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## Formalism, Pragmatism, and the Conservative Critique of the Eleventh Amendment

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# FORMALISM, PRAGMATISM, AND THE CONSERVATIVE CRITIQUE OF THE ELEVENTH AMENDMENT

*Michael E. Solimine\**

NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES. By *John T. Noonan, Jr.* Berkeley: University of California Press. 2002. Pp. ix, 203. Cloth, \$24.95.

## INTRODUCTION: THE EMBARRASSING ELEVENTH AMENDMENT

For many years the Second Amendment to the Constitution<sup>1</sup> was construed by most authorities to grant a communal right to bear arms, through state militias and the like. Some years ago Sanford Levinson labeled this interpretation “embarrassing” to liberal scholars.<sup>2</sup> That characterization was deserved, Levinson argued, since liberal academics had been eager to defend expansive interpretations of other rights-granting provisions of the Constitution.<sup>3</sup> But they failed to do so when it came to language in the Second Amendment, which could be plausibly construed to grant an *individual* right to bear arms. The failure might be attributed, in part, to the conservative, anti-gun-control agenda that such an interpretation might serve.

A similar dynamic<sup>4</sup> is at work for conservative scholars and the Eleventh Amendment.<sup>5</sup> Read literally, without the nuances of history

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1. “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

2. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

3. *Id.* at 642.

4. I do not contend that the analogy is exact. For one thing, the Eleventh Amendment on its face purports to be a rule of construction aimed at Article III, while the Second Amendment is a free-standing provision. For another, the Supreme Court’s current view of the Eleventh Amendment, whatever else you care to say about it, is at least arguably supported by long-standing precedent. In contrast, the Court’s Second Amendment jurisprudence is characterized, to date, by its paucity.

5. “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.” U.S. CONST. amend. XI.

and case law, the Amendment might be read as a mundane house-keeping measure for federal courts. On its face, it just prohibits suits in federal court against a state by citizens of another state, or those of a foreign state. But the Amendment has not been read literally:<sup>6</sup> today its reach extends to any suit in federal court for damage relief by any citizen against an unconsenting state, with only a limited opportunity for Congress to statutorily authorize such suits. And by analogy, the penumbra of the Amendment extends to lawsuits for damages based on violations of federal law against states in their own courts. These interpretations should be embarrassing to conservatives, since they are at war with the text of the Amendment, and draw little support from history or what we know of the intent of the framers and ratifiers of the Amendment. Yet many conservatives cheer on — or do not criticize — the Rehnquist Court's Eleventh Amendment jurisprudence, perhaps because it resonates with a pro-federalism policy agenda.<sup>7</sup>

One conservative who is embarrassed by the Eleventh Amendment jurisprudence is Judge John Noonan,<sup>8</sup> as revealed in his recent monograph, *Narrowing the Nation's Power*. Judge Noonan comes to the topic with impeccable scholarly and conservative credentials. A multidegree graduate of Harvard, he served on the law faculties of Notre Dame and Boalt Hall, published numerous books and articles on religion, ethics, and constitutional law, and was appointed to the Ninth Circuit by President Reagan in 1985.<sup>9</sup> He is now on senior status in that court. Judge Noonan's sharp critique of the Rehnquist Court's federalism jurisprudence in general, and the Eleventh Amendment cases in particular, has drawn notice and praise in the mainstream media.<sup>10</sup> The Senate Judiciary Committee even held a hearing on the book.<sup>11</sup>

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6. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996).

7. As just one example, Kenneth Starr's recent book-length review of the constitutional jurisprudence of the Rehnquist Court makes only brief mention of the Eleventh Amendment cases. KENNETH W. STARR, *FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE* 231 (2002).

8. Judge, United States Court of Appeals for the Ninth Circuit.

9. For a detailed profile of Judge Noonan, see 2 *ALMANAC OF THE FEDERAL JUDICIARY*, at 9th Cir. 79-81 (2003 ed.) [hereinafter 2 *ALMANAC*].

10. E.g., Emily Bazelon, *Sounding Off*, *LEGAL AFFAIRS*, Nov./Dec. 2002, at 30; Linda Greenhouse, *Beyond Original Intent*, *N.Y. TIMES*, Aug. 18, 2002 (Book Review), at 8 (reviewing *Narrowing the Court's Power*); *Judicial Hypocrisy*, *N.Y. TIMES*, Aug. 21, 2002; *Power to the State*, *A.B.A. J.*, Jan. 2003, at 38 (roundtable discussion of *Narrowing the Court's Power*).

11. The hearing was convened by Senator Charles Schumer (D-N.Y.), and Senators Hatch (R-Utah) and Sessions (R-Ala.) attended. Judge Noonan and Cardozo law professor Marci Hamilton made presentations. *Narrowing the Nation's Power: The Supreme Court Sides with the States: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2002)

Yet given the enormous, and mostly critical, scholarly commentary<sup>12</sup> on the Court's Eleventh Amendment cases, one must ask what Judge Noonan's book adds to the literature, which has been described as "not only voluminous but dazzling," and unsurpassed in its "insight, elegance, and sophistication . . . by any similar body of work in all of constitutional law."<sup>13</sup> This Review answers that question. Part I of the Review surveys the tone and substance of Judge Noonan's book. Part II discusses conservative legal opinions on the Eleventh Amendment. The first two parts are concerned mainly with a formalist critique of Eleventh Amendment doctrine, that is, analyzing the cases in light of precedent, history, and deductive logic. Drawing on arguments raised by Judge Noonan, the third and fourth Parts turn to a more pragmatic critique of those cases. Part III considers why the Rehnquist Court has seemingly decided so many cases raising Eleventh Amendment issues, and suggests that one of the reasons is the activism of state attorneys general in aggressively litigating the cases, as parties or amici curiae, in the Supreme Court. An empirical study on the states' amicus activity in Eleventh Amendment cases is presented there. Part IV revisits additional rationales for, and empirical effects of, the Eleventh Amendment cases. With regard to the former, I address whether current Eleventh Amendment doctrine has some functional justifications, whatever its doctrinal shortcomings. With regard to the latter, I revisit the claim of some that there are gaping exceptions to the doctrine that, taken with the purported availability of state-law remedies, considerably ameliorate the supposed negative effects of the doctrine on the enforcement of federal law. The conclusion briefly outlines an alternative path the conservative Justices on the Court could have, and perhaps should have, taken in shaping Eleventh Amendment doctrine.

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[hereinafter *Hearing on Narrowing the Nation's Power*] (transcript of hearing on file with author). Senator Schumer mentioned that the book came to his attention when he read Linda Greenhouse's review in the *New York Times*. *Id.* at 1. After praising the book, Senator Schumer added that the purpose of the hearing was to explore Judge Noonan's ideas on federalism and related issues. *Id.* at 8. Professor Hamilton had been invited, he observed, to "have a worthy co-witness who doesn't see things quite the same way." *Id.*

12. Even a selective listing of the scores of law review articles would take up a lengthy footnote. For example, one recent compilation of the literature since 2000 alone listed twenty-five articles and three symposia. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 1066-67 n.12 (5th ed. 2003) [hereinafter HART & WECHSLER].

13. John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49 (1998). For further discussion of the scholarship on point, see James E. Pfander, *Once More Into the Breach: Eleventh Amendment Scholarship and the Court*, 75 NOTRE DAME L. REV. 817 (2000).

## I. JUDGE NOONAN'S ARGUMENT

In addition to being embarrassed, Judge Noonan is not coy about his position. In a helpful prologue marked by clear, jargon-free writing — as is the balance of the book — he observes that the Court's recent federalism cases are at "the center of an explosive package" of expanding state sovereign immunity, at the expense of Congressional power that results in a federal "right without a remedy" (p. 4). The Eleventh Amendment cases are "boldly innovative" (p. 9) because they have little connection, he says, to the text or original intent of the Amendment. The majority opinions themselves make little attempt, in his view, to justify a broad interpretation of the Amendment in light of precedent, logic, or practical difficulties of the state defendants.

As the title of the book reflects, Judge Noonan is concerned with the whole federalism jurisprudence of the Rehnquist Court. He spends two separate chapters critically examining *Morrison v. United States*<sup>14</sup> and *City of Boerne v. Flores*,<sup>15</sup> where Court majorities struck down provisions of the Violence Against Women Act and the Religious Freedom Restoration Act, respectively, as beyond the constitutional powers of Congress. But the bulk of the book considers the Eleventh Amendment cases.<sup>16</sup>

Those cases will be familiar to many readers, and only the briefest summary is necessary here.<sup>17</sup> The doctrinal story begins with *Chisholm v. Georgia*,<sup>18</sup> in 1793, where the Court held that sovereign immunity did not bar a suit in assumpsit by a South Carolina citizen against Georgia, as it fell within Article III's grant of judicial power over controversies "between a State and Citizens of another State."<sup>19</sup> With a swiftness remarkable for that period or any other, the Eleventh

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

15. 521 U.S. 507 (1997).

16. Perhaps curiously, Judge Noonan makes only passing mention, p. 125, of the most controversial of the Rehnquist Court's Commerce Clause cases, *United States v. Lopez*, 514 U.S. 549 (1995). *Lopez* held that a federal law banning a firearm in a school zone went beyond Congress's power to regulate interstate commerce. Elsewhere he had indicated that *Lopez* was correctly decided. *Hearing on Narrowing the Nation's Power*, *supra* note 11, at 41. Principled distinctions can be drawn between cases involving the Commerce Clause and those involving the Eleventh Amendment, starting with the text and apparent Framers' intent of each clause. So one could be critical of the Court's Eleventh Amendment jurisprudence while supportive of the Commerce Clause cases. That said, both lines of cases rely, in part, on deference to the record developed by Congress in passing statutes. And in both lines of cases, the majority of the Court has usually been nondeferential to congressional judgments (as reflected in the record) as to the need for the legislation.

