

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

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BOOK REVIEW

NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES. By John T. Noonan, Jr. Berkeley and Los Angeles, CA: University of California Press, 2002. Pp. 203. \$12.95.

*Reviewed by Matthew Fogelson**

I. INTRODUCTION

In his book, *Narrowing the Nation's Power: The Supreme Court Sides With the States*,¹ Judge John T. Noonan, Jr.,² argues against the Supreme Court's recent trend of siding with states rather than individuals. Judge Noonan outlines the Court's three new tools used to restrict the lawmaking power of Congress as it pertains to the states. First, the Court expanded the definition of sovereign immunity not only to protect the states from suit, but also to protect all public institutions, including universities.³ Second, the Court held that there must be "congruence and proportionality between the injury to be prevented or remedied and the means adopted by Congress to prevent the injury."⁴ Finally, for legislation under the Fourteenth Amendment, the Court held that Congress must also demonstrate that it is correcting a significant societal evil.⁵

State sovereignty is the notion that states, as sovereign entities, should be immune from suits by their citizens. In the prologue, Judge Noonan describes sovereignty as "an ancient concept" and immunity as "a concept of the common law as old as the monarchy of England."⁶ He sets forth his thesis that recent decisions by the Supreme Court expand and distort historical notions of "sovereignty" and "immunity" by applying sovereign immunity to the fifty states, thereby restricting congressional power.⁷ In addition, individuals seeking monetary

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

2. The author is a Senior Judge of the United States Court of Appeals for the Ninth Circuit.

3. NOONAN, *supra* note 1, at 3.

4. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

5. NOONAN, *supra* note 1, at 3 (citing *Flores*, 521 U.S. at 526).

6. *Id.* at 3.

7. *Id.* 3-4.

damages cannot enforce laws applicable to the fifty states because states are immune from lawsuits.⁸

In the subsequent chapters, Judge Noonan describes the creation of the Court's new definition of sovereign immunity and its recent application to federal legislation.⁹ He looks at a number of case studies, which highlight how the Court uses its new tests to build up states' power as sovereigns at the expense of Congress' lawmaking power. Noonan then explains how this transfer of power ultimately reduces the rights of citizens to seek redress under federal statutes. These case studies include attacks by the Court on the federal government's ability to protect patents issued to individuals against encroachment by state agencies.¹⁰ In addition, they expand state immunity to prevent suits against state universities for alleged violations of the Age Discrimination in Employment Act (ADEA)¹¹ and the Americans With Disabilities Act (ADA).¹² Judge Noonan also looks at the Court's rejection of the Violence Against Women Act (VAWA)¹³ in *United States v. Morrison*.¹⁴ The Court's narrow interpretation of the Constitution's Commerce Clause¹⁵ in *Morrison* served to increase the power of the states at the expense of an individual federal remedy for sexual assault.¹⁶

In his conclusion, Judge Noonan criticizes the direction taken by the Supreme Court in increasing the sovereignty of the states.¹⁷ He also makes an attempt to suggest ways that the nation can overcome such decisions. However, even these suggestions have a negative tone, tending to explain which options will not solve the problem.¹⁸ His closing comments are largely limited to criticisms of the Court's actions and reasoning.¹⁹ While Judge Noonan's criticisms are valid,

8. *Id.* at 4.

9. NOONAN, *supra* note 1, at 15-40, 86-137.

10. *Id.* at 86-97. (discussing *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 669 (1999)).

11. *Id.* at 103-19 (discussing Age Discrimination in Employment Act, 29 U.S.C. §§ 631-634 (2003)).

12. Americans With Disabilities Act, 42 U.S.C. §§ 12101-12213 (2003).

13. *Id.* at 120-37 (discussing Violence Against Women Act, 42 U.S.C. § 13981(b) (2003)).

14. 529 U.S. 598 (2000).

15. The Commerce Clause states: "[The Congress shall have Power] . . . [t]o regulate commerce with foreign nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

16. NOONAN, *supra* note 1, at 120-37.

17. *Id.* at 138-56.

18. *Id.*

19. *Id.* at 140-56.

the despair that echoes in his work is premature. The Supreme Court can set out the “law of the land” regarding the balance of state and federal power, however, a more liberal interpretation by lower federal courts is possible.²⁰ The United States Court of Appeals for the Ninth Circuit, where Judge Noonan sits, has subtly suggested methods for sidestepping some of the Supreme Court’s limitation on federal control of the states.²¹

II. SUMMARY

Judge Noonan begins his analysis of the current Supreme Court’s notions of state sovereignty by tracing the pertinent historical and legal developments that led to the landmark decision of *City of Boerne v. Flores*.²² Using the free exercise of religion clause, the constitutional right at stake in *Flores*, Judge Noonan traces the Court’s treatment of this right throughout American history.²³ Prior to the 1930’s, the Supreme Court rarely involved itself in freedom of religion issues.²⁴ In the 1940’s, the Court held that the First Amendment²⁵ right to religious freedom is enforceable against the states under the first section of the Fourteenth Amendment.²⁶ The right to free exercise of religion was limited by federal laws, but remained relatively unencumbered by state regulation over the next fifty years.²⁷

20. *See infra* pp. 20-25.

21. *See infra* pp. 15-17.

22. 521 U.S. 507 (1997).

23. *Id.* at 15-40.

24. *Id.* at 18.

