

# Book Review

## Judge Noonan's *J'accuse . . . !*

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John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States*. Univ. of Calif. Press, 2002. 203 pp.

There is no shortage of opinion among members of the legal academy on the Supreme Court's decade-long campaign to strengthen and enforce constitutional limits on the power of the federal government. Generally speaking, the most vocal critics of the Court's path tend to be politically liberal, while conservatives by and large applaud recent decisions. This is something of a role reversal for the two groups. From the 1960s through the 1990s, conservatives were the ones calling for "strict construction," "judicial restraint," and even for limits on the power of judicial review.<sup>1</sup> Now Mark Tushnet argues for "Taking the Constitution Away from the Courts"<sup>2</sup> and Larry Kramer suggests that the modern Court's judicial review is more aggressive than that power articulated by Chief Justice Marshall in *Marbury v. Madison*.<sup>3</sup> The vigor with which the Court has struck down acts of Congress in recent years has spawned more than one symposium on "conservative" judicial activism.<sup>4</sup>

What makes the book under review so interesting is that the critique of the Court's jurisprudence is made by a conservative: John Noonan, a former law professor, now judge on the Ninth Circuit Court of Appeals. Polemical in tone, Judge Noonan's book attacks the Court for issuing rulings that have "narrowed the nation's power" and usurped national legislative prerogatives. He argues strenuously that much harm has been done by the Court's decisions, and that more harm is likely. I summarize and assess Noonan's critique in this essay.

### I.

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<sup>1</sup> See, e.g., Robert BORK, *THE TEMPTING OF AMERICA* (1990); ROBERT H. BORK, *SLOUCHING TOWARD GOMORRAH* (1996); CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* (1986); see also LOUIS LUSKY, *BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT'S RIGHT TO REVISE THE CONSTITUTION* (1975); WILLIAM J. QUIRK & R. RANDALL BRIDWELL, *JUDICIAL DICTATORSHIP* (1995).

<sup>2</sup> MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

<sup>3</sup> See, e.g., Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword, We the Court*, 115 HARV. L. REV. 4, 10-16 (2001) (summarizing the argument).

<sup>4</sup> See, e.g., Symposium, *Conservative Judicial Activism*, 73 COLO. L. REV. 1139 (2002); see also Cass Sunstein, *A Hand in the Matter*, LEGAL AFF. (March/April 2003), at 27 (criticizing Rehnquist Court's "conservative judicial activism") and Orrin S. Kerr, *Upholding the Law*, LEGAL AFF. (March/April 2003), at 31 (disputing Sunstein's characterization of the Rehnquist Court as activist).

John T. Noonan, Jr. is a well-respected federal judge and former law professor, whose book received considerable attention when it was published. Before the Republicans retook control of the House and Senate following the 2002 elections, his book was even the subject of hearings held by the Senate Judiciary Committee. That a sitting federal judge—and one considered conservative at that—would criticize the direction in which the Court was headed make his views particularly worthy of consideration.

Noonan’s argument, in a nutshell, is this. In 1997, the Supreme Court handed down *Boerne v. Flores*,<sup>5</sup> which struck down the Religious Freedom Restoration Act passed by Congress under its power to enforce the Fourteenth Amendment.<sup>6</sup> In doing so, the Court articulated a standard by which future exercises of that power were to be measured. *Boerne* required Congress to demonstrate that remedial measures undertaken to prevent state abridgement of constitutional rights needed to demonstrate both congruence in terms of the level of rights violations occurring in the states, as well as proportionality in its remedial response.<sup>7</sup> The decision was unanimous, and no member of the Court expressed dissatisfaction with this congruence and proportionality criteria.<sup>8</sup> Noonan, however, argues that by doing so, the Court laid the foundation for judicial usurpation of legislative prerogatives by requiring Congress to satisfy this heightened standard when enacting civil rights laws. The Court compounded its error, in Noonan’s view, when it simultaneously began to expand the doctrine of sovereign immunity insulating nonconsenting states from private lawsuits, despite lacking a textual, historical, or structural basis for either the doctrine or its expansion. Thus, the Court privileged the preservation of state sovereignty over notions of federal supremacy. The synergy between *Boerne*, on the one hand, and the sovereign immunity cases on the other, argues Noonan, has produced a dramatic scaling back of remedies available to those whose statutory rights have been violated by state actors, and an inability of Congress (because of *Boerne*’s heightened requirements) to do much to secure those rights. The end result, argues Noonan, is a “narrowing of the nation’s power” to secure the ends for which the Constitution was established, as declared in the Preamble.

Noonan lays out his argument in a series of Socratic dialogues and vignettes describing the cases in which the Court has developed these doctrines, devoting particular attention to the plight of the litigants themselves. Along the way, he invites comparisons between the present Court and past Courts that produce *Dred Scott* and *Lochner*; charges the Supreme Court and the lower court judges that have implemented the Court’s decisions with callous insensitivity to plaintiffs coming to court seeking redress for violation of their rights; and criticizes the Court’s attempts to place limits on Congress’s commerce power.

#### A.

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<sup>5</sup> 521 U.S. 507 (1997).

<sup>6</sup> See U.S. CONST. amend. XIV, § 5.

<sup>7</sup> *Boerne*, 521 U.S. at 533-34.

<sup>8</sup> Three justices dissented over the Court’s unwillingness to revisit the decision in *Smith*. See *id.* at 544 (O’Connor, J., dissenting); *id.* at 565 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting).

*Boerne v. Flores* lays at the heart of Noonan's argument, and he begins his book there. In 1993 Congress passed the Religious Freedom Restoration Act<sup>9</sup> in an effort to correct what it saw as a retreat by the Supreme Court in the protection of the First Amendment's Free Exercise Clause. In 1990, the Court held that generally-applicable laws not specifically aimed at religious exercise or at a particular religious group did not violate the Free Exercise Clause.<sup>10</sup> Such laws were valid as long as they satisfied the lesser standard of "rational basis" (pp. 23-25). The decision was surprising, writes Noonan, because the Court "did so without asking the litigants to brief the issue that the Court found dispositive" (p.24). The decision represented, for Noonan, a surprising reversal for the Court after having emerged in the post-war era as an aggressive guarantor of religious liberty (pp.15-23).

RFRA was passed by Congress as a reaction to the *Smith* case; its passage was grounded in Congress's power, under section 5 of the Fourteenth Amendment, to enforce the guarantees of that Amendment (pp.25-27). RFRA required all state and local laws that affected free exercise rights to demonstrate that they served a "compelling governmental interest" and were "narrowly tailored" to that interest.<sup>11</sup> "Not before RFRA had Congress exercised as to religious liberty the power to enforce conferred upon it by section 5," Noonan writes. When it "used the power the constitution gave it and, doing so, explicitly rebuked the Supreme Court," the question was whether the Court "would . . . accept the rebuke" (p.27)?

According to Judge Noonan, Congress may have had reason to be optimistic. He recounts the history of the Fourteenth Amendment's framing, pointing out that Congress, not the Court, was given power to enforce the provisions of the Amendment. In addition, the Court had previously upheld congressional action to prevent discrimination against Spanish-speaking voters, though the Court had held that action did not violate the Fourteenth Amendment (pp. 28-31).<sup>12</sup>

The Court did not accept Congress's rebuke. In a unanimous decision concerning a church's conflict with a local zoning board over expansion plans, the Court struck down RFRA, holding that Congress had improperly exercised its section 5 power.<sup>13</sup> In doing so, the Court formulated and applied what Noonan calls "unprecedented" requirements that remedies under section 5 be both proportional and congruent to the alleged violations Congress seeks to remedy (p.35). "Who was measure the proportion," Noonan asks, "[i]mplicitly, the answer was 'the court.' What measure would the court use? Implicitly, the answer was 'whatever we find handy'" (p.35). Requiring such proof, Noonan argues, had the effect of treating a coequal branch of government no better than an executive agency "whose work will be set aside on appeal if the court finds the record made by the agency not substantial enough to justify the agency's rulings" (p.6). He finds it ironic that while the Court can establish render a constitutional decision, binding on all, in a

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<sup>9</sup> 42 U.S.C. § 2000bb.

