.¹³⁰

Moreover, Rappaport seems to give away the game entirely when he concedes that we cannot simply adopt the eighteenth-century definition of "state" as a fully sovereign power.¹³¹ Instead, he says that upon entering the Union "the states had as much sovereignty as was consistent with structure, purpose, and history."¹³² The critical questions in Rappaport's analysis, then, are whether particular immunity doctrines are (a) necessary to preserve the states' role in the federal system, and (b) not inconsistent with the limitations on state sovereignty necessarily imposed by that system. These are structural questions, not textual ones.

the Tenth Amendment, for example, the powers reserved to the "States" are defined simply as those not delegated to the federal government. Of the clauses that *do* actually purport to define the contours of state authority, most are limitations rather than protections. *See, e.g., id.* art. 1, § 10 (no state entry into treaties or alliances, no bills of attainder, ex post facto laws, or impairments of contracts, etc.); *id.* amend. XIV (no state abridgement of privileges or immunities, deprivations of due process, or denials of equal protection). The best exception to this pattern may be the Guarantee Clause, *id.* art. IV, § 4, which might be read to say that the authority of the "State"—defined as the elements of sovereignty entailed by "a Republican Form of Government"—is something that the federal government must respect. But to rely on this use of "State" is simply to collapse Professor Rappaport's argument into Professor Merritt's argument based explicitly on the Guarantee Clause. I discuss that argument *infra*, at text accompanying notes 133-43.

129. *See infra* notes 220-27 and accompanying text. In *Alden*, Justice Kennedy noted that "[v]arious textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance." *Alden*, 119 S. Ct. at 2247; *see also* *Printz v. United States*, 521 U.S. 898, 919 (1997). But Justice Kennedy did not further rely on or interpret those particular provisions.

130. *Cf.* Fallon, *supra* note 108, at 1201 (characterizing as "arguments of constitutional theory" arguments that focus on the structural presuppositions of the text without relying on "the precise linguistic meaning of particular constitutional provisions").

131. *See* Rappaport, *supra* note 86, at 836 ("It is true that this interpretation does depart from the ordinary meaning in that it confers only some attributes of sovereignty on the states, but such modifications of ordinary meanings are common and entirely appropriate.").

132. *Id.* at 837.

Other attempts to ground limits on national power in particular textual provisions suffer from a similar problem. Deborah Jones Merritt, for example, has sought to revive the Guarantee Clause¹³³ as a textual basis for checks on federal authority.¹³⁴ Merritt's basic argument is that the Guarantee Clause has "two aspects":

On the one hand, the clause prohibits the states from adopting nonrepublican forms of government. On the other hand, as long as the states adhere to republican principles, the clause forbids the federal government from interfering with state governments in a way that would destroy their republican character.¹³⁵

Although Merritt acknowledges the radically open-ended character of the Clause's language,¹³⁶ she uses it to derive relatively rigorous limits on Congress's ability to interfere with state governmental processes.¹³⁷

Merritt acknowledges that the Guarantee Clause "may simply be the 'textual embodiment' of structural concerns reflected in the Constitution as a whole."¹³⁸ This is an important point: The Guarantee Clause does seem explicitly to authorize interpreters to import broad principles of political theory—that is, what is a "republican" government?—into the Constitution.¹³⁹ Interpreters may then use the implications of such theory to decide cases that were not more specifically addressed in the text, in precisely

133. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

134. See Merritt, *supra* note 124, at 36-70.

135. *Id.* at 25.

136. Merritt quotes, for example, John Adams's confession "that he 'never understood' what the guarantee clause meant and 'believe[d] no man ever did or ever will.'" *Id.* at 23 (quoting Letter from John Adams to Mercy Warren (July 20, 1807)).

137. See *id.* at 36-70.

138. *Id.* at 2 n.8 (quoting Henry Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 13 n.72 (1975)).

139. Similarly, the Seventh Amendment's reference to trials "at common law" has allowed Courts to consult the common law background in order to decide whether a jury is required in any given sort of case. See, e.g., *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996).

the same way that Justice Kennedy used the implications of dual sovereignty in his *Term Limits* concurrence.¹⁴⁰

Although Merritt emphasizes the importance of grounding federalism doctrines in a specific textual provision,¹⁴¹ it is hard to see what is textualist about Merritt's discussion. Once debate comes down to particular cases, Merritt's argument moves very quickly to determining what aspects of state power are "an essential component of state sovereignty."¹⁴² At this point, the work of interpretation in any disputed case is being done by the interpreter's theoretical conception of what constitutes a "republican" government. In other words, the Guarantee Clause is at most a textual mandate for *structural* argument.¹⁴³

Similar things can be said of a third approach, put forward in an important article by Gary Lawson and Patricia Granger.¹⁴⁴ Lawson and Granger argue that the word "proper" in the Necessary and Proper Clause—or the "Sweeping" Clause, as the Antifederalists christened it—"serves as a textual guardian of principles of separation of powers, principles of federalism, and unenumerated individual rights."¹⁴⁵ Their approach is surely textualist in that they focus on evidence of contemporary usage in the founding era in order to establish that "proper" had a "jurisdictional" meaning, that is, "that a 'proper' law is one that *is within the peculiar jurisdiction or responsibility of the relevant government actor*."¹⁴⁶ The Sweeping Clause thus requires, *inter alia*, that federal law "must respect the system of enumerated federal powers: executory laws may not regulate or prohibit

140. See *infra* notes 224-25 and accompanying text.

141. See Merritt, *supra* note 124, at 21 n.118 ("It is preferable to rest determination of federalism issues on a specific constitutional command, such as the guarantee clause, than on notions of political accountability that find no support in the constitutional text.").

142. *Id.* at 36, 36-40 (discussing control over the franchise).

143. See, e.g., *id.* at 40 (arguing that "[t]he guarantee clause provides a convenient anchor" for the structural principle that the Constitution protects "the necessary existence of the States").

144. See Lawson & Granger, *supra* note 59.

145. *Id.* at 271-72; see also *id.* at 270 (arguing that the Sweeping Clause imposes "internal, textual limits" on the Article I powers).

146. *Id.* at 291-314.

activities that fall outside the subject areas specifically enumerated in the Constitution."¹⁴⁷

I have no particular quarrel with any of this, but the idea that Congress must not exceed its enumerated powers does not decide many cases on its own. As Lawson and Granger acknowledge, the question "whether executory laws that regulate subjects within Congress's enumerated powers but that significantly impair the autonomy of state governments can be 'improper' because such laws contravene constitutionally 'proper' principles of federalism" is "even thornier" than the issue of defining the limits of those enumerated powers in the first place.¹⁴⁸ Indeed, the two issues may not be all that distinct. Justice O'Connor argued in *New York* that the questions whether an act of Congress fits under an enumerated power and whether that act "invades the province of state sovereignty reserved by the Tenth Amendment" are "mirror images of each other. . . . [I]f a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."¹⁴⁹ The upshot is that no court can evaluate whether Congress has acted "within its jurisdiction" without employing "freestanding conceptions of state sovereignty."¹⁵⁰

Lawson and Granger thus concede that "the Court might have a license—and a duty—to employ such conceptions of sovereignty when measuring congressional authority under the Sweeping Clause."¹⁵¹ And while they argue that "under a jurisdictional construction of the Sweeping Clause, executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights,"¹⁵² Lawson and Granger do not assert that the meaning of "proper" can itself give content to those principles. In this sense, their theory is functionally similar to those put forward by Professors Rappaport and Merritt: "proper" here serves as a textual warrant for *structural* analysis.

147. *Id.* at 331.

148. *Id.* at 332.

149. *New York v. United States*, 505 U.S. 144, 155-56 (1992) (citations omitted).

150. Lawson & Granger, *supra* note 59, at 332 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985)).

151. *Id.* at 332-33.

152. *Id.* at 297.

It bears emphasis that if these theories do no more than this—that is, provide a textualist hook for structural arguments—they will have served an important function. Nor do I wish to criticize any substantive view of federalism that may be implicit in any of these approaches. My point is simply to say that these theories are not “textualist” in the sense that the text itself supplies the content for a theory of federalism protected by the Constitution. These theories thus emphasize the extent to which structural analysis has displaced textualism in the context of federalism. I consider *Alden*’s contribution to that ongoing discussion in the next Part.

III. THE STRUCTURAL JURISPRUDENCE OF “BIG IDEAS”

It may be possible to interpret *Alden*’s atextualism not as a form of specific intent originalism but rather as a form of structural argument. The majority may fairly be read as proposing the existence of a structural principle of immunity not resident in any particular textual provision, but rather immanent in the Constitution’s overall organization. Justice Kennedy’s historical discussion is thus directed not toward defining the original understanding of any particular term in the constitutional text, but rather the original understanding of the general structure constructed by the document.

Structural argument is hardly new in constitutional interpretation.¹⁵³ What seems distinctive about Justice Kennedy’s approach is its reliance on sovereign immunity as a concept drawn from the history of legal and political theory to illuminate the meaning of the constitutional plan. Particular pieces of historical evidence—such as statements by the Framers in the ratification debates or *The Federalist*—are employed to confirm the presence of the broad principle. But it is the principle itself, in the absence of direct historical evidence on the question before the Court, that does most of the work in deciding the case.

153. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426-28 (1819) (arguing that state power to tax federal institutions would unduly interfere with federal supremacy); see also CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 4-5 (1969); BOBBITT, *supra* note 90, at 74-92.

In order to highlight the distinctive aspect of Justice Kennedy's approach, I begin this Part by sketching two more familiar forms of structural argument: the structural aspects of what William Eskridge has called "the new textualism,"¹⁵⁴ and the more open-ended structuralism of Charles Black.¹⁵⁵ I then develop the basic outlines of Justice Kennedy's particular style of structural argument. This approach, I argue, provides the most satisfactory way of looking not only at *Alden*, but at other recent federalism cases such as *Printz*, *New York*, and *Term Limits*. Moreover, this approach helps overcome some of the weaknesses that plague more familiar forms of structural argument.

A. *Structure of Text*

It would be unfair to suggest that *Alden*'s focus on structure is necessarily inconsistent with textualism. In many instances, structural arguments are an integral part of the textualist enterprise. As Justice Scalia has observed:

Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.¹⁵⁶

William Eskridge's influential study of the "new textualism" unpacks Justice Scalia's analysis into three distinct aspects. First, the textualist "will consider how the word or phrase is used elsewhere in the same statute, or how it is used in other statutes."¹⁵⁷ This idea, which Akhil Amar has called "intratextualism,"¹⁵⁸ stems from a familiar canon of statutory construction that—at least in its traditional, relatively weak form—is generally uncontroversial.¹⁵⁹

154. See Eskridge, *supra* note 86.

155. See BLACK, *supra* note 153.

156. *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (citations omitted).

157. Eskridge, *supra* note 86, at 661.

158. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

159. See, e.g., *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934). Professor Amar has advocated what appears

A second way in which textualists use structure is to "consider how the possible meanings [of a given term] fit with the statute as a whole."¹⁶⁰ One might ask, for example, whether a possible meaning for a statutory term is consistent with the statute's overall approach to a problem, or whether that meaning will render other provisions irrational or superfluous.¹⁶¹ Third, a textualist "will rely on the interaction of different statutory schemes to determine statutory plain meaning."¹⁶² This aspect expands the interpretive focus beyond the immediate statute being construed in an effort to achieve overall coherence in a particular area of the law.

Although the primary application of these principles has been in the context of statutory construction, nothing inherently precludes their use in constitutional interpretation as well. A judge seeking the meaning of a particular term in the Constitution frequently can compare the provision at issue to another provision using similar language,¹⁶³ or he may attempt to situate the term in question within a broader set of constitutional purposes and principles.¹⁶⁴ And although there is only one Constitution, it is not unheard of for judges to interpret particular constitutional provisions in order to achieve coherence with statutory enactments—especially those enacted contemporaneously with the Constitution by a Congress that included many of the Constitution's Framers.¹⁶⁵

to be a much stronger form of intratextualism, which may be more problematic. Compare Vermeule & Young, *supra* note 103 *passim* (criticizing Amar's approach), with Michael J. Gerhardt, *The Utility and Significance of Professor Amar's Holistic Reasoning*, 87 GEO. L.J. 2327, 2344-45 (1999) (reviewing AMAR, *supra* note 8) (praising Amar's method).

160. Eskridge, *supra* note 86, at 661.

161. *See id.*

162. *Id.* at 662.

163. *See, e.g.,* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 422 (1819) (comparing "necessary" in the Necessary and Proper Clause with "needful" in Article IV, § 3).

