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## ***J'Accuse: The Court Competes with the Constitution, Congress, and Citizens?***

Oluwaseun O. Ajayi<sup>†</sup>

*Narrowing the Nation's Power: The Supreme Court Sides with the States.* By John T. Noonan, Jr.\* Berkeley: University of California Press, 2002. Pp. 203. \$24.95.

Given the co-equality of the branches of the United States government, the Supreme Court is commonly considered to enjoy a monopoly on interpreting the Constitution.<sup>1</sup> The Court itself has expressed a normative claim to that effect.<sup>2</sup> This claim—and its many implications for the proper institutional role the Constitution actually accords the high court—contextualizes the debate over the meaning of the Eleventh Amendment and the Court's federalism cases.

A plausible thesis states that the Court's case law on federalism and state sovereign immunity describes power relations rather than interpretive differences. That is, the case law in these areas reflects a broader sphere in which the Court limits the roles of the other branches in constitutional interpretation. Although constitutional support for the Court's broad assumption of power may be slim to non-existent,<sup>3</sup> power dynamics constitute a useful prism through which to understand the recent reinvigoration of federalism and state sovereign immunity to limit the powers of the national government. Thus, the Court's recent case law on federalism and the Eleventh Amendment reflects the now accepted norm of unquestioned judicial supremacy. The case law shows the Court's conservative majority acting robustly to curtail the powers of Congress, often placing the other branches of

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\* John T. Noonan, Jr., Senior Judge, United States Court of Appeals for the Ninth Circuit, and Robbins Professor of Law, University of California at Berkeley.

1. KENNETH W. STARR, *FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE* (2002); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 5-6 (2001).

2. As former Chief Justice Charles Evans Hughes declared, "We are under a Constitution, but the Constitution is what the judges say it is." Chief Justice Hughes' remarks are quoted in ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 3 (1941).

3. Akhil Reed Amar, *Shouldn't We the People Be Heard More Often by This High Court?*, WASH. POST, June 30, 2002, at B3 (noting that the Constitution appoints the Supreme Court neither the "ultimate arbiter . . . [nor] first among equals . . .").

government in a position that is less than equal.<sup>4</sup>

Doubt about the constitutional validity of the Court's recent rulings in these areas animates John T. Noonan, Jr., senior judge on the United States Court of Appeals for the Ninth Circuit and law professor emeritus at the University of California at Berkeley. Noonan chastises the Supreme Court for maneuvering itself into position as "the supreme authority" in the United States (p. 7).

*Narrowing the Nation's Power* braves the doctrinal thicket of the Supreme Court's recent Eleventh Amendment and federalism decisions.<sup>5</sup> Judge Noonan advances the following thesis: The five-Justice conservative majority on the Rehnquist Court has appropriated constitutional doctrine in a way that severely limits the powers of the national government (p. 5), ignores the text of the Constitution (p. 9), and arrogates excessive power to the Court at the expense of other branches of the federal government (p. 13).<sup>6</sup> Furthermore, Noonan offers a candid and scathing critique of the Court's Eleventh Amendment jurisprudence, characterizing the decisions as "obfuscations" (p. 12), and claiming that the Court's decisions offend the Constitution and the values of American democracy.

The charges are not novel,<sup>7</sup> although their source is. His is the unique perspective of a senior appellate-court judge whose constitutional law scholarship bespeaks conservative credentials. But, in his careful, earnest logic and historical analyses, Noonan dispenses more principle than ideology in his compelling book.

4. *E.g.*, *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating the civil rights remedy in the Violence Against Women Act as an improper intrusion of the national government into an area reserved for states); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the regulation of firearms near schools was not a matter for the national government). *See also* Erwin Chemerinsky, *The Rehnquist Court and Justice: An Oxymoron?*, 1 WASH. U. J.L. & POL'Y 37 (1999).