<sup>10</sup> See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>11</sup> 42 U.S.C. § 2000bb-1.

<sup>12</sup> See *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

<sup>13</sup> *Boerne*, 521 U.S. at 536.

single case, Congress is required to doing something similar without demonstrating it acted on the basis of an adequate record (p. 37). *Boerne* represents, for Noonan, nothing less than a bid by the Court for judicial supremacy (pp. 39-40).

## B.

The implications of *Boerne* would only become apparent after the Court expanded the doctrine of sovereign immunity by continuing to narrow the instances in which a private citizen could successfully sue a non-consenting state.<sup>14</sup> After 1996's *Seminole Tribe* case concluded that Congress could not abrogate a state's sovereign immunity through the exercise of its commerce power,<sup>15</sup> only the Fourteenth Amendment's section 5 remained as a source of federal power to waive a state's sovereign immunity.<sup>16</sup> But, as Noonan details in the bulk of his work, the Court made clear that its proportionality and congruence criteria in *Boerne* were the measure for congressional action that waived states' sovereign immunity under section 5 as well.<sup>17</sup> Noonan devotes over half his book (4 chapters) to this intersection between *Boerne* and the sovereign immunity doctrine, and to an examination of the doctrine itself.

Chapters 2 and 3 are written as Socratic dialogues among "Judge Samuel Simple" his law clerks, an old law partner, and some graduate school colleagues, which explore the doctrine of sovereign immunity. More to the point, the chapters represent Noonan's argument that sovereign immunity is a legal fiction with no support in the text, history, and structure of the Constitution, but is a product of "mere" judicial doctrine—a doctrine, moreover, beset with so many contradictions that it barely deserves to be called a legal principle (p.10).

Judge Simple's conversation with his clerks ("Yalewoman," "Boaltman," and "Harvardman") illustrates the contours of the doctrine, its exceptions, and possible justifications for sovereign immunity's existence. A clerk summarizes the doctrine:  
An unconsenting state . . . cannot be sued in federal court or in state court except by the federal government itself. It cannot be sued even though Congress in the exercise of the powers conferred on it in article I has given individuals the right to sue. Its immunity from private suits is, as the court has expressed it, "central to the sovereign dignity" (p.42).

The Judge and his clerks then discuss the various exceptions to this general rule. Federal courts can entertain *habeas corpus* petitions, and suits against state officials who, though

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<sup>14</sup> See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 2.10 (2nd ed. 2002); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3.25 (3<sup>rd</sup> ed. 2000).

<sup>15</sup> *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996).

<sup>16</sup> See *id.* at 65; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976).

<sup>17</sup> See *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 122 S. Ct. 1864 (2002) (sovereign immunity bars federal agency adjudication of dispute between private citizen and nonconsenting state); *Board of Trustees v. Garrett*, 531 U.S. 356 (2001) (legislative record insufficient to support congressional abrogation of state sovereign immunity under Fourteenth Amendment in Americans with Disabilities Act); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (same, under Age Discrimination Act); *Alden v. Maine*, 527 U.S. 706 (1999) (holding Congress may not subject nonconsenting states to suit in state court); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999).

acting in the name of the state and thus state-actors, are deemed not to be the state for sovereign immunity purposes (pp. 43-48).<sup>18</sup> The ability of Congress to waive states' sovereign immunity under section 5 of the Fourteenth Amendment is also discussed (pp. 48-49), as is the power of the Supreme Court to review decisions of a state high court on appeal (p. 49). In addition, the groups discuss the fact that cities, but not states, are "persons" under § 1983 actions, and thus are not extended sovereign immunity (p. 51).

The discussion then turns to the reasons given by the Court for its protection of sovereign immunity. "Protection of the dignity of the state" is presented as the only real reason offered by the Court in defense of its aggressive enforcement, leading Harvardman to complain of the "rather abstract character" of the Court's reasoning that "being sued without consent impairs the dignity of the state" (p. 52). The participants note that when the state is suable under one of the exceptions that it loses this dignity (p. 54). Another reason—shielding the financial integrity of the states—is briefly mentioned, and Noonan returns to that in the next chapter.

Noonan has Yalewoman sum up what is troubling about the Court's insistence that sovereign immunity is a structural principle that deserves judicial enforcement. She complains that the structural reasoning used by the Court is too mutable: "If you don't have a stable text, what do you have? Anybody can guess at the background, the hidden postulates, the presuppositions of a text" (p. 57). Another clerk wonders whether "the court's history"—which presumes that sovereign immunity was intended by the Framers—"like its logic, is screwed up" (p. 57).

The Court's fidelity to history is the question that Judge Simple sets off to discuss with old graduate school friends. Before their discussion, however, the Judge sounds out his old law partner on the relationship between sovereign immunity and state financial protection. His partner assures him that there is very little relationship; that sovereign immunity does not, for example, affect the market for state bonds (pp. 58-59). The Judge's partner suggests that the doctrine is so riddled with exceptions that it is susceptible to manipulation in favor of just about any result a judge would want to reach in a given case (p. 60).

Through the dialogue between Judge Simple and his grad school classmates, Noonan summarizes the history of sovereign immunity's development. The conversation attempts to track the evolution of an amendment that, at bottom Noonan argues, was a rule of interpretation for Article III power (p. 62) into an all-purpose state shield against civil rights suits.<sup>19</sup>

All the participants conclude that *Chisholm v. Georgia*,<sup>20</sup> the case that spawned the 11<sup>th</sup> Amendment, proves that no member of the founding generation had "the idea of the modern justices that sovereign immunity was somehow built into the constitution" (p.

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<sup>18</sup> *Ex Parte Young*, 209 U.S. 123 (1908).

<sup>19</sup> For a summary of the competing interpretations of the 11<sup>th</sup> amendment, see Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1693 - 1708 (1997).

<sup>20</sup> 2 U.S. (2 Dall.) 401 (1794).

66). Moreover, they note “how little immunity stood in the way [of federal power *vis-à-vis* the states] at a time when the states were relatively powerful in relation to the federal government” (p.70). Having disposed of the originalist argument for sovereign immunity, Judge Noonan presses his argument that the doctrine is entirely judge-made. The key case from which the current Court has extended the reach of sovereign immunity is *Hans v. Louisiana*,<sup>21</sup> in which the Court’s reasoning made “the eleventh amendment superfluous” by conceiving of sovereign immunity as a background principle (p. 74). *Hans*, Noonan argues, not the 11<sup>th</sup> amendment is the authority for the Court’s aggressive expansion of immunity: *Hans* is an icon for the modern court. . . . The modern court needs *Hans* as a reference point, a precedent, a reassurance,” one character says (p. 75). To speak of “eleventh amendment immunity” allows the Court “a rhetorical boost. The court seems to be citing the construction when all the court actually has to conjure with is its own judicially created immunity for the states” (p. 73).

