JUDICIAL SOVEREIGNTY: THE LEGACY OF THE REHNQUIST COURT

NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES. By John T. Noonan, Jr.[1] University of California Press. 2002. Pp. 203. $24.95.

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Two hundred years ago, in 1803, the Supreme Court decided *Marbury v. Madison*.[3] This seminal case established judicial review of legislation and executive action. It may well be the Supreme Court's most important, celebrated opinion.

The story of *Marbury* is well known. Chief Justice Marshall, the author of the opinion, was an ardent Federalist from Virginia. The case was born and decided amidst great political turmoil during the transition from John Adams' presidency to Thomas Jefferson's. As Adams' term was coming to a close, Congress—dominated by the federalists—passed the Judiciary Act of 1801,[4] creating 16 new federal judgeships. Adams invoked his prerogative and nominated the 16 federal court judges before he left office. The Senate confirmed each. In addition, legislation authorized the President to appoint a number of justices of the peace for the District of Columbia. Marbury was one of those nominated and confirmed. His commission was sealed before Adams' term expired, though not delivered before Adams left the presidency. Interestingly, Marshall had been Adams' Secretary of State and was responsible for delivering Marbury's judicial commission.

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3. 5 U.S. (1 Cranch) 137 (1803). *See generally* Richard H. Fallon, *Marbury and the Constitutional Mind: A Bicentennial Essay of the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1 (2003).

4. Act of Feb. 13, 1801, 2 Stat. 89 (1801), *repealed* March 8, 1802.

President Jefferson refused to recognize Marbury's commission and appointment. Marbury challenged Jefferson's refusal to acknowledge Adams' commissions. Marbury invoked as grounds for jurisdiction the Judiciary Act of 1789,[5] which granted original jurisdiction to the Supreme Court to issue writs of mandamus. Marbury petitioned the Court to mandamus James Madison, the new secretary of state, to deliver the commissions. The Court ordered Madison to show cause why the writ of mandamus should not issue ordering him to deliver the commission to Marbury.

In an elegant, brilliant opinion, Chief Justice Marshall held that Marbury was entitled to his office, but that the Supreme Court lacked the jurisdiction to issue a writ because Congress, in establishing the writ of mandamus in the Judiciary Act, violated the Constitution which set forth the Court's power, but did not include the writ of mandamus in the Court's original jurisdiction. Congress, Marshall concluded, was without authority to expand the Court's power beyond those set forth in Article III. The Court, therefore, could not give Marbury a remedy for what the Court acknowledged had been a violation of his rights.

Although clearly limiting the Court's remedial power, Chief Justice Marshall, importantly, interpreted the Constitution to give the Court its ultimate power—the power of judicial review. He stated, emphatically, that "the province . . . of the judicial department [is] to say what the law is."[6] In doing so, he acknowledged with great care the right of both the executive and legislative branches to interpret the Constitution within the sphere of their own power. He cautioned that "the province of the Court is solely to decide on the rights of individuals not to inquire how the executive, or executive officers, perform duties in which they have a discretion."

Marbury, therefore, launched a two-hundred-year history of judicial review in the United States. Indeed, the Court during Chief Justice Marshall's tenure went on to recognize that Congress had broad discretion to apply and, in the first instance, to interpret the Constitution. The Marshall Court did not declare another congressional act unconstitutional during the 34 years of Chief Justice Marshall's tenure, during which he authored more than 500 opinions.

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5. Act of Sept. 24, 1789, 1 Stat. 73, § 13 (1789).
6. 5 U.S. at 177.

Marshall's expansive interpretation of Congress' power, especially under the commerce clause, as demonstrated in *Gibbons v. Ogden*[7] and *McCulloch v. Maryland*,[8] makes the ascendancy of judicial supremacy surprising. This current turn of events, featuring the supremacy of state rights over the federal government, surely would have alarmed James Madison,[9] the "father" of the Constitution, as well as John Marshall.

This contemporary revolution in narrowing Congress' power is well documented in John T. Noonan, Jr.'s recent book, *Narrowing the Nation's Power*. Judge Noonan, a well-regarded former law professor, legal historian, and senior judge on the United States Court of Appeals for the Ninth Circuit, forcefully argues that the Rehnquist Court is undermining both the structure of the Constitution and the core principles of democratic society by its unprecedented embrace of federalism and its enhanced autonomy of the States.

