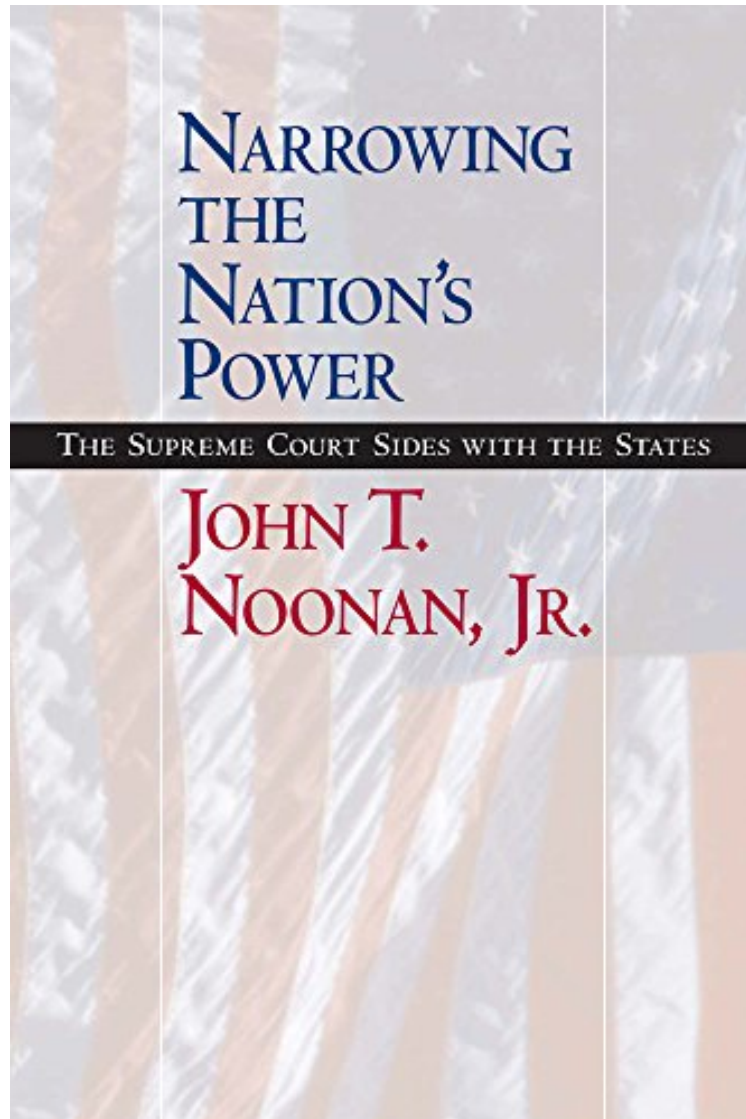


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# **Narrowing the Nation's Power: The Supreme Court Sides with the States**

*John T. Noonan Jr.*

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**John T. Noonan Jr. : Narrowing the Nation's Power: The Supreme Court Sides with the States** before purchasing it in order to gage whether or not it would be worth my time, and all praised *Narrowing the Nation's Power: The Supreme Court Sides with the States*:

1 of 1 people found the following review helpful. Activist Conservative JusticesBy Schmerguls4032 *Narrowing the Nation's Power The Supreme Court Sides with the States*, by John T. Noonan, Jr. (read 2 June 2005) Noonan is a

