The Limits of Logic in Legal Argumentation

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The question I would like to address in this paper is not particularly new: How can competent lawyers and judges derive opposite conclusions from the same set of facts in the context of the same body of law? In fact, the word "opposite" suggests more symmetry in the situation than actually exists. Given the same facts and the same law, competent judges often arrive at multiple opinions, quibbling with one another on myriad sub-issues and sending conflicting signals to the legal profession and to the public, like a mischievous, multi-armed Krishna directing traffic with the intent to confuse. More to the point, each judge is generally persuaded the she or he is "right" in some absolute and objective sense, and that the others are "wrong," perhaps perversely wrong—even though they all must have been told when they were law students that *nothing* in the law is black and white, that there are no "right" answers to legal questions.

My thesis is this: that lawyers practice Sophism without ever having been trained in it, perhaps without even knowing what it is.

Sophism is the ancient philosophical position that truth is created in language, not discovered through logic or dialectic or scientific evidence. The ambivalent position occupied by Sophists in the history of philosophy is reflected in two words in modern English with opposite connotations: "sophistry" (with connotations of specious logic) and "sophisticated" (with connotations of worldly-wise taste and judgment). In Plato's dialogues the Sophists are derided for teaching future statesmen how to construct arguments without first having discovered truth; hence the word "sophistry." The Sophists' position, however, was a bit more sophisticated: they held, as many modern philosophers do, that truth is often not determinable. And yet we have to make decisions—to decide cases and draft laws—on the basis of evidence that is merely probable and logic that is not entirely conclusive.

In the history of rhetoric, the "Second Sophistic" refers to a group of Sophists who taught a less substantial form of rhetoric in the Roman Empire, beginning roughly with the death of Quintilian and ending with the fall of Rome. During this period, the art of rhetoric was reduced to mere ornament and display; there is no room for a truly philosophical or argumentative rhetoric in a totalitarian state

We now seem to be on the edge of what might be called a Third Sophistic. Continental philosophy is compelling us to recognize what common sense tells us every day: that we make numerous decisions in our private and public lives without the comfort of conclusive evidence; that legal language is rotten with ambiguity; and that legal arguments ignore the rules of classical logic. I say "on the edge" because there is still considerable resistance to Sophism, a fear of tumbling into an abyss of relativism and indeterminacy. There is still a strong Platonic yearning implicit in the practice of jurisprudence, a pervasive hope that truth is absolute and objective and that it can be discovered through dialectic—which, in modern jurisprudence, translates as the adversarial system. And yet, I would argue, the refusal to understand the inevitable implications of Sophism result in even worse consequences. The foundational dreams implicit in conventional legal argumentation are actually dangerous dreams. They imply the possibility of certitude to which no one has a legitimate claim, and that illusion of certitude is often the basis for

destructive ideological conflict. In addition, by failing to understand the role of ideology in legal argumentation, advocates fail to understand the nature of persuasion itself.

Sophism survives in jurisprudence, employed even by reputable practitioners who have no idea they are using it—like Molière's bourgeois gentleman speaking prose unawares. Its survival is neither good nor bad. It is a state of affairs over which no one has control. Sophism survives because it must survive. There are no alternatives to it in the "logosphere"—the sphere of language. And while there may be good reasons to foster the illusion that jurisprudence distinguishes right from wrong with reasoned objectivity, there are also important benefits to recognizing that this is not the case.

I. Logic and Law

Jurisprudence generally produces arguments that seem based on an irrefutable logic, often reducible to a precise syllogism:

> **Alleged Fact:** Respondent has done X
> **Controlling Law:** X is proscribed by a particular law
> **(ERGO)** Respondent must pay the penalty prescribed by law.

The "controlling law" in this formulation could be a statute, a contract, a rule of procedure, a judicial precedent, a provision in a charter or a constitution, or in some cases, equity or common sense. If the respondent fails to discredit the factual allegation or to distinguish the controlling law, penalties will be imposed.

Whenever parties agree that the law is clear and the facts beyond dispute, this simple logic resolves the case:

> **Alleged Fact:** Defendant was caught speeding in a school zone.
> **Controlling Law:** Speeding in a school zone is punishable by a fine.
> **(ERGO)** Defendant must pay the prescribed fine.