Naturally, Judge Simple’s grad school classmates have little good to say for *Hans* itself. In addition to suggestions that Justice Bradley’s opinion represented “law-office” history (pp. 80), and suggestions that Bradley might as well have been interpreting and applying the Constitution of the *Confederate States of America* (pp. 84-85), Noonan has his interlocutors offer up a conspiracy theory—*Hans* was a sop to the South, a bid for reconciliation at a time when Reconstruction was winding down (p. 79). “There’s just nothing to support the view that immunity was part of the constitutional design or inherent in its plan,” Judge Simple concludes (p. 85). “*Hans* and the modern cases,” says another, “seem less a development of doctrine than a corruption of doctrine” (p. 84). “The chief practical effect,” the Judge continues, “is to shield not only state governments but many subsidiary state agencies from complying with federal laws enacted for the good of all.”

## II.

For the last chapters of the book, Noonan leaves dialogue behind and offers an account of several of the Court’s recent sovereign immunity decisions: *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,<sup>22</sup> *Kimmel v. Florida Board of Regents*,<sup>23</sup> and *Board of Trustees v. Garrett*.<sup>24</sup> In something of a departure from the main argument of the book, Noonan also takes on the Court’s decision in *United States v. Morrison*, which struck down a portion of the federal Violence Against Women Act.<sup>25</sup> In each instance, Noonan pays particular attention to the facts and personalities, apparently to make the point that real people are affected by the Court’s decisions, and that the Court (and, by implication, lower courts applying the Court’s decisions) has too often neglected to take the impact of their decisions into account.<sup>26</sup>

In the chapter on *Florida Prepaid*, Noonan recounts how the State of Florida allegedly violated the patent of a man who allegedly invented the concept of prepaid

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<sup>21</sup> 134 U.S. 1 (1890).

<sup>22</sup> 527 U.S. 627 (1999).

<sup>23</sup> 528 U.S. 62 (2000).

<sup>24</sup> 121 S. Ct. 955 (2001).

<sup>25</sup> 529 U.S. 598 (2000).

<sup>26</sup> See *infra* notes \_\_\_ - \_\_\_ and accompanying text.

college savings accounts (pp. 86-91). The Court found that Congress did not have enough evidence, under the standard articulated in *Boerne*, to abrogate states' sovereign immunity and permit suits against nonconsenting states.<sup>27</sup> He criticizes the conclusion: "Why should Congress have considered state remedies for such infringement when federal patent law preempted state law and prevented the states from offering remedies" (p. 93). Moreover, he asks, "[w]as it reasonable to expect 'widespread and persistent deprivation' by the states of patent rights, when, since 1790, federal law had protected patentees" (p. 93)? Only a "bold and lawless state . . . would have intentionally violated the patent law in force . . ." (p. 93). While an injunction could still be obtained, Noonan argues the deprivation of a right to damages left patent-holders with "a mutilated kind of right to property" (p. 94). He also chided the Court for concluding, in a companion case,<sup>28</sup> that the state was immune from suit by the 11<sup>th</sup> amendment without considering that "the state was acting for profit and might be competing unfairly with private persons" (p. 96). If the rationale for protecting sovereign immunity was, as the Court had said, protecting the dignity of the state, Noonan writes that rationale "seemed singularly ill-mated to . . . an insurance scheme" (p. 97).

In *Kimel* and *Garrett* the Court held that Congress did not accumulate sufficient evidence to permit it to abrogate sovereign immunity under federal age discrimination and disability laws.<sup>29</sup> "[O]nce again," Judge Noonan notes, "Congress had failed the *Boerne* tests. The evil[s] had not been established. The legislative response[s] were] disproportionate. The states remained immune" (p. 107). These decisions made clear that "the battle of *Boerne* had been but the opening encounter in . . . a continuing struggle between an innovative and entrenched [majority] committed to an agenda controlled by sovereign immunity and a minority, one vote short, attempting to defend positions once believed to be established" (p. 113). In this embattled minority's dissents, Noonan hears "[t]he spirit of John Marshall" speaking to remind the Court that it was not being sufficiently deferential to Congress and that its lack of deference "was 'reminiscent' of the discredited limitation that the court in the 1930s had put on Congress's power over commerce" (p. 119).

Before summarizing his indictment of the Court, Noonan pauses to critique *United States v. Morrison*,<sup>30</sup> in which the Court held that neither the Commerce Clause<sup>31</sup> nor section 5 of the 14<sup>th</sup> amendment<sup>32</sup> provided Congress with authority to permit individuals to file civil suits in federal court against persons for engaging in violence motivated by the victim's gender (pp. 120-37). Noonan's critique of *Morrison*'s Commerce Clause analysis largely tracks that of the *Morrison* dissenting justices, who accuse the majority of flirting with *Lochnerism* in its disregard for congressional authority (p. 135).<sup>33</sup> But "[n]o appeal to history, no sharp reminder of past follies," he writes, "moved the majority. The dissent consoled itself with the observation that not all

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<sup>27</sup> *Florida Prepaid*, 527 U.S. at 637-48.

<sup>28</sup> *College Savings Bank*, 527 U.S. at 683-86.

<sup>29</sup> See *Garrett*, 531 U.S. at 374; *Kimel*, 528 U.S. at 85.

<sup>30</sup> 529 U.S. 598 (2000).

<sup>31</sup> *Morrison*, 529 U.S. at 617-18.

<sup>32</sup> *Id.* at 621.

<sup>33</sup> *Id.* at 628 (Souter, J., dissenting).

the cases affirming the extent of the commerce power were overruled. The new doctrine was not firmly established. . . . The situation was unstable and could not last” (p. 135).<sup>34</sup> The Court’s 14<sup>th</sup> amendment analysis in *Morrison*, he continues, “replayed the drama of the post-Reconstruction reaction, the court staying with the analysis that doomed the law against the Klansmen and the attempt to give civil rights beyond the vote to the emancipated people of color” (p. 137).

### III.

Noonan’s final chapter summarizes his disenchantment with the Court’s direction and offers a few suggestions for Congress to counteract the effects of the Court’s decisions. While not quite a counsel of despair, Noonan is certainly pessimistic, noting that “[a]s long as the members of the majority remain on the court and stick together . . . the court’s position [on sovereign immunity and remedial action under the Fourteenth Amendment] will be difficult to dislodge” (p. 140). He raises, and dismisses, a couple of congressional remedies as either too uncertain (using the confirmation process), cumbersome (using the Article V amendment process), or “beneath the dignity of the national legislature” (using Congress’s budgetary power to harass the judges by limiting salary increases, cutting funds for clerks, etc.) (p. 141). The best remedy, he writes, “is legislation drafted after careful study of the opinions of the Supreme Court establishing the constitutional criteria and, if possible, using powers not constrained by the Court,” like Congress’s conditional spending power (p. 141).

In the end, Noonan’s final chapter, though, seems directed not so much to Congress as it is to the Supreme Court itself. “The sovereign remedy for ills in a democracy,” he writes, “is exploration and exposition of a problem, leaving it to the good sense of those who can affect its solution to take the necessary steps” (p. 143). Since he’s all but admitted that Congress cannot do much to divert the Court from its present path, he must have a different audience—a judicial audience—in mind.

To that audience, Noonan addresses a series of questions. “How did the court get itself in the awkward posture of monitoring Congress the way appellate courts monitor executive agencies” (p.148)? Why should Congress be accorded only a remedial role in enforcing the 14<sup>th</sup> amendment when that amendment “assigns Congress the role of enforcing its guarantees” (p. 148)? Why won’t the Court defer to legislative and executive interpretations of their constitutional duties (p.149)? Why does the Court insist on enforcing a strong version of sovereign immunity when the concept does not play a prominent role in the text or structure of the Constitution (pp. 151-54)?

