REVIEWS

Inflating the Nation's Power

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Narrowing the Nation's Power: The Supreme Court Sides with the States, John T. Noonan, Jr. California, 2002. Pp ix, 193.

John T. Noonan, Jr., is Senior Judge of the United States Court of Appeals for the Ninth Circuit and Robbins Professor Emeritus at the University of California at Berkeley. The title of his latest book neatly proclaims his thesis: the Supreme Court has been depriving Congress of its rightful authority. Judge Noonan's exposition of this proposition necessarily explores issues both of federalism and of separation of powers, not least the question of the proper scope and consequences of judicial review.

Narrowing the Nation's Power does not appear to be a book intended for experts. It has rather the flavor of a polemical essay designed to alert the educated lay reader to insidious dangers commonly concealed by layers of technical jargon from the public view. The book is not a fountain of new insights into the familiar problems it addresses; in large part it is a paraphrase of a row of anguished and voluminous dissenting opinions for the edification of those lucky enough to have been spared the agony of reading them.

For Judge Noonan is by no means alone in perceiving a wrong turn in the Supreme Court's recent rediscovery that we live in a federal system. Apart from the Federalist Society crowd, the academic establishment is solidly in his corner on most of the issues treated in his book, and so are four completely predictable members of the Court itself. He may nevertheless be among the Court's more histrionic critics, as his sensitive antennae detect in the fell course of recent decisions not only a grave curtailment of federal authority and an ominous shift of power to the judiciary (p 5), but a veritable "danger to the exercise of democratic government" as well (p 140).

Judge Noonan concentrates his fire on what he considers three grievous errors in constitutional interpretation committed by the cur-

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rent Supreme Court. The first is the familiar decision in *City of Boerne v Flores*,[1] which refused to allow Congress to define the free exercise of religion so broadly as to entitle religious objectors to special exemptions from generally applicable state laws. His second target is a series of cases beginning with *Seminole Tribe v Florida*[2] in 1996, striking down a medley of congressional efforts to authorize suits by private parties against unconsenting states. The third and final object of his spleen is *United States v Morrison*,[3] where the Court by the usual bare majority declined to countenance a federal right of action for damages on account of rape.

To say that Judge Noonan regards these decisions as erroneous is to understate his position. What he does is to brand them as nothing less than products of a judicial "agenda for restoring power to the several states" (p 140)—which is not far from calling them deliberate perversions of the Constitution.[4]

I. *CITY OF BOERNE V FLORES*

The *Boerne* controversy involved the meaning of the First Amendment provision guaranteeing "the free exercise of religion" and the extent of Congress's authority under § 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article."[5] The facts presented the conventional collision between religious and secular interests: a church's desire to expand its facilities and a community's wish to preserve a landmark. After a century of conflicting decisions, the Supreme Court in *Employment Division v Smith*,[6] by a 5–4 vote, had settled (for the moment) that the Free Exercise Clause forbade only *discrimination* on grounds of religion; it did not relieve individuals invoking religious scruples from legal restrictions that applied impartially to everyone else. Congress, professing to be horrified, voted by overwhelming majorities to overrule the Court's decision: not even a generally applicable law could burden the exercise of religion unless it was narrowly tailored to promote a "compelling governmental interest."[7] It was this statute, the Religious Freedom

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1 521 US 507 (1997).

2 517 US 44 (1996).

3 529 US 598 (2000).

4 See also p 113. Elsewhere, of course, Judge Noonan insists that the Court's "new departures have been made with great deliberateness, great sincerity, great conviction that they are essential to the preservation of our federal form of government" (p 9). That is not quite to say they were made with the conviction that they reflected the true meaning of the Constitution.

5 521 US at 517.

6 494 US 872 (1990).

7 Religious Freedom Restoration Act, 107 Stat 1488 (1993), codified at 42 USC § 2000bb et seq (2000).

Restoration Act of 1993 (RFRA), that the Supreme Court struck down in *Boerne*.

The Court's reasoning was straightforward. Section 5 authorized Congress only to enforce the Fourteenth Amendment's limitations on the states, not to add to them. *Smith* had already established that that Amendment (which alone made the Free Exercise Clause binding on individual states) did not exempt the religious from otherwise valid general laws.[8] Thus in attempting to create such exemptions Congress could not fairly be said to be enforcing the Fourteenth Amendment unless (as in the case of literacy tests notoriously employed to circumvent the Fifteenth Amendment ban on racial qualifications for voting[9]) a more sweeping prohibition was necessary to prevent violations of the Amendment itself. The Court found insufficient evidence of any such need; assuming the legitimacy of the congressional goal, the means chosen were not proportional to that end.[10] Not one Justice, it should be added, dissented from these conclusions.

