

Reviewed by Ernest A. Young*

Judge John T. Noonan, Jr. is worried about America. The Supreme Court, he says, has come to see itself as “the protector of the fifty states.”¹ As such, the Court has embarked on a course of decisions that “has, by its own will, moved the middle ground [between federal and state authority] and narrowed the nation’s power.”² But it’s not just national supremacy that Judge Noonan is worried about. “The present damage” to national power, he says, “points to the present danger to the exercise of democratic government.”³

These are serious charges and they deserve a serious book. But they do not get one from Judge Noonan in Narrowing the Nation’s Power. Judge Noonan starts out on relatively firm ground in arguing that the Supreme Court’s decisions interpreting the Eleventh Amendment⁴ and Section Five of the Fourteenth Amendment⁵ are wrongly decided. A near consensus of the

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† Senior Judge, United States Court of Appeals for the Ninth Circuit and Robbins Professor of Law Emeritus, University of California, Berkeley.
‡ Hereinafter cited by page number only.
* Assistant Professor of Law, University of Texas at Austin. B.A. Dartmouth College 1990; J.D. Harvard Law School 1993; eyoung@mail.law.utexas.edu. I am grateful to the Texas Law Review for patient diligence, to Lynn Baker, Doug Laycock, and Scot P owe for helpful comments, to Garrick Pursley for research assistance, and to Allegra Young for generous forbearance.
1. P. 2.
2. P. 156.
3. P. 140.
5. See, e.g., City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating the federal Religious Freedom Restoration Act on the ground that Section Five of the Fourteenth Amendment does not allow Congress to substitute its own interpretation of the Fourteenth Amendment for the Court’s); see also United States v. Morrison, 529 U.S. 598 (2000) (invalidating the federal Violence Against
legal academy, including many conservatives as well as nearly all liberals, agrees that the Eleventh Amendment cases are wrong.⁶ There is less agreement on the Section Five cases, but still a strong current of professional opinion critical of the Court.⁷ But Judge Noonan squanders what might otherwise be strong arguments by over-claiming the legitimate weaknesses of the Court’s position and exaggerating the implications of its decisions.

These faults loom even larger when we turn from the doctrinal specifics to Judge Noonan’s broader claim, which is that the Court has somehow “sided” with the States against the Federal Government. Judge Noonan says that the Court’s decisions have allowed the States to “escape effective control by Congress”; worse still, the Court has usurped the legislative function by “exercising supremacy over Congress.”⁸ Yet viewing the cases from a slightly less feverish perspective makes clear that the vast reserves of federal regulatory power remain largely intact. And while the Court has retreated from the limitless deference it accorded Congress in some of its prior cases, that retreat hardly endangers democratic government in the way that Judge Noonan suggests.

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⁸ Pp. 4, 147.
Parts I and II of this Review focus on Judge Noonan’s discussion of state sovereign immunity and the Section Five power, respectively. Part III considers Judge Noonan’s more general claims that the Court has somehow shifted the federal balance in favor of the States and, at the same time, aggrandized itself at the expense of Congress and the President. Finally, Part IV assesses the strange tenor of Judge Noonan’s discussion as an illustration of the difficulty of straddling the divide between popular and scholarly audiences.

I. State Sovereign Immunity

Judge Noonan is right to criticize the Rehnquist Court’s state sovereign immunity jurisprudence. Not only are most of the cases wrongly decided; they may even be harmful to the very federalism values that the Court ostensibly seeks to promote. But it does no good to say that the Court’s decisions have weaknesses that they do not in fact have, or to exaggerate the barriers that they create to the enforcement of federal law. It is also instructive—in light of Judge Noonan’s broader claim that the Court has favored the States over the Federal Government—to compare the Court’s state sovereign immunity decisions to the equally judge-made doctrine of federal sovereign immunity.

A. Just How Wrong Are the Sovereign Immunity Cases?

One might agree with Judge Noonan that cases like Seminole Tribe are wrongly decided and yet question his claim that they “have no footing in the constitution.” Perhaps the spirit of a contentious age moves otherwise rational people to exaggerate the weaknesses of the opposing position and the strength of their own. The truth is that Seminole Tribe, as well as many of its predecessors and progeny, were hard cases. The difficulty springs from at least two sources.

First, the pro-immunity position is neither incoherent nor baseless. The majority does have a story that justifies its broad interpretation of state sovereign immunity. It goes something like this:

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9. I have criticized the Court on both these grounds in other work. See Young, Jurisprudence of Structure, supra note 6, at 1665–75 (arguing that the Court has misread the Framers’ original understanding of the constitutional structure); Ernest A. Young, State Sovereign Immunity and the Future of Federalism, 1999 SUP. CT. REV. 1, 50–65 (arguing that state sovereign immunity fails to protect key federalism values and may even be counterproductive to the preservation of those values). The definitive refutation of the majority’s position, of course, is Justice Souter’s dissent in Seminole Tribe. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 100–85 (1996) (Souter, J., dissenting) (arguing that “text, precedent, and history” all contradict the majority’s holding).

10. P. 12.

11. Seminole Tribe concerned the constitutionality of provisions in the Indian Gaming Regulatory Act, 25 U.S.C. § 2710, providing for suits by Indian Tribes against state governments to resolve disputes about gaming activities. The debate in the opinions is so divorced from that particular context that the specific facts and statutory structure have little relevance here.
1. Almost everyone at the Founding understood the States to be sovereign, and "sovereignty" was understood to include immunity from suits by private individuals. Hamilton says as much in *The Federalist No. 81.*

2. The States necessarily gave up some of this sovereignty in ratifying the Constitution in 1789, but only insofar as the Constitution clearly indicates such a surrender.

3. The original Constitution says nothing about overriding the States' pre-existing immunity, and statements by Hamilton, Madison, and Marshall indicate it did no such thing.

4. The Supreme Court got this wrong, however, in *Chisholm* by holding that a state can be sued by an individual without its consent.

5. The Eleventh Amendment was meant to correct *Chisholm.* As such, its terms are limited to addressing *Chisholm's* specific holding; the text covers only state-law claims brought in federal court based on diversity, because that is the sort of case *Chisholm* was. The Amendment is a patch meant only to cover the hole *Chisholm* poked in a broader, pre-existing concept of immunity.

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12. Hamilton said:

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated [by those who said that the Constitution would supersede state sovereign immunity of its own force] must be merely ideal.

*The Federalist No. 81,* at 487–88 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Judge Noonan acknowledges this passage, see p. 81, but gives it far too short shrift; indeed, he characterizes Hamilton as "almost . . . clear" in stating that "immunity was waived by the states as to federal questions when the states ratified the constitution." P. 84. That conclusion is probably correct, but Hamilton is anything but clear on the question. The most that Justice Souter is willing to say on the point, after a considerably more careful exposition of Hamilton's references, is that "Hamilton's discussion does not seem to cover this [situation of federal law claims against states]."

*Seminole Tribe,* 517 U.S. at 149 (Souter, J., dissenting).


14. In addition to the statement from Hamilton already cited, see 3 J. Elliot, *Debates on the Federal Constitution* 533 (2d ed. 1836) (James Madison) ("It is not in the power of individuals to call any state into court. . . . [The Constitution] can have no operation but this: . . . if a state should condescend to be a party, this court may take cognizance of it."); id. at 556 (John Marshall) ("I see a difficulty in making a state defendant, which does not prevent its being plaintiff.").

15. *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419 (1793) (holding that Article III authorized a private citizen of another state to sue the state of Georgia without its consent to recover a debt).

16. See *Alden v. Maine,* 527 U.S. 706, 723 (1999) ("The text reflects the historical context and the congressional objective in endorsing the Amendment for ratification. Congress chose not to enact language codifying the traditional understanding of sovereign immunity but rather to address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision."); *Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare,* 411 U.S. 279, 291–92 (1973) (Marshall, J., concurring in the result) (making a similar argument).
6. Therefore, when the Court holds the States immune in federal question cases (*Hans*, *Seminole Tribe*), or in cases in state court (*Alden*), it is simply enforcing this broad, pre-constitutional notion of immunity, not extending the text of the Eleventh Amendment itself beyond its warrant. The constitutional theory behind this story is not textualism, to be sure, or even the most familiar form of originalism that relies on the historical understanding of particular words in the text. Rather, the majority has relied upon the original understanding of the constitutional structure itself—the particular theory of sovereignty presupposed by the Framers’ understanding of federalism and that theory’s implications for immunity from suit. I have argued elsewhere that this originalist version of structural argument is neither a crazy approach to interpretation nor inconsistent with the Court’s methodology in several other cases.

Now, one can quarrel with this story, and with the majority’s view of the original structural understanding, on many grounds. One might say that, because the pre-existing notion of sovereign immunity in the majority’s story was a product of the common law, it is not constitutional in stature and ought therefore to be modifiable by Congress. Or one might point out that classical notions of sovereign immunity held that the immunity belonged only to the sovereign that made the law on which the plaintiff’s claim is based; therefore, in a system of divided sovereignty like ours, a state sovereign would never be immune with respect to a claim under federal law. One might even read Hamilton’s famous passage in *The Federalist No. 81* very closely to argue that he did not envision state immunities in areas within the concurrent regulatory authority of Congress, i.e., federal law claims. But

19. See *Alden*, 527 U.S. at 728–29 ("[S]overeign 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; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.").
20. See *Young*, *Jurisprudence of Structure*, supra note 6, at 1616–24.
21. See *id.* at 1638–51.
24. See *id.* at 150–59.
25. See *id.* at 145–48.
the fact that these are winning counterarguments—that the state sovereign immunity question does have a “right answer” and the majority’s answer is not it—does not make the majority’s story incoherent, crazy, or without “footing in the constitution.” Judge Noonan is therefore wrong to say that the criteria of “the text of the constitution or... fidelity to the original intent of its framers” are “no longer used by these members who form part of the majority of the present court.” The majority has an interpretation of both text and intention; it is just different from Judge Noonan’s (and my own).

A second difficulty is that the majority’s position is firmly entrenched in a virtually unbroken line of judicial precedent that has endured for over a century. Although Judge Noonan does acknowledge some of these cases in his historical discussion in the book’s interior, his opening and closing arguments make broad immunity sound like a radical innovation of the Rehnquist Court. That, unfortunately, is simply not true.

The story of state sovereign immunity is one of gradual but implacable expansion, from the ratification of the Eleventh Amendment itself in 1795 to whatever case the Supreme Court decides next. No retrenchment in state sovereign immunity law accompanied the general expansion of federal authority after the Civil War; in fact, Reconstruction’s primary impact in this context was another state debt crisis that, in turn, caused a new round of expansion of state immunities. Likewise, there is no 1937 “switch in time” in immunity law. It is the anti-immunity cases, such as Parden v. Terminal Railway and Pennsylvania v. Union Gas Co., that are aberrational chapters in this story.

27. P. 9.
28. Several of the pre-Seminole Tribe cases took a similar tack. See, e.g., Welch v. Tex. Dep’t of Highways & Pub. Transp., 483 U.S. 468, 478–79 (1987) (plurality opinion) (rejecting, based on respect for stare decisis, calls to overrule Hans v. Louisiana); Edelman v. Jordan, 415 U.S. 651, 662–63 (1974) (“While the Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State.”).
29. See, e.g., pp. 72–75 (discussing Hans v. Louisiana).
32. Indeed, the New Deal Court decided Ford Motor Co. v. Dep’t of Treasury of Ind., 323 U.S. 459 (1945), Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944), and Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937), all of which upheld state sovereign immunity in federal question contexts.
33. 377 U.S. 184 (1964) (recognizing a theory of “constructive waiver” by which a state that undertook activity regulated by Congress would be deemed to have waived its immunity from suit).
Perhaps the best evidence that established precedent does not restrict state sovereign immunity is the dog that never barked in Justice Souter's *Seminole Tribe* dissent. If a plausible argument could have been made in *Seminole Tribe* that the majority was departing from precedent, the dissent would have made it.\(^{35}\) No such argument appears. Instead, the dissent works hard to distinguish away a variety of prior decisions—*Hans v. Louisiana*\(^{36}\) chief among them—which have extended state sovereign immunity far beyond the Eleventh Amendment’s text.\(^{37}\)

Justice Souter was surely correct that none of the pre-*Seminole Tribe* cases required the conclusion that state sovereign immunity in federal question suits is not abrogable by Congress. Indeed, the question had come up directly only once before, in *Union Gas*.\(^{38}\) But that hardly demonstrates that a non-abrogable immunity—the majority’s view—is inconsistent with the prior case law. If anything, the vector of the prior cases pointed in the direction of constitutionalizing state sovereign immunity and rendering it

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34. 491 U.S. 1 (1989) (holding, by a narrow 5-4 margin, that Congress may abrogate state sovereign immunity pursuant to its Article I powers). There are other anti-immunity decisions—including enough during the recent Rehnquist Court to complicate allegations that this Court is uncritically committed to shielding the States from liability. See, e.g., Verizon Md. Inc. v. Pub. Serv. Comm’n of Md., 535 U.S. 635 (2002) (holding that the Eleventh Amendment did not bar a claim under the 1996 Telecommunication Act against state public service commissioners); Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613 (2002) (holding that a state’s voluntary removal of a case to federal court amounted to a waiver of immunity); California v. Deep Sea Res., 523 U.S. 491 (1998) (holding that state sovereign immunity did not bar federal jurisdiction over an in rem proceeding where the state did not possess the res in question). But the limiting cases tend to nibble around the edges rather than block the basic line of expansion. For earlier examples, see *Hutto v. Finney*, 437 U.S. 678 (1978), which held that the Eleventh Amendment does not bar an award of attorneys’ fees against the state where the award is incidental to a successful claim for prospective relief under *Ex parte Young*, and *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), which held that Congress may abrogate the States’ immunity when it acts under the Section Five power.

35. That dissent takes up 85 pages in the *United States Reports*; the good Justice is not exactly one to leave good arguments languishing on the cutting-room floor. And Justice Souter is known for a commitment to stare decisis. See, e.g., Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854–69 (1992) (joint opinion of O’Connor, Kennedy, & Souter, JJ.).

36. 134 U.S. 1 (1890). Judge Noonan states—through his fictional historian Cleopatra Sens—that “*Hans* was an extraordinary break, not only with John Marshall but with fairly recent decisions of the court that decided *Hans*.” P. 78 (citing ORTH, *supra* note 31, at 62–63, 79). This statement ignores, however, a number of cases decided in the years prior to *Hans* in which the Court held that the Eleventh Amendment barred attempts to force states to honor Reconstruction-era bonds. See, e.g., *In re Ayers*, 123 U.S. 443 (1887); New Hampshire v. Louisiana, 108 U.S. 76 (1883); Louisiana v. Jumel, 107 U.S. 711 (1883).

37. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 123–30 (1996) (Souter, J., dissenting) (distinguishing, inter alia, Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) (holding that state sovereign immunity extends to suits brought by foreign nations); *Ex parte New York*, 256 U.S. 490 (1921) (extending state sovereign immunity to admiralty suits)).

38. 491 U.S. 1 (1989). In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court did hold that Congress could abrogate a state’s immunity when it acts pursuant to Section Five of the Fourteenth Amendment. But the Court’s reasons for doing so were specific to Section Five; as Justice Brennan’s tortured plurality opinion in *Union Gas* demonstrated, *Fitzpatrick*’s rationale could not easily be extended to Congress’s other enumerated powers.
non-abrogable; Justice Souter’s argument was simply that the Court should not take this final step. Judge Noonan, like many other critics of the Court’s state sovereign immunity jurisprudence, ignores this long line of cases when he claims that the Rehnquist Court is up to something new.

Judge Noonan reserves much of his ire for two additional aspects of the Court’s sovereign immunity jurisprudence: the Court’s willingness to accord immunity to various “arms of the state,” such as state universities, and the existence of numerous exceptions to the immunity principle itself. The first sticking point is hard to understand. Judge Noonan complains that the cases include “no effort to confine the immunity to the core functions of government”; he would exclude from immunity a state’s “commercial enterprises.” But these sorts of distinctions are not easy to administer. How, for example, should we classify a state-run law school? It charges for its services, and it competes with similar entities in the private sector. But when it charges extremely low tuition, as some do, it does so because it views itself as performing a public function for the people of the State. Such an institution seems to have one foot in both the “governmental” and the “proprietary” worlds. As Doug Laycock has observed, “many government activities defy classification,” and “[e]fforts to draw lines in the vast middle sometimes lead to madness.”