Since the questions are raised at the end, not the beginning, they are largely rhetorical. The previous chapters suggest the answers. Congress *should* be allowed to create and enforce remedies of what it perceives to be violations of the 14<sup>th</sup> amendment. The courts, especially the Supreme Court, should defer to those judgments. That the Court has not deferred suggests to Judge Noonan that something other than law is at

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<sup>34</sup> Judge Noonan’s comment that the dissent could take comfort in the fact that “not all” of the precedents confirming the broad sweep of the Commerce Clause were overruled is puzzling. As Judge Noonan surely knows, neither *Lopez* nor *Morrison* overruled *any* of the Court’s prior Commerce Clause decisions.

work. Why does the Court treat Congress like an administrative agency? Why does it continue to enforce sovereign immunity, which Noonan says “is a relic of the past without justification of any kind today” (p. 154)? “[O]nly because the highest court has, by its own will, moved the middle ground and narrowed the nation’s power” (p. 156).

#### IV.

Judge Noonan’s conversational writing style and his use of dramatic narrative devices make *Narrowing the Nation’s Power* a good primer on what is certainly one of the drier topics in constitutional law.<sup>35</sup> Unfortunately, it is a decidedly one-sided primer. In this section, I will highlight problems with the three major portions of his argument: that *Boerne* was nothing more than a bid for judicial supremacy, that sovereign immunity is a fraud on the public that the Court keeps perpetuating, and that other decisions limiting congressional power, like *Morrison*, similarly contain the seeds of our Nation’s undoing. In addition, I critique his proposed corrective to the Court’s doctrinal course and his implication that part of the cure involves judges (particularly appellate judges) paying more attention to the “human face” of the cases they decide.

#### A.

Had *City of Boerne v. Flores* come out the other way, Noonan suggests, the Court could not have led us down this road. Congress should be permitted to “enforce” the 14th Amendment, under its section 5 power, pretty much as it sees fit, with minimal interference from the courts. After all, he notes several places, the Framers of the 14th Amendment left it to Congress, not to the Courts, to “enforce” the provisions of that Amendment (pp. 28, 148). But his point proves too much: the Constitution arguably nowhere explicitly gives power to the Court to review any of Congress’s acts, whether passed under section 5 or under the provisions of Article I. Nor is the Court explicitly given the power to enforce the provisions of the Bill of Rights. That has not prevented the development and legitimization of judicial review.<sup>36</sup> There does not appear to be any evidence that Congress, by reserving to itself the power to enforce the Amendment, intended to deprive the courts of the ability to *interpret* the Amendment and thus to define its content.<sup>37</sup>

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<sup>35</sup> I write this as someone who has written extensively on the dormant Commerce Clause doctrine, which tends to induce dormancy in my students when I teach it.

<sup>36</sup> See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>37</sup> See, e.g., Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 97 (“Nothing is clearer about the history of the Fourteenth Amendment than that its framers rejected the option of an open-ended grant of power to Congress to meddle with conditions within the states so as to render them equal in accordance with its own notions. Rather the framers chose to write an amendment empowering Congress only to rectify inequalities put into effect by the states. Hence the power of Congress comes into play only when the precondition of the denial of equal protection of the laws by a state has been met. Congress’ view that the precondition has been met should be persuasive, but it cannot be decisive.”) [hereinafter Bickel, *The Voting Rights Cases*]; Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 32-40 (1955); but see Michael W. McConnell, *Institutions and Interpretation: A Critique of Boerne v. Flores*, 111 HARV. L. REV. 153, 174-83 (1997) (disputing the Court’s interpretation of history, and conclusions drawn from that history).

Judge Noonan elides the question with which the Court wrestled in *Boerne*: where does “enforcement” of the Amendment end, and the definition of the Amendment’s substantive content begin? While the Court did suggest in *Katzenbach v. Morgan* that Congress could define the content independently and enforce that guarantee, there is history suggesting that language identical to the Necessary and Proper Clause was replaced in response to concerns that section 5 gave too much power over the states to Congress.<sup>38</sup> Moreover, Brennan’s *Morgan* opinion is a bit ambiguous, because it offered an alternative ground for upholding § 4(e) of the Voting Rights Act: that Congress had concluded that non-English speaking Puerto Ricans were being discriminated against in the provision of public services, and needed to exercise the vote in order to elect administrators responsive to their needs.<sup>39</sup>

Even if the language of section 5 was intended to incorporate *McCulloch*’s standard for the Necessary and Proper Clause, there is nothing in *McCulloch* suggesting that courts refrain from *reviewing* exercises of congressional power.<sup>40</sup> It was the Court, after all, not Congress, that proposed the standard of review. Moreover, there is language in *McCulloch* (usually ignored by those invoking it) stressing the need for the end to be within the “letter and spirit” of the Constitution and warning against pretextual congressional power grabs.<sup>41</sup> One might also argue, as the *Boerne* Court did, that permitting Congress to exercise its section 5 power to overturn a particular Supreme Court case and substitute its own interpretation of the Constitution is contrary to separation of powers principles, and undermines the rule announced in *Marbury v. Madison*.<sup>42</sup> Noonan does not stop to consider the ramifications of permitting Congress to independently define the content of the 14<sup>th</sup> amendment’s provisions. One wonders whether critics of *Boerne* would support congressional efforts to protect rights of gun owners against state and local gun control ordinances, on the theory that the right to keep and bear arms is a “liberty” protected by the 14<sup>th</sup> amendment that is being denied to millions around the country;<sup>43</sup> or if Congress defined “persons” protected to include the unborn.<sup>44</sup>

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<sup>38</sup> See *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966); *supra* note 37.

<sup>39</sup> See *Morgan*, 384 U.S. at 652-53, 653-56. Commentators have noted the ambiguity. See, e.g., LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 263 (2000); 1 *TRIBE*, *supra* note 14, at 937.

<sup>40</sup> See Bickel, *The Voting Rights Cases*, *supra* note 37, at 97-98.

<sup>41</sup> See *McCulloch*, 17 U.S. (4 Wheat.) at 423 (“[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.”). Professor Lupu recognized this in his comment on *Boerne*. Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right—Reflections on City of Boerne v. Flores*, 39 *WM. & MARY L. REV.* 793, 816-17 (1998).

<sup>42</sup> *Boerne*, 521 U.S. at 535-36. See, e.g., David P. Currie, *RFRA*, 39 *WM. & MARY L. REV.* 637 (1998).

<sup>43</sup> See, e.g., Brannon P. Denning, *Gun Shy: The Second Amendment as an “Underenforced Constitutional Norm,”* 21 *HARV. J.L. & PUB. POL’Y* 719 (1998) (describing thought experiment involving such a measure).

<sup>44</sup> See, e.g., *The Human Life Bill of 1981*, S.158, 97<sup>th</sup> Cong. (1981). Erwin Chemerinsky addresses this example in *The Religious Freedom Restoration Act is a Constitutional Expansion of Rights*, 39 *WM. & MARY L. REV.* 601, 622-29 (1998).

The point is not that *Boerne* is unassailable, or that the application of the proportionality and congruence tests by the Court in later cases is not open to criticism. But Judge Noonan writes as if no right-thinking person, much less a judge, could question his conclusions. He suggests, moreover, that the Court departed from established understanding of Congress's section 5 power when that "understanding" dates only from the mid-1960s, coming in a decision that has never been free from controversy.