Judge Noonan is quite censorious. To begin with, he thinks *Smith* was wrongly decided: the Constitution *does* create religious exemptions from generally applicable laws. *Smith* was an "[a]brupt[] . . . change" from established doctrine (p 23), a "retreat[]" from the salubrious views of that Father of the Free Exercise Clause, James Madison (p 25), and inconsistent with the accepted interpretation of parallel constitutional provisions. "Other civil liberties," he informs us, "would yield only to a compelling governmental interest. Why was free exercise treated as inferior?" (p 26).

Let us pause momentarily to parse this critique. Judge Noonan has three objections to the *Smith* decision: departure from precedent, from Madison, and from similar clauses of the First Amendment. Now, two of the decisions he tells us the Court ought to have followed (*Cantwell v Connecticut*[11] and *West Virginia State Board of Education v Barnette*[12] (pp 20–21)), to the extent relevant, were *themselves* departures from precedent. In its very first encounter with the religion clauses (in *Reynolds v United States*,[13] one of the "Mormon cases" that Judge Noonan dismisses as benighted (p 18)), the Supreme Court unanimously refused to carve a religious exemption from the law forbidding polygamy. While that result was arguably consistent not only with *Smith*'s understanding that the Free Exercise Clause requires

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8 494 US at 890.

9 Compare *Lassiter v Northampton County Board of Elections*, 360 US 45 (1959), with *Oregon v Mitchell*, 400 US 112 (1970). See also *Mitchell*, 400 US at 216 (Harlan concurring).

10 *Boerne*, 521 US at 536.

11 310 US 296 (1940).

12 319 US 624 (1943).

13 98 US 145 (1878).

only government neutrality but also with RFRA's compelling-interest test, the language of Justice Frankfurter's majority opinion in the first flag-salute case was not;[14] Judge Noonan proudly proclaims that *Barnette* "overruled [Frankfurter's] unfortunate precedent" (p 21).[15] Indeed *Cantwell*, which he acknowledges as the first decision to suggest a religious exemption from generally applicable laws (p 20), represented an even more fundamental departure from precedent—a departure of which Judge Noonan emphatically approves: until shortly before *Cantwell*, the Court had stoutly insisted that the Fourteenth Amendment made *none* of the provisions of the Bill of Rights applicable to the states.[16] Judge Noonan's argument turns out to be not that one should never depart from precedent, but that one should never depart from *good* precedent.[17] What makes a precedent good or bad remains to be explained.

Second point: a "retreat[]" from Madison. The intentions of the Framers. Originalism. Really? Elsewhere, as we shall see, Judge Noonan seems to care less than a fig for the Framers' intentions. But what *were* Madison's intentions? We are left to divine them for ourselves. He was, to be sure, in favor of religious liberty. Does that mean he thought the Constitution granted special privileges to the religious? Not necessarily; that's the very question we're discussing. Some think free exercise means people must not be disadvantaged on account of their religion, as the Supreme Court held in *Smith*. And Madison? He proposed an additional amendment that would have given conscientious objectors an exemption from military service[18]—which is some evidence (I do not call it conclusive) that he thought the First Amendment was insufficient to do the trick. As for the rest? Madison was above all a partisan of the *separation* of church and state; as President he came close (or more) to denying the Government's authority to give religious organizations *any* benefits, even those equally

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14 *Minersville School District v Gobitis*, 310 US 586 (1940).

15 In fact, as Philip Kurland taught us not so many years ago, *Barnette* did no such thing. It created no religious exception; it was not based on the Free Exercise Clause. As Judge Noonan discloses in an aside that vaporizes the argument he is trying to make, *Barnette* held that the *Free Speech* Clause protected *everyone* from compulsion to salute the flag, without regard to religion. Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U Chi L Rev 1, 31 (1961).

16 See, for example, *Prudential Insurance Co v Cheek*, 259 US 530, 538 (1922), declaring flatly that "the Constitution of the United States imposes upon the States no obligation to confer upon those within their jurisdiction either the right of free speech or the right of silence." Judge Noonan himself makes this point: incorporation of other Bill of Rights freedoms into the Fourteenth Amendment went back only to 1925 (p 19).