25. The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

26. NOONAN, *supra* note 1, at 19. The First Section of the Fourteenth Amendment reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

27. NOONAN, *supra* note 1, at 21-22.

A. Power Shifts from Congress to the Supreme Court in the 1990's.

Judge Noonan argues that in 1990, the Court began to reverse its thinking and allowed for state regulation of religious practices.²⁸ Many groups petitioned Congress to pass legislation preventing the states from regulating this area.²⁹ As a result, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993.³⁰ RFRA limited government infringement on religious practice to instances where the government could establish it had a compelling interest.³¹

In *City of Boerne v. Flores*,³² St. Peter the Apostle, a Catholic church located in Boerne, Texas, began to develop plans to enlarge its existing church.³³ By 1991, the congregation had expanded since the present church was finished in 1923 and the 250-seat church was not large enough to accommodate the 780 families in the parish, even with three masses each Sunday.³⁴ During the same year, the Boerne City Council implemented “an historic district” for the purpose of preserving those buildings within the district.³⁵ A portion of the present St. Peter church was located within this new historic district.³⁶ St. Peter’s enlargement plans necessarily required the demolition of most of the existing structure save for the church’s twin bell towers.³⁷ When the Archbishop of San Antonio, P.F. Flores, applied for a construction permit to proceed with the planned expansion, city authorities denied the permit on the basis that the existing church was at least partially inside the recently created historic district.³⁸ In 1994, the Boerne City Council held a public hearing regarding the building plans and ultimately sustained the denial of the license.³⁹ In 1995, Archbishop Flores began to assist St. Peter by filing suit under the RFRA.⁴⁰ The suit alleged that there was no compelling governmental

28. *Id.* at 23-25 (discussing *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990), in which the Court held that Oregon could properly deny unemployment compensation to two Native Americans fired from their jobs for use of peyote for religious purposes because exercise of religion was not free from laws that had an incidental effect on religious practice).

29. *Id.* at 25-26.

30. *Id.* at 26 (citing Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2003)).

31. *Id.* (discussing § 2000bb).

32. 521 U.S. 507 (1997).

33. NOONAN, *supra* note 1, at 31.

34. *Id.*

35. *Id.* at 32.

36. *Id.*

37. *Id.*

38. *Flores*, 521 U.S. at 511.

39. NOONAN, *supra* note 1, at 33.

40. *Id.*

interest that supported Boerne's imposition upon the parishioners by refusing to allow the planned renovation of their church.⁴¹ Boerne responded by attacking the constitutionality of the RFRA.⁴²

The case was argued before the United States Supreme Court on February 19, 1997⁴³ and a majority of the Court held that RFRA was unconstitutional.⁴⁴ The Court looked at whether the Congress had exceeded its constitutional power under § 5 of the Fourteenth Amendment⁴⁵ by passing the RFRA.⁴⁶ The court determined that Congress' power under § 5 is limited to enforcing the Fourteenth Amendment and it cannot be used to create new rights or alter existing ones.⁴⁷ Judge Noonan points out that the Court failed to draw a clear line between the creation of a new right or alteration of an existing right, and a remedial measure used to enforce an existing right.⁴⁸ To help interpret this vague distinction, the Court developed two important tests.⁴⁹ First, the Court reserved the right to review the congressional record regarding the "evil" Congress claimed to regulate.⁵⁰ Second, the Court announced, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."⁵¹ Judge Noonan interprets this test as the Court's implication that it would be the final arbiter for whether legislation is congruent.⁵² He argues that both tests are self-serving because the tests were unnecessary in the decision, and that they increase the Court's decision-making power at the expense of the legislature.⁵³ Implicit in Judge Noonan's writing is the understanding that these *Boerne* criteria lay the groundwork for the Court to challenge other federal statutes.⁵⁴

41. *Id.*

42. *Id.*

43. *Flores*, 521 U.S. at 507.

44. *Id.* at 511.

45. Section 5 of the Fourteenth Amendment reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

46. NOONAN, *supra* note 1, at 35.

47. *Flores*, 521 U.S. at 519.

48. NOONAN, *supra* note 1, at 35 (discussing *Flores*, 521 U.S. at 519-20).

49. *Id.* at 35-36.

50. *Id.* at 36.

51. *Id.* at 35 (quoting *Flores*, 521 U.S. at 520).

52. *Id.*

53. *Id.* at 39-40.

54. *Id.* at 40. Judge Noonan refers to the *City of Boerne v. Flores* case as *Boerne*.

B. The Rise of State Immunity

Judge Noonan then outlines state immunity; the other doctrinal device the Court has recently used to protect states from federal control. Several fictitious characters including “Judge Samuel Simple,” “Boaltman,” “Yalewoman,” and attorneys from the firm of “Fish, Frye & Ketchum” engage in a mock discussion on the subject of state immunity.⁵⁵ Perhaps Judge Noonan’s view that the Court’s present concept of state immunity is largely a fiction, influenced his decision to discuss the issues through fictional characters. Early in the debate, “Harvardman” lays out the current law regarding sovereign immunity:

The law today is that each of the fifty states is a sovereign, and a sovereign cannot be sued for damages by an individual, an Indian tribe, or a foreign government unless the sovereign has consented to being sued. An unconsenting state, therefore, cannot be sued in federal court or in state court except by the federal government itself. It cannot be sued even though Congress in the exercise of the powers conferred by Article I (sic) has given individuals the right to sue.⁵⁶

This serves as the current definition of sovereign immunity.

While Judge Noonan discusses exceptions to this definition of state immunity,⁵⁷ this mock discussion brings out two key elements crucial to his thesis that state immunity is an ill-conceived idea.⁵⁸ First, he points out that the concept of the state in state immunity, is not solely limited to suits by individuals that name a state as a defendant, but also applies to suits against any governmental entity having state-wide reach.⁵⁹ Second, Judge Noonan has the fictitious

55. *Id.* at 41-85.

56. *Id.* at 42 (internal citation omitted).