When defendants choose to contest this logic, however, they can attack it either on the first line by denying the allegation, or on the second line by alleging some fault in the controlling law: that it is the wrong law, or that it the wrong interpretation of the law, or that the law was improperly enacted, or that the court lacks jurisdiction in the case for any of several possible reasons (e.g., the time, the place, or the gravity of the offence make the charge inappropriate).

When charges are contested, the logic of the law becomes dialectical—a war of apparent syllogisms:

> **Position A: (*An assertion of fact or law*)**
> **Flaw in Position A: (*Denial of fact or distinction of law*)**
> **ERGO: (*Position B, often merely implied, prevails*)**

For example, in *Kimel et al. v . Florida Board of Regents et al.* librarians at a state university argued that they had been discriminated against because of their age, contrary to federal law. Implicit in their complaint was what would seem to be an airtight argument:

Alleged Fact: The University of Montevallo has discriminated against employees on the basis of age.

Controlling Law: Discrimination in employment on the basis is proscribed by a federal statute (the Age Discrimination in Employment Act, or ADEA)

(ERGO) The University of Montevallo must compensate those employees for whatever damages they have incurred as a result of the discrimination.

Before the librarians were allowed to provide evidence for their factual allegations, the respondents argued that although the law was clear, Congress exceeded its authority in passing it, so the plaintiffs had no standing in court. As the case ascended through various levels of appeal, the courts discovered numerous subsidiary issues, each containing others, like infinitely fertile Russian dolls. The plaintiff's syllogistic logic became lost in a forest of inconclusive logic, each apparent syllogism countered by another.

- Plaintiffs argue that Respondents discriminated against Plaintiffs on the basis of age, violating the ADEA. ERGO: Plaintiffs were entitled to back pay and other compensation.
- Respondents argue that the 11th Amendment prevents citizens from suing states. ERGO: Plaintiffs have no standing in court.
- Plaintiffs argue that he 11th Amendment prevents citizens from suing states in which they do not reside, but is silent on whether they can sue the states in which they reside. ERGO: Plaintiffs *do* have standing in court.
- Respondents argue that even though the 11th says nothing to prevent citizens from suing the state in which they reside, the Courts have always interpreted it *as if it did*. ERGO: Plaintiffs have no standing in Court.
- Plaintiffs argue that even if the Courts have always interpreted the 11th Amendment to say what it doesn't say, it still doesn't say it. ERGO: Plaintiffs have standing in Court.
- Respondents argue that if Congress had intended to . . .

The arguments go on and on, like a domestic squabble, each side persuaded by its own semblance of conclusive logic. In fact, granting the assumptions implicit in each argument, they can all be construed as equally valid, thereby violating the principle of contradiction that is the cornerstone of conventional logic. Logic melts, like clockwork in a surreal painting, when applied to real language and real issues. To understand why logic is virtually powerless in legal argumentation we need a new theory of knowledge, or perhaps to rediscover an old one.

II. A Theory of Knowledge and Uncertainty

In normal usage, what we call "knowledge" is generally expressed as an assertion in one of three categories:

Symbolic (definitions and inferences made in artificial language without existential pretensions and indifferent to empirical verification);

Empirical (definitions and inferences made in scientific language with existential pretensions and subject to empirical verification);

Rhetorical (assertions and inferences made in natural language, which is rotten with ambiguity, with existential pretensions that are impossible to prove or disprove empirically).

The relationships among these various categories of assertions can be diagrammed as a set of nesting boxes.

The first category includes all propositions made in pure mathematics, symbolic logic, and computer languages. These discourses have no existential pretensions. They consist of assertions in terms that are defined by convention without any dependence upon empirical data. In Euclidean geometry, for example, parallel lines never meet; but whether there are such things as parallel lines in the physical universe is a matter of no consequence. Deduction is the only mode of logic allowed in this realm.

The second category includes all the things we say to one another that are subject to empirical confirmation: that the weather is cold; that fire burns; that snow melts when the temperature rises. These assertions have existential pretensions: they attempt to say something about the world outside our minds. When assertions like these are systematic, we call them science. But because of the impossibility of measuring anything absolutely, empirical assertions are only relatively precise; and because they are always subject to the possibility of being modified or completely discredited by new empirical data or a different point of view, they are always provisional. Induction is the mode of logic characteristic of this realm. When the language of empirical assertions is functionally deprived of ambiguity either by context (as often occurs in ordinary conversation) or convention (as it is in the symbolic language of science), it is possible to communicate with a degree of confidence that is impossible to achieve at the next level of discourse.