## B.

Of course, *Boerne*'s bite would not be as noticeable without the Court's vigorous enforcement of sovereign immunity, the existence of which as a background constitutional principle, it argues, is signaled (but not coextensive with) the 11<sup>th</sup> amendment's text.<sup>45</sup> There is much to criticize about the Court's current approach to sovereign immunity.<sup>46</sup> One may question the *Seminole Tribe-Alden-College Savings Bank* majority's use of history.<sup>47</sup> One may also question the efficacy of the majority's use of structural arguments in these cases.<sup>48</sup> One may question the Court's continued fidelity to decisions like *Hans v. Louisiana*,<sup>49</sup> in which the Court first held that sovereign immunity extended beyond the text of the 11<sup>th</sup> amendment.<sup>50</sup> One can question the myriad exceptions that have arisen to prevent sovereign immunity from being a shield for state officials' violations of constitutional rights.<sup>51</sup> One may even criticize the unease with which state sovereign immunity rests alongside the popular sovereignty thought to undergird our system.<sup>52</sup> Noonan (or his characters) make many of these criticisms.<sup>53</sup> As with his critique of *Boerne*, however, the criticisms are either overdrawn, or fail to alert the reader to arguments made by noted scholars that support the Court's position.

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<sup>45</sup> See, e.g., *Alden*, 527 U.S. at 728-29 (earlier cases "reflect a settled doctrinal understanding, consistent with the views of the leaving advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself. The Eleventh Amendment confirmed, rather than established, sovereign immunity as a constitutional principle; . . . the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by the fundamental postulates implicit in the constitutional design").

<sup>46</sup> The literature on sovereign immunity is now voluminous. In addition to Carlos Vazquez's helpful primer, see Vazquez, *supra* note 19, the issue receives extensive treatment in two recent symposia. See Symposium, *Shifting the Balance?: The Supreme Court, Federalism, and State Sovereign Immunity*, 53 STAN. L. REV. 1115 (2001); Symposium, *State Sovereign Immunity and the Eleventh Amendment*, 75 NOTRE DAME L. REV. 817 (2000).

<sup>47</sup> See, e.g., *Alden*, 527 U.S. at 760-814 (Souter, J., dissenting); *Seminole Tribe*, 517 U.S. at 100-85 (Souter, J., dissenting).

<sup>48</sup> See, e.g., Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601 (2000).

<sup>49</sup> See, e.g., 134 U.S. 1 (1890). For criticism of *Hans*, see, for example, *Seminole Tribe*, 517 U.S. at 116-30 (Souter, J., dissenting); Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling Hans v. Louisiana*, 57 U. CHI. L. REV. 1260 (1990).

<sup>50</sup> *Hans*, 134 U.S. at 14-15.

<sup>51</sup> See, e.g., CHEMERINSKY, *supra* note 14, at 193-226 (discussing exceptions); 1 TRIBE, *supra* note 14, at 534-35 (same).

<sup>52</sup> See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1466 (1987) (characterizing sovereign immunity as "wholly antithetical to the Constitution's organizing principle of popular sovereignty").

<sup>53</sup> See *supra* Part I.B.

For example, Noonan repeatedly charges that the present sovereign immunity doctrine is largely a function of the evolution (or, Noonan would say, “a corruption” [p. 84]) of judicial doctrine. “The new constitutional decisions,” he writes, “do not depend on any words in the constitution. They are boldly innovative. It was once asserted by some members of the present court that decisions were wrong if they were unfaithful to the text of the constitution or lacked fidelity to the original intent of its framers. These criteria are no longer used by these members who form part of the majority of the present court and denounce ‘ahistorical literalism’ in reading a constitutional provision” (p. 9). “The results I criticize were reached largely . . . by means of doctrinal devices that have no footing in the constitution,” he writes elsewhere (p. 12). One of his characters refers to immunity as “an invention by the Supreme Court by which it exercises supreme power over the system” (p. 60); another refers to *Hans* as the means by which the Court is able to “conjure with . . . its own judicially created immunity for the states” (p. 74).

As Judge Noonan surely knows, however, much of American constitutional law is doctrine, or the result of doctrinal evolution.<sup>54</sup> And it is not just the doctrine of sovereign immunity that is (arguably) court-created, and for which little evidence can be found in the text of the Constitution itself. As Richard Fallon<sup>55</sup> and David Strauss<sup>56</sup> have pointed out, doctrine is the mechanism by which the Court *implements* the Constitution, applying its provisions to concrete cases, and furnishing guideposts for future application by other courts.<sup>57</sup> Would Noonan discard the First Amendment’s “content” test,<sup>58</sup> the Fourth Amendment’s exclusionary rule,<sup>59</sup> the dormant Commerce Clause doctrine,<sup>60</sup> the two-

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<sup>54</sup> David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877 (1996) (“In fact, in the day-to-day practice of constitutional interpretation, in the courts and in public discourse, the specific words of the text play at most a small role, compared to the evolving understandings of what the Constitution requires.”). To acknowledge this is not to endorse this state of affairs. Elsewhere I have suggested that too much focus on the work product of the Supreme Court is not a state of affairs to be desired, and have suggested enlarging the “canon” of materials that constitute the corpus of constitutional law. See Brannon P. Denning & Glenn H. Reynolds, *Constitutional “Incidents”*: *Interpretation in Real Time* 70 TENN. L. REV. \_\_ (forthcoming 2003).

<sup>55</sup> RICHARD H. FALLON, *IMPLEMENTING THE CONSTITUTION* (2000).

<sup>56</sup> See Strauss, *supra* note 54, at 877.

<sup>57</sup> See FALLON, *supra* note 55, at 5-6; see also Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1140 (1994).

<sup>58</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (declaring that “[c]ontent-based restrictions are presumptively invalid”); CHEMERINSKY, *supra* note 14, at 903 (locating content distinction in the “fear . . . that the government will target particular messages and attempt to control thoughts on a topic by regulating speech”) (footnote omitted); see also Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987) (discussing content-neutral/content-based distinction).

<sup>59</sup> See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

<sup>60</sup> See, e.g., CHEMERINSKY, *supra* note 14, at 401 (“There is no constitutional provisions that declares that states may not burden interstate commerce. Rather, the Supreme Court has inferred this from the grant of power to Congress in Article I, § 8, to regulate commerce among the states.”); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 17 (1975) (“To my mind, the most satisfactory explanation of the commerce clause cases is that the Supreme Court is fashioning federal common law on the authority of the commerce clause. That clause embodies a national, free-trade philosophy which can be read as requiring the Court, in limited circumstances, to displace state-created barriers.”). For an analysis of a possible textual hook for the dormant Commerce Clause doctrine, see Brannon P. Denning, *Justice Thomas, the Import-Export Clause, and Camps Newfound/Owatonna v. Harrison*, 70 U. COLO. L. REV. 155 (1998).

tiered structure of review from *Carolene Products*,<sup>61</sup> or even judicial review itself<sup>62</sup> because their authority is derived largely from judicial doctrine? If not, then it seems he should explain what it is about this particular doctrine that makes it especially pernicious, other than that it produces results with which he disagrees.

Related to his criticism of the doctrinal basis for sovereign immunity is Noonan's argument that the presence of so many exceptions to the doctrine renders it illogical and, thus, "barely a principle" at all (p. 10). But what would Judge Noonan say about, for example, the Establishment Clause?<sup>63</sup> The Court's Fourth Amendment cases?<sup>64</sup> State action doctrine?<sup>65</sup> To note that judicially-developed doctrine, articulated across time contains contradictions and tensions is not, I think, a successful indictment of the constitutional principles that courts attempt to implement. With sovereign immunity, moreover, the contradictions and exceptions to which Noonan so vigorously objects serve the purpose of preventing state officials' violations of constitutional rights with impunity—a result of which Noonan should approve. The elimination of the *Ex Parte Young* exception might make the Court's sovereign immunity jurisprudence more consistent, less contradictory, but would Judge Noonan really applaud such harmonization of doctrine by the Court?