5. *See, e.g.*, Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447 (1995); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47 (1998) ([T]he Eleventh Amendment is a mess. It is the home of self-contradiction, transparent fiction, and arbitrary stops in reasoning. [It is characterized by] shifting paradigms . . . and logic-chomping combinations."). The foremost example of the aforementioned fiction and the doctrinal difficulty raised is the *Ex parte Young* doctrine. *Ex parte Young*, 209 U.S. 123 (1908). Under the *Ex parte Young* fiction, when a state official is found to have acted beyond his or her official capacity, the actor amenable to suit is the official and not the state. That is, the officer is stripped of the official cloak of the state. This creates the contradiction in which a state official is regarded as the state for purposes of Fourteenth Amendment doctrine but not in Eleventh Amendment jurisprudence.

6. For analysis of how the Supreme Court's decisions could be interpreted as draining power to the Court and away from the political branches, see Rachel E. Barkow, *More Supreme than Court: The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 301-19 (2002).

7. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 32-36 (2002); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1144 (2002) (describing the Court's rulings on the Eleventh Amendment as one of several "stalking horses" that veil a wholly different purpose); Matthew B. Stein, Note, *Something Wicked This Way Comes: Constitutional Transformation and the Growing Power of the Supreme Court*, 71 FORDHAM L. REV. 579 (2002) (suggesting that the Supreme Court has embarked on a jurisprudence that shows little fealty to the people or their elected representatives).

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Every chapter in Noonan's book, save the last, examines a Rehnquist Court federalism or Eleventh-Amendment decision. In the first six chapters, Noonan identifies and dissects flaws in the Court's jurisprudence, before exploring solutions in chapter seven.

Noonan first addresses the Court's decision in *City of Boerne v. Flores*,<sup>8</sup> which held unconstitutional the Religious Freedom Restoration Act of 1993 (RFRA). Providing context, Noonan also examines *Employment Division v. Smith*,<sup>9</sup> in which the Court held that the First Amendment did not protect religious practice where it conflicted with generally applicable laws.<sup>10</sup> Because the RFRA was enacted in reaction to *Employment Division*, that statute was also conscripted into the dispute in *Boerne*.<sup>11</sup> But the Court rebuffed Congress and made its judicial imprimatur final by declaring that Congress can only enforce the Fourteenth Amendment if it compiles an extensive record of the conduct it purported to remediate, and limits remediation to what is congruent and proportional.<sup>12</sup> This effectively relegates Congress to the status of a lower federal court whose actions are contingent on Court approval. The new standard the Court announced in *Boerne* reposed in the judiciary sole interpretive power as to what legislation was proportional and congruent (p. 35). *Boerne* emphasized the effect of federal legislation on states, although no state was involved in the dispute, in a way that cast the Court as defender of the states.<sup>13</sup> Implicit in Noonan's concerns is a perception that this judicial

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8. 521 U.S. 507 (1997).

9. *Employment Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990).

10. *Cf. Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (holding that First Amendment freedom of the press is not offended by incidental burdens imposed by laws of general applicability).

11. Proceeding on the assumption that the church's ambitions were constitutionally protected, the Archbishop of San Antonio sued in federal court to enjoin the local government of Boerne from stopping the Boerne parish's plan to enlarge its historic but physically inadequate church. As defense, Boerne challenged the constitutionality of the RFRA, a successful move at trial. The case reached the Supreme Court after a unanimous Fifth Circuit panel reversed the federal district judge. *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996). Nevertheless, the Supreme Court overruled the Fifth Circuit. Noonan notes that the Ninth Circuit (with Noonan sitting) also ruled on a case involving the RFRA, reaching a similar result as the Fifth Circuit (pp.162-63). *Mockaitis v. Harclerod*, 104 F.3d 1522 (9th Cir. 1997) (finding that the RFRA was constitutional and concluding that it was a valid exercise of Congress's powers under Section 5 of the Fourteenth Amendment). The *Mockaitis* court cited with approval the Fifth Circuit's ruling in *Boerne* as an example of fellow courts of appeals that had found that the RFRA was validly enacted. *Id.* at 1530. Furthermore, the *Mockaitis* court rejected the theory that the RFRA was unconstitutional because it exempted religion from generally applicable laws. *Id.* In addition, the court mentioned tax exemptions and exemptions from military service as examples of analogous instances where religion was exempt from generally applicable laws. *Id.*

12. *City of Boerne*, *supra* note 8, at 508 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.")