The Supreme Court has tried to draw such lines before, with little success. In the field of intergovernmental tax immunity, for example, the Court has concluded “that the distinction between ‘governmental’ and ‘proprietary’ functions was ‘tenable’ and must be abandoned.” Likewise, the Garcia Court firmly rejected any effort to define a core area of

39. See, e.g., Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) (extending the States’ immunity beyond the text of the Eleventh Amendment to suits by Indian tribes); Hoffman v. Conn. Dep’t of Income Maint., 492 U.S. 96 (1989) (plurality opinion) (holding that Congress did not make its intent to abrogate state sovereign immunity unmistakably clear, assuming arguendo that Congress had the power to do so; two justices concurred on the ground that Congress lacked that power); Dellmuth v. Muth, 491 U.S. 223 (1989) (applying a very rigorous clear statement rule to restrict abrogation of state sovereign immunity even when Congress acts under Section Five of the Fourteenth Amendment); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) (tightening rules for waiver of state immunity and rejecting any officer suit exception for pendent state law claims); Edelman v. Jordan, 415 U.S. 651 (1974) (rejecting much of the Court’s prior “implied waiver” of immunity doctrine and narrowing the traditional exception for officer suits).

40. See, e.g., Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994) (discussing the inquiry for determining whether an entity is an “arm of the state” for Eleventh Amendment purposes); Ex parte Young, 209 U.S. 123 (1907) (recognizing an exception to state sovereign immunity for suits against state officers).

41. Pp. 97, 100; see also p. 96 (suggesting that immunity should be unavailable where “the state was acting for profit and might be competing unfairly with private persons”).

42. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1002 (2d ed. 1994).

43. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 542 (1985) (quoting New York v. United States, 326 U.S. 572, 583 (1946)); see also id. at 543 (“This inability to give principled content to the distinction between ‘governmental’ and ‘proprietary,’ no less significantly than its unworkability, led the Court to abandon the distinction in New York v. United States.”).
protected state governmental functions. “Any rule of state immunity that looks to the ‘traditional,’ ‘integral,’ or ‘necessary’ nature of governmental functions,” Justice Blackmun wrote, “inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.” That result seems exactly what Judge Noonan wants to prevent.

To be sure, current doctrine for determining what entities count as “arms of the state” for immunity purposes is hardly a model of clarity. But its primary thrust—a functional inquiry into whether a damages award against the entity would ultimately be borne by the state treasury—is more determinate and consistent with immunity’s underlying goal of protecting the States’ financial integrity than any alternative Judge Noonan offers.

Judge Noonan’s second objection is that the principle of state sovereign immunity has too many exceptions. “A principle with many exceptions is barely a principle,” he says; even worse, the availability of many exceptions renders the doctrine manipulable at the Court’s whim. His particular ire focuses on the doctrine of Ex parte Young, which allows private plaintiffs to obtain prospective relief against state officers even though they cannot seek damages against the state. Yalewoman, one of Noonan’s fictional interlocutors, calls Young “a logical mess” and “really intolerable.” “How can people have respect for a system that violates the laws of logic?” she asks.

44. Id. at 543–46.
45. Id. at 546.
46. In another passage, Judge Noonan abandons the “core functions” idea and seems to prefer limiting sovereign immunity—if we must have it at all—to the governors of the fifty states or to their core political officers.” P. 154. But that is a strange suggestion, since the sovereign immunity of the state itself traditionally has been far more limited when officers are the targets of a plaintiff’s suit. See, e.g., John C. Jeffries, Jr., In Praise of the Eleventh Amendment and Section 1983, 84 VA. L. REV. 47, 49–50 (1998).
47. See, e.g., Mancuso v. N.Y. State Thruway Auth., 86 F.3d 289, 293 (2d Cir. 1996) (“The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused.”). Federal courts have generally applied a six-factor test that examines “(1) how the entity is referred to in the documents that created it; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity’s function is traditionally one of local or state government; (5) whether the state has a veto power over the entity’s actions; and (6) whether the entity’s obligations are binding upon the state.” Id.
48. See Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 51 (1994) (stating that “state treasury” criterion—whether any judgment must be satisfied out of the state treasury—is the most important consideration in Eleventh Amendment immunity issues).
49. See Hess, 513 U.S. at 48 (observing that “the impetus for the Eleventh Amendment [was] the prevention of federal-court judgments that must be paid out of a State’s treasury”).
50. Pp. 10, 60. One might dispute the basic proposition. The First Amendment’s protection of free speech remains “a principle,” despite the existence of many, many exceptions. Indeed, those exceptions are arguably essential to reconcile liberty of expression with the sometimes contradictory imperatives of living in society.
52. P. 47.
53. Id.
Justice Souter gave one answer to that question in *Seminole Tribe*. “The decision in *Ex parte Young*, and the historic doctrine it embodies,” he wrote, “plays a foundational role in American constitutionalism, and while the doctrine is sometimes called a ‘fiction,’ the long history of its felt necessity shows it to be something much more estimable.”54 Some version of the principle that government officers may be sued even if the sovereign may not appears to have existed for as long as the principle of immunity itself. The English common law, for instance, recognized a variety of such remedies,55 and a similar principle appears in American law as early as Chief Justice Marshall’s opinion in *Osborn v. Bank of the United States*.56 Because the two principles have been paired in this way for so long, a rule of sovereign immunity without the *Young* “fiction” would be far more artificial than current arrangements.

The law almost always pursues multiple objectives, and in this area the courts from time immemorial have sought to allow government entities to pursue their view of the public interest without judicial interference, while still ensuring governmental accountability to law.57 As my colleague Doug Laycock has observed, “Any line the Court draws will seem artificial, but some lines are more defensible than others.”58 The balance that has been struck—again, from time immemorial—is this basic distinction between damages and injunctive relief. Hence, “[t]he dominant theme in governmental immunity law is that injunctions are the preferred remedy, and that damages are more dangerous, more intrusive into the legitimate operations of government, and more in need of restriction.”59 Although the *Young* “fiction” has always had its critics, I suspect that it has endured for so long precisely because it represents a workable and practical accommodation.

B. Immunity’s Impact

Judge Noonan’s antipathy to traditional sovereign immunity exceptions seems to underlie his most serious error, which is to overstate—radically—the impact of the Supreme Court’s decisions in this area. “The chief practi-

56. 22 U.S. (9 Wheat.) 738 (1824); see also *United States v. Lee*, 106 U.S. 196, 220 (1882) (recognizing the availability of officer suits as a way around federal sovereign immunity even prior to *Ex parte Young*).
57. See CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 313–14 (6th ed. 2002) (stating that the *Young* “fiction” is “indispensable to the establishment of constitutional government and the rule of law”).
58. LAYCOCK, supra note 42, at 463.
59. Id. at 456–57.
cal effect" of the Court's decisions, he asserts, "is to shield not only state
government but many subsidiary state agencies from complying with federal
laws enacted for the good of all." But sovereign immunity does not render
federal law non-binding on the States; it simply makes enforcement more
difficult for private individuals. Eliding that distinction is itself a serious sin
of Judge Noonan's book. Judge Noonan might respond that limiting reme-
dies shields states from compliance as a practical matter, but even that is
doubtful.

In *Alden*, the Court reiterated that the States' constitutional immunity
from damages suits "does not confer upon the State a concomitant right to
disregard the Constitution or valid federal law. The States and their officers
are bound by obligations imposed by the Constitution and by federal statutes
that comport with the constitutional design." Numerous means remain
available for holding the States to these obligations. We might gauge the
effectiveness of the remaining remedial options by way of the examples with
which Judge Noonan starts his book:

If you were a writer whose short stories were published by an ethnic
press affiliated with the University of New Mexico, you would be
justifiably surprised to learn that, when your publisher disregarded
your copyright, you could not sue for damages because the press was a
sovereign entitled to a sovereign's immunity from suit. If you were
a professor of business at the University of Montevallo in Shelby
County, Alabama, and were passed over for a raise because of your
age, you would be understandably indignant to learn that your
university, classified as a sovereign, could not be brought to court for
violating federal law against discrimination based on age.

While Judge Noonan is correct that neither university could be sued by
the private plaintiffs for money damages, he overlooks a wide variety of other
remedial options.

First and foremost is the availability of injunctions against state officers
to compel compliance with federal law. Ms. Chavez, the author in the first
example, could stop the university from unlawfully publishing her book by
suing the head of the university press. In that suit, she could invoke a variety

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60. P. 85. The statement reflects a persistent theme in Judge Noonan's book, which is that
federal actions are taken "for the good of all" but that state governments do not similarly act in the
public interest. And yet the classic justification for restricting remedies against governments is the
need for governments at *every* level to retain sufficient discretion to act in the public interest. See,
e.g., Ann Woolhandler, Patterns of Official Immunity and Accountability, 37 CASE W. RES. L. REV.


62. P. 1. These are the facts of Chavez v. *Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000).

63. P. 1. These are the facts of one of the cases consolidated in *Kimel v. Fla. Bd. of Regents*,

64. *See Ex parte Young*, 209 U.S. 123 (1908).
of prospective remedies provided by the federal intellectual property laws, including not only an injunction against further publication but perhaps also impoundment and disposition of the unlawful copies. Likewise, in the second example, Professor Macpherson could get an order requiring the university to place him in the position warranted by his competence.

Chavez could likewise have obtained damages by suing the offending state officials in their personal capacity. Even though the officers may have acted on the state’s behalf, they are unshielded by the state’s immunity. Individual officers will most often not have deep pockets, but states generally indemnify them for damages awards and costs of litigation; thus, the prospect of some compensation in suits against individual officers is not unrealistic. It probably goes too far to say, as John Jeffries does, that “[t]he Eleventh Amendment almost never matters.” Nonetheless, the availability of damages in personal capacity suits suggests that state sovereign immunity may matter considerably less than people often think.

States are not immune from suit when the United States is the plaintiff, even when the United States is suing on a private individual’s behalf. Suits


66. See id. § 503 (providing for impoundment and disposition of infringing articles). The Copyright Remedy Clarification Act expressly authorized impoundment and disposition against state governments. § 511(b). For a general discussion of the relationship between these remedies and Ex parte Young, see Mitchell N. Berman, R. Anthony Reese & Ernest A. Young, State Accountability for Violations of Intellectual Property Rights: How to “Fix” Florida Prepaid (And How Not To), 79 TEXAS L. REV. 1037, 1095–1106 (2001). As that discussion indicates, the availability of impoundment and disposition against a state officer is somewhat more doubtful than that of injunctions generally.

67. See 29 U.S.C. § 626(e)(1) (2000) (providing for equitable relief in private suits); § 626(h) (indicating that such relief may include “judgments compelling employment, reinstatement or promotion”).

68. Professor Macpherson could not, because the Age Discrimination in Employment Act provides for suits only against the employer, not the employer’s agents. See, e.g., Stuits v. Conoco Inc., 76 F.3d 651, 655 (5th Cir. 1996). But this is a statutory problem, not a constitutional one. Congress could facilitate officer suits for damages simply by amending the ADEA to provide for such suits.

69. See, e.g., 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3524, at 150 (2d ed. 1984). State officers will often be able to invoke doctrines of official immunity, but these doctrines usually bar recovery only when the federal rule violated was not “clearly established” at the time the officer acted. See Wilson v. Layne, 526 U.S. 603, 609 (1999); RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1124–25 (4th ed. 1996) (hereinafter HART & WECHSLER). Moreover, these official immunity doctrines could be overridden by Congress if it so chose. See Tapley v. Collins, 211 F.3d 1210, 1214 (11th Cir. 2000); Berman, Reese & Young, supra note 66, at 1127.

70. Jeffries, supra note 46, at 50.

71. Id. at 49. Professor Jeffries goes on to state that “[s]o long as officer suits remain generally available, Seminole Tribe will have relatively little impact.” Id. at 52 n.19.


73. See Jonathan R. Siegel, Congress’s Power to Authorize Suits Against States, 68 GEO. WASH. L. REV. 44, 67–68 (1999); Berman, Reese & Young, supra note 66, at 1115–21.
by the federal government thus offer a third way around the barrier of state sovereign immunity in Judge Noonan’s examples. The Age Discrimination in Employment Act at issue in the second example, like other federal employment discrimination statutes, provides for direct government enforcement; indeed, private individuals must first afford the government an opportunity to bring suit before filing their own complaints. Congress could provide a similar option for copyright suits, although the federal government’s limited enforcement resources significantly constrain this option. Despite that constraint, however, the possibility of direct federal enforcement could solve the most egregious state violations and possibly deter the rest.

Fourth, Congress could rewrite the abrogation statutes that failed in *Chavez* and *Kimel*, fitting them within the confines of Congress’s power under Section Five of the Fourteenth Amendment. Mitch Berman, Tony Reese, and I have explored this option at great length elsewhere. For present purposes it suffices to say that Congress can always abrogate state sovereign immunity by making an actual constitutional violation an element of the plaintiff’s cause of action. In other words, Congress could write an abrogation provision for the ADEA that imposes damages liability on the state if and only if the plaintiff can prove that the age discrimination in his case was so arbitrary as to be unconstitutional under the Court’s equal protection precedents. This showing might be difficult to make, but it would take care of the most egregious cases.

The fifth option arises out of the longstanding rule that state sovereign immunity may be waived. Because states are democratically accountable governments, waiver might occur with some regularity. Moreover, the Court has practically invited Congress to pressure the States to waive their immunity by, for example, requiring such waivers as a condition for the receipt of federal funds. Because of the States’ dependence on federal

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75. See generally Berman, Reese & Young, supra note 66, at 1055–1114.
76. Cf. id. at 1083–1109 (arguing that Congress could write an abrogation statute for patents, copyrights, and trademarks that simply required the plaintiff to show that the state had failed to provide the adequate remedy in its own courts that due process requires).
funding grants and other federal benefits— and because the "unconstitutional conditions" doctrine currently has little purchase where Congress seeks to extract concessions from state governments—Congress should be able to force immunity waivers whenever it really wants them.

Even putting these options aside, shielding the States from damages liability might not have the same effect as according private parties such immunities. In *Alden*, Justice Kennedy insisted that

[w]e are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."  

This might seem like a hollow assurance, but Peter Menell's recent work on state infringement of intellectual property rights suggests that state officials may not, in fact, have the same incentives to violate federal laws that private actors do. Because of the bureaucratic and public-service-oriented culture of state governmental entities, as well as the absence of a significant profit motive, Professor Menell concludes that "state infringement, to the extent it occurs, is likely to be unintentional and episodic in most areas of state activity." His analysis is, of course, a far cry from the greedy and exploitative states that Judge Noonan's account depicts.

Professor Menell's prediction is borne out by the University of Texas's response to the Fifth Circuit's decision in *Chavez* that states are immune from damages suits for copyright infringement. Following the Court's

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80. See, e.g., Todd J. Gillman, *Nation's Governors are Looking for More Help from Washington*, DALLAS MORNING NEWS, Feb. 24, 2003, at 1A; see also Nat'l Governors Ass'n, *The State Fiscal Crisis*, at http://www.nga.org/nga/legislativeUpdate/1,1169,C_ISSUE_BRIEF^D_5080,00.html (Feb. 22, 2003) ("States are facing a perfect storm: deteriorating tax bases, an explosion in health care costs, and a virtual collapse of capital gains and corporate profit tax revenues.").

81. See *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987) (upholding conditions on federal grants of highway funds to state governments that required states to raise their drinking age to 21).


83. See Menell, *supra* note 78, at 1428–35.

84. *Id.* at 1433. The pre-Florida Prepaid experience under the patent laws seems to bear this prediction out. See *Patent Remedy Clarification Act: Hearings on H.R. 3886 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House of Representatives Comm. on the Judiciary*, 101st Cong. 22 (1990) (statement of Rep. Kastenmier) ("We do not have any evidence of massive or widespread violation of patent laws by the States either with or without this State immunity."). Perhaps it will not always be possible to generalize from Professor Menell’s analysis, which focuses on the incentives to comply with intellectual property laws, to other forms of federal regulation. But that analysis seems broadly applicable to many instances. In the private sector, for example, a business that fired its most senior employees and replaced them with low-cost junior ones might hope to reap greater profits—benefits that would redound to the financial benefit of management in most instances. That seems less likely in the public sector. Moreover, Professor Menell’s more general observations about the culture of compliance in public sector jobs, see *id.* at 1429–32, are not at all specific to intellectual property.
decision, the University General Counsel’s office reviewed the holding’s impact on the University’s operations. That review uncovered two central facts: First, the University remained bound—both legally and ethically—by the federal intellectual property laws. As a result, the General Counsel’s office concluded, “we are not running to the copy machine or logging onto every bootleg music and software site we can get to. There are far too many other reasons besides fear of lawsuits for money damages in federal court for us to respect the intellectual property of creative people.”

The review also seems to have revealed—although for obvious reasons it did not come right out and say so—that the University’s compliance with those laws left much to be desired. One result of this finding was a new school policy on the copying of course packets. In the past, individual professors had the duty to obtain permission to duplicate copyrighted materials in such packets—with the spotty results that one might expect. Now all such packets must be turned in to the central duplicating office six weeks in advance; the duplicating office then handles the permissions before printing the packets. As a result, the present author can proudly state that his course packets—and those of the overwhelming majority of his colleagues—are fully legal, perhaps for the first time!