His condemnation of the structural reasoning employed by the Court to explain the origins of their sovereign immunity principle is similarly overdrawn. Criticizing the Court's *Seminole Tribe* decision, "Yalewoman," one of the clerks for "Judge Simple" exclaims:

The court may have written magisterially . . . but it spoke mysteriously. What is a "constitutional plan" that is not expressed in the constitution? What is a "background principle" that does not make it into the foreground? What is a "presupposition" that isn't put into words? I thought that modern justices, or at least some of them, were attached to the text of the document they were expounding. If you don't have a stable text, what do you have? It makes the constitution so open to interpretation that, as the old Southern expression goes, you could drive a team of mules through it (p. 57).

One may say similar things about *any* Court decision that employs structural reasoning. Marshall's *McCulloch* opinion,<sup>66</sup> rightly praised as the very model of structural

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<sup>61</sup> See *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). This shift towards vigorous protection of individual liberties, which Judge Noonan celebrates, see pp. 15-23, is itself "judge-made."

<sup>62</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing doctrine of judicial review despite lack of explicit textual authority).

<sup>63</sup> See, e.g., See, e.g., CHEMERINSKY, *supra* note 14, at § 12.2.6.2 (describing confusion resulting from Court's cases regarding public aid to parochial elementary and secondary schools); *id.* at 1194 (noting that the Court's "rulings can be attacked as drawing a series of distinctions that appear to be arbitrary").

<sup>64</sup> See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757-58 (1994) (terming current state of Fourth Amendment doctrine an "embarrassment"; describing exceptions and qualifications imposed by judicial decisions).

<sup>65</sup> See, e.g., Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967) (concluding that state action doctrine is a "conceptual disaster area").

<sup>66</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

reasoning,<sup>67</sup> was criticized at the time for similarly relying on background first principles that many felt found no expression in the Constitution's text.<sup>68</sup> His interpretation of the Necessary and Proper Clause,<sup>69</sup> moreover, was thought similarly to "destabilize" the text at the time.<sup>70</sup> Structural opinions reaching nationalist ends—*McCulloch*, the *Term Limits* decision,<sup>71</sup> some dormant Commerce Clause doctrine cases<sup>72</sup>—or those that protect civil liberties, like *Griswold*,<sup>73</sup> are as vulnerable as the sovereign immunity decisions and others, like *Printz*,<sup>74</sup> that endorse non-nationalist results.

Like any other mode of interpretation, structural analysis can be done well or done poorly.<sup>75</sup> Ernest Young has argued that the Court used structural analysis poorly in the sovereign immunity decisions.<sup>76</sup> However, Noonan's critique—inasmuch as it seems to reject structural analysis *in toto*—is either too broad (if he *is* rejecting all of structural analysis) or incomplete. If he is not rejecting structural analysis completely, then he ought to explain what, precisely, it is about these sovereign immunity decisions that renders the Court's resort to structural analysis particularly objectionable.

Judge Noonan might respond that structural reasoning, doctrinal elaboration of constitutional principle, and even tensions within doctrine itself are not *per se* objectionable, but are deserving of particular condemnation in the Court's sovereign immunity cases because there is no historical basis for the principle the Court has undertaken to vigorously enforce.<sup>77</sup> One of Judge Simple's grad school classmates, upon reviewing the history of the 11<sup>th</sup> amendment, exclaims "[t]here's nothing to support the view that immunity was part of the constitutional design or inherent in its plan" (p. 85). The problem with this statement is that it contradicts statements made earlier in the chapter that the Court in *Hans* had claimed that history and original intent required it to enforce the background principle of sovereign immunity, even beyond the express wording of the 11<sup>th</sup> amendment (p. 80), and offered quotations from Hamilton, Madison,

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<sup>67</sup> See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 27 (1990) (describing *McCulloch* as a "magnificent example of reasoning from the text and structure of the Constitution").

<sup>68</sup> See, e.g., Mark R. Killenbeck, *Pursuing the Great Experiment: Reserved Powers in a Post-Ratification, Compound Republic*, 1999 SUP. CT. REV. 81, 117-25 (discussing the debate over power of Congress to incorporate a national bank).

<sup>69</sup> U.S. Const. art. I, § 8, cl. 18.

<sup>70</sup> Criticisms of *McCulloch* in the Virginia newspapers, and John Marshall's responses are reprinted in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* (Gerald Gunther, ed., 1969).

<sup>71</sup> U.S. Term Limits v. Thornton, 514 U.S. 779 (1995).

<sup>72</sup> E.g., *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851); Brannon P. Denning, *The Dormant Commerce Clause Doctrine and Constitutional Structure* (unpublished manuscript) (on file with author).

<sup>73</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>74</sup> See *United States v. Printz*, 521 U.S. 898 (1997).

<sup>75</sup> Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbra*, 77 B. U. L. REV. 1089, 1120 (1997) ("We do not mean to say that penumbral reasoning is always the answer, or that it always will be used properly or responsibly."); Young, *supra* note 48, at 1664 ("Structural argument, like any other form of constitutional interpretation, can be done well or poorly.").

<sup>76</sup> Young, *supra* note 48, at 1651-75.

<sup>77</sup> See, e.g., p. 57 (clerk questions whether "the court's history [regarding sovereign immunity], like its logic, is screwed up).

and Marshall in support of its conclusion.<sup>78</sup> To get around this fact, Judge Noonan has his impromptu seminar simply declare that *Hans* was so much law office history, and that the quotations from the Framers were either ripped out of context by Justice Bradley (p. 80), or that the Framers themselves said things they did not believe to ensure the Constitution's ratification.

The problem with Noonan's account of the intent of the Framers on the question of sovereign immunity is the same as with his account of congressional enforcement power under the 14<sup>th</sup> amendment: he adopts a particular historical view without even mentioning works of scholars whose views contradict his own. David Currie<sup>79</sup> and Lawrence Marshall,<sup>80</sup> just to name two scholars, have suggested that the Court has gotten it exactly right. Currie has defended *Hans* and writes that those who read the 11<sup>th</sup> amendment as merely a jurisdictional provision are engaged in wishful thinking.<sup>81</sup> Yet none of this is mentioned in the conversations among Noonan's characters or is cited in the notes accompanying the book. This omission is particularly troubling given the serious nature of the charges Noonan levels at the Court. If reasonable people can look at the same evidence and arrive at different conclusions regarding sovereign immunity, is it really fair to then characterize the Court's cases in this area as no more than an exercise of will by the majority? Or consider his implicit argument that by affirming *Hans*'s approach to sovereign immunity, the Court is complicit in the *Hans* Court's contribution to the federal government's abandonment of Reconstruction in its bid for reconciliation with the South (pp. 79, 84-85). While the disputes over whose history is more accurate may make us wary of its regular use, and more willing to hew closely to text and structure, it does not prove Noonan's argument, which is that sovereign immunity is a fraud that a majority of the Court has continued to perpetrate on the country.

### C.

Judge Noonan's critique of the Court's Commerce Clause decisions is even less persuasive. While he implicitly criticizes the majority's distinction between commercial and noncommercial activity, as well as its rejection of any interpretation of the Clause that rendered it essentially limitless (pp. 127-28, 133-34), Noonan does not propose any alternative—other than to hint that the Commerce Clause ought to have *no* judicially-enforceable limits.<sup>82</sup> If Noonan doesn't advocate complete judicial withdrawal from policing the boundaries of congressional power, he at least indicates that once Congress has passed some sort of findings that a regulated activity affects interstate commerce, the Court should defer to that finding (pp. 131-33), which is scarcely different than saying

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<sup>78</sup> See *Hans*, 134 U.S. at 12-15.

