

BOOK REVIEW

SLAYING THE DYING DRAGON OF STATE SOVEREIGNTY

A Review of *Narrowing the Nation's Power: The Supreme Court Sides with the States*, by John T. Noonan, Jr.

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[A] terrible dragon had ravaged all the country round a city of Libya, called Selena, making its lair in a marshy swamp. Its breath caused pestilence whenever it approached the town, so the people gave the monster two sheep every day to satisfy its hunger, but, when the sheep failed, a human victim was necessary and lots were drawn to determine the victim. On one occasion the lot fell to the king's little daughter . . . , and so the maiden, dressed as a bride, was led to the marsh.

There St. George chanced to ride by [W]hen the dragon appeared, St. George, making the sign of the cross, bravely attacked it and transfixing it with his lance. Then asking the maiden for her girdle . . . , he bound it round the neck of the monster, and thereupon the princess was able to lead it like a lamb. They then returned to the city, where St. George bade the people have no fear but only be baptized, after which he cut off the dragon's head and the townsfolk were all converted.¹

I. INTRODUCTION

John Noonan cuts a chivalric figure as the author of *Narrowing the Nation's Power: The Supreme Court Sides with the States*.² He takes up the

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1. 6 CATHOLIC ENCYCLOPEDIA 455 (Charles G. Herbermann et al. eds., 1909).

2. JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002) [hereinafter *NARROWING THE NATION'S POWER*].

lance against a maleficent Court dominated by five conservative Justices.³ The cause of his battle is a series of recent decisions in which the Court has relied on principles of federalism to limit Congress's power over states.⁴ These federalism decisions, Noonan contends, so limit Congress's power that they pose a "present danger to the exercise of democratic government."⁵

Judge Noonan joins legions of commentators in criticizing the Rehnquist Court's federalism decisions as pestilential.⁶ Judge Noonan's criticism has attracted particular attention, however, partly because of who he is.⁷ He is a sitting federal judge who is bound to apply the precedent he criticizes;⁸ he is a highly regarded conservative attacking the work product of fellow conservatives on the Court;⁹ and he has published dozens of respected works on law and on Roman-Catholic theology.¹⁰

Judge Noonan depicts his cause as a righteous, even a holy, one. He begins the book with a chapter entitled "The Battle of Boerne."¹¹ This chapter

3. See *id.* at 8-9 (observing that "[i]n this area of law, five to four has become the rule" and that his study will "look at the court as it functions collectively under its chief").

4. This review's use of the term "federalism" does not imply a position on the different ways in which the U.S. Constitution might be understood to have structured relations between the national and state governments. See, e.g., Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 141-45 (2001) (discussing various terms used to describe relationship between national and state governments under the Constitution).

5. NARROWING THE NATION'S POWER, *supra* note 2, at 140; see also *id.* at 11 (referring to "the present danger to the vital balances of our organic national life").

6. See, e.g., Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 887 & n.7 (2003) (observing and documenting that Rehnquist Court's federalism decisions have been "mostly criticized, by legal academics").

7. For example, the publication of *Narrowing the Nation's Power* prompted an adulatory article and an effusive editorial in the *New York Times*. See Linda Greenhouse, *Beyond Original Intent: The Supreme Court's Majority Has Given Up on Strict Construction, a Judge Asserts*, N.Y. TIMES BOOK REVIEW, Aug. 18, 2002, § 7, at 8; *Judicial Hypocrisy*, N.Y. TIMES, Aug. 21, 2002, at A16.

8. See Bruce Fein, *Creaky U.S. Supreme Court Criticism: 9th Circuit Judge's Proactive Treatise Unfounded in Law*, LEGAL TIMES, Nov. 25, 2002, at 19 ("It is uncommon for an active federal judge to . . . assail cascades of constitutional decisions by . . . the U.S. Supreme Court. The intellectual onslaught creates an appearance of bias against faithful implementation in future cases.").

9. See *id.* at 19 (stating that Noonan "is generally admired by political conservatives"); Greenhouse, *supra* note 7, at 8 (stating that Noonan's "judicial provenance gives his analysis a weight that similar arguments from any well-known liberal judge would lack"); see also Peter Shinkle, *One Nation . . . Under the Gavel*, ST. LOUIS POST-DISPATCH, Oct. 19, 2003, at B1 (stating that Noonan's book "has drawn considerable attention" and that it is "no rank diatribe by a Democratic appointee," but rather the work of a judge appointed by President Ronald Regan); Kirk Victor, *Congress in Eclipse*, 35 NAT'L J. 1066, 1070 (2003) (stating that while Noonan "is hardly a liberal . . . he took the unusual step of harshly criticizing the Court" in his book).

10. See Lucy Salsbury Payne, *Bibliography of Works by John T. Noonan, Jr.*, 76 NOTRE DAME L. REV. 1075 (2001) (listing twelve books and dozens of articles).

11. NARROWING THE NATION'S POWER, *supra* note 2, at 15.

discusses *City of Boerne v. Flores*,¹² in which the Court struck down part of the Religious Freedom Restoration Act of 1993 (RFRA).¹³ As the name of that statute declares, it concerns religious liberty, a subject to which Judge Noonan devotes a homily in Chapter One.¹⁴ Noonan continues the religious theme as he discusses the Court's post-*Boerne* decisions in later chapters. For example, he gives later chapters titles such as "Superior Beings"¹⁵ and "Votaries."¹⁶ He calls himself a "pilgrim."¹⁷

Complementing this religious imagery, Noonan expresses righteous indignation, often mounting to religious fury, throughout the book. He strikes that tone in the opening words of his prologue, as he summarizes with escalating, vicarious emotion three decisions that he will criticize:

If you were a writer whose short stories were published by an ethnic press affiliated with the University of New Mexico, you would be justifiably *surprised* to learn that, when your publisher disregarded your copyright, you could not sue for damages because the press was a sovereign entitled to a sovereign's immunity from suit. If you were a professor of business at the University of Montevallo in Shelby County, Alabama, and were passed over for a raise because of your age, you would be understandably *indignant* to learn that your university, classified as a sovereign, could not be brought to court for violating federal law against discrimination based on age. If you were a woman attending a state college and you were raped by several members of the football team, you would be *more than outraged* to discover that, when state authorities did nothing to punish the rapists, federal law was helpless to make up for their deficiency. Yet these and similar results have been reached in the last five years because of judgments of the Supreme Court of the United States.¹⁸

In addition to setting the tone, this passage foreshadows Judge Noonan's role in this book as a champion for the victims of the Court's federalism decisions.

The book's religious imagery and rhetoric aim to proselytize. Judge Noonan seeks a larger audience than has previously paid attention to the

12. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

13. See *NARROWING THE NATION'S POWER*, *supra* note 2, at 25-40 (discussing *City of Boerne*, which partially invalidated the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)).

14. See, e.g., *id.* at 15-18 (subsection of Chapter One entitled "The Lustrous Experiment," drawn from JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 75-91 (1998)).

15. *Id.* at 41 (Chapter Two).

16. *Id.* at 58 (Chapter Three).

17. *Id.* at 41 ("Samuel Simple, a federal appellate judge in San Francisco, had completed his pilgrim's process in the intricate forest of the first amendment as it touches on religion when he encountered the cases of the past five years restricting the power of federal law and invalidating new and old acts of Congress."); see also *id.* at 139 ("Holmes and Brandeis have become secular saints.").

18. *Id.* at I-II (emphases added).

Rehnquist Court's federalism decisions, and he hopes to turn his readers, especially conservative ones, against those decisions.¹⁹ Indeed, but for its secular subject, Noonan's book would fit comfortably within a long Christian tradition of religious rhetoric.²⁰

It is not yet clear whether Judge Noonan will win many converts. True, some commentators have hailed Judge Noonan like the residents of Selena must have greeted St. George when he and the king's daughter entered town with the dragon on a leash.²¹ Furthermore, soon after the book came out, Democratic Senator Charles Schumer arranged a hearing on the book before the Senate Judiciary Committee.²² More than a year after its publication, the book is still being written about in mass media such as the *New York Times*²³

19. See Greenhouse, *supra* note 7 (stating that Noonan's book attempts to "[r]ouse the sleeping public"); Simon Lazarus, *The Court Runs Amok*, BLUEPRINT, Nov.-Dec. 2002 (stating that Noonan's book "is intended to fill th[e] gap" created by the fact that the "alarums" expressed about the Rehnquist Court's federalism decisions "have gone largely unnoticed outside of academia"), available at <http://www.ndol.org/blueprint/> (last visited Nov. 16, 2004); see also NARROWING THE NATION'S POWER, *supra* note 2, at 143 (justifying the book on these grounds: "The sovereign remedy for ills in a democracy is exploration and exposition of a problem, leaving it to the good sense of those who can effect its solution to take the necessary steps."); see also *infra* notes 76-81 and accompanying text (discussing the role in which Noonan casts himself in the book).

20. See generally DAVID S. CUNNINGHAM, FAITHFUL PERSUASION: IN AID OF A RHETORIC OF CHRISTIAN THEOLOGY 31-34 (1991) (discussing historical argument for rhetorical nature of Christian theology).

21. See, e.g., David J. Garrow, *Prudence in Jurisprudence*, WILSON Q., Winter 2003, at 109, 111 (book review) (describing the book as "an immensely valuable and important critique"); Josh Gottheimer, *States Supreme*, WASH. MONTHLY, Nov. 2002, at 57, 58 (praising the book for, among other things, "tak[ing] issue with the naked hypocrisy of the Rehnquist faction"); Greenhouse, *supra* note 7, at 8 (praising Noonan's book for exposing "[t]he real error of the court's federalism decisions"); Lazarus, *supra* note 19 (praising the book as presenting a "refreshingly concise argument" that "illuminate[s]" a "constitutional crisis"); *The Supreme Court Returns*, N.Y. TIMES, Oct. 6, 2003, at A16 (citing Noonan's book with approval); *Judicial Hypocrisy*, *supra* note 7 (expressing hope that the conservative majority of the current Court will be "chastened by" the "persuasive critique" of Judge Noonan, a "fellow conservative").

22. *Narrowing the Nation's Power: The Supreme Court Sides with the States, Hearing Before the Senate Committee on the Judiciary*, 107th Cong. (2002); see also Fein, *supra* note 8, at 19 (stating that Senator Schumer "summoned" Judge Noonan to testify about his book).

23. *The Supreme Court Returns*, *supra* note 21 ("Many of the court's decisions on states' rights have been widely criticized. John Noonan Jr., a federal appeals court judge appointed by President Ronald Reagan, argued in . . . 'Narrowing the Nation's Power,' that the court's recent federalism rulings profoundly misread the Constitution.").

and in law reviews.²⁴ Much of the commentary, however, has been negative.²⁵ Judge Noonan's hagiographers cannot celebrate yet.

This review assesses whether a celebration is in the offing that would suit an author whom Professor Mary Ann Glendon calls "one of the legal giants of the twentieth century" and Judge Richard Posner calls one of the "great scholars of modern law."²⁶ The review concludes that Noonan's book will be celebrated for its influence but not for its legal scholarship. Noonan's legal analysis is flawed, to the extent that it is original. Furthermore, Judge Noonan's overheated rhetoric about the "present danger" posed by the *Boerne* line of cases ignores the broader legal context, in which state sovereignty is steadily becoming less terroristic. This review nonetheless predicts that, despite the book's flaws—indeed, because of them—the book will come to be regarded as a signal event in the crusade against state sovereignty.