57. Noonan discusses seven exceptions to state immunity. These exceptions are: 1) habeas corpus petitions by state prisoners; 2) unconstitutional taking by a state official; 3) claiming a right under a federal law that abrogates state’s immunity; 4) reversal of a state’s highest court by the United States Supreme Court; 5) review by the Supreme Court of a case where a state has consented to be sued only in its own courts; 6) removal of a case from state court to federal district court; and 7) suit of a state by the United States itself. *Id.* at 43-50. Numbers 4 through 7 show situations where a state issue can be “federalized” by review in the United States Supreme Court.

58. *Id.* at 50, 52-53.

59. *Id.* at 50.

debaters note that the Constitution is silent as to state immunity. He explains that the Court instead relies on the notion that suits against states should not be allowed because they hurt the “sovereign dignity” of the state.⁶⁰ This last consideration is not addressed in an objective fashion. Instead, “Harvardman,” “Yalewoman,” and “Boaltman” all make negative observations about the notion that states should be immune to preserve their dignity and ultimately refer to the Court’s logic as “screwed up.”⁶¹ After discussing the two main weapons employed by the Court in its most recent decisions, the *Boerne* criteria and the doctrine of state sovereignty, Judge Noonan turns to various case studies that apply these devices.

C. The Court Makes States Immune from Legislation Meant to Protect Individual Rights

The Supreme Court has held that states are immune from federal legislation that protects certain classes of citizens from abuse or discrimination. In 2000 the Court held that individuals could not sue states under the Age Discrimination in Employment Act (ADEA)⁶² because Congress failed to properly abrogate state immunity. The ADEA made it illegal to fire or fail to hire someone because of age in most instances, and tried to abrogate a state’s immunity in this area.⁶³ J. Daniel Kimel and other state employed co-plaintiffs sued the Florida Board of Regents under the ADEA.⁶⁴ Kimel, a professor at Florida State University, alleged that the Board of Regents’ failure to budget for pay increases constituted age discrimination, as all of the plaintiffs were over forty years old.⁶⁵ In *Kimel v. Florida Board of Regents*, the Court held 5-4 that Florida and its Board of Regents were immune from being sued under the ADEA.⁶⁶ The Court applied the standard put forward in *Flores*, and held that Congress had not established any patterns of age discrimination.⁶⁷ As a result, the legislative response was disproportionate to the ill they were trying to cure.⁶⁸

60. *Id.* at 52-53 (citing *Alden v. Maine*, 527 U.S. 706, 715 (1998)).

61. *Id.* at 54-57.

62. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 66 (2000).

63. NOONAN, *supra* note 1, at 103, 107.

64. *Id.* at 105.

65. *Id.* at 105-06.

66. *Id.* at 107 (discussing *Kimel*, 528 U.S. at 81-91).

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

68. NOONAN, *supra* note 1, at 107 (discussing *Kimel*, 528 U.S. at 81-91).

Judge Noonan first criticizes the decision of the Court on two main grounds. He argues that while Congress did not establish a record of age discrimination, as one would do for an appellate court, it did follow normal legislative processes.⁶⁹ U.S. citizens and the President of the United States identified a national problem with age discrimination.⁷⁰ Congress agreed with the concern and “acted . . . like all legislatures act most of the time”⁷¹ by passing legislation to correct this harm.⁷² Second, Judge Noonan criticizes the Court, whose members’ ages ranged from fifty-one to seventy-nine, for holding that the elderly are not a “discrete and insular minority” because of the fact that “[a]t any given time, the majority of persons are not old.”⁷³

D. Unconstitutionality of the Violence Against Women Act Decreases Federal Ability to Protect Women

The most recent, and perhaps the most striking, case examined by Judge Noonan is the Court’s treatment of the Violence Against Women Act (VAWA)⁷⁴ in *United States v. Morrison*.⁷⁵ He briefly describes the VAWA as an attempt by Congress to “remedy a perceived failure in the states’ ordinary administration of criminal justice.”⁷⁶ Passed in 1994, the VAWA tried to protect citizens from gender-motivated violence by creating a civil remedy, which could be used to seek damages from an alleged attacker.⁷⁷

In 1995, Christy Brzonkala, a freshman student at Virginia Polytechnic Institute and State University (Virginia Tech), sued under VAWA after she was allegedly raped by Antonio Morrison and James Crawford, two members of the Virginia Tech football team.⁷⁸ Criminal rape charges were never brought against Morrison or Crawford.⁷⁹ Judge Noonan describes how Virginia Tech’s disciplinary committee took no action against Crawford for his actions.⁸⁰ The school initially gave Morrison a one-year suspension for “using

69. *Id.* at 109, 111-12.

70. *Id.* at 109.

71. *Id.*

72. *Id.*

73. *Id.* at 112-13.

74. Violence Against Women Act, 42 U.S.C. § 13981 (2003).

75. 529 U.S. 598 (2000).

76. NOONAN, *supra* note 1, at 120.

77. *Id.* at 120.

78. *Id.* at 123.

79. *Id.* at 121.