164. *See id.* at 415 (arguing that "necessary" must be construed in the context of "a constitution, intended . . . to be adapted to the various crises of human affairs").

165. *See id.* at 401-02 (suggesting that the scope of Congress's implied powers must be construed in light of the first Congress's decision, after extensive constitutional debate, to create a national bank); *see also* Seminole Tribe v. Florida, 517 U.S. 44, 77-78 n.1 (Stevens, J., dissenting) (suggesting that the scope of the Eleventh Amendment should be construed in light of the federal statutes conferring exclusive jurisdiction on federal courts for certain types of cases, including copyright and bankruptcy).

The starting point for each of these structural elements within textualism, however, is a particular piece of text. Structure informs the meaning of text, but structure does not operate of its own force without some textual hook. For this reason, Justice Kennedy's use of structure in *Alden* cannot be assimilated to textualism. And as *Alden* itself suggests, the dependence of the textualist approach on particular constitutional language makes it difficult for the textualist to capture fully certain constitutional values.

Some values that seem clearly to have been important to the Framers, for example, have no particular referents in the constitutional text. Whether or not it can justify the Court's result, Justice Kennedy's historical discussion in *Alden* is surely persuasive to the extent of demonstrating that sovereign immunity was an important concept to the Framers, even prior to the Eleventh Amendment. And yet there is absolutely no *textual* provision in the original Constitution giving voice to this value. Similarly, even those skeptical about state sovereign immunity frequently consider the Constitution to embody a principle of *federal* sovereign immunity despite the total impossibility of locating that principle in any particular textual provision.¹⁶⁶ Other implications from the structural concept of sovereignty—such as Congress's plenary power over aliens¹⁶⁷—likewise exist without any textual warrant.

Perhaps even more significant, the most important *changes* in the constitutional structure over the course of our history seem to have occurred largely without any substantial alterations in

166. See, e.g., RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1002 (4th ed. 1996) ("Despite the Constitution's silence on immunity . . . , early Supreme Court decisions assumed that the United States could not be sued *eo nomine* absent congressional consent").

167. See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) (establishing the plenary power doctrine). More broadly, Justice Sutherland argued in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936), that the federal government's power over foreign affairs derived from the inherent nature of sovereignty rather than the constitutional text. One need not accept Justice Sutherland's argument in its entirety to agree on the importance of structural argument in this context. See generally Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127, 1135 (1999) (discussing "the theory of an extraconstitutional foreign affairs authority, derived from concepts of international law and sovereignty, and not clearly subject to traditional constitutional constraints or to judicial review, which found ultimate expression in *Curtiss-Wright*").

the constitutional text. The New Deal's revolution in the size and scope of federal power vis-à-vis the states left no textual footprint in the Constitution itself.¹⁶⁸ Similarly, the advent of the modern administrative state—which fundamentally altered the constitutional separation of powers at the federal level—also occurred without any modification in the relevant textual provisions.¹⁶⁹ These developments suggest that any approach to structure that depends exclusively on tying structure to text is likely to miss a very great deal.¹⁷⁰

B. Structure and Relationship

The most prominent alternative approach to structure would alleviate this problem by recognizing that, although the constitutional structure ultimately is created by text, that structure once created may have legal force of its own rather than simply informing the interpretation of particular textual provisions. This approach is developed most prominently in the White Lectures on Citizenship given by Charles Black in 1968.¹⁷¹ Black was troubled by

The great extent to which, in dealing with questions of constitutional law, we have preferred the method of purported explication or exegesis of the particular textual passage . . . as opposed to the method of inference from the structures and relationships created by the constitution in all its parts or in some principal part.¹⁷²

168. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 346 (1998).

169. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 23-30 (1990).

170. Professor Rappaport suggests a different relationship between text and structure whereby structural arguments, as well as the purpose and history of the constitutional provision at issue, are used to resolve *ambiguities* in the text. See Rappaport, *supra* note 86, at 823. But to say this seems little more than to say that text should be consulted first, and that other theories are necessary if the text provides no clear answer. I doubt many proponents of other interpretive theories would disagree with that proposition. See, e.g., Fallon, *supra* note 108, at 1195.

171. See BLACK, *supra* note 153.

172. *Id.* at 7.

According to Philip Bobbitt, Professor Black's lectures "created anew the structural form."¹⁷³ As Bobbitt describes Black's method, it combines "deceptively simple logical moves from the entire Constitutional text rather than from one of its parts" with "a macroscopic prudentialism . . . arising from general assertions about power and social choice."¹⁷⁴ Black began with the example of *Carrington v. Rash*,¹⁷⁵ a 1965 decision involving a Texas constitutional provision barring military personnel from voting in any Texas county unless they resided in that county at the time they entered the service.¹⁷⁶ The Warren Court struck down the provision as irrational under the Equal Protection Clause,¹⁷⁷ Black, by contrast, would have rested the decision on the structural principle that "no state may annex any disadvantage simply and solely to the performance of a federal duty."¹⁷⁸ Rather than strain the particular text of the Equal Protection Clause to vindicate this principle, Black would have had the Court simply infer the principle directly from the overall federal structure established by the Constitution.¹⁷⁹

Black's primary concern was to defend the results reached by the Warren Court by offering more satisfactory grounds for the decisions than those the Court had articulated.¹⁸⁰ He accordingly focused less on the classic questions of constitutional structure—the extent of national power under federalism and the relationship of the federal branches under the constitutional separation of powers—than on developing structural explanations for some of the Supreme Court's more dramatic expansions of individual rights.¹⁸¹ So, for example, Black defended the appli-

173. BOBBITT, *supra* note 90, at 77.

174. *Id.* at 74.

175. 380 U.S. 89 (1965).

176. *See id.* at 89.

177. *See id.* at 96-97.

178. BLACK, *supra* note 153, at 11.

179. *See id.* at 9-12.

180. *See* BOBBITT, *supra* note 90, at 77.

181. *See id.* at 79 (noting that, for Black, the key structural relationships were "the electorate's assigned central role in the federal government; the existence of a federal court system as one of the agencies for redress of citizens' grievances; 'the economic structure of nationhood'; the structure of 'national unity'; [and] the concept of 'citizenship'").

cation of the First Amendment's Free Speech Clause to state governments not via some form of "incorporation" theory, but rather by arguing that "the nature of the federal government, and of the states' relations to it, compels the inference of some federal constitutional protection for free speech."¹⁸² That, Black explained, is because "petition and assembly for the discussion of national governmental measures are rights founded on the very nature of a national government running on public opinion."¹⁸³ Black thus concluded that "the First Amendment is only evidentiary of what would in any case be reasonably obvious."¹⁸⁴

For Black, the primary virtue of the structural approach was that "to succeed it has to make sense—current, practical sense."¹⁸⁵ Structural argument plunges lawyers immediately into "the practicalities and proprieties of the thing, without getting out dictionaries whose entries will not really respond to the question we are putting, or scanning utterances, contemporary with the text, of persons who did not really face the question we are asking."¹⁸⁶ By relying on structural argument, Black emphasized, "[w]e will have to deal with policy and not with grammar."¹⁸⁷

By drawing operative rules directly from structure, rather than restricting structural argument to the role of informing interpretation of particular texts, Black achieved far greater flexibility than the textualists would accord to structural argument. Unlike the textualists, Black was able to give voice to values that he saw as immanent in the constitutional structure, even if not tied to any particular textual provision. It is a commonplace of constitutional argument, however, that helpful flexibility quickly shades over into troubling indeterminacy. Black's ability time and again to justify morally appealing re-

182. BLACK, *supra* note 153, at 39.

183. *Id.* at 41.

184. *Id.*

185. *Id.* at 22; see also BOBBITT, *supra* note 90, at 85 ("[O]ne good reason for adopting structural approaches is that they are more satisfying, being truer approximations of the interaction of actual reasons yielding actual results than are doctrinal or textual approaches. We share a constitutional sense and we use it.").

186. BLACK, *supra* note 153, at 22-23.

187. *Id.* at 23.

sults on structural grounds might, after a while, give rise to the suspicion that a sufficiently skillful structuralist can justify any result he pleases.¹⁸⁸

Moreover, Black's emphasis on "the practicalities and proprieties of the thing" may systematically downplay some kinds of structural values. In *Commodity Futures Trading Commission v. Schor*,¹⁸⁹ for example, Justice O'Connor applied a similarly pragmatic approach in construing the limits of Congress's authority to assign judicial business to administrative tribunals rather than to Article III courts.¹⁹⁰ In dissent, Justice Brennan argued against weighing "the legislative interest in convenience and efficiency . . . against the competing interest in judicial independence."¹⁹¹ Justice Brennan opposed such a balancing test because the pragmatic interests of convenience and efficiency are "immediate, concrete, and easily understood," whereas the benefit of judicial independence is "almost entirely prophylactic, and thus often seem[s] remote and not worth the cost in any single case."¹⁹² Similarly, Laurence Tribe has warned that the greatest threat to structural principles of federalism is "the tyranny of small decisions"—each of which may make pragmatic sense on its own merits—that ultimately leave the federalism principle as nothing but "a gutted shell."¹⁹³

188. See *id.* at 24-26 (arguing that the "unhallowed 'state action' doctrine" should not apply to rights derived from the constitutional structure); *id.* at 28-29 (justifying the right to travel recognized in *Edwards v. California*, 314 U.S. 160 (1941), as "a consequence of [Edwards's] being one of the people in a unitary nation, to which . . . internal barriers to travel are unthinkable, rather than pretending that I have performed a warranted inference from a clause empowering Congress to regulate commerce among the several states"); *id.* at 65 (concluding that "in the status of the national citizen . . . as political participant, as warranted claimant to membership in the public life, as free man, there might have been found much the same immunities as those we have perilously worked out from the fifty-two word text [of Section 1 of the Fourteenth Amendment]"); cf. BOBBITT, *supra* note 90, at 85 (suggesting that Black's ability to come up with ingenious structural arguments to justify Warren Court results gave rise to a "weaker form" of "the indeterminacy argument"). The manipulability problem plagues certain forms of structured textualism as well. See, e.g., Vermeule & Young, *supra* note 103, at 767-69 (criticizing Professor Amar's intratextual approach for loosening the constraints on judges).

189. 478 U.S. 833 (1986).

190. See *id.* at 847-59.

191. *Id.* at 863 (Brennan, J., dissenting).

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

193. TRIBE, *supra* note 34, § 5-20, at 381.

Taken together, then, the textualist and Blackian approaches frame the central question for structural constitutional interpretation: How can one formulate a structural interpretive method flexible enough to give voice to constitutional values that are only indirectly recognized in the text itself, without rendering the method so indeterminate that it simply mirrors the preferences of the interpreter? And how does one ensure that the method's pragmatism—one of structuralism's central virtues—does not eliminate the "Ulysses-tied-to-the-mast" quality of constitutionalism that shields enduring constitutional values from short-term expediency?¹⁹⁴

Some of Justice Kennedy's argument in *Alden* seems Blackian in character. In particular, Justice Kennedy's discussion of the practical ways in which subjecting states to liability threatens their ability to perform their own governmental functions¹⁹⁵ has important affinities with Black, although it is employed in the service of a rather different end from the ones Black typically espoused. But Kennedy's broader structural argument in *Alden* is much different. Those differences, as I hope to show in the next section, go a long way toward addressing the central questions of structural interpretation that I have raised.

C. Justice Kennedy's Structuralism

I began this Part by describing Justice Kennedy's approach in *Alden* as relying primarily upon the original understanding of the general structure created by the Constitution.¹⁹⁶ This de-

194. On Ulysses and the Constitution (and their relationship to certain experiments on pigeons), see LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 1-8, at 22-24 (3d ed. 2000).

195. See *Alden v. Maine*, 119 S. Ct. 2240, 2264-65 (1999).

196. As I hope to make clear in this section and the next Part, Justice Kennedy is neither the originator of this approach nor always its most proficient practitioner. See *infra* text accompanying notes 226-45. But the approach has achieved a particular prominence in Justice Kennedy's recent federalism opinions, perhaps because of his position as a "swing vote" in this area of the law. See, e.g., Lynn A. Baker, *Interdisciplinary Due Diligence: The Case for Common Sense in the Search for the Swing Justice*, 70 S. CAL. L. REV. 187, 202 (1996) (predicting that "one might expect Justice Kennedy . . . to be the Court's 'most powerful' Justice on matters of federalism") (citation omitted); *id.* at 203-06 (concluding that this prediction is borne out by statistical analysis of the 1994 and 1995 terms).

scription suggests that we might distinguish this method from structured textualism and Blackian structuralism by focusing on two aspects of Justice Kennedy's method. First, Justice Kennedy's structural arguments differ from their textualist cousins by focusing on the federal structure as a whole rather than the structure of particular textual provisions. Second, Justice Kennedy diverges from Professor Black by emphasizing the historical understanding of the Constitution's structure rather than its present-day imperatives. The Court's method in *Alden* thus stands in the same relation to constitutional structure as an original meaning approach does to constitutional text.