<sup>79</sup> DAVID P. CURRIE: THE CONSTITUTION IN CONGRESS: THE FEDERALIST ERA, 1789-1801, at 195-98 (1997); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, at 7-9 (1990).

<sup>80</sup> Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); see also William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989).

<sup>81</sup> CURRIE, THE CONSTITUTION IN CONGRESS, *supra* note 79, at 197.

<sup>82</sup> See pp. 133-34 (referring to the Court's "misguided and ineffectual attempts" to "create categorical enclaves exempt from the commerce power").

that limits on Article I power are not judicially enforceable. Considering Judge Noonan's earlier argument that the framers of the 14<sup>th</sup> amendment intended Congress, not the courts, to enforce it, one might have expected to see a similar argument that the framers of the Constitution intended, through the Commerce Clause, to grant Congress near-plenary power.

The closest he comes to articulating his position is a quotation from *Gibbons v. Ogden*,<sup>83</sup> in which Marshall refers to the commerce power as having "no limitations, other than are prescribed in the constitution" (p. 133). Noonan chooses to read this as supporting the notion that "the commerce power of Congress [was] 'plenary'" and that it had "not been restricted to a category" (p. 133). But Marshall's statement is largely a truism: Saying that Congress's power, to the extent it possesses it, is plenary, means only that, for example, in deciding what powers are "reserved" to the States under the 10<sup>th</sup> amendment, you have to first decide what powers Congress is assigned by Article I, aided by powers implied through the operation of the Necessary and Proper Clause. But the quoted phrase also refers to those limits "prescribed in the constitution." As Marshall also noted in *Gibbons*, the enumeration of powers in Article I presumes something *not* enumerated.<sup>84</sup> John Marshall may have been a nationalist, but he was hardly a New Dealer.<sup>85</sup> Here Noonan seems perilously close to replicating the law office history that he condemned in Bradley's *Hans* opinion.<sup>86</sup> And if precedent occasionally reinforced the view that there were no limits to Congress's power (p. 133-34) why could that not be regarded as the same sort of "corruption of doctrine" that Noonan feels taints the Supreme Court's sovereign immunity jurisprudence (p. 84)?<sup>87</sup>

#### D.

Judge Noonan also presents little evidence that the restrictions on Congress's power under the 14<sup>th</sup> amendment, and the Court's expansion of sovereign immunity, have rendered Congress prostrate at the feet of a mighty federal judiciary, producing irreparable harm to the Nation as a whole. He writes of the "present damage," the "present danger to the exercise of democratic government," and of "much mischief" being done until the Court can be made to change and gravely prophecies " (p. 140). The decisions of the Court "fail to carry out purposes set out by the constitution itself" (p.

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<sup>83</sup> 22 U.S. 1 (1823).

<sup>84</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

<sup>85</sup> See, e.g., Sanford Levinson, Book Review, 75 VA. L. REV. 1429, 1447-48 (1989) (reviewing G. EDWARD WHITE, III-IV THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835 (1988)).

<sup>86</sup> See *supra* notes 77-78 and accompanying text.

<sup>87</sup> See, e.g., Randy E. Barnett, *Is the Rehnquist Court an "Activist" Court?: The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275 (2002) (suggesting that *Lopez* and *Morrison* were a necessary corrective to prior cases suggesting no limits on power of Congress under the Commerce Clause). An additional problem with calls for deference to legislative judgments regarding the scope of their power is that the logic could be extended to restrict judicial enforcement of the Bill of Rights. To those who would argue that the Bill of Rights are explicit limits on legislative power, I would respond that the enumeration of powers in Article I, like other structural features of the Constitution, were likewise seen as a safeguard against legislative overreaching.

143) and cannot “be squared with the announced purposes of our constitution” (p. 12). In his prologue, he asks:

Do decisions that return the country to a pre-Civil War understanding of the nation establish a more perfect union? Are decisions just that shield not only the states but lesser appendages of the states from paying for the wrongs they commit? Do decisions that leave the elderly and the disabled with inadequate remedies for unequal treatment establish justice? Do decisions that dislodge patents, copyrights, and trademarks from assured protection insure domestic tranquility? Do decisions that deny Congress the power to protect the free exercise of religion secure the blessings of liberty? Do decisions that leave women less protected than men achieve any of the constitution’s ends (p. 12).

As is apparent from the structure of this remarkable paragraph, the source for Judge Noonan’s constitutional purposes is the Preamble, and his own sense of “justice,” which is nowhere further defined in the book.

His characterizations of the cases he discusses, and their ramifications are, to say the least, tendentious. Which of the Court’s decisions have sought to reestablish antebellum constitutional principles? The Court’s expansion of its sovereign immunity jurisprudence in *Hans*, dates from 1890. Do decisions like *Garrett* and *Kimel* really leave citizens without any remedy? Congress could, as Noonan later suggests, attempt to compile a record to justify legislation under section 5.<sup>88</sup> Moreover, to get around sovereign immunity, the United States could sue the states directly.<sup>89</sup> Even with sovereign immunity in place, though, plaintiffs can seek an injunction,<sup>90</sup> or sue state officials whose actions violate their rights.<sup>91</sup> He barely mentions that both the Commerce Clause and the Spending Clause remain potent sources of congressional power.

Moreover, one may quibble with Judge Noonan’s assumption that “adequate” remedies have to be *federal* remedies. Many states have antidiscrimination statutes that, in some cases, are broader than those passed by Congress.<sup>92</sup> And the charge that *Morrison* left men more protected than women simply does not wash. Whatever the failings of Virginia Tech in punishing Christy Brzonkala’s attackers, there is no evidence that *state* tort remedies were so inadequate as to require a federal remedy to see justice done. As for the judicial restrictions on congressional power to “secure the blessings of liberty” by “protecting the free exercise of religion,” one might as easily characterized *Boerne* as having protected the integrity of the Article V amendment process by preventing transient congressional majorities from altering substantive constitutional

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<sup>88</sup> See *infra* Part I.A.

<sup>89</sup> See, e.g., CHEMERINSKY, *supra* note 14, at 193; 1 TRIBE, *supra* note 14, at 527.

<sup>90</sup> See, e.g., CHEMERINSKY, *supra* note 14, at 199; 1 TRIBE, *supra* note 14, at 534-35.

<sup>91</sup> See, e.g., CHEMERINSKY, *supra* note 14, at 199-200; 1 TRIBE, *supra* note 14, at 534-35. It is a symptom of the book’s argumentative, as opposed to analytical tone, that Noonan nowhere explains how careful pleading can assist plaintiffs wishing to avoid the traps posed by sovereign immunity. Compare 1 TRIBE, *supra* note 14, at 534-36.

<sup>92</sup> See, e.g., *Garrett*, 531 U.S. at 368 n.5, 374 n.9; *Kimel*, 528 U.S. at 91 n.1, 92. One other possible result from the Court’s decisions is that citizens will demand their states abolish or limit sovereign immunity. See, e.g., ILL. CONST. OF 1970, art. XIII, § 4 (abolishing sovereign immunity “[e]xcept as the General Assembly may provide by law”).

rights by majority vote. Nevertheless, Noonan writes as if the harm is self-evident, if only because the limitations on the powers of Congress resulted in individuals—many of whom are sympathetic—losing in court. This brings me to the final aspect of Judge Noonan’s indictment that deserves comment.