13. Noonan sees in the Court's rulings a reawakening of the old "states' rights" conception, or "the championing of the states at the expense of the nation" (pp. 2-3). Others counter this notion with the proposition that the current Court's federalism jurisprudence bears no resemblance to the states' rights advocated in the antebellum and Jim Crow eras. Ronald D. Rotunda, *The Implications of the New Commerce Clause Jurisprudence: An Evolutionary or Revolutionary Court?*, 55 ARK. L. REV. 795, 797 (2003). What is more remarkable about the states rights posture of the Court is that it often adopts a paternalistic form, which the states have sometimes resisted. For instance, Professor Marci Hamilton, who successfully challenged the RFRA on behalf of the city of Boerne, unwittingly admits this much

arrogation of power lacks constitutional backing.<sup>14</sup>

Sovereign immunity doctrine, like federalism, raises questions about when national power preempts that of the states and subjects the states to private suits for damages. Noonan notes that the Constitution is silent on both sovereignty and immunity (p. 41). Even the Eleventh Amendment does not mention the judge-made rule of sovereign immunity.<sup>15</sup> But the Rehnquist Court has invalidated federal statutes,<sup>16</sup> narrowed the scope of tort liability for states,<sup>17</sup> and expanded the power of the Court and states to the detriment of the national government and ordinary citizens—all ostensibly because the Eleventh Amendment so commands. Cognizant that “by its terms the [Eleventh] Amendment applies only to suits against a State by citizens of another State,” and that the Court has “extended the Amendment’s applicability to suits by citizens against their own States,”<sup>18</sup> the Court’s conservative majority, usually enamored of text, has responded by “denounc[ing] ‘ahistorical literalism’” (p. 57). Furthermore, the Court explains that although the text does not cover “suits brought by citizens against their own States,” it has “long ‘understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.’”<sup>19</sup> That is, the Eleventh Amendment

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when she observes that several states filed amicus briefs in favor of the law. Marci A. Hamilton, *The Elusive Safeguards of Federalism*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 93, 99-100 (2001). This, of course, raises the question of whose interests the Court was actually safeguarding.

14. See also Kramer, *supra* note 1, at 130-58 (2001). The concern about the Court’s attitude to power is also reflected in other contexts. See *infra* note 24 and accompanying text.

15. See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1130-31 (1983) (arguing that the original purpose of the Eleventh Amendment was a jurisdictional grant); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1897 (1983) (concluding that the history of sovereign immunity before the Eleventh Amendment establishes “the absence of any expectation that governments were to be immune from suit”). For recent scholarly inquest into the history of the Eleventh Amendment and the jurisprudence it spawned, see generally MELVYN R. DURCHSLAG, STATE SOVEREIGN IMMUNITY (2002) (describing sovereign immunity as integral to an understanding of the purpose of the Eleventh Amendment).

16. In what one scholar describes as “an assault on the powers of Congress,” the Supreme Court has invalidated no less than twenty-six acts of Congress. Cass R. Sunstein, *Taking Over the Courts*, N.Y. TIMES, Nov. 9, 2002, at A19. See also Jeffrey A. Segal & Harold J. Spaeth, *Supreme Court 5 Are on Power Trip*, NEWSDAY, Feb. 21, 2001, at A31. The Court has wholly or partly invalidated about ten federal statutes in the past decade on account of its new understanding of federalism. This increased activity contrasts with a single statute invalidated on federalism grounds in the previous fifty years. Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 430 (2002). Taking these figures into account, Professors Segal and Spaeth suggest that the upshot of the resurrection of sovereign immunity by the Court is an invasion into the power of other branches of the national government. SEGAL & SPAETH, *supra* note 7, at 35.

17. E.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (holding that state sovereign immunity precludes the application of the ADEA to states and thus prevents private suits for damages against states by individuals who have suffered discrimination as a result of age).

18. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001).

19. *Kimel*, 528 U.S. at 72-73 (quoting *Seminole Tribe v. Fla.*, 517 U.S. 44, 54 (1996)). The said presupposition, the Court explains, has two components. The first is that “each State is a sovereign entity” and the second is that states are not subject to suit unless they consent. *Seminole Tribe*, 517 U.S. at 54.