I certainly do not claim that all, or even most, state institutions will respond to the Court’s state sovereign immunity decisions by taking steps to enhance their compliance. But my example does illustrate the fact that most state officials, in most situations, have comparatively little incentive, other than laziness or inadvertence, to disobey federal laws. “The good faith of the States,” as Justice Kennedy put it, is hardly an airtight guarantee of respect for federal law—but it is not nothing, either.

The pre-Seminole world was hardly one of widespread congressional abrogation of state sovereign immunity. No cases before Union Gas in 1989 held that Congress may abrogate the States’ sovereign immunity when it acts pursuant to its Article I powers. Prior to that, the Court had, on a few occasions, assumed without deciding that such abrogation was possible. In those cases, however, the Court had held that such abrogation would have to be accomplished by a plain statement in the statutory text. Prior to Union Gas, no statute enacted under the Article I powers had met the clear statement requirement. Indeed, even after the Union Gas decision, all the other statutes that came before the Court continued to founder on the plain

86. Id.
statement rule. Only in *Seminole Tribe* did the Court find another clear effort to abrogate, and in that case the Court held that the power of abrogation did not exist.

*Seminole Tribe, Florida Prepaid, Kimel,* and *Garrett* did not disturb a widespread, pre-existing practice under which private plaintiffs could obtain damages against state entities for federal statutory violations. Congress simply did not attempt abrogation very often. Prior to *Florida Prepaid,* for example, precious few cases allowed patent suits to go forward against state governments. The other statutes involved in the Court’s recent cases—the Indian Gaming Regulatory Act in *Seminole Tribe,* the ADEA in *Kimel,* and the ADA in *Garrett*—are all relatively new statutes. One can argue that these statutes should have created new liabilities for states; indeed, as I have said, state sovereign immunity *should* be abrogable for federal question claims. But it is simply misleading to say that the Court has “narrowed the nation’s power” by depriving Congress of a power that Congress itself has hardly ever tried to use.

C. The Federal Analogy

Judge Noonan seems to object to state sovereign immunity altogether, whether in cases outside the Eleventh Amendment’s text or in those that fall within it. “Why should a state not pay its just debts,” he asks, “why should it be saved from compensating for the harm it tortiously causes?” These are not bad questions, but they have nothing to do with the Supreme Court’s overextension of state immunity beyond the Amendment’s text. Claims for tort or breach of contract are generally state law claims, after all, and therefore fall within the Amendment’s clear textual bar. Judge Noonan thus adopts the more basic critique of state sovereign immunity that Justice James Wilson urged in *Chisholm:* “haughty notions of state independence,

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91. The Federal Circuit held, six years prior to *Seminole,* that the Patent Act did not contain the requisite clear statement of congressional intent to abrogate state sovereign immunity. Chew v. California, 893 F.2d 331 (Fed. Cir. 1990). Nothing in that opinion suggested that it was a radical departure from prior law. See also REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, COPYRIGHT LIABILITY OF STATES AND THE ELEVENTH AMENDMENT: A REPORT OF THE REGISTER OF COPYRIGHTS 90–97 (1988) (discussing trend in pre-*Seminole* lower court decisions barring copyright suits on state sovereign immunity grounds).
93. P. 156.
94. At least they do if brought by an out-of-stater. If brought by an in-stater, the problem is simply that there is no basis for federal jurisdiction in the first place—that is, no federal question and no diversity of citizenship. Either way, the plaintiff is stuck in state court, where the state’s willingness to be sued is purely a question of state law.
state sovereignty and state supremacy” should not allow a State to “assume[] a supercilious preeminence above the people, who have formed it.”

Like Justice Wilson, Judge Noonan believes that the sovereign’s immunity from suit is inconsistent with republican democracy. “Sovereignty cannot be found in America in the form classically imagined,” he explains. “It is not directly or indirectly ascribed to the states by the constitution of the United States.” This position has much to recommend it as a matter of political theory and plain justice. It has not, however, ever been the law in the United States. While Hamilton, Madison, and Marshall’s comments in *The Federalist* and the ratification debates can be explained to endorse state sovereign immunity only in diversity cases, they clearly believed in some such immunity in some (relatively broad) set of cases. Hamilton, for instance, was quite unprepared to say that the proposed Constitution would render States accountable for their Revolutionary War debts. And the long history of state sovereign immunity jurisprudence in the centuries since has involved arguments about the scope of the States’ immunity, not the legitimacy of the basic principle. It is unfair for Judge Noonan to talk as if this anti-republican principle were a modern-day innovation of the Rehnquist Court.

One way to test whether people who seem outraged about state sovereign immunity are really serious is to ask how they feel about federal sovereign immunity. State and federal sovereign immunity are equally

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95. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 461 (1793) (Wilson, J.); see also id. at 478–79 (Jay, C.J.) (arguing that an interpretation of Article III that would override state sovereign immunity was superior “because it teaches and greatly appreciates the value of our free republican national Government, which places all our citizens on an equal footing, and enables each and every of them to obtain justice without any danger of being overborne by the weight and number of their opponents; and, because it brings into action, and enforces this great and glorious principle, that the people are the sovereign of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded by appearing with each other in their own Courts to have their controversies determined”).

96. P. 152. It is instructive to compare Justice Souter’s far more nuanced statement in *Seminole Tribe*:

> We said in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991), that “the States entered the federal system with their sovereignty intact,” but we surely did not mean that they entered that system with the sovereignty they would have claimed if each State had assumed independent existence in the community of nations, for even the Articles of Confederation allowed for less than that.


97. This is true even for the brief period between the Court’s ruling in *Chisholm* and the ratification of the Eleventh Amendment. Chief Justice Jay’s opinion in *Chisholm*, for instance, conceded that the same reasoning that held Article III’s provision for jurisdiction over suits involving state governments over rode their immunity would likewise support suits against the United States itself. *Chisholm*, 2 U.S. (2 Dall.) at 478. Jay acknowledged that the federal courts would not be allowed to hear such a suit, although he attributed the federal government’s immunity to the courts’ regrettable lack of means to enforce a judgment in such a case. *Id.*

inimical to republican government. As Justice Wilson’s opinion in Chisholm made clear, the only real “sovereign” in this country is the People—not the state governments, and not the national one either. And federal sovereign immunity has even less footing in the Constitution’s text. Justice Frankfurter once observed that “[a]s to the states, legal irresponsibility was written into the Eleventh Amendment; as to the United States, it is derived by implication.”

Federal sovereign immunity has implications in many of the same sorts of cases that state sovereign immunity does. Take the first example Judge Noonan gives: infringement of an author’s copyright by an arm of the state. If Ms. Chavez’s copyright had been infringed by a federal entity, her remedies would have been limited to those permitted by federal statutes that enact a limited waiver of federal sovereign immunity. The damages available in such a case are far less than one can obtain from a private party, and the statute appears to bar both injunctive relief against further infringements and attorneys’ fees to cover the cost of the lawsuit. The remedies available against the States look less unattractive when compared with those available against the federal government than when compared with what one might get from a private infringer.

The history of federal sovereign immunity, moreover, includes examples more ghastly than anything that Judge Noonan cites against the

99. Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 388 (1939). The Court’s opinion in Monaco made clear that federal sovereign immunity is another of those mysterious “postulates which limit and control” the operation of Article III:

Thus there is no express provision that the United States may not be sued in the absence of consent. Clause one of § 2 of Article III extends the judicial power “to Controversies to which the United States shall be a Party.” Literally, this includes such controversies, whether the United States be party plaintiff or defendant. . . . But by reason of the established doctrine of the immunity of the sovereign from suit except upon consent, the provision of Clause one of § 2 of Article III does not authorize the maintenance of suits against the United States.


100. See 28 U.S.C. § 1498(b) (2000) (providing that the owner’s “exclusive action” for infringement by the United States “shall be an action . . . against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages”).

101. The ordinary measure of compensatory damages is the diminution in the market value of the infringed work, see 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.02[A] (2002), which is often quite difficult to prove. The waiver statute does not appear to provide for recovery of any profits the United States might have gained from the infringer, and the “minimum statutory damages” provided in the statute are currently only $750 per work infringed. Berman, Reese, & Young, supra note 66, at 1107.


States. There is, for instance, the *Dalehite* case,\textsuperscript{104} in which ammonium nitrate fertilizer being loaded on government ships spontaneously combusted, killing 560, injuring some 3,000, and leveling much of Texas City, Texas. The Supreme Court found the case barred by the “discretionary function” exception to the Federal Tort Claims Act.\textsuperscript{105} The Court has been no less willing to tolerate seemingly draconian results for the sake of sovereign immunity when the government defendant is the United States than when it is an individual state.\textsuperscript{106}

Judge Noonan is probably no fan of federal sovereign immunity, either. He has suggested that “[t]he ordinary reason[s] for enforcing [federal] sovereign immunity” are “not free from challenge and not always very attractive.”\textsuperscript{107} Nonetheless, he has insisted that “[t]he immunity of the [federal] government applies whether the government is right or wrong. The very purpose of the doctrine is to prevent a judicial examination of the merits of the government’s position.”\textsuperscript{108} Such statements simply respect the existing state of the law, and I have little doubt that Judge Noonan similarly would follow the Court’s Eleventh Amendment precedents in a case that came before him. But nothing in the few reported cases on federal sovereign immunity that Judge Noonan has decided indicates that he finds that doctrine comparably outrageous to *state* immunity.

More importantly, not once in *Narrowing the Nation’s Power* does Judge Noonan acknowledge the federal parallel. If the problem with state sovereign immunity is really its archaic origins, its absence from the constitutional text, or its unfairness to victims of government misconduct, then surely federal sovereign immunity is comparably outrageous. Moreover, the Rehnquist Court’s continued hostility to suits against the


\textsuperscript{105} See Dalehite, 346 U.S. at 35–36 (construing 28 U.S.C. § 2680(a)).

\textsuperscript{106} Compare Feres v. United States, 340 U.S. 135, 146 (1950) (creating an implied exception to the FTCA for injuries to military personnel that “arise out of or are in the course of activity incident to service”), *with* United States v. Johnson, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting) (“[N]either the three original *Feres* reasons nor the *post hoc* rationalization of military discipline justifies our failure to apply the FTCA as written. *Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received.”) (internal quotation marks omitted). The Court extended *Feres* to cover *Bivens* suits in *United States v. Stanley*, 483 U.S. 669, 683–84 (1987), which involved a former serviceman’s suit against military officers who had administered the drug LSD to him as part of an army experiment without his consent. Justice O’Connor, in dissent, exclaimed that “conduct of the type alleged in this case is so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission.” *Id.* at 709 (O’Connor, J., dissenting). Where is Judge Noonan’s outrage about federal immunities?

\textsuperscript{107} Wildman v. United States, 827 F.2d 1306, 1309 (9th Cir. 1987).

\textsuperscript{108} *Id.*
United States\textsuperscript{109} casts doubt on Judge Noonan’s assertion that the Court is “siding” with the States. I return to this notion of “siding” in Part III, below. First, however, I consider the second target of Judge Noonan’s attack: the Rehnquist Court’s jurisprudence interpreting Section Five of the Fourteenth Amendment.

II. The Section Five Power

I have argued that many of Judge Noonan’s assertions about the Court’s state sovereign immunity jurisprudence are either clearly wrong or so exaggerated as to be dangerously misleading. My disagreements with the Judge on the Section Five power, on the other hand, are more within the bounds of reasonable debate. But my basic point remains the same: The Court’s interpretation of Section Five is plausible, and Judge Noonan’s efforts to paint it as outrageous are both unfair and misleading.

In \textit{City of Boerne v. Flores}, the Court held that Congress’s power to enforce the Fourteenth Amendment is “remedial,” not “substantive”; that is, Congress does not have the authority to enforce an interpretation of the Constitution that is different from the interpretation that the Court itself would adopt.\textsuperscript{110} While Congress may still act prophylactically, prohibiting some amount of constitutional state action to ensure the elimination of unconstitutional conduct, \textit{Boerne} held that such legislation must have “congruence and proportionality” to the constitutional violation at issue.\textsuperscript{111} Applying these principles in subsequent cases, the Court has held that several federal statutes fall outside the appropriate scope of the Section Five power.\textsuperscript{112}

In most of these cases, the holding’s only consequence is that Congress may not subject the states to damages liability under the statutory scheme in question.\textsuperscript{113} The reason, as I have discussed, is that Congress may abrogate state sovereign immunity when it acts under the Section Five power but not

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\item[110.] 521 U.S. 507, 527 (1997).
\item[111.] \textit{Id.} at 520.
\item[113.] Of the Section Five cases after \textit{Boerne}, only \textit{Morrison} involved an issue of power to enact the statute, as opposed to power to subject the States to damages liability. The \textit{ADEA in Kimel}, the ADA in \textit{Garrett}, and the Lanham Act in \textit{College Savings Bank} were all perfectly valid Commerce Clause statutes, while the Patent Act in \textit{Florida Prepaid} was enacted under the Patent Clause of Article I.
\end{enumerate}
\end{footnotesize}
when it acts under the Commerce Power or some other power enumerated in Article I.\textsuperscript{114} Statutes like the Americans with Disabilities Act, for instance, seem unlikely to face any serious challenge under the Commerce Clause,\textsuperscript{115} it is only such statutes’ provisions for state damages liability that have been found wanting. The Court’s Section Five cases are in this sense driven by its state sovereign immunity jurisprudence. If Seminole Tribe had gone the other way and held that Congress may abrogate the States’ immunity pursuant to its Article I powers, no one would be trying to fit the ADA, the patent laws, and other federal regulation under the aegis of Section Five. One may thus criticize Garrett, Kimel, and the Florida Prepaid cases as stemming from Seminole Tribe’s flawed premise without impugning the holding and reasoning of Boerne itself.\textsuperscript{116}

Judge Noonan is not content to stop there, however. He objects to the Court’s Section Five jurisprudence on four primary grounds. First, he appears to reject the Court’s characterization of the Section Five power as “remedial” in nature. Second, he has no use for the “congruence and proportionality” test that the Court has devised to hold Congress to this remedial function. He is particularly hostile to the Court’s practice of reviewing the legislative record in applying this test. Third, he disagrees with the Court’s adherence to the state action doctrine, which limits Section Five legislation to addressing the acts of public, not private, entities. And finally, he sees the entire Section Five corpus as a power grab by the Court designed to usurp the rightful role of Congress. I take up the first two of these objections in Section A. The third and fourth are the subjects of Sections B and C, respectively.

A. Boerne, the Remedial Power, and Proportionality

Section Five of the Fourteenth Amendment provides that “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”\textsuperscript{117} In Boerne, the Court observed that this text is “inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.”\textsuperscript{118} Congress thus has the power to “remedy

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\item[114.] See supra notes 75, 88–90, and accompanying text.
\item[116.] See, e.g., Colt. Sav. Bank, 527 U.S. at 699–705 (Breyer, J., dissenting) (approving the holding in Boerne, while “contin[uing] to register... agreement with the view expressed in the Seminole dissents and in the scholarly commentary on that case”).
\item[117.] U.S. Const. amend. XIV, § 5.
\item[118.] 521 U.S. 507, 519 (1997). On this point, we might compare the “enforce” language in Section Five with Congress’s power under Article I, § 8 “[t]o define and punish Piracies and
or prevent unconstitutional actions” but not to “make a substantive change in the governing law.”

Judge Noonan asks “why Congress should be confined to the remedial. The fourteenth amendment assigns Congress the role of enforcing its guarantees. The amendment assigns no role to the court.” But this suggestion is doubly wrong. Section Five creates a new enumerated power for Congress tied to the enforcement of the Amendment’s substantive provisions. The lack of any explicit mention of the courts has never been thought to foreclose a complementary judicial enforcement role; indeed, enforcement of the Fourteenth Amendment has been a judicial growth industry for the past three-quarters of a century. Nor has the mere enumeration of particular legislative powers been generally thought to bar judicial review of acts taken pursuant to those powers. At least since McCulloch v. Maryland, the Court has been willing to review whether particular acts of Congress fall within the confines of the power grants used to justify them.