favorite of mine, and the four books I previously read by him (Contraception: A History of Its Treatment by the Catholic Theologians and Canonists, by John T. Noonan, Jr. (read 5 Jun 1967), Power to Dissolve: Lawyers and Marriages in the Courts of the Roman Curia, by John T. Noonan, Jr. (read 16 Jun 1973)(Book of the Year), The Lustre of Our Country: The American Experience of Religious Freedom, by John T. Noonan, Jr. (read 24 Jan 2001),and The Scholastic Analysis of Usury, by John T. Noonan, Jr. (read 25 May 2005)) were really worth reading, one of them being the best book I read in 1973. This book is a 2002 book attacking the Supreme Court conservative majority's embracement of sovereign immunity, which is that Congress cannot legislate in ways limiting the states, grounded on the 11th Amendment. He assails *City of Roene v. Flores*, 521 U.S. 507, which held the Religious Freedom Restoration Act unconstitutional because congruence and proportionality had not been exercised by Congress--a finding reminiscent of the pre-New Deal days when the Court threw out legislation because the Court did not like it. This is a stunningly well-argued book by a leading conservative thinker in which the five person Rehnquist-voting conservative majority on the Court is shown to be 'activist' and non-respectful of Congress and laws it passes. A really thought-inducing book.9 of 10 people found the following review helpful. A Senior (Judge) Moment...By CooperThis book comes as a disappointment. Prior to reading of *Narrowing the Nation's Power*, I had perused several reviews of it--some praising it and some panning it--and I was actually expecting to really enjoy the book and agree with all of its arguments. Unfortunately, I found myself underwhelmed after reading it.The problem here is not that Senior Judge John Noonan lacks a great intellect--he is an experienced and respected academic and jurist. Nor is Judge Noonan a bad writer. I had read his book on "masks" the month before this work, and thoroughly enjoyed Judge Noonan's scholarship and insights.The problem with Judge Noonan's book is that it is a lost opportunity. There ARE some very legitimate criticisms to be made of the U.S. Supreme Court's state sovereign immunity jurisprudence. Likewise, serious issues abound concerning the Supreme Court's claim to judicial supremacy as well as its employment of "balancing tests" in Section 5 (14th Amendment) cases, and in other cases. However, many of Judge Noonan's better points and critiques in these matters are obscured and lost by his incessant railing against the motives and hidden agendas of the justices with whom he disagrees.Judge Noonan is to be praised for correctly noting that: "To make 'federalism' a slogan for states' rights is to contort the original meaning and to suppress the national component in the original design." Yet, rather than relying upon solid textual and case law grounds in critiquing the state sovereign immunity and Section 5 subsets of the "New Federalism," Judge Noonan quotes the pre-ambule of the Constitution and states that it is his "endeavor" to "lay them as criteria alongside the facts of particular cases and to ask if the results of these cases can be squared with the announced purposes of our constitution." He then employs the abstractions of the pre-ambule to critique the views of justices with whom he disagrees while accusing those same justices of using the abstractions of federalism in their opinions. In so doing he ignores the important question of whether it is just for a governing authority to exceed its lawful limits.The Section 5 cases receiving much of Judge Noonan's attention are *Smith* and *Borne*. I found it interesting, in the least, that Judge Noonan, the attacked the Supreme Court for its respect for the Mormon polygamy cases of the 19th Century. He dismissed them all in a simplistic fashion as discriminatory, when there are more complex issues at stake in those cases.Of course, Judge Noonan is correct in criticizing the Supreme Court for calling Section 1 of 14th Amendment is "self-executing." For in so doing, the Supreme Court gives itself a monopoly over creating and defining the parameters of rights and determining their applicability in specific instances. And the Supreme Court has made use of its monopoly with a new test in Section 5 cases: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Judge Noonan rightly criticizes the Supreme Court for adopting that test and for its use of special inspections of the congressional record for convincing evidence of the evils being legislated against, as mechanisms to second-guess the Congress and undermine its duty under the Constitution.The book takes a rather strange twist in Chapters 2 and 3, with Judge Noonan writing in the third person. Although somewhat distracting, he does manage to convey the mess that is the *Ex Parte Young* doctrine, with all its unpredictable and contradictory exceptions and exceptions to the exceptions' exceptions.Since I do not at this stage of my legal career and education have a thorough understanding of patents and trademarks, I do not have any comments on Chapter 4, which deals with those subjects.Judge Noonan's chapter on the Violence Against Women Act and the Commerce Clause is rather embarrassing, for he again employs attacks on the motives of the justices with whom he disagrees and gives the other justices a pass on problems in their own opinions (thereby seemingly accepting "process federalism.") Again, another blown opportunity, because there are some points to be made that that act could pass muster under the Commerce Clause in conjunction with the Necessary and Proper Clause.This work is not without good insight and points, but those really have to be picked out from amongst all of the other, overly-simplistic and unfair charges that Judge Noonan makes.6 of 9 people found the following review helpful. Exposing An Activist CourtBy A CustomerJudge Noonan does not need to hide behind difficult-to-understand legalese in order to expose the Rehnquist Court's 5-4 judicial activism. The book puts a human face on the individuals whose rights have been ignored by a bare majority of justices who are more interested in protecting the "dignity" of the States than the dignity of the People -- though that concern for State "dignity" was not apparent when the same 5 justices decided *Bush v. Gore*. Any educated reader will easily understand Judge Noonan's description of the Rehnquist Court's outrageous activism -- a critique all the more stinging because it comes from a Reagan-appointed

judge who has never been accused of being a "liberal." As Judge Noonan observes, the 5 justices' "interpretation" of the Constitution seems more like an interpretation of the Articles of Confederation -- a document that failed to provide for an effective and independent federal government, thereby requiring enactment of the Constitution in order to preserve the United States. Highly recommended for all -- but especially recommended for lawyers and law students, who need to understand this revolutionary return to the properly discredited States Rights movement.