The third category includes all the things we say to one another that are *not* subject to empirical confirmation. It includes all assertions in the modality expressed by "should," or "ought, or other locutions that signal what Kant called the categorical imperative. It includes every prediction that is not guaranteed by statistical probability or the laws of science and every generalization that cannot be supported by rigorous empirical data. Like empirical assertions, rhetorical assertions have existential pretensions; but unlike empirical assertions, their subject matter includes references to things that would cease to exist if there were no language—no logosphere—to spawn them.

There are no hierarchical preferences in this arrangement. In fact, there is a sort of fixed economy among these categories of assertions, certitude and scope inversely proportional to one another.

The concept of a logosphere is essential to this theory of knowledge. Just as life, as it is normally conceived, depends upon an atmosphere to exist, many of the things we talk about in the realm of rhetoric depend upon language—a logosphere—for their existence. There are, for example, no values where there is no language; there are no values on a distant planet or star, where only physical or chemical activities might occur. Values are a product, not of mere consciousness, but that peculiar kind of consciousness that is saturated with language. There are no values in the jungle or in the sea, unless people happen to visit these places. Nor is there any faith or any

doubt. No assertions of belief or value can be made in a universe devoid of linguistic consciousness.

Among academic discourses, ethics, esthetics, politics, and metaphysics all exist in the realm of rhetoric. These are the indefinite discourses, indefinite not because of faulty methodology but because they use natural languages, which are rotten with ambiguity, and because, unlike the other discourses, they include assertions of value and of belief beyond empirical confirmation or refutation. Because natural languages are incurably ambiguous, definitions in rhetorical discourses are always subject to contestation, and assertions are always subject to multiple interpretations. No one can say what "justice" really is, or "truth," or "beauty" in a way that will command the assent of everyone who feels entitled to use those terms. These are not mathematical functions or chemical isotopes or biological species that can be given Latin names and distinguished with precision. This is why scholarship in these areas is always inconclusive, especially when it is most interesting.

Jurisprudence also exists in the logosphere. It cannot occur in a universe without language. And although lawyers constantly take pains to squeeze the ambiguity out of natural language (e.g., by providing definitions of key terms in contracts or statutes), they are doomed to failure, doomed to having the courts intervene to determine what the statute or contract *really* means. Jurisprudence is the application of community values—to the extent that these can be determined—to human behavior. The job of jurisprudence is to make findings of fact when empirical evidence is inconclusive and to interpret laws that at are perpetually dissolving into ambiguity. In law, it is not just the notorious terms—like "reasonable doubt" or "probable cause" that escape definition. The verdict in a given case can depend on the contested definition of even the most ordinary words—like "employee," or "aircraft," or "weapon," or "delivery," or "import"—virtually any word at all.

Two things are worth noticing about the way we read assertions in these various realms of discourse. One is that assertions in symbolic and scientific discourses are "functionally" unambiguous—which is to say that people who are equipped with a knowledge of their conventional language all understand these assertions in the same way. Secondly, we can usually read these assertions without interference from ideological assumptions. When we can read $e=mc^2$, for example, as a representation of a quantitative relationship without any obvious political or ideological implications. But when we read a statement like "All men are created equal," we realize that the definition of every word is contestable, as is the meaning of the assertion as a whole.

Although each of the more inclusive realms can invoke the mode of reasoning characteristic of the less inclusive realm within it (as represented in Figure 1), the precision of that mode is inevitably compromised in its appropriation, contaminated by the less tractable data of a different realm. Mathematical calculations are absolutely precise as long as they remain in the realm of the hypothetical; but their precision is compromised the moment we apply them to the world outside the mind. Similarly, the inductive method of empirical science is severely limited when we apply it to those issues that are generated by language. Science cannot tell us, for example, what a disputed clause in a contract *really* means, or whether a particular act of homicide should be described as manslaughter or murder, or when, exactly, a human fetus acquires civil rights of its own. And jurists are compelled to make these distinctions. They are all that separate us from

chaos and existential absurdity. Making these determinations is the function of rhetorical reasoning, a sort of logic that is quite distinct from conventional syllogistic thought.