The comparison to original meaning or understanding immediately raises a problem, however. The trick with original meaning is to keep it from shading back into original *intent*. We are supposed to ask, for example, "What did the generation that ratified the Fourteenth Amendment understand 'equal protection' to mean?" rather than "Did they intend to dismantle segregated schools?" This helps avoid or mitigate some of the standard criticisms of originalism, such as the frequent absence of direct evidence about what the truly relevant decision makers—the ratifiers of constitutional provisions, not their drafters¹⁹⁷—thought about particular questions, or the frequent inability of the ratifying generation to foresee particular questions that might arise later on.¹⁹⁸

The problem is that original meaning and intent are frequently hard to separate, especially where the same sorts of evidence would be used to divine both. The paradigmatic original *meaning* argument would be to cite dictionary definitions from the period in which the provision at issue was ratified to demonstrate that a particular word was understood in a particular way at that time.¹⁹⁹ The problem, of course, is that most words worth

197. See, e.g., Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.130 (1981) (acknowledging the dearth of direct evidence concerning the intentions of the ratifiers at each state convention); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 512 (1988) (arguing that it is the ratifiers that really count).

198. Focusing on original meaning of the words likewise avoids criticisms stemming from the difficulties of determining *collective* intentions or of separating interpretive "hopes" from "expectations." See Fallon, *supra* note 108, at 1211-12.

199. See, e.g., *United States v. Lopez*, 514 U.S. 549, 585-86 (1995) (Thomas, J.,

arguing over have—and have *always* had—a variety of meanings at any given time, and the dictionary itself cannot help us much in choosing between them.²⁰⁰ The real question is almost always what the term meant in the context of the political debate over the constitutional provision in question. For that, we naturally turn to the statements of the provision's framers and ratifiers—the same sources in which we might seek evidence of those framers' and ratifiers' original *intent*.²⁰¹

If anything, focusing on the original understanding of structure rather than text would seem to exacerbate this problem. Because we are not working with any particular piece of text, we cannot even begin by going to contemporaneous dictionaries. And any halfway-cynical law student could take the questions that an intentionalist might ask in cases like *Alden* or *Printz* ("Did the Founders intend to subject a state to suit in its own courts?" and "Did they think Congress could commandeer executive officials?") and reformulate them as issues of original understanding ("Did the Founders understand Congress's powers to include the power to subject a state to suits in its own courts?" and "Did they understand the constitutional structure to permit indirect federal action through state officers?"). Obviously nothing has changed in these different formulations.

In *Alden*, the originalist's problem is further complicated by the fact that not only is there no specific text to interpret,²⁰²

concurring) (citing a definition from the 1773 edition of Samuel Johnson's famous *Dictionary of the English Language* in support of the proposition that "[a]t the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes").

200. See, e.g., *McCulloch v. Maryland* 17 U.S. (4 Wheat.) 316, 355 (1819) (pointing out that "necessary" was commonly understood to have more than one definition in the Founding era).

201. Some critics of originalism have suggested that the slide from original meaning to original intent may be more sinister than this—that is, that the proponents of original meaning have been intentionalists in disguise all along. See, e.g., Douglas Laycock, *Book Review*, 101 *Ethics* 661-63 (1991) (reviewing BORK, *supra* note 109). I am less interested in this question than in whether the slide could be prevented by fine-tuning the approach to originalist interpretation. If it can, and if the method employed to do so is sufficiently transparent as to expose any attempt to substitute intent for meaning to criticism, then it seems that we would have come a long way toward allaying the critics' concerns.

202. Leaving aside those instances in which Congress acts pursuant to Section 5 of the Fourteenth Amendment, the power to subject states to suit under federal law

there is also no specific evidence of the Framers' specific intentions. As Justice Kennedy acknowledged, there is simply no evidence that the Framers ever specifically addressed the possibility that Congress might want to preempt the states' immunity in their own courts.²⁰³ The *Alden* Court's solution to all these difficulties is to employ a broad theory of sovereign immunity that the Constitution is thought to embody. This resolution has two steps. First, the Court demonstrates that sovereign immunity was part of the background of legal principles against which the Constitution was drafted and ratified.²⁰⁴ Second, the Court demonstrates that subjecting the states to suit in their own courts would be inconsistent with this largely uncoded set of background norms.²⁰⁵

This is what I mean by a jurisprudence of "big ideas." While the textual provisions bearing upon a case like *Alden* are sparse indeed, sovereign immunity is itself a highly robust principle. It has a well-developed history, with extensive commentary and case law fleshing out its implications across a wide range of circumstances.²⁰⁶ Once the Court determines that the Framers believed the states to possess sovereign immunity, the Court is able to draw upon the established corpus of sovereign immunity law and theory to identify answers to any number of potential issues not directly addressed by the text itself. The underlying "big idea"—whether it is sovereign immunity, dual sovereignty, or something else—remains external to the views of the Framers themselves on particular questions. This fact seems likely to help keep the original understanding of structure from collaps-

would be an implied power incident to the power to make federal law in the first place. As I have noted, one might say a court is interpreting the word "proper" in delimiting the appropriate scope of such implied powers, see *supra* text accompanying notes 144-52, but that inquiry very quickly collapses into a general structural analysis.

203. See *Alden v. Maine*, 119 S. Ct. 2240, 2260 (1999) (acknowledging "the founders' silence" on this particular question).

204. See *id.* at 2247 ("The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity.").

205. See *id.* at 2263-66.

206. See, e.g., 3 WILLIAM BLACKSTONE, COMMENTARIES *254-*265; Edwin M. Borchard, *Governmental Responsibility in Tort*, VI, 36 YALE L.J. 1 (1926); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

ing back into an inquiry about the Framers' original intent on particular questions.

The "big ideas" approach may provide the best explanation not only for *Alden*, but also for other significant federalism cases. Certainly this form of argument has become an important feature of Justice Kennedy's jurisprudence in the federalism area. The best pre-*Alden* example is the juxtaposition of *Term Limits*²⁰⁷ and *Lopez*,²⁰⁸ the two most significant federalism decisions of the 1994 term. *Lopez*, of course, was a potentially revolutionary victory for states' rights in that it imposed, for the first time since the New Deal, an outer limit on Congress's legislative authority to regulate private conduct under the Commerce Clause.²⁰⁹ *Term Limits*, on the other hand, was a significant victory for federal supremacy in that the Court struck down the State of Arkansas's attempt to impose term limits on its federal representatives.²¹⁰ Justice Kennedy was the swing vote in each of these 5-4 decisions, and in each he offered a separate concurring opinion that underlines the importance of "big ideas" theory in construing the structural constitution.

Justice Kennedy's concurrence in *Lopez* is centrally concerned with justifying the very idea of judicially enforceable federalism limits on Congress's authority.²¹¹ The *Garcia* case, after all, had

207. U.S. *Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

208. *United States v. Lopez*, 514 U.S. 549 (1995).

209. See Young, *State Sovereign Immunity*, *supra* note 48, at 43-47 (arguing that preservation of the states' authority to regulate private conduct is the most important function of federalism doctrine). There has been considerable debate since *Lopez* as to whether that decision was simply a one-time shot across Congress's bow or a lasting recommitment to judicial review under the Commerce Clause. See, e.g., Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1484 (1995) (taking the former view). The Court has two commerce power cases before it this term which should help resolve this debate. See *United States v. Jones*, 178 F.3d 479 (7th Cir.), *cert. granted*, 120 S. Ct. 494 (1999) (concerning whether application of the federal arson statute to destruction of residential property falls outside the commerce power); *Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820 (4th Cir.) (en banc), *cert. granted sub nom. United States v. Morrison*, 120 S. Ct. 11 (1999) (concerning the constitutionality of the Violence Against Women Act); see also Young, *State Sovereign Immunity*, *supra* note 48, at 73-79 (discussing the federalism cases set to be decided this term).

210. See *Term Limits*, 514 U.S. at 837-38.

211. See *Lopez*, 514 U.S. at 568-83 (Kennedy, J., concurring).

previously all but renounced such judicial interference in relations between the nation and the states.²¹² Justice Kennedy's rebuttal to *Garcia* began by conceding the impropriety of the pre-New Deal Court's attempts to define the reach of the commerce power through common law doctrinal elaboration.²¹³ The old Court, in his view, improperly sought to "draw content-based or subject-matter distinctions, thus defining by semantic or formalistic categories those activities that were commerce and those that were not."²¹⁴ Justice Kennedy likewise rejected the analysis of Justice Thomas's separate concurrence, which urged a return to the narrow original meaning of "commerce."²¹⁵ Instead, Justice Kennedy concluded that the Court's obligation to safeguard "the stability of our Commerce Clause jurisprudence . . . forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy."²¹⁶

Where originalism and common law doctrine had failed, Justice Kennedy turned to structure and theory. Judicial enforcement is appropriate, Justice Kennedy argued, because federalism is of equal dignity with other structural principles enforced through judicial review; indeed, "federalism was the unique contribution of the Framers to political science and political theory."²¹⁷ Even more important, federalism is central to the Framers' theory of political accountability. "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities," Justice Kennedy worried, "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."²¹⁸ The case for judicial review, then, rests explicitly on the place of

212. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51, 554 (1985); see also William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985) (criticizing *Garcia*).

213. See *Lopez*, 514 U.S. at 574-75 (Kennedy, J., concurring).

214. *Id.* at 569 (Kennedy, J., concurring).

215. See *id.* at 585-93 (Thomas, J., concurring).

216. *Id.* at 574 (Kennedy, J., concurring).

217. *Id.* at 575 (Kennedy, J., concurring) (noting judicial enforcement of separation of powers, checks and balances, and judicial review); see also *Garcia*, 469 U.S. at 567 n.12 (making the same observation).

218. *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring).

the federal structure not so much in the Constitution's text, but in the abstract political theory developed by the Framers that undergirds the text.

The focus is even more sharply on political theory in Justice Kennedy's *Term Limits* concurrence. While Justice Stevens's majority and Justice Thomas's dissent each engaged in more traditional textual and originalist analysis of Article I's Qualifications Clauses,²¹⁹ Justice Kennedy emphasized more abstract "fundamental principles of federalism."²²⁰ "It was the genius of [the Framers'] idea," Justice Kennedy observed, "that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."²²¹ The result, he concluded, is that each order of government has "its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."²²² This principle is grounded in history, but it is the history of ideas—not the historical understanding of a particular constitutional provision or the specific views of the Framers on a particular legal question.²²³

Once Justice Kennedy determined that the federal government's relationship with the people is not mediated by state governments, it followed that "the National Government is, and must be, controlled by the people without collateral interference by the States."²²⁴ This proposition—for Justice Kennedy, at least—decided the case: "Nothing in the Constitution," he declared, "supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives."²²⁵ With or without the Qualifications Clause, one suspects that the political theory

219. See U.S. CONST. art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3.

220. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

221. *Id.* (Kennedy, J., concurring).

222. *Id.* (Kennedy, J., concurring).

223. See, e.g., GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 344-89 (1969) (chronicling the development of sovereignty theory in the thought of the founding generation between 1776 and 1789).

224. *Term Limits*, 514 U.S. at 841 (Kennedy, J., concurring).

225. *Id.* at 842 (Kennedy, J., concurring).

of dual sovereignty would compel the conclusion that state governments cannot set qualifications for federal representatives.²²⁶

One can detect similar reasoning at work in other keystone opinions of the “federalist revival”—even those penned by justices known for quite different interpretive methodologies. Justice O’Connor’s jurisprudence, for example, is noted more frequently for pragmatic attention to context than for abstraction.²²⁷ In *New York v. United States*,²²⁸ however, she chose to anchor the anti-commandeering principle in the Framers’ decision—fully articulated in their political theory but not obviously embodied in any constitutional text—to create a national government acting directly on individuals rather than employing the states as instruments of regulation.²²⁹ Similarly, Justice Scalia, normally a proponent of the original understanding of constitutional text, accepts this abstract rationale as the primary basis for extending the anticommandeering principle in *Printz*.²³⁰ Indeed, the dueling opinions in *Printz* dramatize the extent to which political theory has replaced text and original understanding by parsing the abstract discussions in *The Federalist* as carefully as a tax opinion might parse the Internal Revenue Code.²³¹

226. There is the additional wrinkle on the facts of *Term Limits* itself that the people of Arkansas—not the state government acting through its normal processes—had set the qualifications by popular referendum. See *id.* at 883 (Thomas, J., dissenting). Although Justice Kennedy did not respond to this point directly in his concurrence, his likely answer is evident from his emphasis on the fact that when the people of a state vote in a federal election, “they act in a federal capacity and exercise a federal right.” *Id.* at 842 (Kennedy, J., concurring). He would thus likely respond to Justice Thomas by asserting that, in passing the term limits initiative, the people of Arkansas acted in their *state* capacity, exercising a *state* right, and were thus powerless to constrain choices they might later wish to make when acting in their *federal* capacity. My point is not to resolve whether such a response ultimately would be persuasive, but to suggest that Justice Kennedy would approach the issue in rather abstract terms.