17 Compare W.S. Gilbert, *The Gondoliers* Act I, in Ian Bradley, ed, *The Complete Annotated Gilbert and Sullivan* 901 (Oxford 1996) ("When I say I detest kings, I mean I detest *bad* kings.").

18 See 1 Annals of Congress 451 (1789) (Madison).

available to others.[19] Madison's record hardly supports the conclusion that he understood the First Amendment to grant special privileges on religious grounds.

Third point: other clauses of the First Amendment. Yes, they have been differently construed; but they are not in fact parallel. There are two religion clauses; there is only one about speech. Congress is forbidden not only to prohibit the free exercise of religion but also to pass any law "respecting an establishment of religion."[20] No comparable clause forbids anything resembling the "establishment" of speech.

That there is a certain tension between the two religion clauses has been understood for a very long time. What one arguably requires, the other arguably forbids. The Government may not burden religion; the Government may not support religion. To exempt religion from burdens is to support it; to deny it benefits is to subject it to burdens. The unique challenge of the religion clauses is to reconcile the two provisions. One way to do this, as Professor Kurland demonstrated not so long ago, is to interpret the two provisions together to require strict governmental neutrality: no one shall be either disadvantaged or preferred on grounds of religion.[21]

Smith takes a giant step in the direction of this solution: the Free Exercise Clause does not require religious exemptions from generally applicable laws. Other recent decisions take another: the Establishment Clause does not require that religion be *excluded* from benefits that are available to others.[22] If the church burns, the state may put out the fire.[23] The jury is still out on Kurland's final hypothesis: that special religious exemptions from generally applicable laws, far from being required by the Free Exercise Clause, actually run afoul of the establishment provision.[24]

Smith's neutrality principle is not the only plausible way to interpret the Free Exercise Clause. It is, however, a perfectly respectable effort to reconcile two constitutional provisions that appear to point in opposite directions. There is no comparable difficulty with respect

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19 Consider his vetoes of the Alexandria church charter (Feb 21, 1811) and the Salem land grant (Feb 28, 1811), in James D. Richardson, ed, 1 *Messages and Papers of the Presidents* 489–90 (Bureau of National Literature 1897), both discussed in David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801–1829* 318–24 (Chicago 2001).

20 US Const Amend I.

21 Kurland, 29 U Chi L Rev at 96 (cited in note 15).

22 See, for example, *Zelman v Simmons-Harris*, 536 US 639 (2002).

23 *Everson v Board of Education*, 330 US 1, 17 (1947).

24 In *Smith*, Justice Scalia, in dictum, suggested they did not. See 494 US at 890. But see *Texas Monthly, Inc v Bullock*, 489 US 1 (1989) (striking down a tax exemption available only for religious publications). The exemption of conscientious objectors from the most recent military draft (invoked by Judge Noonan at p 38) is not a good counterexample; the Court went out of its way to interpret the statute to include virtually all conscientious objectors in order to avoid what it considered a serious constitutional question. See *United States v Seeger*, 380 US 163 (1965).

to freedom of speech, of the press, of assembly, or of petition. That the Free Exercise Clause is construed differently from these provisions is not to give it "inferior" status; it is merely to recognize the unique gravitational pull of the Establishment Clause.

Against this background, what does Judge Noonan have against the Court's conclusion in *Boerne* that Congress has no power to set aside the *Smith* decision? It is not merely that, as Justice O'Connor argued, the Court should have reconsidered *Smith* and overruled it.[25] It is apparently that Congress rather than the Court should decide what the Free Exercise Clause means, by virtue of its authority to "enforce" the Fourteenth Amendment's provisions. For the framers of that amendment, he tells us, were "deeply suspicious of the Supreme Court, still under a cloud for its notorious decision in *Dred Scott*" (p 28).

> The drafters of the fourteenth amendment did not desire to destroy a federal structure or concentrate all power in Congress. Still less, however, did they have in mind a grant of power to the court. They gave power for the amendment's enforcement to Congress (p 28).

Only Congress may enforce the Fourteenth Amendment? How many of those decisions Judge Noonan praises for creating religious exceptions under the Free Exercise Clause would have to be abandoned if that were so? And what about the fact that Congress *rejected* an earlier draft of the Amendment that would have done nothing but authorize Congress to legislate to protect civil rights?[26] The Amendment did two things: it imposed explicit restrictions on the states that have always been understood, like those found elsewhere in the Constitution, to be enforceable in the courts; and it empowered Congress to provide additional enforcement tools (such as civil and criminal remedies) by legislation.[27]

Judge Noonan waxes righteous over the Court's "new" requirement that in determining the validity of legislation enforcing the Fourteenth Amendment the means must be proportional to the end (pp 35, 39):

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25 *Boerne*, 521 US at 544–45 (O'Connor dissenting).