17. For fuller discussions of the jurisprudence of the Eleventh Amendment, see HART & WECHSLER, *supra* note 12, at 973-1066, and LARRY W. YACKLE, *FEDERAL COURTS* 367-411 (2nd ed. 2003).

18. 2 U.S. (2 Dall.) 419 (1793).

19. U.S. CONST. art. III, § 2, cl. 1.

Amendment was passed to overrule that holding within two years.<sup>20</sup> What more, if anything, it was intended to do remains controversial to this day. A century later in *Hans v. Louisiana*,<sup>21</sup> the Court held that the intent of the Framers, though not conveyed by a literal reading of the text, was to bar federal question suits for damages in federal court by citizens of a state against that state.

But several exceptions seemingly blunted the broad ruling in *Hans*. On the same day *Hans* was decided, the Court held the ruling did not apply to suits against political subdivisions of a state.<sup>22</sup> During the Progressive Era, the Court held in *Ex parte Young*<sup>23</sup> that the Amendment did not bar injunctive relief in federal court when the state official was named as the defendant. The Court in the 1970s held that the *Young* exception did not cover injunctive suits against state officials that had the effect of a retroactive damage award drawn from the state treasury.<sup>24</sup> But only two years later, a unanimous Court held in *Fitzpatrick v. Bitzer*<sup>25</sup> that Congress could statutorily abrogate state immunity in federal court by passing legislation under Section Five of the Fourteenth Amendment.

*Fitzpatrick* seems to have been the high-water mark of the expansion of exceptions to a broad reading of the Eleventh Amendment. In the 1980s the Court required that Congress clearly state in the text of a statute that sovereign immunity was meant to be abrogated.<sup>26</sup> At the end of that decade a fractured Court held that Congress could statutorily abrogate under its Article I powers as well,<sup>27</sup> but that was overruled in 1996 by *Seminole Tribe of Florida v. Florida*.<sup>28</sup> Then the Court began to restrict Congress's Section Five power. Building on the *Boerne* case, which did not involve the Eleventh Amendment, the Court insisted that the abrogating statute must be based on a legisla-

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20. "A constitutional amendment to overrule *Chisholm* was introduced in the Senate only two days after the decision." HART & WECHSLER, *supra* note 12, at 979. Congress approved the amendment less than a year after the decision, and within a year later the requisite number of states had approved the amendment. H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 31, 218 n.35 (2002).

21. 134 U.S. 1 (1890).

22. *Lincoln County v. Luning*, 133 U.S. 529 (1890).

23. 209 U.S. 123 (1908).

24. *Edelman v. Jordan*, 415 U.S. 651 (1974).

25. 427 U.S. 445 (1976).

26. See *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985). In earlier cases the Court had suggested, though less explicitly, that congressional statutes should speak with clarity on whether suit against a state was authorized. See *Edelman*, 415 U.S. at 675-77; *Employees of the Dep't of Pub. Health and Welfare v. Dep't of Public Health and Welfare*, 411 U.S. 279, 284-85 (1973).

27. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

28. 517 U.S. 44 (1996).

tive record that demonstrates that the remedy created (a private cause of action for damages against a state in federal court) is proportionate to the injury (state violation of a federal constitutional right embodied in Section One of the Fourteenth Amendment). On three of four occasions the Court has found that abrogating legislation did not meet this level of scrutiny, and hence the legislation was found unconstitutional.<sup>29</sup> And equally if not more controversially, the majority of the Court in *Alden v. Maine*<sup>30</sup> in 1999 held that the penumbra of the Eleventh Amendment did not permit Congress to statutorily authorize private suit for damages against unconsenting states in state court.

Judge Noonan tells this story at greater length, though much of it will be familiar to experts in the field. Still, he has useful insights and nuances to the story. For example, he discusses, and finds wanting, the purported Framers' intent cited by the *Hans* Court. Evidence that some of the Framers wished to preserve a broad understanding of sovereign immunity (and thus apparently contradicted by *Chisholm v. Georgia*) is best read, he says, as restricted to diversity jurisdiction, not federal-question jurisdiction, and as not limiting the power of Congress.<sup>31</sup> Elsewhere, he notes the "illogic" of *Ex parte Young*<sup>32</sup> —

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29. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Title I of Americans with Disabilities Act ("ADA")); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act ("ADEA")); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (Patent Remedy Act).

For the 2002 Term, the Court agreed to review two cases that raised Eleventh Amendment challenges to provisions of federal law that authorized a private suit for damages against states in federal court. In *Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003), a six to three majority of the Court upheld the constitutionality of the private right of action found in the Family Medical Leave Act ("FMLA"). *Fitzpatrick*, in my view, is still the high-water mark of the Court's expansion of exceptions, even after *Hibbs*. In the latter case, authored by Chief Justice Rehnquist (the author of the majority opinions in *Seminole Tribe* and *Garrett*), the Court scrupulously adheres to the analytical framework of the post-*Boerne* cases. *But see id.* at 1986 (Kennedy, J., dissenting) (arguing that *Garrett* and *Kimel* "should counsel far more caution than the Court shows in holding [the FMLA provision] is somehow a congruent and proportional remedy to an identified pattern of discrimination.").

The Court also agreed to hear a challenge to Title II of the ADA. See *Hason v. Med. Bd. of Cal.*, 279 F.3d 1167 (9th Cir. 2002), *cert. granted* 537 U.S. 1028 (U.S. Nov. 18, 2002) (No. 02-749). At the request of the petitioner in the case, however, the Court dismissed certiorari. 123 S. Ct. 1779 (2003). Reportedly, the California Attorney General withdrew the case without having reached a settlement because the case — attacking a provision of the ADA — turned out to be a political liability. Apparently it was the first time a case before the Court had been dismissed by a party, which had successfully obtained certiorari, in the absence of a settlement. See Charles Lane, *On Second Thought . . .*, WASH. POST, Apr. 11, 2003, at A25.

30. 527 U.S. 706 (1999).

31. See pp. 66-67, 72-74. Judge Noonan thus seems to fully endorse the "diversity interpretation" of the Amendment. For further discussion of the diversity interpretation, see HART & WECHSLER, *supra* note 11, at 983-85; James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998); and Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1 (2002). For a thorough discussion of the historical context of *Hans*, concluding that the decision was driven, in part, by racist policies of the post-Reconstruction Era, see Edward Purcell, Jr., *The*

the defendant official is a state actor, but is stripped of immunity by virtue of being alleged to have violated federal law — and argues that the “real irony is that a formal oxymoron should be a cornerstone of . . . jurisprudence.”<sup>33</sup> But the case can also be regarded as “a masterful compromise” (p. 46), permitting plaintiffs to prospectively stop unlawful conduct by states but shielding the states from retroactive damage relief. Perhaps this “immunity by half,” Judge Noonan argues, should work the other way around:

wouldn't it make more sense to say that an ongoing project of the state could not be halted by a litigious individual, but if the state was found in fact to have violated a constitutional right that it should make up for the damage it has caused? That way, you wouldn't let important work be interrupted but the states would be on notice that they would have to pay if they were mistaken.<sup>34</sup>

Judge Noonan, I think, has this half right. Virtually everyone agrees<sup>35</sup> that *Ex parte Young* is illogical and incoherent, yet most critics defend *Young* and attack *Hans*.<sup>36</sup> The latter case may be wrongly decided, but its ruling is hardly incoherent. To help make Eleventh Amendment jurisprudence more coherent, if nothing else, *Young* could be overruled. Moreover, *Young* has shaky jurisprudential origins. It was decided only three years after *Lochner*<sup>37</sup> and like that case, struck down a piece of state regulation from the Progressive Era. *Young*, much like *Lochner*,<sup>38</sup> was subject to harsh contemporary criticism,<sup>39</sup> and only gradually achieved iconic status later in the

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*Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, History, and the “Federal Courts,”* 81 N.C. L. REV. 1927 (2003).

32. 209 U.S. 123 (1908).

33. P. 47. But see John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1032 n.325 (2002). Ferejohn and Kramer argue that *Ex parte Young* should not be regarded as a fiction, because properly understood, sovereign immunity always permitted officials (as opposed to the sovereign) to “be sued personally for illegal action taken in their official capacity . . . [a]ll *Ex parte Young* did was to enlarge this cause of action in a thoroughly conventional manner to reflect new activities not already covered by common law”.

34. P. 46 (citing Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury and Section 1983*, 53 STAN. L. REV. 1311, 1328-29 (2001)).

35. Even the Court. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105, 111-14 & n.25 (1984) (describing *Young* as a “fiction”).

36. E.g., Vicki Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495 (1997).

37. *Lochner v. New York*, 198 U.S. 45 (1905).

38. As detailed in Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001).

39. There were calls in Congress to statutorily limit or overrule *Young*, but two years later Congress settled on a compromise of sorts, by passing legislation establishing three-judge district courts. That statute (now codified as amended in 28 U.S.C. § 2284 (2000)) required that three federal judges (typically, two district judges and one circuit judge) convene to decide whether a request for conjunctive relief under *Young* should be granted. For dis-



twentieth century. Coherence, of course, may not be the only value, and perhaps one could live with an incoherent decision to ameliorate a badly decided one. So, in hindsight, it can be seen as a "masterful compromise."