227. See, e.g., Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 592-613 (1986).

228. 505 U.S. 144 (1992).

229. See *id.* at 161-66.

230. See *Printz v. United States*, 521 U.S. 898, 918 (1997) (relying on structural arguments due to lack of applicable text and inconclusive historical practice); *id.* at 918-19 (“[T]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton’s words, ‘the only proper objects of government.’”).

231. See *id.* at 912-16 (quoting THE FEDERALIST NO. 15, at 109 (Alexander Hamil-

With these examples in front of us it becomes possible to make some additional observations about this sort of "big idea" structuralism. First, it is tempting to see the difference between a specific intention on a particular issue—say, whether the states may intervene in the selection of federal representatives—and a general theory of dual sovereignty that resolves that question as a function of differing levels of generality.²³² But the "big ideas" approach as used in the federalism cases maps imperfectly onto this familiar concept. In *Term Limits*, for instance, Justice Kennedy's dual sovereignty theory is surely more abstract and "general" than most of the historical trench warfare waged between Justice Stevens's majority opinion and Justice Thomas's dissent.²³³ In *Alden*, however, the "big idea" is sovereign immunity, a hoary common law concept with innumerable details, quirks, and qualifications.²³⁴ The utility of tapping into a concept like common law sovereign immunity is not that it is more "general" than the text of the Eleventh Amendment or the set of issues debated in the ratification conventions; rather,

ton) (Clinton Rossiter ed., 1961)); *id.* at 970-76 (Souter, J., dissenting); see also Eskridge, *supra* note 84, at 1307 (noting that in *Printz*, Justice Scalia "relied on *The Federalist* to establish that the Constitution was meant to prohibit [commandeering state officers], both as specifically understood by at least one framer and as generally understood from the constitutional principle or spirit of dual sovereignty") (footnotes omitted); Rappaport, *supra* note 86, at 828-29 (criticizing *Printz's* methodology from a textualist perspective).

232. See, e.g., LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 100 (1991) (observing that "historical traditions, like rights themselves, exist at various levels of generality"); Fallon, *supra* note 108, at 1198-99 (distinguishing between "specific" and "abstract" forms of the Framers' intent).

233. For a taste of the Verdun-esque clash between Justices Stevens and Thomas, compare *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 816-17 (1995) (discussing the 1807 controversy over the qualifications of Representative William McCreery), with *id.* at 915-16 (Thomas, J., dissenting) (chastising the majority for not digging deeply enough into the historical record on this point).

234. As I discuss further in Part V, see *infra* text accompanying notes 301-33, Justice Kennedy actually invokes two different conceptions of sovereign immunity in *Alden*—the common law kind and a "natural law" version which is indeed quite abstract or "general." See, e.g., *Alden v. Maine*, 119 S. Ct. 2240, 2248, 2257 (1999); see also *id.* at 2270 (Souter, J., dissenting) (disentangling the two strands of the majority's reasoning). But Justice Kennedy's mistake in *Alden* was not in relying partly on a concrete, specific doctrine like the common law version of sovereign immunity; rather, it is in failing to keep the two sorts of sovereign immunity straight. See *infra* text accompanying notes 315-28.

the point is that sovereign immunity doctrine had been elaborated across a broader range of circumstances than were directly addressed by the Constitution's framers and ratifiers in the course of their debates. For that reason, sovereign immunity doctrine—and the extant authority concerning the treatment of common law doctrine generally²³⁵—was able to provide quite specific answers in *Alden* when the text and the Framers' specific understandings could not.

Argument from "big ideas" also differs from levels of generality analysis in another respect. Because the level of generality at which a problem is evaluated can have a powerful impact on the outcome,²³⁶ a number of Justices and commentators have discussed how to choose the appropriate level. Many seem to have concluded that, unless the interpreter is willing to commit to a default rule of always choosing the most specific level of generality possible, there is no way of choosing an appropriate level without making some kind of substantive value choice.²³⁷ The "big ideas" interpreter, on the other hand, is bound to employ

235. For Justice Souter, *Alden* (and *Seminole Tribe*) should have been decided not based on the implications of common law sovereign immunity doctrine itself, but on the extensive and quite specific body of law and principle that had grown up around the question of how to treat common law doctrines imported from the mother country. See *infra* text accompanying notes 311-17. These "reception" doctrines became, on the dissenters' view, an essential component of any common law doctrine like sovereign immunity once it was imported into the United States.

236. Compare, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (defining the right asserted as the right to engage in homosexual sodomy), with *id.* at 199 (Blackmun, J., dissenting) (defining the relevant right more generally as "the right to be let alone" (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))).

237. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 128 n.6 (1989) (Scalia, J.) ("Because . . . general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views."); Fallon, *supra* note 108, at 1217 ("Once a consistent adherence to the framers' specific intent is renounced, there simply is no value-neutral way to choose among possible specifications of the framers' abstract intent."). Justice Scalia would thus accept the narrowest-tradition default rule, see *Michael H.*, 491 U.S. at 128 n.6, while Professor Fallon would embrace the opportunity for normative judgment, see Fallon, *supra* note 108, at 1255. But see J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1624 (1990) (suggesting that the appropriate level of generality can be chosen through a process resembling common law development); Young, *Rediscovering Conservatism*, *supra* note 8, at 700 (arguing that judges should use "the level of generality used in related prior precedent").

those ideas as a source of authority if and only if there is affirmative evidence that those ideas were part of the Framers' presuppositions. Hence, in *Alden*, the crucial step is the majority's demonstration that the Framers viewed sovereign immunity as part of the legal background against which the Constitution was adopted; similarly, in *Term Limits*, the argument that the Framers viewed representative government through the lens of dual sovereignty is equally critical.

This "linkage" step of the argument—by which the interpreter taps into a broader intellectual tradition presupposed by the constitutional structure—thus determines not only whether an appeal to "big ideas" will be available at all but also the form and "generality" of the ideas to which the interpreter can appeal. This choice is not explicitly normative; rather, it turns on what the relevant historical evidence shows. If *Term Limits* had been decided prior to ratification of the Seventeenth Amendment, for example, it might have been impossible to characterize the Constitution's representative structure as presupposing an unalloyed commitment to dual sovereignty; rather, the structure would have looked much more like a compromise between a dual sovereignty regime (direct election of the House of Representatives), and a compact theory regime (election of the Senate by the state legislature, which would serve as an intermediary between the people and their senators).²³⁸ In such a case, recourse to "big ideas" might simply be impossible. Similarly, in *Alden*, the versions of the sovereign immunity tradition that the Justices could invoke were those for which they could find support in the historical record of the founding generation—not those that the Justices chose based on a default rule or explicitly normative criteria.²³⁹

238. See generally Sullivan, *supra* note 6, at 88-91 (describing the competing political theories in *Term Limits*).

239. See, e.g., *Alden*, 119 S. Ct. at 2270-85 (surveying the historical foundations of sovereign immunity doctrine in America). It may be, of course, that normative judgments are inevitable in the selection and handling of historical materials. See Fallon, *supra* note 108, at 1212 ("Far from being a simple fact awaiting discovery by the industrious researcher, the framers' intent must be viewed as an intellectual construct, developed through a process of interpretation, that seeks to embody the principles that furnish the best political justification for a constitutional provision and that find substantial support in the political climate surrounding the provision's

The second general point is that the constitutional "theory" employed in cases like *Alden*, *Term Limits*, *Printz*, and *Lopez* is *internal* to the available evidence about the original understanding of the Constitution; it is not an additional, *external* source of interpretive pressure. Richard Fallon's important work on the relationships among the various types of constitutional argument posits a different role for constitutional theory: such theories "claim to understand the Constitution as a whole, or a particular provision of it, by providing an account of the values, purposes, or political theory in light of which the Constitution or certain elements of its language and structure are most intelligible."²⁴⁰ Because more than one constitutional theory may plausibly fill this role, Professor Fallon argues that an interpreter should choose the one that is the most "normatively attractive."²⁴¹ While one might run a nonoriginalist version of "big ideas" structuralism this way,²⁴² Justice Kennedy's approach is quite different. The important point is not whether a particular theory provides *an* account of the constitutional structure—and certainly not whether that account is the most normatively attractive—but rather which theory the constitutional structure was originally thought to have presupposed.

Third, although it is easy to see the difference between Justice Kennedy's emphasis on high political theory in *Term Limits* and Professor Black's more familiar emphasis on the pragmatic implications of constitutional structure, there will be times when this distinction is not nearly so clear. Chief Justice Marshall's opinion in *McCulloch* provides a useful example. Marshall's

framing and adoption.""). But the originalist form of "big ideas" structuralism resists the pressure toward normative judgment more than Professor Fallon would. Rather than choose the level of abstraction at which the Framers' understandings are measured by explicitly normative criteria, *see id.* at 1213, the "big ideas" approach would impose a second layer of "fit"—that is, the interpreter must select the level of abstraction that is best reflected in the historical materials themselves. If that choice itself involves a submerged normative choice, it is at least a more constrained one than Professor Fallon would seem to advocate.

240. Fallon, *supra* note 108, at 1200.

241. *Id.* at 1202 ("[W]here more than one theory plausibly accounts for the text having been written as it was, an assessment along a normative dimension . . . becomes inevitable and desirable.").

242. *See infra* text accompanying note 247.

argument concerning the first question in *McCulloch*—whether Congress has an implied power under the Constitution to create a national bank—relies heavily on a structural argument concerning the nature and limits of written constitutionalism.²⁴³

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects, themselves. . . .

This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which the government should, in all future time, execute its powers . . . would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.²⁴⁴

This is, to be sure, very practical stuff. But it is also a fairly sophisticated response to eighteenth-century conservative and reactionary criticisms of written constitutionalism, which held that no written document could possibly respond to the complexity of human society or to the unforeseeable future.²⁴⁵ Chief Justice Marshall's argument is that our own constitution presupposes a

243. As I noted above, see *supra* notes 163-65 and accompanying text, Chief Justice Marshall's resolution of *McCulloch's* second issue—whether Maryland could tax the Bank—is a straightforward example of pragmatic Blackian structuralism. See BLACK, *supra* note 152, at 15.

244. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819). Professors Gerald Gunther and Kathleen Sullivan have suggested that in light of this structural argument, Chief Justice Marshall's exegesis of the Necessary and Proper Clause in *McCulloch* was virtually an afterthought. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 109 (13th ed. 1997).

245. See *infra* note 278 and accompanying text.

political theory of written constitutionalism that is aware of and responsive to those criticisms—that is, that does not try to meet every conceivable (or inconceivable) need by express enumeration. Does that make *McCulloch* an example of “big ideas” structuralism? Or of Blackian structural pragmatism? The best answer is probably “both.”

Finally, as the preceding discussion makes clear, Justice Kennedy’s approach to “big ideas” structuralism in *Alden* has a decidedly originalist bent. It is “big ideas” that capture the *original* understanding of structure that count—not contemporary political theory. This is not a necessary combination, however. One can imagine structural arguments predicated on “big ideas” that were not originalist in nature—that argued, for example, that particular aspects of the constitutional structure are presently understood or even *should* be understood to reflect broader commitments to a particular contemporary political theory. Such a position would be analogous to Frank Michelman’s argument that the Fourteenth Amendment should be read in light of John Rawls’s contemporary account of just institutions and entitlements.²⁴⁶

Here, again, the implications of the broader theory would be more robust than any specific evidence available about the meaning of “equal protection” or the structural understandings of the Amendment’s ratifiers. For that reason, such an approach would capture many of the advantages of Justice Kennedy’s approach to constitutional structure in *Alden*. Familiar arguments would remain, of course, over whether the constitution should be interpreted so as to maximize continuity with historical traditions or conformity to contemporary notions of political morality. It is not my goal to resolve those arguments, but rather to suggest that Justice Kennedy’s “big ideas” structuralism has broad implications that reach beyond the confines of originalist argument.