Part II of this review describes the flaws in Noonan's legal analysis and shows that they stem from his choice of the wrong dragon.²⁷ The source of the pestilence abroad in the land is not the Rehnquist Court. The true source of the evil is an old concept of "residuary" state sovereignty that arguably survived and was implicit in the original Constitution.²⁸ The current Court serves only as the handmaiden—albeit a cheerful one—to this aging dragon of state sovereignty.

Part III explains why this dragon is not only aging; it is dying. In terms of the affirmative attributes of state sovereignty, states can regulate less and

24. See, e.g., Michael E. Solimine, *Formalism, Pragmatism, and the Conservative Critique of the Eleventh Amendment*, 101 MICH. L. REV. 1463 (2003).

25. Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 TEX. L. REV. 1551, 1551 (2003) (finding that although Noonan's charges deserve a serious book, "they do not get one from Judge Noonan in *NARROWING THE NATION'S POWER*"); Richard A. Epstein, *A Federal Case*, NAT'L REV., Oct. 28, 2002, at 50 (book review) (reviewing *Narrowing the Nation's Power* and describing Noonan's analysis as "wholly one-sided and historically flawed"); Fein, *supra* note 8, at 19 (finding Noonan's analysis "at best anemic"); Michael Greve, Book Review, WKLY. STANDARD, Dec. 30, 2002, available at <http://www.federalismproject.org/masterpages/publications/noonan.html> (last visited Nov. 2, 2004) (stating that the book "fails" to achieve its purposes); see also John C. Eastman, *Altered States*, CLAREMONT REV. OF BOOKS, Spring 2003, at 32 (book review) (finding both positive and negative aspects in the book); William E. Thro, *A Question of Sovereignty: A Review of John T. Noonan, Jr.'s NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES*, 29 J.C. & U.L. 745, 748 (2003) (concluding that "despite the quality of the scholarship and the general readability, Judge Noonan's critique of dual sovereignty is flawed in several ways").

26. John T. McGreevy, *A Case of Doctrinal Development—John T. Noonan: Jurist, Historian, Author*, SAGE, COMMONWEAL, Nov. 17, 2000, at 12, 13.

27. See *infra* Part II.

28. *Alden v. Maine*, 527 U.S. 706, 715 (1999) ("The States thus retain 'a residuary and inviolable sovereignty.'" (quoting THE FEDERALIST NO. 39, at 245 (James Madison))).

less as Congress regulates more and more.²⁹ When the states can regulate, they often do so within the confines of programs of cooperative federalism.³⁰ As to the defensive attributes of state sovereignty, much of the states' armor of sovereign immunity has been stripped away by state statutes and state court decisions eliminating immunity.³¹ Moreover, to the extent that states retain sovereign immunity as a matter of state law, Congress can carve away pieces of that immunity under Section 5 of the Fourteenth Amendment, if it uses a keen enough blade.³²

Part IV argues that Noonan's role in the crusade against state sovereignty is important despite—indeed, because of—his erroneous targeting of the Rehnquist Court as the source of “present danger.” Although Noonan's legal analysis is flawed, he draws serious blood because he dwells on the human costs of upholding claims of state sovereignty, and he vividly, though inaccurately, depicts them as inflicted by a callous set of five current Justices. He is the selfless hero who does battle with that evil entity on behalf of its human victims and the greater public good. The impact of the Court's federalism decisions on ordinary people has been largely hidden from the public and forms the soft underbelly of state sovereignty. By dramatically exposing and hacking away at this weak spot, Noonan's book greatly furthers the crusade.

This review nonetheless does not have an entirely happy ending. For the very same reason that Judge Noonan's book effectively exposes problems in the law of state sovereignty, it suggests illegitimate solutions. Noonan encourages his readers to believe that the problems in the law stem from a personnel problem on the current Court. He strongly suggests that the most logical solution is the removal or coercion of the current, wrongheaded Justices.³³ That solution, however, would pose a greater threat to the constitutional order than the precedent that Noonan challenges.

II. ERRANT KNIGHT NOONAN

St. George happens upon the dragon just as it is about to kill the king's daughter, whose life, the legend implies, has special value compared to that

29. See *infra* notes 159-62 and accompanying text.

30. See *infra* notes 163-66 and accompanying text.

31. See *infra* notes 167-73 and accompanying text.

32. See *infra* notes 174-76 and accompanying text.

33. See *infra* notes 210-15 and accompanying text.

of prior victims.³⁴ Similarly, Judge Noonan happens upon the Rehnquist Court's federalism case law just as the Court is about to strike down a federal statute of special value to Judge Noonan, the Religious Freedom Restoration Act.³⁵ Judge Noonan criticizes the Court's 1997 RFRA decision, *City of Boerne v. Flores*, and five later decisions in which the Court relied on *Boerne* to hold other acts of Congress unconstitutional:

- * *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*³⁶ and a similarly named companion case,³⁷ in which the Court struck down a federal statute exposing states to private lawsuits for patent infringement and violations of the Lanham Act.
- * *Kimel v. Florida Board of Regents*, in which the Court struck down the federal statute exposing states to private lawsuits for age discrimination in employment.³⁸
- * *Board of Trustees of the University of Alabama v. Garrett*, in which the Court struck down the federal statute exposing states to private lawsuits for employment discrimination based on disability.³⁹

34. See, e.g., John E. Matzke, *The Legend of St. George: Its Development Into a Roman D'aventure*, in 19 PUBLICATIONS OF THE MODERN LANGUAGE ASSOCIATION OF AMERICA 449, 452 (Charles H. Grandgent ed., 1904) (describing standard elements of the legend of St. George and the dragon).

35. See NARROWING THE NATION'S POWER, *supra* note 2, at 41 ("Samuel Simple, a federal appellate judge in San Francisco, had completed his pilgrim's process in the intricate forest of the first amendment as it touches on religion when he encountered the cases of the past five years restricting the power of federal law and invalidating new and old acts of Congress."). Judge Noonan's description of how his fictional alter ego, Samuel Simple, encountered the Rehnquist Court's federalism decision appears to reflect Judge Noonan's own situation. In 1998, he published *The Lustre of Our Country: The American Experience of Religious Freedom*. This presumably completed his "pilgrim's progress" on the issue of religious liberty. In 1997, Judge Noonan sat on a panel of Ninth Circuit judges assigned a pre-*Boerne* case involving the constitutionality of RFRA, *Mockaitis v. Harclerod*, 104 F.3d 1522 (9th Cir. 1997). Judge Noonan wrote for the panel an opinion upholding the constitutionality of RFRA. See *id.* at 1524, 1529. That decision, of course, was overruled by *Boerne*. See *United States v. Antoine*, 318 F.3d 919, 923 (9th Cir. 2003) (recognizing that *Boerne* overruled *Mockaitis* in part).

36. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 637-48 (1999) (relying on *Boerne*, among other cases, to hold that the Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. §§ 271(h), 296(a), exceeded Congress's power under Section 5 of the Fourteenth Amendment to the extent that the Act abrogated the states' sovereign immunity from private actions for patent infringement).

37. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672-75 (1999) (relying on *Boerne*, among other cases, to hold that the Trademark Remedy Clarification Act, 15 U.S.C. §§ 1122, 1125(a) (2000)), exceeded Congress's power under Section 5 of the Fourteenth Amendment to the extent that the Act abrogated the states' sovereign immunity from private actions for violations of Lanham Act, 15 U.S.C. § 1125(a) (2000)).

38. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80-91 (2000) (relying on *Boerne*, among other cases, to hold that the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2000), exceeded Congress's power under Section 5 of the Fourteenth Amendment to the extent that the Act authorized private actions against unconsenting states).

39. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 365-74 (2001) (relying on *Boerne*, among other cases, to hold that, in authorizing private actions against unconsenting states for employment discrimination based

* *United States v. Morrison*, in which the Court struck down the federal statute authorizing victims of gender-based violence to sue the perpetrators in federal court.⁴⁰

Judge Noonan characterizes *Boerne* as “the big break” from precedent.⁴¹ He argues that not only is *Boerne*, and the later cases’ reliance upon it, “unprecedented,”⁴² “boldly innovative,”⁴³ “surprising,”⁴⁴ “extraordinary,”⁴⁵ “explosive,”⁴⁶ even “bizarre,”⁴⁷ but the cases also curtail the national government’s power so severely that they pose a “present danger to the vital balances of our organic national life.”⁴⁸

This Part argues that it is Judge Noonan’s characterization of the *Boerne* line of cases—and not the case law itself—that is errant. The *Boerne* line of cases may be wrong, and they do reflect a shift in the law, but they are not the bastard spawn of the Rehnquist Court. Section A discusses Noonan’s analysis of *Boerne*. Section B discusses his analysis of the post-*Boerne* cases.

A. *Boerne’s Test of “Congruence and Proportionality”*

To understand *Boerne* and Judge Noonan’s criticism of it requires an understanding of an earlier Court decision and Congress’s response to it. *Boerne* was a 1997 decision of the Supreme Court. In an earlier (1990) decision, *Employment Division v. Smith*, the Court construed the Free Exercise Clause more narrowly than its precedent had appeared to do.⁴⁹ To “restore”

on disability, Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12111-12117 (2000), exceeded Congress’s power under Section 5 of the Fourteenth Amendment).

40. *United States v. Morrison*, 529 U.S. 598, 624-27 (2000) (relying on *Boerne*, among other cases, to hold that, in authorizing private actions against private perpetrators of gender-motivated violence, the Violence Against Women Act, 42 U.S.C. § 13981 (2000), exceeded Congress’s power under Section 5 of the Fourteenth Amendment).

41. NARROWING THE NATION’S POWER, *supra* note 2, at 15 (“The big break came with *Boerne*.”).

42. *Id.* at 9 (referring to the “unprecedentedness” of the decisions); *id.* at 35 (describing *Boerne*’s congruence and proportionality test as “unprecedented”).

43. *Id.* at 9.

44. *See id.* at 1 (stating that the plaintiff in one of the cases to be discussed “would be surprised to learn” that she could not sue a state university for damages); *id.* at 9 (referring to the “surprisingness” of the *Boerne* line of cases).

45. *See id.* at 6 (referring to criteria of *Boerne* as “extraordinary”).

46. *Id.* at 4.

47. *Id.* at 94-95 (quoting commentators on Court’s *College Savings Bank* decisions, discussed *infra* notes 110-19 and accompanying text).

48. *Id.* at 11.

49. *See Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (“[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”) (internal

the pre-*Smith* breadth of the Free Exercise Clause, Congress enacted the Religious Freedom Restoration Act of 1993.⁵⁰ RFRA invalidated any law that substantially burdened religion unless the law was the “least restrictive” way to further a “compelling” government interest.⁵¹ Congress justified RFRA’s application to state and local laws under Section 5 of the Fourteenth Amendment, which empowers Congress to “enforce” the Amendment with “appropriate” legislation.⁵² In *Boerne*, the Court held that, as applied to state and local laws, RFRA exceeded Congress’s Section 5 power because of its “lack of proportionality or congruence” to the elimination of state and local violations of the Free Exercise Clause.⁵³

Judge Noonan calls *Boerne*’s “congruence and proportionality” test an “invention” of the majority.⁵⁴ He protests: “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.’ . . . Was there anything but subjective feeling for the justices to use as a measuring stick?”⁵⁵ Repeatedly, Judge Noonan insists that *Boerne*’s congruence and proportionality test reflects “new criteria.”⁵⁶ He believes the *Boerne* majority invented those criteria to restore “the autonomy, the dignity, the sovereignty of the fifty states.”⁵⁷

Far from being “unprecedented,”⁵⁸ however, much about *Boerne* is old. The Court had previously addressed Congress’s power under Section 5 to regulate or prohibit state and local government action that does not violate the Fourteenth Amendment.⁵⁹ To resolve that issue, the Court used a test of

quotation marks and citations omitted); see also U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

50. 42 U.S.C. § 2000bb(b)(1) (2000) (stating that a purpose of the Act is to “restore” the compelling interest test of pre-*Smith* case law).