80. *Id.* at 121-22.

abusive language” after he admitted engaging in sexual relations with Brzonkala despite her saying no twice.⁸¹ After two rehearings during which the school denied Brzonkala procedural advantages given to her attackers,⁸² Virginia Tech’s Provost annulled Morrison’s sentence completely.⁸³

Judge Noonan argues that when Brzonkala sued under the VAWA in December 1995, her case constituted a “textbook case” of why Congress had created the VAWA.⁸⁴ Brzonkala was raped on a state campus, denied procedural rights by her school, she had not filed criminal charges, and ultimately the school failed to sanction Brzonkala’s assailants.⁸⁵ After initially being dismissed at the district court level without a trial,⁸⁶ Brzonkala’s case was briefly rejuvenated by the Fourth Circuit Court of Appeals.⁸⁷ However, the court of appeals sitting *en banc* again dismissed Brzonkala’s claims.⁸⁸

The United States Supreme Court granted *certiorari* and the Court issued its opinion in *United States v. Morrison*⁸⁹ on May 15, 2000. In a 5-4 decision, Chief Justice Rehnquist delivered the opinion of the Court and affirmed the ruling of the Fourth Circuit Court of Appeals.⁹⁰ First and foremost, the Court turned its attention to Congress’ power to regulate commerce under Article I, § 8 of the Constitution.⁹¹ The majority held that for Congress to regulate an activity under the Commerce Clause, the activity must be economic in nature and that gender-motivated crimes failed to meet this requirement.⁹² The Court was concerned that regulation of a “non-

81. *Id.*

82. *Id.* at 122. Virginia Tech refused to let Brzonkala have access to audio recordings and records of the first hearing. *Id.* At the same, Morrison and his attorney were given full access to these materials. *Id.* School officials failed to give Brzonkala notice that Morrison had appealed a third time, and as a result of that third appeal, Morrison’s initial sentence by Virginia Tech, a two-semester suspension, was annulled. *Id.*

83. *Id.*

84. *Id.* at 123.

85. *Id.*

86. *Id.* at 125 (discussing *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 935 F.Supp. 779 (W.D. Va. 1996)).

87. *Id.* at 126 (discussing *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 132 F.3d 949 (4th Cir. 1997)).

88. *Id.* (discussing *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820 (4th Cir. 1999) (*en banc*)).

89. 529 U.S. 598 (2000).

90. *Id.* at 599.

91. *Id.* at 127 (citing The Commerce Clause, which reads “[The Congress shall have the Power] . . . [t]o regulate commerce with foreign nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3).

92. *Id.*

economic” issue through federal legislation would open the floodgates for Congress to regulate any crime that it found to have a significant impact on interstate commerce.⁹³ Specifically, the Court argued that the entire realm of domestic relations, such as alimony, divorce, and child custody, had an impact on interstate commerce, and therefore, could be subject to federal regulation if the VAWA was upheld.⁹⁴ Moreover, the Court was concerned that the VAWA blurred the lines between the police powers of the state to regulate common crimes such as rape and the proper scope of congressional power.⁹⁵ The Court held that Congress could not justify the VAWA under the Commerce Clause as a commercial activity.⁹⁶

Judge Noonan discussed how the *Morrison* Court applied the *Boerne* test, specifically, congruence and proportion between the injury and the available remedy.⁹⁷ The Court held that if the evil to be remedied was the ineffective handling of the situation by state officials, then the VAWA did not provide a remedy.⁹⁸ According to the Court, the sexual assault on Brzonkala was not properly addressed by the VAWA, and she should seek a remedy under Virginia state law.⁹⁹

Justice Souter’s dissent in *Morrison*, joined by Justices Stevens, Ginsburg, and Breyer, argued that the VAWA fell within Congress’ power to regulate commerce.¹⁰⁰ He relied on the large number of surveys, statistics and studies included in the congressional record that showed the effect of violence against women on interstate commerce and the ineffectiveness of state domestic violence statutes in punishing such offenders.¹⁰¹ Justice Souter argued that the second criterion of the *Boerne* test, congressional establishment of an “evil” to be regulated, was met by this review of the congressional record.¹⁰²

In his dissent, Justice Souter also noted its general dissatisfaction with subjecting the congressional record to review by the Court to determine if legislation required a review in a given area.¹⁰³ He argued that reviewing evidence used to support legislation

93. *Id.* at 128.

94. *Id.*

95. *Id.* at 129.

96. *Id.* at 127.

97. *See supra* p. 5.

98. NOONAN, *supra* note 1, at 131.

99. *Id.*

100. *United States v. Morrison*, 529 U.S. 598, 628 (2000) (Souter, J., dissenting).

101. NOONAN, *supra* note 1, at 131-32.

102. *Id.*

103. *Id.*

is solely within the purview of Congress and not the courts.¹⁰⁴ Justice Souter criticized the majority for trying to preserve a “proper sphere of state autonomy” by overturning the VAWA because there was nothing in the Constitution stating that the powers of Congress and the states cannot overlap.¹⁰⁵

III. ANALYSIS

Judge Noonan effectively explains how seemingly vague constitutional principles used by the Court, such as “sovereign immunity” and the *Boerne* tests, have a negative effect on individual rights.¹⁰⁶ His thesis that the present members of the Court are choosing to protect states over individuals leads him to rather pessimistic conclusions regarding how this trend can be changed.¹⁰⁷ One area not discussed is the treatment of the Supreme Court’s opinions by the Ninth Circuit Court of Appeals, where Judge Noonan sits as a Senior Judge. The Ninth Circuit’s response to *Morrison v. United States*,¹⁰⁸ one of the case studies used in *Narrowing the Nation’s Power*,¹⁰⁹ provides room for optimism that lower courts can sidestep this case.¹¹⁰

For a book of only 156 pages, *Narrowing The Nation’s Power* covers a great deal of material. After laying out the constitutional principles, Judge Noonan effectively explains how the struggle between states and the federal government has impacted individuals in the United States, with the Supreme Court playing the role of referee. Anyone expecting a treatise on obscure constitutional principles soon realizes that the effectiveness of important federal legislation such as the ADEA and VAWA is determined by the current battle, taking place in the Supreme Court.

Judge Noonan also draws a number of conclusions based upon his examination of the case studies.¹¹¹ These conclusions take two main forms.¹¹² First, Judge Noonan discusses possible solutions to the

104. *Id.* at 132.