Narrowing the Nation's Power is the tale of how a cohesive majority of the Supreme Court has, in the last six years, cut back the power of Congress and enhanced the autonomy of the fifty states. The immunity from suit of the sovereign, Blackstone taught, is necessary to preserve the people's idea that the sovereign is "a superior being." Promoting the common law doctrine of sovereign immunity to constitutional status, the current Supreme Court has used it to shield the states from damages for age discrimination, disability discrimination, and the violation of patents, trademarks, copyrights, and fair labor standards. Not just the states themselves, but every state-sponsored entity--a state insurance scheme, a state university's research lab, the Idaho Potato Commission has been insulated from paying damages in tort or contract. Sovereign immunity, as Noonan puts it, has metastasized. "It only hurts when you think about it," Noonan's Yalewoman remarks. Crippled by the states' immunity, Congress has been further brought to heel by the Supreme Court's recent invention of two rules. The first rule: Congress must establish a documentary record that a national evil exists before Congress can legislate to protect life, liberty, or property under the Fourteenth Amendment. The second rule: The response of Congress to the evil must then be both "congruent" and "proportionate." The Supreme Court determines whether these standards are met, thereby making itself the master monitor of national legislation. Even legislation under the Commerce Clause has been found wanting, illustrated here by the story of Christy Brzonkala's attempt to redress multiple rapes at a state university by invoking the Violence Against Women Act. The nation's power has been remarkably narrowed. Noonan is a passionate believer in the place of persons in the law. Rules, he claims, are a necessary framework, but they must not obscure law's task of giving justice to persons. His critique of Supreme Court doctrine is driven by this conviction.

From Publishers Weekly This is a readable introduction to a legal issue that may sound obscure but in fact has an impact on issues relating to discrimination and other important areas of the law. Noonan, a senior federal appellate judge, dissects an emerging trend in recent Supreme Court decisions bolstering the sovereign immunity of the 50 states that is, saying the states and their many agencies (including state-funded universities, for example) are immune from lawsuits by individuals for money damages. Writing as a historian, Noonan examines the common-law origins of the doctrine that a sovereign monarch is immune from suit; he finds the doctrine absent from the Constitution. Nevertheless, as he recounts, a connected series of cases decided by the Supreme Court since 1997 has invoked sovereign immunity. For example, the Court has decided that individuals may not recover compensation from states (or from many state-related entities) for patent infringement or for discrimination on the basis of age or disability. Similarly, federal laws granting remedies for violence against women or protecting religious freedom cannot be enforced by individuals suing a state. Writing as an advocate, Noonan briefs the case against what he views as the Court's sudden expansion of sovereign immunity. Not only does state immunity lack a constitutional basis, Noonan argues, but the doctrine also improperly interferes with Congress's power to enact protections for Americans on a national scale. Noonan concludes that sovereign immunity is an outmoded abstraction, disconnected from concrete injustices inflicted by the states, and remains "without justification of any kind today." Noonan's compressed and subtle treatment of current immunity jurisprudence should trigger further debate on this important area of law. Copyright 2002 Cahners Business Information, Inc. From Library Journal Written in an informal style, federal appellate judge Noonan's current work attempts to warn all citizens of a dangerous direction taken by the current Supreme Court. The issue in contention is as old as our republic: the rights of the individual states vs. the power of federal authority. What is new is the conservative majority's use of the 11th Amendment to the U.S. Constitution to justify the expansion of the sovereign immunity enjoyed by each of the 50 states. According to Noonan, this concept has become the Court's way of restricting the powers of Congress and enlarging the areas where the states can escape effective federal control. The author traces the history of the 11th Amendment to the era of Chief Justice John Marshall, who properly noted that in the nation's early years, all 13 states were debtors, and because some of the creditors were aliens, the states needed and were granted immunity from lawsuits by individual citizens for reasons that no longer exist. The Court's current claim that the sovereignty of the states is constitutional, notes the author, rests on a disingenuous interpretation of both the legislative history of the amendment and its subsequent application. As a result, individual states are now immune from suits impacting finance, debt, injury, patent and copyright infringement, employment discrimination, and gender bias. In this highly recommended work, the author convincingly sounds the alarm. Philip Y. Blue, New York State Supreme Court Criminal Branch Law Lib., New York Copyright 2002 Reed Business Information, Inc. ". . . [A] blistering book arguing that the court's conservatives are actually engaged in a huge power grab." -- New York Times "A stinging and even startling critique of recent decisions that have shifted the balance of power in the country." -- Linda Greenhouse, New York Times Book "Noonan's compressed and subtle

treatment of current immunity jurisprudence should trigger further debate on this important area of the law." -- Publishers Weekly, 6/17