#### E.

Judge Noonan devotes a large portion of his book to describing the facts of the various cases that he criticizes—at least as much (if not more) attention is paid to personalities than to the legal analysis of the cases.<sup>93</sup> One gets the sense, especially during his description of the facts in *Morrison* (pp. 120-26) that he faults the courts, particularly the courts of appeals and the Supreme Court, for *not* devoting much attention to the parties, focusing instead on the legal niceties of the cases. “Almost complete indifference to the individual plaintiffs has been accompanied in [the Supreme Court’s] cases by an absence of interest in the number of persons negatively affected by the court’s rulings” (p. 145). Facts, he writes in the conclusion, “should drive cases,” not abstract rules (p. 144). “At the center of facts are the persons who brought the facts into existence or responded to them. Forget the facts, and you forget the persons helped or hurt by the decision” (p. 144). To put it another way: “Let me state the facts, experienced counsel might say, the law will follow” (p. 144). And Judge Noonan labors mightily to keep the facts—by which he means “persons negatively affected by the court’s rulings”—before the reader.

But does he really mean to criticize courts (especially lower courts) for not deciding cases according to the amount of sympathy that the litigants are able to elicit from the bench? Such individualized adjudication seems to be, at best, in tension with rule of law values like neutrality, consistency, and predictability. At worst it utterly subverts them. Such critiques play to the simplistic urges of editorial page editors who have recently taken to opposing judicial nominees because their rulings evidence “insensitivity” to particular classes of plaintiffs, because they rule against them or in favor of corporate defendants on the basis of legal “technicalities.”<sup>94</sup> Such criticisms display an astounding indifference to the underlying merits of judges’ rulings, focusing instead on a judge’s “box score” in favor of women, civil rights litigants, corporations, law enforcement, and the like. It is amazing that a sitting judge and former academic would give aid and comfort to those employing such uninformed assessments. If partisan politics has not already rendered the judicial appointments process positively radioactive in its toxicity, then the continuation of these critiques that Judge Noonan seems to endorse would certainly contribute further to the complete breakdown of the process.

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<sup>93</sup> Cf. JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* (1976). I thank my colleague Pat Kelley for pointing out that this is a long-running theme in Judge Noonan’s writings.

<sup>94</sup> See, e.g., Stephen B. Presser, *Time to Bury Borking*, CHI. TRIB., Sept. 8, 2002, at 11 (offering examples and criticizing the trend); Jesse J. Holland, *Senate Approves Owen’s Nomination to Appeals Court*, WASH. POST, March 27, 2003 (quoting Sen. Ted Kennedy as opposing Texas Supreme Court Justice Pricilla Owen’s nomination to a federal appeals court seat because “It continues to be clear that Justice Owen is one of the most frequent dissenters . . . in cases involving workers, consumers, and victims of discrimination”).

## V.

And what should be done to a Court so obviously out of touch with the values of the Constitution, so intent on arrogating power to itself at the expense of Congress, so indifferent to the plight of real people who have to live with the consequences of the Court's willful decisions? Noonan's answer is . . . not much. Perhaps the most surprising aspect of *Narrowing the Nation's Power* is how pusillanimous the "sovereign remedy" to the problem of the Rehnquist Court actually is. After dismissing as too uncertain, cumbersome, or petty, a variety of weapons at Congress's disposal—from amendment to limiting judges' salaries<sup>95</sup>—he suggests that the best remedy "is legislation drafted after careful study of the opinions of the Supreme Court establishing the constitutional criteria and, if possible, using powers not constrained by the Court," like Congress's conditional spending power (p. 141).

For someone whose just heaped scorn on the Court and its recent decisions, this strikes me as remarkably timid. After criticizing the Court for usurping legislative prerogatives, Judge Noonan in the end counsels Congress to acquiesce to judicial supremacy, even though he thinks it unjust and harmful to the Nation. Attempts to reclaim power, Noonan says will either be futile or "beneath the dignity of a national legislature." Moreover, since Noonan asserts that doctrines like sovereign immunity and the "proportionality and congruence" test of *Boerne* can mean whatever judges want them to mean in particular cases, careful drafting and close study of the Court's cases are unlikely to furnish very effective guides for Congress.

While his reluctance to advocate drastic measures might be borne of a sense of judicial propriety, it is rather coy of him to restrain himself at the conclusion of his attack on the Court. It could hardly be thought more disrespectful of the present Court to urge Congress to pass, and states to ratify, a constitutional amendment repealing the 11<sup>th</sup> amendment or barring states from invoking sovereign immunity, than it is to accuse the Justices of fraud and usurpation of legislative power. Moreover, if the course on which the present Court has embarked is indeed as harmful to the Nation as Judge Noonan suggests, and if he truly feels that judges and justices derogate from our national values to the extent that they enforce the Court's erroneous decisions, then it seems incumbent upon the Senate to inquire into the view of nominees on this matter, and to reject those who do not provide satisfactory answer or assurances during the confirmation process.

On the other hand, it might be, as Judge Noonan testified before the Senate Judiciary Committee, that both the error of the Court's way in these decisions as well as the quantum of harm to the country resulting from those decisions, are matters over which reasonable people might disagree. If so, then the tentative nature of his sovereign remedy makes sense. The Court will either be convinced of the error of its ways, or as a result of dialogue one of the justices will change her mind, or, perhaps, a new majority will form following the appointment of new personnel. If one takes this view, then there is no need for Congress to begin resurrecting traditional court-bashing strategies like jurisdiction-stripping bills, Court-packing plans, or appointments embargoes. But if this

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<sup>95</sup> See *supra* Part III.

is the reason for the pulling of punches that marks Judge Noonan's conclusion, then one wonders why what came before—the excoriation of the cases and the none-too-subtle accusations that judicial will (as opposed to legal analysis and interpretation, sincerely applied) lay behind the decisions—was not similarly tempered with at least an acknowledgement that there were other sides to the issue and that right answers were not necessarily apparent?

## VI.

While Judge Noonan's book avoids some of the more inflammatory rhetoric that is characteristic of popular attacks on the Supreme Court,<sup>96</sup> there is enough there that it blunts the palpable hits that he scores against the evolution and expansion of sovereign immunity as a principle of constitutional law. Moreover, the good points he does make would have been strengthened had he acknowledged the other side of the position he embraces and not attempted to characterize the Court's recent decisions as near-fraudulent and mere exercises in judicial will. While his engaging writing style and clear explanation of complicated subject matter are helpful as an introduction to the issues, his analysis, unfortunately, does little to advance either the debate over the Court's approach to the 11<sup>th</sup> amendment and sovereign immunity or the renewed debate over the proper scope of judicial review in a 21<sup>st</sup> century democracy.<sup>97</sup>

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<sup>96</sup> See, e.g., VINCENT BUGLIOSI, NO ISLAND OF SANITY: *PAULA JONES v. BILL CLINTON*: THE SUPREME COURT ON TRIAL (1998); VINCENT BUGLIOSI, THE BETRAYAL OF AMERICA (2001); ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001); MARTIN GARBUS, COURTING DISASTER: THE SUPREME COURT AND THE UNMAKING OF AMERICAN LAW (2002). Of course, some of the works listed *supra* note 1, which railed against a liberal Supreme Court are similarly polemical and given to rhetorical excess.

<sup>97</sup> For a more thoughtful, evenhanded critique, see Mark R. Killenbeck, *The Physics of Federalism*, 51 U. KAN. L. REV. 1 (2002).