III. Sophistic Reasoning

There is no science of critical thinking in the realm of rhetoric, no sure-fire rules for reaching conclusions that all reasonable and well informed people will accept. Rhetoric employs a soft logic, an inconclusive logic, the sort of logic developed by the Sophists. Paradoxically, the most useful catalog of sophistic logic was compiled by Aristotle, who is not considered a Sophist. Aristotle seems to have occupied a position midway between Plato, for whom truth was absolute, and the Sophists, for some of whom truth was a linguistic construction. Nevertheless, it was Aristotle who provided an enduring catalog of the logical patterns that can be abstracted from legal and legislative debates.

For Aristotle, rhetorical reasoning has its own characteristic logic: enthymemes (analogous to deductive syllogisms) and paradigms (analogous to inductive syllogisms). Enthymemes are syllogisms based on premises (often implied rather than stated) that are presumed to be true but are not provable. Paradigms are examples, often narrative examples, either true of fictitious, but suasive as cautionary tales (e.g., the story about the boy who cried "Wolf!") or as patterns of events that might well repeat themselves in the future (e.g., U.S. involvement in World War II , or in Vietnam). Paradigms, in law, often take the form of precedents, in which analogies based on past cases are cited as models for deciding a present case.

Neither line of reasoning is conclusive. Enthymemes are persuasive only if you happen to believe their unprovable premises and if no ideological preferences make it impossible for you to accept their conclusions; and precedents, like analogies, are always distinguishable.

Ever since Plato maligned them in his dialogs, the Sophists have always been regarded as a scandalous lot because they taught their students to recognize that every proposition could be argued both ways. But for the Sophists, this was not so much a philosophical theory as it was a description of the way rhetorical argumentation actually works. The same may be said of modern jurists. We can be scandalized by the repeated inability of the judiciary to agree on the meaning or the application of the law; or we can recognize that given the nature of the language and the logic of the law, judicial disagreements are inevitable. The only thing we have to lose is illusion: the illusion that judges are capable of rising above ideology; the illusion that in a divided decision, some members of the court have it "right" and others have it "wrong."

Any of the compressed syllogisms in the analysis of *Kimel* (above) could serve as an example of an enthymeme. Here is just one example:

Respondents argue that the 11th Amendment prevents citizens from suing states.

> **ERGO:** Plaintiffs have no standing in court.

This is conclusive logic if you happen to believe that the 11th Amendment says what Respondents say it does, and if you happen to believe that the 11th Amendment is the proper controlling law in this situation, and especially if you happen to believe that the federal government's intrusion into state law has been excessive and should be curbed at every opportunity. These beliefs are not

shared by the plaintiffs, however, nor by four of the nine members of the Supreme Court. It is not that there is a defect in the Respondent's logic; it is that, like all rhetorical logic, Respondent's reasoning depends on assumptions that are themselves based on assumptions in a kind of endless regress.

With respect to "paradigms" as evidence, any reference to precedent can serve as an example. For example, when Justice O'Connor provides authority for her reading of the 11th Amendment, she cites a battery of previous case law:

> Although today's cases concern suits brought by citizens against their own States, this Court has long "'understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'" *Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996)* (quoting *Blatchford v. Native Village of Noatak, 501 U.S. 775, 779, 115 L. Ed. 2d 686, 111 S. Ct. 2578 (1991))*. Accordingly, for over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States. *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. ____, ____ (1999) (slip op., at 2-3); *Seminole Tribe, supra, at 54;* see *Hans v. Louisiana, 134 U.S. 1, 15, 33 L. Ed. 842, 10 S. Ct. 504 (1890)*. (O'Connor)

Precedent is a staple of common law. Among other things, it gives the appearance of authority. But it is *never* conclusive, because precedent can always be distinguished. In his dissent, Justice Stevens cites numerous precedents in an effort to show that Justice O'Connor's interpretation of the Eleventh Amendment is just flat wrong:

> The Eleventh Amendment simply does not support the Court's view. As has been stated before, the Amendment only places a textual limitation on the diversity jurisdiction of the federal courts. See *Atascadero State Hospital v. Scanlon, 473 U.S. 234, 286-289, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985)* (Brennan, J., dissenting). Because the Amendment is a part of the Constitution, I have never understood how its limitation on the diversity jurisdiction of federal courts defined in Article III could be "abrogated" [*63] by an Act of Congress. *Seminole Tribe, 517 U.S. at 93* (STEVENS, J., dissenting). Here, however, private petitioners did not invoke the federal courts' diversity jurisdiction; they are citizens of the same State as the defendants and they are asserting claims that arise under federal law. Thus, today's decision (relying as it does on *Seminole Tribe*) rests entirely on a novel judicial interpretation of the doctrine of sovereign immunity, n6 which the Court treats as though it were a constitutional precept. It is nevertheless clear to me that if Congress has the power to create the federal rights that these petitioners are asserting, it must also have the power to give the federal courts jurisdiction to remedy violations of those rights, even if it is necessary to "abrogate" the Court's "Eleventh Amendment" version of the common-law defense of sovereign immunity to do so. That is the essence of the Court's holding in *Pennsylvania v. Union Gas Co., 491 U.S. 1, 13-23, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989)*. (Stevens)