26 See Charles Fairman, 6 *History of the Supreme Court of the United States: Reconstruction and Reunion 1864–88* 1270–83 (MacMillan 1971).

27 *Ex parte Virginia*, 100 US 339 (1880), cited by Judge Noonan to establish that the courts have no power to enforce or protect rights guaranteed by the Amendment (pp 28–29), does contain language declaring that the Amendment gave enforcement authority to Congress rather than to the courts. What it *did*, however, was to uphold a statute making it a federal crime to deny rights the Amendment guaranteed, while a companion case gave a purely judicial remedy for a similar violation. See *Strauder v West Virginia*, 100 US 303 (1880) (reversing a criminal conviction because of the exclusion of blacks from the jury).

> 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" (p 35).

What is there about the innocuous term "proportionality" to trigger this outburst? The terminology may be novel, but the principle is not. Once the end is recognized as legitimate, the relation between the end and the means is *always* central to determining the necessity and propriety of federal legislation[28]—and indeed commonly to determining the validity of state legislation too, as in myriad cases involving equal protection and free speech—not to mention cases that would have arisen under RFRA itself, which required a particularly close fit between ends and means.

The argument thus boils down to a disagreement as to the degree of deference the Court should pay to congressional interpretation of the Constitution. Judge Noonan sneers at the Court's conclusion that it had the right to determine the issue for itself: "Six or even five of us count for more than five hundred of you . . . ." (p 39). If that sounds like an attack on the whole principle of judicial review, it does not stand alone: "The decisions now to be reviewed have been possible because the constitution has been interpreted by the Supreme Court as confiding to that court the power definitively to interpret the constitution." (p 7).

Was that wrong? Sure, if you think the Framers were so foolish as to appoint the rabbit to guard the cabbages.[29] That was not the dominant view in the Constitutional Convention, or in the early Congress; it was not the view of Alexander Hamilton; it was not the view of James Madison, who in introducing the Bill of Rights in the House assured us the courts would enforce them, as they have always done.[30] Judge Noonan seems to like judicial review well enough when the cases come out his way; *Cantwell*, *Barnette*, and other decisions he applauds were products of judicial review.

Perhaps the key word in Judge Noonan's attack on the Court's understanding of judicial review is "definitively": perhaps the vice is that the Court's decision is final. "Our words," he paraphrases the Court as saying, "constitute the constitution that is now in force" (p 40). Both Andrew Jackson and Abraham Lincoln, it is true, denied

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28 See, for example, *McCulloch v Maryland*, 17 US 316, 421 (1819), which Judge Noonan praises to the skies (pp 29–30).

29 See *Marbury v Madison*, 5 US (1 Cranch) 137, 178 (1803).

30 See David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801* 120 (Chicago 1997); Paul M. Bator, et al, *Hart and Wechsler's The Federal Courts and the Federal System* 8–9 (Foundation 3d ed 1988); Federalist 78 (Hamilton), in Jacob E. Cooke, ed, *The Federalist* 521, 524–27 (Wesleyan 1961); 1 Annals of Congress 457 (1789) (Madison).

that the Court's decisions were binding on other branches of government as a matter of stare decisis: each branch had the right and the duty to interpret the Constitution for itself.[31] By the same token, Congress's interpretation is not binding on the Court; the judges too must make their own determination as to what the Constitution means.[32] And it seems to me that, whoever had the better of the argument about the First Amendment, the Court in *Boerne* was right about the Fourteenth: the text of § 5 shows that Congress's power is to enforce the provisions of the amendment, not to amend them.

II. SOVEREIGN IMMUNITY

We come to sovereign immunity. Judge Noonan presents his views on this question in the form of a Socratic dialogue in which all the participants agree that the Court's decisions are illegitimate. The burden of the argument is that the Constitution says nothing about immunity (p 41); not even the Eleventh Amendment uses the term (pp 61–62, 66–67). The latter point, I should think, is trivial: when the Constitution says the judicial power shall not be read to embrace suits against states by citizens of other states, it might as well have said there was sovereign immunity.

