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

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Review of John T. Noonan, Jr., Narrowing the Nation’s Power: The Supreme Court Sides with the States (Univ. of California Press 2002)

Even before opening Judge John T. Noonan, Jr.’s latest book, Narrowing the Nation’s Power: The Supreme Court Sides with the States, one suspects that something is amsiss. The cover photo is a picture of an American flag draped backwards, not the kind of mistake that the author of The Lustre of Our Country: The American Experience of Religious Freedom, which meticulously traced the original understanding of the Constitution’s religion clauses, should have made. But then, at first blush, there is something backwards about a conservative judge such as John Noonan criticizing the conservative Rehnquist Court’s recent federalism decisions, the most successful effort to restore the Constitution’s original limits since the New Deal rendered them virtually meaningless.

The decisions by the high Court that come under Judge Noonan’s scathing attack read like a pantheon of recent conservative favorites. Seminole Tribe of Florida v. Florida (1996) and Alden v. Maine (1999), in which the Supreme Court crafted a doctrine of state sovereign immunity designed to help limit the reach of the federal government, demonstrates for Noonan a “federalism” that is really a misnomer for the old secessionist slogan “states’ rights.” (pp. 2-3). United States v. Morrison (2000), in which the Supreme Court struck down provisions of the Violence Against Women Act as exceeding Congress’s power to regulate commerce among the states, “leave[s] women less
protected by the law than men,” in Noonan’s world. (p. 12). *City of Boerne v. Flores* (1997), in which the Court struck down the Religious Freedom Restoration Act as exceeding Congress’s power to implement the provisions of the Fourteenth Amendment, amounts to judicial “activism,” according to Noonan, an example of the Court being “boldly innovative.” (pp. 6, 9). And the series of cases decided by the Court restricting the reach of the Americans with Disabilities Act leave the elderly and disabled with inadequate remedies for “unequal treatment,” writes Noonan. (p. 12). Noonan even goes so far as to compare the Court’s recent federalism decisions to the notorious decision in *Dred Scott v. Sandford* (1857) and, apparently for Noonan, the equally notorious decisions in *Lochner v. New York* (1905) (which, according to Noonan, “had a negative effect on the conditions of employment for over a quarter century”) and *Carter v. Carter Coal Co.* (1936) (which, heaven forbid, “nearly brought the New Deal to an end”). (p. 13).

With such an assault on the conservative citadel, one might be tempted simply to write off Judge Noonan as yet another Earl Warren or Harry Blackmun, judges who “evolved” toward a more “enlightened” liberalism (and away from any original understanding of the constitution) during their tenure on the bench. Indeed, some of Noonan’s premises are so contrary to the original understanding of the Constitution that his characterization of the Court as a “hitchhiker of history” seems much more apt when applied to own claims. (p. 11). Noonan treats the Constitution’s preamble as a broad grant of power, for example, thus rendering redundant the entire list of Congress’s powers in Article I, section 8, and rendering a nullity the fundamental constitutional doctrine of limited, enumerated powers. (p. 2). He mistakenly notes, in criticizing the
Court’s Free Exercise of Religion decisions in *Employment Division v. Smith* (1990) and *City of Boerne*, that when “Congress adopted the Bill of Rights, . . . the free exercise was set out as our first freedom” (p. 16), apparently overlooking that the First Amendment only became the *first* amendment by virtue of the fact that the first two amendments actually proposed by Congress were not ratified at the time. And, in criticizing the Court’s decision in *Morrison*, Noonan accuses the Court of ignoring an “appeal to history,” but the history to which Noonan looks is the history of 1937, when the Court threw off the supposed shackles of the Constitution’s limits on federal power, not the history of 1789, during which those limits were so carefully wrought.

Still, there are two aspects of Judge Noonan’s critique of the Court’s recent federalism decisions that warrant careful consideration. The more obvious is his criticism of the Court’s Eleventh Amendment state sovereign immunity decisions. Couched in a wonderfully humorous exchange between a mythical federal appellate judge, Samuel Simple, and his ivy-league team of law clerks, Yalewoman, Boaltman, and Harvardman, Noonan decimates the reasoning of the entire line of Eleventh Amendment decisions beginning with *Seminole Tribe* and its historical building blocks, *Ex Parte Young* (1908) and *Hans v. Louisiana* (1890). “It’s a logical mess,” Noonan’s character Yalewoman notes, “and it’s really intolerable. How can people have respect for a system that violates the laws of logic in one of the system’s most important operations?” (p. 47).

