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Protecting Federalism or Assaulting Separation of Powers: The Proposed Tenth Amendment Enforcement Act

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PROTECTING FEDERALISM OR ASSAULTING SEPARATION OF POWERS? THE PROPOSED TENTH AMENDMENT ENFORCEMENT ACT

[B]y usurping functions traditionally performed by the States, federal overreaching . . . undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.[1]

I. INTRODUCTION

In response to President Clinton's Executive Order 13,083[2] (EO 13,083, or the Order) and two of the Supreme Court's decisions in

1. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 572 (1985) (5-4 decision) (Powell, J., dissenting).

2. Exec. Order No. 13,083, 3 C.F.R. 146 (1998), *reprinted in* 5 U.S.C.A. § 601 at 55 (1999). The Order, which has since been rescinded, staged a blatant, fundamental assault on the federal-state relationship established in the Tenth Amendment, and raised serious questions regarding the Clinton Administration's view of the scope of federal power. *See Clinton-Gore v. State and Local Governments: Hearing Before the Subcomm. on Nat'l Econ. Growth, Natural Resources, and Regulatory Affairs of the House Comm. on Gov't Reform and Oversight*, 105th Cong. 323 (1998) [hereinafter *Hearing on EO 13,083*] (letter from Malcolm Wallop, U.S. Senate-Ret., Frontiers of Freedom Institute). The Order gave the federal government supreme power over the states and was viewed in Washington as "threaten[ing] the authority of the United States Congress, the sovereignty of the States, and the most basic rights of individual citizens." *Id.* at 2 (prepared statement of Rep. Collins). It vastly expanded federal authority by increasing the number of situations where federal action is justified. *See* 3 C.F.R. 146 (expanding the areas where federal action is justified under § 3(d), including "[w]hen there is a need for uniform national standards" and "[w]hen States have not adequately protected individual rights and liberties"). Moreover, it revoked both of the following: President Reagan's 1987 Executive Order, Exec. Order No. 12,612, 3 C.F.R. 252 (1987), *reprinted in* 5 U.S.C.A. § 601 (1996), and President Clinton's own 1993 Executive Order, Exec. Order No. 12,875, 3 C.F.R. 669 (1993), *reprinted in* 5 U.S.C.A. § 601 (1996). Both of these orders had provided many protections for state and

the Tenth Amendment area, Senator Paul Coverdell of Georgia introduced Senate Bill 2250, the "Tenth Amendment Enforcement Act of 1998" (the Bill), on June 26, 1998.[3] Although the Bill never made it out of committee during the 105th Congress, the Bill may be reintroduced in a future congressional session and is well worth examining for the serious constitutional questions it poses. This Note addresses the following question: Even though the Bill seeks to protect principles of federalism from an overreaching federal government, would Congress itself exceed its power by keeping too much control over judicial interpretation and executive enforcement?

The Bill is aimed at rectifying the problem of increasing federal regulation of state law, as apparent in *Garcia v. San Antonio Metropolitan Transit Authority*.[4] The Bill's supporters also seek to expand the decision in *United States v. Lopez*[5] by further curtailing federal regulation of private activity that displaces state and local law. The goal is admirable—to restore meaning to the Tenth Amendment guarantees[6] given to the states.[7] The Bill proposes "[t]o return power to State and local governments which are close to and more sensitive to the needs of the people"[8] by directing Congress, the judiciary, and executive agencies on how to construe federal statutes.

Part II examines whether section 6 of the Bill usurps the judicial function by comparing the Bill to the Religious Freedom Restoration

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local autonomy from the federal government. Thus, the Order substantially weakened traditional federalism principles by legitimizing broad power for federal agencies.

3. S. 2250, 105th Cong. (1998). The Bill is one in a series of bills introduced in response to EO 13,083. *See id.*

4. 469 U.S. 528 (1985) (holding that the federal government could directly regulate the wages and hours of state employees, thus diluting the state's power to do so).

5. 514 U.S. 549 (1995) (invalidating a federal law that criminalized the possession of a firearm in a school zone, thus rejecting federal regulation of private activity within the state).

6. *See* U.S. CONST. amend. X ("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.").

7. *See* 144 CONG. REC. S7280 (daily ed. June 26, 1998) (statement of Sen. Coverdell).

8. *Id.* (daily ed. June 26, 1998) (statement of Sen. Coverdell).