51. 42 U.S.C. § 2000bb-1(b) (2000).

52. U.S. CONST. amend. XIV, § 5; see also *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) (“Congress relied on its Fourteenth Amendment enforcement power in enacting the most far-reaching and substantial of RFRA’s provisions, those which impose its requirements on the States.”).

53. *Boerne*, 521 U.S. at 516-36.

54. NARROWING THE NATION’S POWER, *supra* note 2, at 146 (“To strike down a law as incongruous or as disproportionate or as both is an invention of *Boerne*.”).

55. *Id.* at 35-36.

56. *E.g., id.* at 4, 5, 8, 40 (“new criteria”); see also *supra* notes 42-47 and accompanying test (quoting adjectives used to describe supposed unprecedentedness of the *Boerne* line of cases).

57. NARROWING THE NATION’S POWER, *supra* note 2, at 6.

58. *Id.* at 35.

59. See *Katzenbach v. Morgan*, 384 U.S. 641, 649-50 (1966) (distinguishing issue of whether a local literacy requirement for voting violated Fourteenth or Fifteenth Amendments from issue of whether Congress could prohibit such literacy requirements using its power to enforce those Amendments); see also

congruence, balancing the scope and effect of challenged legislation—including the burden it placed on states—against the Fourteenth Amendment “evil” that the legislation was meant to combat.⁶⁰ More generally, the Court uses similar means-ends tests in other areas of the law.⁶¹ The existence of precedent for *Boerne*’s “congruence and proportionality” test presumably explains why the dissenting Justices in *Boerne* and later cases applying the *Boerne* test never criticized the test as unprecedented.⁶² Judge Noonan muses, “[t]he absence of challenge to the creation of new criteria vitally affecting the balance between the courts and Congress was an unusual characteristic of the [*Boerne*] case.”⁶³ He does not acknowledge that this characteristic undermines his claim that the *Boerne* test was an “invention.”⁶⁴

What is new about *Boerne* is the stringency with which the Court applies the congruence and proportionality test.⁶⁵ As Judge Noonan recognizes at one point, however, this stringency was born not so much out of a desire to protect state sovereignty as out of a desire to punish Congress for attempting, in

South Carolina v. Katzenbach, 383 U.S. 301, 327 (1966) (rejecting the argument that, in enforcing the Fifteenth Amendment, Congress was limited to prohibiting only state laws that violated that Amendment).

60. *Morgan*, 384 U.S. at 650-57 (examining the purpose and effect of the federal statute as well as the purpose and effect of New York City law that was invalidated by the federal statute); see also *Katzenbach*, 383 U.S. at 324-36 (giving a similar analysis of federal provisions enacted under Congress’s power to enforce Fifteenth Amendment).

61. See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring). [W]here a law significantly implicates competing constitutionally protected interests in complex ways—the Court has closely scrutinized the statute’s impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionality. Rather, it has balanced interests. And in practice that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute’s salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative).

Id. See also Young, *supra* note 25, at 1576 (making the same point).

62. See *NARROWING THE NATION’S POWER*, *supra* note 2, at 8, 40, 110, 132 (noting that dissenting Justices in *Boerne* and its progeny have never criticized the congruence and proportionality test as unprecedented). Judge Noonan says that “[t]wo of the three dissenters [in *Boerne*] explicitly agreed with” the “test of congruence and proportionality.” *Id.* at 40. It appears, however, that the only dissenting Justice in *Boerne* who endorsed the test was Justice O’Connor. *City of Boerne v. Flores*, 521 U.S. 507, 545 (1997) (O’Connor, J., dissenting) (agreeing with majority that “whether Congress has exceeded its § 5 powers turns on whether there is a ‘congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end’”) (quoting majority opinion). Although Judge Noonan cited Justice Breyer’s dissent as also endorsing the test, Justice Breyer actually declined to join the paragraph of Justice O’Connor’s dissent in which she endorsed the test. See *id.* at 566 (Breyer, J., dissenting).

63. *NARROWING THE NATION’S POWER*, *supra* note 2, at 40.

64. See *id.* at 146.

65. See, e.g., Evan H. Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1143-47 (2001) (discussing extent to which *Boerne* altered precedent).

RFRA, to overrule the Court's decision in *Smith*.⁶⁶ *Boerne* is thus better understood as the Court's reaction to one federal statute that was singularly offensive to the Court's authority to "say what the law is"⁶⁷ than as the Court's pursuit of "an agenda for restoring power to the several states."⁶⁸ So understood, *Boerne* is not so much evidence that the Court is "siding with the States,"⁶⁹ as it is evidence of the Court protecting its interpretive turf from congressional trespass.⁷⁰

Certainly, one can criticize the Court for using a stringent version of the congruence and proportionality test not only in *Boerne* but also in later cases involving federal statutes that, unlike RFRA, did not aim to overrule the Supreme Court's interpretation of the Constitution. Judge Noonan, however, does not mount that criticism and is not in a good position to do so. True, the Court in *Boerne* was arguably overreacting to Congress's disagreement with the Court's decision in *Smith*. So too, however, it appears that Judge Noonan overreacts to *Boerne* largely because of his disagreement with *Smith* (and his corresponding allegiance to RFRA).⁷¹ Just as the Court construed Section 5 narrowly to prevent Congress from overruling *Smith*, Judge Noonan would construe Section 5 broadly to allow Congress to overrule *Smith*.⁷²

66. See NARROWING THE NATION'S POWER, *supra* note 2, at 11 ("It is my observation in 'The Battle of Boerne' that the Supreme Court, in repelling what it saw as an invasion of the judicial domain by Congress, invented criteria for Congress that invaded the legislative domain."); *id.* at 37 ("The court's real quarrel with RFRA was that RFRA made incidental burdens on free exercise provable as substantial burdens that prohibited free exercise in violation of the first amendment. The court's position was that only purposeful persecution constituted prohibition.").

67. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

68. NARROWING THE NATION'S POWER, *supra* note 2, at 140; see also *id.* at 9 (charging that the Court has "an agenda"); *id.* at 113 (referring to "an innovative and entrenched group of five justices committed to an agenda controlled by sovereign immunity"); *id.* at 139 ("If five members of the Supreme Court are in agreement on an agenda, they are mightier than five hundred members of Congress with unmobilized or warring constituencies.").

69. The quotation in the text is from the subtitle of Judge Noonan's book: "*Narrowing the Nation's Power: The Supreme Court Sides with the States*."

70. See, e.g., Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 437 (2002) ("The Court's decisions limiting congressional power to enforce Fourteenth Amendment individual rights to remedial legislation represent primarily a judicial claim of primacy in interpreting the nature and scope of individual liberties."); Robert Post, *Congress and the Court*, DAEDALUS (Summer 2003), at 7 ("What is most fundamentally at issue in the Court's recent opinions is the structure of the constitutional relationship that will obtain between the Court and Congress.").

71. See NARROWING THE NATION'S POWER, *supra* note 2, at 23-26 (criticizing *Smith* as a "backslide," "shock[ing]," an "abandonment of established precedent," and reflecting "insensitivity . . . to the requirements of conscience"; also quoting with apparent approval a description of *Smith* as "the *Dred Scott* of first amendment law"); see also Epstein, *supra* note 25, at 51 (stating that "Noonan would have been on strong ground if he had openly urged the Supreme Court to overrule *Smith*").

72. See NARROWING THE NATION'S POWER, *supra* note 2, at 31 (stating that precedent "pointed to

Perhaps it all just goes to show that: (1) reasonable minds can differ about the proper standard for analyzing Congress's Section 5 power to enforce the Fourteenth Amendment; (2) reasonable minds can also differ about the substance of Fourteenth Amendment rights; (3) reasonable minds would agree that the first issue—*i.e.*, the proper standard for Congress's Fourteenth Amendment enforcement power—is logically distinct from the second issue—*i.e.*, the Fourteenth Amendment's substance; and yet (4) reasonable minds can allow their views on the substance of the Fourteenth Amendment to influence their views on the standard for analyzing Congress's power to enforce the Fourteenth Amendment. None of this establishes Judge Noonan's thesis that the test of *Boerne* is the "unprecedented" "invention" of the current Court.⁷³

B. Post-Boerne Cases Involving State Sovereign Immunity

In five cases after *Boerne*, the Court used *Boerne*'s "congruence and proportionality" test to strike down federal statutes that exposed the states to private actions from which they would otherwise have sovereign immunity.⁷⁴ Before discussing those post-*Boerne* cases, Judge Noonan devotes Chapters Two and Three of his book to the history and a modern critique of the doctrine of state sovereign immunity.⁷⁵ His general discussion of the doctrine and his specific critique of each of the five post-*Boerne* cases are discussed separately below.

1. Noonan's General Discussion of State Sovereign Immunity

To enliven his general discussion of sovereign immunity in Chapters Two and Three, Judge Noonan creates an alter ego, "Samuel Simple, a federal appellate judge in San Francisco."⁷⁶ When Samuel Simple attended law

the full legitimacy of RFRA"); *id.* at 37 (arguing that RFRA was congruent in scope with the Free Exercise Clause).

73. See *supra* notes 54, 58.

74. See *supra* notes 36-40 and accompanying text (citing and summarizing the post-*Boerne* cases discussed in Noonan's book). For a general description of the doctrine of state sovereign immunity, see Richard H. Seamon, *Damages for Unconstitutional Affirmative Action: An Analysis of the Monetary Claims in Hopwood v. Texas*, 71 TEMP. L. REV. 839, 845-53 (1998).

75. See NARROWING THE NATION'S POWER, *supra* note 2, at 41-85.

76. *Id.* at 41. Judge Noonan is a judge on the United States Court of Appeals for the Ninth Circuit, which sits in San Francisco. See 2 ALMANAC OF THE FEDERAL JUDICIARY: PROFILES AND EVALUATIONS OF ALL JUDGES OF THE UNITED STATES CIRCUIT COURTS AND THE UNITED STATES SUPREME COURT 81

school in the 1960s, the doctrine of state sovereign immunity “had not been very prominent.”⁷⁷ Fortunately, Judge Simple learns about the doctrine in a series of conversations with his law clerks in chambers;⁷⁸ lawyer acquaintances at the St. Wenceslas Club;⁷⁹ and graduate-school friends at the Roma coffee house.⁸⁰ Judge Noonan, speaking as himself, ultimately concludes: “Not in the constitution, not implied by the structure of the constitution, not needed for [state] solvency, not explained by dignity, the immunity of the fifty states is a relic of the past without justification of any kind today.”⁸¹

The Samuel Simple chapters undermine Judge Noonan’s characterization of the entire *Boerne* line of cases as unprecedented. After all, the decisions after *Boerne* concern a doctrine that is so well-established that it spouts from the people whom Judge Simple runs across in the course of a day. If the doctrine is so well-established, how can Judge Noonan blame it on the Rehnquist Court?