105. *Id.* at 134 (citing *United States v. Morrison*, 529 U.S. 598, 644 (2000)).

106. *See infra* pp. 18-21.

107. *See infra* pp. 20-22.

108. 529 U.S. 598.

109. NOONAN, *supra* note 1, at 120-37.

110. *See infra* pp. 22-29.

111. NOONAN, *supra* note 1, at 140-56.

112. *Id.*

Court's transfer of power from the federal government to the states.¹¹³ Most of these "solutions," including impeachment, financial cutbacks by Congress on the Justices' raises, insurance, and parking, as well as the rejection of future nominees on ideological grounds, are dismissed outright.¹¹⁴ Judge Noonan briefly discusses a number of realistic solutions, such as careful crafting of legislation after a review of the Court's recent decisions, distribution of federal funds based upon states obeying congressionally mandated conditions, and using other powers of Congress to try to sidestep the Court's rulings and accomplish the same ends.¹¹⁵

Second, Judge Noonan criticizes the Court's decision that in effect transfers power from the federal government to the states. In ignoring some key facts of the cases, such as the procedural unfairness experienced by Christy Brzonkala in *Morrison*,¹¹⁶ Judge Noonan argued that the Court exposed that it was not approaching these cases objectively, but rather with its decision already made.¹¹⁷ The notions of the new requirement that legislation be "congruent" and "proportionate" are also attacked as an invention and an invasion of the realm of the legislature.¹¹⁸ Congruence and proportionality are considered by legislators who ". . . form their ideas of congruence and proportion, as most people do, intuitively. They do so because there is no other guide."¹¹⁹ The Court, in second-guessing Congress, brings no stronger sense of reasoning or logic to these decisions.¹²⁰ Instead, the Justices are inappropriately substituting their value judgments for those of the members of Congress whose constitutional function it is to make such decisions.¹²¹

The criticisms and suggestions offered by Judge Noonan paint a bleak outlook for this area of law. While this assessment may be largely accurate, there have been some positive developments in the Ninth Circuit. Considering that Judge Noonan sits on the bench for the Ninth Circuit Court of Appeals, it is ironic that he did not discuss the treatment of the Supreme Court's decisions by lower federal courts, where the bulk of cases are decided. Despite the fact that the

113. *Id.* at 140-43.

114. *Id.* at 140-41.

115. *Id.* at 141-42.

116. 529 U.S. 598 (2000).

117. NOONAN, *supra* note 1, at 144-45.

118. *Id.* at 145-46.

119. *Id.* at 146.

120. *Id.*

121. *Id.* at 147.

Supreme Court is funneling power to the states, its decisions are vague enough that some room exists for an enterprising court of appeals to maintain a more liberal view. A brief look at the post-*Morrison* jurisprudence in Judge Noonan's own Ninth Circuit Court of Appeals reveals that *Morrison* has not had a significant impact on the Ninth Circuit's decisions.¹²² The Ninth Circuit identified holes in *Morrison* that could potentially be used by Congress to sidestep its holdings in attempts to reduce violent crime, both in general and against women.

A. The Impact of "Academic" Constitutional Principles on the Individual

The importance of *Narrowing The Nation's Power* lies in its ability to expose the Supreme Court's negative impact on the ability of individuals to seek redress through federal statutes. Judge Noonan begins his book by providing a quote that represents the Court's theme in its protection of state sovereignty: "[T]he States entered the federal system with their sovereignty intact."¹²³ Through his insights regarding the Court's decisions, Judge Noonan translates this foundational phrase into an issue that can be understood to affect many.

For example, in reviewing the Court's decision to hold the public College of Business of the University of Montevallo immune from the ADEA, Judge Noonan does more than just explain the holding and dissent.¹²⁴ First, he explains that the Court contradicted itself when it first stated that Congress has "wide latitude" in enforcing the Equal Protection Clause of the Fourteenth Amendment,¹²⁵ but later applied the strict *Boerne* test¹²⁶ when reviewing the ADEA.¹²⁷ Next, Judge Noonan argues that despite the Court's assertions to the contrary, the ADEA addressed a significant societal issue; the forced retirement of professors from state universities.¹²⁸ This posture is reflected in the ADEA, that age discrimination by employers, whether

122. See *United States v. Jones*, 231 F.3d 508 (9th Cir. 2000); *United States v. Cortez*, 299 F.3d 1030 (9th Cir. 2002).

123. NOONAN, *supra* note 1, at 2 (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)).

124. *Id.* at 109-13 (discussing *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000)).

125. *Id.* at 110 (citing U.S. CONST. amend. XIV, § 1. See *supra* note 26 for text of this amendment).

126. *Id.* at 35-36.

127. *Id.* at 110-11.

128. *Id.* at 111.

public or private, is a problem.¹²⁹ The Court ignored Congress' decision by exempting the states. Judge Noonan also points out that by "[b]owing to the stereotype of the elderly [having diminished mental faculties], the Court unwittingly demonstrated the prevalence of the stereotype throughout the land."¹³⁰ Noonan argues that if the learned Justices of the Supreme Court believed that the stereotype of the elderly as having diminished mental faculties was accurate, then anyone might believe it.¹³¹

Judge Noonan's insights help emphasize the fact that the age discrimination discussed in *Kimel* is not limited to the facts of the case. Rather, it is an issue deemed to affect enough people to result in the passage of legislation addressing the problem. In turn, the Court's decision limiting the applicability of the ADEA is not only a shift in power from the federal government to the states, but also a decision that will make it much harder for elderly public employees to seek redress in the event of discrimination.¹³²

Likewise, when discussing the VAWA,¹³³ Judge Noonan effectively highlights that the legislation was aimed at protecting individuals like Christy Brzonkala, for whom the typical state-controlled legal remedies of criminal charges or administrative responses had failed.¹³⁴ Additionally, he demonstrates how the debate over the Commerce Clause, a seemingly vague constitutional principle, led to the downfall of the VAWA.¹³⁵ In *Morrison*,¹³⁶ the Court was more concerned with limiting federal power to regulate under the Commerce Clause.¹³⁷ Its desire to limit the applicability of the Commerce Clause, as utilized by Congress in creating the VAWA, overrode the Court's concern with the individual wrong suffered by Christy Brzonkala.¹³⁸

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 112-13.