On the other hand, Judge Noonan is less persuasive in suggesting that *Young* ought to be turned around. He suggests forward-looking injunctive relief could be prohibited, but retrospective damages relief could be permitted. This notion, though, seems wrong. It permits a state to continue in violation of constitutional norms, as long as it pays off past victims of the conduct. This would have permitted, for example, the states in school desegregation cases to continue to run segregated schools even after a federal court found them to violate the Fourteenth Amendment.<sup>40</sup> In contrast, the current *Young* doctrine shields the state from accumulated damages, which might have occurred because the state thought, in good faith, that its actions were constitutional. It is also more consistent with the asserted concern of sovereign immunity to protect the fiscal integrity of states. Expenses associated with prospective relief can be budgeted contemporaneously with other expenses, while retrospective damages awarded on an ad hoc basis presumably cause more havoc for state fiscal planning.<sup>41</sup> Correcting the state for the future while forgiving it for the past seems a better compromise (if compromise is necessary) than the other way around.<sup>42</sup>

In reviewing the more recent cases, Judge Noonan finds them unduly restrictive of congressional power and a "present danger to the exercise of democratic government" (p. 140). For example, he observes that Congress is in a better position than the Court to measure proportionality, and that the Court's insistence on a seemingly massive record of state violation of federal law ignores the fact that Congress does not irrationally rely on anecdotes in law making (pp. 146-48). Ultimately, Judge Noonan argues for a "middle ground,"<sup>43</sup> a

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cussion of the immediate reaction to *Young*, see OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910*, at 218-21 (1993), and Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 83-84 (1996). For discussion of the subsequent effect of *Young* on federal courts jurisprudence, see EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 43-45 (2000), and 17 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4231 (2d ed. 1988).

40. For an argument positing such a scheme, see DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 47-64 (1992).

41. A point suggested, albeit briefly, by the Court in *Edelman v. Jordan*, 415 U.S. 651, 666 n.11 (1974).

42. I am particularly indebted to Ann Althouse for her insightful comments on several of the points raised here, and elsewhere, in this Review.

43. Pp. 83, 119. As he observes, pp. 82-83, the term appears in Alexander Hamilton's discussion of sovereign immunity in *THE FEDERALIST* NO. 81.

term he employs but does not precisely define. We can infer, I think, that he prefers some literal interpretation of the Amendment, but can live with the status quo as it existed until *Boerne*: a broad interpretation of the Amendment, coupled with broad exceptions, including recognition of a robust congressional power (under Section Five if nothing else) to abrogate the immunity.<sup>44</sup>

Another point Noonan does not entirely make clear is its intended audience. As noted, the book is useful but not especially revelatory to experts on federal courts. But that's a relatively small group, and Judge Noonan's helpful exposition of this area of law is probably most intended for academics and policymakers not steeped in the arcana of federal jurisdiction. The text, in a reader-friendly font, is only 156 pages, with 36 pages of endnotes, where he cites relevant portions of the considerable academic literature. Rather than relying on mundane narrative, Judge Noonan sets out large parts of his discussion as an exchange between a hypothetical federal judge and his law clerks. He also enlivens the discussion by telling us, though not at excessive length, about the parties and attorneys<sup>45</sup> involved in the cases. His tone

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44. There is considerable support for Judge Noonan's position that the recent federalism cases are based on an unrealistic conception of the congressional lawmaking process, and unfairly impose new standards of review upon statutes passed prior to *Boerne*. See A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328 (2001); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Phillip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002). But see Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169 (2001) (arguing that due to interest group pressures and other reasons, Congress's superior fact-finding capability, as compared to the Courts, often is not fully brought to bear on legislation). The critical literature may need to be revised in light of *Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003), in which the majority, in the course of upholding a challenged provision of the FMLA, carefully and at length examined the legislative record built up over several years in Congress, prior to the passage of the law in 1993. *Id.* at 1978-81.

As an example of what he regards as the pernicious "impact of the *Boerne* criteria on the federal system," p. 100, Judge Noonan points out that not only the Supreme Court, but a three-judge Court of Appeals panel or a sole district judge, can "function as the censor of Congress," p. 100, by closely examining the record before Congress in these cases. I don't see how that point is related to his substantive criticism of the *Boerne* criteria. Under any standard of review, any Article III judge at any level of the federal system (and indeed state court judges) is empowered to declare acts of Congress unconstitutional.

45. P. 35 (mentioning counsel for both sides in *Boerne*); p. 62 (mentioning counsel in *Chisholm v. Georgia*). A quite different discussion of counsel appears in one of the recent articles sharply critical of the recent Eleventh Amendment cases. Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367 (2002). There, Professor Law, while discussing a federal district court decision upholding a state's Eleventh Amendment challenge to a portion of the Medicaid laws, points out that the judge sua sponte invited Ohio attorney Jeffrey Sutton to argue that issue. *Id.* at 393. Sutton, as Law tells us, successfully argued for the state in *Garrett*, is a member of the Federalist Society, and has been nominated to the Sixth Circuit by President Bush. *Id.* at 393-94. She does not state why these facts are relevant to her discussion of the issue at hand. As best as I can tell, she does not reveal counsels' identity or backgrounds in the other cases

throughout, almost without exception,<sup>46</sup> is measured and objective, making it a model of academic discourse on the Eleventh Amendment, or any other topic.

## II. CONSERVATIVES AND THE ELEVENTH AMENDMENT

Judge Noonan's book gained attention in some quarters<sup>47</sup> because the author was a presumed conservative criticizing the putative conservative federalism decisions of five members of the Court. The apparent apostasy of Judge Noonan was hard to ignore. But these characterizations beg the question of what is, or should be, a *conservative* critique of the Eleventh Amendment.

Richard Fallon recently revisited this issue.<sup>48</sup> He acknowledges that the " 'conservative' label is easier to apply than to define," and that "the relationship between a commitment to constitutional federalism and other conservative values is by no means always obvious."<sup>49</sup> Nonetheless, he sketches out several aspects of judicial federalism in this context. One dimension is substantive conservatism, which generally means disfavor of many civil-liberties and civil-rights claims, and suspicion of government regulation except when used to protect "traditional values and structures."<sup>50</sup> Another dimension is methodological conservatism, which generally favors forms of originalism and textualism in interpreting constitutional and statutory provisions, coupled with respect for precedent and the desire to change precedent in only small, incremental steps.<sup>51</sup> A final dimension is institutional conservatism, which often favors a strong presidency, is suspicious of

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she discusses. Cf. Lee A. Casey & David B. Rivkin, Jr., *Devil's Advocates: The Danger of Judging Lawyers by Their Clients*, POL'Y REV., Feb. & Mar. 2002, at 15 (arguing that for a variety of reasons, judicial nominees, and lawyers in general, should not be judged on the identity of their clients or on the arguments, however unpopular, they make on behalf of clients). Sutton was confirmed by the Senate in April of 2003.

46. Admirably, Judge Noonan eschews efforts to engage in "psychobiography" of the Justices, and for the most part does not focus on or name particular Justices. P. 8. Nor does he discuss or speculate on the presumed policy or ideological agendas of the Justices. At one point, however, while discussing *Kimel*, involving the ADEA, he mentions in passing that almost all of the Justices are older, but are protected from job discrimination by their Article III status. P. 112. Of course that's true, but it does little to advance the discussion to mention the personal characteristics of the Justices. Cf. RICHARD A. POSNER, *PUBLIC INTELLECTUALS: A STUDY OF DECLINE* 49-50 (2001) (discussing situations when ad hominem arguments may be appropriate).

47. See, e.g., Greenhouse, *supra* note 10.

48. Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002).

49. *Id.* at 434.

50. *Id.* at 447. As Fallon points out, these categories are "crude" and "[s]elf-identified political conservatives include both libertarians . . . and social conservatives," *id.*, who often take different positions on the propriety of government regulation in various contexts.

51. *Id.* at 448-50.

federal legislative power, and seeks to protect the prerogatives of state and local government, vis-à-vis the national government.<sup>52</sup>

According to Fallon, the Court's Eleventh Amendment jurisprudence does not fare well under the lens of methodological conservatism. The expansive interpretation of the Amendment in *Hans*, he says, finds little support in the constitutional text or the original understanding of the Framers.<sup>53</sup> Moreover, the recent cases have expansively interpreted *Hans* itself<sup>54</sup> and have aggressively overturned precedent.<sup>55</sup> From originalism premises, Fallon finds the diversity interpretation the best reading of the Amendment.<sup>56</sup>

Fallon's views are reflected in the writings of conservative<sup>57</sup> legal scholars on the Court's Eleventh Amendment jurisprudence. Several writers forthrightly defend the expansion of sovereign immunity on the originalist grounds advanced by the *Hans* Court.<sup>58</sup> Several other writers, unconvinced by that reading of the Framers' intent, and discomfited by the tension between *Hans* and the text, advance other

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52. *Id.* at 450-51. For a similar catalog of conservative legal thought, see Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1182-1203 (2002).

53. Fallon, *supra* note 48, at 481.

54. As Fallon, and others, point out, the *Hans* opinion is not without ambiguities, and is arguably susceptible to a narrow reading that establishes a broad reach of state sovereign immunity as a matter of federal common law only, thus permitting it to be abrogated by any congressional power. *Id.* at 481-82. The Court majority has all but rejected that narrower reading. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 79-80 (2000); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 68 (1996).

55. Fallon, *supra* note 48, at 482. The charge that the majorities in the recent Eleventh Amendment cases have eagerly overturned precedent seems overdrawn. While *Seminole Tribe* overruled *Union Gas*, see *supra* notes 27-28 and accompanying text, the latter case was only seven years old, and few have made the effort to defend the result in *Union Gas*. Cf. Ferejohn & Kramer, *supra* note 33, at 1032 n.328 (stating that *Union Gas* "must stand as one of the Court's all-time most tortured and poorly reasoned opinions"). On the other hand, the dissenters frequently call for *Hans* and more recent cases (like *Seminole Tribe*) to be overruled. *E.g.*, *Kimel*, 528 U.S. at 97-99 (Stevens, J., dissenting).

