Narrowing the Nation's Power: *The Supreme Court Sides with the States* by Judge John T. Noonan

*By John Eastman**

Even before opening Judge John T. Noonan, Jr.'s latest book, *Narrowing the Nation's Power: The Supreme Court Sides with the States*,[1] one suspects that something is amiss. The cover photo is a picture of an American flag draped backwards, not the kind of mistake that the author of *The Lustre of Our Country: The American Experience of Religious Freedom*,[2] which meticulously traced the original understanding of the Constitution's religion clauses, should have made. But then, at first blush, there is something backwards about a conservative judge such as John Noonan criticizing the conservative Rehnquist Court's recent federalism decisions, the most successful effort to restore the Constitution's original limits since the New Deal virtually annulled them.

The decisions by the high Court that come under Judge Noonan's scathing attack read like a list of conservative favorites. *Seminole Tribe of Florida v. Florida*[3] and *Alden v. Maine*,[4] in which the Supreme Court crafted a doctrine of state sovereign immunity designed to help limit the reach of the federal government, demonstrate for Noonan a "federalism" that is really a "confusing misnomer" for the "old [secessionist] slogan 'states' rights.'"[5] *United States v. Morrison*,[6] in which the Supreme Court struck down provisions of the Violence Against Women Act as exceeding Congress's power to regulate commerce among the states, "leave[s] women less protected by the law than men," in Noonan's world.[7] *City of Boerne v. Flores*,[8] in which the Court struck down the Religious Freedom Restoration Act as exceeding Congress's power to implement the provisions of the Fourteenth Amendment, amounts to judicial activism, according to Noonan, an example of the Court being "boldly innovative."[9] And the series of cases decided by the Court restricting the reach of the Americans with Disabilities Act leaves the elderly and disabled with inadequate remedies for "unequal treatment," he charges.[10] Noonan even goes so far as to compare the Court's recent federalism decisions to the notorious *Dred Scott v. Sandford*[11] and, apparently for Noonan, the equally notorious *Lochner v. New York*[12] (which, according to Noonan, "had a negative effect on the conditions of employment for over a quarter of a century")[13] and *Carter v. Carter Coal Co.*[14] (which, heaven forbid, "nearly brought the New Deal to an end").[15]

With such an assault on the conservative citadel, one might be tempted simply to write off Judge Noonan as yet another Earl Warren or Harry Blackmun, judges who "evolved" toward a more "enlightened" liberalism (and away from any original understanding of the Constitution) during their tenure on the bench. Indeed, some of Noonan's premises are so contrary to the original understanding of the Constitution that his characterization of the Court as a "hitchhiker of history"[16] seems more apt when applied to his own claims. Noonan treats the Constitution's preamble as a broad grant of power, for example, thus rendering redundant the entire list of Congress's powers in Article I, section 8, and rendering a nullity the fundamental constitutional doctrine of limited, enumerated powers. He mistakenly notes, in criticizing the Court's Free Exercise of Religion decisions in *Employment Division v. Smith*[17] and *City of Boerne*,[18] that when "Congress adopted the Bill of Rights, . . . the free exercise of religion was set out as our first freedom,"[19] apparently overlooking the fact that the First Amendment only became the *first* amendment because the two amendments actually proposed by Congress before it were not ratified.[20] And, in criticizing the Court's decision in *Morrison*, Noonan accuses the Court of ignoring an "appeal to history,"[21] but the history to which Noonan looks is the revolution of 1937, when the Court threw off the supposed shackles of the Constitution's limits on federal power, not the deliberations of 1787, during which those limits were so carefully wrought.