Judge Noonan raises important legal and public policy questions about the path the Rehnquist Court has taken: Is Congress still an equal and coordinate branch of government? What has happened to deference to political branches by unelected judges? Why is there such disrespect by the present Court for the doctrine of stare decisis, the tradition of following earlier judicial decisions? Does the expansion of judicial review interfere with republican self-government?[10] Is the Court's present interpretation of Congress' power ahistorical? Does judicial review have no boundaries? Is the Court's authority exclusive over the Constitution?[11] Has judicial activism replaced judicial restraint as the overriding conservative theme?[12] Why has Congress not objected to restrictions on its domain and powers, especially when there often has been bipartisan approval of many acts, now over 30 in the past decade, declared unconstitutional by the Court? Have we arrived at an Imperial Court?

Judge Noonan's critique of the Rehnquist Court's recent federalism decisions not only centers on the revival of state

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7. 22 U.S. (9 Wheat) 1 (1824).
8. 17 U.S. (4 Wheat) 316 (1819).
9. GARRY WILLS, JAMES MADISON 21, 24, 39-43 (2002).
10. *See generally* Larry Kramer, *The Supreme Court, 2000 Term—Foreword: We The Court*, 115 HARV. L. REV. 4, 158-69 (2001).
11. *See generally* Robert Post & Reva Siegel, *Protecting the Constitution From the People: Juricentric Restrictions on Section Five Power*, 78 IND. L. J. 1 (2003) [hereinafter, Post & Siegel, *Protecting*]; Robert Post & Reva Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000).
12. Cass R. Sunstein, *Taking Over the Courts*, N.Y. TIMES, Nov. 9, 2002, at A29.

rights but on the larger policy issue of judicial supremacy over deference to Congress. Regarding state sovereignty, he strongly disagrees with the Court's recent assertion that "the States entered the federal system with their sovereignty intact" (p. 2).[13] "[T]o anyone familiar with the precedents of that Court or with the text of the Constitution of the United States or with the history of the Civil War," Judge Noonan remarks, "this] is an extraordinary statement" (p. 2). He considers much of the Court's federalism jurisprudence since 1995 to be "profoundly ahistorical" (p.83). For him, the Court has undone, through its expanded view of judicial review, scores of incontestable constitutional principles. He further laments the Court's "complete indifference to the individual plaintiffs"[14] and to giving justice to persons in these cases (p. 145). His arguments are punctuated with strong language:

> The claim that the sovereignty of the states is constitutional rests on the audacious addition to the Eleventh Amendment, a pretense that it incorporates the idea of state sovereignty. Neither the text nor the legislative history of the amendment supports this claim, nor does an appeal to the history contemporaneous with the amendment. A rhetorical advantage is gained by the current court referring to the state sovereignty as 'an Eleventh Amendment' matter. The constitutional connection is imaginary (p. 151-152).

The Court's rhetorical abstractions, according to him, lose sight of our country's motto—*e pluribus unum*—from many (states) to one (country) (p. 14).

Narrowing the Nation's Power covers four constitutional areas that form the core of the Rehnquist Court's federalism jurisprudence: (1) the commerce clause, (2) the 10th Amendment, (3) the 11th Amendment, and (4) section 5 of the 14th Amendment.

COMMERCE CLAUSE JURISDICTION

The federalism revolution under Chief Justice Rehnquist began in earnest with the 1995 case of *United States v. Lopez*,[15] a

13. *See* Federal Maritime Comm. v. South Carolina State Ports Auth., 122 S. Ct. 1864 (2002).

14. *See* David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976).

15. 514 U.S. 549 (1995); *see also* Solid Waste Agency of No. Cook County v. United States Corps of Eng's., 531 U.S. 159 (2001); Jones v. United States, 529 U.S. 848 (2000);

case that required interpretation of the commerce clause. From the Court's first commerce clause decision in 1824 in *Gibbons v. Ogden*,[16] through the Court's commerce clause cases from 1937[17] to mid-1970s, the Court had given Congress broad authority to legislate under its constitutionally "enumerated powers" as fortified by its authority to enact laws that are "necessary and proper" in order to carry out the enumerated powers.