56. Fallon, *supra* note 48, at 443-44.

57. Here and elsewhere in this Review, I use the term "conservative" to mean scholars that, by my reading, generally take positions on federal-court issues that most would regard as examples of conservative legal thought. I agree with Fallon that crude ideological labels are difficult to define precisely, and should only be used with caution.

58. *E.g.*, David P. Currie, *Ex Parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547 (1997); Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485 (2001). Indeed, so convinced is Professor Hill of the constitutional basis of *Hans* that he argues *Fitzpatrick* was wrongly decided. *Id.* at 529-31. In a similar vein, one group has filed amicus briefs in recent Eleventh Amendment cases advising the Court to overrule *Fitzpatrick* or *Ex parte Young*, on the basis that those decisions are inconsistent with *Hans*. See Brief Amicus Curiae of Coalition For Local Sovereignty in Support of Petitioner at 2-26, *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (No. 99-1240) (arguing *Fitzpatrick* should be overruled); Brief Amicus Curiae of the Coalition For Local Sovereignty in support of the Respondent at 7, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (No. 98-0791) (arguing *Young* should be overruled).

originalist or textual interpretations.<sup>59</sup> Still other conservative writers seem to vaguely approve of *Hans* and more recent decisions, but by my reading make little extended effort to defend *Hans* and its progeny on originalist grounds.<sup>60</sup>

To be sure, conservative writers have not cornered the market on abandoning preferred interpretational methodologies when it might appear, to the outside observer, to be convenient for policy reasons. Many liberal critics of the Court's Eleventh Amendment cases insist the cases are wrongly decided on originalist grounds. Yet they often argue against originalism when interpreting other provisions of the Constitution, and are not embarrassed by abandoning the constitutional text in those situations.<sup>61</sup>

In his book, Judge Noonan does not label his critique as a "conservative" one, and indeed it is difficult to force his analysis into the traditional categories of that ideology.<sup>62</sup> He is conversant with

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59. E.g., John C. Eastman, *A Seminole Dissent?*, 1 GEO. J.L. PUB. POL'Y 29 (2002) (arguing that the majority in *Seminole Tribe* misinterpreted the Framers' views on sovereign immunity); Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027 (2002) (arguing the Framers intended to incorporate international law notions of sovereignty); Robert A. Levy, *When State Dignity Trumps Individual Rights*, in CATO SUPREME COURT REVIEW: 2001-2002, at 31 (2002) (arguing the Eleventh Amendment ought to be interpreted narrowly and literally, and that federal power should be reined in directly, rather than relying on sovereign immunity); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989) (advocating a literal reading but arguing that *Hans* and its progeny would be better grounded in the Tenth Amendment); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002) (revisiting Framers' intent of both Article III and the Eleventh Amendment, and arguing that the Amendment is better understood as granting a new kind of immunity akin to personal jurisdiction, not as codifying sovereign immunity); 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 (1999) (revisiting the historical meaning of the word "State" in the Eleventh Amendment and elsewhere in the Constitution).

60. See, e.g., MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 66-76 (1999); ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM 60-62 (2001); Ronald D. Rotunda, *The Eleventh Amendment, Garrett, and Protection for Civil Rights*, 53 ALA. L. REV. 1183 (2002); cf. Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2001, at 24, 26 (defending Court's federalism decisions, but leaving detailed defense of sovereign immunity decisions "for another day").

61. To their credit, some liberal critics of sovereign immunity acknowledge the inconsistency. See Law, *supra* note 45, at 421-25; Jed Rubenfeld, *The New Unwritten Constitution*, 51 DUKE L.J. 289, 293-95 (2001). For an empirical study demonstrating that none of the Justices are fully consistent in utilizing textual and originalism arguments presented by litigants in their briefs, see Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 L. & SOC'Y REV. 113 (2002).

62. Perhaps this is reflective of his reputation as an unpredictable conservative on the bench. 2 ALMANAC, *supra* note 9, at 75.

Admirably, he also eschews the epithet of "activism" when discussing the cases, arguing that the term "should be banished from the political lexicon." P. 9. That term has degenerated from overuse in legal discourse and now signals little more than that the user disagrees with the decision. For an extensive and helpful discussion of this point, see Young, *supra* note 52, at 1141-81. Nonetheless, to the extent the term "judicial activism" is a coherent con-

methodological conservatism, as he is critical of the recent cases on originalist grounds (p. 9). On the other hand, he seemingly breaks with institutional conservatism by his frequent calls for more Court deference to Congress, particularly regarding that institution's Section Five powers. Thus, it seems an oversimplification at best to label, as has been done,<sup>63</sup> Judge Noonan's book as a mainstream conservative critique. It simply doesn't fall neatly into either conservative or liberal camps. To my mind, that is a compliment, not an insult. Moreover, Judge Noonan addresses functionalist arguments for the results of the Eleventh Amendment cases, which adds to the literature and which I address below.

### III. ACTIVISM BY STATE ATTORNEYS GENERAL AND ELEVENTH AMENDMENT LITIGATION

Presumably, Judge Noonan would not have written *Narrowing the Nation's Power* if the Supreme Court had not decided an abundance of Eleventh Amendment cases. One of the critics of that jurisprudence, Larry Kramer, has lamented that the Court has decided "a seemingly neverending succession of cases defining, upholding, protecting, or extending the sovereign immunity of the states."<sup>64</sup> Why the Court has undertaken to decide so many cases, and why it has been given the opportunity to do so, has been little discussed in the vast literature on the Eleventh Amendment.

Attempting to answer these questions has both demand and supply sides. The Supreme Court, through its discretionary certiorari jurisdiction, controls the demand side. The Court's exercise of this discretion has attracted the attention of legal scholars and social scientists, as the Court rarely states why it has decided, or not decided, to review a particular case. Scholars have examined a variety of variables (such as the filing of amicus briefs, the presence of repeat players like the United States Government, or the ideological direction of the holding sought to be reviewed) to glean some systematic patterns.<sup>65</sup> More recently,

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cept, Professor Young observes that *Chisholm v. Georgia*, championed by critics of the modern cases, "was considered an outrageous act of judicial activism in 1793." *Id.* at 1170. Moreover, he continues, "the most widely criticized aspect of the Court's federalism jurisprudence — the state sovereign immunity cases — are clearly not activist in the sense of being a major break with the past. . . . That does not mean that the Court's present cases are rightly decided." *Id.* at 1172 n.129.

63. *E.g.*, Stuart H. Shiffman, *Strong Words for the Court*, 86 JUDICATURE 214, 214 (2003).

64. Larry D. Kramer, *The Supreme Court 2000 Term — Foreword: We The Court*, 115 HARV. L. REV. 4, 145 (2001) (internal citation omitted); see also Fallon, *supra* note 48, at 481 (wondering why "the Court devote[s] so much energy to refining and incrementally expanding" Eleventh Amendment doctrine).

65. See, *e.g.*, LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 78-83 (1997); H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES

attention has focused on the Court's diminishing caseload during much of the last decade.<sup>66</sup>

So far as I can tell, this literature has not focused on the Eleventh Amendment cases. And the Court itself has not provided much guidance (any more than it does in other cases), only blandly indicating on occasion that certiorari was granted to resolve a circuit split.<sup>67</sup> Yet, it is striking that the Court has taken up these cases at a regular rate, when the docket shrank to about eighty-five cases per term in the early 1990s.<sup>68</sup> On the other hand, as Judge Noonan noted,<sup>69</sup> the Solicitor General often intervenes in these cases as litigant or amicus to defend the constitutionality of the statute. It is well documented that the presence of the United States in these capacities makes it more likely that the Court will review the case.<sup>70</sup>

By my count, the Court decided thirty-six Eleventh Amendment cases from 1964 to 2002, with twenty-one and eight of those being decided from 1990 and 2000 to the present, respectively.<sup>71</sup> Only a little

SUPREME COURT (1991). For a brief review of the literature, see Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeal En Banc*, 9 SUP. CT. ECON. REV. 171, 174-75 (2001).

66. See Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737 (2001); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403.

67. E.g., *Nevada Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1976 (2003); *Lapides v. Bd. of Regents*, 535 U.S. 613, 618 (2002); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72 (2000); *Alden v. Maine*, 527 U.S. 706, 712 (1999); cf. *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002) (simply repeating the legal issue on which certiorari was granted); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 770 (2000) (same); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 53 (1996) (same).

68. Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 353 (2002) (listing Court cases decided on merits from 1989 to 1999 Terms).

69. Pp. 35, 116. The statute permitting intervention as a party is 28 U.S.C. § 2403(a) (2000). For discussion on the Solicitor General's role in the Eleventh Amendment context, see Seth P. Waxman, *Foreword: Does the Solicitor General Matter?*, 53 STAN. L. REV. 1115, 1120-21 (2001).

70. George & Solimine, *supra* note 65, at 189. But see Waxman, *supra* note 69, at 1120 (suggesting that Solicitor General's influence has been diminished in federalism cases due to the availability of private rights of action in which "counsel will press even weak cases to the next highest court," interest groups now plan litigation and thus diminish the uniqueness of the government strategically litigating cases, and statutes now subject to constitutional challenge were often "not carefully crafted and justified in the legislative record"); Suzanna Sherry, *Irresponsibility Breeds Contempt*, 6 GREEN BAG (2d ser.) 47 (2002) (making similar points).