Apparently to avoid that question, Judge Noonan is slippery when describing the post-*Boerne* decisions on state sovereign immunity. Twice he describes them as “surpris[ing],”⁸² even apart from their use of *Boerne*’s congruence and proportionality test. In a similar vein, he says they reflect “a continuing struggle between an *innovative* and entrenched group of five justices committed to an *agenda controlled by sovereign immunity* and a minority, one vote short, attempting to defend positions *once believed to be established*.”⁸³ Those statements imply the *Boerne* line of cases makes innovations in the law of sovereign immunity. Elsewhere in the book, however, Noonan calls sovereign immunity an “ancient concept”⁸⁴ and criticizes the Court for relying on this “relic of the past.”⁸⁵ In the end, Noonan is coy about who is to blame for the current doctrine of state sovereign

(Christine Housen et al. eds., 2004) [hereinafter 2 ALMANAC OF THE FEDERAL JUDICIARY].

77. NARROWING THE NATION’S POWER, *supra* note 2, at 41.

78. *See id.* at 41-57.

79. *See id.* at 58-61.

80. *See id.* at 61-85.

81. *Id.* at 154.

82. *Id.* at 1, 9.

83. *Id.* at 113 (emphases added); *see also id.* at 156 (“The states are permitted to act unjustly only because the highest court in the land has, by its own will, moved the middle ground and narrowed the nation’s power.”).

84. *Id.* at 3; *see also id.* at 8 (“Mixing *old doctrine* and new, the Supreme Court is making a mighty effort to put the states in what the court conceives to be their rightful place.”) (emphasis added); *id.* at 8 (“[S]overeign immunity itself is an old judicial invention.”).

85. *Id.* at 154.

immunity. He says in his closing pages that the doctrine's constitutional status rests on an "audacious addition" to constitutional text.⁸⁶ He does not, at that point, identify who is responsible for this "audacious addition." The term "audacious" is quite similar, though, to adjectives he uses elsewhere to describe the Rehnquist Court's decisions.⁸⁷ Moreover, the charge of making an "audacious addition" to constitutional text asserts the very sin of which he finds the Rehnquist Court guilty.⁸⁸ Yet, Noonan never comes out and says that the Rehnquist Court is responsible for the audacious interpretations that have constitutionalized state sovereign immunity. That is because he could not say so truthfully.

The careful reader will discover only one way in which Judge Noonan asserts that the post-*Boerne* decisions extend sovereign immunity, and even this limited assertion is misleading. He claims that a "modern gloss by the Supreme Court" expands sovereign immunity to subunits of the states such as state universities.⁸⁹ By using the adjective "modern," Noonan implies that this gloss is that of the Rehnquist Court.⁹⁰ Elsewhere, though, Judge Noonan admits that the extension of state sovereign immunity to the state subunits—which are known as "arms" of the state in the precedent—dates back to at least 1921; his admission is so subtle, however, that few readers

86. *Id.* at 151.

87. *See, e.g., id.* at 9 (describing federalism decisions of the current Court as "boldly innovative" and "highly original," and reflecting an "adventurous" reading of the Constitution); *id.* at 10 (describing the current Court as "inventive").

88. *See id.* at 9 ("The court's rejection of 'ahistorical literalism' is a turn toward a more adventurous reading of the constitution."); *see also* Greenhouse, *supra* note 7 (quoting Noonan's use of adjective "audacious" and treating it as Noonan's description of the current Court).

89. NARROWING THE NATION'S POWER, *supra* note 2, at 3; *see also id.* at 154-55 (arguing that "the immunity of the states has, as it were, metastasized" so that "there are not fifty sovereigns in America, but at least two thousand entitled to claim the dignity and protection that accompany the title").

90. *See, e.g., id.* at 57 ("The *modern* court has denounced fidelity to the words of the constitution as 'ahistorical literalism.'") (emphasis added) (quoting *Alden v. Maine*, 527 U.S. 706, 730 (1999)); *id.* at 63 (referring to "our *modern* justices for whom sovereign immunity is central") (emphasis added); *id.* at 170 (identifying "*modern* justices attached to the text" of the Constitution as Justices Scalia, O'Connor, and Thomas) (emphasis added).

will pick up on it.⁹¹ Thus, the single change in sovereign immunity doctrine that Judge Noonan identifies cannot be pinned on the Rehnquist Court.

Oddly, Judge Noonan all but ignores one of the Rehnquist Court's most important decisions on state sovereign immunity. In *Seminole Tribe v. Florida*, the Court held that Congress cannot use its Article I powers to abrogate (override) state sovereign immunity.⁹² After *Seminole Tribe*, Section 5 of the Fourteenth Amendment was the only certain source of congressional power for abrogating state sovereign immunity.⁹³ Thus, *Seminole Tribe*'s restriction on Congress's Article I powers made the Court's narrow construction of Section 5 in *Boerne* all the more important.⁹⁴ Partly for that reason, many commentators consider *Seminole Tribe* a landmark case on state sovereign immunity.⁹⁵ Nonetheless, Judge Noonan barely mentions *Seminole Tribe*,⁹⁶ perhaps because extended treatment would conflict with his assertion that the "big break" came with the Court's decision a year later in *Boerne*.⁹⁷ *Boerne* may have been the case that inflamed Judge Noonan against the Rehnquist Court's federalism, but the "big break," if any, came with *Seminole*

91. See *id.* at 97 (stating that, to justify allowing sovereign immunity to be asserted by a state entity engaged in a commercial venture, the majority in *College Savings Bank* merely provided "citation of a 1920 [*sic*] case in which the state of New York had been held immune in its operation of a ferry"); *id.* at 50 (making another reference to the ferry case without mentioning the date of the case); *id.* at 167 (endnote citing the ferry case as *In re State of New York*, 256 U.S. 490, 497 (1921)); see also, e.g., *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 280 (1977) (discussing whether a school board was an "arm of the State" for sovereign immunity purposes); *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 460-64 (1945) (sovereign immunity barred private action for monetary relief against state department of treasury and officials constituting its board), *overruled on other grounds*, *Lapides v. Bd.*, 535 U.S. 613, 623 (2002).

92. See *Seminole Tribe v. Florida*, 517 U.S. 44, 57-73 (1996).

93. See *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989) (referring to Congress's "undoubted power" to abrogate state sovereign immunity using Section 5 of the Fourteenth Amendment); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976) (holding that Title VII's authorization of private actions against states for intentional employment discrimination fell within Congress's power under Section 5); *Massey*, *supra* note 70, at 484 (stating that *Seminole Tribe* "raised the stakes with respect to the scope of Congress' power under section 5 of the Fourteenth Amendment to enforce the substantive guarantees of that amendment, because the enforcement power was left as the only avenue for Congress to subject the states to liability to private litigants for damages attributable to their violation of federal law").

94. See, e.g., Caminker, *supra* note 65, at 1127-32 (discussing doctrinal relationship between *Seminole Tribe* and *Boerne*).

95. See, e.g., Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1032 (2002) (describing *Seminole Tribe* as a "landmark" case); Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167, 1170 (2003) (same).

96. See NARROWING THE NATION'S POWER, *supra* note 2, at 42-43 (having a fictional law clerk describe *Seminole Tribe* to Judge Simple as a "seminal" case "establishing the modern law" of state sovereign immunity).

97. *Id.* at 15.

Tribe.⁹⁸ With the possible exception of *Seminole Tribe*, the Rehnquist Court's decisions on state sovereign immunity, like its decision in *Boerne*, bend, but do not break, from precedent. The sovereign immunity cases and the Section 5 cases can fairly be criticized only as more protective of state sovereignty than precedent required. Before *Boerne*, the Court seldom addressed Congress's Section 5 power and, when it did, it usually construed the power broadly.⁹⁹ *Boerne* changed that pattern. *Boerne* was the first of a series of cases, all decided within a few years, in which the Rehnquist Court construed Congress's Section 5 power narrowly.¹⁰⁰ Similarly, in recent years, the Rehnquist Court has addressed state sovereign immunity more often than in the past, and has usually upheld state claims of immunity.¹⁰¹

In contrast to the Court's Section 5 decisions, however, the Rehnquist Court's expansive view of state sovereign immunity continues a trend that dates back, at the latest, to the Court's 1890 decision in *Hans v. Louisiana*.¹⁰² Citing that long trend, Richard Fallon contends that the Rehnquist Court has

98. The dissents in *Seminole Tribe* and legal commentators have argued that state sovereign immunity should be treated as a creation of federal common law, rather than as a doctrine of constitutional stature. See *Seminole Tribe*, 517 U.S. at 117 (Souter, J., dissenting); see also, e.g., William Burnham, *Taming the Eleventh Amendment Without Overruling Hans v. Louisiana*, 40 CASE W. RES. L. REV. 931 (1989-1990); Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2244-45 (1996); cf. Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1998) (arguing that state sovereign immunity jurisprudence should be revised to recognize separate constitutional immunity from certain diversity actions and common law immunity from other actions). But even supporters of this theory recognize that it alters "[t]raditional eleventh amendment jurisprudence." Burnham, *supra*, at 931. Elsewhere, for what it is worth, I have written that I do not find the common law argument convincing. See Richard H. Seamon, *A Brief Comment on the Current Eleventh Amendment Jurisprudence of the Supreme Court*, 1 GEO. J.L. & PUB. POL'Y 9, 10-11 (2002).

99. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 454-56 (1976) (upholding Title VII provision authorizing employment discrimination claims against states); *Oregon v. Mitchell*, 400 U.S. 112, 117-119 (1970) (opinion of Black, J., announcing judgment of Court) (holding that Congress lacked power to enact law allowing people 18 years old and older to vote in state and local elections); *Katzenbach v. Morgan*, 384 U.S. 641, 648-58 (1966) (upholding federal ban on literacy tests that prevented certain people schooled in Puerto Rico from voting); *United States v. Guest*, 383 U.S. 745, 753-59 (1966) (rejecting constitutional challenge to criminal charges under federal statute enacted under Section 5); see also, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 325-37 (1966) (upholding provisions of the Voting Rights Act as falling within Congress's power to enforce the Fifteenth Amendment).

100. See, e.g., Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 7, 11-12 (2003) (describing *Boerne* as the first of a series of cases narrowly construing Section 5).

101. See, e.g., Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 2006 (2003) (referring to recent decisions on sovereign immunity as part of a "bold revival of federalism principles").

102. *Hans v. Louisiana*, 134 U.S. 1 (1890).

expanded state sovereign immunity because it is an easy way for the Court to increase state power at the expense of national power.¹⁰³ That path is easy because so much precedent supports a broad view of state sovereign immunity.

Thus, even granting Judge Noonan's assertion that the *Boerne* test was new, the five post-*Boerne* cases applying that test to uphold claims of sovereign immunity did not break any ground that had not been broken in *Boerne*. Judge Noonan's characterization of the *Boerne* line of cases as unprecedented is, at best, accurate only for the first of the six cases in that line, *Boerne* itself.

Aside from Judge Noonan's attempt to portray state sovereign immunity as having been extended by the Rehnquist Court, his legal analysis merely repeats the standard criticisms. Thus, he argues that sovereign immunity is not supported by the text, structure, or history of the Constitution and serves no useful purpose today.¹⁰⁴ This review will not add to the ink spilled on that subject other than to state the counter-arguments.¹⁰⁵ Sovereign immunity has as much basis in the text and structure of the Constitution as does judicial review of the constitutionality of legislation.¹⁰⁶ Historical support for state sovereign immunity's constitutional status comes from, among other places, the writings of Hamilton, Madison, and Marshall.¹⁰⁷ Finally, although the modern usefulness of state sovereign immunity is relevant to whether immunity should be eliminated or reduced by political means, such as state legislation waiving the immunity and federal legislation abrogating it, its modern usefulness is not so clearly relevant to its constitutional status.¹⁰⁸

103. Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 434, 480 (2002) (positing "path dependence" as partial explanation for Rehnquist Court's robust understanding of sovereign immunity).