Perhaps Judge Noonan meant to say not that the Court has no role in supervising Congressional action under Section Five, but rather that the courts should afford Congress wide latitude in this area. In particular, he might argue, Congress should have interpretive latitude; where reasonable people can differ about the meaning of the Constitution, Congress should be able to act on the basis of its own reading even though the Court might have

Felony committed on the high Seas, and Offences against the Law of Nations.” U.S. CONST. art. 1, § 8, cl. 10 (emphasis added).
119. Boerne, 521 U.S. at 519.
120. P. 148.
121. 17 U.S. (4 Wheat.) 316 (1819).
122. See id. (inquiring whether the creation of the Bank of the United States fell within the scope of the “necessary and proper” powers allocated to Congress). For more recent examples, see, e.g., Eldred v. Ashcroft, 122 S. Ct. 1170 (2002) (reviewing whether the Copyright Extension Act fell within the scope of the Article I copyright power); United States v. Lopez, 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act fell outside the scope of Congress’s commerce power). Some scholars have argued, of course, that cases concerning the limits of Congress’s powers should be non-justiciable. See, e.g., Jesse H. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court 380 (1980). But even Herbert Wechsler, whose work inspired many of these “political safeguards” arguments, refused “to say that the Court can decline to measure national enactments by the Constitution when it is called upon to face the question in the course of ordinary litigation; the supremacy clause governs there as well.” Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543, 559 (1954). The Court came close to swearing off judicial review of federalism issues in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), but the question in that case was whether, once Congress was conceded to be acting within the confines of its enumerated commerce power, the Court should nonetheless fashion further implied limitations on national power in the name of state sovereignty. See id. at 537. To the extent that Garcia might be read more broadly to reject judicial review of federalism issues generally, it is pretty clearly no longer good law. See John C. Yoo, The Judicial Safeguards of Federalism, 70 S. CAL. L. REV. 1311, 1311–12 (1997).
a different view. Such a reading might draw on language from Justice Brennan's opinion in *Katzenbach v. Morgan*, which suggested that Congress might find a violation of the Equal Protection Clause even where the Court has not.

This "substantive power" reading of *Katzenbach* has always been controversial. Archibald Cox argued shortly after *Katzenbach* that the opinion is better read to defer to Congress's *factual* determinations in certain circumstances. Where unconstitutionality of a state practice turns on the existence of purposeful discrimination, for instance, Congress may appropriately be more confident that such discrimination is at work than a court, with its limited investigatory powers, would be. But this is not to say that Congress can *alter* the substance of the Constitution; it simply suggests that Congress may sometimes have an easier time bringing constitutional violations to light.

In any event, no decision has clearly relied on the "substantive power" reading of Section Five since *Katzenbach*. Moreover, as the *Boerne* Court suggested, that reading must contend with substantial practical difficulties. First, if Congress may define the substantive meaning of constitutional provisions, then "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V." Justice Harlan's dissent in *Katzenbach* noted a second problem: Congress might exercise its power to define the substance of constitutional limitations "so as in effect to dilute equal protection and due process decisions of this Court." Justice Brennan attempted to answer this concern by suggesting that the power to "enforce" includes "no power to restrict, abrogate, or dilute these guarantees." But this "one-way ratchet" idea has never been altogether persuasive; "enforce" may be read quite naturally to include "police the limits of." If Congress's view of the Fourteenth Amendment is really supreme—as Judge Noonan insists—then it is hard to see why Congress may not exercise this power to curb Supreme Court interpretations that, in its view, go too far.

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123. For a similar proposal, see Cole, *supra* note 7, at 77 (stating that "Congress should be permitted to go further than the Court in its interpretation of what equal protection or due process requires").


125. See Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 106–08 (1966). Moreover, the relevant passage of *Katzenbach* was an alternative ground of decision and therefore unnecessary to the judgment.


128. *Id.* at 651 n.10.

129. Another problem with Justice Brennan's view is that many individual rights that Congress might "enforce" under the Fourteenth Amendment tend to trade off with one another. For example, Congress might "enforce" the Establishment Clause by preempting the "mini-RFRAs" state governments enacted to protect religious liberty after the federal RFRA was struck down. *Cf.*
The most serious objection to the "substantive power" reading is its potential drastically to enlarge Congress’s power vis-à-vis state governments. Consider Judge Noonan’s criticism of the Court’s application of Boerne in Garrett and Kimel.\textsuperscript{130} Those cases involved federal statutes barring discrimination against the disabled and the aged, respectively. Under current doctrine, both those groups are non-suspect classes; that is, classifications based on disability or age are subject only to “rational basis” review.\textsuperscript{131} Courts reviewing such classifications are highly unlikely—to put it mildly—to strike them down.\textsuperscript{132}

Under the “substantive power” reading, however, Congress would have the power to reach a different result, determining, in essence, that all such classifications are irrational and therefore unconstitutional. Because all legislative classifications—whether based on age, disability, or any other characteristic—are subject to rational basis review under the Equal Protection Clause, Congress would be able to legislate against any state law or practice that made distinctions between persons. Moreover, all laws—whether they classify or not—are similarly subject to minimal, rational basis review under the Due Process Clause. Congress would therefore be able to outlaw literally any state practice that it found to be irrational. The Courts swore off this sort of review of state statutes long ago,\textsuperscript{133} but no similar restraint would necessarily constrain Congress were the “substantive power” reading adopted.

To be sure, we might count on the good faith of Congress to avoid this sort of aggrandizement. But Congress has already tried to shoehorn statutes into the Section Five power, even when the law’s subject matter had nothing to do with the Reconstruction Amendments’ purposes. In Florida Prepaid, for example, the Court rejected Congress’s effort to recast the federal patent laws as Section Five legislation.\textsuperscript{134} One might have thought it obvious that

\textit{Boerne}, 521 U.S. at 536–37 (Stevens, J., concurring) (arguing that the federal RFRA violated the Establishment Clause by preferring religious claims over secular ones). Similarly, Congress might “enforce” the privacy rights of black families by enacting a federal statute barring cross-burning directed at a particular residence, notwithstanding the cross-burners’ free speech rights. \textit{Cf.} R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (holding that a state statute barring cross-burnings violated the Free Speech Clause).

\textsuperscript{130} Pp. 102–19.


\textsuperscript{132} \textit{But see} Romer v. Evans, 517 U.S. 620 (1996) (invalidating, under rational basis scrutiny, a Colorado constitutional amendment that discriminated against homosexuals); \textit{City of Cleburne}, 473 U.S. at 450 (holding the challenged local discrimination against the mentally retarded unconstitutional even under rational basis review).

\textsuperscript{133} See, e.g., Ferguson v. Skrupa, 372 U.S. 726, 731 (1963) (observing that the Court had abandoned “the use of the ‘vague contours’ of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise”); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (marking the end of the \textit{Lochner} era).

the Civil War was not fought to establish federal intellectual property rights. In any event, reliance on congressional self-restraint as an adequate check on the Section Five power would violate the elementary constitutional principle that foxes do not guard henhouses.  

The Boerne Court did not say, however, that Congress could legislate no more broadly than the scope of judicially recognized constitutional violations. Rather, the Court recognized that Congress might enact complex and preventive remedies that would be more elaborate than anything a court might be willing to order by injunctions.  

Even more important, the Boerne Court also acknowledged that Congress may act prophylactically. "Legislation which deters or remedies constitutional violations," the Court said, "can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." This prophylactic power is limited, however, by the requirement that "[t]here must be a congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end." It is this "proportionality" test that gives rise to Judge Noonan's second broad objection.

Judge Noonan is shocked—shocked!—by the proportionality test:

This formula was unprecedented. Proportionality in legislation! Who would measure the proportion? Implicitly, the answer was "the court." What measure would the court use? Implicitly, the answer was "whatever we find handy."  

A sympathetic reader might interpret this outburst as speaking solely of the Court's Section Five jurisprudence, which had not, in fact, used the term "proportionality" prior to Boerne. But it reads as if directed at the notion of "Proportionality in legislation!" generally, and the next sentence invokes criticism of proportionality in the Court's Eighth Amendment jurisprudence as evidence that the notion is unworkable. Judge Noonan is clearly

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135. See, e.g., Cass R. Sunstein, Constitutionalism After the New Deal, 101 HARV. L. REV. 421, 467 (1987) (observing that "[t]he case for judicial review depends in part on the proposition that foxes should not guard henhouses"); see also THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (stating that the Constitution embodies a "policy of supplying by opposite and rival interests, the defect of better motives" so that "the private interest of every individual may be a sentinel over the public rights").


138. Id. at 520.

139. P. 35.

140. See id. (observing that "scorn had been heaped by members of the court themselves on the notion of the court measuring proportionality in criminal sentences"). One would never know from Judge Noonan's account that proportionality analysis is in fact alive and well in the Court's Eighth Amendment jurisprudence. See, e.g., Atkins v. Virginia, 122 S. Ct. 2242, 2246–47 (2002) (acknowledging that to avoid excessive punishments, the Court must engage in a proportionality review based on evolving standards of decency); see also Apprendi v. New Jersey, 530 U.S. 466,
suggesting that proportionality is a foreign and misguided concept in American constitutional law.

That suggestion is just not correct. A brief LEXIS search reveals many explicit references to "proportionality" in constitutional cases. As Justice Breyer recently explained, the concept is useful in a variety of situations "where a law significantly implicates competing constitutionally protected interests in complex ways." In such situations,

the Court has closely scrutinized the statute’s impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionality. Rather, it has balanced interests. And in practice that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute’s salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative).

559 (2000) (Breyer, J., dissenting, joined by Rehnquist, C.J.) (observing that “in respect to sentencing systems, proportionality, uniformity, and administrability are all aspects of that basic "fairness" that the Constitution demands") (emphasis added). In Harmelin v. Michigan, 501 U.S. 957 (1991), the case Judge Noonan cites, seven justices in fact endorsed a proportionality principle for evaluating criminal sentences, although they disagreed about its breadth. See id. at 997 (Kennedy, J., concurring, joined by O’Connor and Souter, JJ.) (arguing that the Cruel and Unusual Punishment Clause includes a narrow proportionality principle); id. at 1009 (White, J., dissenting, joined by Blackmun and Stevens, JJ.) (supporting a broad proportionality test); id. at 1027–28 (Marshall, J., dissenting) (agreeing with White as to the constitutionality of capital punishment). The Court’s most recent decisions have given the states wide leeway on punishment, but have nonetheless continued to employ the “proportionality” rubric. See Lockyer v. Andrade, 123 S. Ct. 1166 (2003); Ewing v. California, 123 S. Ct. 1179 (2003). This is hardly a central point—proportionality analysis under the Eighth Amendment is quite different from that conducted under Section Five. But Judge Noonan’s misleading discussion of this point is symptomatic of a broader problem.

141. See, e.g., BMW of N. Am. v. Gore, 517 U.S. 559, 580–81 & n.32 (1996) (evaluating the constitutionality of a punitive damages award in part by examining the proportionality or ratio between the award and the harm caused by the defendant); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (holding, in the context of land-use exactions, that "rough proportionality" best encapsulates the requirement of the Fifth Amendment and that "the required dedication [must be] related both in nature and extent to the impact of the proposed development"); Zinermon v. Burch, 494 U.S. 113, 132 (1990) (observing that due process does not require a hearing prior to deprivation of a liberty interest where such a hearing "is unduly burdensome in proportion to the liberty interest at stake"); Rock v. Arkansas, 483 U.S. 44, 55–56 (1987) (under the Sixth Amendment, "restrictions of a defendant’s right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve"); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 418 (1977) (rejecting the broad remedy imposed by the court of appeals in a school desegregation case on the ground that it was “entirely out of proportion to the constitutional violations found by the District Court”); see also Johnson v. DeGrandy, 512 U.S. 997, 1000 (1994) (holding that, in adjudicating a vote dilution claim under section 2 of the Voting Rights Act, "proportionality" between the number of minority districts and the number of minority voters in the population is an important factor).


143. Id. Justice Breyer went on to point out that "[t]he approach taken by these cases is consistent with that of other constitutional courts facing similarly complex constitutional problems," specifically invoking the proportionality analysis employed by the European Court of Human Rights and the Supreme Court of Canada. Id. at 403 (citing Bowman v. United Kingdom, 26 Eur.
In essence, proportionality is just another word for the familiar means/ends fit analysis that pervades constitutional law. Hence, for example, the Court’s commercial speech jurisprudence “has examined the restriction’s proportionality, the relation between restriction and objective, the fit between ends and means. In doing so, the Court has asked whether the regulation of commercial speech ‘directly advances’ a ‘substantial’ governmental objective and whether it is ‘more extensive than is necessary’ to achieve those ends.”144 It is highly implausible to suggest, as Judge Noonan does,145 that this sort of analysis is somehow alien or radical.

The proportionality component of Boerne is necessary only because the Court did not limit Congress strictly to prohibiting state conduct that a court would find unconstitutional. Because the Court recognized a prophylactic aspect to the Section Five power—that is that Congress may ban permissible state conduct in an effort to prevent or remedy actual constitutional violations—the Court needs a way to distinguish between prophylactic legislation and legislation that seeks to change the substantive meaning of the Constitution. That is the office of the proportionality test. It is hard to imagine how the Court might have proceeded differently without either (a) abandoning the remedial nature of Congress’s power, (b) abandoning the notion of prophylactic legislation, or (c) leaving Congress to police the boundaries of its own power.

Judge Noonan objects to proportionality in part because the Court, in applying the test, has frequently looked to the legislative record. “This criterion,” he argues, “means that the federal judiciary... may, and indeed must, treat Congress the way courts would treat an administrative 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.”146 Now


144. Thompson v. Western States Med. Ctr., 122 S. Ct. 1497, 1514 (2002) (Breyer, J., dissenting) (emphasis added); see also Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) ("What our decisions require is a ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends... a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served’...") (quoting In re R.M.J., 455 U.S. 191, 203 (1982)). Cases like Fox make clear that proportionality analysis is a form of intermediate scrutiny. See id.

145. See, e.g., p. 40 (describing the proportionality test as a "new and powerful weapon[] to be deployed in constitutional litigation").

146. P. 6. Judge Noonan also objects that, in Chavez, this sort of review was conducted not by the Supreme Court but by "a circuit court, and, by implication it could be any federal district court. The federal judiciary as a whole was to function as the censor of Congress." P. 100; see also p. 6 (making the same point). The propriety of judicial review in this country, however, has never depended on the level of the judicial food chain at which review takes place. We do not—as many European countries do—centralize judicial review in a single "constitutional court." Surely Judge Noonan does not mean to challenge this foundational aspect of our system. But then why throw in such a comment?
the first thing to say about this is that agencies are treated pretty well in American public law; in fact, they tend to make out like bandits.\textsuperscript{147} Moreover, the reasons that courts defer to Congress in the Section Five context are similar to the reasons courts often defer to agencies, i.e., a combination of expertise (particularly at factfinding) and democratic accountability.\textsuperscript{148} One might concede that the two situations are similar, of course, and still argue that Congress should receive considerably more deference than an agency.\textsuperscript{149} But Judge Noonan has made no effort, as far as I can tell, to compare the two situations to determine whether the Court is applying the same standard of review or, if not, to what extent and in what direction the standards actually differ.

In any event, it remains highly unclear how significant the Court’s review of the legislative record really is to the resolution of Section Five cases. Consider \textit{Florida Prepaid}, which held that a federal law subjecting state governments to private damages suits for patent infringements was not “appropriate” Section Five legislation.\textsuperscript{150} In holding the Patent Remedy Clarification Act disproportionate to the constitutional problem posed by state infringements, the Court did look to the legislative record. That record included only a few instances of state infringement, leading the Court to conclude that “the Patent Remedy Act does not respond to a history of ‘widespread and persisting deprivation of constitutional rights’ of the sort Congress has faced in enacting proper prophylactic § 5 legislation.”\textsuperscript{151} Judge Noonan, as well as many other commentators, has taken this to mean that the proportionality test turns on the \textit{number} of violations of federal law by state actors reflected in the legislative record.\textsuperscript{152} Passages in \textit{Kimel}\textsuperscript{153} and \textit{Garrett}\textsuperscript{154} have been read in a similar way.\textsuperscript{155}

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\textsuperscript{148} Compare, e.g., \textit{Chevron}, 467 U.S. at 865–66 (giving democratic reasons for deferring to agency interpretations of law), and \textit{State Farm}, 463 U.S. at 53–54 (suggesting that deference to an agency is based on expertise and therefore appropriate only when the agency has actually applied that expertise), \textit{with Katzenbach v. Morgan}, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting) (acknowledging that “[d]ecisions on questions of equal protection and due process are based not on abstract logic, but on empirical foundations. To the extent ‘legislative facts’ are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect”).

\textsuperscript{149} This would be a plausible but not an obvious concession. After all, Congress has more democratic accountability than an agency but considerably less expertise.


\textsuperscript{151} \textit{Id.} at 645.

\textsuperscript{152} See pp. 92–93.
My own view is that a different reading is more plausible. In passing prophylactic legislation Congress bars some state action that is constitutionally permissible in order to prevent or remedy state action that actually violates the Constitution. Proportionality speaks to the relation between these two sets of acts covered by the federal law. As Doug Laycock has explained, "The proportionality part of this standard seems to require an empirical judgment: Congressional enforcement legislation is valid only if violations of the Constitution, as interpreted by the Court, appear in a sufficiently large proportion of all cases presenting violations of the statute." Because this judgment is empirical, the Court understandably looks to the legislative record as a convenient source of evidence.