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means something other than what its words state.

Chapter three, titled “Votaries,” after Alexander Hamilton’s unflattering term for states rights supporters (p. 83), analyzes the concept of sovereign immunity. Stressing sovereign immunity’s common-law roots and ambiguous constitutional history, Noonan seeks to show that a good-faith historical inquiry would differ with the Court on the proper role of the Eleventh Amendment in federal-to-state and state-to-citizen relationships.<sup>20</sup>

Chapter four discusses the detrimental effects of contemporary sovereign immunity doctrine. Patent holders, Noonan reports, cannot protect their patents by suing states that disregard them (p. 94).<sup>21</sup> States may now willfully violate copyright laws (pp. 98-101), and by extension, discard established notions of contract law.<sup>22</sup> By shielding the states and remotely attached agencies (“dependency of a dependency of a state” (p. 100)), sovereign immunity countenances “a right without a remedy” (p. 96).<sup>23</sup> Furthermore, notions of rule of law are implicated, for reliance is eroded,<sup>24</sup> and separation of powers

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20. One difference is that a sovereign ruler is an absolute ruler who has subjects. Neither sovereign nor subjects aptly describes the relationship between citizens and any of the several levels and branches of government in America. Thus sovereign immunity appears to be an inapt way to describe a republican democracy where “governments . . . derive[] their just powers from the consent of the governed.” U.S. CONST. pmbl. This rendering implies that power devolves to the government from the citizens and it may not be exercised to its grantor’s detriment. It is also consistent with the values of the American republic’s founding in its “repudia[ti]on [of] British notions of ‘sovereign’ governmental omnipotence.” Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1436 (1987). Cast in another light, the Declaration of Independence and the Constitution embody principles superior to sovereign immunity. These include the principles that empower a free people to self-government in a republican democracy.

21. One scholar disagrees that “states enjoy carte blanche to infringe on patents.” See Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1314-15 (2001). Professor Karlan finds persuasive the Court’s conclusion that Congress had erred by neither properly justifying its creation of a private cause of action under its Fourteenth Amendment powers nor making available a sufficient state-law remedy. *Id.* at 1315.

22. The foundation of contract law is captured in the words, *pacta sunt servanda*, which means “promises must be kept.” Where as Noonan notes, the threat of damages no longer exists to deter a publisher (affiliated with a state) from disregarding an author’s copyright (p. 101), contracts are no longer worth much. Aside from copyright law, respect for copyright agreements depends on valid contracts between author and publisher that may be rendered irrelevant if states are no longer deterred by damages. Furthermore, it creates a lopsided system where states are immune from suit for infringing intellectual property rights while they may sue parties who commit that same infraction. Robert T. Neufeld, *Closing Federalism’s Loophole in Intellectual Property Rights*, 17 BERKELEY TECH. L.J. 1295, 1312 (2002).

23. To reach this rather incongruous outcome, the Court interpreted “another” to mean “the same,” that is “*Garrett* reads a word that is in the Constitution to mean its opposite.” Rubinfeld, *supra* note 7, at 1151. In its own defense, the Court simply stated: “Although by its terms the Eleventh 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.” *Garrett*, 531 U.S. at 363 (2001). As Rubinfeld points out, this recourse to rewriting the Constitution is not anomalous in the decisions of the Court, although it is also of recent vintage. Rubinfeld, *supra* note 7, at 1157 n. 62.

24. Carlos Manuel Vasquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 YALE L.J. 1927, 1981 (2000) (calling the Court’s teachings on sovereign immunity a “doctrinal maze” that “cannot hope to provide meaningful guidance to litigants or lower courts, or even to the Court itself, let alone to ordinary citizens”); see also Fallon, *Supra* note 16 at 492 (2002) (describing the Court’s rulings on federalism as “occasionally bewildering” and “slid[ing] into Byzantine complexity”). Earlier in the

concerns are heightened (pp. 100-01). Perhaps even more grave is Noonan's suggestion that Congress is now subject to at-will censorship by any court in the federal judiciary (p. 100).