Lopez shocked the country by reallocating power between the States and the federal government. The result was a significant narrowing of Congress' powers. It was the first Supreme Court case since 1937 to strike down a federal statute as a violation of the commerce clause. The Court held that when Congress enacted the Gun-Free School Zones Act, making it a federal offense for an individual knowingly to possess a firearm in a school zone, it exceeded its commerce clause authority, since possession of a gun in a local school zone is not, according to the Court, an economic or commercial activity that substantially affects interstate commerce.

The second commerce clause case to fall victim to the advances of federalism was *United States v. Morrison*,[18] decided five years after *Lopez*. At issue in *Morrison* was the constitutionality of a federal statute that provided a civil remedy for victims of gender-motivated violence. Again, the Court struck down section 13981 of the statute, concluding that Congress lacked commerce clause powers since gender-motivated crimes of violence, such as rape, were not considered economic or commercial activity substantially affecting interstate commerce. Clearly, the Court was drawing the line of Congress' power at commercial or economic activity only.

Judge Noonan cites with approval the dissenting view of four justices in *Morrison* that "for the better part of the twentieth century, since 1937, the Supreme Court had accepted the

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United States v. Morrison, 529 U.S. 598 (2000).

16. 22 U.S. (9 Wheat) 1 (1824). Several cases from 1887 to 1937 struck down Congress's commerce clause exercises.

17. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding congressional power to regulate "those activities having a substantial relation to interstate commerce"). Since 1937, no commerce clause statutes have been held invalid except those in *Lopez* and *Morrison*. *See also* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Wickard v. Filburn, 317 U.S. 111, 122 (1942).

18. 529 U.S. 598 (2000). On the different question of Congress' power under section 5 of the Fourteenth Amendment, the Court found it an unconstitutional invocation of the Fourteenth Amendment since the statute governed the conduct of private individuals without a showing of harm caused by the state. Private conduct was not subject to Congress' section 5 discretion to regulate, said the Court.

commerce power of Congress as 'plenary'; the power had not been restricted to a category"—such as economic or commercial activity (p. 133). As John Marshall reasoned in *Gibbons*, "The power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution" (p. 133). Noonan draws from *Gibbons* the principles that once "a rational basis for its exercise of the commerce power" was found, "the court's function was over" (p. 133), and that "the power of Congress, [as expressed by Justice Marshall in *Gibbons*] over commerce could be exercised as 'absolutely as it would be in a single government'" (p. 134).[19]

Although the *Gibbons* "rational basis" standard had long guided the exercise of commerce clause power, the Court, in *Lopez* and *Morrison*, insisted on a much higher level of congressional fact-finding before Congress could legislate. The Court did concede in *Lopez* that "Congress need [not] make particularized findings in order to legislate,"[20] and added that Congress "is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."[21] Nevertheless, the Court, as the Court of Appeals below had done,[22] hinted that the holding might have been different if Congress had made explicit findings connecting guns in local schools to a substantial effect on interstate commerce.

Justice Souter, in dissent, noted that historically this is the wrong standard: "The only question is whether the legislative judgment is within the realm of reason."[23] Justice Breyer, also in dissent, cited substantial authority for the point, that the Court's duty is to judge the commerce connection independently of the Congressional findings and that the only test the Court has employed is whether there is a "rational basis" for the congressional action.[24] Indeed, he documents that the rational basis test traditionally has been not whether Congress made an explicit finding

19. Hodel v. Virginia Surface Mining & Reclamation Ass'n Inc., 452 U.S. 264, 276 (1981) ("[T]he only remaining question for judicial inquiry is whether the means chosen by Congress [are] reasonably adapted to the end permitted by the Constitution.")

20. 514 U.S. at 562-63; *see also* Katzenbach v. McClung, 379 U.S. 294, 299 (1964) ("no formal findings were made, which of course are not necessary").

21. 514 U.S. at 562.

22. United States v. Lopez, 2 F.3d 1342, 1363-68 (5th Cir. 1993).

23. 514 U.S. at 613 (Souter, J., dissenting).