In Florida Prepaid, for example, the statute in question subjected the States to damages suits in all cases of patent infringement. Only a certain subset of patent infringements by state actors, however, are constitutional as well as statutory violations. A state patent infringement works a deprivation of due process only if it is intentional, and only if the state fails to provide adequate remedies for the infringement after the fact. The proportionality

153. See, e.g., Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89 (2000) ("Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation.").

154. See, e.g., Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 369 (2001) ("The record assembled by Congress includes many instances to support such a finding [of widespread discrimination against the disabled]. But the great majority of these incidents do not deal with the activities of States.").


156. Laycock, Conceptual Gulfs, supra note 7, at 746; see also Ruth Colker & James J. Brudney, Dissing Congress, 100 Mich. L. Rev. 80, 125 (2001) (stating that, in Kimel, "as in City of Boerne, the Court compared the scope of the actions that were made unlawful under the federal legislation with the Court's prior holdings concerning what kind of conduct has been found to be unconstitutional in the subject area").


158. See Fla. Prepaid, 527 U.S. at 643 (citing Parratt v. Taylor, 451 U.S. 527, 539–41 (1984)); Berman, Reese & Young, supra note 66, at 1066–68. Judge Noonan asks, "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. Once again, however, Judge Noonan oversimplifies a fairly complicated issue. The Florida Prepaid court noted that "the State of Florida provides remedies to patent owners for alleged infringement on the part of the State. Aggrieved parties may pursue a legislative remedy through a claims bill for payment in full, Fla. Stat. § 11.065 (1997), or a judicial remedy through a takings or conversion claim, see Jacobs Wind Electric Co. v. Florida Dep't of Transp., 626 So.2d 1333 (Fla. 1993)." 527 U.S. at 644 n.9. For reasons that Mitch Berman, Tony Reese, and I have explained elsewhere, see Berman, Reese & Young, supra note 66, at 1088–90, these sorts of remedies are unlikely to be either preempted by federal substantive law or covered by 28 U.S.C. § 1338(a) (2000), which provides for exclusive federal jurisdiction over most intellectual property claims. Moreover, as the Court also pointed out, the intellectual property experts testifying before Congress did not claim that all state remedies were preempted, but rather that they were inconvenient, non-uniform, or uncertain. See Fla. Prepaid, 527 U.S. at 643 n.8. In any event, it would be strange if Congress could put the States in violation of the federal
analysis thus turns on whether, in most cases where a state infringes a patent, that infringement is intentional, unremedied, and therefore unconstitutional. Looking at the legislative record, the Court found that the opposite was the case: "Congress did not focus on instances of intentional or reckless infringement on the part of the States. Indeed, the evidence before Congress suggested that most state infringement was innocent or at worst negligent."\(^{159}\) Moreover, "Congress . . . barely considered the availability of state remedies for patent infringement and hence whether the States’ conduct might have amounted to a constitutional violation under the Fourteenth Amendment."\(^{160}\) The Court thus concluded that "Congress appears to have enacted this legislation in response to a handful of instances of state patent infringement that do not necessarily violate the Constitution."\(^{161}\)

Similar language appears in *Kimel* and *Garrett*.\(^{162}\) The Court does not search the legislative record for a sufficiently widespread pattern of statutory violations by state governments.\(^{163}\) Rather, the Court looks at the state statutory violations that Congress had in mind to see if most of them are likely to have been *constitutional* violations as well. If not, then the statutory remedy is likely out of proportion to the constitutional wrong which alone gives Congress the power to act under Section Five.

Unless one believes that Congress’s power to outlaw constitutionally permissible state behavior exceeds the prophylactic function, it is hard to see what is wrong with the Court’s approach. But one need not accept that conclusion—indeed, may people whom I respect greatly do not—to agree that the Court’s approach is not altogether incoherent or indefensible. So long as *that* is the case, Judge Noonan’s treatment is simply over the top. Reasonable people can disagree about the best approach to interpreting Section Five. Reasonable people do not, however, accuse judges taking a different view of simply following their own “value judgments” or of

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\(^{159}\) *Fla. Prepaid*, 527 U.S. at 645.

\(^{160}\) *Id.* at 643; *see also Id.* at 644 (“The primary point made by these witnesses . . . was not that state remedies were constitutionally inadequate, but rather that they were less convenient than federal remedies, and might undermine the uniformity of patent law.”).

\(^{161}\) *Id.* at 645–46 (emphasis added).

\(^{162}\) *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 370 (2001) (“JUSTICE BREYER’s Appendix C consists not of legislative findings, but of unexamined, anecdotal accounts of ‘adverse, disparate treatment by state officials.’ . . . Of course, as we have already explained, ‘adverse, disparate treatment’ often does not amount to a constitutional violation where rational-basis scrutiny applies.”); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000) (“Congress never identified any pattern of age discrimination by the States, *much less any discrimination whatsoever that rose to the level of constitutional violation.*”) (emphasis added).

\(^{163}\) *Contra* p. 100 (stating that, under the Court’s test, “Congress could not make a new rule absent a record of multiple and persistent violations of the constitution over a period of time”).
viewing the persons affected by their decisions as "worthy of almost no
attention."164

B. Morrison and State Action

Judge Noonan objects to a second aspect of the Court’s Section Five
jurisprudence: its limitation of the targets of Section Five legislation to state
actors.165 The key decision here is United States v. Morrison,166 in which the
Court struck down the private civil remedy provisions of the Violence
Against Women Act. The VAWA provided that, when a woman was the
victim of gender-motivated violence, she could sue her attacker in federal
court as a supplement to whatever criminal and civil remedies might be
available in state court under state law.167 Congress enacted the VAWA in
response to years of congressional testimony indicating that state criminal
justice systems were inhospitable, for a number of reasons, to women’s
claims of battery and rape.168

Unlike most of the Court’s recent Section Five cases, Morrison
involved a claim against a private individual rather than a state government.
There was thus no issue of sovereign immunity, and the only question before
the Court was whether Congress had the enumerated power to address the
problem of violence against women at all. The Government defended the
statute under both the Commerce Power and the Section Five power. The
Court rejected both grounds, holding that the law fell outside the Commerce
Power because violence against women was not “commercial activity” and
outside Section Five because the law was directed at private rather than
governmental actors.169

Judge Noonan finds Morrison outrageous, although he is a little vague
as to exactly why. The tone of his account makes clear he disagrees with the
Commerce Clause reasoning,170 but his analysis focuses on the Section Five
power. Judge Noonan plausibly argues that Congress should be able to
provide remedies against private defendants as a remedy for unconstitutional

166. 529 U.S. 598 (2000).
168. As the Morrison Court reported, “Congress received evidence that many participants in
state justice systems are perpetuating an array of erroneous stereotypes and assumptions. Congress
concluded that these discriminatory stereotypes often result in insufficient investigation and
prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the
victims of that crime, and unacceptably lenient punishments for those who are actually convicted of
gender-motivated violence.” 529 U.S. at 620 (citing H.R. CONF. REP. NO. 103-711, at 385–86
(1991)).
169. See id. at 617–18 (Commerce Clause), 620–21 (Section Five).
170. See, e.g., id. at 133 (sympathetically recounting the dissent’s comparison of the Commerce
Clause holding to Lochner-era precedents).
state action. In other words, the state’s failure to prosecute rapists, not the rape itself, is unconstitutional; Congress has simply chosen to remedy the state’s unconstitutional default by providing the victim with a federal forum for suing her attacker rather than sanctioning the state officials directly.

This strikes me as a plausible argument, but, as the *Morrison* Court pointed out, it is flatly contrary to over a century of precedent. In the *Civil Rights Cases*, the Court struck down the public accommodation provisions of the Civil Rights Act of 1875, which, like the VAWA, sanctioned private conduct. Although the Southern states had laws on the books requiring equality of treatment, those laws were unequally enforced by state governments; hence, the Reconstruction Congress sought to give the newly freed slaves an alternative remedy in federal court under federal law. If this option was foreclosed in 1883, the *Morrison* Court found, Congress could not offer a similar alternative remedy against private actors for women in the VAWA.

It is important to distinguish between two aspects of the holding in the *Civil Rights Cases*. The *Morrison* Court read the earlier precedent to hold not only that the Constitution applies solely to state action, but also that Congress may not remedy unconstitutional state action by providing an alternative federal remedy in federal court. This second point, as I have suggested, is legitimately contestable. As Justice Breyer’s dissent in *Morrison* suggested, this second aspect of the *Civil Rights Cases* is arguably only implicit in the decision—it arises from the reality that the Civil Rights Act of 1875 was in fact addressed toward the same sort of discriminatory state enforcement as the VAWA, not from any explicit language in the Court’s opinion. And even if the second point was necessarily included in the *Civil Rights Cases*’ holding, this aspect of the holding may have been wrong.

However, the Court seems necessarily to have rejected the inadequate state enforcement argument in the *Civil Rights Cases*, and that decision has stood for 120 years. It is hardly surprising that the Court chose to adhere to a precedent of that vintage; indeed, only Justice Breyer (joined by Justice Stevens) questioned the majority’s analysis under Section Five, and even he did not purport actually to decide the question. Even if one rejected this

172. 109 U.S. 3 (1883).
174. Id. at 621–24. The Court went on to hold that the provisions of the VAWA swept so broadly as to provide private remedies in a disproportionate number of cases in which no unconstitutional lack of enforcement by the state could be shown. Id. at 625–27. Judge Noonan does not address this argument.
175. Id. at 664–65 (Breyer, J., dissenting).
176. See id. at 666 (“Despite my doubts about the majority’s § 5 reasoning, I need not, and do not, answer the § 5 question, which I would leave for more thorough analysis if necessary on another occasion.”) (Breyer, J., dissenting).
second aspect of the *Civil Rights Cases*, one would then have to show that the States’ failure to respond adequately to violence against women was not only unconstitutional but so pervasive as to support a nationwide federal remedy in every case of gender-motivated violence.\textsuperscript{177}

The basic problem with Judge Noonan’s analysis of *Morrison* is similar to that afflicting his analysis of the other cases he discusses. There are plausible arguments that the Court is getting these cases wrong. But there are also plausible arguments that the cases are not wrong. Judge Noonan’s one-sided treatment obscures these latter arguments. And the level of his rhetoric—especially his strong suggestion that the Court is somehow insensitive to “Gang Rape at State U.”\textsuperscript{178}—is simply out of line.

C. Marbury and Cooper, *Colliding At Last*

One pervasive theme of Judge Noonan’s critique of the Court’s Section Five jurisprudence is the degree to which it concentrates ultimate interpretive authority in the Supreme Court, thereby denying Congress the right to interpret the Constitution in its own way. This concern is shared by any number of other commentators, who rightly point out that Congress, like all public officials, has both the right and the responsibility to interpret the Constitution.\textsuperscript{179}

This concern goes to the heart of a longstanding debate about the proper role and authority of the Supreme Court in constitutional adjudication. In *Cooper v. Aaron*, the Court asserted that “the federal judiciary is supreme in the exposition of the law of the Constitution . . . . It follows that the interpretation of the Fourteenth Amendment enunciated by this Court . . . is the supreme law of the land.”\textsuperscript{180} This position is often contrasted with a narrower reading of *Marbury v. Madison*,\textsuperscript{181} which emphasizes that “[i]n Marbury, an important strand of Marshall’s reasoning derives the Court’s power to declare acts of Congress unconstitutional, and hence its power to make authoritative determinations of constitutional law, solely from its function of deciding cases.”\textsuperscript{182} The central debate concerns whether the

\textsuperscript{177.} *See id.* at 625–27 (concluding that this showing could not be made).

\textsuperscript{178.} P. 120.

\textsuperscript{179.} *See, e.g.*, PAUL BREST, SANFORD LEVINSON, J.M. BALKIN, & AKHIL REED AMAR, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* xxxiii (4th ed. 2000) (insisting that “the Supreme Court is not the only interpreter of the Constitution”).

\textsuperscript{180.} 358 U.S. 1, 18 (1958).

\textsuperscript{181.} 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{182.} HART & WECHSLER, *supra* note 69, at 78; *see also* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 177 (1962). Although *Marbury* states expansively that “[i]t is emphatically the province and duty of the judicial department to say what the law is,” 5 U.S. (1 Cranch) at 177— the language relied upon in *Cooper*, *see* 358 U.S. at 18—Chief Justice Marshall immediately followed that statement with the following passage:
Court’s interpretations of the Constitution are binding on all other actors—even those not a party to the instant litigation—or whether those other non-parties are free to interpret the Constitution in the course of their own duties. Hence, former Attorney General Edwin Meese argued that a Supreme Court decision “binds the parties in a case and also the executive branch for whatever enforcement is necessary. But such a decision does not establish a supreme law of the land that is binding on all persons and parts of government henceforth and forevermore.”

The Meese position has substantial appeal. The Supreme Court does its job, and the other branches of the government do theirs. Each branch applies the Constitution as best it can, without purporting to impose that interpretation on other, coordinate branches. In some situations, this makes a great deal of sense. A member of Congress may vote against a bill on the ground that she thinks it is unconstitutional, even if a court would likely rule (or has already ruled) otherwise. Likewise, few people have a problem with Thomas Jefferson’s pardon of certain individuals convicted by the previous administration under the Sedition Act on the ground that he thought the law unconstitutional, notwithstanding that the lower federal courts had been willing to apply the law. Nor is it problematic that Andrew Jackson vetoed a bill to recharter the Bank of the United States on the ground that he thought the Bank unconstitutional, notwithstanding the Court’s contrary decision in McCulloch v. Maryland.

All these uncontroversial situations have a common characteristic: None of the legislative or executive decisions at issue—a vote, a pardon, or a veto—is reviewable by a court. In each case, the official may base his decision on any reason or no reason at all, so no one can complain if the decision is, in fact, based on an erroneous reading of the Constitution. In none of

Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.


185. 417 U.S. (4 Wheat,) 316 (1819); see also SULLIVAN & GUN ThER, supra note 184, at 20–21.
these situations, in other words, is a court being asked to defer to the coordinate branch’s reading of the Constitution.

The Section Five cases, on the other hand, pose the dilemma of the Court’s authority far more starkly. Consider Boerne and the RFRA again. Congress was not a party to the prior Smith decision; under the Meese view, Congress is thus not bound by the Court’s decision that incidental burdens on religious practice imposed by generally applicable laws are usually unpromblematic under the Free Exercise Clause. Instead, Congress is interpreting the Constitution pursuant to its own function of enacting legislation. And yet, once Archbishop Flores sues the City of Boerne under the RFRA, the courts are confronted with the classic Marbury situation. The court may only apply the RFRA to the case before it if the RFRA is consistent with the Constitution. Given Smith, the Court may only apply the RFRA if it acknowledges two valid interpretations of the Free Exercise Clause—one that Congress is enacting and a different one that the Court would apply if there were no federal statute in the case.\footnote{186} Most critics of the Court’s Section Five jurisprudence thus ask the Court to do what it clearly refused to do in Marbury—that is, resolve a case before it by deferring to a coordinate branch’s judgment about the proper interpretation of the Constitution.

In the Section Five context, then, the basic thrust of Cooper cannot be avoided by distinguishing between who is and is not a party before the court. Whenever the Court interprets the Fourteenth Amendment, it also sets the basic parameters of Congress’s power to enforce that Amendment. Congress may not—in fact, it almost certainly will not—be a party to the case giving rise to the Court’s initial interpretation. But if Congress then legislates under Section Five, it will be bound by that interpretation.

The dual role that the Court’s interpretation of the Fourteenth Amendment plays in such cases forecloses another possible distinction, which is that in Cooper the state government tried to provide less equality than the Constitution required; while in Boerne Congress sought to protect religious freedom beyond the constitutional minimum. The Court’s decision in Cooper, in other words, enforced a constitutional floor, while Boerne imposed a ceiling.\footnote{187} But federal legislative action is constrained not only by individual rights limitations like equal protection but also by the doctrine of

\footnote{186. My colleague Doug Laycock, who argued Boerne for the Archbishop, would say that there is another out: The Court could defer to Congress’s factual judgment that most “generally applicable” laws that burden religion are in fact discriminatory against particular religions and therefore unconstitutional under Smith. I am agnostic on whether the pattern of such laws would actually support such a judgment, and—as on most things—I’m willing to take Professor Laycock’s word for it, at least in principle. But this view is consistent with the Court’s position that Congress is entitled to no deference on the separate question of what the Constitution itself requires. Since Judge Noonan disputes that position, Professor Laycock’s view can offer him no comfort.}

\footnote{187. Doug Laycock has suggested this distinction in comments on this Review.
enumerated powers. And unless one adopts a substantive reading of Congress’s power under Section Five, then the Fourteenth Amendment’s constitutional “floor” for state action is closely—if not perfectly—connected to the “ceiling” on Congress’s enforcement power. When a federal statute is challenged on the ground that it exceeds Congress’s power, the position of both floor and ceiling will have to be determined by a court.