More serious is the argument, made almost monthly by four dissenting Justices in recent years, that the Court has extended sovereign immunity far beyond the confines of the Eleventh Amendment—to suits brought by citizens of the defendant state, for example, or by federal corporations, or by foreign states.[33] Of course it has, and the Court has not helped its cause by thoughtlessly insisting, from time to time, that it has found these extended immunities in the Eleventh Amendment itself.[34] Judge Noonan accuses the Justices of making them up out of whole cloth. "What law," asks one of the interlocutors in his dialogue, immunizes states from actions by their own citizens (p 74)?

Judge Noonan knows the answer to that question. Every law student knows it, for the Supreme Court spelled it out over a hundred

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31 See Andrew Jackson, Veto message to extend charter of the Bank of the United States (July 10, 1832), in James D. Richardson, ed, 2 *Messages and Papers of the Presidents* 576, 582 (US Congress 1900); Paul M. Angle, ed, *Created Equal? The Complete Lincoln-Douglas Debates of 1858* 26, 36–37 (Chicago 1958) (quoting Lincoln's speech at Chicago, July 10, 1858).

32 See David P. Currie, *RFRA*, 39 Wm & Mary L Rev 637 (1998).

33 See, for example, *Monaco v Mississippi*, 292 US 313 (1934) (foreign state); *Smith v Reeves*, 178 US 436 (1900) (federal corporation); *Hans v Louisiana*, 134 US 1 (1890) (citizen of defendant state). None of these decisions, the reader will note, can fairly be described as recent.

34 See, for example, *Board of Trustees v Garrett*, 531 US 356, 363 (2001) ("Although by its terms the Amendment applies only to suits against a State by citizens of another State, our cases have extended the Amendment's applicability to suits by citizens against their own States.").

years ago in *Hans v Louisiana*.[35] Article III must be read against the background of a tradition of sovereign immunity; the King was not suable without his consent. Not one but three of the most important Framers announced flatly during the ratification debates that not even the provision extending the judicial power to controversies between states and citizens of other states would displace the traditional rule.[36] When the Supreme Court disagreed with this conclusion in *Chisholm v Georgia*,[37] the country overturned its decision as quickly as you can say "Jack Robinson": not even the only clause that mentions states as parties to private suits should be interpreted to permit them to be sued without consent.[38] A fortiori, said the Court in *Hans*, other clauses that are *less* suggestive of any intention to abrogate immunity should not be so interpreted either.[39] What law provided the basis for sovereign immunity in *Hans*? Private suits against unconsenting states do not fall within the federal judicial power as defined by Article III.

But it doesn't *say* that, Judge Noonan's debaters insist, in the Constitution (pp 151–53).[40] No, it doesn't. Where does it say that states may not tax the Bank of the United States?[41] That states may not secede from the Union?[42] That new states are admitted on an equal footing with the old?[43] That the President cannot be sued for damages arising out of actions taken in the course of his official duties?[44] That confidential communications within the executive branch are presumptively privileged against involuntary disclosure?[45] The Constitution cannot be construed by looking only at its words; history, tradition, consequences, and purpose help us to understand what the words of the Constitution mean.

Hans is the fulcrum on which the entire argument turns. If *Hans* is right, almost everything the Court has done since in the sovereign immunity cases follows easily.[46] If the case is not within Article III,

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35 134 US 1, 15 (1890).

36 See Jonathan Elliot, ed, 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 533 (2d ed 1836) (James Madison); id at 555 (John Marshall); Federalist 81 (Hamilton) in Cooke, ed, *The Federalist* 541, 548–49 (cited in note 30). Judge Noonan dismisses these observations with the statement that they should not be taken "out of context" (pp 80, 83), but all of them were made in response to the suggestion that Article III permitted unconsenting states to be sued in federal court.

37 2 US (2 Dall) 419 (1793).

38 US Const Amend XI.

39 See *Hans*, 134 US at 15.

40 See also p 12: "doctrinal devices . . . that have no footing in the constitution."

41 See *McCulloch v Maryland*, 17 US 316, 436 (1819).

42 See *Texas v White*, 74 US 700 (1869).

43 See *Coyle v Smith*, 221 US 559 (1911).

44 See *Nixon v Fitzgerald*, 457 US 731 (1982).

45 See *United States v Nixon*, 418 US 683 (1974).

46 I say "almost" not only because of *Fitzpatrick v Bitzer*, 427 US 445 (1976), which is discussed below (see text accompanying notes 58–61), but because the Court got the Commerce