24. *Id.* at 617-19 (Breyer, J., dissenting).

connecting the conduct to interstate commerce but rather whether Congress "*could* have had a rational basis."[25]

The holding in *Morrison* makes clear that the specificity of congressional fact-finding is not determinative of the constitutionality of Congress' exercise of commerce clause discretion, as *Lopez* had implied. Judge Noonan carefully marshals the evidence to demonstrate, as the dissent in *Morrison* had done, that Congress had before it a "mountain of data showing the effects on interstate commerce of violence against women" (p. 131). No matter, Chief Justice Rehnquist, while conceding that, contrary to *Lopez*, the statute in question in *Morrison* "is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families,"[26] makes the majority's larger point that the march of judicial supremacy and federalism is now more important than Congress' long-standing power under the commerce clause:

> [T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.... [S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.... Rather, [w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.[27]

Morrison, therefore, implicitly rejects the "rational basis" test that had been upheld against commerce clause challenges in scores of Supreme Court cases, including numerous civil rights acts.[28] Plainly, the new majority is strongly in favor of expanding federalism in order to develop "an enclave for the states to rule" (p. 134). and in favor of expanding judicial review over Congress' commerce clause discretion. According to the present majority, Congress lacks power unless the activity sought to be regulated is directly economic or commercial in character. As Chief Justice Rehnquist concluded in *Morrison*, we uphold "Commerce Clause regulation of intrastate activity only where the activity is economic in nature ... [even the] conduct's aggre-

25. *Id.* at 618 (emphasis added).
26. 529 U.S. at 614.
27. *Id.*
28. *See e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); *see also Morrison*, 529 U.S. at 628-55 (Souter, J., dissenting).

gate effect on interstate commerce[29] is not enough when Congress seeks to regulate noneconomic conduct. In dismay, Judge Noonan observes that the Court in *Lopez* and *Morrison* "was giving the states more autonomy than their own chief prosecutors thought desirable" (p. 135),[30] with the result that the federal government's power to regulate had been narrowed drastically.

THE FOURTEENTH AMENDMENT

In addition to the commerce clause problem in *Morrison*, the Court also struck down the civil remedy of the Violence Against Women Act on the ground that this remedy was outside Congress' remedial power under section 5 of the Fourteenth Amendment, because the statute governed the conduct of private individuals rather than harm caused by the State. Section 5 states that Congress may "enforce by 'appropriate legislation' the constitutional guarantee that no state shall deprive any person of 'life, liberty, or property, without due process of law,' nor deny any person 'equal protection of the laws.'" The Court concluded that the Fourteenth Amendment, at its core, prohibits only state action.[31] Here, the Court found that the statute was aimed at individuals who have committed criminal acts motivated by gender bias, not the State itself.

In his condemnation of the Court's section 5 cases, Judge Noonan notes that "[t]he Congress that drafted the Fourteenth Amendment after the Civil War had been deeply suspicious of the Supreme Court" (p. 28). "[The drafters] gave power for the amendment's enforcement to Congress" (p. 28). He observes that *Ex parte Virginia*,[32] decided eleven years after the Fourteenth Amendment had been ratified by the States, discussed congressional power under the amendment:

> It is the power of Congress which has been enlarged.... Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial

29. 529 U.S. at 613, 617.

30. Thirty-eight states through their Attorneys General had urged Congress to pass the Violence Against Women Act (pp. 134-35).

31. 529 U.S. at 621.

32. 100 U.S. 339 (1879).

> or invasion, if not prohibited, is brought within the domain of congressional power (p. 28-29).

But the *Morrison* majority reigned in this broad, remedial language with an admonition that "prophylactic legislation under § 5 must have a 'congruence and proportionality' between the injury to be prevented or remedied and the means adopted to that end."[33]

The same "congruence and proportionality" test had been cited earlier in *City of Boerne v. Flores*[34] where the Court overruled, as unconstitutional, the Religious Freedom Restoration Act. Judge Noonan thunders at this invented standard: "This formula was unprecedented. Proportionality in legislation! Who would measure the proportion? . . . [With this requirement there is] a need for a court to look more closely at what evils the legislation was said to be eliminating or preventing" (p. 35-36). For many, this new standard permits the Court to act as a super legislature in substituting its subjective judgment for that of the elected body and the executive who signs the legislation, thus undermining democratic principles of the Republic.[35]

Others have posited that separation of power principles also are implicated as the Court, both in *Morrison* and *Boerne*, feared Congress' power under section 5 "as challenging the Court's ultimate authority to interpret the 14th Amendment."[36] The Court's "juricentric Constitution," these authors assert, leaves the Court as the "exclusive authority of the Constitution.[37]

> The juricentric Constitution imagines the judiciary as the executive guardian of the Constitution. It allows the Court's coordinate branches to enforce the Constitution only insofar as they enforce judicial interpretations of constitutional meaning, an approach that radically circumscribes Congress' power under § 5 of the 14th Amendment. The Court justifies these restrictions in a way that fundamentally misdescribes Ameri-

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33. 529 U.S. at 625-26.