Reliance on precedent is presumed to provide common law with a degree of stability. But as these examples show, precedents are persuasive only to people who find them persuasive. They have no effect on people who are ideologically opposed to their implications.

In addition to these two patterns of soft logic, there are recurrent *topoi* (topes), lines of argument that occur in case after case. Every tope is arguable in both directions without ever reaching the degree of conclusiveness characteristic of pure logic. Listed below are topes that occur in *Kimel* (topes that are likely to be found in any complex legal case). In classical Greece, young men and women would have been trained to recognize a set of topes somewhat like those listed below, and to argue both sides of every one.

"*Intent.*" Intent is often a crucial element in criminal law, and it has to be decided on the basis of signs and probabilities. Signs are observable indices of something beyond the sign itself (smoke indicates fire, fever indicates illness, shouting indicates excitement). Probabilities are assumptions about the normal course of events (e.g., that a person who has been injured will want to be avenged). Jurors are often asked to infer intent—or lack of it—from signs and probabilities like these.

Inferences of intent can also be important in construing the meaning of legal documents. In *Kimel*, O'Connor invokes this tope when she asks "whether the ADEA contains a clear statement of Congress' ***intent*** to abrogate the States' Eleventh Amendment immunity." (Emphasis added). On the basis of textual evidence, she decides that Congress did intend to give individual employees the right to sue the states in which they worked.

But like every rhetorical topos, intent can be argued both ways in any situation. What seems explicit language to O'Connor does not seem so to Justice Thomas, who analyzes the statute, its history, and its cross-references in exquisite detail and concludes (with the concurrence of Justice Kennedy) that Congress did *not* express its intent very clearly, if at all.

"Appropriateness." Justice O'Connor invokes this tope when she asks "whether the ADEA is a ***proper*** exercise of Congress' constitutional authority." (Emphasis added). In deciding that the ADEA was "inappropriate" legislation, he relies on the equally subjective standards of "congruence and proportionality":

> This Court has held that for remedial legislation to be ***appropriate*** under § 5, "there must be a congruence [*5] and proportionality between the injury to be prevented or remedied and the means adopted to that end." *521 U.S. at 520.* Pp. 6-18
>
> The ADEA is not "***appropriate*** legislation" under § 5 of the Fourteenth Amendment. The ADEA's purported abrogation of the States' sovereign immunity is accordingly invalid. (O'Connor)

The notion of appropriateness as a standard has a venerable history in classical thought. It was often expressed as impersonal verbs in Latin (DECET) and in Greek[1]—both meaning "fitting" or "suitable." The Greeks, particularly the Sophists, were aware that appropriateness is a culturally relative concept. To determine what was appropriate in a particular situation they took two other elements into consideration: timeliness and circumstance[2]. These are topes worth studying in the context of modern law since they often play a critical role in judicial reasoning.

In *Kimel*, not surprisingly, Stevens considers inappropriate what O'Connor considers appropriate. Stevens has no problem recognizing the appropriateness of the ADEA as legislation. But he does consider the Supreme Court's interference with Congress to be inappropriate:

> The kind of judicial activism manifested in cases like *Seminole Tribe*, *Alden* v. *Maine*, *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U.S. (1999), and *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. (1999), represents such a radical departure from the ***proper*** role of this Court that it should be opposed whenever the opportunity arises. (Stevens, emphasis added)

Interpretation. Because natural language is inherently ambiguous, the meaning of a text can always be questioned. Lawyers have a standard battery of tools to debate this issue (legislative history, historical dictionaries, textual contexts, historical contexts, contemporary documents, etc.), but normally questions of interpretation cannot be definitively settled.