Judge Noonan asks, “Why, in the last analysis, is the court’s competence sole?” The answer is that there is only one Fourteenth Amendment, and when a court must choose between its own interpretation of that Amendment and a statute embodying a different interpretation, Marbury requires that the court’s interpretation wins.

III. Taking Sides

I have already discussed Judge Noonan’s particular arguments about the Supreme Court’s jurisprudence of state sovereign immunity and the Section Five power. In this Part, I want to step back and evaluate the Judge’s larger claim that, in the words of his title, the Court is “Narrowing the Nation’s Power” and “Sid[ing] with the States.” If we take this to mean that the Court has taken a more active role in policing the federal balance and limiting central power than it did between 1937 and 1995, the claim is surely correct. Many commentators have identified a “federalist revival” in the Court’s jurisprudence. But if Judge Noonan means that the Court has somehow shifted the balance so far as to actually endanger national authority—and his tone throughout the book suggests that this is what he does mean—then that claim is awfully hard to defend.

Section A of this Part addresses the claim that the Court has genuinely shifted our federal balance in favor of the States. As I discuss, it is unclear how we would even begin to verify such a claim empirically, and Judge Noonan makes no attempt to do so. Without attempting to fill that gap myself, I raise several reasons to be profoundly skeptical of the claim. Section B considers a second and related claim—that the Court’s decisions


189. See supra note 156 and accompanying text (acknowledging a prophylactic element to Congress’s power).

190. See, e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819) (“Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted 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.”).

191. P. 149.

have not only shifted power vertically, from the Nation to the States, but also horizontally, from the political branches of the Federal Government to the Supreme Court. I am skeptical about this claim, too, and I suggest that the state sovereign immunity cases that Judge Noonan emphasizes are a singularly odd set of cases with which to support it.

A. The Unruly Facts

"Facts are unruly. Facts should drive cases," Judge Noonan says.\footnote{193} But he does not follow that standard when he claims that the Court has "sided" with the States. Whether the Court has "moved the middle ground and narrowed the nation’s power"\footnote{194} is obviously a highly subjective question. Judge Noonan proposes no metric for measuring the answer. Do we ask, for example, whether the federal government is more or less powerful in absolute terms than it was 20 years ago? Or whether it is more or less powerful vis-à-vis the States? After the New Deal transformation of 1937, for example, there was little doubt that Congress’s power had increased vis-à-vis the States. But as Stephen Gardbaum and others have demonstrated, the States’ overall regulatory power also increased as a result of the removal of due process-based judicial limitations on state regulation.\footnote{195} Which measure we care about depends on whether we are worried about the efficacy of government or the accumulation of power in one place.

Even if we could agree on the right comparison, we would still confront a difficult question of measurement. How does one measure governmental power? Perhaps understandably, Judge Noonan doesn’t try to measure "power" outright; instead, he concentrates on the Court’s willingness to constrain national power. This approach assumes, of course, that judicial intervention is highly significant in shaping the balance of power between state and nation. Given recent work that questions the efficacy of the federal courts in impacting individual liberties,\footnote{196} one cannot assume that a string of court decisions can really "narrow the nation’s power" in a meaningful way.

These questions of comparison, measurement, and judicial efficacy are important, and Judge Noonan’s book would be far more interesting if it addressed them. Unfortunately, the Judge never moves beyond anecdotal evidence that, in particular cases, the Court has constrained national power in

\footnotesize{193. P. 144.}
\footnotesize{194. P. 156.}
\footnotesize{195. See generally Stephen Gardbaum, New Deal Constitutionalism and the Unshackling of the States, 64 U. CHI. L. REV. 483, 566 (1997) (arguing that the New Deal Court’s rejection of economic substantive due process “liberal[ed] the states to . . . realize[] the vision expressed by Justice Brandeis [that] ‘[t]here must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs’") (quoting New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 7 (2000).}
ways that it might not have 20 years ago. That may be so, but do the cases Judge Noonan cites reflect a broader pattern of judicial favoritism toward the States? It is true that the Rehnquist Court has been willing to invalidate federal statutes at a higher rate than its predecessors. According to former Solicitor General Seth Waxman, “The Justices struck down only 128 federal laws during the Court’s first two centuries.” A recent study, by contrast, found that the Rehnquist Court invalidated federal statutory provisions on 29 occasions between 1994 and 2001. Most of these cases, however, had nothing to do with federalism; the largest category involved First Amendment rights of speech and press. The States, moreover, have lost their share of cases, too. Another study notes that “[s]ince the 1991 Term, when Justice Clarence Thomas’s addition to the Court created a five-vote federalist majority, the Court invalidated state action in 111 of the 203 (54.7%) cases in which it granted certiorari.”

197. Stuart Taylor, Jr., The Tipping Point, NAT’L J., June 10, 2000, at 1810.
198. See Colker & Brudney, supra note 156, at 80–81.


200. Ruth Colker & Kevin M. Scott, Dissenting States?: Invalidation of State Action During the Rehnquist Era, 88 VA. L. REV. 1301, 1308 (2002); see also Frank B. Cross, Realism About
No claim of a judge-made shift in the federal balance credibly can proceed without taking these broader trends into account. Even so, numbers cannot tell the whole story. One would want, after all, to assess the qualitative importance of the decisions striking down federal laws on state autonomy grounds and to weigh those decisions against those invalidating state statutes on the basis of federal law. But Judge Noonan makes no effort at comparison, and he exaggerates the importance of the pro-states decisions he considers. As I have already discussed, Judge Noonan substantially overstates the impact of the state sovereign immunity decisions by ignoring, for the most part, the substantial remedial options that remain against state governments, as well as Congress’s ability to induce waivers of immunity through conditions on federal benefits. Judge Noonan also fails to explain why legislative abrogation of state sovereign immunity is a central and essential feature of federal power, given that the Court never acknowledged that power until 1976.

As for the Court’s limitation of Section Five, Judge Noonan fails to mention that Congress used that power relatively rarely prior to the 1990s and almost never did so successfully outside the area of remedies for race (and sometimes gender) discrimination, an area in which the Court has shown no inclination to limit the power’s reach. It is primarily in response to the Court’s state sovereign immunity decisions that Congress has broadened its use of Section Five to support statutes that previously would have been justified under the Commerce Clause or some other Article I power. The impact of the Court’s Section Five jurisprudence is thus generally no more extensive than that of the state sovereign immunity cases themselves.

Judge Noonan might have made a stronger case for a shift in the federal balance if he had added three other classes of cases: cases limiting the reach of Congress’s power under the Commerce Clause; decisions announcing a

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*Federalism, 74 N.Y.U. L. REV. 1304, 1319 (1999) (noting that “states win only about 41% of their federalism cases at the Court”).

201. See supra part I(B); see also Cross, supra note 200, at 1324 (observing that the sovereign immunity decisions are “careful not to deny Congress power; they just make it a little more difficult for Congress to exercise that power”).

202. See Fitzpatrick v. Bitzer, 427 U.S. 445, 448 (1976). Even after Fitzpatrick, as I have discussed, the power was virtually never used. See supra note 34 and accompanying text.

203. See, e.g., Oregon v. Mitchell, 400 U.S. 112, 118 (1970) (holding that Congress could not use Section Five to lower the voting age to 18 in state elections).

204. Both Garrett and Kimel relied heavily on the fact that, in those cases, Congress was trying to use Section Five to protect non-suspect classes. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365–68 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000). Nothing in those cases suggests that, in the context of race (where virtually any state discrimination is unconstitutional) the proportionality test would be difficult to meet.

new doctrine that Congress may not "commandeer" state legislatures or executive officials; and cases where the Court has narrowly construed a variety of federal statutes in order to protect values associated with state autonomy. The Commerce Clause and commandeering cases, however, seem unlikely to work any long-term shift in the balance of power. The Court's view of the Commerce Clause remains extremely broad, and commandeering was not a tool that Congress used frequently, even before the Court declared it off limits. Moreover, each of these constraints can be readily circumvented through the spending power.

The "clear statement rule" cases of statutory construction are better candidates for a lasting impact. There are a fair number of them, they often deal with important statutes, and they often, but not always, restrict the statute's substantive reach rather than simply cutting off particular remedies. But decisions resting on statutory construction rather than constitutional doctrine allow Congress to override narrow constructions if it feels sufficiently strongly about the matter. If the Court takes too much of Judge Noonan's "middle ground" this way, Congress can reclaim it.

206. See Printz v. United States, 521 U.S. 898, 933 (1997) (holding that Congress may not require state officers to enforce federal programs); New York v. United States, 505 U.S. 144, 149 (1992) (holding that Congress may not require state legislatures to enact federal regulations).


208. See Ernest A. Young, Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception, 69 GEO. WASH. L. REV. 139, 157-63 (2001) (reading Lopez as dissolving the old distinction between interstate and intrastate commerce and allowing a very broad scope for federal regulation); Meltzer, Seminole, supra note 6, at 63 (reading Lopez as a "warning shot across [Congress's] bow" rather than a harbinger of aggressive limits on Congress's authority).

209. See Printz, 521 U.S. at 918 (noting "almost two centuries of apparent congressional avoidance of the practice" of commandeering).

210. See, e.g., New York, 505 U.S. at 173 (noting that Congress may induce state legislative cooperation through spending conditions); Lynn A. Baker, Conditional Spending After Lopez, 95 COLUM. L. REV. 1911, 1924-43 (1995) (explaining how Congress may use the spending power to evade limits on the commerce power).

211. See, e.g., Solid Waste, 531 U.S. at 174 (restricting the reach of regulations under the Clean Water Act); Jones v. United States, 529 U.S. 848, 857-58 (2000) (construing the federal arson statute narrowly not to apply to arson of a private residence in order to avoid potential Commerce Clause problems); Gregory, 501 U.S. at 473 (holding that the ADEA does not apply to state judges).

212. See, e.g., Ernest A. Young, Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review, 78 TEXAS L. REV. 1549, 1596 (2000). To be sure, congressional override is often difficult, due to legislative inertia. See, e.g., Jane S. Schacter, Metademocracy:
Any assessment of judicial intervention in the federal balance, moreover, must consider the Court's many decisions limiting state authority. Judge Noonan discusses only those cases where the Court has struck down federal laws in the interest of state sovereignty. But what about cases striking down state laws on the basis of federal law? Many areas of constitutional and subconstitutional doctrine are concerned primarily with restricting state authority, and the Rehnquist Court has pursued these doctrines with considerable vigor. The Court continues, for example, to regularly strike down state regulatory and revenue laws under the dormant Commerce Clause.\textsuperscript{213} Judicial review of state laws that discriminate against or unduly burden interstate commerce continues, even though constraints on state authority are no more apparent in the text of the Commerce Clause than the Court's state sovereign immunity doctrine is in the text of the Eleventh Amendment.\textsuperscript{214} Dormant Commerce Clause review has the effect of foreclosing or undermining a wide range of important state policies, such as responsible attempts at waste disposal,\textsuperscript{215} state safety regulation,\textsuperscript{216} and efforts to encourage important state industries.\textsuperscript{217} I do not mean to suggest that these decisions are wrong; substantial arguments can be made in favor of dormant Commerce Clause review. But one cannot responsibly omit this important, judge-made limit on state regulatory autonomy from any assessment of the judicial impact on federalism.

More important still, the Rehnquist Court has been particularly aggressive about invalidating state laws under the Supremacy Clause,
holding them preempted by federal statute. Although the record is mixed, the Rehnquist Court has generally been awful for the States on preemption issues. Richard Fallon recently noted that, "[o]ver the decade since Clarence Thomas joined the Court . . . the Court has decided thirty-five preemption cases and found state statutes or causes of action to be preempted, either in whole or in part, in twenty-two." To name just a few recent examples, the Court has

- invalidated Massachusetts laws restricting tobacco advertising directed at children; \(^220\)
- barred the State of Washington from regulating the safety features and practices of oil tankers in Puget Sound; \(^221\)
- held that Massachusetts may not protest the junta in Myanmar by refusing to contract with companies doing business in that country; \(^222\)
- forbidden the District of Columbia to provide tort remedies for the failure to install airbags that might have prevented serious injuries; \(^223\) and
- interpreted the Telecommunications Act of 1996 as authorizing the Federal Communications Commission broadly to displace traditional state regulatory authority over local telephone markets. \(^224\)

I have argued elsewhere that preemption doctrine is the most important aspect of federalism, because it impacts directly the States’ ability to provide services and beneficial regulation to their citizens. \(^225\) In contrast to the Supreme Court’s restriction of particular remedies against state governments, the preemption cases involve the survival of state regulatory power *per se.*

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\(^{219}\) Richard H. Fallon, Jr., The "Conservative" Paths of the Rehnquist Court's Federalism Decisions, 69 U. CHI. L. REV. 429, 462 (2002). Professor Fallon goes on to note that, “during the Court’s 1999 and 2000 Terms, the Court decided seven preemption cases and held that federal law preempted state law in all of them.” Id. at 462–63.


\(^{225}\) See generally Ernest A. Young, "The Ordinary Diet of the Law": Federal Preemption and State Autonomy (forthcoming—hopefully—2004); Ernest A. Young, Two Cheers for Process Federalism, 46 VILL. L. REV. 1349, 1377–80 (2001) [hereinafter Young, Two Cheers]; see also Egelhoff v. Egelhoff, 532 U.S. 141, 160–61 (2001) (Breyer, J., dissenting) (arguing that “the true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress’ commerce power at its edges . . . or to protect a State’s treasury from a private damages action . . . but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law”).
They thus ought to have a greater impact in terms of governmental power than most of those cases in which the Court has ruled in favor of the States.\textsuperscript{226}

The voting alignment in preemption cases is often the opposite of what one might expect. By Dan Meltzer's count,

The five Justices most protective of state autonomy in constitutional federalism cases are the Justices who most often join opinions finding state laws preempted . . . . By contrast, the four Justices most supportive of national authority in constitutional federalism cases are those who most often vote to uphold state activity that has been challenged as in conflict with national programs.\textsuperscript{227}

In \textit{Lorillard}, for instance, the five justices who formed the pro-states majority in \textit{Seminole Tribe, Printz}, and \textit{Lopez} also formed the five-vote majority to hold state laws on tobacco advertising preempted. Likewise, in \textit{Geier}, Justice Stevens penned a dissent joined by Justices Souter and Ginsburg that began by observing that "'[t]his is a case about federalism,' . . . that is, about respect for 'the constitutional role of the States as sovereign entities.'"\textsuperscript{228} Both the supposed "states' rights" justices and the supposed nationalists thus tend to switch sides in preemption cases. While this pattern is not uniform and may not be subject to a single explanation, it does suggest that something more complicated is going on in the Court's federalism jurisprudence than one group of justices " siding" with the States and the other aligning themselves with the national government.\textsuperscript{229}

\begin{footnotes}
\item[226] The Court sometimes has held that Congress lacked power to regulate altogether, as it did with the RFRA, the Gun Free School Zones Act, and portions of the VAWA. But those rulings do not strike at the heart of the regulatory project in the way that, say, divesting state utility commissions of rulemaking authority over local telephone service does. See \textit{Iowa Util. Bd.}, 525 U.S. at 427 (Breyer, J., dissenting) ("Today's decision does deprive the States of practically significant power, a camel compared with Printz's gnat.").

\item[227] Daniel J. Meltzer, \textit{The Supreme Court's Judicial Passivity}, 2002 \textit{Sup. Ct. Rev.} (forthcoming June 2003) (manuscript at 36–37, on file with the author) [hereinafter Meltzer, \textit{Judicial Passivity}]; \textit{see also id} (manuscript at 37 n. 117) (providing a chart with votes for each Justice in the 1999, 2000, and 2001 Terms); Young, \textit{Two Cheers, supra} note 225, at 1381–83 (noting that the judges who regularly dissent in state sovereign immunity cases are often, though not always, more protective of states in preemption cases).