133. Violence Against Women Act, 42 U.S.C. §13981(b) (2003).

134. NOONAN, *supra* note 1, at 123-24.

135. *Id.*

136. 529 U.S. 598 (2000).

137. NOONAN, *supra* note 1, at 137. See *supra* note 91 for text of the Commerce Clause.

138. *Id.*

B. Judge Noonan's Conclusions: Correct, but Overly Grim

Judge Noonan divides his conclusions into a discussion of possible responses and criticisms of the Court's recent decisions.¹³⁹ The possible responses are based on his belief that the Court's newfound notion of sovereign immunity is "[a] doctrine that has swelled beyond bounds," which gives power to the states and unjustifiably takes it from the federal government.¹⁴⁰ Judge Noonan's list of potential "responses" reads more as a checklist of unworkable options than an attempt to create genuine solutions. For example, Judge Noonan briefly considers drastic options such as the impeachment of Justices or reductions of their financial benefits, including salary raises, parking, and the number of law clerks.¹⁴¹

The focus of the Court on "large questions of constitutional law and on grand conceptions, such as sovereignty" is also decried by Judge Noonan.¹⁴² Noonan rightly feels that the Court has overlooked the facts behind the cases before it.¹⁴³ For example, in *United States v. Morrison*,¹⁴⁴ Noonan feels that in reaching its decision, the Court largely ignored the facts of the assault on Christy Brzonkala and the insufficient response by Virginia Tech's administrators.¹⁴⁵ Noonan points out that the decisions reached by the Court in a case such as *Morrison* affect all future plaintiffs in a similar situation.¹⁴⁶ Removing remedies put in place by Congress to protect this exact group of potential plaintiffs is indefensible. It does damage to these plaintiffs' rights that is not easily undone by Congress.¹⁴⁷

Judge Noonan halfheartedly proposes more useful options to this problem than the extreme measures he rejects above.¹⁴⁸ Although buried in his own doubt regarding its effectiveness, one of these

139. *Id.* at 140-43.

140. *Id.* at 156.

141. *Id.* at 140-41.

142. *Id.* at 144.

143. *Id.*

144. 529 U.S. 598 (2000).

145. NOONAN, *supra* note 1, at 144-45.

146. *Id.* at 145.

147. *Id.* at 145-47. Noonan feels that the Court's decisions to overturn a statute based upon it being unreasonable (or "incongruous" and "disproportionate") is indefensible when Congress deemed the statute to be needed based upon research, debate, and anecdotal evidence. The nine members of the Court should not substitute their hunches for those of Congress. *Id.* at 146.

148. *Id.* at 141.

options is for the legislature to carefully craft legislation based upon the restrictive pro-state cases by the Court.¹⁴⁹

When pondering the fate of legislation such as the RFRA,¹⁵⁰ ADEA,¹⁵¹ and VAWA,¹⁵² Judge Noonan writes that “[i]t is not certain that other state employees can be assured the protection of federal anti-discrimination statutes . . . The Violence Against Women Act cannot be resuscitated unless the Constitution is amended or the members of the majority change.”¹⁵³ It is hard to dispute that what has been done by the Court cannot be undone without a change in the makeup of the Supreme Court in the future.

However, perhaps Judge Noonan overestimates what has been done in theory instead of looking at what has *actually* been done by such decisions. In incorporating Supreme Court opinions into their own, the lower federal courts can still interpret and analyze those opinions. While the Supreme Court’s opinions are mandatory authority on all federal courts, perhaps Judge Noonan underestimates the ability of federal courts to find and create loopholes for a mindful legislature through this process of interpretation.

C. A Glimmer of Hope: Judge Noonan’s Own Ninth Circuit Examines United States v. Morrison

Judge Noonan, in his haste to criticize the national developments in the Supreme Court, failed to augment his discussion through an introspective review of the decisions handed down by his fellow Ninth Circuit Judges. Perhaps Judge Noonan refrained from examining such cases because he did not want to draw attention to more hopeful solutions. Regardless, the treatment of *Morrison* by the Ninth Circuit creates room for guarded optimism.

1. United States v. Jones

In November 2000, the Ninth Circuit decided *United States v. Jones*.¹⁵⁴ The court reviewed whether a federal statute prohibiting a person subject to a domestic violence restraining order from possessing a firearm is a violation of the Commerce Clause¹⁵⁵ and the

149. *Id.*

150. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2003).

151. Age Discrimination in Employment Act, 29 U.S.C. §§ 631-634 (2003).

152. Violence Against Women Act, 42 U.S.C. §13981(b) (2003).

153. *Id.* at 143.

154. 231 F.3d 508 (9th Cir. 2000).