Act of 1993 (the Act, or RFRA),[9] an act that the Court struck down in *City of Boerne v. Flores*.[10] In contrast to RFRA, the Bill is a permissible use of Congress's remedial power because it has sufficient indicia of contemporary legislative findings and is sufficiently tailored. Congress is merely reshaping its own lawmaking power in order to protect its interests rather than attempting to override the Court's approach to the Supremacy Clause and federal preemption. Thus, in this section of the Bill, Congress is not actually telling the Court how to interpret the laws and is acting within the boundaries of its power.

Part III examines section 5 of the Bill, which is directed to executive agencies. In section 5, Congress is unconstitutionally telling the executive branch how to execute the laws and thus is acting contrary to fundamental notions of the separation of powers doctrine. This part of the Bill results in a merger of the legislative and executive branches and usurpation by the legislature of executive authority. This section of the Bill would not withstand a constitutional attack.

Finally, Part IV concludes that, while the Bill can stand as to the section regarding judicial interpretation of federal preemption, section 5 must be severed because it unconstitutionally directs executive agencies on how to perform their tasks. A revised Bill, even without section 5, would still give strength to federalism by confirming the principles established by the Tenth Amendment and by providing protection to the states—and thus the liberty of the people—against an overreaching federal government.

II. ANALYSIS OF SECTION 6: CONGRESS AND JUDICIAL INTERPRETATION

A. The Court as Final Arbiter

The legislative, executive, and judicial branches derive their powers from Articles I, II, and III of the United States Constitution, respectively.[11] Article I, Section 8 sets out Congress's enumerated

9. *See* Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb(b) (1994).

10. 521 U.S. 507 (1997).

11. *See* U.S. CONST. arts. I, II, III.

powers, which include the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated and unenumerated] Powers . . . ."[12] Generally, the executive veto[13] and judicial review[14] act as checks on Congress's power. Although the Constitution is silent regarding the judicial power to interpret the laws, *Marbury v. Madison*[15] further defined the role of judges by establishing judicial supremacy, the final power of the judiciary to determine what the Constitution and federal statutes mean.[16]

Thus, judicial review was established by case law and is not found in the text of the Constitution. The doctrine allows the Supreme Court and lower federal courts to decide the constitutionality of a case or controversy that stems from acts of the legislative and executive branches.[17] Judicial review does not preclude the legislative or executive branches from construing the Constitution itself; rather, it gives the judiciary the final say as to what is or is not constitutional.[18] In reviewing executive acts, the Court generally defers to agency interpretation of federal statutes as long as that view is reasonable with respect to congressional intent.[19]

Judicial review gives the Court considerable power because the Court acts as the final arbiter of what the law is. However, Congress can limit judicial review by manipulating the appellate jurisdiction of the Court[20] and by decreasing the number of, or abolishing, lower federal courts.[21] Yet Congress's power to limit judicial review is not absolute. The first limitation on Congress's power is structural. If Congress disagrees with the Supreme Court's interpretation of the

12. *Id.* art. I, § 8, cl. 18.
13. *See id.* § 7, cl. 2.
14. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).
15. *Id.*
16. *See id.* at 177-78.
17. *See id.*
18. *See id.*
19. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-45 (1984).
20. *See* U.S. CONST. art. III, § 2, cl. 2.
21. *See id.* art. I, § 8, cl. 9.

Constitution, Congress cannot dictate how to decide a case or overturn the Court's decision.[22] Congress's remedy is to seek to amend the Constitution through the legislative process.[23] The second limitation on Congress's power is that Congress's purpose must be legitimate and constitutional in order to survive judicial scrutiny.[24]

Applying these principles, does section 6 of the Bill unconstitutionally interfere with judicial power to interpret the laws by directing the Court on how to do its job?[25] Although it tells the courts how to construe federal statutes, section 6 is constitutional. When introducing the Bill in the Senate, Senator Coverdell explained section 6 as "direct[ing] the courts to strictly construe Federal laws and

22. *See Marbury*, 5 U.S. at 177 (holding that it is "the province and duty of the judicial department to say what the law is"); *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995) (striking down Congress's attempt to command federal courts to reopen final judgments); United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871) (holding that Congress cannot tell the Court how to decide a case or controversy in pending matters).

23. *See* U.S. CONST. art. V; *see also* City of Boerne v. Flores, 521 U.S. 507, 532 (1997) (striking down Congress's attempt to make a substantive change in constitutional protections).