104. See NARROWING THE NATION'S POWER, *supra* note 2, at 154 (summarizing conclusions about sovereign immunity).

105. For a concise statement of this author's views, see Seamon, *supra* note 98, at 9-12.

106. Compare Prakash & Yoo, *supra* note 6, at 894-913 (giving textualist defense of judicial review), with Printz v. United States, 521 U.S. 898, 919 (1997) (stating that the "residuary and inviolable sovereignty" of the states is "reflected throughout the Constitution's text"). See generally Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 821-22, 868-74 (1999) (giving textualist defense of Court's state sovereignty decisions).

107. See, e.g., Alden v. Maine, 527 U.S. 706, 713-19 (1999) (discussing historical support for constitutional stature of state sovereign immunity).

108. See, e.g., *id.* at 748-54 (discussing policies underlying state sovereign immunity).

Furthermore, in debate over whether political means should be used to curb sovereign immunity, its modern usefulness is, indeed, fairly debatable.¹⁰⁹

2. Noonan's Discussion of Specific Cases

In addition to his broad attack on state sovereign immunity, Judge Noonan criticizes each decision in which the Court has used *Boerne's* "congruence and proportionality" test to invalidate federal statutes overriding state sovereign immunity. His individualized criticism mostly echoes his general objections to the doctrine. The main respects in which his case-specific analyses differ from his generalized critique are discussed below. They suffer from some of the same flaws as his general critique, yet add other distinctive ones.

a. The College Savings Bank Cases

In a pair of post-*Boerne* cases involving the same private plaintiff and the same state defendant, the Court invalidated federal statutes exposing the states to private actions for patent infringement and Lanham Act violations.¹¹⁰ In both cases, the defendant was a state agency, the Florida Prepaid Postsecondary College Expense Board, that, in competition with a private company, the plaintiff College Savings Bank, sold investment instruments to help people save for college tuition.¹¹¹ The Court held that sovereign immunity barred the private company's patent infringement and Lanham Act claims against the Board.¹¹² Judge Noonan criticizes the Court's *College Savings Bank* decisions primarily on two grounds. The first reflects a dispute with long-standing precedent; the second is cogent, but of decreasing importance.¹¹³

109. See Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C.L. REV. 485, 489 (2001) ("There is probably not a country in the world that permits itself to be sued except on terms satisfactory to it.").

110. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672-75 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639-48 (1999).

111. See *College Savings Bank*, 527 U.S. at 670-71; *Florida Prepaid*, 527 U.S. at 630-33.

112. *College Savings Bank*, 527 U.S. at 672-75; *Florida Prepaid*, 527 U.S. at 639-48.

113. See also NARROWING THE NATION'S POWER, *supra* note 2, at 97-101 (discussing litigation in lower federal courts involving the constitutionality of a federal statute abrogating states' sovereign immunity from private actions for copyright infringement and misappropriation under the Lanham Act, specifically discussing *Chavez v. Arte Publico Press*, 157 F.3d 282 (5th Cir. 1998)).

First, Judge Noonan does not think a state should escape liability when it carries on commercial activities, such as selling investment instruments, rather than traditional governmental activities.¹¹⁴ This particularly troubles him when the state's conduct infringes a patent, because patents are a "cherished creation of the constitution."¹¹⁵ Judge Noonan has a point. It seems unfair for a state to act like a private actor yet avoid liability for conduct for which a private actor would be liable. Nonetheless, the Court has never recognized an exception to sovereign immunity for the states' commercial activities.¹¹⁶ Thus, in according immunity to the state in the *College Savings Bank* cases despite the commercial nature of its conduct, the Rehnquist Court was following precedent, not departing from it.

Judge Noonan's second criticism of the *College Savings Bank* cases identifies an apparent departure from pre-*Boerne* precedent. The Court, in the *College Savings Bank* patent infringement case, seemed to hold that Congress can legislate under Section 5 only if it has evidence of a pattern of state and local violations of the Fourteenth Amendment.¹¹⁷ Judge Noonan joins many other commentators in attacking this apparent evidentiary requirement.¹¹⁸

114. *See id.* at 96.

115. *Id.* at 94.

116. The plaintiff in *College Savings Bank* argued, as does Judge Noonan, that the Court should have recognized a commercial-activities (or "market participant") exception to state sovereign immunity. *See College Savings Bank*, 527 U.S. at 680. The plaintiff based that argument mainly on *Parden v. Terminal Railway*, 377 U.S. 184 (1964). *Parden*, however, does not support such an exception. The Court in *Parden* relied on two theories to reject a state's sovereign immunity defense, neither of which depended on the state's engaging in commercial, as distinguished from traditional governmental, activities. *See id.* at 191-93 (holding that by entering into the Union the states surrendered sovereign immunity to private actions authorized by federal legislation enacted under the Commerce Clause); *id.* at 192-93 (holding that the state waived its immunity by operating a railroad after Congress enacted legislation exposing states who did so to private actions). In a post-*Parden* case involving sovereign immunity, the Court did distinguish between a state's commercial activities and its traditional governmental activities, but the Court drew this distinction only as one ground for distinguishing *Parden* and upholding a state's claim of immunity for the operation of a hospital. *See Employees of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 284 (1973). In short, the precedent that Judge Noonan believes the Court should have drawn in *College Savings Bank* is slim to nonexistent.

117. *See Florida Prepaid*, 527 U.S. at 640-44.

118. *See* NARROWING THE NATION'S POWER, *supra* note 2, at 5-6, 39, 92, 111, 147-48; *see also, e.g.,* Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 85-87 (2001) (criticizing the evidentiary requirement as unfair and unattainable); Post, *supra* note 100, at 13 (referring to the "devastating effect" of the evidentiary requirement); Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 154-57 (2003) (discussing Section 5 cases as part of broader, problematic trend by Court to use empirical evidence in its analyses).

Perhaps not coincidentally, the Court has backed away from it in more recent cases.¹¹⁹

*b. Kimel v. Florida Board of Regents*¹²⁰

Judge Noonan again joins many commentators in criticizing *Kimel*, in which the Court held that states cannot be sued for money damages by their employees for age discrimination.¹²¹ Judge Noonan identifies the “fundamental” flaw of *Kimel* to be its premise that age discrimination can be rational.¹²² He observes that, in an earlier case, the Court found it “probably not true” that most judges “suffer significant deterioration in performance at age 70.”¹²³ Generalizing from this finding, Noonan asks, “Why should what was ‘probably not true’ be taken as the basis for discrimination treated as rational?”¹²⁴

That rhetorical question really challenges, not the Rehnquist Court’s interpretation of Section 5 in *Kimel*, but earlier decisions interpreting the substance of the Equal Protection Clause.¹²⁵ In 1976, the Court used the

119. In *Kimel v. Board of Regents*, 528 U.S. 62 (2000), the Court implied that Congress needs evidence of widespread Fourteenth Amendment violations only when it wants to regulate or prohibit state and local conduct very little of which, on its face, violates the Fourteenth Amendment. Thus, in contrast to its approach in *Boerne* and the *College Savings Bank* case, the Court in *Kimel* first examined the extent to which the challenged statute prohibited state and local conduct that did not violate the Fourteenth Amendment. See *id.* at 82-89; cf. *Florida Prepaid*, 527 U.S. at 640-46 (examining evidence of state and local violations before examining scope of challenged statute); *Boerne v. City of Flores*, 521 U.S. 507, 530-32 (1997). Only after finding that the statute “prohibit[ed] very little conduct likely to be held unconstitutional” did the Court in *Kimel* examine the evidence of state and local violations. See *Kimel*, 528 U.S. at 89-91. Even then, the Court first observed that its assessment of evidence of state and local violations is only “[o]ne means” by which the Court determines whether legislation is proper remedial legislation under Section 5 or, instead, impermissible, substantive legislation. *Kimel*, 528 U.S. at 88. In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Court further limited the evidentiary requirement by stating that it would ordinarily be hard to meet only when Congress enacts legislation prohibiting or regulating state conduct the constitutionality of which is gauged under a rational basis standard of judicial review. *Id.* at 726-40 (upholding provisions in Family Medical Leave Act, 29 U.S.C. §§ 2615(a)(1) and 2617(a)(2) (2000), that authorized private actions against states for violations of the Act). For a discussion of *Hibbs*, see *infra* notes 174-75 and accompanying text.

120. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

121. See, e.g., Colker & Brudney, *supra* note 118, at 144 (criticizing *Kimel* and other recent Section 5 decisions as threat to proper separation of powers).

122. See NARROWING THE NATION’S POWER, *supra* note 2, at 111 (“More fundamental, how reasonable was it for the court to rely on what could ‘rationally’ be believed about the effect of age?”).

123. See *id.* at 107, 111 (quoting Gregory v. Ashcroft, 501 U.S. 452, 473 (1991)).

124. *Id.* at 111.

125. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

“rational basis” standard of equal protection review to uphold a Massachusetts law requiring police officers to retire at age 58.¹²⁶ The Court relied on that case in 1991 to uphold a state law requiring judges to retire at age 70.¹²⁷ Judge Noonan clearly disagrees with those decisions’ interpretation of the Equal Protection Clause.¹²⁸ The meaning of the Clause, however, poses a different issue from the issue of Congress’s Section 5 power to enforce the Clause, which was the issue in *Kimel*.¹²⁹ Judge Noonan’s attack on earlier cases involving the first issue does not impugn *Kimel*’s ruling on the second issue unless one believes, as Judge Noonan appears to do at times, that Congress should be able to use Section 5 to alter the Court’s interpretation of the substantive provisions of the Fourteenth Amendment.¹³⁰

c. *Board of Trustees v. Garrett*¹³¹

In *Board of Trustees v. Garrett*, the Court struck down a provision in the Americans with Disabilities Act authorizing private actions against states for disability-based employment discrimination.¹³² Aside from summarizing the facts and the majority and dissenting opinions, Noonan makes three assertions about *Garrett*:

- (1) “The spirit of John Marshall spoke in the dissent.”¹³³
- (2) “[T]he dissent’s indictment of the court reflected the degree to which the court had departed from precedent to keep the states from being sued.”¹³⁴
- (3) “The continuing division in the court was a measure of the magnitude of the shift in the middle ground where the power of the nation was being narrowed.”¹³⁵

126. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312-17 (1976).

127. *Gregory v. Ashcroft*, 501 U.S. 452, 470-73 (1991).

128. Evidence of this belief comes from his challenge to the stereotype that judges’ performance deteriorates at age 70, *see supra* text accompanying notes 121-24, and from the solitary instance in the book in which he mentions a judge’s age. *See* NARROWING THE NATION’S POWER, *supra* note 2, at 99 (describing a dissenting opinion by “John Minor Wisdom, at age ninety-two one of the most respected of federal judges”).

129. As two commentators noted, no Justices in *Kimel* dissented from the Court’s Section 5 holding. *See* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 442 (2000).

130. *See supra* notes 50-72 and accompanying text (suggesting that Noonan’s criticism of *Boerne* reflects disagreement with *Smith*).

131. *Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001).

132. *Id.* at 365-74.

133. NARROWING THE NATION’S POWER, *supra* note 2, at 119.

134. *Id.*

135. *Id.*

The first assertion means nothing; John Marshall is often invoked by commentators or dissenting Justices who believe that the majority has construed national power too narrowly. The second and third assertions make no sense. As to the second, the existence of a dissent that charges the majority with departing from precedent does not imply that the majority has deviated from precedent to an abnormal “degree.” Likewise as to the third assertion, one cannot “measure” a majority’s “shift” from the “middle ground” by the existence of a series of 5-4 decisions. Such a series often signifies only continuing disagreement between almost equally balanced factions.