In *Kimel*, the main interpretive issue is whether the 11th Amendment gives states immunity from suits brought by private citizens within those states. The text of the 11th Amendment would seem to prohibit suits brought by citizens of *other* states, but it does not mention suits brought by a citizen against the state in which he or she lives. It states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Justice O'Connor recognizes that the 11th Amendment is silent on the issue in *Kimel*, but she chooses to rely on precedent instead of plain language to determine what the Amendment means:

> Although today's cases concern suits brought by citizens against their own States, this Court has long "'understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'" (O'Connor)

Justice Stevens is not persuaded. He refers to O'Connor's precedents as "judge-made law," and would prefer that the Court stick to what is arguable plain language in the 11th Amendment:

> There is not a word in the text of the Constitution supporting the Court's conclusion that the judge-made doctrine of sovereign immunity limits Congress' power to authorize private parties, as well as federal agencies, to enforce federal law against the States. . . . The Eleventh Amendment simply does not support the Court's view. (Stevens)

He is not moved by O'Connor's reliance on precedent:

> Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent. First and foremost, the reasoning of that opinion is so profoundly mistaken and so fundamentally inconsistent with the Framers'

> conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court. *Stare decisis*, furthermore, has less force in the area of constitutional law.

"Definition." Lawyers may avail themselves numerous tools to determine the meaning of words in context: legal dictionaries, ordinary dictionaries, statutory definitions, definitions within a contract or other document, definitions inferred from context or from contemporary documents. In the Kimel case, however, Justice O'Connor chooses to define the term "minority" in a way that does not apply to the elderly, even though statistically this group comprises considerably less that half of the population. It is, apparently, her own original definition:

> Old age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it. (O'Connor)

There is nothing wrong with providing an original definition; it is a common occurrence in all sorts of writing outside of science and symbolic logic. Original definitions, however, are successful only if readers find them persuasive. O'Connor's definition of a minority can be challenged on sociological as well as mathematical grounds. We are all part of *some* minority at every point in our lives; and changes in age, health, religion, politics, or wealth can make us part of minority groups to which we have not always belonged. The fact that we *become* part of a minority group does not alter the fact that the group comprises less than half the population, and may, therefore, need protection from the majority.

The other judges in *Kimel* do not indicate whether they find O'Connor's definition of "minority" persuasive. It is, however, a novel definition, and might well be invoked in future cases in which lawyers need to establish that a minority is not a minority.

"*Consequence.*" The consequence tope is sometimes invoked by judges when they have no law to support the conclusion they want to reach. In this situation, they might justify their conclusion by saying, "To rule otherwise would be to invite"—thereafter listing horrible consequences that would ensue from the opposite conclusion.

In his dissent, Justice Stevens points out what he foresees as adverse consequences of the majority's decision in *Kimel* and similar cases:

> *Seminole Tribe* is a case that will unquestionably have serious ramifications in future cases; indeed, it has already had such an effect, as in the Court's decision today and in the equally misguided opinion of *Alden* v. *Maine*, 527 U.S. ___ (1999). Further still, the *Seminole Tribe* decision unnecessarily forces the Court to resolve vexing questions of constitutional law respecting Congress' Section 5 authority.

Although it is common to accuse particular judges of being "result oriented"—i.e., more concerned with their conclusions than with respect for legal or logical processes—in fact, *all* judges are normally result oriented. Sometimes they are concerned with the results as they affect the lives of litigants or victims; at others, they are concerned with how the case

will affect future cases. In *Kimel*, the concern for the litigants is hardly evident; they seem to get lost in a struggle for power between federal and state governments and between Congress and the Supreme Court.

IV. Conclusion

In real debates in natural language, formal logic is next to useless. Pointing out logical fallacies in an opponent's argument can be persuasive, but syllogistic reasoning is incapable of proving anything in a positive way since, as numerous philosophers have pointed out, formal logic can only reach conclusions that are implicit in the presmises.

In rhetorical dialectic, each side views the arguments through a set of beliefs and values that operate as filters, rendering each argument either persuasive or unpersuasive, regardless of its "objective" merits. If anything approaches an objective argument in *Kimel*, it is Stevens' assertion that the 11th Amendment does not prohibit a citizen from suing the state in which he or she lives. There simply is no such prohibition in the text. And yet pointing this out has no effect on readers who, for one reason or another, need to believe otherwise. In legal disputes, each side may pretend to be governed by precedent or law, and it may even believe its own pretension; but in fact each side is motivated by inevitable ideological assumptions and considerations of consequence that are often unexpressed in the text.