24. *See, e.g.*, *Klein*, 80 U.S. at 128 (striking down a law whose purpose was to deny presidential pardons and which foreclosed all federal courts from reviewing the act); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (striking down a state law imposing a tax on the Bank of the United States as unconstitutional). *But cf. Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868) (upholding a statute that insulated specific laws from judicial review because a federal forum was still available).

25. Senate Bill 2250 states in part:

> (a) IN GENERAL.—No statute enacted after the date of enactment of this Act (or rule promulgated under such statute), shall be construed by courts or other adjudicative entities to preempt, in whole or in part, any State or local government law, ordinance or regulation unless—(1) the statute, or rule promulgated under such statute, contains an explicit declaration of intent to preempt; or (2) there is a direct conflict between such statute and a State or local government law, ordinance, or regulation, such that the two cannot be reconciled or consistently stand together.
>
> (b) FAVORABLE CONSTRUCTION.—Notwithstanding any other provision of law, any ambiguities in this Act, or in any other law of the United States, shall be construed in favor of preserving the authority of the States and the people.

S. 2250, 105th Cong. § 6 (1998).

regulations interfering with State powers . . . [and requiring] a presumption in favor of State authority and against Federal preemption."[26] Section 6, in essence, provides that state law is to trump federal law in all but two situations: (1) where the federal statute states explicitly that it intends to preempt state law; or (2) where there is a direct conflict between state and federal law.[27]

Here, Congress is not defining the Tenth Amendment, which it cannot do. Rather, Congress allows the Court to still have the final say as to the meaning of the Amendment. Even though congressional intent to defer to state law is clear, Congress merely tells the Court to give deference to state law. Congress does not direct the Court on its *final decision* about the law.

B. Congress Does Not Have Substantive Power

Congress has the power to enact the Bill under Article I, Section 8, Clause 18 of the United States Constitution, also known as the Necessary and Proper Clause. Congress can use its necessary and proper power to remedy what it sees as unwarranted federal intrusion on states' rights.[28] Even though Congress has the power to reach out and remedy constitutional violations, congressional enforcement power is limited.[29] The "powers of the legislature are defined, and limited" and do not include congressional power to enact a substantive change—as opposed to a remedial change—in what the law is, which is a power reserved for the judiciary.[30] The line between remedial and substantive change can be a fine distinction. Legislation is more likely remedial if the evil to be remedied is congruent and proportional to the means adopted, and is supported by evidence in the legislative record.[31] The rationale for not giving Congress the power to have the final say in interpreting the laws is to prevent Congress from defining its own powers and thereby changing the meaning of the Constitution on a whim.[32]

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26. 144 CONG. REC. S7280 (daily ed. June 26, 1998) (statement of Sen. Coverdell).
27. *See* S. 2250, 105th Cong. § 6 (1998).
28. *See* U.S. CONST. art. I, § 8, cl. 18.
29. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976).
30. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).
31. *See* City of Boerne v. Flores, 521 U.S. 507, 519-20, 530-33 (1997).
32. *See id.* at 518-19, 529; *see also Marbury*, 5 U.S. at 177.

In the Voting Rights Cases,[33] the Court upheld certain provisions of the Voting Rights Act of 1965 because the provisions were "remedies aimed at areas where voting discrimination has been most flagrant,"[34] and necessary to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century."[35] Because the Court found evidence in the legislative record showing discriminatory application of literacy tests that excluded certain groups from voting,[36] the Court ultimately deemed the Act a necessary use of Congress's remedial power to help cure discrimination in voting.[37]

Similarly, the Bill seems to address the problem of increasing federal power over state law and seeks to remedy the problem by enforcing the Tenth Amendment guarantees. The Bill has four main purposes:

> to protect the rights of the States and the people from abuse by the Federal Government, to strengthen the partnership and the intergovernmental relationship between State and Federal Governments, to restrain Federal agencies from exceeding their authority, [and] to enforce the Tenth Amendment of the United States Constitution . . . .[38]

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33. *See generally* City of Rome v. United States, 446 U.S. 156, 161 (1980) (upholding a seven-year extension of a requirement of preclearance by the Attorney General or district court of any change in a "'standard, practice, or procedure with respect to voting'"); Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding a five-year nationwide ban on literacy tests and similar voting requirements for registering to vote); Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding a ban on literacy tests that prohibited certain people educated in Puerto Rico from voting); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding a suspension of literacy tests and similar voting requirements that combatted racial discrimination in voting).

