Testimony of

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Thank you, Mr. Chairman and members of the Committee, for inviting me to testify today on the important issue of the Supreme Court's federalism jurisprudence. I hold the Paul R. Verkuil Chair in Public Law at the Benjamin N. Cardozo School of Law, Yeshiva University, where I specialize in constitutional law, particularly federalism and church/state issues. I write, lecture, and testify frequently on these issues. I clerked for 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 these hearings, I was lead counsel for the successful City of Boerne, Texas in Boerne v. Flores, 521 U.S. 507 (1997), a seminal federalism case.

Judge John Noonan has written a book--"Narrowing the Nation's Power: The Supreme Court Sides with the States"--in which he has expressed in strong terms his disagreement with the Supreme Court's federalism jurisprudence. I am grateful to be here today to explain why I believe Judge Noonan's thesis is misguided. The Supreme Court has not sided with the states, though this is a popular misconception, but rather with the Constitution.

Let me begin by pointing to one line in Judge Noonan's book with which I strongly agree: the Court's federalism cases "have been [decided] with great deliberateness, great sincerity, great conviction that they are essential to the preservation of our federal form of government." (p.9) The good faith of the Justices implementing the Constitution's explicit and inherent federalism limits cannot and should not be questioned.

There are some relevant principles on which there is no disagreement.

(1) It is the province of the Supreme Court to say what the law--including the Constitution--is. Marbury v. Madison, 5 U.S. (1 Cranch), 137 (1803).

(2) The Supreme Court is charged with drawing the lines of power set out by the Constitution.

(3) The federal courts routinely determine the constitutional boundaries between the federal branches (through separation of powers doctrine) and between church and state.

(4) One of the Constitution's fundamentals is that governing power is divided between the federal government and the states.

(5) From 1936 to 1995, the Supreme Court did not police the boundary between the federal and state governments, but rather gave the federal government carte blanche to enact any law at will.

(6) Since 1995, the Supreme Court has clarified the boundaries of power between the federal government and the states.

(7) The Tenth Amendment is a limit on congressional power: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people."

(8) The Congress is properly limited by the Constitution.

(9) The states are properly limited by the Constitution.

Taken together, these principles fully support the Supreme Court's federalism jurisprudence. Judge Noonan apparently believes the Constitution places no meaningful limits on Congress's capacity to regulate the states. Judge Noonan begins his book with reference to Alexander Hamilton, writing to George Washington that "[t]here are some things the General Government has clearly a right to do--there are others which it has clearly no right to meddle with, and there is a good deal of middle ground." This is a very odd quote for his purpose, which is to prove that Congress should have plenary power over all subject areas, as it shows that there was clear intent at the time of the framing, even among the most ardent Federalist, that the states would retain certain core areas of power.

Until 1995, there was virtually no middle ground left and there was precious little ground reserved exclusively to the states; rather, Congress (and the policy elites) assumed it had unlimited power. The Supreme Court's refusal to take up federalism principles for most of the twentieth century and Congress's willingness to move in where no limits existed almost eliminated those arenas where Congress "clearly [has] no right to meddle with." Rather, we reached a moment in history where Congress had persuaded itself it had plenary power over any policy item a lobbyist could conjure. It is that sense of entitlement to plenary power that appears to motivate Judge Noonan's book and leads him to erroneous conclusions about the proper role of federalism.

Judge Noonan does not quote another passage by Alexander Hamilton, though it is relevant to his task. Hamilton mistakenly believed that Congress would not have the desire to encroach on the arenas controlled by the states, but rather would only be attracted to the new powers given to the federal legislature:

It may be said that [the constitutional design] would tend to render the government of the Union too powerful, and to enable it to absorb those residuary authorities, which it might be judged proper to leave with the States for local purposes. Allowing the utmost latitude to the love of power which any reasonable man can require, I confess I am at a loss to discover what temptation the persons intrusted with the administration of the general government could ever feel to divest the States of the authorities of that description. The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition. Commerce, finance, negotiation, and war seem to comprehend all the objects which have charms for minds governed by that passion; and all the powers necessary to those objects ought in the first instance to be lodged in the national depository. The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction. It is therefore improbable that there should exist a disposition in the federal councils to usurp the powers with which they are connected; because the attempt to exercise those powers would be as troublesome as it would be nugatory; and that possession of them, for that reason, would contribute nothing to the dignity, to the importance, or to the splendor of the national government.