34. 521 U.S. 507 (1997). *See also* Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savs. Bank, 527 U.S. 627 (1999).

35. *But see* Suzanne Sherry, *Irresponsibility Breeds Contempt*, 6 GREEN BAG 2d 47, 49 (2002) (arguing that this statute cannot be authorized under section 5 because Congress only has "the power to *enforce* the substantive provisions of the Fourteenth Amendment. It does not give Congress any additional power to *enlarge* or *interpret* those provisions"). *See also*, Ana Maria Merico-Stephens, United States v. Morrison *and the Emperor's Clothes*, 27 J.C. & U.L. 735 (2001).

36. Post & Siegel, *Protecting*, *supra* note 11.

37. *Id.* at 3.

> can constitutional culture. ... [Its] recent decisions ... are fundamentally indifferent to the subtle but fundamental interconnections between the constitutional dimensions of our political life and the democratic dimensions of our constitutional culture.[38]

THE TENTH AMENDMENT

Early in his tenure, (then) Justice Rehnquist identified the Tenth Amendment as a constitutional principle that needed revisiting.[39] That provision reserves to the States (or to the people) those powers not delegated to the federal government by the Constitution, nor prohibited to the States.[40] For the first time in four decades, in 1976, the Court, in an opinion authored by then Justice Rehnquist, struck down a congressional act under the Tenth Amendment. In *National League of Cities v. Usery*,[41] the Court held unconstitutional under the Tenth Amendment the Federal Labor Standards Act, which extended the minimum wage provisions to state and municipal (police and firefighters) employees, because Congress, the Court concluded, had invaded an "attribute of state sovereignty" by enacting the statute. The Rehnquist opinions gave new dignity to the States. These opinions were couched in terms of the structure of the Constitution, particularly when the Tenth Amendment was read together with the Eleventh Amendment.[42] According to Justice Rehnquist, "Congress may not exercise [its] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral government functions are to be made.... [S]uch assertions of power if unchecked, would indeed ... allow 'the National Government [to] devour the essentials of

38. *Id.* at 25. ("The ultimate *reduction* of this approach is that Congress can legislate pursuant to § 5 only to remedy violations that courts have already condemned").

39. Fry v. United States, 421 U.S. 542, 550 (1975) (Rehnquist, J., dissenting). Justice Rehnquist's dissent here might well be considered the beginning of his long-sought desire to reinterpret the Constitution toward a federalism theme.

40. U.S. CONST. amend. X.

41. 426 U.S. 833, 854-55 (1976) ("States as States stand on a quite different footing from an individual or corporation when challenging the exercise of Congress's power to regulate commerce."); *see also* Fry, 421 U.S. at 549 (Rehnquist, J., dissenting).

42. *Fry*, 421 U.S. at 557 (Rehnquist, J., dissenting) ("[The Tenth and Eleventh Amendments] are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superceded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation.").

state sovereignty."[43] Although *National League of Cities* moved the federalism debate to the forefront, it did not make further distinctions to clarify when state rights were violated. Nearly ten years later, the Court, in *Garcia v. San Antonio Metropolitan Authority,*[44] overruled *National League of Cities* with quite a different view of federalism. With *Garcia,* the Court returned to the pre-*National League of Cities* view of state sovereignty.

Writing for the Court in *Garcia*, Justice Blackmun elaborated on the "process of federalism" that balances the interest involved with more emphasis on the "political process," rather than judicial review, to inform the contours of the Tenth Amendment. Focusing on the "procedural safeguards inherent in the structure" of the federal political process, the majority concluded, "ensures that [the federal] laws that unduly burden the states will not be promulgated."[45] In the end, Justice Blackmun concluded that "the model of democratic decisionmaking the Court [in *National League of Cities*] identified underestimated . . . the solicitude of national political process for the continued vitality of the States."[46] In dissent, Justice Rehnquist cautioned the majority that his long view toward reading the Tenth and Eleventh Amendments and the commerce clause as a single theme embracing federalism would eventually prevail. "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."[47]

Judge Noonan chose not to include these Tenth Amendment cases as part of his argument. This is regrettable since *Narrowing The Nation's Power* would have profited from their inclusion. In many respects Chief Justice Rehnquist's early opinions in *Fry* and *National League of Cities* revealed his almost singular drive or preoccupation with federalism as an overarching theme of the Constitution.[48] His impressionist view of the Tenth Amendment, together with how he shaped the Court's dramatic reinterpretation of the Eleventh Amendment, created

43. 426 U.S. at 855.