Logical mess indeed. The essence of the Court’s modern state sovereign immunity doctrine is that the states entered into the Constitution’s more perfect union with their sovereignty intact, a sovereignty that includes the old Hobbesean notion of governmental immunity from suit unless there is an express waiver of that immunity (in
contrast to the Lockean view adopted by the founders, which recognized the people as
sovereign and the government as mere agent). What this means is that the states cannot
be sued even for violating federal law duly enacted pursuant to powers expressly and, in
some cases exclusively, granted to the federal government in Article I of the Constitution.
This, supposedly, because the Eleventh Amendment to the Constitution so commands.

What the Eleventh Amendment actually provides is vastly different, of course,
particularly when read in light of the specific controversy over the Supreme Court’s
decision in *Chisolm v. Georgia* (1793) that produced it: “The Judicial power of the
United States shall not be construed to extend to any suit in law or equity, commenced or
prosecuted against one of the United States by Citizens of another State, or by Citizens or
Subjects of any Foreign State.” On its face, the amendment says nothing about suits
against a state by its own citizens, yet that non-textual interpretative gloss was added a
century later in the 1890 case of *Hans v. Louisiana*. Moreover, when compared to the
specific language of Article III relied upon by the Supreme Court in *Chisolm v. Georgia*
to uphold diversity suits against the states based on state law, the amendment was
arguably designed simply to counteract the holding in *Chisolm*, and is therefore properly
read as merely a statement about the inability of federal courts to entertain state law
claims against the states based on the accident of diversity of citizenship, not a
pronouncement of state immunity from suits based on federal statutory or constitutional
law. The Court has long held to the broader view, however, and as a result was forced in
the 1908 case of *Ex Parte Young* to create what it has subsequently termed an “obvious
fiction,” namely, that suits to enjoin state officers from enforcing unconstitutional state
laws do not violate the principle of state sovereign immunity. Such suits, which can only
be brought against officers of the state, are permissible, according to the Court, because of the fiction that when acting in defense of unconstitutional state laws they are not really officers of the state.

Quite apart from the utter incoherence of the Court’s recent decisions, *Seminole Tribe* and its progeny are also problematic because, being based on a non-textual, extra-constitutional theory of inherent immunity, the *Seminole Tribe* majority has placed at risk the broader project of restoring some semblance of the Rule of Law to constitutional adjudication, leaving itself open to the otherwise unfair charge that its resort to the original understanding is simply driven by the majority’s preferred results. By criticizing the sovereign immunity cases on the Court’s own originalism terms, Judge Noonan at least suggests an alternative theory—perhaps the Court simply got it wrong.

Which brings us to the second, and much more subtle, critique of the Court’s federalism decisions offered by Judge Noonan. By enhancing the power of the States via its sovereign immunity decisions, and as importantly, preventing federal intrusion upon the states’ exercise of power in select areas drawn off limits by the Court’s own interpretation of the Constitution, the Court has, according to Noonan, really “accreted” power to itself. (p. 13).

The sovereign immunity cases provide a good example of the problem. For the Founders, the division of the people’s sovereign powers between two levels of government was not designed simply or even primarily to insulate the states from federal power. It was designed so that the states might serve as an independent check on the federal government, preventing it from expanding its powers against ordinary citizens. And it was designed so that decisions affecting the day-to-day activities of ordinary
citizens would continue to be made at a level of government close enough to the people so as to be truly subject to the people’s control. The Eleventh Amendment is simply an example of what the Founders accomplished principally through the main body of the Constitution itself. Congress was delegated only specifically enumerated powers (and the necessary means of giving effect to those powers) over subjects of truly national concern; it was not given a general police power to control the ordinary, local activities of the citizenry. By exempting the States from illegitimate exercises of power by the national government (as it did in *Seminole Tribe*) rather than invalidating the illegitimate exercise of power itself (as it did in *United States v. Lopez* when invalidating the Gun Free School Zones Act as beyond Congress’s power to regulate commerce among the states), the Court eliminated the states as the counterbalance to federal power that the Founders believed would inure to the benefit of individual liberty.

Noonan’s critique might be carried to the commerce clause cases, as well. *Lopez* was itself a landmark decision, and had it been consistently applied, would have resulted in the invalidation of literally thousands of federal laws and regulations. Instead, the Court has only invalidated two federal statutes as inconsistent with Congress’s power under the Commerce Clause—both in areas that were already heavily regulated by state governments. With such a piecemeal application of the Constitution’s limits, the doctrine of enumerated powers is transformed from a protection of individual liberty into a turf war between two governments, each fighting for the right to regulate every aspect of our lives, with the Court serving as some grand and final arbiter between the competing claims but not as defender of individual liberty.
This is a serious claim. Unfortunately, the lesson Judge Noonan draws from it is that the Court should abdicate its responsibility for enforcing the Constitution’s limits at all rather than more broadly and consistently enforce the Constitution’s original limits. The conclusion of the book is thus consistent with its cover—the material for a proper flag is there, but the analysis somehow gets backwards in its display. Sometimes you really can judge a book by its cover.