155. U.S. CONST. art. I, § 8, cl. 3.

Tenth Amendment.¹⁵⁶ In *Jones*, Defendant Jones was indicted for possessing a handgun while subject to a domestic violence protection order.¹⁵⁷ This constituted a violation of a federal statute¹⁵⁸ making it unlawful for Jones to “possess in or affecting interstate commerce, any firearm or ammunition; or to receive any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”¹⁵⁹ Jones argued that § 922(g)(8) was unconstitutional in light of the Supreme Court’s recent decisions in *United States v. Morrison*¹⁶⁰ and *United States v. Lopez*.¹⁶¹

The Ninth Circuit made two distinctions between the statute at issue in *Morrison* and the one reviewed in *Jones*.¹⁶² First, the court held that “the most important distinction is that, unlike § 922(g)(8), the statute at issue in *Morrison* does not contain an express jurisdictional element that demonstrates the necessary nexus between the statutory provision and interstate commerce.”¹⁶³ The court held that because § 922(g)(8) contained such language, *Morrison*’s restrictive view of the Commerce Clause did not apply.¹⁶⁴ Second, the Court held that the nature of the subject matter regulated by the statutes differed in an important manner.¹⁶⁵ Whereas the VAWA regulated gender-motivated violence, which is a non-commercial activity, § 922(g)(8) regulates possession of firearms that travel in and affect interstate commerce.¹⁶⁶

Both of the differences between *Morrison* and *Jones* appear readily surmountable by Congress. The first difference, identified as the most important, creates a distinction between a statute explicitly claiming a link to interstate commerce and one that does not, regardless of the statute’s subject matter. Perhaps adding the words “interstate commerce” to a statute would legally distinguish it from the unconstitutional VAWA.¹⁶⁷ The Ninth Circuit also distinguishes § 922(g)(8) from another Supreme Court decision, *United States v.*

156. The Tenth Amendment of the Constitution states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

157. *Jones*, 231 F.3d at 511.

158. 18 U.S.C. § 922(g)(8) (2003).

159. *Jones*, 231 F.3d at 513-14 (quoting § 922(g)(8)).

160. *Id.* at 514-15 (citing *United States v. Morrison*, 529 U.S. 598 (2000)).

161. 514 U.S. 549 (1995). See *infra* pp. 24-25 for a discussion of *Lopez*.

162. 231 F.3d 508.

163. *Id.* at 514-15.

164. *Id.*

165. *Id.*

166. *Id.*

167. Violence Against Women Act, 42 U.S.C. §13981(b) (2003).

Lopez.¹⁶⁸ In *Lopez*, the Court invalidated another federal firearm statute, the Gun-Free School Zone Act (GFSZA).¹⁶⁹ The Ninth Circuit noted that the GFSZA did *not* contain an explicit requirement that there be a nexus between firearms and interstate commerce.¹⁷⁰ The statute at issue in *Jones* did contain a nexus connecting the prohibited firearm to interstate commerce.¹⁷¹

The second difference between § 922(g)(8) and the VAWA deals with the subject matter, but again appears easily incorporated by Congress into future legislation. The purpose of § 922(g)(8) is to regulate who may possess firearms, not to restrict the passage of firearms through interstate commerce. Yet, the Ninth Circuit held that because the statute dealt with firearms that are “*manufactured in and travel through interstate commerce*” the statute is a valid regulation of interstate commerce.¹⁷² Nearly every manufactured object travels through interstate commerce. Perhaps explicitly connecting a statute to an item that travels through interstate commerce (for example, handgun violence against women) would be enough to address this second consideration.

The Ninth Circuit protected individuals that would make the legislation more difficult to challenge on constitutional grounds. The conclusions reached in *Narrowing The Nation’s Power* provide little guidance in preserving individual federal remedies in the face of recent Supreme Court decisions like *Morrison*.¹⁷³ The result in *Jones* creates the possibility that small changes in the wording of a statute may preserve such remedies.¹⁷⁴ In *Jones*, the Ninth Circuit enforced § 922(g)(8) against a state, which suggests that minor adjustments could be made to federal legislation to protect the legislation from constitutional challenges.¹⁷⁵

168. 514 U.S. 549 (1995).

169. *United States v. Jones*, 231 F.3d 508, 514 (9th Cir. 2000) (discussing *United States v. Lopez*, 514 U.S. 549 (1995)); Gun-Free School Zone Act 18 U.S.C. § 922(q) (2003).

170. *Id.* at 514.

171. *Id.* See also § 922(g)(8).

172. *Jones*, 231 F.3d at 514-15 (emphasis added).

173. See 529 U.S. 598 (2000).

174. See 231 F.3d 508.

175. *Id.*

2. *United States v. Cortez*

In *United States v. Cortez*,¹⁷⁶ the Ninth Circuit considered whether 18 U.S.C. § 2119¹⁷⁷ was constitutional under the Commerce Clause and in light of the Supreme Court's decision in *Morrison*.¹⁷⁸ This statute criminalized the taking of a motor vehicle that had been "transported, shipped or received in interstate or foreign commerce."¹⁷⁹ The defendant, Walter Cortez, was convicted under 18 U.S.C. § 2119 for an attempted carjacking and was sentenced to ninety-seven months in prison.¹⁸⁰ On the night of the crime, a drunken Cortez attempted to carjack two individuals at a 7-Eleven by demanding their car keys.¹⁸¹ The second individual was a plainclothes FBI agent who refused to surrender his keys to Cortez.¹⁸² After a violent confrontation with the FBI agent, Cortez escaped, only to be arrested a few hours later.¹⁸³

The facts, as described by the Court of Appeals, do not suggest that Cortez had any secondary motive for attempting to steal a car, such as a desire to sell the parts.¹⁸⁴ Rather, Cortez appears to be an individual who decided to do something illegal while intoxicated.¹⁸⁵

In holding § 2119 constitutional, the Ninth Circuit distinguished it from the VAWA at issue in *Morrison* in two ways.¹⁸⁶ First, the Ninth Circuit found that based on the congressional record,

176. 299 F.3d 1030 (9th Cir. 2002).

177. 18 U.S.C. § 2119 (2003). The statute reads:

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall —

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

§ 2119.