In any of the enthymemes identified earlier, each Justice has his or her own ideological baggage. No one knows precisely what goes on in their minds, but it might be inferred from their past history that some members of the Supreme Court think the Federal Government has usurped state prerogatives in recent years, while others think that state governments cannot be trusted to protect the rights of minorities. Ideological baggage of this sort would seem to account for the fact that any given enthymeme will be persuasive to some judges but not to others.

The history of philosophy is littered with examples of failed attempts to escape Sophism: Socrates, Plato, Ramus, Descartes, Kant, the logical positivists in general, and many important scientists in our own time have been obsessed with the possibility of regulating human affairs with the precision of symbolic logic or laboratory science. They have all failed, of course, because the objects of *human* science are not observable as empirical data, and the natural language in which they exist is not subject to the precise methods of definition that are possible in symbolic logic and empirical sciences.

One of the most important paradoxes of legal reasoning, however, is that it maintains a pretense of logic about issues for which logic is always and inevitably inconclusive. This pretense is a legal fiction, perhaps a necessary fiction: societies like to feel that there is an objective stability in the law. Judges, too, sometimes take comfort in the illusion that they are not ideologues, imposing their political preferences on society, but simply instruments of the law, reaching conclusions that the law requires them to reach. Many judges are able to maintain this self-deception even in the face of constant evidence to the contrary

They would find it disheartening to acknowledge that there are no unambiguous sacred texts, no firm and unequivocal principles against which the fickle will of majority rule can be judged and found either equitable or unfair. There are no self-evident truths and no original meanings in the Constitution, a document that meant different things even to those who had a hand in drafting it.

From this perspective it is disturbing to hear Justice Scalia speak, as he often does, about his fidelity to the "original meaning" of the Constitution, as if that meaning were recoverable and he and Justice Thomas had access to it. Their performance in *Kimel* might have persuaded them otherwise: in this case, both Thomas and Scalia read meaning into the 11th Amendment without any words in the text to support it. But the nature of rhetorical persuasion is such that our beliefs can absorb apparent contradictions. In all probability, they would defend themselves against inconsistency with arguments that would be persuasive to themselves and anyone else who needs to believe them.

At the same time, it is odd that Justice Stevens castigates his brethren for "judicial activism"—as if the Court had any choice. Cases are not granted *certiori* unless there are silences, contradictions, or ambiguities in the law. These fissures cannot be repaired; they must be filled—and they will be filled by reading into the texts meanings that, had they been there, would have prevented the case from reaching appeal in the first place. When judges determine what a law means, they are actually *declaring* meaning, not discovering it. Even unanimous decisions are not signs of clear and unambiguous controlling laws; rather, the judges happen to bring identical or compatible assumptions and ideologies to bear in interpreting a law that, at some point in history, either has been or will be found to support more than one interpretation.

If there is no objective foundation for interpreting or applying the law, there is at least some comfort in the process. An independent judiciary maintains balance among various segments of the body politic. The courts will necessarily disappoint us on occasion; the very nature of litigation requires that they will disappoint at least half the litigants, and sometimes more than half. What is truly amazing is how often the courts manage to resolve disputes with the appearance of logic and objectivity. One index of this achievement is that only a very small minority of cases is accepted on appeal, and even fewer succeed. Even then, denial of *certiorari* does not guarantee that a decision is "right"; it just means that a number of judges have viewed the same evidence and arguments from the perspective of compatible assumptions and ideologies.

For this reason, dissent plays an important role in the evolution of the law, even if the dissenters are, like those in *Kimel*, unlikely to persuade the present majority. It seems unfair that the term dissent is applied only to the minority in a decision: "dissent" is a meaningless term except in the context of other people who disagree. It is an accident of language and of Presidential politics that enables Justice O'Connor to speak patronizingly of the dissenters, as if they were merely obtuse:

> the present dissenters' refusal to accept the validity and natural import of decisions like Hans, rendered over a full century ago by this Court, makes it difficult to engage in additional meaningful debate on the place of state sovereign immunity in the Constitution. (O'Connor)

Actually there are *nine* dissenters in the Kimel case: five on one side, four on the other, with several changing sides for one part or another of the decision. All dissents are important to the process. Some may eventually prevail.

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[1] πρεπει

[2] καιροσ; περστασισ