Congress cannot bring it within the jurisdiction of a federal court. That was the lesson of a thousand decisions seeking to determine whether a particular dispute constituted a "case" or "controversy" within Article III.[47] It was the lesson of Chief Justice Taney in *The Genesee Chief*[48] and of six Justices in the *Tidewater* case.[49] Chief Justice Marshall said it in his usual magisterial way in 1807: "Turn to the article of the constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the constitution."[50]

Thus of course Congress cannot make states suable by private plaintiffs under the Indian Gaming Regulatory Act,[51] or for patent infringement,[52] or for discrimination on grounds of age[53] or disability.[54] If there were no constitutional immunity, it might well be necessary and proper to the creation of such rights to open the federal courts to private suits against states in order to enforce them; but Article III limits the jurisdiction that may be given to the federal courts. And of course Congress cannot make unconsenting states suable in state courts[55] or before federal agencies[56] either: the same considerations that persuaded the Court in *Hans* that the Framers did not intend to permit suits against unconsenting states demonstrate that they would not have wanted Congress to subject them to suit in any other forum.[57]

Clause question wrong too the first time it faced it, upholding an abrogation of immunity under that provision by a 5–4 vote in *Pennsylvania v Union Gas Co*, 491 US 1 (1989), where there was no opinion of the Court.

47 See, for example, *Hayburn's Case*, 2 US (2 Dall) 408 (1792); *Muskrat v United States*, 219 US 346 (1911).

48 53 US 443 (1852). The statute in issue, which extended admiralty jurisdiction to the Great Lakes, was upheld only because the Court was willing to redefine maritime cases for purposes of Article III; the Court made clear that Congress could not confer jurisdiction outside that Article by enacting legislation under the Commerce Clause.

49 *National Mutual Insurance Co v Tidewater Transfer Co*, 337 US 582 (1949). The Court in *Tidewater* upheld a statute conferring diversity jurisdiction in cases in which one of the parties was a citizen of the District of Columbia, but six Justices denied that Congress could extend the judicial power beyond Article III.

50 *Hodgson v Bowerbank*, 9 US (5 Cranch) 303 (1809). The statute before the Court purported to grant jurisdiction whenever an alien was a party; the Court chopped it down to constitutional size.

51 See *Seminole Tribe*, 517 US at 47.

52 See *Florida Prepaid Postsecondary Education Expense Board v College Savings Bank*, 527 US 627 (1999).

53 See *Kimel v Florida Board of Regents*, 528 US 62 (2000).

54 See *Garrett*, 531 US at 360–61.

55 See *Alden v Maine*, 527 US 706 (1999).

56 See *Federal Maritime Commission v South Carolina State Ports Authority*, 535 US 743 (2002).

57 The same considerations that limited federal judicial power in *Hans*, in other words, limit federal legislative authority to make states suable outside the federal courts. Once again, in describing the central policy underlying sovereign immunity as a concern for state "dignity," the Court has shot itself in the foot, and Judge Noonan understandably makes fun of the Court's contention (pp 52–54). The real concern is state *autonomy*, not dignity; the power to adjudicate, like the power to tax, is the power to destroy.

The one conspicuous uncorrected flaw in the Court's recent decisions was the conclusion in *Fitzpatrick v Bitzer*[58] that Congress *can* lift a state's immunity when it legislates to enforce the Fourteenth Amendment. That Amendment, the Court explained, came after the Eleventh, and on its face it limited state authority.[59] As I have said elsewhere, I find this argument unconvincing. The Fourteenth Amendment came after the Eighth as well as the Eleventh, but so far as I know no one has suggested that Congress may ordain cruel and unusual punishments to enforce its provisions.[60]

The consequence of *Bitzer* is that every litigant endeavors to squeeze his case into the Fourteenth Amendment in order to persuade the Court to uphold a congressional abrogation of sovereign immunity. Simple torts are transmogrified into takings of property in the face of contrary Supreme Court precedent; flat prohibitions of discrimination are defended as means of enforcing a constitutional ban on that which lacks a rational basis. As in *Boerne*, the alleged cure goes so far beyond the disease that the Court quite rightly concludes that Congress is not enforcing the Fourteenth Amendment at all but imposing new substantive duties on the states. It may do so under current caselaw,[61] but not under the Fourteenth Amendment; and thus despite *Bitzer* it may not abrogate the states' immunity.

Judge Noonan seems to suggest at one point that it is "unethical" to deny relief to the injured party in all of these cases (p 56). States, like other people, ought to pay when they do wrong (p 55). The preamble tells us one purpose of the Constitution was to establish justice (pp 11–12). For every right there should be a remedy (p 4).