Similarly, chapters five and six raise the specter of a Congress hindered from enacting remedial legislation. In *Kimel v. Florida Board of Regents*,<sup>25</sup> the Court ruled that states were immune from the damage provisions of the Age Discrimination in Employment Act (ADEA).<sup>26</sup> A parallel decision in *Board of Trustees of the University of Alabama v. Garrett* held that private damages could not be enforced against states violating the Americans with Disabilities Act (ADA).<sup>27</sup> Both laws had provisions abrogating state sovereign immunity. Noonan observes that by requiring that Congress abrogate state immunity only by using *Boerne's* congruent and proportional criteria, "the [C]ourt-created doctrine of . . . sovereign immunity . . . was now formally equated with the Constitution" (pp. 116-117).

The theme of individual justice rightly animates Noonan's overall argument. He surmises that the Court's rulings may now jeopardize the putatively legitimate claims of numerous injured plaintiffs (pp. 12-13). He cites *United States v. Morrison* disapprovingly and upbraids the Court's "almost complete indifference to the individual plaintiffs" (pp. 144-45). *Morrison* exemplifies the triple victimization of plaintiffs—by criminal violations, state inaction, and unresponsive legal institutions. Noonan concludes astutely that "the most odious kind of anomaly . . . [is] judicial indifference to a right the other branches of government believed that the Constitution secured" (p. 39).<sup>28</sup>

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same article, Fallon notes that Justice Scalia—a member of the Rehnquist Court's majority in federalism and Eleventh Amendment cases—prefers a jurisprudence that provides clarity in the law. *Id.* at 449 n.109 (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989)).

25. 528 U.S. 62 (2000).

26. Pub. L. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. § 631-34). Congress took quick notice of the Court's decision. *See* Older Workers' Rights Restoration Act of 2001, S. 928, 107<sup>th</sup> Cong. § 3 (2002) (making a waiver of sovereign immunity from private suits a condition for states' receipt of federal funds).

27. 531 U.S. 356 (2001). An important coda applies here: the question of whether plaintiffs can still successfully claim damages against states through 42 U.S.C. § 1983 (2002). By its terms, section 1983 makes it possible for plaintiffs to sue and recover damages from state officials acting in their official capacities. *Id.* Extant case law may actually circumvent the limitations imposed by the Court's interpretation of the Eleventh Amendment. Jeffries, *supra* note 5, at 49-50; Nick Daum, Case Comment, *Section 1983, Statutes, and Sovereign*, 112 YALE L.J. 353 (2002). Also important to note is that this understanding appears to be applicable to the ADA. *Id.* at 353 n.3. However, section 1983 may be less effective where the claim against a state official or state is for statutory as opposed to constitutional violations. Roger C. Hartley, *The Alden Trilogy: Praise and Protest*, 23 HARV. J.L. & PUB. POL'Y 323, 386-92 (2000) (discussing the various possible barriers to the effective use of section 1983 to recover damages against state officials). *But see* Daum at 357-58 (arguing that section 1983 damage remedies should be available against states where Congress has made them explicit).

28. This judicial indifference rejects Congress's and the President's interpretation of the Constitution as guaranteeing the rights embodied in such laws as the VAWA. Thus, federalism and sovereign immunity now evoke feelings of oppression in their roles as foundations for the Court's rulings, for the twin concepts "thwart full remedies for violations of constitutional rights." Amar, *supra* note 20, at 1425-26.

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Presumably interpreting a Constitution out of its exile,<sup>29</sup> the Court's jurisprudence seems to have sent justice into exile.<sup>30</sup>

Noonan's final chapter offers solutions that Congress might consider. He suggests that Congress enact new legislation that tiptoes around its Court-imposed restrictions (p. 141). He notes that Congress's spending power is intact and thus Congress can invoke it by conditioning funds on state waivers of immunity (p. 142).<sup>31</sup> He asks Congress to enact remedial legislation in "piecemeal" fashion. He cites the proposed Religious Liberty Protection Act to that effect (p. 14). But all these suggestions appear to concede the supremacy of judicial restraints on Congress's ability to act even in its constitutionally prescribed duties. The suggestions appear to subdue the indignation that fills the rest of its chapters.

