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Unmasking Federalism

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BOOK REVIEW

UNMASKING FEDERALISM

Carl Tobias†


If you were a woman attending a state college and you were raped by several members of the football team, you would be more than outraged to discover that, when state authorities did nothing to punish the rapists, federal law was helpless to make up for their deficiency. Yet [this] and similar results have been reached in the last five years because of judgments of the Supreme Court of the United States.¹

Judge John Noonan has astutely chronicled law and society over a half century. He was a professor for twenty-five years, authoring such classics as Persons and Masks of the Law,² and has rendered distinguished service since 1985 on the United States Court of Appeals for the Ninth Circuit.³ Thus, the publication of Narrowing the Nation's Power: The Supreme Court Sides with the States ("Narrowing")⁴ would be important, even if the monograph were only a venerated scholar's reflections on his long, rich experience. This book, however, is a provocative critique that meticulously and incisively exposes the Court's new federalism and separation of powers jurisprudence as radical departures from settled understandings, departures that lack constitutional support. Noonan has issued a powerful, timely indictment of Supreme Court decisionmaking, which is striking because his position in the judicial hierarchy requires a keen understanding of those cases and because some observers may have thought him sympathetic to the Justices' dramatic new path. These ideas mean that Narrowing war-

† Beckley Singleton Professor, William S. Boyd School of Law, University of Nevada, Las Vegas; Visiting Williams Professor, University of Richmond School of Law. I wish to thank Chris Bryant, Lynne Henderson, Margaret Sanner, and Rod Smith for valuable ideas; Genny Schloss for processing this piece; and Beckley Singleton and Jim Rogers for generous, continuing support. Errors that remain are mine.

¹ John T. Noonan, Jr., Narrowing the Nation's Power: The Supreme Court Sides with the States 1–2 (2002) [hereinafter Narrowing].


³ 780 F.2d XXIII n.10 (1986).

⁴ Narrowing, supra note 1.
rants analysis. This Review first descriptively examines the volume and finds that Noonan illuminates comprehension of this recent, novel turn in Supreme Court jurisprudence. The Review then explores the work's numerous beneficial features. It concludes with several recommendations for future work in this area.

I.

**DESCRIPTIVE ANALYSIS**

Noonan initially traces a conundrum experienced by the American Republic since the Founding: the proper allocation of authority between the states and the national government as well as among the federal legislative, executive, and judicial branches. The Prologue considers how the Supreme Court has enunciated doctrines that protect the sovereignty of the fifty states. The Justices have scrutinized Congress's legislative power, especially under the Fourteenth Amendment, and have demanded "congruence and proportionality between" the evil at issue and any legislative treatment. They have also mandated that lawmakers develop a record that historically demonstrates "widespread and persisting deprivation of constitutional rights." Those requirements shift power from Congress toward both the states and the federal judiciary.

The opinions Noonan assesses received facilitation when the Court decided it had authority for the Constitution's definitive interpretation. The Justices invoke no express constitutional language and ridicule "ahistorical literalism," which Noonan describes as "a

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5 *See id.* at 1-5. For several histories of the protracted, tortured debate over the states as sovereigns, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 3, 4 (6th ed. 2000); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5, 6 (8ed ed. 2000).

6 *See Narrowing*, *supra* note 1, at 1-5.

7 *Id.* at 5 (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997)).


9 *See Narrowing*, *supra* note 1, at 5. *See generally* David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 77 (arguing that "Congress should be permitted to go further than the Court in its interpretation of" the Constitution).