44. 469 U.S. 528 (1985).

45. *Id.* at 552, 556, *quoted in* KENNETH W. STARR, FIRST AMONG EQUALS 235-36 (2002).

46. *Id.* at 565-57.

47. *Id.* at 580 (Rehnquist J., dissenting). *See generally* Ana Maria Merico-Stephens, *Of Maine's Sovereignty, Alden's Federalism, and the Myth of Absolute Principles, The Newest Oldest Question of Constitutional Law*, 33 U.C. DAVIS L. REV. 325 (2000).

48. Tony Mauro, *The Rehnquist Revolution's Humble Start*, LEGAL TIMES, Feb. 3, 2003, at 1, 10.

a new structural canvas from which the present Supreme Court views the Constitution and its role in interpreting the Constitution.

THE ELEVENTH AMENDMENT

Clearly, the most persuasive section of Judge Noonan's book is his rich, historical discussion of the Court's treatment of the Eleventh Amendment. The Eleventh Amendment cases are the cases most at odds with majoritarian principles of democratic society—where the elected branches of government, the Congress and the presidency, are given greater deference. These are the cases that come closest to the *Lochner*-era[49] approach to judicial review. These cases demonstrate the path that the modern Court has traveled to broaden state sovereignty and immunity in ways that depart from the founders' understanding of these concepts.[50]

In the last ten years, the Court has decided fourteen cases on Eleventh Amendment grounds, culminating in the most radical interpretation of the Eleventh Amendment in *Federal Maritime Commission v. South Carolina State Ports Authority*.[51] The result is a vastly different interpretation of the amendment than its original understanding in 1798. On its face, the Eleventh Amendment says federal judicial power does not extend to a suit against a state "by citizens of another state, or by citizens or subjects of any foreign state."[52] As the Court now interprets the amendment, it provides a remarkably broad immunity for states. For Judge Noonan, "[t]here's nothing to support the view that immunity [for states] was part of the Constitutional design or inherent in its plan.... Nowhere in the entire document are the states identified as sovereigns" (p. 85, 151). He concludes that "[l]ike other common law principles [sovereign immunity for

49. Lochner v. New York, 198 U.S. 45 (1905) (use of substantive due process to strike down a state law regulating the maximum hours of work as a violation of liberty of contract).

50. *Power to the State*, ABA JOURNAL 38-44 (Jan. 2003).

51. 122 S. Ct. 1864 (2002); *see, e.g.*, Bd. of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); Alden v. Maine, 527 U.S. 706 (1999); College Savs. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381 (1998); California v. Deep Sea Research, 523 U.S. 491 (1998); Printz v. United States, 521 U.S. 898 (1997); Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997); Regents of the Univ. of California v. Doe, 519 U.S. 425 (1997); Seminole Tribe v. Florida, 517 U.S. 44 (1996); Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994).

52. U.S. CONST., amend. XI.

states] is open to being overridden by federal law and by the federal Constitution. . . . As federal law is the supreme law of the land, at no time in the history of the United States has sovereignty of the states been intact" (p. 152).

Judge Noonan acknowledges the arguments for the "judge-made" state immunity: "to preserve the structure of the federal union, to keep it from collapsing into a single unitary system, the states must be immune from private lawsuits" (p. 153). He likewise recognizes that state sovereignty is needed to preserve the states' solvency, (p. 153) and "that the dignity of the state demands it" (p. 154). But his position is clear, if not cursory: "the immunity of the fifty states is a relic of the past without justification of any kind today" (p. 154). It is a doctrine with a broad "penumbra" that has "metastasized" throughout all the "arms," entities and subsidiaries of the state government (p. 154). In short, it has "swelled beyond bounds," (p. 156) and is one that "cannot be consistently applied or reconciled with the federal system" (p. 156). Indeed, he asserts, "[i]t is unjust" (p. 156).