Nevertheless, Noonan's denouement captures the way his analyses point most strongly to the human dimension of the Court's new federalism and Eleventh Amendment case law.<sup>32</sup> The ordinary citizen who needs access to the courthouse cannot—must not—be left without a voice. The citizen member of the polis is not deserving of less constitutional attention than the institutional member. In advocacy for ordinary citizens, claims have been made that the Court's decisions have eviscerated federal civil rights protections, especially those for the elderly and disabled.<sup>33</sup> Moreover, stringent Court-imposed restrictions on Congress's ability to remedy civil rights violations mean that victims of sexually motivated violence such as Ms. Brzonkala, the rape victim in *Morrison*, find themselves without federal remedy, although they may

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29. See generally William W. Van Alstyne, *The Constitution in Exile: Is It Time To Bring It In from the Cold?*, 51 DUKE L.J. 1 (2001) (exploring the notion that certain aspects of the Constitution have been in "exile").

30. Chemerinsky, *supra* note 4, at 52 (contending that the Rehnquist Court lacks a commitment to implementing the dictates of justice and equity in the law).

31. Noonan is less sanguine about this option because the Court could plausibly take umbrage at Congress imposing conditions on state conduct that relates little to the actual purpose of the funds (p. 142). Nevertheless, it is important to note that one of the Court's own cases tilts the balance for congressional power to impose conditions on states funds. At least one other scholar has argued that under to the Court's holding in *S.D. v. Dole*, 483 U.S. 203 (1987), Congress can achieve its direct ends through indirect means. Ronald J. Krotoszynski, Jr., *Listening to the "Sounds of Sovereignty" But Missing the Beat: Does the New Federalism Really Matter?*, 32 IND. L. REV. 11, 15-17 (1998). For a bibliography of scholarly commentary on conditional spending by Congress, see *id.* at 16 nn.32 & 33.

32. While important, one may leave aside the question of institutional design; all things considered, Congress can still exercise the power of the purse—and indeed, legislation—to register its displeasure with the Court. And the President is by no means an uninfluential actor either. Although the federalism case law is chipping away at national powers, the national government is still the more powerful actor in the federal structure of the United States.

33. MARTIN GRABUS, *COURTING DISASTER: THE SUPREME COURT AND THE UNMAKING OF AMERICAN LAW* 155 (2002); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 387-390 (2002) (criticizing the Court's "revolutionary new interpretations of federal statutes that drastically undermine federal statutory protection of individual rights to liberty and equality"); Brent E. Simmons, *The Invincibility of Constitutional Error: The Rehnquist Court's States' Rights Assault on Fourteenth Amendment Protections of Individual Rights*, 11 SETON HALL CONST. L.J. 259, 260 (2001) (asserting that the Court is "engaged in an aggressive judicial campaign to dismantle federal protection for individual rights").



theoretically have a right.<sup>34</sup> But a right without a remedy is an abnormal legal creature, often an ineffectual one.<sup>35</sup>

To be sure, federalism is implicit in the structure of American government. Yet, to ignore the human costs of the Court's decisions is to conceive abstractly of the federal structure of government as not a government over real people. The cases analyzed and criticized in Judge Noonan's book can satisfy only a doctrinal construction that does not consider human costs. An analytic lens that measures the human condition compels Noonan's and others' deep suspicion of those cases. As Noonan implies, the facts of each case could have brought the Justices closer to the human experience that their decisions ignore (p. 144). The names *Morrison*, *Kimel*, and *Garrett* evoke instances where novel interpretations of constitutional doctrine barred the access of ordinary people to true justice. These anomalies do not represent the aspirations of the American people or of American law to a just society.

The Supreme Court has been presented with two new opportunities to revisit its recent jurisprudence. The Court recently granted certiorari in *Medical Board of California v. Hason*.<sup>36</sup> Instructively, the United States Court of Appeals for the Ninth Circuit, where Judge Noonan sits, rejected the state Medical Board's sovereign immunity claim against the disability discrimination suit brought against it. The suit echoes *Garrett* in bringing to issue the ADA and the power of Congress to protect disabled Americans.