71. A list of the cases is found in the Appendix to this Review. I gleaned the cases from standard secondary sources, i.e., casebooks and hornbooks. The list is composed of fully argued cases where a substantive or procedural Eleventh Amendment issue was resolved on the merits. Thus, I excluded cases which were summarily decided by the Court, e.g., *Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam), and cases where an Eleventh Amendment issue was noted but not decided because it had been advanced for the first time only on appeal. E.g., *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Patsy v. Bd.*

over one-half (nineteen) of the cases were brought to the Court by a litigant asserting a sovereign-immunity defense, and these litigants were usually represented by the attorney general of that state. But that percentage underestimates the activity of the state attorneys general on this topic. It is well-documented that state attorneys general have become more active and professionalized in a wide range of contexts.<sup>72</sup> And more relevant to our purposes, over the last two decades, state attorneys general have been more active in preparing for and litigating cases at the Supreme Court level, as well as in filing amicus briefs.<sup>73</sup>

Data regarding the amici activity of state attorneys general are presented in this Review's Appendix.<sup>74</sup> Until the 1990s, the amicus activity of states in these cases was sporadic. In *Fitzpatrick v. Bitzer*,<sup>75</sup>

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of Regents, 457 U.S. 496, 515 n.19 (1982). On the other hand, I included cases that involved claims brought in state court, and thus are not strictly speaking covered by the Eleventh Amendment, but nonetheless are resolved by principles derived from Eleventh Amendment jurisprudence. See *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533 (2002); *Alden v. Maine*, 527 U.S. 706 (1999). I excluded *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), however, because the holding of that case — that neither States nor state officials acting in their official capacities are “persons” under 42 U.S.C. § 1983 — did not directly rely on Eleventh Amendment doctrine, though that doctrine was discussed.

Regarding the distribution of these cases, Dan Meltzer has observed that the Eleventh Amendment was only cited in ten Warren Court decisions, over sixteen Terms. Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 1. Only the first of the cases in the Appendix is from the Warren Era. Meltzer further observed that the first and second editions of Hart & Wechsler's casebook on federal courts, published in 1953 and 1973, respectively, had less than eleven pages on the Eleventh Amendment. *Id.* at 1-2. In contrast, the fifth edition of the casebook has 93 pages on the Amendment. See HART & WECHSLER, *supra* note 12, at 973-1066.

72. See generally ERIC N. WALTEBURG & BILL SWINFORD, LITIGATING FEDERALISM: THE STATES BEFORE THE U.S. SUPREME COURT 43-56 (1999); Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525 (1994); Leonard Ray & Rorie L. Spill, *The States in Federal Appellate Court: Litigation Trends Over Time*, 23 JUST. SYS. J. 97 (2002); Joseph F. Zimmerman, *Interstate Cooperation: The Roles of the State Attorneys General*, 28 PUBLIUS: J. FEDERALISM 71 (Winter 1998); Russell Gold & Andrew Caffrey, *United Crime Busters: Chasing Bad Guys Together, State Attorneys General Join Forces to Win Cases*, WALL ST. J., Aug. 1, 2002, at B1.

73. See WALTEBURG & SWINFORD, *supra* note 72, at 57-79 (describing increase of litigation activity in the Supreme Court by state attorneys general); Clayton, *supra* note 72, at 542-48 (describing how the National Association of Attorneys General (“NAAG”) in 1982 set up a Supreme Court Project to coordinate and professionalize various litigation activity before the Court). Further information about NAAG's Supreme Court Project can be found at the NAAG website, [http://www.naag.org/issues/issue-supreme\\_court.php](http://www.naag.org/issues/issue-supreme_court.php) (last visited Oct. 8, 2003).

74. A recent, definitive empirical study of amicus filings in the Supreme Court used as the database the listing of such briefs provided on the U.S. Reports by the Court's Reporter of Decisions, Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 835-43 (2000) (describing methodology of study), and I did the same. Aside from the ease of using this information, the “Reporter's office has a deserved reputation for meticulousness,” *id.* at 839, and past researchers have expressed confidence in the completeness of the information provided by the Reporter, including the indication of what position, if any, the amicus brief was advocating. *Id.* at 839-40.

75. 427 U.S. 445 (1976).



decided in 1976, twenty-two states joined in an amicus brief in favor of the state defendant. But as late as 1991, there were cases in which no states appeared as amici in favor of the party advocating the Eleventh Amendment defense. That changed in the past decade. Twenty to forty states began joining in one or more amicus briefs<sup>76</sup> in favor of the sovereign-immunity position. In all cases but one, all of the states supported the Eleventh Amendment defense. The one exception was *Board of Trustees of the University of Alabama v. Garrett*,<sup>77</sup> which involved Title I of the Americans with Disabilities Act ("ADA"). There, seven states supported Alabama but fourteen states argued as amici *against* the Eleventh Amendment defense. Reportedly, over twenty states had originally agreed to file amicus briefs in support of Alabama, but eventually advocates of disability rights persuaded many of those states to change their position.<sup>78</sup>

To be sure, this state amicus activity<sup>79</sup> may be little more than symbolic politics. The filing of amicus briefs by all litigants in the Supreme Court has been rising,<sup>80</sup> and state attorneys general have increasingly filed such briefs in many other cases.<sup>81</sup> It is not clear how

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76. In recent cases state attorneys general have been coordinating their amicus activity, and joining in one or two briefs, as opposed to each state filing its own brief. WALTENBURG & SWINFORD, *supra* note 72, at 70-75; Cornell W. Clayton & Jack McGuire, *State Litigation Strategies and Policymaking in the U.S. Supreme Court*, 11 KAN. J.L. & PUB. POL'Y 17, 22-25 (2001).

77. 531 U.S. 356 (2001).

78. Marci A. Hamilton, *Why Federalism Must Be Enforced: A Response to Professor Kramer*, 46 VILL. L. REV. 1069, 1083 (2001). Hamilton goes on to say that the "threat of making the politicians in those states appear as though they were opposed to the disabled was sufficient to move those politicians from a position of principle on behalf of their states to a position of silence." *Id.* For a similar example, see *Douglas v. California Dep't of Youth Auth.*, 271 F.3d 812, 821 n.7 (9th Cir. 2001) (California attorney general waived Eleventh Amendment defense in an ADA case, even *after Garrett*). See also *supra* note 29 (describing litigation strategy of California Attorney General in *Hason* litigation).

A similar situation is evidenced by the amici activity in the case in the 2002 Term, *Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003), involving the FMLA. See Linda Greenhouse, *In Family Leave Case, Supreme Court Steps Back Into Federalism Debate*, N.Y. TIMES, Jan. 12, 2003, at 23 (fourteen and six states filed amicus briefs supporting and opposing the sovereign-immunity position, respectively).

79. There are other aspects of state amicus activity in Eleventh Amendment cases that are beyond the scope of this Review. For example, one could further examine amicus activity in the lower federal courts or in state courts, amicus activity at the certiorari stage in the Supreme Court, or the content of the arguments presented in the amicus briefs.

As the Appendix indicates, there are also other interest groups appearing as amici in these cases who advance the interest of the states. Thus, the Council of State Governments and the National Conference of State Legislatures filed amicus briefs in eight and four cases, respectively.

80. Kearney & Merrill, *supra* note 74, at 753 (percentage of cases with one or more amicus briefs filed rose from 23% in the 1940s to over 80% by 1995).

81. *Id.* at 753 n.25 (state amicus briefs rose from 4% of cases in 1940s to about 30% by 1995); see Clayton & McGuire, *supra* note 76, at 21-22 (similar data).

much impact all of these briefs have on the Court's decisionmaking.<sup>82</sup> Judge Noonan is aware of amicus activity, as he mentions in passing that advocacy groups for the disabled filed amicus briefs in favor of the ADA in *Garrett* (p. 116). He doesn't mention the briefs filed by the state in that case. More interesting for examining the activism of state attorneys general is Judge Noonan's reference to *Morrison v. United States*,<sup>83</sup> where the majority of the Court struck down as unconstitutional provisions of the Violence Against Women Act ("VAWA"). Echoing the observations of a dissent in that case — that thirty-six state attorneys general filed an amicus brief in support of VAWA<sup>84</sup> — Judge Noonan argues that the "irony of championing the autonomy of the state sovereigns when they did not appear to want it was palpable" (p. 135). But there is a further irony in giving weight to state attorneys general in *Morrison*, but not in the Eleventh Amendment context. If state amicus activity should be given jurisprudential weight in federalism cases, it ought to do the same in sovereign-immunity cases — the theory should be applied evenhandedly.

#### IV. PRAGMATISM AND THE ELEVENTH AMENDMENT

Much of the Eleventh Amendment case law is highly formalist in its reasoning. For example, as Judge Noonan observes (p. 154), the Court has spoken of the states' "dignity" fostered by the Amendment.<sup>85</sup> Yet formalism has characterized much, though not all,<sup>86</sup> academic writing on the topic as well. In particular, much of that writing has avoided serious discussion of the practical consequences of the decisions. One of the strengths of Judge Noonan's book is that he does expressly grapple with such pragmatic issues.

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82. For a thorough discussion of this issue, though it does not focus on the Eleventh Amendment cases, see Kearney & Merrill, *supra* note 74.

83. 529 U.S. 598 (2000).

84. *Morrison*, 529 U.S. at 653 (Souter, J., dissenting).

85. *E.g.*, *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002); *Alden v. Maine*, 527 U.S. 706, 715 (1999).