more adventurous reading of the [C]onstitution.” Noonan finds judicial “activism” an illusory analytical tool and prefers logic, excoriating the “contradiction in terms” wrought by the sovereign immunity rule as “intolerable in any rational discourse.” He thus posits the modest goal of articulating a principle unbroken by multiple exceptions yet believes even worse a principle with no rationale for its creation or extension, is an apt description of the recent jurisprudence. As a guiding principle, Noonan employs the purposes the people voiced in the Constitution’s Preamble: “to form a more perfect Union, establish Justice, insure domestic Tranquility [ ] and secure the Blessings of Liberty.” Noonan asks whether the case results honor these grand objectives by posing several rhetorical questions. For example, “[d]o decisions that return the country to a pre-Civil War understanding of the nation establish a more perfect union?” The answers show that the opinions are grounded in doctrinal constructs—“state sovereign immunity, congruence and proportionality of legislation, and a record of evils to be eradicated”—without basis in the Constitution. Thus, removal of these obfuscatory doctrinal constructs clarifies the rulings’ failure to serve the Constitution’s purposes. Noonan criticizes the constitutional balance struck as suggesting that the fifty states count more than the millions of individuals potentially affected by the opinions. The effort to enlarge states’ power simultaneously increases judicial authority vis-à-vis Congress and the President because the Court exercises discretion to ascertain whether immunity exists, whether an enactment is congruent or proportionate, and whether a legislative record suffices.

The writer analogizes the present situation to other historical moments when similar decisions—decisions which replaced legislatures’ judgments with those of courts and which were subsequently discredited because they lacked constitutional support—negatively affected

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12 Id.; see infra notes 40–47, 49–60 and accompanying text (supplying additional vociferous criticism of the Court by Noonan).

13 NARROWING, supra note 1, at 10.

14 Id.

15 See id.


17 NARROWING, supra note 1, at 12; see infra notes 22–23 and accompanying text.

18 NARROWING, supra note 1, at 12.

19 See id.

20 See id. at 12–13.

21 See id. at 13; see also Evan H. Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127 (2001) (arguing against the Court’s “congruence and proportionality” test); supra notes 8–10 and accompanying text (reiterating the Court’s lack of deference to Congress and assertion of supremacy in interpreting the Constitution).
the country. 22 For example, *Dred Scott v. Sandford* 23 led to the Civil War, and *Lochner v. New York* 24 adversely affected working conditions over several decades. 25

Noonan finds that *City of Boerne v. Flores* 26 is a sharp break, and Chapter One tells its story in light of America’s devotion to religious liberty and the power that the Fourteenth Amendment granted Congress. 27 The greatest danger in *Boerne* is how the Justices anoint themselves the paramount expositors of the Constitution by creating, for use against future Congresses, two novel weapons: close judicial inspection of the legislative record for persuasive evidence of the evil at issue and inspection for a congruent or proportionate response. 28

The second and third chapters use a dialogic technique, albeit with mixed effects, to show how the Court, as the devotee of state dignity and “history’s hitchhiker,” embraces sovereign immunity in ways that are overdrawn, lack historical support, and defy consistent application. 29 Chapters Four and Five assess major cases that illustrate the “unhappy” results when the Justices apply novel legislative criteria to sovereign immunity in the context of an old intellectual property statute 30 and a newer measure that accorded elderly and disabled individuals equality. 31 The sixth chapter examines the hostile judicial reaction to legislative efforts that provided women with equal protection, a reaction premised on state autonomy and individual liberty. 32

22 See Narrowing, supra note 1, at 13. See generally 1 Tribe, supra note 5, at §§ 7-5 to -6, at 1318-22, § 8-1, at 1332-34, §§ 8-2 to -9, at 1343-74 (describing the post-Lochner evolution of substantive due process and the problems that arose).


24 198 U.S. 45 (1905).

25 See Narrowing, supra note 1, at 13.


28 See Narrowing, supra note 1, at 40.

29 See id. at 41-45.


32 See Narrowing, supra note 1, at 120-37 (discussing United States v. Morrison, 529 U.S. 598 (2000), holding that Congress lacked the authority under either the Commerce Clause or § 5 of the Fourteenth Amendment to enact 42 U.S.C. § 13981, which provided federal civil remedies for victims of gender-motivated violence). See generally Kramer, supra
Noonan admits the difficulty of calibrating perfect balances between the states and the national government and among its co-equal branches. However, his experience as a citizen immersed in law for fifty years and as a reader of history prompts his conclusion that "[t]he middle ground has . . . moved, with unsettling consequences," and the country's motto, e pluribus unum, must also be its polestar. 33