As *Narrowing the Nation's Power* argues, there is great irony today in the Court's conflation of the Eleventh Amendment and section 5 of the Fourteenth Amendment, as discussed above. After all, the Court, through Justice Rehnquist, had held in *Fitzpatrick v. Bitzer*[53] that state sovereignty as interpreted through the Eleventh Amendment is limited by section 5 of the Fourteenth Amendment, which authorizes Congress "by appropriate legislation" to enforce the substantive provisions of the Fourteenth Amendment. In *Fitzpatrick*, Justice Rehnquist reasoned that:

> When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against states or state officials which are constitutionally impermissible in other contexts.[54]

Unfortunately, this logic has been discarded by the Court's more recent section 5 decisions which have reduced, drastically, Con-

53. 427 U.S. 445 (1976).
54. *Id.* at 456.

gress' power under section 5. *Board of Trustees of the University of Alabama v. Garrett*[55] is the most recent example.

As previously discussed, the Court now places Congress' exercise of section 5 under close scrutiny, demanding that *before* Congress can exercise its power "by appropriate legislation"[56] it must first document that constitutional rights, as determined by judicial interpretations, are being violated. In other words, Congress must make an evidentiary record much like a court would be required to do before issuing a remedy. Absent such a record, Congress lacks "a valid grant of constitutional authority[57] under section 5 to abrogate state immunity under the Eleventh Amendment. Moreover, a valid exercise of section 5 powers is only present when the legislation is congruent and proportional to the injury and the means adopted to correct the injury. The Court alone determines, through strict scrutiny standards, whether Congress has met this test. The result, as John Noonan's apt title states, is an historically important narrowing of the nation's power, at least that of Congress, in reducing section 5's check and balance authority over an expansive interpretation of immunity for states under the Eleventh Amendment.

Garrett suggests that the Eleventh Amendment is now a check on section 5, rather than vice versa.[58] In short, state immunity trumps Congress' power to enact legislation to enforce equal protection of the laws. As a result, states become insulated from suits and liability, the Supreme Court becomes the exclusive authority over constitutional interpretation, and Congress loses substantial authority and prerogatives to legislate through the democratic process.

The most extreme articulation of the state sovereignty under the Eleventh Amendment is found in *South Carolina State Ports Authority*.[59] Justice Thomas, writing for the 5-4 Court majority, ruled that a federal administrative agency under the Eleventh Amendment could not adjudicate a private party's complaint against a state agency. The Court, in reaching its decision, was not content to limit itself to a textual reading of the Elev-

55. 531 U.S. 356 (2001); *see also* United States v. Morrison, 529 U.S. 598 (2000); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savs. Bank, 527 U.S. 627 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997).

56. *See* Post & Siegel, *Protecting*, *supra* note 11, at 5-18.

57. *Garrett*, 531 U.S. 356, 363.

58. Post & Siegel, *Protecting*, *supra* note 11, at 18.

59. 122 S. Ct. 1864 (2002).

enth Amendment. Plain meaning was too narrow an approach for the Court to reach its desired result. In the most strained and expansive reading of the amendment to date, Justice Thomas stated: "[T]he Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity.... We have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms."[60]

Although Justice Thomas conceded that the federal agency in question, the Federal Maritime Commission, does not exercise "judicial power of the United States," as required by the language of the Eleventh Amendment,[61] he reaches in a bold stroke of judicial activism beyond the amendment to find immunity when the nature of the proceedings in a federal agency resembles civil litigation[62] and to protect a state's "dignity."[63] As Justice Stevens observed, "the 'dignity' rationale [offered by the Court] is 'embarrassingly insufficient.'"[64] Or, as Justice Breyer said: the "principle has no logical starting place ... neither does it have any logical stopping point."[65] The Thomas logic, at bottom, is without historical support. At best, the logic is escapable.

CONCLUSION

Has the Rehnquist Court rewritten the Constitution to advance federalism beyond anything recognizable in history? *Narrowing the Nation's Power* makes a strong case that it has. Unfortunately, only four justices of the Supreme Court agree.