IV. EVALUATING *ALDEN*’S STRUCTURAL JURISPRUDENCE

I hope to have demonstrated in the preceding Part that a particular kind of structural argument—that is, structural argu-

246. See Frank I. Michelman, *The Supreme Court, 1968—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 14-16 (1969).

ment based heavily on the abstract political theory of the Framers—has played a central role in the “federalist revival.” In particular, this approach is integral to the jurisprudence of Justice Kennedy, who typically casts the Court’s critical “swing vote” in federalism cases.²⁴⁷ This Part addresses two questions about this form of structural argument. First, does it make a helpful contribution to constitutional interpretation? And second, is it consistent with the “judicial conservatism” generally espoused by the Court’s pro-states majority?

In concluding that “big ideas” structuralism has potential, I do not wish to argue for this approach as an exclusive theory of interpretation or to paper over its potential liabilities. Nor do I wish to take a strong position here on the degree to which this sort of structural argument should be privileged vis-à-vis other forms of constitutional analysis.²⁴⁸ My purpose here is simply to suggest that the distinctiveness of “big ideas” structuralism from other, more well-recognized modalities like textualism and originalism is not itself a reason to reject this approach as illegitimate or unhelpful.

A. *The Advantages of Structural Argument from “Big Ideas”*

I am inclined to think well of Justice Kennedy’s general approach to structural argument. As I have suggested in the preceding Part, the “big ideas” approach tends to address the primary deficiencies of the textualist use of structure and Charles Black’s more open-ended approach. The textualist’s use of structure to illuminate only the meaning of particular textual provisions runs into the problem, as Philip Bobbitt has observed, “that sheer text does not address many situations which the constitutional sense of judges tells them must be addressed.”²⁴⁹ On the other hand, the

247. Compare, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (Justice Kennedy supplying the fifth vote to strike down a federal law), with *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) (Justice Kennedy casting the fifth vote to strike down a state term limits law); see also *supra* notes 196-205 and accompanying text.

248. Cf. BOBBITT, *supra* note 90, at 3-119 (describing six different modalities of constitutional argument, each of which may have varying force in different contexts); Fallon, *supra* note 108, at 1223-24 (arguing that the various modalities must be ranked in a hierarchical order so as to avoid a “commensurability problem”).

249. BOBBITT, *supra* note 90, at 76; see *supra* notes 92-122 and accompanying text.

relentlessly pragmatic emphasis of Blackian structuralism may prove excessively manipulable in the hands of a skilled practitioner.²⁵⁰ These are both forms of the indeterminacy objection: Structured textualism leaves one with no guidance at all in areas where the text runs out, while Blackian structuralism offers a tool of such universal flexibility that it consistently proves too much.

"Big ideas" structuralism offers at least a partial cure for both forms of this ailment. By grounding the institutions created by constitutional text in the political theory of the Framers, this approach offers a recourse to a set of ideas that is more robust than both the text itself and the set of circumstances that may have been specifically foreseen by its drafters. In *Term Limits*, for example, the Qualifications Clauses hardly resolve the question whether states may limit federal terms, and there is little evidence that the Framers ever focused on that question. Yet the political theory of dual sovereignty is more robust than the text or the original debates in the sense that its implications sweep more broadly than the particular questions the Framers addressed. For this reason, it is possible to derive from that theory a particular answer to the question in the case.²⁵¹ In deriving that answer, moreover, it is important that this political theory tradition is external not only to the text but also to the particular facts and exigencies of the case before the court. This fact helps to maintain the confidence that "law" is being applied, rather than simply the preferences of the judge in the form of what makes "practical sense" in the particular situation.

Justice Kennedy's approach yields two other important benefits. First, it downplays technical, lawyer-like arguments about the ins and outs of particular provisions in favor of broad generalities about the principles and purposes of the Constitution. To the extent that the Constitution must serve as a conventionalist "focal point" for citizens,²⁵² the structural approach may help further that goal. This will not always be true: When opinions degenerate into a word by word parsing of particular theoretical

250. See *supra* note 188 and accompanying text.

251. See *supra* notes 200-05 and accompanying text.

252. Strauss, *supra* note 90, at 910.

texts—such as the exchange between Justices Scalia and Souter in *Printz*—they are unlikely to yield principles of broad accessibility.²⁵³ And sometimes the “big ideas” that the Court taps into are themselves archaic, intricate, or both, like the sovereign immunity doctrines debated in *Alden*. But cases like *Term Limits*—in which Justice Kennedy’s concurrence alone rises above the hand-to-hand historical combat to make a general argument of broad accessibility—demonstrates the method’s potential.²⁵⁴ Efforts to ground constitutional holdings in broad constitutional principles thus seem, in the run of cases, likely to increase the accessibility of constitutional reasoning rather than to decrease it.

Second, “big ideas” structuralism may serve as a particularly useful vehicle for “translation” of the original structure established by the text into modern context.²⁵⁵ As I have suggested, the institutional environment created by the Constitution has changed fundamentally over the course of our history, often without any corresponding change in the constitutional text.²⁵⁶ “Translation” seeks to maintain fidelity to the presuppositions of the original constitutional structure in the changed institutional context.²⁵⁷ “Big ideas” structuralism is useful for these purposes because the “big ideas” at the heart of the approach are typically integral to the presuppositions that the interpreter is seeking to maintain. In other words, when Justice Kennedy asks in *Lopez* how we maintain a system of dual sovereignty in the context of a modern integrated economy,²⁵⁸ he is asking precisely the right question for purposes of translation.

253. See *supra* note 230.

254. Contemporaneous news accounts of *Term Limits* understandably emphasized Justice Kennedy’s position and the proportionally small portions of the majority opinion that reflected that position. See, e.g., Linda Greenhouse, *High Court Blocks Term Limits for Congress in a 5-4 Decision*, N.Y. TIMES, May 23, 1995, at A1.

255. See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) [hereinafter Lessig, *Fidelity in Translation*]; Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125 [hereinafter Lessig, *Translating Federalism*].

256. See *supra* notes 168-70 and accompanying text.

257. See Lessig, *Fidelity in Translation*, *supra* note 255, at 1184-85.

258. See *United States v. Lopez*, 514 U.S. 549, 575-80 (1995) (Kennedy, J., concurring).

Finally, recourse to broad arguments of political theory may, in some cases, facilitate efforts to reach consensus on multimember courts. This is frequently *not* the case; as Cass Sunstein has observed, judges “may be unwilling to commit themselves to large-scale theories of any kind, and they will likely disagree with one another if they seek to agree on such theories.”²⁵⁹ But the federalism cases may offer a counterexample. In *Term Limits*, for example, Justice Kennedy abandoned his usual place in the Court’s pro-states majority based entirely on a commitment to the political theory of dual sovereignty.²⁶⁰ And opinions by other Justices in other cases indicate that—the *Term Limits* dissent notwithstanding—the idea of dual sovereignty has more than five votes behind it.²⁶¹ I have thus argued elsewhere that agreement on dual sovereignty at the level of theory may provide a basis for forging a broader consensus on federalism issues at the Court,²⁶² although cases like *Alden* and *Seminole Tribe* stand as disappointing reminders that such agreement may not always be enough.²⁶³ In any event, the role played by theory in at least some of these cases suggests that “big ideas” may sometimes make consensus-building less difficult rather than more so.²⁶⁴

259. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735 (1995); see also *id.* at 1746-47 (suggesting that “judges . . . should not challenge . . . one another’s deepest and most defining commitments”).

260. *New York v. United States*, 505 U.S. 144 (1992), may be another example. In that case, Justice Souter—since a staunch member of the Court’s nationalist minority—was persuaded to join an opinion relying heavily on “big ideas” structural arguments in condemning the commandeering of state legislative bodies. Similar arguments failed to convince Justice Souter in *Printz*, however. See *Printz v. United States*, 521 U.S. 898, 919-23 (1997).

261. See, e.g., *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2238 (1999) (Breyer, J., dissenting for four Justices); *Seminole Tribe v. Florida*, 517 U.S. 44, 150-55 (1996) (Souter, J., dissenting for three Justices); *Gregory v. Ashcroft*, 501 U.S. 452, 457-59 (1991) (O’Connor, J., writing for majority of five).

262. See Young, *State Sovereign Immunity*, *supra* note 48, at 70-72.

263. See *infra* note 328 and accompanying text (noting Justice Kennedy’s failure in *Alden* to accept the implications of dual sovereignty for state sovereign immunity in federal question cases); see also *Seminole Tribe*, 517 U.S. at 150-55 (Souter, J., dissenting) (criticizing the majority’s similar departure from dual sovereignty).

264. Professor Sunstein appears to acknowledge this possibility, although he does not seem to think it will be realized in many situations. See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 50-51 (1996) (“Sometimes seemingly similar cases provoke different reactions, and it is necessary to raise the level of theoretical

The method is not without potential pitfalls, however. As the phrase implies, "big ideas" involve a form of what Professor Sunstein has called "conceptual ascent," by which a relatively particularized issue or principle is "made part of a more general theory."²⁶⁵ Such general theories may be too abstract to be useful; Laurence Tribe has argued, for example, that the Constitution's system of separated and divided powers should be understood not in terms of "what the Framers thought, nor in what Enlightenment political philosophers wrote, but in what the Constitution itself says and does."²⁶⁶ Historical commitments to abstract theories may turn out to be more rhetorical than real; some commentators have argued, for example, that the Framers' rhetorical commitment to a theory of separation of powers did not translate into any coherent approach to concrete institutional design that could be applied to resolve actual cases.²⁶⁷ Such examples suggest that the structuralist interpreter must "pick his spots" with care. Some general theories reflected in the historical materials may turn out to be useful tools of interpretation, while others may only contribute to confusion in constitutional doctrine.

The conceptual ascent associated with "big ideas" may also drive a tendency to treat the Constitution as reflecting a coherent "grand design." I have argued elsewhere that our Constitution—which embodies any number of compromises and contains provisions arising out of markedly different periods in our history—probably does not reflect any such coherence, and that efforts to achieve coherence through interpretation may hinder the Constitution's ability to protect divergent values.²⁶⁸

ambition to explain whether those different reactions are justified or to show that the seemingly similar cases are different after all By looking at broader principles, we may be able to mediate the disagreement.").

265. *Id.* at 51.

266. *TRIBE*, *supra* note 194, § 2-3, at 127.

267. *See, e.g.,* William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263 (1989).

268. *See* Vermeule & Young, *supra* note 103, at 749; *see also* *TRIBE & DORF*, *supra* note 232, at 24 (describing "the fallacy of hyper-integration" of "treating the Constitution as a kind of seamless web"); Sunstein, *supra* note 259, at 1748 (arguing that "any simple general theory of a large area of the law . . . is likely to be too crude to fit with the best understandings of the multiple values that are at stake in that area").

This objection, like the abstraction problem, counsels caution rather than rejection of the structural method. Some "big ideas," like the common law conception of sovereign immunity, remain fairly localized in that they do not purport to unify broad sections of the Constitution. Even more ambitious theories like dual sovereignty are not imperialistic in the sense that they would dictate a particular approach to, say, due process or equal protection. The important point is that the structuralist interpreter should employ "big ideas" where they can shed light on particular aspects of the constitutional structure without imposing a single, grand unified theory on the Constitution as a whole.

Finally, an interpretive method that seeks to resolve particular cases through commitments on more general questions of theory poses certain risks for the Court's decision processes. I have suggested previously that such an approach may sometimes actually facilitate agreement on divisive issues, contrary to Professor Sunstein's theory of "incompletely theorized agreements."²⁶⁹ But there will also undoubtedly be situations where, consistent with Sunstein's theory, disagreement on theory may impede agreement on particular results.²⁷⁰ Moreover, a broad commitment to a particular theory may impede the Court's ability to make incremental adjustments to the relevant constitutional doctrines over time.²⁷¹ Some of the arguably more successful aspects of our state sovereign immunity doctrine—such as the development of exceptions for suits against officers and municipalities, as well as recognition of waivers of immunity—are most readily characterized

269. See *supra* text accompanying notes 259-64.

270. Cf. *TRIBE*, *supra* note 194, § 1-14, at 69 n.70 (arguing that in *Term Limits*, a "potentially narrow question" about the Qualifications Clauses "needlessly escalated into the breathtakingly broad questions of just what the Federal Union really is, to whom it answers, and how it relates to the fifty states that some say comprise it"). Although my own view is that the turn to theory actually *facilitated* agreement in *Term Limits* itself, see *supra* text accompanying notes 259-60, it is easy to see how raising the stakes in this way might undermine prospects for consensus. See Sunstein, *supra* note 259, at 1748.