Chapter Seven proposes meaningful resolution, given the current risk to democratic government, a risk that has upset vital balances in organic national life, despite the judiciary's characterization as the least dangerous branch. 34 Noonan canvasses a broad spectrum of congressional responses. However, he deems a few, such as impeachment, too "heavy;" some, namely court funding, petty; and others, including Justices' confirmation, awkward. 35 Noonan finds legislation most "readily available" and surveys powers the Court has yet to restrict and ideas that could satisfy its constitutional standards, but he is not sanguine about these measures' efficacy. 37 His obligatory allusion to amending the Constitution recognizes the solution as difficult and rare. 38

Noonan asserts that "[t]he sovereign remedy for ills in a democracy is exploration and exposition," assisting those with authority in


34 See Narrowing, supra note 1, at 138–56; see also The Federalist No. 78 (Alexander Hamilton) ("[I]n a government in which [the departments of power] are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution . . . ."). See generally Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962) (discussing the Court's power and influence on the country).

35 See Narrowing, supra note 1, at 140–41; see also U.S. Const. art. I, § 8, cl. 9 (referring to Congress's power "[t]o constitute Tribunals inferior to the supreme Court"); art. II, § 2, cl. 2 (referring to the president's power to appoint "Judges of the supreme Court"); art. II, § 4 (stating that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors"). See generally Stephen L. Carter, The Confirmation Mess: Cleaning Up the Federal Appointments Process (1994) (criticizing the politicization of the confirmation process); Richard A. Posner, An Affair of State (1999) (discussing President Clinton's impeachment and surrounding events).

36 Narrowing, supra note 1, at 141.

37 Id. at 141–43; see Colker & Brudney, supra note 31, at 136; Meltzer, supra note 30 and accompanying text.

38 Narrowing, supra note 1, at 143; see U.S. Const. art. V; see also A. Christopher Bryant, Stopping Time: The Pro-slavery and "Irrevocable" Thirteenth Amendment, 26 Harv. J.L. & Pub. Pol'y 501 (2003) (examining the historical and contemporary significance of, exclusivity of, and limitations on the Article V amendment power of the Constitution).
exercising good sense to resolve problems. The author summarizes his critique, emphasizing the Justices' abstractions and lack of concern for facts and for all the people affected by sovereign immunity. He reiterates that the Court's approach to legislation is a novel, destructive creation that invades the prerogatives of Congress. Noonan discredits congruence and proportionality for affording no real measure, even as they prompt invention of the "legislative record" notion that similarly requires subjective judgment. The writer chastises the Justices for acting as if they alone have competence, positing that only the people are supreme in the American form of government.

Noonan analyzes the states' role in the Constitution, which does not mention sovereign immunity, while reviewing and exposing as deficient arguments for sovereign immunity derived from structure, solvency, tort, and dignity. Immunity also resists felicitous application because it cannot be confined, equitably or consistently used, or reconciled with the federal system. Finding no support in the Constitution, the "nature of things," or statutes, the author concludes that states can accord people unfair treatment only because the Court "has, by its own will, moved the middle ground and narrowed the nation's power."

39 Narrowing, supra note 1, at 143; see Philip P. Frickey & Steven S. Smith, Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique, 111 Yale L.J. 1707 (2002).
40 See Narrowing, supra note 1, at 143-45; see also infra notes 58-61 and accompanying text.
41 See Narrowing, supra note 1, at 145-48; supra notes 7-9, 26-32 and accompanying text.
42 See Narrowing, supra note 1, at 145-48; supra notes 7-9, 26-32 and accompanying text.
43 See Narrowing, supra note 1, at 149-50. See generally Ackerman, supra note 16 (agreeing that only the American people are supreme and urging them to become informed and involved in their government).
44 See Narrowing, supra note 1, at 150-53. See generally Nagel, supra note 33 (discussing the social and legal history as well as implementation of federalism).
45 See Narrowing, supra note 1, at 153-54; see also O.W. Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."). See generally Erwin Chemerinsky, Against Sovereign Immunity, 53 Stan. L. Rev. 1201, 1201 (2001) (arguing that sovereign immunity is an unconstitutional anachronism).
46 See Narrowing, supra note 1, at 154-56. See generally Caminker, supra note 21 (arguing for a "rational relationship" test rather than the existing "congruence and proportionality" test); Meltzer, supra note 30, at 1343-89 (describing alternative courses of legislative action in the face of sovereign immunity).
47 See Narrowing, supra note 1, at 156.
II. Contributions