Still, there are two aspects of Judge Noonan's critique of the Court's recent federalism decisions that warrant careful consideration. The more obvious is his criticism of the Court's Eleventh Amendment state sovereign immunity decisions.[22] Couched in a wonderfully humorous exchange between a mythical federal appellate judge, Samuel Simple, and his all-star team of law clerks, Yalewoman, Boaltman, and Harvardman, Noonan decimates the reasoning of the entire line of Eleventh Amendment decisions beginning with *Seminole Tribe*,[23] and its historical building blocks, *Ex Parte Young*[24] and *Hans v. Louisiana*.[25] "It's a logical mess," Noonan's character Yalewoman notes, "and it's really intolerable. How can people have respect for a system that violates the laws of logic in one of the system's most important operations?"[26]

Logical mess indeed. The essence of the Court's modern state sovereign immunity doctrine is that the states entered into the Constitution's more perfect union with their sovereignty intact, a sovereignty that includes the old Hobbesian notion of governmental immunity from suit unless there is an express waiver of that immunity (in contrast to the Lockean view adopted by the founders, which recognized the people as sovereign and the government as mere agent).[27] What this means is that the states cannot be sued even for violating federal law duly enacted pursuant to powers expressly and, in some cases exclusively, granted to the federal government in Article I of the Constitution.[28] This, supposedly, because the Eleventh Amendment to the Constitution so commands.

What the Eleventh Amendment actually provides is

vastly different, of course, particularly when read in light of the specific controversy over the Supreme Court's decision in *Chisholm v. Georgia*[29] that produced it: "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."[30] On its face, the amendment says nothing about suits against a state by its own citizens, yet that non-textual interpretive gloss was added a century later in the 1890 case of *Hans v. Louisiana*.[31] Additionally, the amendment seems designed simply to counteract the holding in *Chisholm*, and is therefore properly read as merely a statement about the inability of federal courts to entertain state law claims against the states based on the diversity of citizenship, not a pronouncement of state immunity from suits based on federal statutory or constitutional law. The Court has long held to the broader view, however, and as a result was forced in the 1908 case of *Ex Parte Young*[32] to create what it has subsequently termed an "obvious fiction," namely, that suits to enjoin state officers from enforcing unconstitutional state laws do not violate the principle of state sovereign immunity.[33] Such suits, which can only be brought against officers of the state, are permissible, according to the Court, because of the fiction that when acting in defense of unconstitutional state laws they are not really officers of the state.[34]

Quite apart from the utter incoherence of the Court's recent decisions, *Seminole Tribe* and its progeny are also problematic because, being based on a non-textual, extra-constitutional theory of inherent immunity, the *Seminole Tribe* majority has placed at risk the broader project of restoring some semblance of the rule of law to constitutional adjudication—leaving itself open to the otherwise unfair charge that its resort to original understanding is simply driven by the majority's preferred results. By criticizing the sovereign immunity cases on the Court's own originalism terms, Judge Noonan at least suggests an alternative theory; perhaps the Court simply got it wrong.

Which brings us to the second, and much more subtle, critique of the Court's federalism decisions offered by Judge Noonan. By enhancing the power of the States via its sovereign immunity decisions, and as importantly, preventing federal intrusion upon the states' exercise of power in select areas declared off limits by the Court's own interpretation of the Constitution, the Court has, according to Noonan, really "accreted" power to itself.[35]

The sovereign immunity cases provide a good example of the problem. For the founders, the division of the people's sovereign powers between two levels of government was not designed simply or even primarily to insulate the states from federal power. It was designed so that the states might serve as an independent check on the federal government, preventing it from expanding its powers against ordinary citizens.[36] And it was designed so that decisions affecting the day-to-day activities of ordinary citizens would continue to be made at a level of government close enough to the people so as to be truly subject to the people's control. The Eleventh Amendment is simply an example of what the Founders accomplished principally through the main body of the Constitution itself. Congress was delegated only specifically enumerated powers (and the necessary means of giving effect to those powers) over subjects of truly national concern; it was not given a general police power to control the ordinary, local activities of the citizenry. By exempting the States from illegitimate exercises of power by the national government, rather than invalidating the illegitimate exercise of power itself (as it did in *United States v. Lopez*, which overruled the Gun Free School Zones Act as beyond Congress's power to regulate commerce among the states[37]), the Court effectively eliminated the states as the counterbalance to federal power.