Well, sure there should. Never mind that in the case everyone cites for this principle the Court denied a remedy, and that for thirty-five years no court in the country was authorized to give one.[62] Sovereign immunity is unjust; states ought to pay when they violate individual rights. The Illinois legislature has just waived sovereign immunity for a variety of federal suits the Supreme Court had held it did not have to defend.[63] Bravo! But *unethical*? Unethical to follow the law

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58 427 US 445 (1976).

59 Id at 456.

60 David P. Currie, *The Constitution in the Supreme Court: The Second Century* 573 (Chicago 1990).

61 See *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528 (1985). The Court has vacillated on this issue as well. *United States v California*, 297 US 175 (1936), held the state was not immune; *National League of Cities v Usery*, 426 US 833 (1976), held it was; *Garcia* held it was not.

62 See *Kendall v Stokes*, 37 US 524 (1838); *McClung v Silliman*, 19 US 598 (1821); *McIntire v Wood*, 11 US (7 Cranch) 504 (1813); *Marbury v Madison*, 5 US (1 Cranch) 137, 163 (1803).

63 State Lawsuit Immunity Act, Pub Act No 93-0414, 2003 Ill Legis Serv 2259–60 (West), to be codified at 745 ILCS 5/1.5.

because we think it bad policy? Maybe so, if we are talking about sending innocent people to gas chambers in Nazi Germany. But what happens to Judge Noonan's precious powers of Congress if the courts generalize this principle? No law can be enforced if the judges don't like it. Now who is it who's advocating government by the unelected judiciary?

Lots of people agree with Judge Noonan that the Supreme Court has carried sovereign immunity farther than the Constitution can support it. But the Court has buttressed its conclusions with serious historical arguments that seem to me entitled to respect even from those who think them ultimately unpersuasive; one ought not to dismiss the Justices as either fools or knaves.

III. THE COMMERCE CLAUSE

Finally, Judge Noonan argues that the Court was seriously misguided in concluding, in *United States v Morrison*,[64] that Congress was without power to create a cause of action for damages on account of rape.

Hooray for the Court! When, after years of upholding federal regulation of even the most isolated nooks and crannies of the economy on the basis of increasingly imaginative Rube Goldberg scenarios about their ultimate effect on commerce, the Court in *United States v Lopez*[65] finally called a halt, it was about time. Knee-jerk dissenters predictably argued, more or less, that if there are guns in schools people will get shot, and that dead people don't engage in interstate commerce.[66] Nor do they while recovering from rape, as the same four Justices argued in *Morrison*.[67] Can these judges really believe what they are saying? James Madison told the people of New York the powers delegated to the Federal Government were few and defined, those reserved to the states numerous and indefinite.[68] The Tenth Amendment assumes that there are powers not delegated to the United States; the dissenters would read it out of the Constitution.

Judge Noonan does not waste much ink trying to defend the proposition that Congress can regulate whatever it likes under the Commerce Clause. His principal attack on the Commerce Clause holding proceeds by way of ridicule:

> But activity that Congress regulated for its substantive effect on commerce, the court said, must itself have a commercial charac-

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64 529 US 598 (2000).

65 514 US 549 (1995).

66 See id at 618–25 (Breyer dissenting).

67 See 529 US at 631–35 (Souter dissenting). Again I paraphrase. The essence is there.

68 Federalist 45 (Madison), in Cooke, ed, *The Federalist* 308, 313 (cited in note 30).

> ter, it must be an economic activity of some kind. Gender-related crime did not have a commercial character. It was not a form of economic activity. QED: As neatly as a demonstration in geometry, the conclusion followed that Congress lacked the power in regulating commerce to ban violence against women (p 127).

Why the conclusion did not follow Judge Noonan leaves to the reader; this is criticism by innuendo. Does he think rape *is* an economic activity? Does he take issue instead with the Court's test? The New Deal revolution was about economic activity; as Justice Kennedy wrote in *Lopez*, the lesson of the New Deal cases is that Congress can regulate the national market.[69]

Judge Noonan goes on to raise questions (though less sharply) about the Court's rejection of a second suggested justification for the federal rape law in *Morrison*. For in that case, as in *Boerne* and the sovereign-immunity decisions, the challenged statute was also defended as an exercise of congressional power to enforce the Fourteenth Amendment.