34. *South Carolina v. Katzenbach*, 383 U.S. at 315.

35. *Id.* at 308.

36. *See id.* at 333-34.

37. *See id.* at 313-15.

38. 144 CONG. REC. S7280 (daily ed. June 26, 1998) (statement of Sen. Coverdell).

Thus, the Bill seeks to address Congress's concern about federal regulation of the states, including federal laws that displace state and local laws by regulating private individuals.[39]

C. *Other Triggers:* Garcia v. San Antonio Metropolitan Transit Authority[40] *and* United States v. Lopez[41]

With the Bill, Congress attempts to revitalize federalism through the legislative process. In particular, the Bill addresses Congress's concern with federal regulation of the states[42] and, to a lesser extent, federal regulation of private activity that displaces state and local laws.[43] One cause for the demise of federalism results in part from "doctrinal developments in constitutional law that have largely freed the national government of the constraints inherent in its enumerated powers."[44]

To better understand the context in which the Supreme Court decided *Garcia* and *Lopez*, one should examine the background of Tenth Amendment jurisprudence. In 1976, the Court in *National League of Cities v. Usery*[45] resurrected the Tenth Amendment from a truism[46] to an affirmative limit on congressional power. In *National League*, the Court held that Congress lacked power under the Commerce Clause to regulate certain applications of the Fair Labor Standards Act to state employees engaged in "traditional government functions."[47] The Court made clear, however, that it was not limiting congressional power over private activity affecting interstate commerce.[48] Rather, regulating the "States *qua* States" is not allowed if

39. *See supra* Part II.E for a detailed examination of why the Bill resembles a remedial measure, as in the Voting Rights Cases, and not a substantive measure.

40. 469 U.S. 528 (1985).

41. 514 U.S. 549 (1995).

42. The Bill addresses Congress's concerns after *Garcia*.

43. The Bill addresses Congress's concerns after *Lopez*.

44. *Hearing on EO 13,083*, *supra* note 2, at 265.

45. 426 U.S. 833 (1976) (overruling Maryland v. Wirtz, 392 U.S. 183 (1968)).

46. *See* United States v. Darby, 312 U.S. 100, 124 (1941) (stating that "all is retained which has not been surrendered").

47. *National League*, 426 U.S. at 833.

48. *See id.*

it interferes with federalism principles.[49] Writing for the Court, Justice Rehnquist remarked:

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.[50]

Thus, *National League* resurrected the Tenth Amendment protections of the states.

However, in the 1985 *Garcia* decision, the Court drastically undercut its decision in *National League* and diluted the states' Tenth Amendment protections. The *Garcia* Court held that the federal government could directly regulate the wages and hours of state employees.[51] The Court reasoned that because Congress consisted of state-elected representatives, the states' interests were protected through the political process.[52] The majority believed that the states' participation in the political process would sufficiently "ensure[] that laws that unduly burden the States will not be promulgated."[53] Thus, repudiating *Marbury*, the *Garcia* Court reasoned that it was up to Congress, not the judiciary, to decide the extent of states' Tenth Amendment rights.[54]

In 1995, the *Lopez* Court changed its course in favor of protecting the states and limited congressional power over them.[55] The *Lopez* Court invalidated a federal law that criminalized the possession of a firearm in a school zone.[56] The supporters of this Bill would agree with the *Lopez* Court's rejection of federal regulation of private activity that displaces state and local regulations; however, *Lopez* is only a starting point. Whereas *Lopez* was limited to non-commercial activities, the Bill gives greater protection to the states by extending *Lopez* to all state activities.

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49. *Id.* at 847.
50. *Id.*
51. *See Garcia*, 469 U.S. at 555-56.
52. *See id.* at 550-54.
53. *Id.* at 556.
54. *See id.* at 546-47.
55. *See Lopez*, 514 U.S. at 551, 556.
56. *See id.* at 551.