Noonan's critique might be extended to the commerce clause cases, as well. *Lopez* was itself a landmark decision, and had it been consistently applied, would have resulted in the invalidation of literally thousands of federal laws and regulations. Instead, the Court has only invalidated two federal statutes as inconsistent with Congress's power under the Commerce Clause—both in areas that were already heavily regulated by state governments.[38] With such a piecemeal application of the Constitution's limits, the doctrine of enumerated powers is transformed from a protection of individual liberty into a turf war between two governments, each fighting for the right to regulate every aspect of our lives, with the Court serving as some grand and final arbiter between the competing claims but not as a defender of individual liberty.

This is a serious contention. Unfortunately, the lesson Judge Noonan draws from it is that the Court should more or less abdicate its responsibility for enforcing the Constitution's limits rather than more broadly and consistently enforce them. The book's conclusion is thus consistent with its cover—the material for a proper flag is there, but somehow it comes out backwards. Sometimes you really can judge a book by its cover.

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Footnotes

[1] John T. Noonan, Jr., Narrowing the Nation's Power: The Supreme Court Sides with the States (2002).
[2] John T. Noonan, Jr., The Lustre of Our Country: The American Experience of Religious Freedom (1998).
[3] 517 U.S. 44 (1996).
[4] 527 U.S. 706 (1999).
[5] Noonan, *supra* note 1, at 2-3.
[6] 529 U.S. 598 (2000).

[7] Noonan, *supra* note 1, at 12.
[8] 521 U.S. 507 (1997).
[9] Noonan, *supra* note 1, at 9.
[10] *Id.* at 12.
[11] 60 U.S. (19 How.) 393 (1857); *see* Noonan, *supra* note 1, at 13.
[12] 198 U.S. 45 (1905).
[13] Noonan, *supra* note 1, at 13.
[14] 298 U.S. 238 (1936).
[15] Noonan, *supra* note 1, at 13.
[16] *Id.* at 11.
[17] 494 U.S. 872 (1990).
[18] 521 U.S. 507 (1997).
[19] Noonan, *supra* note 1, at 16.
[20] The history of these amendments can be found on the website for the U.S. Congress. *See* U.S. House of Representatives, U.S. Congress, Amendments Not Ratified: Proposed Amendments to the Constitution Not Ratified by the States, *at* http://www.house.gov/house/Constitution/Amendnotrat.html.
[21] Noonan, *supra* note 1, at 135.
[22] Noonan, *supra* note 1, at 41-57.
[23] 517 U.S. 44 (1996).
[24] 209 U.S. 123 (1908).
[25] 134 U.S. 1 (1890).
[26] Noonan, *supra* note 1, at 47.
[27] *See generally* Thomas Hobbes, Leviathan (1651); John Locke, Second Treatise of Civil Government (1690).
[28] Noonan's character, Harvardman explains:

> The law today is that each of the fifty states is a sovereign, and a sovereign cannot be sued for damages by an individual, an Indian tribe, or a foreign government unless the sovereign has consented to being sued. . . . It cannot be sued even though Congress in the exercise of the powers conferred by article I has given individuals the right to sue.

Noonan, *supra* note 1, at 42.
[29] 2 U.S. (2 Dall.) 419 (1793).
[30] U.S. Const. amend. XI.
[31] 134 U.S. 1 (1890).
[32] 209 U.S. 123 (1908).
[33] *See, e.g.*, Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 270 (1997).
[34] *See, e.g.*, *id.* at 269-70.
[35] Noonan, *supra* note 1, at 13.
[36] *See, e.g.*, The Federalist No. 46 (James Madison).
[37] 514 U.S. 549 (1995).
[38] *See id*; United States v. Morrison, 529 U.S. 598 (2000) (holding that the Congress exceeded its authority under the Commerce Clause when it enacted the Violence Against Women Act); *see also* Jones v. United States, 529 U.S. 848 (2000) (holding that the federal arson statute may not be applied to buildings not used in interstate commerce).