Noonan provides many valuable insights. Most crucial, he illustrates the ways in which the new cases have shifted authority's previous vertical balance toward the states from the federal government while fostering horizontal accretion in the judiciary of power earlier held by the legislative and executive branches. Prior scholarship had criticized individual decisions, and even changes in doctrine and emergent patterns, but Narrowing is the clearest, fullest rendition thus far. The book traces the applicable history, evaluates, and imposes a salutary conceptual structure on integral, specific opinions, identifies discrete doctrinal strands, and trenchantly shows that the whole is more than the sum of its parts.

A related, helpful contribution is the clarity, force and candor with which Noonan dissects the cases and finds them contradictory, lacking constitutional support, and perhaps unprincipled. Noonan sees as exaggerated and misguided the notion of state sovereignty that pervades many rulings. He vociferously criticizes the Justices for expanding the Eleventh Amendment language, thus limiting federal jurisdiction to resolve some litigation against state governments and creating wider immunity that encompasses subsidiary bodies, such as college presses. Noonan attacks as "'ahistorical literalism" the Court's fidelity to the amendment's words, a fidelity which cannot sustain the inclusion of state court lawsuits within the immunity. Noonan apparently believes the revisionist views of Justices who formerly espoused adherence to constitutional text and the Framers' original intent to be disingenuous, or even hypocritical. The author damns this method as "audacious" and "a pretense," while he expressly accuses the Court of securing a rhetorical benefit when it labels state

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49 See Narrowing, supra note 1, at 1–14, 138–56.

50 See, e.g., id. at 3, 86–101, 154–55.

51 Id. at 9 (quoting Alden v. Maine, 527 U.S. 706, 730 (1999)).

52 See, e.g., id. at 9–10; supra notes 12, 44, 47 and accompanying text.

sovereignty “‘an eleventh amendment’ matter.” According to Noo­
nan, the constitutional connection is imaginary. Noonan disparages
the recent, sharp restriction of Congress’s power to enforce, by appro­
priate legislation, the Fourteenth Amendment. He considers the de­
cision that makes the Justices, not the lawmakers, the arbiters of propriety to be an “invention,” premised on the amendment’s mis­
derstanding, which enlarges judicial authority at the expense of the legislature.

Particularly effective is his criticism of the novel demand that
Congress support legislative choices with an evidentiary record, rather
than material that the Court devalues as merely anecdotal. Noonan
recounts the travails of the litigants who actually pursue federalism
cases and chastises the Justices for ignoring them and millions of
other persons whom the opinions touch. His admonitions are tell­
ing reminders that abstract conceptualizations of harmonious distri­
bution of governmental power can profoundly affect individuals. The
recent decisions’ gravest error is their authorization for states to treat
many people inequitably. This insightful storytelling is thus re­
dolent of Noonan’s exploration of the individual in legal history, legal
philosophy, and legal education in Persons and Masks of the Law.

These ideas assume greater force because their advocate is a judi­
cial officer, obligated to follow the precise rulings that he so incisively
criticizes. Noonan explains that judges and attorneys have an impor­
tant duty to reform and enhance the law, and he astutely wonders
what change is more necessary than the elucidation of opinions that
do not implement purposes specified in the Constitution.