271. See Sunstein, *supra* note 259, at 1749 (arguing that a "completely theorized judgment . . . would be unable to accommodate changes in facts or values"); Young, *Rediscovering Conservatism*, *supra* note 8, at 653-56, 711-12 (arguing for an incrementalist approach to legal doctrine).

as incremental adaptations in response to other doctrinal developments.²⁷² And while some of these aspects, such as the officer suit doctrine, can be anchored in common law immunity theory,²⁷³ it seems unlikely that a rigid adherence to the common law model would have produced the nuanced set of governmental remedies and immunities that we have.

At this stage, it seems unwise to pursue firm conclusions as to whether the potential liabilities of "big ideas" structuralism outweigh its advantages. The questions raised here require difficult predictions about how this interpretive method will play out if used more often than it has been in the past: Will the turn to theory, in the run of constitutional cases, more often facilitate or undermine agreement among multimember panels? Can we identify "big ideas" that help explicate particular aspects of the Constitution without pushing judges toward grand unified "coherence" theories? To what extent are the other political theories underlying various aspects of the constitutional structure sufficiently concrete, and sufficiently shared among the founding generation, to increase the determinacy of structural interpretation? The minimalist conclusion that I want to advance here is simply that "big ideas" structuralism has shown some promise in the federalism cases, and that under the right circumstances this method may prove a useful addition to the Court's interpretive arsenal.

To say that "big ideas" structuralism may be useful, however, is not to say that it is easy. Even the best interpretive approach can be done well or poorly, and one important test of an interpretive methodology is whether it yields ready criteria for determining when the interpreter has used it correctly. Before addressing that issue in Part V, however, I want to pause a moment to ask a narrower question of ideological consistency.

B. Is It Conservative?

Justice Kennedy's structural approach represents a distinct alternative to the textualism and originalism commonly associat-

272. See *supra* notes 33-35 and accompanying text.

273. See, e.g., *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 308 (1997) (Souter, J., dissenting).

ed with his conservative colleagues on the Court, especially Justices Scalia and Thomas. This section addresses whether this methodological divergence represents a departure from judicial conservatism or, instead, judicial conservatism of a different kind. In a sense, this question raises only an issue of taxonomy, and it is not obvious why we should care whether the label "conservative" is applied to any particular approach. Nevertheless, the inquiry is useful for two reasons.

First, an analysis of what makes Justice Kennedy's approach "conservative" tends to highlight some of the strengths and weaknesses of structural analysis and tie them into broader debates about interpretive methodology.²⁷⁴ Second, and more important, identification of Justice Kennedy's approach as "conservative" highlights the fact that the Rehnquist Court's "conservative" bloc is not monolithic, and that the Justices within it may disagree in important ways about the proper approach to interpretation.²⁷⁵ By contrast, the fundamental agreement in *Alden* between Justices Kennedy and Souter on basic methodology²⁷⁶ may prompt us to question the conventional view of the Court as divided into "conservative" and "liberal" factions. We might also wonder, more broadly, whether there is any necessary relationship between interpretive methodology and the political tendency of substantive results.²⁷⁷

274. See Young, *Rediscovering Conservatism*, *supra* note 8, at 623 (arguing that "confusion about ideological labels has seriously distorted the debate about constitutional interpretation generally").

275. See generally Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 69-95 (1992) (analyzing basic methodological differences among the Court's "conservative" justices); Young, *Rediscovering Conservatism*, *supra* note 8, at 715-24 (same); Michael Stokes Paulsen, *The Many Faces of "Judicial Restraint,"* 1993 PUB. INTEREST L. REV. 3 (same).

276. See *Alden v. Maine*, 119 S. Ct. 2240, 2291 (1999) (Souter, J., dissenting) (acknowledging that "[t]he Framers' intentions and expectations count so far as they point to the meaning of the Constitution's text or the fair implications of its structure") (emphasis added).

277. This basic agreement on methodology characterizes a number of controversial cases that we frequently think of as reflecting a "conservative"-liberal divide. In addition to the federalism cases, see, for example, *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 840, 868-72 (1995) (both majority and dissent taking originalist view of the Establishment Clause).

The case for "big ideas" structuralism as a legitimately "conservative" methodology begins with the classical conservative critique of textualism. That critique—developed most forcefully in late-eighteenth and early-nineteenth-century European circles as a reaction against the French Revolutionaries—did not attack textualism as an interpretive methodology so much as the very idea of a "textual" or written constitution.²⁷⁸ These conservatives preferred the unwritten British "Constitution"—an organic accumulation of customs and institutional practices not delimited by any central written text.²⁷⁹ The present-day inheritors of this tradition tend to advocate interpretive methodologies that emphasize the organic aspects of our own constitutional regime—most importantly, the incremental development of constitutional doctrine through judicial precedent.²⁸⁰

Two aspects of this conservative critique of textuality are important in assessing the structuralism of the current Court. First, the classical conservatives held that any attempt to capture the needs of a political community in a written document would be necessarily incomplete, given the inherently limited capacity of human reason to anticipate and respond adequately to those needs. Second, the conservatives feared the potential of constitutional text to replace the organic and incremental development of society with a radical break from the past. After all, these

278. See, e.g., JOSEPH DE MAISTRE, *Essay on the Generative Principle of Political Constitutions*, in THE WORKS OF JOSEPH DE MAISTRE 147, 161-62 (Jack Lively trans., Schocken Books 1971) (decrying the idea that a political "constitution [could] be written or made a priori," and asserting that a "constitution is divine," thus, "[t]he corpus of fundamental laws that must constitute a civil . . . society [can] never . . . be written").

279. See, e.g., 2 EDMUND BURKE, *Thoughts on the Present Discontents*, in THE WRITINGS AND SPEECHES OF EDMUND BURKE: PARTY, PARLIAMENT, AND THE AMERICAN CRISIS 1776-1774, at 241, 277 (Paul Langford & William B. Todd eds., Clarendon Press 1981) (defending the British Constitution by contrasting "scheme[s] upon paper" with "a living, acting, effective constitution"); Young, *Rediscovering Conservatism*, *supra* note 8, at 665-69 (discussing the Burkean critique of written constitutionalism); see also J.G.A. Pocock, *Burke and the Ancient Constitution: A Problem in the History of Ideas*, in POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY 202, 202-32 (1971).

280. See, e.g., Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 515-23 (1996); Young, *Rediscovering Conservatism*, *supra* note 8, at 691; see also Strauss, *supra* note 90, at 884-90 (describing "common law constitutional interpretation").

thinkers had the French Revolution freshly (and painfully) in mind.²⁸¹

"Big ideas" structuralism responds to each of these criticisms. It begins by recognizing the necessary incompleteness of the written document. It is precisely because the Framers could not have considered every question in advance that the structuralist seeks to identify the broader presuppositions that the Framers held. These presuppositions, which had frequently developed over many generations and through application to innumerable diverse circumstances, are generally more robust than the limited set of possibilities addressed in the text itself. Recourse to such "big ideas" therefore helps us to overcome the human limitations of the founding generation's work.

Structuralism also tends to minimize, or at least mitigate, the written document's break with the past. An opinion like *Alden* recognizes that the Constitution rests on a foundation of ideas and practices which frequently are only reflected—not comprehensively captured—by the document itself. By using the preexisting background to flesh out the structural implications of the Constitution, structuralism serves the basically conservative purpose of preserving that background intact. Structuralism is in this sense similar to the statutory canon holding that statutes in derogation of the common law should be narrowly construed.²⁸²

281. Conservatives like Edmund Burke tended to view the American Revolution as a much less radical departure, see, e.g., 5 EDMUND BURKE, *An Appeal from the New to the Old Whigs in Consequence of Some Late Discussions in Parliament Relative to the Reflections on the French Revolution*, in THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 1, 36-37 (Henry Frowde ed., Oxford Univ. Press 1925) (1791) (arguing that the American Revolution was essentially "defensive" in nature); see also George F. Will, *Why Celebrate this Revolution?*, WASH. POST, July 13, 1989, at A23 (observing that "[t]he American Revolution was a conservative act, arising organically from a tradition it aimed to recapture"), although I am not aware of any comment by Burke on America's venture in written constitutionalism. By 1789, Burke was preoccupied by events in France.

282. Indeed, the common law is a frequent source of the structural principles articulated in cases like *Alden*. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 130-31 (1996) (Souter, J., dissenting) (arguing that state sovereign immunity derives from the common law); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890) (same). *Alden* thus bears a kinship to numerous cases that essentially import common law understandings to define the content of otherwise open-ended constitutional terms. See, e.g., *Burnham v. Superior Court*, 495 U.S. 604, 610-19 (1990) (Scalia, J.) (defining "due process" to include at a minimum those practices sanctioned by settled usage at

This canon, as David Shapiro has pointed out, tends to promote continuity in the law over time.²⁸³

To be sure, "big ideas" structuralism carries some serious risks for conservatives. The Framers were, in some ways, "great gamblers on the power of untested abstractions,"²⁸⁴ and many of those abstractions are precisely the sort of "big ideas" that *Alden's* structuralism may accord decisive weight. Although I have already noted the abstraction problem as a drawback of this method, this vice ought to particularly vex conservatives. In describing the Burkean form of conservatism, for example, Alexander Bickel observed that "[t]rue believers[,] . . . theorists, and ideologues made the French Revolution, and for Burke a politics of theory and ideology, of abstract, absolute ideas was an abomination, whether the idea was the right of the British Parliament to tax the American colonies or the rights of man."²⁸⁵ This conservative distrust of abstract theory, however, is better taken as a caution than a prohibition. Much of Burke's own work, after all, consists of articulating the somewhat inevitable abstract principles immanent in established political institutions.²⁸⁶

A related problem arises from the potentially disruptive impact of abstract "big ideas" on settled practices and institutions. For example, Frank Michelman argued in the late 1960s that the Equal Protection Clause should be construed to reflect John Rawls's theory of distributive justice.²⁸⁷ These arguments are essentially structural in character: What is doing the work of

common law). Here, too, the common law practice offers a more robust set of rules than could be gleaned from parsing the text alone.

283. See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 949-50 (1992).

284. Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5, 9 (1991).

285. ALEXANDER M. BICKEL, *Edmund Burke and Political Reason*, in *THE MORALITY OF CONSENT* 11, 19 (1975); see generally Young, *Rediscovering Conservatism*, *supra* note 8, at 644-47 (discussing Burke's aversion to abstract theory).

286. See, e.g., 5 BURKE, *supra* note 281, at 129 (insisting that "[t]he theory contained in [the *Reflections on the Revolution in France*] is not to furnish principles for making a new constitution, but for illustrating the principles of a constitution already made"); see also Robert M. Hutchins, *The Theory of the State: Edmund Burke*, 5 REV. POL. 139, 139 (1943) (observing that Burke "could seldom leave a question without a fling at the theory of it").

287. See Michelman, *supra* note 246, at 14-16.

interpretation is a particular political theory that the constitutional document is thought to embody. And obviously such an interpretation, if adopted, would produce a fairly radical discontinuity with past practices.

Although "big ideas" structuralism might support such interpretations in principle, this seems unlikely as a practical matter. As I have noted, the structural approach of Justice Kennedy's opinion in *Alden*, as well as of other Justices in cases like *Printz* or *New York*, is firmly originalist: Any broad structural principle—like dual sovereignty or sovereign immunity—must be shown to be rooted in the historical understanding of the Framers. That should rule out anachronistic attempts like Michelman's to read contemporary philosophical notions into the constitutional structure. Moreover, an important part of the Court's structuralist method has been to check the implications drawn from "big ideas" theory against actual historical practice.²⁸⁸ It is therefore not surprising to find that the primary function of structuralist interpretation in the federalism cases has been to rule out innovative practices—term limits, executive and legislative commandeering, attempts to abrogate *state court* immunities—that have rarely been attempted in our history.

The basic agreement on method between Justices Kennedy and Souter in *Alden* raises two final issues. The first, which I can only flag here, is whether there is any necessary relationship between interpretive philosophy (i.e., textualist, structuralist) and substantive ideology (i.e., nationalist, states' rights). The federalism cases suggest that if such a relationship exists, it is not a strong one. In *Alden* itself, Justices Kennedy and Souter each accept the same basic premises of structuralist argument, but end up at diametrically opposed positions on the merits. The same could be said of the opposing opinions in *Printz* and *Term Limits*.²⁸⁹ Other commentators have argued that other interpretive methods show a similar diversity of outcomes. Professor Eskridge has suggested, for instance, that a textualist approach to

288. See, e.g., *Alden v. Maine*, 119 S. Ct. 2240, 2261-62 (1999).

289. Not all the federalism cases can be characterized in this way. In *Lopez*, for instance, it seems fair to say that the dissenters did not consider the structural idea of enumerated powers to be a principle that courts may legitimately enforce. See *United States v. Lopez*, 514 U.S. 549, 608-11 (1995) (Souter, J., dissenting).

statutory construction does not reliably produce politically conservative results.²⁹⁰

If interpretive methodology is not strongly related to outcomes, then the second issue is: What does that mean? Does structuralism's failure to produce politically reliable outcomes show that the method is too constraining simply to implement the interpreter's preferences? Or does it show that in any given case, structuralism is so manipulable that the individual judge can follow his heart? One way to evaluate these conflicting conclusions would be to ask, in *Alden*, whether we can judge one of the two conflicting structuralist opinions to be "better" based on some criteria other than the political palatability of the result. I examine this question in the next Part.