*d. United States v. Morrison*¹³⁶

Morrison involved a lawsuit by Christy Brzonkala, a student at a state university, against two fellow students who raped her.¹³⁷ Brzonkala brought her action under the federal Violence Against Women Act, which authorized the victims of gender-motivated violence to sue the perpetrators in federal court.¹³⁸ The Court held that her action had to be dismissed because the Act exceeded Congress’s powers under both the Commerce Clause and Section 5 of the Fourteenth Amendment.¹³⁹ Judge Noonan savages the Court’s Section 5 holding.¹⁴⁰ His attack relies on the gruesome facts alleged in the case and on novel legal arguments. Like much else in the book, Noonan’s attack may inflame readers about the Court’s decision, but it is poor legal analysis.

Judge Noonan signals the tone and factual focus of his discussion of *Morrison* in the title of his chapter about the case: “Gang Rape at State U.”¹⁴¹ He details the rape and the failure of the state university officials to do much about it.¹⁴² He strongly implies that this failure stemmed from official incompetence and the alleged attackers’ status as football players.¹⁴³ He labels

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

137. *Id.* at 601-05 (describing allegations of Brzonkala’s complaint).

138. *See id.* at 605-06 (describing 42 U.S.C. § 13981 (2000)).

139. *Id.* at 607-27.

140. *See* NARROWING THE NATION’S POWER, *supra* note 2, at 120-137. Judge Noonan describes the Court’s Commerce Clause analysis but does not criticize it except to suggest that it was overly mechanical. *See id.* at 127 (“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.”).

141. *Id.* at 120.

142. *See id.* at 120-25.

143. *See, e.g., id.* at 124 (“Although [the university] knew that the basis of [one of the alleged rapist’s] threatened [administrative] appeal was groundless, it had caved before his empty threat.”); *id.* at 123 (“Virginia Tech did not report Brzonkala’s [i.e., the alleged victim’s] charges to the police. Virginia

the case “a textbook example of why the Violence Against Women Act was needed.”¹⁴⁴ This was, he sums up, “one case where the state’s default of its duty cried out for a remedy.”¹⁴⁵

But the need for a remedy does not establish Congress’s power to create that remedy. Congress’s power to authorize Brzonkala’s suit under Section 5 of the Fourteenth Amendment was particularly doubtful because she was suing her attackers, who were private—not state—actors.¹⁴⁶ More than 100 years before *Morrison*, the Court had held that the Fourteenth Amendment only prohibited certain *state* action, not purely private conduct.¹⁴⁷ Thus, Judge Noonan must fault the Court in *Morrison* for following precedent instead of departing from it.¹⁴⁸

And so he does. Judge Noonan argues that the Court should have used *Morrison* to make two changes in the law.¹⁴⁹ First, the Court should have “ma[d]e a general rule that a state acted when it shirked its responsibilities.”¹⁵⁰ Noonan acknowledges that this state action rule, standing alone, would only justify federal legislation authorizing private suits against the state and its officials, not against wholly private actors like Brzonkala’s attackers.¹⁵¹ Noonan would therefore have had the Court hold that Section 5 empowers Congress to authorize suits directly against private actors when “a state institution [can] be found to have shielded [the victim’s] attackers.”¹⁵²

One struggles to take this argument seriously. The first step would greatly change the state action doctrine, yet Judge Noonan barely justifies that change except to emphasize the harrowing facts of *Morrison*.¹⁵³ The second step is unclear. Judge Noonan does not explain what, beyond a state’s inaction, constitutes “shielding” attackers. In addition, the “shielding the

Tech has a fine reputation as a football power. In 1995 [the year after the alleged rape], it was to rank eighth in the nation.”).

144. *Id.*

145. *Id.* at 125.

146. *See Morrison*, 529 U.S. at 604-05 & n.2 (recounting that Brzonkala named Virginia Polytechnic Institute as a defendant, but her claim against it was not within the Court’s grant of certiorari).

147. *See, e.g., Civil Rights Cases*, 109 U.S. 3, 11 (1883).

148. As was true in *Kimel*, no Justices in *Morrison* dissented from the Court’s Section 5 holding. *See Post & Siegel, supra* note 129, at 442.

149. NARROWING THE NATION’S POWER, *supra* note 2, at 135 (“Two hurdles stood in the way of reliance on section 5.”).

150. *Id.* at 136.

151. *Id.*

152. *Id.*

153. *See id.* at 136, 190 (arguing by analogy to tort law, trust law, and some case law involving race discrimination).

attackers” standard does not match the facts of the case. As Judge Noonan observes, Brzonkala did not bring criminal charges against her attackers.¹⁵⁴ Nor, apparently, did she bring a civil action against them in state court based on state tort law.¹⁵⁵ In the absence of allegations that the university discouraged Brzonkala from resorting to the state civil and criminal justice system, it is hard to understand how it “shielded” her attackers except through inaction. If inaction is “shielding,” however, the second step of Noonan’s argument collapses into the first.

Judge Noonan’s discussion of *Morrison* leaves us outraged at the apparent injustice in Ms. Brzonkala’s case. Unfortunately, Noonan does not leave us with a plausible theory of why Congress had power to address that particular injustice with the particular remedy prescribed in the Violence Against Women Act.

III. SYMPATHY FOR THE DRAGON

Judge Noonan says that in its “substantial impact upon the nation” the *Boerne* line of decisions “invites comparison . . . with *Dred Scott*” and other notorious Court decisions.¹⁵⁶ Noonan insists that the harm is current; at least three times he refers to the “present danger” that the *Boerne* line of cases poses to the modern balance between state and federal power.¹⁵⁷ The most laudatory reviewers have not echoed those views, for good reason. Even if the decisions are wrong, they have not “returned the country to a pre-Civil War understanding of the nation,” as Judge Noonan claims.¹⁵⁸ Viewed in the big picture and in an historical framework, the dragon of state sovereignty is not only old, but it is dying (or becoming domesticated)—partly because of decisions by the Rehnquist Court. Several factors produce the decrepitude.

First in line must come preemption. Thanks to the Supremacy Clause, state power to regulate private conduct subsides as Congress enacts more and

154. *See id.* at 121.

155. *See Morrison*, 529 U.S. at 627 (stating that a remedy for Brzonkala’s injuries “must be provided by the Commonwealth of Virginia, and not by the United States”).

156. *NARROWING THE NATION’S POWER*, *supra* note 2, at 13; *see also id.* at 26 (citing with apparent approval someone else’s description of *Boerne* as “the *Dred Scott* of first amendment law”).

157. *Id.* at 11 (referring to “the present danger to the vital balances of our organic national life”); *id.* at 138 (titling a portion of the chapter “present damage, present danger”); *id.* at 140 (stating that “[t]he present damage” caused by the Court’s decisions “points to the present danger to the exercise of democratic government”).

158. *Id.* at 12.

more preemptive legislation.¹⁵⁹ As a theoretical brake on that trend, the Court has articulated a presumption against interpreting federal statutes to preempt state regulation in traditional areas of state concern.¹⁶⁰ If applied consistently, that presumption would strengthen state sovereignty. As many commentators have observed, however, the Rehnquist Court does not apply the presumption consistently.¹⁶¹ To the contrary, some of the Court's recent preemption decisions have construed federal statutes to have broad preemptive effect.¹⁶² The Court's generous interpretation of federal preemptive legislation gives Congress power to diminish the areas in which states may regulate, thereby draining the swamp in which the dragon of state sovereignty has kept its lair.

This dragon is also increasingly girdled by programs of "cooperative federalism."¹⁶³ In those programs, Congress induces states to regulate in accordance with federal requirements in order to get federal money or avoid federal preemption.¹⁶⁴ Cooperative federalism programs probably will continue to grow and multiply.¹⁶⁵ The Court has shown no sign that it will curb that trend.¹⁶⁶ Thus, regardless of the *Boerne* line of cases, Congress can continue using cooperative federalism to keep the states on a short leash.

159. U.S. CONST. art. VI.

160. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (stating that when Congress regulates in a field traditionally regulated by states, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress").

161. See, e.g., Fallon, *supra* note 103, at 432 ("[S]ome of the Court's most prominently pro-federalism justices are quick to find that federal regulatory statutes displace or preempt state regulations."); Massey, *supra* note 70, at 510 (referring to the Rehnquist Court's "cavalier treatment of the presumption against preemption").

162. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-28 (2003) (holding that state law was preempted because it interfered with federal control of foreign policy); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-51 (2001) (holding that state law was preempted by federal statute); cf. *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432-42 (2002) (holding that city ordinance was not preempted by federal statute).

163. See, e.g., Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1695-98 (2001) (discussing rise of cooperative federalism programs).

164. See, e.g., *New York v. United States*, 505 U.S. 144, 167-68 (1992); Joshua D. Sarnoff, *Cooperative Federalism, The Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 205-06 (1997).

165. See Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 561 (2000); see also Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1918 (1995) (noting that federal dollars represent increasing proportion of state revenues and that Congress usually attaches conditions to state and local government's receipt of those funds); Samoff, *supra* note 164, at 211 (arguing that delegation to states of overbroad federal regulatory power violates the Constitution).

166. See *New York*, 505 U.S. at 167-68 (referring to cooperative federalism programs with apparent approval).

Preemptive federal legislation and cooperative federalism programs limit the states' regulatory power and discretion. In addition to these restrictions on the affirmative sovereign power to regulate, the state's defensive armor of sovereign immunity poses less of a "present danger" than many readers of Judge Noonan's book might suppose. Judge Noonan admits that the doctrine of sovereign immunity has exceptions that expose states to lawsuits.¹⁶⁷ He does not make clear that those exceptions permit judicial remedies for much wrongful state conduct.¹⁶⁸

In particular, state sovereign immunity is increasingly unavailable because more and more states have waived sovereign immunity by state legislation or state court decisions.¹⁶⁹ For example, many states have waived their immunity from many types of tort and contract claims.¹⁷⁰ Congress might be able to induce even more state waivers as a condition for states to get

167. *NARROWING THE NATION'S POWER*, *supra* note 2, at 42-50, 60-61, 155-56 (discussing sovereign immunity, in the first two cited passages through fictional characters).

168. See John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49 (1998) ("The Eleventh Amendment almost never matters."); see also Henry Paul Monaghan, *The Sovereign Immunity "Exception"*, 110 HARV. L. REV. 102, 103 (1996) ("[S]overeign immunity has become a rare exception to the otherwise prevailing system of state governmental accountability in federal court for violations of federal law . . .").

169. See *Alden v. Maine*, 527 U.S. 706, 755 (1997) ("Many States, on their own initiative, have enacted statutes consenting to a wide variety of suits"); James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments After Seminole Tribe*, 46 UCLA L. REV. 161, 172-73 (1998) ("[V]irtually every state in the country has overthrown the doctrine of sovereign immunity to some extent and . . . [t]he sheer availability of state-court dockets helps to solve the problem of sovereign immunity . . ."); Lauren K. Robel, *Sovereignty and Democracy: The States' Obligations to Their Citizens Under Federal Statutory Law*, 78 IND. L.J. 543, 545 (2003) (stating that the history of the states' treatment of sovereign immunity "is marked by a growing—indeed, overwhelming—recognition . . . that sovereign immunity is a doctrine inconsistent with many values deeply ingrained in our democratic form of government"); see also Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1928 (2003) (referring to "the increasing willingness of democratic governments . . . [including states] to submit to legal processes"); Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1118-20 & nn.249-52 (2001) (surveying state laws relevant to suits against the states for just compensation).