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54 Narrowing, supra note 1, at 151–52. See generally Chemerinsky, supra note 45 (argu­
ing that sovereign immunity is not a constitutional doctrine and that it should be abolished
by the Supreme Court).
55 See Narrowing, supra note 1, at 148–50; supra notes 8, 21 and accompanying text.
56 Narrowing, supra note 1, at 146.
57 See id. at 6–7, 145–47; supra notes 8–10, 21 and accompanying text.
58 See, e.g., Narrowing, supra note 1, at 5–6, 147–48. See generally Colker & Brudney,
supra note 31, at 108–10 (discussing the Court’s rejection of legislation in absence of suffi­
cient legislative record in Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)).
59 See Narrowing, supra note 1, at 12–13, 144–45; supra text accompanying note 8.
60 See Narrowing, supra note 1, at 12, 144–45.
2073 (1989) (exploring the importance of storytelling in law).
62 Narrowing, supra note 1, at 143. Noonan’s candor perfectly shows the grave im­
port of the Article III judiciary’s independence. See The Constitution Project, Uncer­
tain Justice: Politics and America’s Courts 11–75, 129–71, 213–42 (2000); Symposium,
III. SUGGESTIONS FOR THE FUTURE

Despite the numerous perceptive contributions afforded by Narrowing, I can proffer suggestions for future work. Expanding on some issues may facilitate comprehension of the present Court and its federalism jurisprudence. For instance, appreciating the ways in which state sovereign immunity disadvantages individuals is certainly valuable, although it would be equally useful to analyze the Court's influence on power's horizontal distribution given, for example, the Bush Administration assertions of authority vis-à-vis Congress. It would be similarly advantageous to delineate the vertical effects, as national power's devolution to the states seems anachronistic, if not dangerous, in a time of global crisis engendered by terrorism. Detailing the horizontal and vertical impacts might concomitantly inform modern domestic controversies, such as the preferable governmental branch and level to address important societal concerns, including crime, education, and the environment. This knowledge would assist policymakers as well as the public in determining whether the United States benefits from judicial power's accretion at the expense of the legislative and executive branches or from increasing state authority vis-à-vis the federal government.

Notwithstanding Noonan's thorough critique and the urgent nature of his messages, they may reach a rather narrow audience. The theoretical complexity that inheres in federalism and sovereign immunity, the abstruse and coded nature of the rulings assessed, Noonan's technical and occasionally elliptical approach to certain matters, and the limited effectiveness of his dialogic technique might preclude broad dissemination. Many readers without legal training could find the book inaccessible, while even attorneys and law students may en-

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63 See supra notes 30–32, 58–60 and accompanying text.
66 See Edward L. Rubin, Getting Past Democracy, 149 U. Pa. L. Rev. 711 (2001); see also Caminker, supra note 21 (criticizing the Court's power assertion and exploring alternative sources of congressional power); Meltzer, supra note 30 (examining alternative courses of action for Congress). See generally Nagel, supra note 33 (exploring the implications of the Court's federalism jurisprudence for various areas of American life and law).
67 See supra notes 64–65.
68 Linda Greenhouse, Beyond Original Intent, N.Y. Times, Aug. 18, 2002, § 7, at 8. For one notable, albeit controversial, effort to reach a comparatively broad audience, see Bork, supra note 53.
counter difficulty following the specific ideas that the writer accords laconic treatment.

These concerns do not undermine Noonan's important contributions. However, he might have considered a few areas expressly or in greater detail, extracted more lessons from the state sovereign immunity decisions, and proffered additional suggestions for rectifying or ameliorating the current situation. It would be valuable to have a larger number of and more particularized insights from an observer who has so assiduously studied federalism and separated powers. Elaboration of his expert views on precisely why the doctrine developed as it did and on how to realize improvement would be instructive, especially for those who seek change in the recent case law. The above concepts have particular salience when highly controversial, strongly held perspectives on superior means of allocating governmental authority suffuse present discourse, and the United States confronts apparently insoluble domestic and world problems.

**Conclusion**

*Narrowing the Nation's Power* substantially enhances appreciation of the Court's federalism jurisprudence, demonstrating how the new opinions have redistributed power between the states and the national government and among the federal legislative, executive, and judicial branches. Noonan illuminates a novel, critical jurisprudential turn and its detrimental impacts, while he provides promising responses to these phenomena.