In *Nevada Department of Human Resources v. Hibbs*,<sup>37</sup> plaintiff brought a suit for damages against the state of Nevada for alleged violations of the Family and Medical Leave Act of 1993 (FMLA).<sup>38</sup> Although his situation satisfied the Act's provisions, plaintiff-appellee was denied the statutory twelve weeks of leave without pay to care for his sick wife. In response to the Act's explicit provision for this kind of situation and its explicit waiver of state sovereign immunity, Nevada challenged the constitutionality of the Act. The

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34. Law, *supra* note 33 at 402, 406-07.

35. *Id.* at 402; Mark R. Brown, *Weathering Constitutional Change*, 2000 U. ILL. L. REV. 1091, 1112.

36. 279 F.3d 1167 (9th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3351 (U.S. Nov. 18, 2002) (No.02-479). Plaintiff Dr. Hason had sued the Medical Board of California in federal district court for allegedly discriminating against him on disability grounds. 279 F.3d at 1170. His application for a medical license was turned down for reasons of mental illness. *Id.* The trial court judge dismissed his claims, concluding that they were barred by the doctrine of sovereign immunity. The court interpreted *Garrett* to confer immunity against suits such as the one at bar. *Id.* On appeal, the Ninth Circuit remanded for the lower court to consider the merits of plaintiff's claims. The court of appeals found that the Eleventh Amendment did not bar claims where, as in Title II of the ADA, Congress had acted in accordance with its powers in Section 5 of the Fourteenth Amendment and had abrogated the immunity of a state. Furthermore, the court noted that the *Garrett* Court had not ruled on whether the Congress's abrogation of state sovereign immunity in Title II of the ADA was a valid exercise of its Section 5 powers. *Id.* at 1171.

37. 273 F.3d 844 (9th Cir., 2002), *cert. granted*, 70 U.S.L.W. 3788 (U.S. June 24, 2002) (No. 01-1368).

38. Pub. L. No. 103-3 § 2, 107 Stat. 6, 29 U.S.C. 2601 (2003).

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case squarely presents the question of whether Congress properly exercised its remedial powers under the Fourteenth Amendment in enacting this piece of legislation.

In light of the Court's negative response to this question in analogous cases,<sup>39</sup> the more appropriate question to ask is whether the Court will again challenge congressional authority to enact remedial legislation under Section 5 of the Fourteenth Amendment. Section 2601 of the FMLA is replete with findings of why the legislation is necessary, demonstrating Congress's acceptance of the Court's mandate that it act like a subordinate court when enforcing the Fourteenth Amendment. If it reverses Congress, the Court will again spurn the representatives' interpretation of the needs of an oppressed people to accommodate neat doctrinal analyses that reflect the Constitution only tangentially.

Commentators agree that the Supreme Court's federalism and state sovereign immunity decisions betray a lack of trust in the political process and in the lawmaking power of Congress.<sup>40</sup> While sovereign immunity and federalism cannot be said to be totally irrelevant, they appear to have interposed themselves between right and remedy, and between a nation, its representatives, and their Constitution. It is worth noting that no idea is unassailable, no principle is beyond reproach, and no concept beyond reproof. An idea that becomes unassailable too frequently confronts the demands of freedom. That danger is especially great when the principle is not directly mandated by the Constitution.

The Court's own charter recognizes this tension. The Court fulfills its mission and derives its greatest legitimacy in expressing fidelity to the governed whose consent—the Constitution—it claims to safeguard.

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39. See *supra* note 6 and accompanying text; *supra* note 22.

40. Compare Melvin R. Durchslag, *Accommodation by Declaration*, 33 LOY. L.A. L. REV. 1375, 1378-79 (2000) (describing the Court's approach as reflecting a "general distrust of federal legislative power"), and David J. Garrow, *A Reliably Assertive Supreme Court*, CHRISTIAN SCI. MONITOR, July 2, 2001, at 9 (stressing "the Court majority's active and repeated contempt for Congress's lawmaking power"), with Kate Stith, *Justice White and the Law*, 112 YALE L.J. 993, 993 (2003) (highlighting the late Justice Byron R. White's belief "that those who hold positions of public trust generally act in good faith").