170. See Robert G. Bone, *From Property to Contract: The Eleventh Amendment and University-Private Sector Intellectual Property Relationships*, 33 LOY. L.A. L. REV. 1467, 1496 (2000) ("[M]ost states have waived sovereign immunity to breach of contract claims in state court."); Robel, *supra* note 169, at 549-66 (describing the history of states' waiving immunity from tort claims).

federal money and other benefits,¹⁷¹ or, possibly, to avoid preemption.¹⁷² In any event, most existing state-law waivers do not result from federal pressure. They probably result, instead, from political pressure by the states' own citizens. This should surprise no one. Many citizens no doubt share Judge Noonan's view that it is unfair for government to avoid liability for wrongs such as unduly burdening the exercise of religion; infringing on people's property rights; discriminating against people because of their age or disability; and allowing rapists to avoid punishment. Congress and the U.S. Supreme Court are not the only engines of improved fairness in the law.¹⁷³

Moreover, the Court recently confirmed that Congress can use Section 5 of the Fourteenth Amendment to slice away additional pieces of state sovereign immunity, if it uses a sharp enough blade. In *Nevada Department of Human Resources v. Hibbs*, the Court upheld a provision in the federal Family and Medical Leave Act abrogating state sovereign immunity.¹⁷⁴ The *Hibbs* Court concluded that the Act met *Boerne's* congruence and proportionality test.¹⁷⁵ *Hibbs* was decided after Judge Noonan published *Narrowing the Nation's Power*. Perhaps *Hibbs* demonstrates that the Court (like the states) responds to social pressures from sources such as Judge Noonan's popular book.¹⁷⁶

In short, the regulatory power of states exists only in puddles, and the armor of sovereign immunity exists only in patches. Of course, the dragon of state sovereignty can still burn people. States retain "residuary sovereignty,"

171. See Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1373-89 (2001) (discussing inducing state waivers by making them a condition of federal benefits); Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 185-86 (2002) (discussing Supreme Court case law supporting this use of the spending power).

172. See Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1064 n.211 (2000) (reading Court's case law as inconclusive on permissibility of Congress's use of conditional preemption to induce states to waive sovereign immunity); Seamon, *supra* note 74, at 839, 851-52 (same); cf. Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 61 (reading Court's case law as appearing "to leave open the option of coercing express waivers through conditional preemption").

173. See Robel, *supra* note 169, at 545 ("States have increasingly come to see waiver of immunity as that state's moral obligation to its injured citizens.").

174. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 725-40 (2003).

175. *Id.* at 740 ("[W]e conclude that [the challenged provision] is congruent and proportional to its remedial object . . .").

176. See *Judicial Hypocrisy*, *supra* note 7 (citing the possibility that "[t]he Supreme Court majority, chastened by" the criticism of "fellow conservative" John Noonan, "could start practicing some of the restraint, and respect for the meaning of the Constitution, that it likes to preach."); see also Post, *supra* note 100, at 8 (contending that *Hibbs*, among other cases, "reveals a Court that defines the substance of constitutional law in the context of the beliefs and values of nonjudicial actors").

the exercise and non-exercise of which can harm as well as help.¹⁷⁷ Judge Noonan goes far wrong, though, in asserting that *Boerne* and the five post-*Boerne* cases that he writes about will do much to counteract other forces that make the residuary sovereignty of the states increasingly residual.

IV. THE VIRTUE OF THE VICES OF *NARROWING THE NATION'S POWER*

This review has suggested so far that *Narrowing the Nation's Power* is a misdirected attempt to pile on to the already beleaguered dragon of state sovereignty. In so suggesting, this review joins those commentators who find the book's legal analysis flawed.¹⁷⁸ On the other hand, this review also joins other commentators who praise the book for making the arcane subject of state sovereignty accessible and engaging.¹⁷⁹ Prior commentary has not recognized the connection between this virtue of the book and its vices. The connection is this: If the book did not dramatize the legal developments discussed by depicting them as the malevolent invention of the current Court and as posing a "present danger" requiring knightly intervention on behalf of the Court's victims, the book would not have made the splash that it has. The problem with this approach is that it suggests that the most appropriate remedy is the removal or coercion of current Court personnel.

Tales of knights fighting dragons capture our imagination because they depict absolute good and evil as two living, breathing, distinct creatures—person vs. serpent—and because they have a plot—person slays serpent after fierce battle.¹⁸⁰ Dragon tales captivate us despite—indeed, because of—the difficulty in the real world of identifying and separating good and evil and getting them to do glorious battle.

Similarly, Judge Noonan's book has gotten so much attention because it is a good yarn. First, Judge Noonan takes state sovereignty, an abstract concept that has been developed by many judges and historical forces, and

177. See *supra* note 28.

178. See *supra* note 25 (citing additional negative commentary).

179. See, e.g., Oluwaseun O. Ajayi, *J'Accuse: The Court Competes with the Constitution, Congress, and Citizens?*, 21 YALE L. & POL'Y REV. 527, 533-34 (2003); Stuart H. Shiffman, *Strong Words for the Court*, 86 JUDICATURE 214, 215 (2003).

180. See, e.g., Northrop Frye, *Archetypal Criticism: Theory of Myths*, in ANATOMY OF CRITICISM: FOUR ESSAYS 189 (1957) ("The central form of quest-romance is the dragon-killing theme exemplified in St. George and Perseus.").

makes it the “agenda” of the Rehnquist Court.¹⁸¹ That Court imposes this agenda through an act of “Will”:

The Court has enjoyed the prestige and the power conferred by the belief of its admirers.

Possessed of these advantages as it entered battle with Congress, the court is not invulnerable but stronger than Hamilton imagined. The Court, Hamilton wrote, has “neither Force nor Will,” only judgment. He did not foresee a court with an agenda for restoring power to the several states. Such a court has “Will.”¹⁸²

Thus, what Dean Robel calls the “strong sovereignty model” becomes the nefarious plot hatched by the willful Rehnquist Court.¹⁸³

This willful Court despises its human victims. Thus, it does not care that, after its *College Savings Bank* decision, patent holders have only a “mutilated kind of right to property.”¹⁸⁴ That harm “was treated not only as collateral but as so inconsequential as not to be worthy of mention.”¹⁸⁵ The Court in *Kimel* could be “insensitive” to the victims of age discrimination, for its members “had no personal experience of the bite of age discrimination.”¹⁸⁶ “[T]he assault on Christy Brzonkala [the plaintiff in *Morrison*] and the lack of effective response by state officials were also a matter of indifference to the [C]ourt.”¹⁸⁷ Judge Noonan explains, “For the Supreme Court, proceeding as it appears to proceed in these cases with an agenda, . . . the persons affected are worthy of almost no attention.”¹⁸⁸ They are sacrificed like so many sheep to the cause of state sovereignty.

The people cannot save themselves without a hero’s intervention. True, Noonan writes, the Court “ultimately” may be “overwhelmed by the forces” of democracy, but that does not remove “the present danger to the exercise of democratic government” posed by the Court’s decisions.¹⁸⁹ This is where Judge Noonan comes in. A democratic solution depends on the “exploration and exposition of a problem, leaving it to the good sense of those who can

181. NARROWING THE NATION’S POWER, *supra* note 2, at 113 (referring to “a continuing struggle between an innovative and entrenched group of five justices committed to an agenda controlled by sovereign immunity and a minority, one vote short, attempting to defend positions once believed to be established”).

182. *Id.* at 140.

183. *E.g.*, Robel, *supra* note 169, at 544, 546.

184. NARROWING THE NATION’S POWER, *supra* note 2, at 94.

185. *Id.*

186. *Id.* at 112.

187. *Id.* at 144-45.

188. *Id.* at 144.

189. *Id.* at 140.

effect its solution to take the necessary steps.”¹⁹⁰ Who better to explore and expose the problem than a federal judge?

It is the duty of lawyers . . . to work for the reform of the law. . . . Lawyers do not cease to have this duty when they become judges. It is the right of judges . . . to speak and write for the improvement of the law. Judges, even more than lawyers, will know and feel its imperfections.¹⁹¹

Judge Noonan fights for the little people and democracy. Lest the reader wonder, the book’s front cover displays the American flag.¹⁹² Noonan writes under the banner of the red, white and blue, just as St. George fought under the red cross.¹⁹³

Although this is not good legal scholarship, it *is* a good story.¹⁹⁴ Indeed, it could stir public opposition to the strong sovereignty model by a process akin to what Professors Kuran and Sunstein call an “availability cascade.”¹⁹⁵

190. *Id.* at 143.

191. *Id.*

192. See Eastman, *supra* note 25, at 32 (noting that the flag is draped backwards).

193. See, e.g., SAMANTHA RICHES, ST. GEORGE: HERO, MARTYR AND MYTH 103-04 (2000) (tracing history of association of red cross with St. George). Considering Judge Noonan’s attempt to portray himself as a selfless champion of democracy, I must confess the nagging suspicion that Judge Noonan was motivated to write this book partly because his own oxen had been gored. By “oxen” I mean not only his sacred cows, such as religious liberty, but also his professional work. In the latter regard, as mentioned above, Judge Noonan wrote an opinion upholding RFRA provisions that were later held unconstitutional by the Court in *Boerne*. See *supra* note 35. Judge Noonan also authored an opinion on state sovereign immunity that was reversed by the Supreme Court. *Native Vill. of Noatak v. Hoffman*, 896 F.2d 1157 (9th Cir. 1990), *rev’d sub nom. Blatchford v. Native Vill. of Noatak*, 501 U.S. 775 (1991). These are only two of seven opinions (as of April 2001) written by Judge Noonan that have been reversed by the Supreme Court. See Natalie Stern, *Judicial Record of John T. Noonan, Jr.*, 76 NOTRE DAME L. REV. 1073 (2001).

194. Two commentators on Judge Noonan’s writings have observed that Noonan uses story-telling as a rhetorical device in many of them. See Stanley Hauerwas & Richard Church, *The Art of Description: How John Noonan Reasons*, 76 NOTRE DAME L. REV. 849, 863 (2001) (“Noonan is a story-teller.”).

195. See generally Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999). The “availability heuristic” is a “pervasive mental shortcut whereby the perceived likelihood of any given event is tied to the ease with which its occurrence can be brought to mind.” *Id.* at 685; see also Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1124-28 (2002) (book review) (discussing the availability heuristic). Professors Kuran and Sunstein’s principal claim is that “this heuristic interacts with identifiable social mechanisms to generate availability cascades . . . through which expressed perceptions trigger chains of individual responses that make these perceptions appear increasingly plausible through their rising availability in public discourse.” Kuran & Sunstein, *supra*, at 685. Although this claim relates to public perception of risk (such as the risk of a nuclear power plant accident), the authors emphasize that their general framework for analyzing availability cascades “can be applied to a wide variety of other areas,” including, for example, “the rise and decline of McCarthyism; the struggle for black civil rights; [and even] . . . the emergence of the Federalist Society at American law schools.” *Id.* at 688-89. Similarly, I will argue in the text, public opposition to the strong model of state sovereignty could arise from criticism of that model of state sovereignty by a highly respected conservative

The book makes “available” to—*i.e.*, capable of readily being called to mind by—members of the public a vivid story of the danger of state sovereignty.¹⁹⁶ The book makes the danger sound urgent, a “present danger.” Equally important, the danger can hit close to home. After all, many readers can empathize with the victims of the Court’s decisions, which include the members of a congregation, the owners of intellectual property, and the victims of employment discrimination and of rape. The book heightens reader anxiety by depicting the victimization as surprising and capricious.¹⁹⁷ The book warns: “This could happen to you.”

