Testimony of

The Honorable Orrin Hatch

October 1, 2002

First, I would like to applaud my friend from New York for holding this hearing, which I hope will be a high-minded discussion of the constitutional structure and theories that underlie the Supreme Court's recent jurisprudence in the area known as federalism, which includes cases interpreting the commerce clause and the doctrine of sovereign immunity.

Views of those cases defy partisan or political pigeonholing. There are people on both sides of the political aisle who agree, and disagree, with the Supreme Court from time to time. There are subtleties that are not explained simply by whether a person generally favors state power over federal power. For instance, I have been critical of the Court's City of Boerne decision, not because I disagree with the notion of state or local control - I don't - but rather because I believe the First Amendment protects religious freedom against ANY government that seeks to interfere. A majority of the Supreme Court happened to disagree with me, and I respect that. That is our system of justice under the Constitution. For different reasons, I was troubled by the College State Bank case, which caused a great deal of uncertainty among the owners of intellectual property. So these issues are not a simple matter of politics.

A second point that must be made is that the Supreme Court's federalism decisions are often wildly exaggerated in the media. Most of the decisions have been pretty narrow, affecting only one part of a larger Act of Congress, and they have certainly not left people without legal remedies. In the Morrison case, for example, the Court's decision left intact many important programs, which I happened to co-sponsor with Senator Biden, aimed at reducing violence against women and had no adverse affect on the existing state laws designed to prevent and punish acts of violence. And the sovereign immunity cases, while blocking private suits for money damages, leave open a number of possible remedies - including injunctions - that protect people in important ways. I hope our witnesses will illuminate these issues further.

It is a great pleasure to welcome our distinguished witnesses here today, and I'll start with Professor Marci Hamilton. She holds the Paul R. Verkuil Chair in Public Law at the Benjamin N. Cardozo School of Law, Yeshiva University, where she specializes in constitutional law, particularly federalism and church/state issues. She served as a law clerk to Chief Judge Edward R. Becker of the United States Court of Appeals for the Third Circuit and for Justice Sandra Day O'Connor of the Supreme Court. Perhaps most important for today's hearing, she was lead counsel for the successful City of Boerne, Texas in Boerne v. Flores, a seminal federalism case.

It is also a great pleasure to welcome Circuit Judge John Noonan, an outstanding federal judge who was a renown scholar and teacher before he took the bench. Judge Noonan's most recent

book, Narrowing the Nation's Power: The Supreme Court Sides with the States, shows that he continues his great scholarship. The book of his with which I am most familiar is A Private Choice, published in 1979, which is a scholarly condemnation of the Supreme Court's decision in Roe v. Wade. He demolishes every conceivable argument on behalf of the liberty of abortion, concluding with a twelve-point indictment of legalized abortion which begins as follows:

The liberty established by The Abortion Cases has no foundation in the Constitution of the United States. It was established by an act of raw judicial power. Its establishment was illegitimate and unprincipled, the imposition of the personal beliefs of seven justices on the women and men of fifty states. The continuation of the liberty is a continuing affront to constitutional government in this country. [(Page 189) (emphasis added)].

Professor Noonan drafted and lobbied for a constitutional amendment to overturn Roe and to return the power to outlaw abortions to the states. His federalism approach influenced me when I co-sponsored the Human Life Amendment in 1981. So I have great respect for Judge Noonan's scholarly opinions on both Roe v. Wade and federalism, regardless of where one might be on the policy of any issue implicated.

Fortunately for the Country, Judge Noonan was confirmed back in 1985, when the single-issue extremist interest groups did not hold such sway over this Committee. I recall that his nomination was attacked by a group called the Federation of Women Lawyer's Judicial Screening Panel, not for his views, the group said, but for the "intemperate zeal with which he holds and expresses them." The group decried his "tone", saying that "[t]here is a certain passion, an emotional pitch, if you will, which pervades Professor Noonan's work on the subject [of abortion]" which, the group said, should force one to "pause and consider whether such fervor could magically disappear with the incantation of the oath of office."

Well, the Judiciary Committee and the Senate looked beyond such unwarranted attacks, and chose instead to take this fine scholar at his word that he would enforce Roe v. Wade and all other controlling Supreme Court precedents.
I would like today's record to reflect that Judge Noonan has not, from his perch on the Ninth Circuit, overturned the Supreme Court's abortion decisions - despite the fears of his critics. He has done as he said, as any fine judge should.

The fact that Judge Noonan is here today at the invitation of this Committee should be a profound warning of the price this Committee pays - and forces the American people to pay - when it deprives the judiciary of the service of high-caliber legal thinkers on the basis of unfounded criticism made by the usual Washington single-issue interest groups. You have to admit, Mr. Chairman, that the Ninth Circuit and the country are better off today for Judge Noonan's service, right? And we would be even better if we confirmed the highly qualified nominees currently pending for that court, Carolyn Kuhl and Jay Bybee.

Judge Noonan is an example of what I have been saying about well-qualified judges: they take seriously their responsibilities of adhering to the Constitution and following precedent. Judge Noonan clearly disagrees with the Supreme Court both on Roe and on the issue of state sovereign immunity. In fact, he has written powerful books challenging the basis for those

decisions. Nevertheless, as a lower court judge, he has no qualms whatever about being bound by those very precedents.

Again, I thank the Chairman for holding, and the witnesses for participating in, this forum for discussing the role of the Supreme Court, federalism, and state sovereign immunity.

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