\item[229] This is not the place to speculate why these votes come out the way they do. The answer is likely a complicated mix of ideology (preemption tends to have a deregulatory effect that political conservatives favor and liberals oppose), views on statutory construction, and broader separation-of-powers concerns. See, e.g., David B. Spence & Paula Murray, \textit{The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis}, 87 \textit{Cal. L. Rev.} 1125, 1164–87 (1999) (considering ideological factors); Colker & Scott, \textit{supra} note 200, at 1320–23 (same); Meltzer, \textit{Judicial Passivity, supra} note 227 (manuscript at 45–47) (acknowledging the force of ideological explanations but arguing that the Justices are also motivated by a common recognition of the need for judicial implementation of federal statutes); Young, \textit{Two Cheers, supra} note 225, at 1383–84 (suggesting that results in preemption cases are influenced by a number of factors, including views on the appropriateness of canons of construction in statutory cases). Regardless of
\end{footnotes}
One committed to Judge Noonan’s “state favoritism” view might try to explain away the preemption cases on the ground that they are simply straightforward applications of federal statutes. The Court has little choice in such cases, one might argue, so in order to get a fix on the Court’s real sympathies we should focus on the more difficult cases in which meaningful choices do exist. But that response would be unpersuasive for at least two reasons. First, Judge Noonan’s claim is about the impact of decisions, not their motivation. If the net impact of the Court’s decisions on federalism—considering preemption and dormant commerce cases as well as the likes of Lopez, Boerne, and Seminole Tribe—is to decrease state authority, then the Judge stands refuted. As I have already suggested, it would be very difficult to measure any such net effects. But two readily observable facts—that there are just more preemption and dormant commerce cases and that they seem to involve issues more central to the regulatory project than the cases in which the States have prevailed—strongly contradict the claim that the Court has “sided” with the States against national power. 230

Second, the preemption cases are anything but straightforward applications of federal statutes. 231 Frequently Congress says little about preemption in the statutory text, leaving the Court with an open-ended inquiry into whether state law conflicts with federal purposes that are themselves often only implicit. 232 Even where Congress does explicitly

the explanation, however, the important fact for present purposes is that other considerations frequently trump the conservative justices’ affection for state power.

230. One might, I suppose, claim that the set of cases decided at the Supreme Court may be non-representative; it would remain possible, then, that the lower courts aggressively further state autonomy through restrictive interpretations of Congress’s enumerated powers and expansions of state sovereign immunity. Without trying definitively to resolve this empirical question, my impression is that the real situation is the reverse. One study of dormant commerce and preemption cases in the lower federal courts concluded that “the lower federal courts take a broad view of federal preemption authority” under both the Commerce and Supremacy Clauses. Spence & Murray, supra note 229, at 1128. Likewise, a study of the lower courts’ reception of Lopez concluded that the lower federal courts were basically unwilling to restrict Congress’s commerce power with respect to federal statutes on which the Supreme Court had not itself passed. Glenn H. Reynolds & Brannon P. Denning, Lower Court Readings of Lopez, Or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?, 2000 Wis. L. REV. 369. Neither study covered state sovereign immunity; the pattern there could be different. But the Supreme Court’s general policy on certiorari is almost always to grant review whenever a provision of federal law is struck down in the lower courts. See, e.g., David B. Sentelle, Lopez Speaks, Is Anyone Listening?, 45 LOY. L. REV. 541, 558 (1999). In light of that policy, one would expect the universe of federalism cases decided in the lower courts that the Supreme Court does not review to be more favorable to national power than the ones in which certiorari is granted. In any event, Judge Noonan’s claim is fundamentally one about the Supreme Court itself.

231. See Meltzer, Judicial Passivity, supra note 227 (manuscript at 33) (“[O]ne cannot view preemption decisions merely as straightforward applications of the Supremacy Clause.”).

232. See, e.g., United States v. Locke, 529 U.S. 89 (2000) (holding that federal statutes impliedly preempted state regulation of oil tankers); see also Susan Raeker-Jordan, The Pre-Emption Presumption That Never Was: Pre-Emption Doctrine Swallows the Rule, 40 ARIZ. L. REV. 1379 (1998) (criticizing the Court for finding preemption based on implicit congressional purposes);
address preemption, the text is often contradictory and difficult questions of implied preemption may remain. Likewise, the Court has struggled recently with the interaction between its preemption doctrines and other aspects of separation-of-powers law, such as the deference normally accorded administrative agencies interpreting the statutes that they administer. It is not surprising that these issues frequently find the Court deeply divided. The bottom line is that the preemption cases are not easy. They involve basic judgments about the scope of state autonomy vis-à-vis national power. A Court as committed to undercutting federal authority as Judge Noonan suggests could surely make them come out the other way.

A final class of cases also undercuts Judge Noonan’s thesis: the broad category of decisions in which the Court has struck down state legislation under the Constitution’s individual rights provisions. Many have viewed the enforcement of federal constitutional rights against state governments as a primary function of the federal courts. If the Rehnquist Court were really “siding” with the States against the Nation, we would expect to see a substantial drop-off in its willingness to perform this function. And yet, as Ruth Colker and Kevin Scott have noted, the current Court’s invalidation rate for state statutes over the last decade is actually slightly higher than the Warren Court’s. High-profile invalidations have occurred in both politically conservative and politically liberal areas. For example, the Court has imposed significant restrictions on sentencing in capital cases, struck down state laws forbidding discrimination on the basis of sexual orientation in public accommodations based on rights of free speech and association,

Meltzer, Judicial Passivity, supra note 227 (manuscript at 29–33) (discussing the open-ended nature of implied preemption doctrine).


234. Compare, e.g., Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992) (suggesting that the presence of an express preemption clause means that courts should ordinarily reject implied preemption arguments), with id. at 547–48 (Scalia, J., concurring in part and dissenting in part) (rejecting this approach).

235. Compare, e.g., Medtronic, Inc. v. Lohr, 518 U.S. 470, 505–06 (1996) (Breyer, J., concurring in part and in the judgment) (suggesting that courts should defer to agency interpretations of the preemptive effect of statutes they administer), with id. at 511–12 (O’Connor, J., concurring in part and dissenting in part) (suggesting that deference may be inappropriate).

236. See generally Young, Two Cheers, supra note 225, at 1377–80 (faulting the supposedly pro-States justices for not defending state autonomy in preemption cases).

237. See Colker & Scott, supra note 200, at 1308 (observing that “[t]he 1991–2000 invalidation rate [54.7%] is comparable to the invalidation rate of the supposedly activist Warren era, when the Court invalidated state action in 128 of 239 (53.6%) cases in which it granted certiorari”).

238. See Ring v. Arizona, 122 S. Ct. 2428 (2002) (holding that aggravating factors leading to a capital sentence must be found by a jury, not a judge); Atkins v. Virginia, 122 S. Ct. 2242 (2002) (holding that the Eighth Amendment does not permit execution of the mentally retarded).

struck down state discrimination against homosexuals and state sodomy laws, 240 reinvigorated the Privileges and Immunities Clause as a restriction on state durational residence requirements, 241 expanded constitutional limitations on state and local land-use decisions, 242 intervened frequently to invalidate state regulation of elections, 243 rejected state and local policies both for failing to include religious persons and for including them too much, 244 restricted state regulation of abortion, 245 and continued to invalidate state criminal convictions, sentences, and conditions of incarceration. 246

I do not mean to suggest any of these decisions are wrong on the merits. My point is simply that much of the current Supreme Court's "activism" has the effect of restricting state authority and invalidating state policy choices. In this sense, the relative breadth with which the Court construes individual rights has profound implications for federalism. 247 Right or wrong, the Rehnquist Court's willingness to construe individual rights broadly in many cases stands as an important example of its continued willingness to assert federal authority over the States.

240. Romer v. Evans, 517 U.S. 620 (1996) (discrimination). Moreover, the Court seems likely to strike down the Texas sodomy statute this term. See Lawrence v. Texas, No. 02-102 (argued March 26, 2003).


246. See, e.g., Hope v. Pelzer, 536 U.S. 730 (2002) (holding that Alabama's "hitching post" method of disciplining inmates violated the Eighth Amendment); Kirk v. Louisiana, 536 U.S. 635 (2002) (summarily reversing a state conviction on the ground that probable cause to arrest did not create probable cause to search the defendant's home); Williams v. Taylor, 529 U.S. 362 (2000) (invalidating a state death sentence based on ineffective assistance of counsel); see also Miller-El v. Cockrell, 123 S. Ct. 1029 (2003) (holding that a habeas petitioner was entitled to appeal the district court's denial of a hearing to challenge his capital sentence, based on possible discrimination in jury selection by state prosecutors).

247. See, e.g., Griffin v. Illinois, 351 U.S. 12, 39 (1956) (Harlan, J., dissenting) (arguing that the Court should not, in this instance, use the Fourteenth Amendment to impose criminal procedure reforms on the States).
The Court’s willingness to “side” with the national government in many important contexts, “federalist revival” notwithstanding, should surprise no one. As Martin Shapiro has observed, the Court is an “arm of the central government.” Federal judges are most often drawn from and live within a professional culture that celebrates federal primacy, they are appointed and confirmed by federal officials, and the federal political branches retain a variety of means to influence even life-tenured justices. While judges and justices may often be called to act contrary to these sorts of institutional incentives, the Court’s record over time seems consistent with Professor Cross’s conclusion that “[t]he national government . . . has a thumb on the scale of judicial federalism doctrine. . . . [T]he inescapable presence of the thumb inevitably drives federalism doctrine over time in a direction contrary to states’ rights.”

B. Aggrandizing the Court

What of Judge Noonan’s other charge that, in the process of favoring the States, the Court has also aggrandized itself? The accusation is actually twofold: not only has the Court adopted doctrines that shift power to the judiciary, but the Court has also applied those doctrines in an unprincipled way. Judge Noonan asserts, for example, that

The institution of judicial review of a legislative record is a particularly bold way of exercising supremacy over Congress, or, to put it another way, of the court itself playing a legislative part . . . . The justices are all acting as legislators, exercising their own good judgment as to what is probative and what is irrelevant and so making up their own minds as to whether the legislation that was passed should have been passed.

In this process of legislative discernment the value judgments of the justices naturally play a predominant part. The Justices’ usurpation, Judge Noonan insists, is so serious as to create a “present danger to the exercise of democratic government.”

250. See LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 82 (1998) (concluding that the Supreme Court decides cases with an eye to the preferences of the federal political branches); Cross, supra note 200, at 1315–20 (arguing that various mechanisms make the Court heavily dependent on Congress and the President); Judith Resnik, The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations, 86 GEO. L.J. 2589, 2635 (1998) (concluding that the federal judiciary is “heavily dependent on Congress for resources and plainly eager to be as responsive as possible”).
251. Cross, supra note 200, at 1319.
252. P. 147.
253. P. 140.
We can dispose of the second element of Judge Noonan’s charge first, as I think it holds little water. Does anyone really think, for example, that the Court’s *Seminole Tribe* decision that Congress may not abrogate state sovereign immunity pursuant to its Article I powers was motivated by five justices’ deep-seated antipathy to the Indian Gaming Regulatory Act? Or that the majority has it in for patent rights and favors discrimination against the aged and disabled? Judge Noonan might answer that the Court’s “value judgment” is not so much against these federal statutes as against the idea of state liability in general. That is possible, but two characteristics of the opinions militate against reading into them a simple policy preference against state liability. First, one would expect opinions motivated by such concerns to stress the practical impact of damages liability on state governments. As written, however, the opinions tend to raise that issue almost as an afterthought while dwelling on history and abstract considerations of political theory. Second, the Court has long held that the States must pay attorneys’ fee awards associated with successful suits for prospective relief, and these awards often dwarf the amount of damages that a plaintiff might have claimed. If the jurisprudence is really being driven by a naked preference that states not have to pay plaintiffs, this pattern makes little sense.

In any event, a simple belief that the states should ordinarily be immune from damages liability, unlike hostility to a particular federal statutory regime like the ADA or the ADEA, is not a “political” or “value” judgment in the sense in which people ordinarily use those terms. It is simply a view about what the Constitution requires. It may be mistaken; in fact, as I have said, it probably is. But it does not advance the discussion to label it “political” or a “value judgment.”

What about the more plausible aspect of Judge Noonan’s claim, that is, that the doctrines that the Court has articulated, principled or not, aggrandize the judiciary at the expense of the other branches? Judge Noonan eschews the term “judicial activism,” but his charge fits the most useful definition of that term—that the Court’s actions enhance the significance of its own judgments vis-à-vis other governmental actors. Many respected legal


256. *See supra* text accompanying note 9.

257. *See* p. 10 (stating that “[t]he idea that ‘activism’ is a helpful or accurate or meaningful category for judging the Supreme Court of the United States is an illusion”).

scholars have recently taken up this charge of institutional aggrandizement.\textsuperscript{259}

The first thing to be said about this charge is that judicial activism is not necessarily a bad thing.\textsuperscript{260} Many, if not most, federal systems have a constitutional court that polices the boundary between central and peripheral authority.\textsuperscript{261} If this function is to be meaningful, that court cannot always defer to other governmental actors. Indeed, another form of activism would be for the Court to assert the authority to pick and choose those aspects of the Constitution that it is willing to enforce.\textsuperscript{262}

Moreover, most constitutional decisions worth talking about are activist in some ways and restrained in others. Both the state sovereign immunity cases and the Section Five cases are mixed bags in this sense. The state sovereign immunity decisions are "activist" in the sense that they apply a judicially defined concept of sovereign immunity that is not constrained by the constitutional text or, on the best reading, by the relevant historical materials.\textsuperscript{263} But they are also "restrained" in other senses: they adhere to a very well-established line of precedent,\textsuperscript{264} and their holdings limit the remedial powers of the federal courts.\textsuperscript{265}

Indeed, it is this last aspect of the state sovereign immunity decisions—their imposition of a limit on judicial remedial authority against state entities—that really seems to set Judge Noonan off. He poignantly recounts the facts of several cases in which the Court has found the states immune, and he clearly views such findings as inconsistent with the federal courts' duty to do justice to the injured plaintiff. "Immunity is pretty close to sterility," the Judge says. "The courts are sterilized as sources of justice. Where is the passion of a Wilson or a Jay that a constitution created to establish justice must assure that the courts provide justice?"\textsuperscript{266} This frustration is understandable; there is an element of unfairness whenever sovereign


\textsuperscript{260} See Young, \textit{Judicial Activism}, supra note 258, at 1163 (arguing that a coherent definition of judicial activism should not necessarily have strong normative connotations).

\textsuperscript{261} See Martin Shapiro, \textit{The European Court of Justice, in The Evolution of EU Law} 321, 321 (Paul Craig & Gráinne de Búrca eds., 1999).


\textsuperscript{263} See Young, \textit{Judicial Activism}, supra note 258, at 1147–49 (discussing departures from text and history as a form of activism); Young, \textit{Jurisprudence of Structure}, supra note 6, at 1665–75 (arguing that the majority's treatment of history in the state sovereign immunity cases effectively avoids the constraining function that the historical materials ought to serve).

\textsuperscript{264} See supra note 28 and accompanying text.

\textsuperscript{265} See, e.g., William Wayne Justice, \textit{The Two Faces of Judicial Activism}, 61 GEO. WASH. L. REV. 1, 7–13 (1992) (discussing remedial activism as one of the primary forms of judicial assertiveness); Young, \textit{Judicial Activism}, supra note 258, at 1154–57 (same).

\textsuperscript{266} P. 84.
immunity bars an otherwise meritorious claim. But it is hardly activism when a court says it may not intrude into the internal operations of a state government by awarding damages payable out of the state treasury. Indeed, a view of the judicial power that condemns any impediment to the courts’ ability to be “sources of justice” may have many attractive qualities, but restraint is not one of them.

The Section Five cases likewise exhibit countervailing tendencies regarding institutional assertiveness. To be sure, the Court has refused to defer to the constitutional interpretation of Congress, designating itself as the final and supreme arbiter of constitutional meaning, at least in cases that come before it. But the Court’s refusal to allow Congress broadly to prohibit discrimination against the aged or disabled or state practices that burden religious exercise is rooted in interpretations of the underlying constitutional provisions—the Equal Protection and Free Exercise Clauses—designed to limit the Court’s own authority. If the Section Five power is remedial rather than substantive—a conclusion that seems far less controversial than the Court’s proportionality test—then it is difficult for the Court to expand Congress’s authority without at the same time expanding its own.

For example, the Court held in Kimel that the Age Discrimination in Employment Act was not proportional to a constitutional violation of equal protection because it had previously held that age classifications are not suspect; rather, they are constitutional so long as they are rationally related to a legitimate state purpose. This rational basis standard is itself designed, of course, to limit judicial interference with legislative policy judgments. Judge Noonan, however, attacks the standard itself. “[H]ow reasonable was it,” he asks, “for the court to rely on what could ‘rationally’ be believed about the effect of age?” Indeed, he lambasts the Court’s rationale for refusing to recognize the aged as a suspect class as “insensitive to human experience.” But, as Judge Noonan suggests, holding age classifications “suspect” under the Equal Protection Clause would not simply validate the ADEA; it would also allow courts a much broader power to second-guess state policy judgments about aging in a wide variety of contexts. That might be a good result, but it is hardly a restrained one.