This argument takes a little explaining. Rape is not ordinarily a violation of the Fourteenth Amendment. It was not the University of Virginia that allegedly raped the complainant, and the Amendment forbids only state action. But the state was said not to have been diligent enough in prosecuting her assailants, and since it prosecuted a whole lot of other offenders, it was argued, it had denied her the equal protection of the laws.

There is a grain of sense in this equation. Although the Court has rightly held that the Due Process Clause imposes no affirmative duty on the Government to protect one citizen from another,[70] the text of the Equal Protection Clause reveals that one of its purposes was to require the states to afford blacks the same protection from third parties it afforded everyone else; if it is a crime to kill whites it must be a crime to kill blacks as well.[71] Now that the Clause is understood to forbid discrimination on grounds of gender as well as race, the same must be true of men and women. The difficulty in *Morrison*, as in the other cases we have been discussing, was one of proof: had it been sufficiently demonstrated that Virginia was protecting only men and not women from physical assault?

One swallow, one supposes, does not make a summer. Not every failure to convict a woman's attacker establishes prosecutorial discrimination against women. Congress purported to find a pattern of underenforcement of laws against sexual assaults, which are notori-

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69 514 US at 574 (Kennedy concurring).

70 See *DeShaney v Winnebago County*, 489 US 189 (1989).

71 See *Slaughter-House Cases*, 83 US 36, 70 (1873).

ously difficult to prove; five Justices found the evidence insufficient to justify federalizing a subject that no serious externalities prevented the states from regulating quite adequately on their own.[72]

Not one of the dissenters, Judge Noonan acknowledges, voted to sustain the rape law as an exercise of Congress's power to enforce the Fourteenth Amendment (p 135). To do so, he argues, would only have required them to conclude, as he does, "that a state acted when it shirked its responsibilities" and that a federal remedy against the offending individual was an appropriate sanction for a state's failure to act (p 136). All that stood in the way of the first of these conclusions, he announces in his usual neutral way, is a handful of nineteenth-century decisions that "preserved the individual freedom of the members of the Klan and the liberty of racist innkeepers" (id). Obviously there could be no objection to overruling any such decisions.

CONCLUSION

Judge Noonan is on the side of the angels. Religious liberty ought not to be infringed. Sovereign immunity is unjust. Rape is a bad thing. Ergo Congress has power to correct all these evils under § 5 of the Fourteenth Amendment.

Unfortunately the matter is not so simple. Neither the Fourteenth Amendment nor any other provision gives Congress general authority to deliver us from evil. What § 5 authorizes Congress to do is to enforce the prohibitions of the Fourteenth Amendment—to provide remedies to redress or deter a state's deprivation of life, liberty, or property without due process of law, denial of the equal protection of the laws, or abridgement of the privileges or immunities of citizens of the United States. The free exercise of religion is one of the liberties the Fourteenth Amendment protects against state infringement, but free exercise has never been simply a matter of exempting religious people from generally applicable laws. Powerful considerations of equality, together with the Establishment Clause, militate against the conclusion that the First Amendment creates a caste system in which the religious are singled out for preferential treatment on the basis of their beliefs. Sovereign immunity, while unjust, has substantial and respectable roots in our constitutional history. And the Equal Protection Clause does not require the impossible: not every unjustified failure to prosecute an alleged criminal offender amounts to invidious discrimination against the class to which the unfortunate victim belongs.

The Supreme Court, Judge Noonan tells us, is on the side of the states, not the angels, in the controversies he has elected to discuss. In-

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72 See *Morrison*, 529 US at 616.

deed it is, because the Court is convinced that in these cases the law is on the side of the states. In a society that prides itself on the rule of law—and whose Constitution proclaims itself "the supreme law of the land"—to be on the side of the law is to be on the side of the angels. Reasonable minds may differ as to whether the Court was right in any or all of the cases Judge Noonan dissects; I happen to think it was. I also think Chief Justice Marshall was right when he said it was the Court's responsibility to help see to it that other governmental organs not exceed the limits of their authority, and I am glad that it is; judicial review has spared us a vast array of unconstitutional actions, legislative and executive, state and federal, over the past two hundred fifteen years.

No book that employs the term "velleity" (p 5) can be all bad. Nevertheless, even if one disagrees with the Court's decisions (and nobody agrees with all of them), it seems to me one has no cause to go about insisting that the sky is falling. Judge Noonan to the contrary notwithstanding, I think the reader can rest assured that in the Court's current course of decisions there is nothing remotely resembling a "present danger to the exercise of democratic government" (p 140).