Although Judge Noonan's book is not intended to provide a close doctrinal analysis of all the Supreme Court's federalism cases in the past ten years, it is powerful nevertheless, for the story it tells of the reinterpretation of an important American constitutional doctrine and political theory. While he does not use the term "revisionism," Judge Noonan might well have

60. *Id.* at 1871.
61. *Id.*
62. *Id.* at 1873.
63. *Id.* at 1874.
64. *Id.* at 1880 (Stevens, J., dissenting); *see also*, Seminole Tribe v. Florida, 517 U.S. 44 (1996).
65. 122 S. Ct. at 1889 (Breyer, J., dissenting). Although *Narrowing the Nation's Power* was in the press at the time *South Carolina State Ports Authority* was decided, I am sure Judge Noonan would share Justice Steven's and Breyer's dismay at the majority's sweeping exercise of judicial activism. *See Power to the State*, *supra* note 50, at 41-42.

branded the Court's handiwork as such. It fits his theme. Indeed, while he offers many conclusions and colorful language to make his points, his theme is a sobering one: The Supreme Court is engaged in judicial activism[66] as it rewrites history in order to shift power back to the states at the expense of democratic principles and congressional prerogatives. The consequence is that the Court's federalism jurisprudence has reached an ascendancy and dominance not seen before in history. Moreover, Judge Noonan implies that the Court's approach calls into question the legitimacy of its judicial decision-making as it gives little deference to established judicial precedent, historical understandings, or democratic processes. Stare decisis as a fundamental constraint on the judicial process is discarded in favor of ahistorical interpretations and ideology.[67] This indictment of the Court comes not from a liberal commentator but from a distinguished, conservative judge appointed by President Ronald Reagan.

The Court's method, as documented by Judge Noonan, has been to rewrite incrementally the historical understandings of the commerce clause, the Tenth, the Eleventh, and the Fourteenth Amendments. Only when one reads the Court's opinions in combination can one appreciate the full impact of the Court's revisionism. The Court has forgotten that the framers of the Constitution placed Congress' powers first in the Constitution in Article I. It has forgotten Chief Justice Marshall's other important contribution—beyond judicial review—namely the principle that "National power—especially the power of Congress—would be interpreted generously, to allow Congress and the president to fashion policies and programs that met the felt necessities of the time."[68]

The Rehnquist Court's muscular opinions on federalism create many tensions between its expanded view of judicial review and the other political branches of government.[69] Although Chief Justice Rehnquist continues to hold Chief Justice Marshall

66. *See generally* Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole Tribe *Decisions*, 96 COLUM. L. REV. 2213 (1996).

67. The Court's federalism decisions since 1995 would make an interesting study under the legal process school of jurisprudence since so many precedents are rejected or ignored for the sake of the "dignity of the state."

68. STARR, *supra* note 45, at 12.

69. Professor Lynn Baker cast the question this way: "The issue . . . is whether judicial review is necessary to maintain and reinforce these [state autonomy] political safeguards." Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 972 (2001); *see also*, Lynn Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001).

in the highest regard and recognizes him as one of the "founding fathers" of the country—he recently called the present Court "the lengthened shadow" of Chief Justice Marshall[70]—the Court selectively ignores the Marshall Court's broad grant of authority to Congress, notably through the commerce clause and the recognition of Congress' status as a coordinate branch of government in interpreting the Constitution.[71] While judicial review may have been the means to achieve the Court's federalism goals of strengthening the rights of states at the expense of Congress, ultimately the larger judicial and political shift, as ably demonstrated by Judge Noonan, has been structural—judicial supremacy over Congress' sovereignty and democratic values. Whether we have yet reached the apex of judicial sovereignty and activism is unclear. But one can hope that criticism such as Judge Noonan's will make the current reign of judicial supremacy no more than a temporary detour in our constitutional history. For now, judicial sovereignty is the legacy of the Rehnquist Court. After *Narrowing the Nation's Power*, the burden should be on the Supreme Court to make a compelling case for its drive to rearticulate federalism as an overarching constitutional and political doctrine. To date, the Court certainly has not done so.

70. *See* Linda Greenhouse, *The Last Days of the Rehnquist Court: The Rewards of Patience and Power*, 45 ARIZ. L. REV. 251, 254 (2003) (quoting William H. Rehnquist, *Remarks from the Bench on the Occasion of the 200th Anniversary of John Marshall's Swearing-In as Chief Justice*, Feb. 20, 2001, J. SUP. CT. U.S., Oct. Term 2000, at 549.

71. *See also* Post & Siegal, *Protecting*, *supra* note 11.