V. STRUCTURAL ARGUMENT AND JUDICIAL CONSTRAINT

Structural argument, like any other form of constitutional interpretation, can be done well or poorly. For this reason it is important to identify criteria for separating good structural arguments from bad ones; indeed, it may be fair to say that the existence and workability of such criteria are themselves the sine qua non of a viable interpretive approach. One important class of criteria—there are surely others—relates to the ability of a given method to constrain the interpreter, so that he is in some meaningful sense implementing the meaning of the Constitution rather than his own preferences.²⁹¹ Responsible judges, like traditional poets, prefer to play tennis with a net.²⁹²

290. See Eskridge, *supra* note 86, at 668-69 (observing that in recent statutory construction cases, the "new textualism" of Justice Scalia had not frequently correlated to politically conservative outcomes).

291. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2, 4 (1971) (arguing that constitutional principles must be neutral both in application and derivation in order to overcome the judges' lack of any majoritarian mandate for their decisions); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 784-85 (1983) ("Interpretivism . . . [is] designed to remedy a central problem of liberal theory by constraining the judiciary sufficiently to prevent judicial tyranny.").

292. In a 1966 interview, Robert Frost commented that "I'd as soon write free verse as play tennis with the net down." THE OXFORD DICTIONARY OF QUOTATIONS 295 (Angela Partington ed., 4th ed. 1996).

The important question thus becomes whether big structural ideas can constrain an interpreter, or whether they inevitably become tools for justifying a result reached in fact on other grounds. Although no source of constitutional meaning constrains absolutely, it is hard to see why structural principles would always constrain less than, say, an exclusive focus on text.²⁹³ Robust historical concepts like sovereign immunity or dual sovereignty, for example, are surely more determinate than some of the Constitution's grand generalities like "due process" or "cruel and unusual."

A key test of a given application of "big ideas," then, is whether the principle is robust enough to contain well-established inherent limitations, and, if so, whether the interpreter has respected those limitations. It is here that Justice Kennedy's opinion in *Alden* falls down. Although respectable historical antecedents were available to ground the majority's "fundamental postulates"—such as the English common law or classical political theory conceptions of sovereignty and sovereign immunity—the majority expressly disavowed those antecedents as well. The result is a sovereign immunity jurisprudence that is wholly untethered and, as a result, subject to no constraint other than the preferences of five Justices.

A. *The Alden Court's Treatment of Sovereignty Theory*

As I have suggested, "big ideas" structuralism seeks to mitigate the problems associated with conventional textualism and originalist approaches by recurring to a set of broader understandings which can be shown to have formed the theoretical backdrop against which the Constitution was adopted. We might ask, for example, "What did the founding generation understand by the term 'sovereign immunity?'" or "Where did the concept come from historically?" Although there is precious little evidence on the precise question of whether Congress was understood to have the power to subject the States to suits in their own courts,

293. See, e.g., Thomas C. Grèy, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 2 (1984) (suggesting that "the text, if read with an appropriately generous notion of context, provides as lively a Constitution as the most activist judge might need").

as the *Alden* majority admitted,²⁹⁴ there *do* turn out to be fairly determinate answers to the more general questions. Sovereign immunity was a well-developed concept by the eighteenth century, with a history of its own and a set of well-established limiting principles.²⁹⁵

When general “postulates” of state sovereign immunity are used to invalidate an act of Congress, as they were in *Alden*, we are entitled to ask where those postulates come from. Justice Kennedy’s opinion vacillates between two answers to this question. The first is the idea, originally articulated in Justice Scalia’s *Union Gas* dissent,²⁹⁶ that state sovereign immunity is a survival from the English common law—a principle that formed part of the preconstitutional legal background and that was not abrogated by the Constitution’s adoption in 1789.²⁹⁷ This view is consistent with the precise question addressed in the ratification debates, that is, whether Article III, *of its own force*, would strip the states of their preexisting immunity.²⁹⁸ *Chisholm* later held that Article III *did* abrogate this immunity, and Justice Iredell’s dissent in that case—which *Hans* and its progeny have interpreted as hav-

294. See *Alden v. Maine*, 119 S. Ct. 2240, 2260-61 (1999).

295. See *id.* at 2247-52; see also 3 BLACKSTONE, *supra* note 206; Borchard, *supra* note 206; Jaffe, *supra* note 206.

296. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29 (1989) (Scalia, J., concurring in part and dissenting in part).

297. See *Alden*, 119 S. Ct. at 2260-61.

298. See *id.* at 2248-49, 2260-61; *Seminole Tribe v. Florida*, 517 U.S. 44, 69-71 (1996). Even the idea that state sovereign immunity predated the Constitution is not strictly correct, however. As Justice Souter pointed out, “[t]he American Colonies did not enjoy sovereign immunity, that being a privilege understood in English law to be reserved for the Crown alone.” *Alden*, 119 S. Ct. at 2271 (Souter, J., dissenting). The best answer to this argument, as Justice Souter also recognized, is that the states *became* sovereign once they had wrested their independence from the Crown, and that they brought this sovereignty with them into the Union except to the extent they surrendered it to the national government. See *id.* at 2282 (Souter, J., dissenting) (“Every State in the Union in every instance where its sovereignty has not been delegated to the *United States*, I consider to be as completely sovereign, as the *United States* are in respect to the powers surrendered.” (quoting *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 435 (1793) (Iredell, J., dissenting))). The short-lived nature of preconstitutional state sovereignty in America suggests caution in importing English-sovereignty concepts to the American Constitution, as the ways in which those concepts would have to be adapted to the new American context had not had much time to settle out by 1789.

ing been adopted somehow through ratification of the Eleventh Amendment²⁹⁹—focused on rejecting this claim.³⁰⁰

Justice Kennedy's opinion in *Alden* contained language emphasizing the common law view. He used evidence about English common law sovereign immunity to refute Justice Souter's argument that such immunity applies only where the sovereign is the source of the law at issue.³⁰¹ Justice Kennedy characterized the history as demonstrating that "no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity."³⁰² But in so doing, he conflated the question whether "the Constitution stripped the States of immunity in their own courts" and the quite different issue whether the Constitution "allowed Congress to subject them to suit there."³⁰³

One might answer "no" to the first question based only on a view that the Constitution did not disturb well-established background legal principles unless it clearly said so—a view much like applying the canon disfavoring statutes in derogation of the common law to constitutional interpretation.³⁰⁴ But to answer the *second* question, one has to evaluate where these preconstitutional common law norms ranked in the post-constitutional legal hierarchy. In other words, were they themselves of constitutional stature? Or could they be modified by duly enacted federal legislation?

299. See *Hans v. Louisiana*, 134 U.S. 1, 11 (1890); see also *Alden*, 119 S. Ct. at 2253-54.

300. See *Chisholm*, 2 U.S. (2 Dall.) at 429-50 (Iredell, J., dissenting subsequently) (arguing that because Article III did not itself strip the States of their preexisting immunity, that immunity should not be held to have been overridden absent a clear statutory directive from Congress). Justice Iredell's dissent did, however, include isolated statements suggesting that such an attempt to override the states' immunity might be unconstitutional. See *id.* at 436-37 (Iredell, J., dissenting). These statements, however, are isolated and tentative, and should not be confused with the main thrust of his dissent.

301. See *Alden*, 119 S. Ct. at 2257. I discuss Justice Souter's argument *infra* notes 305-09 and accompanying text.

302. *Alden*, 119 S. Ct. at 2260.

303. *Id.* at 2261.

304. See, e.g., *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1812) ("The common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose."); see also Shapiro, *supra* note 283, at 936-37 (discussing this canon and its relationship to federalism).

These questions, as Justice Souter demonstrated in *Seminole Tribe*, turn out to have a fairly clear answer. The founding generation spent a great deal of time thinking and debating about the status of common law norms inherited from the mother country.³⁰⁵ Where they decided to adopt those norms—mostly as a matter of state law—they did so through specific reception statutes, and it was clear in every case that those norms remained subject to modification by subsequent acts of the state legislatures.³⁰⁶ The Framers debated whether to include a similar reception provision in the *federal* Constitution, but rejected the idea precisely because incorporation of the common law into the Constitution would render it immune from legislative alteration.³⁰⁷ Instead, the few aspects of the common law that the Framers wished to constitutionalize—like the right to jury trial—were included as specific constitutional amendments.³⁰⁸ It follows that other preexisting principles like sovereign immunity must remain subject to alteration by statute, just like any other common law rule.³⁰⁹ We must therefore look elsewhere for authority to support the Court's *constitutional* principle of state sovereign immunity.

305. See Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791 (1951); Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003 (1985); Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231 (1985); William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393 (1968).

306. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 159-64 (1996) (Souter, J., dissenting); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 90 (1975); WOOD, *supra* note 223, at 299-300; Hall, *supra* note 305, at 796. The state law on common law reception uniformly made clear, in addition, that only so much of the common law was adopted as was adapted to the circumstances of the new nation. See *Seminole Tribe*, 517 U.S. at 136-37 (Souter, J., dissenting); ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 20 (1938); Hall, *supra* note 305, at 805. From this principle, it is easy to argue that sovereign immunity—as a vestige of arbitrary government antithetical to democratic principles—should not be viewed as having survived the Revolution. See *Seminole Tribe*, 517 U.S. at 95 (Stevens, J., dissenting). One need not accept this broader argument in order to agree that sovereign immunity, like any other common law concept, is subject to alteration by subsequent legislative act.

307. See *Seminole Tribe*, 517 U.S. at 104-05 (Souter, J., dissenting).

308. See *Alden*, 119 S. Ct. at 2270 n.1 (Souter, J., dissenting).

309. It is this aspect of the majority's reasoning that undergirds Justice Souter's

Aware, after *Seminole Tribe*, that the English common law was a dead end, Justice Kennedy argued that “[a]lthough the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design.”³¹⁰ That design is vague at best, absent any reference to particular constitutional provisions composing it. Justice Souter comes up with about as charitable an interpretation as possible when he reads the majority’s “references to a ‘fundamental aspect’ of state sovereignty as referring not to a prerogative inherited from the Crown, but to a conception necessarily implied by statehood itself. The conception is thus not one of common law so much as of natural law, a universally applicable proposition discoverable by reason.”³¹¹

Justice Souter’s reference to “natural law” may have been unfortunate in that, while perhaps technically correct, it seems to have distracted the majority from the dissent’s real point.³¹² “Natural law” in common legal parlance has come to signify another form of “brooding omnipresence in the sky”³¹³ that is employed to invalidate legislation that runs against the judge’s own prefer-

comparison, both in *Alden* and in *Seminole Tribe*, of the current Court’s state immunity doctrine to the *Lochner* Court’s conception of substantive due process. See *id.* at 2294 (Souter, J., dissenting); *Seminole Tribe*, 517 U.S. at 166-67 (Souter, J., dissenting). As Cass Sunstein has demonstrated, *Lochner*’s dominant characteristic was its exaltation of common law baselines—such as freedom of contract—to the level of constitutional norms immune from legislative alteration. See Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 882 (1987).

310. *Alden*, 119 S. Ct. at 2256.

311. *Id.* at 2270 (Souter, J., dissenting). Several references in the majority opinion support Justice Souter’s identification of the majority position with “natural law.” See, e.g., *id.* at 2262 (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857), to the effect that “[i]t is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission”); see also *Seminole Tribe*, 517 U.S. at 69 (arguing that the doctrine of *Hans* “found its roots not solely in the common law of England, but in the much more fundamental ‘jurisprudence in all civilized nations’” (quoting *Hans v. Louisiana*, 134 U.S. 1, 17 (1890))).