86. For some exceptions, see Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123 (1989) (arguing that Eleventh Amendment jurisprudence should be shaped by practical consideration of the federal interests at stake, not by legal fictions and obtuse historical debates); Melvyn R. Durchslag, *Should Political Subdivisions Be Accorded Eleventh Amendment Immunity?*, 43 DEPAUL L. REV. 577 (1994) (discussing functionalist reasons for making a distinction between states and their political subdivisions); Roderick M. Hills, Jr., *The Eleventh Amendment as a Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225 (2001) (arguing that insulating states from liability for damages permits states greater control over their bureaucracies); Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329 (2003) (defending Eleventh Amendment cases as facilitating healthy competition between the federal and state governments); and Pfander, *supra* note 13, at 826-31 (discussing Eleventh Amendment scholarship that explicitly or implicitly considers functionalist issues).

Consider first practical rationales for the decisions. On some occasions the Court has moved beyond formalism and advanced functionalist justifications for the broad interpretation of the Eleventh Amendment. Thus, for example, the Court has spoken of the need to protect the financial integrity of the states to enable them to provide goods and services to their citizens.<sup>87</sup> Cognizant of the small body of academic literature discussing functionalist rationales,<sup>88</sup> Judge Noonan finds the proposition unpersuasive. As he observes, the Court cites no empirical data for the fiscal integrity argument.<sup>89</sup> Judge Noonan makes the provocative and convincing point that if the Amendment's shield was really necessary, one would expect to see states paying higher interest rates on bonds they issue. Since states, unlike political subdivisions, cannot be sued in federal court if they default on bonds, the distinction should be reflected in the interest rate for such bonds. The bond market reflects no such difference: "A city, a county, a state agency, a state — they'll all give about the same return."<sup>90</sup>

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87. *Alden*, 527 U.S. at 750; see also *Nevada Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972 (2003) (rejecting Eleventh Amendment challenge to provision of FMLA creating private right, in part, given that Congress placed limits on its scope, including various restrictions on damages awardable).

As has been observed, e.g., *Durchslag*, *supra* note 86, at 604-05, some earlier Eleventh Amendment cases spoke in functionalist terms, at least in part, see, e.g., *Hutto v. Finney*, 437 U.S. 678, 691-92 & n.18 (1978) (finding that attorneys' fee award against state would not interfere "with the State's budgeting process"); *Employees of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 284-85 (1973) (making distinction between nonprofit and proprietary functions of a state), but most of the cases eschew such analysis.

88. P. 170 (discussing *Hills*, *supra* note 86).

89. To be fair, it appears that in their briefing in Eleventh Amendment cases, neither the state parties nor the amici supporting the state position consistently spend time supporting the fiscal integrity argument. For example, by my reading, none of the briefs in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), explicitly cited any data supporting arguments that the state's fiscal integrity would be undermined by permitting ADEA suits against states. On the other hand, several of the briefs in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) did expressly address such matters regarding ADA suits against states. See Brief of Amici Curiae States of Hawaii et al., in Support of Petitioners at 18-27, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (No. 99-1240) (detailing high costs of various ADA suits brought against states); Brief of Amicus Curiae Association of State Correctional Administrators in Support of Petitioners at 9-10, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (No. 99-1240) (same, with regard to ADA suits brought by prisoners).

90. Pp. 56, 58; see also p. 59 ("As for [Eleventh Amendment] immunity, you could count on one hand the number of bond traders who've heard of it.").

No doubt the market considers a large number of factors in setting an interest rate for bonds issued by a state, as opposed to those issued by political subdivisions or others. For example, one factor that might suggest lower interest rates for state bonds is that most states are larger and have more taxing power than the typical political subdivision. Thus, the Eleventh Amendment bar to suit may only play the limited role of counteracting such market pressures. Since states cannot print their own money, "they operate in private credit markets just like private borrowers. These markets themselves, through the determination of credit ratings and other forms of monitoring fiscal performance, create an environment in which the fiscal authorities must behave in responsible ways." Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J. ECON. LITERATURE 1120, 1139 (1999) (footnote omitted).

Perhaps Judge Noonan should have stopped there, for some of his other arguments are less compelling. Pointing out that sovereign immunity bars damage relief “for real injuries committed by a state,” he asks “why should a state tortfeasor not pay compensation for the injury it inflicts?” (p. 154). The short answer is that a state is institutionally different from other tortfeasors, such as private individuals or corporations. Governments do not easily respond to market incentives and, for example, may not internalize costs in the same way as a private firm. While we generally permit the market to govern the financial viability of private tortfeasors, bankruptcy is not a good option for a state. States provide a panoply of goods and services that may not be provided by the market, and face a variety of political obstacles not faced by private parties in order to raise revenue to pay for all of that (including money judgments). It does not necessarily follow that the state should never be treated like a private tortfeasor, but it suggests that limiting damage awards (as opposed to, say, injunctive relief) is not irrational.<sup>91</sup>

Judge Noonan also suggests that states do not “need an extra dollop of security” provided by the Eleventh Amendment since “federal law will be shaped by members of Congress not insensitive to the protection of their home states” (p. 56). This remark enters the debate on whether there are “political safeguards of federalism,”<sup>92</sup> enforced by Congress with which the federal courts should not interfere. There is extensive academic debate over whether and to what extent such political safeguards exist and the implications for judicial protection of

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Despite the bar to recovery in litigation if states default on their bonds, states have significant incentives to pay their bonds. In particular, states (and other sovereigns that issue debt) presumably seek to maintain their reputation as good credit risks, so as not to be excluded from future borrowing. William W. Bratton & G. Mitu Gulati, *Sovereign Debt Restructuring and the Best Interest of Creditors*, 57 VAND. L. REV. (forthcoming 2004) (manuscript on file with author). In this environment, the Eleventh Amendment bar to suit probably has little direct effect on the bond market interest rate. See Christopher Shortell, *The Hidden Costs of Protection: State Sovereign Immunity and Harm to States* (unpublished paper, presented at 2003 Annual Meeting of the Midwest Pol. Sci. Ass'n, Chicago, Ill., on file with author) (studying certain states evading payment of debts in 1840s, through bar of sovereign immunity; concluding that those states had difficulty in reentering capital markets, and led to adoption of restrictions in state constitutions to borrowing authority).

91. For further discussion of the issues raised in this paragraph, see Mark R. Brown, *Deterring Bully Government: A Sovereign Dilemma*, 76 TUL. L. REV. 149 (2001); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000); and Michael Wells & Walter Hellerstein, *The Government-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073 (1980). For application to the Eleventh Amendment context, see Adam Feibelman, *Federal Bankruptcy Law and State Sovereign Immunity*, 81 TEXAS L. REV. 1381 (2003).

92. See the seminal article, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

state prerogatives.<sup>93</sup> An exhaustive review of that debate is unnecessary here. Suffice it to say that if one accepts some version of the political-safeguards argument, as Judge Noonan and some dissenters in the recent Eleventh Amendment cases appear to do,<sup>94</sup> it follows that expansive interpretations of the Eleventh Amendment are inappropriate or at the very least Congress should enjoy wide power to statutorily abrogate the immunity. At least in the Eleventh Amendment arena, though, the predicate for that argument is at least debatable. For over two decades, it seems, Congress has frequently enacted statutes creating private causes of action against states for damages in federal court.<sup>95</sup> More to the point, it seems difficult to conclude Congress has been engaged on the issue of state sovereign immunity, other than to pass laws abrogating it.<sup>96</sup>

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93. For a sampling of the extensive literature, see Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001); Hamilton, *supra* note 78; Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); and John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997). For a review and critique of the literature, see Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 8-12 (2002), and Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 NW. U. L. REV. 977 (2002).

94. See, e.g., *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 93 (2000) (Stevens, J., concurring in part and dissenting in part) (citing Wechsler, *supra* note 92).

95. See Carol F. Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 URB. LAW. 301 (1988); Meltzer, *supra* note 71, at 32; Pfander, *supra* note 13, at 826-27. In *Alden v. Maine*, the majority observed that the Federal Employers Liability Act, passed in the early 1900s, apparently was the first law to subject states to private actions, but that such statutes "multiplied" in the 1960s and beyond. 527 U.S. 706, 744 (1999). The Court added that the passage of such statutes "in the last generation," *id.*, was "perhaps inspired by *Parden* and *Union Gas*," *id.* at 745. These two rulings found congressional power to abrogate sovereign immunity. This suggestion seems plausible but, to my knowledge, has not been addressed in depth in the Eleventh Amendment jurisprudence. See also *infra* note 110 (discussing similar theories about how Congress has legislated in light of *Hans*).

96. In the considerable literature on the political-safeguards model, there is relatively little direct discussion of Eleventh Amendment issues, so further empirical research on that point would be beneficial. For example, Evan Caminker has argued that the political-safeguards model should include the possibility of private businesses joining states in lobbying on sovereign immunity issues, since the federal laws in question typically regulate both public and private entities. Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1189 n.261 (2001). For a study of such joint lobbying, albeit not focusing on Eleventh Amendment issues, see Michael S. Greve, *Business, the States, and Federalism's Political Economy*, 25 HARV. J.L. & PUB. POL'Y 895 (2002). See also Neal Devins, *The Federalism-Rights Nexus: Explaining Why Senate Democrats Can Tolerate Rehnquist Court Decision Making But Not The Rehnquist Court*, 73 U. COLO. L. REV. 1307 (2002) (arguing that Congress has rarely responded to the recent Eleventh Amendment and other federalism cases, which struck down federal statutes, in whole or in part, because the decisions usually leave open alternative avenues for the enforcement of federal law, and most lawmakers and interest groups rarely focus on federalism issues as such); John Dinan, *Congressional Responses to the Rehnquist Court's Federalism Decisions*, PUBLIUS: THE J. OF FEDERALISM, Summer 2002, at 1 (making similar points).