178. *Cortez*, 299 F.3d at 1032 (citing *United States v. Morrison*, 529 U.S. 598 (2000)).

179. § 2119.

180. *Cortez*, 299 F.3d at 1031.

181. *Id.*

182. *Id.* at 1031-32.

183. *Id.* at 1032.

184. *Id.* at 1031-32.

185. *Id.*

186. *Id.* at 1035.

the carjacking did affect interstate commerce and could be regulated under the Commerce Clause.¹⁸⁷ In so holding, the court looked at the impact of carjacking on interstate commerce.¹⁸⁸ For example, the court discussed congressional findings that stolen cars were often taken to “chop shops” where they were disassembled and their parts sold in interstate commerce.¹⁸⁹ The court did not create a requirement that any federal statute criminalizing carjacking possess a similar nexus between carjacking and interstate commerce. In fact, the court held that “[b]ecause we decide that carjacking does substantially affect interstate commerce, Congress may regulate it in its entirety. That a particular instance of carjacking may have a *de minimis* effect on interstate commerce is of no consequence.”¹⁹⁰ Section 2119 contains no express provisions that require it to eliminate the sale of stolen car parts.¹⁹¹ Rather, it criminalizes the act of carjacking under any circumstance.¹⁹² Presumably, under the Ninth Circuit’s holding, a statute that regulates or criminalizes anything related to carjacking would be constitutional.

Finally, as in *Jones*,¹⁹³ the court attached significance to the fact that the nexus between § 2119 and interstate commerce was contained within the statute.¹⁹⁴ A motor vehicle stolen as a result of a carjacking needed to be one that has been “transported, shipped, or received in interstate or foreign commerce.”¹⁹⁵ To this end, the court noted that the government introduced evidence that the car Cortez attempted to steal in California was manufactured in Kansas City, Kansas.¹⁹⁶ Furthermore, the court held that the attempted carjacking in California of a car manufactured in Kansas “sufficiently tied this particular carjacking to interstate commerce. No greater nexus between the carjacking and interstate commerce was required.”¹⁹⁷

Cortez illuminates a method that could potentially be utilized by Congress when attempting to tie its legislation to commerce.¹⁹⁸ A statute with an explicit nexus to interstate commerce may be

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 1036.

191. *See* 18 U.S.C. § 2119 (2003).

192. *Id.*

193. *See* discussion *supra* pp. 22-25.

194. *Cortez*, 299 F.3d at 1037.

195. *Id.* at 1036 (quoting § 2119).

196. *Id.* at 1037.

197. *Id.*

198. *Id.* at 1036-37.

constitutional if it regulates an activity deemed to be even remotely related to interstate commerce.¹⁹⁹ Section 2119 reads as a general statute criminalizing carjacking under any circumstances, not just where the intent is to sell the car parts in interstate commerce. As discussed above, the court went one step further and held that once an activity is found to impact interstate commerce, “Congress can regulate in its entirety.”²⁰⁰ Perhaps by tying legislation to activities that impact interstate commerce, in this case carjacking, the legislature would be able to regulate in areas otherwise out of reach.

As in *Jones*, the explicit nexus between carjacking and interstate commerce appears to be a superficial one, accomplished primarily by placing the words “interstate commerce” within the text of the statute. The court’s application of the statute results in the conclusion that having a car built in one state and stolen in another is a sufficient nexus between a crime and interstate commerce. This conclusion suggests that adding a reference to interstate commerce in a federal statute may be sufficient to protect the statute from a constitutional challenge based on the Commerce Clause.

IV. CONCLUSION

Narrowing the Nation’s Power is a brief, yet thorough review of the Supreme Court’s shift of power from the federal government to the states. It documents the way in which the Court utilized the sovereign immunity doctrine, increased scrutiny, and the commerce clause to tie the hands of Congress.²⁰¹ Judge Noonan shows that these constitutional principles have considerable impact on federal legislation such as the VAWA²⁰² and ADEA.²⁰³ He explains that this impact on federal statutes affects individuals seeking relief by either invalidating the statute, or holding the state to be immune from suit. Noonan concludes that little can be done to change the Supreme Court’s support of state’s rights and sovereign immunity over the rights of the individual citizen is only partially correct. Although lower federal courts are bound by Supreme Court decisions, they have

199. *Id.*

200. *Id.* at 1036.

201. NOONAN, *supra* note 1, at 3, 120-37.

202. Violence Against Women Act, 42 U.S.C. § 13981(b) (2003).

203. Age Discrimination in Employment Act, 29 U.S.C. §§ 631-634 (2003).

a substantial role in determining how decisions such as *Morrison* and *Flores* are applied in subsequent cases.

For example, *United States v. Cortez*²⁰⁴ and *United States v. Jones*²⁰⁵ decided in the Ninth Circuit Court of Appeals on which Judge Noonan sits, suggest a number of alternatives that Congress could use to sidestep the Supreme Court's decision in *Morrison*.²⁰⁶ The Ninth Circuit cases suggest that a statute with one or more of the following qualities may survive a constitutional challenge based upon *Morrison*: 1) an explicit nexus between a statutory provision and interstate commerce; 2) connection of the subject of the new statute to an object that has traveled through interstate commerce; or 3) an activity that is connected to interstate commerce. These measures do not provide a guarantee that a statute will survive constitutional review, but they do provide some measure of hope that decisions such as *Morrison*,²⁰⁷ and other cases reviewed by Judge Noonan, have not created an insurmountable barrier in the name of state sovereignty against federal protection of the individual.

204. 299 F.3d 1030 (9th Cir. 2002).

205. 231 F.3d 508 (9th Cir. 2000).

206. 529 U.S. 598 (2000).

207. *Id.*