In the final analysis, it is hard to take Judge Noonan’s charge of judicial aggrandizement seriously. He conspicuously fails to condemn parallel instances of judicial assertiveness that enhance national power, such as federal sovereign immunity and dormant Commerce Clause review. It is hard to avoid the conclusion that Judge Noonan is perfectly comfortable with judicial power so long as it is used against the States rather than on their

268. P. 111.
269. P. 113.
behalf. But that stance is no more principled than the one he imputes to the Court.

IV. The Audience Problem

A discussion of Judge Noonan’s book requires some consideration of its tone and its audience. The tone, to use one of the Judge’s favorite descriptors for the Court’s rulings, is frequently “bizarre.” The Judge creates fictional interlocutors with silly names, uses strained paraphrases of novel titles as section headings, and scatters theological and literary references seemingly at random. Much of the book has the tenor of barely contained righteous anger. All of this raises the question of what audience the author is trying to reach and what he hopes to achieve.

A. Samuel Simple and Friends

Judge Noonan develops the law of state sovereign immunity through Samuel Simple, a fictional creation who just happens to be a federal appellate judge in San Francisco. Judge Simple is bewildered by the doctrinal thicket into which he has stumbled. Fortunately, he has three bright law clerks—“Yalewoman,” “Harvardman,” and “Boaltman”—to help him figure it out. Harvardman, good doctrinalist that he is, gamely tries to explain the intricacies of the immunity rules to the evident dismay of Yalewoman, who interjects pithy Legal Realist statements like “I can’t believe that you, or the court itself, take this kind of guff seriously.” The unfortunate Boaltman doesn’t get to talk much.

When Judge Simple exhausts the learning of his law clerks, he turns to his former law partners from the law firm of “Fish, Frye & Ketchum” as well as “his graduate school friends, Cleopatra Sens, Lucinda Logic, and John Henry.” These colleagues fill Judge Simple in on the history and political theory of sovereign immunity. Not surprisingly, given that his narrative device allows Judge Noonan to avoid the actual historical arguments of the real judges in cases like Seminole and Alden, everyone concludes that “[t]here’s nothing to support the view that immunity was part of the constitutional design or inherent in its plan.”

270. P. 94 ("There was only one word for the court’s decision [in Florida Prepaid]: bizarre.").
271. See infra text accompanying note 276.
272. See p. 86 ("The Unbearable Disproportionateness of Patent Protection").
273. See p. 77 (observing that Justice Bradley, the author of Hans, was "brought up a Calvinist in the Dutch Reformed Church" and suggesting that "echoes of Calvin on the majesty of God can be found in Bradley’s devotion to the sovereign"); p. 146 (using Dante’s description of Purgatory as an illustration of the Court’s proportionality test).
274. P. 41.
275. P. 53.
277. P. 85.
I doubt whether the Samuel Simple device makes the background of sovereign immunity more comprehensible. In addition to some outright errors that I have already discussed, the dialogue skips around and leaves out too much. Lawyers and even, I suspect, many laypersons could do better by reading the first fifteen pages of most contemporary law review articles on the subject. But two additional problems make the device worse than simply unhelpful. One is the sheer one-sidedness of the whole thing. Indeed, the omission from Judge Noonan’s fictitious dialogue of any character prepared to defend the Court’s holdings is striking. Even Plato, in constructing his dialogues to set up a particular set of conclusions, generally provided Socrates a sparring partner who actually disagreed with him.

The second problem is that the Samuel Simple device makes Judge Noonan seem disingenuous. Any reader remotely familiar with the Judge’s reputation—or who reads the inside of the book jacket—will know that Judge Noonan is not “Simple,” but rather a scholar and jurist of considerable stature. He is not really confused or bewildered by state sovereign immunity, and many readers may perceive the fictional guise as condescending. Since the Judge demonstrates elsewhere in the book that he is quite capable of illuminating complex concepts in a straightforward way, the reader may conclude that Simon Simple is simply a pose designed to elicit sympathy and to make the Court look ridiculous.

Simon Simple mercifully appears in only two of the book’s seven chapters. But his voice echoes in Judge Noonan’s more pervasive complaint that “[t]he court’s decisions here are driven by abstractions.” Judge Noonan seems to want to align himself with the “simple” layperson against those tricky lawyers, who seek to mask injustices done to real people by resorting to technicalities and conceptual smoke and mirrors. He asserts that “[f]or the Supreme Court, proceeding as it appears to proceed in these cases with an agenda, the facts are of minor importance and the persons affected are worthy of almost no attention.” “Forget the facts,” Judge Noonan laments, “and you forget the persons helped or hurt by the decisions.”

278. Linda Greenhouse agrees in the one critical moment in a book review that might otherwise be described as a fan letter. See Linda Greenhouse, Beyond Original Intent, N.Y. TIMES, Aug. 18, 2002, Book Review section, at 8 (describing the mythical law clerks, etc., as “a stylistic choice that is not particularly successful”). As I discuss infra note 303 and accompanying text, Ms. Greenhouse and other nationalists seem likely to applaud Judge Noonan’s book because it is useful to them, not because it is well done.

279. Readers of a certain age may be reminded of the late, great Phil Hartman’s “Unfrozen Caveman Lawyer” on Saturday Night Live, who pretended to misunderstand the complexities of modern life in order to snooker juries into giving his clients whopping damages awards. For a sample, try http://snltranscripts.jt.org/91/91gcaveman.phtml (last visited Nov. 10, 2002).

280. P. 144.

281. Id.

282. Id.
It is unclear, however, what Judge Noonan really means by his admonition that "[f]acts should drive cases." Should the Court apply the state sovereign immunity rules differently in different cases, depending on how sympathetic the plaintiff is? Consider two recent cases about sovereign immunity in intellectual property cases. In *Chavez v. Arte Publico Press*, a sympathetic individual author sought to enforce her copyright—a traditional and quite personal form of intellectual property protection—against a state university press. In *Florida Prepaid*, on the other hand, a corporation sought to enforce a business method patent—a decidedly non-traditional form of intellectual property protection that has been quite controversial—in an arguably opportunistic attempt to prevent state governments from assisting their citizens in paying for college. If facts really should drive cases, perhaps these two cases should come out differently. I had thought, however, that one of the great achievements of modern constitutional law is the notion that cases should be decided according to "neutral principles" that a court is willing to apply to sympathetic and non-sympathetic cases alike.

This focus on sympathetic facts ultimately leads Judge Noonan into an unfortunate self-righteousness. He spends a good deal of time, for example, accusing the Court of insensitivity to the problem of violence against women, as well as to the horrific facts underlying the claim in *Morrison* itself. The unfairness of that accusation is surprising in a sitting federal judge, who must know that legal rules must sometimes be applied to defeat otherwise sympathetic claims. Is it fair to say that defenders of the free speech rights of Nazis are "insensitive" to the Holocaust? Or that judges willing to limit governmental powers in the war on terrorism are "insensitive" to the legitimate value of public safety? Legal rules must be applied in real factual contexts, and of course judges must be "sensitive" to those contexts. But to suggest that the Justices in the *Morrison* majority do not care about the

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283. *Id.*
284. 204 F.3d 601 (5th Cir. 2000).
286. See, e.g., Malla Pollock, *The Multiple Unconstitutionality of Business Method Patents: Common Sense, Congressional Consideration and Constitutional History*, 28 Rutgers Computer and Tech L.J. 61 (2002) (arguing that the Supreme Court should at least require congressional factfinding that such patents are likely to promote the progress of the useful arts).
288. See, e.g., pp. 144-45 ("All the facts surrounding the assault on Christy Brzonkala and the lack of effective response by state officials were also a matter of indifference to the court focused on the precedents interpreting the fourteenth amendment.").
289. See Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) (holding that the First Amendment required that Nazis be allowed to march in Skokie, Illinois, a predominately Jewish community).
victims of rape and domestic violence is—or at least ought to be—beyond the pale.

B. Professional Criticism and the Audience Problem

One last question remains: Why write something like this? Judge Noonan points out that “[i]t is the right of judges” under the Code of Judicial Conduct “to speak and write for the improvement of the law.” 291 This sounds like a defense against potential charges that the Judge has overstepped his institutional role by criticizing his judicial superiors. 292 I have no interest in that sort of criticism here: The tradition that Judge Noonan seeks to join, of sitting judges weighing in on the broad constitutional controversies of the day, is a long and honorable one. 293 My interest, rather, is in discerning the audience to which Judge Noonan’s indictment is directed and the ends that Judge Noonan hopes to achieve. While these objectives do not frame the only standard by which a work like this ought to be judged, they are surely relevant to any assessment of its ultimate success.

“The sovereign remedy for ills in a democracy,” Judge Noonan writes, “is exploration and exposition of a problem, leaving it to the good sense of those who can effect its solution to take the necessary steps.” 294 Linda Greenhouse reads this as an attempt to “[r]ouse the sleeping public” 295 against the Court. The author’s “explicit, even urgent, aim” is to reach a “general audience”—not the usual academic readership of the law reviews. 296 Yet this conclusion glosses over a fundamental ambiguity in Judge Noonan’s presentation. Certainly the didactic tone of much of the exposition points toward a general audience. Yet Judge Noonan rejects the sort of responses to the Court—such as impeachment or resistance to confirmations of future judges—that a public groundswell might mobilize around. 297

291. P. 143.
292. See, e.g., Greenhouse, supra note 278, at 8 (noting that “highly topical” books on other current legal controversies by sitting judges have “raised some eyebrows”).
294. P. 143.
295. Greenhouse, supra note 278, at 8.
296. Id.
297. Pp. 140–41 (concluding that “[e]ven the legal scholar most convinced that the court is misusing the eleventh amendment and frustrating the fourteenth would quail at the prospect of an impeachment where constitutional interpretations were the issue,” while “[c]ontrol of the court through the process of nomination and confirmation cannot occur without hitches, uncertainties, improprieties, and surprises”). Judge Noonan does suggest several ways that Congress might get around the Court’s sovereign immunity rulings, such as more carefully drafted abrogation statutes and conditional spending designed to induce states to waive their immunity. Pp. 141–43. Yet sophisticated elites—not a roused public—would likely drive such efforts. For an example of the
In any event, I think Judge Noonan would be ill-advised to place his hopes in the masses. I suspect that the unavoidable intricacies of Eleventh Amendment law will be too arcane to inspire the general reader, notwithstanding the best efforts of Harvardman, Yalewoman, and Lucinda Logic. (It's hard enough to get first-year law students excited about state sovereign immunity—and believe me, I've tried.) Even the Section Five decisions that have invalidated popular statutes—the RFRA in Boerne, the VAWA in Morrison—seem to have had little traction in the broader circles of public opinion. Public controversy over the Court continues to center around abortion, an issue far simpler to understand than the institutional imbalances that Judge Noonan is mad about.

Perhaps, then, we should understand Narrowing the Nation's Power as part of a tradition of professional criticism of the Court, designed not to "rouse the sleeping public" but to persuade a smaller community of academics and members of the bench and bar to whom the Court looks for approval. Michael Dorf and Samuel Issacharoff have recently argued that courts and the Supreme Court are accountable to public scrutiny, just as are all other public institutions.... [B]ecause federal courts are not elected, the scrutiny takes on a different form from the customary world of the press, intermediary institutions, and the electorate. The custom in this country is that judicial orders are accompanied by written opinions that set forth the legal propositions that guide the courts. Those opinions not only form the basis of the common law method, but also are the basis for critical commentary by informed communities of interest, including both the bar and the academy. As Justice Holmes reportedly observed, "[t]he Supreme Court is not the Court of Final Consideration... following every term, there's always the law reviews."298

One need not go all the way with Professors Dorf and Issacharoff's claim that professional criticism can hold the Court "accountable" in a practically significant way to acknowledge that such criticism is important.

In order to be effective, however, such criticism has to abide by some basic rules. Professors Dorf and Issacharoff suggest a couple of these. Critics should avoid "confident ascription[s] of motivation"—an admonition that Judge Noonan ignores when he accuses the Court of hostility to the statutes involved in cases like Garrett and Kimel.300 Even more

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299. Id. at 943.

300. See, e.g., p. 147 ("The justices are all acting as legislators, ... making up their own minds as to whether the legislation that was passed should have been passed.")
important, critics should engage in "sympathetic criticism" that "takes seriously the enterprises in which the Court is engaged." 301 Hence "a sympathetic critic of the Court's federalism jurisprudence would argue why some doctrines are likely to be more effective than others, why some are more faithful to the structure and history of the Constitution, and so forth, rather than simply rejecting the entire federalism enterprise as serving the wrong values." 302 Judge Noonan's criticism is hardly "sympathetic" in this sense; one searches it in vain for an acknowledgement that federalism serves important constitutional values, or even that state governments serve other functions than the ruthless exploitation of their citizens.

The most important requirements for professional criticism, however, are rigor and intellectual honesty. The book simply has too many places where Judge Noonan overstates the consequences of particular rulings, fudges important doctrinal details, or fails to consider important counter-arguments to his position. Perhaps these failings would be excusable in a work that was trying hard to simplify for a lay audience, although I am inclined to insist that greater rigor can be maintained even there. If the work is to be evaluated by the standards of good professional criticism, however, they are inexcusable.

Judge Noonan's book thus exists in a peculiar no-man's land. It succeeds neither as rabble-rousing polemic nor as scholarly commentary. This does not make the book harmless, however. The likelihood is that Judge Noonan's analysis will be dumbed down even further and used by others who have their own reasons to oppose the Court. Linda Greenhouse—who seldom misses an opportunity to criticize the Court's federalism decisions 303 —has praised Judge Noonan for his "meticulous deconstruction of the court's work." 304 Likewise, the New York Times editorial staff cites Judge Noonan for uncovering "judicial hypocrisy" in the Court's "current obsession with states' rights." 305 Even scholars, who should know better,

301. Dorf & Issacharoff, supra note 298, at 949.
302. Id.
303. See, e.g., Linda Greenhouse, For a Supreme Court Graybeard, States' Rights Can Do No Wrong, N.Y. TIMES, Mar. 16, 2003, § 4, at 5 (just like it sounds). Ms. Greenhouse does waffle between predicting extreme consequences from the Court's federalism jurisprudence, see Linda Greenhouse, Focus on Federal Power, N.Y. TIMES, May 24, 1995, at A1 (suggesting that Justice Thomas's dissent in Term Limits left the Court "a single vote shy of reinstalling the Articles of Confederation"), and anticipating that jurisprudence's imminent demise, see Linda Greenhouse, Will the Court Reassert National Authority?, N.Y. TIMES, Sept. 30, 2001, § 4, at 14 (taking advantage of the September 11 attacks to suggest that "[t]he Supreme Court's federalism revolution has been overtaken by events").
304. Greenhouse, supra note 278, at 8.
305. Editorial, Judicial Hypocrisy, N.Y. TIMES, Aug. 21, 2002, at A16. In their enthusiasm for Judge Noonan's attack on the Court, the Times editors attributed to Judge Noonan significant errors that his book does not in fact make. For example, the editors suggested that the Arte Publico case held that "the state was immune to Congress's copyright statute," id., when Judge Noonan was careful enough to confine himself to saying that the author's "case for damages could be barred
have joined in the chorus. Dean Jesse Choper, for example, raves that Judge Noonan's book "provides a devastating attack on the logic of the Supreme Court's revival of states' rights, and makes complex legal doctrine enjoyable and readily understandable reading."\textsuperscript{306}

Of course, these people are all well-known advocates of liberal nationalism. Judge Noonan is a particularly appealing instrument for the Court's liberal/nationalist critics, because he is a Reagan appointee and thus generally presumed to be "conservative." But Judge Noonan has never been a typical "conservative" jurist in the mode of an Antonin Scalia or a Michael Luttig.\textsuperscript{307} Moreover, as Lynn Baker and I have argued elsewhere, there is no necessary correlation between federalism and conservative policy.\textsuperscript{308} Certainly Judge Noonan's arguments in Narrowing the Nation's Power have none of the flavor that comes from a man who believes in federalism yet remains unpersuaded by the doctrines that the Court has devised to enforce it. The fact that these arguments come from a Republican appointee thus ought to lend them no additional credibility.

V. Conclusion

One of the privileges of being a junior faculty member is that senior colleagues often feel obligated to read one's rough drafts. On many occasions when I have written about federalism—from a stance considerably more sympathetic to the States than Judge Noonan's—my colleagues have responded with the following comment: "Relax. The States retain vast reserves of autonomy and authority over any number of important areas. It will be a long time, if ever, before the national government can expand its authority far enough to really endanger the federal balance. Don't make it sound like you think the sky is falling."

This has always been good advice. Someone should have given the same advice, in reverse, to Judge Noonan. The Supreme Court's decisions on state sovereign immunity and Section Five of the Fourteenth Amendment are important but limited. The national government retains \textit{truly} vast

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\textsuperscript{306} This language appears on the back cover of Narrowing the Nation's Power.


\textsuperscript{308} See Baker & Young, supra note 262, at 133–62.
reserves of authority. The Court shows no inclination to change that, even if it had the institutional power to do so. No one is “narrowing the Nation’s power.” The sky is not falling.