Consider next the effects of Eleventh Amendment cases. For some time majority opinions in these cases, even while holding that a private plaintiff was unable to pursue a damage claim in federal court, took pains to observe that at least in theory, the plaintiffs could pursue relief in state courts under federal or state law, or that federal rights could be enforced in other ways (e.g., through injunctive relief or in actions by the federal government).<sup>97</sup> These observations, at one time thought to be of some doctrinal significance,<sup>98</sup> are now probably little more than rhetorical flourish to ameliorate anticipated criticism of holdings.<sup>99</sup> Of course, states can still consent to suit in their own courts. But how effective are the remedies voluntarily allowed by a state? No doubt the answer will vary from state to state and from topic to topic, but Judge Noonan is not sanguine.<sup>100</sup> Though he doesn't discuss the point at length, his pessimism seems justified. For example, recent studies of the scope of state-law remedies for the age and disability discrimination involved in recent cases reveal that their substantive and procedural protections fall short of what is provided by federal law (i.e., the ADEA and the ADA).<sup>101</sup> More generally, most states provide a partial waiver of sovereign immunity and permit suit under

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97. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001); *Kimel*, 528 U.S. at 91 n.\*; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.14 (1996); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 240 n.2 (1985); see also *Nevada Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1994 (2003) (Kennedy, J., dissenting) (making similar points).

98. Prior to *Seminole Tribe*, the Court's Eleventh Amendment jurisprudence could be read as establishing a forum-allocation principle by recognizing an obligation of the states to provide monetary relief in their own courts when such relief was barred in federal court. *Seminole Tribe* and later cases, especially *Alden v. Maine*, however, seem to stand for the principle that an unconsenting state is immune from a damage action in either federal or state court. For a thorough analysis of this shift, see Carlos Manuel Vasquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997).

99. On the other hand, the presence and efficacy of other federal- and state-law remedies might be relevant to the issue of whether a remedy provided by Congress is proportional to the constitutional violation being addressed. See *supra* note 29 & accompanying text. See also *Hibbs*, 123 S. Ct. at 1980 (describing "important shortcomings of some state [parental leave] policies" before passage of the FMLA, including limited available remedies).

100. P. 94 (finding the possibility of state-law remedies for patentees, as suggested by the Court in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 644-45 (1999), unlikely since "[e]xisting patent law largely preempted the state courts"); P. 183 n. \* (plaintiffs in *Kimel* had no other remedy available).

101. See Ruth Colker & Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 ALA. L. REV. 1075 (2002) (surveying all 50 states indicating, inter alia, that less than one-half of states have substantive law protecting disabled persons comparable to the ADA, and many states limit remedies (e.g., damages, attorneys' fees) that would be available under federal law); Brent W. Landau, Note, *State Employees and Sovereign Immunity: Alternatives and Strategies for Enforcing Federal Employment Laws*, 39 HARV. J. ON LEGIS. 169 (2002) (surveying all fifty states for employment laws regarding age, disability, minimum wage, and family leave, revealing, inter alia, that many states have no such laws, and the state laws that do exist often lack the full substantive and remedial protection found in federal law).

certain circumstances, but often the procedures and remedies provided fall short of that in a normal civil action.<sup>102</sup> While on paper the situation might look bleak for a plaintiff seeking relief against a state, to my knowledge there is very little empirical work on how often such remedies are used, rates of settlement, or other factors which would inform a judgment on the true worth of these alternative remedies.

As mentioned earlier, the Court has pointed to exceptions or alternatives to the bar of Eleventh Amendment immunity, notably enforcement actions by the federal government, private actions for injunctive relief, and private actions for damages against individual state officers. Judge Noonan acknowledges the exceptions (pp. 43-51) but doesn't seem impressed by their breadth. Someone who is impressed is John Jeffries, who has famously argued that the "Eleventh Amendment almost never matters."<sup>103</sup> For example, aside from the exceptions mentioned, Jeffries observes that almost all states, as a matter of law or policy, will defend and indemnify state officials in suits for damages.<sup>104</sup> Thus, states are paying damage awards despite their Eleventh Amendment protection.

Yet none of these exceptions are panaceas. Absent significant expansion of the numbers and responsibilities of U.S. Attorneys, public enforcement of federal law will not replace private actions.<sup>105</sup> Injunctive relief might be limited by restrictions on the scope of *Ex parte Young*.<sup>106</sup> Damage actions against individual officers might be barred by qualified immunity in particular circumstances.<sup>107</sup> As Judge Noonan recognizes (p. 142), the new frontier of Eleventh Amendment jurisprudence will be Court review of statutes conditioning federal

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102. Most states permit themselves to be sued in a court of claims or another specialized tribunal. They often limit the right to a jury trial or place ceilings on full compensation for damages, however. See Joanne C. Brant, *The Ascent of Sovereign Immunity*, 83 IOWA L. REV. 767, 801-03 (1998).

103. Jeffries, *supra* note 13, at 49.

104. *Id.* at 50; see also Vasquez, *supra* note 98, at 1795-96 (listing statutes from almost all the states providing for indemnification and further noting that collective-bargaining agreements can provide that as well).

Yet if Jeffries is correct and if a "striking feature of the sovereign immunity cases is their apparent relative inefficacy as devices for protecting federalism," Fallon, *supra* note 48, at 459, it is curious why state attorneys general have expended so much energy on such cases, as documented in Part III, *supra*.

105. Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 62-63; Landau, *supra* note 101, at 194-97.

106. In *Seminole Tribe*, the Court suggested that *Ex parte Young*-type relief might not be appropriate "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996). Such schemes are not uncommon. Arguably the ADA, ADEA, and FMLA — all subject to past or pending Eleventh Amendment challenges in the Court — are examples of such schemes. Landau, *supra* note 101, at 197-99.

107. Landau, *supra* note 101, at 200.

spending on states waiving the immunity.<sup>108</sup> That, coupled with possibly renewed efforts by Congress to act under Section Five of the Fourteenth Amendment, will probably keep the Court busy for years to come.

### CONCLUSION: THE ROAD NOT TAKEN

Soon after he joined the Court, Justice Scalia had the opportunity to opine on the correctness of *Hans*. He did so in a way that might have suggested that he was open to overruling the case.<sup>109</sup> Shortly thereafter, he closed the door and declined to overrule *Hans*. In doing so, however, he did not undertake a vigorous defense of *Hans* on its own terms. Rather he seemed more concerned with the effect that retroactively overturning *Hans* would have on the interpretation of statutes in the intervening period.<sup>110</sup> Then in *Seminole Tribe*, he joined an opinion that constitutionalized *Hans*.<sup>111</sup>

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108. For a sampling of the burgeoning literature on this issue, see Mitchell N. Berman, et al., *State Accountability for Violations of Intellectual Property Rights: How to "Fix" Florida Prepaid (And How Not To)*, 79 TEXAS L. REV. 1037 (2001); Landau, *supra* note 101, at 201-05; Susan M. Luken, Comment, *Irreconcilable Differences: The Spending Clause and the Eleventh Amendment: Limiting Congress's Use of Conditional Spending to Circumvent Eleventh Amendment Immunity*, 70 U. CIN. L. REV. 693 (2002).

109. In *Welch v. Texas Department of Highways & Public Transportation*, Justice Scalia stated that for him,

both the correctness of *Hans* as an original matter, and the feasibility, if it was wrong, of correcting it without distorting what we have done in tacit reliance upon it, [are] complex enough questions that I am unwilling to address them in a case whose presentation focused on other matters.

483 U.S. 468, 496 (1987) (Scalia, J., concurring).

110. In his discussion of *Hans*, Justice Scalia stated in part as follows:

Even if I were wrong, however, about the original meaning of the Constitution, or the assumption adopted by the Eleventh Amendment, or the structural necessity for federal-question suits against the States, it cannot possibly be denied that the question is at least close. In that situation, the mere venerability of an answer consistently adhered to for almost a century, and the difficulty of changing, or even clearly identifying, the intervening law that has been based on that answer, strongly argue against a change. . . . Moreover, unlike the vast majority of judicial decisions, *Hans* has had a pervasive effect upon statutory law, automatically assuring that private damages actions created by federal law do not extend against the States. . . . It is impossible to say how many extant statutes would have included an explicit preclusion of suits against States if it had not been thought that such suits were automatically barred. . . .

I would therefore decline respondents' invitation to overrule *Hans v. Louisiana*.

Pennsylvania v. Union Gas Co., 491 U.S. 1, 34-35 (1989) (Scalia, J., concurring in part and dissenting in part).

Dan Meltzer is unpersuaded by this congressional-reliance argument. Since 1973 (in the *Employees of the Department of Public Health*, 411 U.S. 279, 284-85 (1973), case), he says, Congress has had to deal with a plain-statement requirement in the Eleventh Amendment context, and in "that legal environment, it is chimerical to suppose that overruling *Hans* would suddenly subject the states to liability not fairly contemplated by Congress." Meltzer, *supra* note 71, at 32. He has a point, but it ignores congressional activity from 1890, when *Hans* was decided, to 1989. During that period, Scalia argues, Congress may have drafted legislation on the assumption that the *Hans* barrier prevented private enforcement for



Justice Scalia passed up an opportunity to stake out a principled, conservative position on the Eleventh Amendment. Put another way, he closed the window on the possibility of developing the "middle ground" that Judge Noonan calls for in his book.

Where might such middle ground exist?<sup>112</sup> It could be some combination of the following. *Hans* could be overruled, but only prospectively. Or *Hans* could be left intact, but reinterpreted as a federal common law decision, making it capable of being statutorily abrogated by Congress's Article I or Fourteenth Amendment powers.<sup>113</sup> The clear-statement requirements could be left intact,<sup>114</sup> and congressional

money damages, even if that assumption is not clear from the text or the legislative history. Were the *Hans* barrier not there, perhaps the legislation would have been drafted differently or not enacted at all. All of these assumptions are worthy of further scholarly inquiry, especially for the 1890-1973 period.

111. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 68-71 (1996); see also *supra* note 54.

112. The discussion that follows has been informed by Young, *supra* note 105, particularly at 70-73, where he discusses a "possible middle ground," to "break [the] impasse" in the Court over the Eleventh Amendment.

113. This is a position advocated by at least two Justices, see *Seminole Tribe*, 517 U.S. at 84-93 (Stevens, J., dissenting); *id.* at 130-31 (Souter, J., dissenting). See generally Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988).

114. Clear-statement rules of statutory construction are often, explicitly or implicitly, based on constitutional norms. See William N. Eskridge, Jr. & Phillip Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959 (1994).

Recently, Professor Elhauge has advanced a general theory to explain the existence of canons of statutory construction that frequently result in decisions that are statutorily overridden by Congress. Many of the canons, he says, "reflect neither efforts to divine statutory meaning nor attempts to further judicial or legislative preferences, but rather reflect default rules designed to elicit legislative preferences under conditions of uncertainty." Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165 (2002). Normally, the rules of construction should estimate "the preferences of the enacting or current government." *Id.* (internal citation omitted). But "when enactable preferences are unclear, often the best choice is instead a preference-eliciting default rule that is more likely to provoke a legislative reaction that resolves the statutory indeterminacy. . . ." *Id.*

The clear-statement rules in the Eleventh Amendment context, he continues, seem at first blush to be examples of preference-eliciting default rules, a conclusion reinforced by the frequent examples of statutory overrides in such cases. *Id.* at 2250. But he discounts this conclusion, since:

These canons cannot truly be justified on preference-eliciting grounds for they favor a set of parties — the states — that has unusually strong, not weak, access to the congressional agenda to get statutes overridden. Given the logic of preference-eliciting default rules, this would, if anything, justify a default rule of resolving ambiguities *against* the states.

*Id.* (emphasis added; footnote omitted). He goes on to explain these canons on other grounds, such as rules estimating the likely preference of Congress on the issue. *Id.* at 2251-52.

It is true that the Court's (or lower courts') use of the clear-statement rules has been overruled by Congress on several occasions. *Id.* at 2250 n.313 (giving examples). But it does not follow that the states have extraordinary access to Congress to prevent such overrides. This implicates the political-safeguards-of-federalism theory, noted above. The support for that theory, in my judgment, is weak, both in the Eleventh Amendment context and else-

statutes would be subject to something more than perfunctory rational basis review, especially if a state presented compelling empirical evidence that a private remedy for damages would indeed undermine its fiscal integrity. By constitutionalizing *Hans* and cutting off Congress's Article I powers, *Seminole Tribe* limits the scope of a middle ground. It makes it more difficult to struggle toward a middle ground. Even in the wake of that case, and without overruling later cases, a middle ground might encompass, say, more benign views of congressional power under Section Five of the Fourteenth Amendment,<sup>115</sup> or under the conditional spending power. Judge Noonan's provocative and engaging monograph should aid thoughtful and reflective people on all sides of the continuing and contentious Eleventh Amendment debate, but especially conservatives who, like him, would like to find some middle ground.

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where. It follows that clear-statement canons in this instance can be justified as preference-eliciting.

115. Cf. P. 142 (suggesting that under Section Five, Congress could "do piecemeal what it had attempted to do wholesale"). Perhaps the Court's decision in *Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003), is a portend of a middle ground. One reaction to the decision described the Court as engaging in "a surprising break with its march toward states' rights." Linda Greenhouse, *Justices*, 6-3, *Rule Workers Can Sue States Over Leave*, N.Y. TIMES, May 28, 2003, at A1. No doubt, this was not only due to the upholding of a high-profile federal statute against an Eleventh Amendment challenge, but because Chief Justice Rehnquist wrote the opinion, and Justice O'Connor joined the majority, both of whom had been in the majorities in prior, post-*Boerne* Eleventh Amendment cases. Still, as I argue above, *see supra* note 29, the majority opinion is hardly revolutionary. It faithfully applies the framework of *Seminole Tribe* and its progeny, and distinguishes, and does not claim to limit, prior decisions. *Hibbs*, 123 S. Ct. at 1976-77. On the other hand, it does arguably take a more nuanced view of the legislative record than did prior decisions, and the Court acknowledged the prophylactic nature of the remedy in the FMLA, as one that did not merely create a remedy for a violation of the Fourteenth Amendment. *Id.* at 1983. That said, a number of factors counsel in favor of a restrained interpretation of the decision. For example, the majority noted that state gender discrimination is subject to heightened scrutiny under the Fourteenth Amendment, thus making it "easier for Congress to show a pattern of state constitutional violations." *Id.* at 1974-75. Also, the majority emphasized that the FMLA "affects only one aspect of the employment relationship," *id.* at 1975, and found "significant . . . the many other limitations that Congress placed on the . . . scope" of the FMLA damages remedy. *Id.* In short, the case seems best read as an incremental change of the current Eleventh Amendment regime, though one I think that Judge Noonan would welcome.

## APPENDIX: ELEVENTH AMENDMENT CASES, 1964-2002

Case Name	Citation	Year	# amicus briefs filed	# for state immunity	# against state immunity	other amicus briefs	# states on amicus briefs
Parden v. Terminal Ry. of the Ala. State Docks Dep't	377 U.S. 184	1964	0	0	0	0	0
Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare	411 U.S. 279	1973	1	0	1	0	0
Edelman v. Jordan	415 U.S. 651	1974	2	0	2	0	0
Fitzpatrick v. Bitzer	427 U.S. 445	1976	6	3	3	0	22
Milliken v. Bradley	433 U.S. 267	1977	4	1	2	1	2
Hutto v. Finney	437 U.S. 678	1978	8	3	3	2	5
Quern v. Jordan	440 U.S. 332	1979	1	1	0	0	1
Florida Dep't of State v. Treasure Salvors, Inc.	458 U.S. 670	1982	1	1	0	0	11+ Vir- gin Is- lands, Ameri- can Sa- moa, Guam
Pennhurst State Sch. & Hosp. v. Halderman	465 U.S. 89	1984	1	0	0	1	22+ Puerto Rico, Ameri- can Sa- moa
Atascadero State Hosp. v. Scanlon	473 U.S. 234	1985	4	1	3	0	0
Green v. Mansour	474 U.S. 64	1985	0	0	0	0	0

Papasan v. Allain	478 U.S. 265	1986	0	0	0	0	0
Welch v. Texas Dep't of Highways & Pub. Transp.	483 U.S. 468	1987	2	1	1	0	0, Council of State Governments
Pennsylvania v. Union Gas Co.	491 U.S. 1	1989	6	1	4	1	20
Missouri v. Jenkins	491 U.S. 274	1989	1	0	1	0	0
Dellmuth v. Muth	491 U.S. 223	1989	2	1	1	0	1
Port Auth. Trans-Hudson Corp. v. Feeney	495 U.S. 299	1990	3	1	2	0	0, Council of State Governments
Hilton v. South Carolina Pub. Rys. Comm'n	502 U.S. 197	1991	2	1	1	0	0, Council of State Governments
Blatchford v. Native Vill. of Noatak & Circle Vill.	501 U.S. 775	1991	5	2	2	1	21, Council of State Governments
Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.	506 U.S. 139	1993	2	2	0	0	41+ Guam, Puerto Rico, Northern Mariana Islands
Hess v. Port Auth. Trans-Hudson Corp.	513 U.S. 30	1994	3	2	1	0	31, Council of State Governments
Seminole Tribe of Fla. v. Florida	517 U.S. 44	1996	9	2	6	1	31
Idaho v. Coeur D'alene Tribe of Idaho	521 U.S. 261	1997	5	1	2	2	23+ various Indian tribes, Council of State Governments

Regents of the Univ. of Cal. v. John Doe	519 U.S. 425	1997	2	1	1	0	0, Nat'l Conf. of State Legislatures
Cal. & State Lands Comm'n v. Deep Sea Research, Inc.	523 U.S. 491	1998	7	3	4	0	17 states + Guam, Virgin Islands, Council of State Governments
Wisconsin Dep't of Corrs. v. Schacht	524 U.S. 381	1998	1	0	0	1	22
Alden v. Maine	527 U.S. 706	1999	7	5	2	0	37, Nat'l Conf. of State Legislatures
Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank & U.S.	527 U.S. 627	1999	11	3	6	2	26, Nat'l Conf. of State Legislatures
Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.	527 U.S. 666	1999	4	2	1	1	28, Nat'l Conf. of State Legislatures
Kimel v. Florida Bd. of Regents	528 U.S. 62	2000	6	3	1	2	23
Vermont Agency of Natural Resources v. United States ex rel. Stevens	529 U.S. 765	2000	18	8	2	8	44
Bd. of Trs. of the Univ. of Ala. v. Garrett	531 U.S. 356	2001	21	3	12	6+ a "statement" by former Pres. GHW Bush	21

Raygor v. Regents of the Univ. of Minn.	534 U.S. 533	2002	2	2	0	0	23+ Guam, Nat'l Conf. of State Le- gis- latures
Lapides v. Bd. of Regents of the Univ. Sys. of Ga.	535 U.S. 613	2002	3	1	2	0	29
Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.	535 U.S. 835	2002	3	2	1	0	1
Fed. Mar. Comm'n v. South Carolina State Ports Auth.	535 U.S. 743	2002	7	3	4	0	38+ Nat'l Gov. As- soc.