312. See *Alden*, 199 S. Ct. at 2270 (Souter, J., dissenting).

313. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). Justice Holmes used the phrase to describe not natural law, but the pre-*Erie* “general” common law. The common law, Holmes argued, should be understood not as “not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.” *Id.* (Holmes, J., dissenting).

ences.³¹⁴ Justice Kennedy thus answered the natural law point by insisting that “[w]e seek to discover . . . only what the Framers and those who ratified the Constitution sought to accomplish when they created a federal system. We appeal to no higher authority than the Charter which they wrote and adopted.”³¹⁵ But this response fundamentally misunderstood the dissent’s argument. Justice Souter’s point, I believe, was not that the majority was appealing to a source of law “higher” than the Constitution itself, but rather that the majority’s understanding of the constitutional structure itself incorporated an abstract conception of sovereign immunity drawn from works of classical political theory.³¹⁶

Having reconstructed the majority’s argument in this way, the dissent bent over backwards to address it on its own terms. The majority’s first error, Justice Souter argued, lay in incorporating the wrong historical version of sovereign immunity theory. Because a “natural law” view of immunity was not widely held by the founding generation, Justice Souter contended that the majority should be restricted to the common law version of sovereign immunity.³¹⁷ Such a restriction would, of course, require that the immunity be abrogable by statute.

The second error was wholly independent of the first. Even if the Framers *had* adhered to natural law notions of sovereign immunity, Justice Souter asserted, the *Alden* majority had failed to acknowledge the inherent limits of sovereign immunity within that tradition—that is, the majority had ignored the historical

314. See, e.g., David Dietz, *A Growing Debate on “Natural Law,”* S.F. CHRON., Sept. 13, 1991, at A1, available in 1991 WL 4205178 (describing criticisms of Justice Thomas, prior to his confirmation, for having voiced a belief in this sort of “natural law”); see also *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (reasoning from natural law in this sense).

315. *Alden*, 119 S. Ct. at 2268.

316. See *id.* at 2272 (Souter, J., dissenting) (explaining that Blackstone first drew the distinction between common law and natural law versions of sovereign immunity). The majority may have been helped toward its misunderstanding of Justice Souter’s point by a passage in Justice Souter’s *Seminole Tribe* dissent likening the Court’s nontextual immunity doctrine to Justice Chase’s natural law argument in *Calder*. See *Seminole Tribe*, 517 U.S. at 167 (Souter, J., dissenting).

317. See *Alden*, 119 S. Ct. at 2271 (Souter, J., dissenting) (demonstrating that the founding generation generally adopted the common law version of sovereign immunity over the natural law version).

limitation that "natural law" sovereign immunity could be asserted only in cases where the sovereign was the source of the law sued upon.³¹⁸ In other words, there is no warrant in a system of *dual* sovereignty for state sovereign immunity vis-à-vis a claim based on *federal* law.

The mention of dual sovereignty suggests a possible response to Justice Souter's invocation of classical political theory: Maybe there is something unique in the *American* theory of sovereignty that supports the majority's view of state sovereign immunity. But this avenue is also foreclosed. As Justice Kennedy is fond of saying, "[t]he Framers split the atom of sovereignty" and established "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."³¹⁹ The founding generation reconciled this idea with the older concept of unitary sovereignty by holding that unitary sovereignty was reserved to the people themselves, who in turn parcelled out sovereignty over different areas to the national and state governments, respectively.³²⁰ The federal government, in other words, is "sovereign" only within its delegated sphere of activity, and conversely the states are "sovereign" only within the scope of their reserved powers.³²¹ The practical effect of American sovereignty theory thus mirrors that of the classical "natural law" doctrine: The states cannot possibly be "sovereign" as to a claim brought pursuant to a valid federal law.³²²

It should be obvious by now that I find the majority's reasoning in *Alden* profoundly wrong on the merits. This, however,

318. See *id.* at 2271-73 (Souter, J., dissenting) (showing that the classical writers on sovereign immunity limited the immunity to cases where the sovereign was the source of the law).

319. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

320. See *Seminole Tribe*, 517 U.S. at 151-52 (Souter, J., dissenting).

321. In a world where state and federal power is largely concurrent, a better way of saying this may be that the federal government is sovereign where it has validly acted pursuant to its delegated powers, and the states are sovereign where their authority has not been validly preempted by federal law. See Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 812-15 (1994) (arguing that, in a world of concurrent powers, the boundary between state and federal authority is largely defined by preemption).

322. See *Seminole Tribe*, 517 U.S. at 149-50 (Souter, J., dissenting).

is an Essay about interpretive methodology rather than Eleventh Amendment doctrine. What I hope to show in the next section is that the majority's doctrinal errors flow directly from its failure to appreciate the limitations and potential pitfalls inherent in Justice Kennedy's approach to structural argument. By identifying these errors, I seek to shed some light on how to practice "big ideas" structuralism well, and how to tell when it is being practiced poorly.

B. Taking Ideas Seriously (or Not)

Justice Kennedy's opinion in *Alden* began by taking both ideas and their history very seriously indeed—by suggesting, in fact, that historical concepts like sovereign immunity can be a judicially enforceable part of the constitutional design even where they are not actually embodied in a piece of constitutional text.³²³ Although I have suggested that textualists like Justice Scalia ought to be uncomfortable with the turn from text to structure and abstract theory,³²⁴ I do not mean to attack the latter approaches in the abstract.³²⁵ Nor is it inconsistent for the author of *Romer v. Evans*³²⁶ and the coauthor of *Planned Parenthood v. Casey*³²⁷ to view nontextual norms as judicially enforceable. Indeed, the clash in *Alden* between Justice Kennedy and Justice Souter (another co-author of *Casey*) is an exchange between two Justices in basic agreement about the rich diversity of possible sources for constitutional argument.

323. See *Alden*, 119 S. Ct. at 2254.

324. See *supra* notes 87-122 and accompanying text.

325. Justice Kennedy's approach is hardly a recent concoction of a conservative Court. For example, Laurence Tribe has noted:

Congressional action which treats the states in a manner inconsistent with their constitutionally recognized independent status . . . should be void, not because it violates any specific constitutional provision or transgresses the explicit boundaries of any specific grant of authority, but because it would be contrary to the structural assumptions and the tacit postulates of the Constitution as a whole.

TRIBE, *supra* note 34, § 5-20, at 379.

326. 517 U.S. 620, 635-36 (1996) (striking down a state constitutional provision excluding homosexuals from protection of state antidiscrimination laws).

327. 505 U.S. 833, 869 (1992) (joint opinion of O'Connor, Kennedy, & Souter, JJ.) (recognizing a fundamental substantive due process right to abortion).

Despite this basic agreement, I believe that the debate between Justices Kennedy and Souter can help us identify some basic prerequisites for successful use of the structural method. The key difference in *Alden* emerges in terms of the willingness of each Justice to respect the limitations inherent in the source material with which they are working. As I explained in the previous section, two theories of sovereign immunity were at least arguably available in the historical materials: a common law theory, and a natural law theory. Each of these theories had internal limitations of its own. The common law theory, read in light of the history of common law reception in the new nation, could not be *constitutional* in stature; rather, it would have to remain subject to congressional abrogation. On the other hand, the natural law theory, based on its articulation in eighteenth-century works of political theory known to the Framers, could only apply where a state government was itself the source of the law sued upon; in other words, it could not apply in cases raising a *federal* question.

Each theory thus entailed a major principle—immunity from suit—and an inherent limit on that principle. Fidelity to the source material necessarily means that a court using these theories as a tool of interpretation must take the limit along with the principle; failure to do so would be directly analogous to a textualist reading a particular word out of historical or grammatical context. Where two distinct theories are available in the historical materials, it is equally inappropriate to mix and match. One cannot deploy theory B in order to meet an argument based on the inherent limitations of theory A, then switch gears and employ theory A to refute a claim based on the inherent limits of theory B.

That, unfortunately, is exactly what the *Alden* majority did. For Justice Kennedy, the source of the constitutional state sovereign immunity doctrine of *Alden* and *Seminole Tribe* is never entirely clear.³²⁸ Moreover, because Justice Kennedy never com-

328. See, e.g., *Alden*, 119 S. Ct. at 2256 (suggesting that the distinction between a common law and natural law conception of sovereign immunity is “a false dichotomy” “[a]s should be obvious to all”). A particularly vivid example is the following: “Although the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was

mits to a common or natural law source for the doctrine, he is able to employ it as a free-floating principle that can be adapted to suit the needs of the case. When Justice Souter argued that the Framers would never have held the English common law immunity doctrine to be of constitutional stature, Justice Kennedy disclaimed reliance on the common law and cited language pointing toward a natural law theory. When Justice Souter responded by invoking the principle that natural law immunity does not apply when the State is not the source of the law sued upon, however, Justice Kennedy swapped theories again and cited common law sources refusing to recognize that limitation. One can have it both ways in this fashion only at the cost of stripping the method of its power to constrain.

Justice Souter's handling of the two historical theories provides an instructive contrast. By sticking closer to the original materials articulating the respective theories of sovereign immunity,³²⁹ and by paying attention to distinct bodies of historical evidence concerning the status these ideas had for the founding generation,³³⁰ Justice Souter was able to transform the amorphous concepts raised by the majority into doctrines with determinate limits. We know what those limits are because common law immunity, natural law immunity, the mechanics of common law reception, and the American innovation of dual sovereignty were all working doctrines at the end of the eighteenth century. These ideas had agreed-upon areas of application, and equally well-recognized limitations. And by doing the hard work of recovering the contemporaneous understanding of these ideas, a judge can employ that understanding to determine where and how those ideas should affect contemporary law. By contrast, the *Alden* majority's conception of state sovereign immunity ulti-

universal in the States when the Constitution was drafted and ratified." *Id.* at 2248. Did Justice Kennedy mean the theory embodied in English common law or the "natural law" theory identified by Blackstone, but not particularly prevalent in England? It makes a difference in analysis, if not in outcome, but the Court did not say.

329. *See, e.g., id.* at 2286 (Souter, J., dissenting) (identifying Hobbes, Bodin, and other theorists as the antecedents for the natural law theory).

330. *See id.* at 2270 (Souter, J., dissenting) (discussing the historical evidence on the status of English common law norms as received in the early Republic); *see also* *Seminole Tribe v. Florida*, 517 U.S. 44, 132-42, 160-62 (1996) (Souter, J., dissenting) (surveying this evidence more thoroughly).

mately has an ahistorical, "made up" feel—like a tool newly fashioned to reach a desired result.

In the end, the line of federalism cases considered here may provide too small a sample to yield any firm conclusions about the ability of "big ideas" structuralism to constrain judges engaged in constitutional interpretation. Justice Kennedy's performance in *Alden* yields some support for the view that "[t]he past . . . is in its essence indeterminate," and judges will inevitably "creatively construct" the historical materials instead of finding determinate answers to present questions.³³¹ On the other hand, the need to respect the inherent limitations of the source material exists with respect to *any* method of interpretation,³³² and Justice Souter's analysis in the *Alden* dissent holds out some hope that this constraint can be observed as well with the structuralist method as any other. If I am right that important constitutional values are captured only imperfectly in particular snippets of text,³³³ then the search for viable forms of structural doctrine is surely worth pursuing.

CONCLUSION

The Supreme Court's holding and opinions in *Alden v. Maine* will no doubt generate extensive debate. Given the significance of the issues involved, that debate will undoubtedly focus, as it should, on the implications of state sovereign immunity for Congressional power and the supremacy of federal law. *Alden* has significant implications for constitutional interpretation as well, however. Indeed, it seems fair to say that *Alden*, *Printz*, and *Term Limits* together represent the Court's most sustained effort to develop an interpretive approach based on implications from structure rather than particular constitutional texts.

331. Tushnet, *supra* note 291, at 800.

332. See generally H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987) (discussing similar pitfalls arising under more conventional forms of originalism).

333. See *supra* text accompanying notes 166-70; see also *supra* text accompanying notes 128-32, 142-43, 148-50 (concluding that some textual provisions, such as the Guarantee Clause, "proper" in the Necessary and Proper Clause, and the use of "state" throughout the Constitution, are essentially textual mandates for structural argument).

From this perspective, *Alden* stands both as a hopeful indication of new interpretive possibilities and a sobering reminder of how structural interpretation can go astray. By tapping into the robust "big ideas" that undergird the constitutional structure, *Alden* offers a welcome relief from the endless rehashing of snippets of Constitutional Convention rhetoric or the indeterminate parsing of eighteenth-century dictionaries. But *Alden* likewise warns that structural inferences can become a vehicle for imposing judicial preferences once "big ideas" are severed from their historical nuances and qualifications. These difficulties, in the end, are not significantly different from those attending any of the other modalities of constitutional interpretation, and it should not be surprising to find that here, too, there are no easy cures. For the present it is enough to say that structural interpretation appears to be here to stay, and that the Court's work in this area will benefit from careful and systematic attention to the particular benefits and pitfalls of this approach.