How wrong he was. The innate pride in national issues in which Hamilton placed his faith has not been a check on the "love of power." To the contrary, there is no local arena into which Congress has been unwilling to venture. Indeed, the situation is so bad that the debate has become whether there is any identifiable arena of local control left. Land use? Education? Crime?

The federalism cases unfortunately show Congress at its worst--grabbing for power as it imposed fewer and fewer restraints on itself, vis-à-vis the states. For example, when Congress enacted the Gun-free School Zones Act, it did not even consider the constitutional basis of its action. U.S. v. Lopez, 514 U.S. 549, 551, 559, 561(1995) . When Congress enacted the Religious Freedom Restoration Act, it did not consult with the state and local governments on the likely impact of a law that would apply strict scrutiny to every general law that affected religious claimants.

The Court is not imposing its policies on the nation. Despite Judge Noonan's charges, the Court has not usurped policymaking power and has not aggrandized its own power, but rather has embraced its responsibility to draw the constitutionally mandated lines of power. It is doing nothing different in the federalism cases than the courts do routinely in separation of powers and church-state cases. The burden of proof lies with those who would disable the courts vis-à-vis federalism to explain why the federal/state divide is off-limits, but the courts properly demarcate the boundaries between federal branches and between church and state. There is nothing in Judge Noonan's work or in the work of others criticizing the Court that satisfactorily explains why the Court should stand down when it comes to federalism but continue to arbitrate the separation of powers and church-state separation.

The federalism cases do not leave civil rights out in the cold. Although this would be hard to decipher if one were to read "Narrowing the Nation's Power" and not the cases, the pragmatic result of the federalism decisions is not to shut down any particular policy, but rather to send the lobbyists to the states on particular issues. There is no constitutional guarantee that lobbyists need have offices in Washington only.

In fact, in two civil rights arenas--prohibiting age and disability discrimination--the Court made a point of noting that the states had already enacted laws prohibiting such discrimination. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 n.1, 92 (2000); Bd. of Trustees v. Garrett, 531 U.S. 356, 368 n.5, 374 n.9 (2001). Thus, the heat and light Judge Noonan trains on these decisions is odd, to say the least.

"Narrowing the Nation's Power" underexplains the Supreme Court's Eleventh Amendment cases. One of the means the Court has used to bring Congress back within reasonable constitutional boundaries and to give the states some room within which to act as sovereigns, is to strengthen the Eleventh Amendment doctrine. The Eleventh Amendment is one of the constitutional features that reinforces the Framers' clear intent to set up a federal republic, one wherein the states retained significant power to serve the public good alongside the federal government.

Under the doctrine, the states are protected from suits for damages, unless they abrogate their immunity. Yet, there are still ample means of forcing the states to obey the federal law (assuming the law was enacted within Congress's enumerated powers). As the Court explained in Garrett, a holding that the Eleventh Amendment prohibits a suit against a state for monetary damages still leaves open suits brought by the United States for monetary damages, private actions for injunctive relief, and state laws providing "independent avenues of redress." 531 U.S. 356, 374 n. 9 (2001).

It is my view that the recent federalism cases do not invalidate the vast majority of congressional lawmaking and certainly do not impede any civil rights agenda. Rather, the Court's decisions

have called on the Congress to ask whether the states might already have acted on a particular issue, to engage in a dialogue with the states, and to respect the states. That seems hardly worthy of the disapprobation heaped upon it by Judge Noonan, but rather worthy of the high praise earned when a court pursues fundamental constitutional principles.

In sum, it is my view that Judge Noonan has misjudged the Supreme Court's federalism decisions, and the strong constitutional bases for them. The Court should be praised for its wisdom and perseverance in the federalism cases, not castigated.

Thank you again for the honor of appearing before this Committee on these important national issues.