The credibility of that warning is enhanced by Justice Noonan’s reputation and the subject matter of *Narrowing the Nation’s Power*.¹⁹⁸ As one reviewer put it, the book is “no rank diatribe by a Democratic appointee”;¹⁹⁹ it is instead written by a highly respected, seemingly objective, conservative scholar. Many readers who would not trust criticism of state sovereignty from perceived liberals will trust the very same criticism from Judge Noonan. Furthermore, by subscribing to Judge Noonan’s views, conservative readers get the added bonus of affiliating with someone who is considered conservative, but unpredictable, because of the strength and independence of his intellect.²⁰⁰ Few readers of any stripe are likely to study the relevant precedent themselves, because it is much less accessible and entertaining than Noonan’s book.²⁰¹

The credibility of Noonan’s book among conservatives is further enhanced by the many reasons that conservatives have to dislike strong state

who supports the criticism with vivid anecdotes and whose criticism is endorsed by respected publications like the *New York Times*.

196. Of course, the direct audience for Noonan’s book is relatively narrow, but that audience’s views influence many other people. See Greenhouse, *supra* note 7, at 8 (“‘Narrowing the Nation’s Power’ is unlikely to reach the broadest general audience with its alarm bell. But that leaves a large potential audience, not only court-watchers but those interested in the current political scene . . .”).

197. See *supra* text accompanying note 18.

198. See Kuran & Sunstein, *supra* note 195, at 722-23 (discussing the influence of an information source’s credibility on availability cascades).

199. Shinkle, *supra* note 9.

200. See, e.g., Norman Dorsen, *John T. Noonan, Jr.: Renaissance Man in the Catholic Tradition*, 76 NOTRE DAME L. REV. 843, 846 (2001) (stating that Judge Noonan’s willingness to anger conservatives with some of his rulings is “telling of his intellectual consistency”); see also 2 ALMANAC OF THE FEDERAL JUDICIARY, *supra* note 76, at 82-83 (section entitled “media coverage”).

201. Cf. Kuran & Sunstein, *supra* note 195, at 685-86 (“An informational cascade occurs when people with incomplete personal information on a particular matter base their own beliefs on the apparent beliefs of others.”); *id.* at 705 (arguing that it is rational for people not to devote extensive time and effort to learning the full truth about every issue of public concern; “[a]ccordingly, we become informed about issues only insofar as the learning process is costless, entertaining, or a matter of civic obligation”).

sovereignty. Many of those reasons brood just below the surface of Noonan's book. As discussed above, for example, conservatives who value religious liberty, such as Judge Noonan, hate *Boerne* because it perpetuates *Smith*'s restrictive view of the Free Exercise Clause.²⁰² Many conservatives no doubt deplore the *College Savings Bank* cases because they let states escape liability for unlawfully competing with private enterprise and interfering with "cherished" property rights.²⁰³ More generally, state sovereign immunity undermines government accountability to the rule of law, a cardinal conservative value.²⁰⁴ Just as bad from a conservative viewpoint, state sovereign immunity is said to lack grounding in the plain text of the Constitution.²⁰⁵ Maybe many conservatives have been waiting for a conservative opinion leader such as Judge Noonan to take up arms against the strong sovereignty model.²⁰⁶

Depending on what arms are used, that mobilization would not necessarily bother even the current Justices responsible for recent precedent supporting strong state sovereignty. In *Alden v. Maine*, for example, the five so-called conservative Justices on the current Court praised states that have "mitigated" the "rigors" of sovereign immunity by waiving their immunity

202. See Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 168 (1997).

203. See NARROWING THE NATION'S POWER, *supra* note 2, at 94 (describing patents as a "cherished" creation of the Constitution); see also Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 613 (2003) (commenting that, as a staunch defender of property rights, Justice Scalia must have found it hard to join the *College Savings Bank* case upholding state sovereign immunity from patent infringement suit).

204. See, e.g., Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 509 (1996) (identifying the rule of law as one of the "values near and dear to conservative hearts"); see also, e.g., Christo Lassiter, *The New Race Cases and the Politics of Public Policy*, 12 J.L. & POL. 411, 437 (1996) ("Individual accountability is central to the conservative paradigm . . .").

205. See NARROWING THE NATION'S POWER, *supra* note 2, at 151 ("The claim that the sovereignty of the states is constitutional rests on an audacious addition to the eleventh amendment . . ."); Erwin Chemerinsky, *The Hypocrisy of Alden v. Maine: Judicial Review, Sovereign Immunity and the Rehnquist Court*, 33 LOY. L.A. L. REV. 1283, 1286-92 (2000) (arguing that conservative members of the Court are hypocritical in recognizing broad state immunity that lacks foundation in the text of the Constitution while refusing to recognize individual rights that lack similar textual foundation); Solimine, *supra* note 24, at 1464 (remarking that the Court's Eleventh Amendment jurisprudence "should be embarrassing to conservatives" because it does not appear faithful to text or original understanding of the Amendment); Eastman, *supra* note 25, at 33 (describing the current doctrine of state sovereignty as "non-textual" and "extraconstitutional" and therefore as posing a risk to "the broader project of restoring some semblance of the rule of law to constitutional adjudication").

206. Cf. Kuran & Sunstein, *supra* note 195, at 688 ("[A]vailability campaigns often produce social cascades by overcoming public torpor and fueling debates on long-festering though rarely articulated problems.").

from “a wide variety of suits.”²⁰⁷ In *Hibbs*, two of the five—Chief Justice Rehnquist and Justice O’Connor—voted to sustain Section 5 legislation that reflected care and deliberation by Congress in combating state discrimination.²⁰⁸ Moreover, as discussed above, the conservative members of the Court have continued to recognize Congress’s broad power to preempt state legislation and to induce states to regulate according to federal requirements to get federal money and other federal benefits.²⁰⁹ In short, despite Judge Noonan’s demonization of the Rehnquist Court, that Court has displayed no hostility to diminutions of state sovereignty that occur through political processes such as the enactment of federal and state legislation (or, for that matter, the amendment of state and federal constitutions).

Unfortunately, Judge Noonan focuses the reader’s attention on other, less legitimate processes for changing the law of state sovereignty. He encourages the perception that the problem with current law is a problem with the current Court personnel. This encouragement is most obvious in the final chapter. There, he describes the conservative majority of the current Court as a “small band, entrenched in its position,” whose *Boerne* line of cases poses a “present danger to the exercise of democratic government.”²¹⁰ The first “possible response” that he proposes to this danger is impeachment of the offending Justices. He dismisses this as “[t]oo heavy” a weapon.²¹¹ Next he considers Congress’s power to “cripple or curtail the court” by cutting its budget. He dismisses this as too “[p]icayune.”²¹² Ultimately, he settles on other means, including Congress’s using care to legislate within its powers as construed by the Court.²¹³ That does not dispel the impression left by his earlier proposals

207. *Alden v. Maine*, 527 U.S. 706, 755 (1997) (quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)).

208. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 725–40 (2003). For a discussion of *Hibbs*, see *supra* notes 174–75 and accompanying text.

209. See *supra* notes 159–66 and accompanying text.

210. *NARROWING THE NATION’S POWER*, *supra* note 2, at 140.

211. Noonan begins the subsection of his last chapter that is entitled “The Range of Possible Response,” as follows:

Congress in its quiver has armaments too heavy or too petty or too awkward to employ. Too heavy is impeachment. Even the legal scholar most convinced that the court is misusing the eleventh amendment and frustrating the fourteenth would quail at the prospect of an impeachment where constitutional interpretations were the issue.

Id.

212. *Id.* at 141.

213. See *id.* at 141–43; see also Suzanna Sherry, *Irresponsibility Breeds Contempt*, 6 GREEN BAG 2D 47 (2002) (arguing that the Court’s recent decisions striking down federal statutes display disrespect for Congress that Congress earned by acting irresponsibly when enacting those statutes).

that the most logical and direct responses to the “present danger”²¹⁴ consist of removing or coercing the Justices that he has identified as the source of the danger. Followers of Judge Noonan are all the more likely to take away that impression because Judge Noonan initially proposed a similarly drastic response to the Court’s decision in *Roe v. Wade*.²¹⁵

The suggested approach of removing or coercing the wrongheaded Justices has two flaws. First, as discussed above, it does not target the real source of the presently dangerous principles identified by Noonan; those principles predate the Rehnquist Court.²¹⁶ Furthermore, even if the conservative wing of the Rehnquist Court were to blame, that does not justify the threats of impeachment or budget cuts. Those measures are inappropriate—not because one is too “heavy,”²¹⁷ the other too “picayune”²¹⁸—but because they are political retaliation for the Court’s exercise of its power to “say what the law is.”²¹⁹ To propose those responses (and dismiss them only because they are, in different ways, disproportionate) suggests that we should drop all pretense that the Court bases its decision on law and fight fire with fire.²²⁰

It is one thing to “rel[y] upon new appointments to the Court as the principal means of assuring its continuing identification with the felt necessities of the times.”²²¹ It is another thing to make the current Justices change their minds by mutterings of impeachment and slashed budgets. The latter approach poses a greater danger to the current system than the *Boerne* line of cases.

214. NARROWING THE NATION’S POWER, *supra* note 2, at 140.

215. 10 U.S. 113 (1973). In response to *Roe v. Wade*, Judge Noonan proposed that the Supreme Court be expanded from nine to fifteen members. See Dorsen, *supra* note 200, at 845. He later withdrew that proposal. See *id.*

216. See *supra* Part II.A.

217. NARROWING THE NATION’S POWER, *supra* note 2, at 140.

218. *Id.* at 141.

219. See *supra* note 67.

220. After describing impeachment as “[t]oo heavy” a response to the *Boerne* line of cases, Judge Noonan says a legal scholar “would quail at the prospect of impeachment where constitutional interpretations were the issue.” NARROWING THE NATION’S POWER, *supra* note 2, at 140. See *supra* note 211 for the full quotation. This statement reinforces the implication that impeachment is a grave, but not a categorically inappropriate, response to constitutional interpretations by the Court.

221. William W. Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229, 230 (1973).

V. CONCLUSION

Narrowing the Nation's Power has heroic and draconic qualities.²²² It is a heroic effort to focus public attention on the important but esoteric issue of the balance of power between states and the national government. In making that effort, Judge Noonan champions the individuals who lack meaningful remedies for state-caused injuries. This is all to the good. The darker side is that Noonan misleads readers into believing that the Rehnquist Court has invented the strong state sovereignty model and that it poses a present danger. This makes for a good read and may very well contribute to a wave of public hostility to residual features of state sovereignty, such as sovereign immunity. Unfortunately, the book suggests that the appropriate channel for this hostility is political retaliation against judges whose legal interpretations we do not like. That suggestion carries particularly unfortunate weight coming from a sitting federal court judge who claims no interest other than improving the law. Accepted for all it is worth, the suggested use of political retaliation would put the politicians who appoint, remove, and fund judges in a position relative to the institution of judicial review akin to the dragon outside the town of Selena. The institution, similar to the town, would be spared only as long as it regularly sacrificed individual judicial victims.

222. The mixture of good and bad in Noonan's work calls to mind one legend in which, when St. George's mother is pregnant with him, an oracle predicts that she will give birth to a dragon, suggesting a similar mixture of good and evil. See Matzke, *supra* note 34, at 456.