D. Comparison to RFRA

The Court's decision in *City of Boerne v. Flores*[57] sheds light on the possible outcome of a constitutional attack on the Bill if enacted. In *Boerne*, the Court struck down RFRA as being beyond Congress's lawmaking power.[58] Congress enacted RFRA in response to the Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.[59] In *Smith*, the Court applied rational basis review and upheld an Oregon law that prohibited peyote use and denied unemployment benefits to persons fired for sacramental peyote use.[60] The Court upheld the law because it was not aimed at regulating religious beliefs; rather, the law was a generally applicable criminal drug law.[61] Because of the law's general applicability, the Court held that its incidental burden on religious practices was constitutional.[62]

After the *Smith* decision, Congress enacted RFRA to provide a statutory cause of action or defense to any party whose free exercise of religion had been substantially burdened.[63] In addition, RFRA rejected the highly deferential rational basis review used in *Smith* and instead required the government to show that the burden furthered a compelling interest and was the least restrictive alternative.[64] RFRA applied both prospectively and retroactively to all local, state, and federal laws.[65]

At issue in *Boerne* was whether Congress had authority to enact RFRA.[66] Congress enacted RFRA under its Fourteenth Amendment Section 5 enforcement power.[67] Section 5 of the Amendment is "a positive grant of legislative power"[68] and allows Congress "to enforce, by appropriate legislation, the provisions of [the Fourteenth

57. 521 U.S. 507 (1997).
58. *See id.* at 511, 536.
59. 494 U.S. 872 (1990).
60. *See id.* at 874, 890.
61. *See id.* at 884-86.
62. *See id.* at 872, 885-86, 876-82.
63. *See* Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb(b) (1994).
64. *See id.*
65. *See id.*
66. *See Boerne*, 521 U.S. at 511, 517.
67. *See id.* at 507.
68. Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

Amendment]."[69] Because the First Amendment's Free Exercise Clause was made applicable against the states through the Fourteenth Amendment, Congress can enact legislation under Section 5 to enforce the First Amendment right to free exercise of religion.[70] Similar to its Article I necessary and proper power, under the Fourteenth Amendment, Congress cannot enact substantive—as opposed to remedial or preventative—measures that change the constitutional right at hand.[71]

The specific issue in *Boerne* was whether RFRA was an appropriate use of legislative power to remedy a state's curtailment of a person's liberty protected by the Fourteenth Amendment. RFRA, in effect, was a substantive change to the constitutional right to free exercise of religion and therefore an unconstitutional use of Congress's Section 5 power. RFRA was fatally flawed because it lacked both sufficient legislative findings and proportionality, two essential ingredients for an act of Congress to be constitutional.[72]

First, the act at hand must be appropriate in light of the evil presented and must be supported by the legislative record.[73] The record for RFRA contained no evidence of any generally applicable laws that Congress passed out of hostility against the free exercise of religion within the past forty years.[74] Rather, the legislative findings focused on generally applicable laws that had only an incidental burden on religion.[75] Thus, the Court found little evidence of laws targeting religion and determined that "Congress'[s] concern was with

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69. U.S. CONST. amend. XIV, § 5. Section 1 of the Fourteenth Amendment states in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

70. *See id.* amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .").

71. *See* South Carolina v. Katzenbach, 383 U.S. 301, 326-27 (1966).

72. *See Boerne*, 521 U.S. at 530-33.

73. *See id.* at 530; *see also South Carolina v. Katzenbach*, 383 U.S. at 308, 309.

74. *See Boerne*, 521 U.S. at 531.

75. *See id.*

the incidental burdens imposed, not the object or purpose of the legislation."[76]

Second, RFRA was substantive rather than remedial legislation because it was disproportionate. The Act was "so out of proportion to a supposed remedial or preventive object that it [could not] be understood as responsive to, or designed to prevent, unconstitutional behavior."[77] Under RFRA, strict scrutiny would be triggered for generally applicable laws that incidentally burdened religion, most of which would otherwise be constitutional.[78] The Court distinguished RFRA from other measures that it upheld under Congress's enforcement power,[79] and noted that RFRA intruded at all levels of government, prohibited official actions regardless of subject matter, applied to government agencies and officials from the federal level to the local level,[80] applied retrospectively and prospectively to all federal and state laws,[81] had no termination date or mechanism, and gave a cause of action to all individuals who claimed a substantial burden on their free exercise of religion.[82] The Court believed RFRA imposed too strict a test for a virtually unsubstantiated burden.

Thus, the Court struck down RFRA because it was disproportionate and lacked legislative findings of modern instances of laws targeting religious practices. The Court rejected Congress's attempt to determine what constituted a constitutional violation.[83] The problem was congressional usurpation of a judicial function.[84]

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76. *Id.*
77. *Id.* at 532.
78. *See id.* at 532-34.
79. *See id.* at 532-33 (distinguishing *South Carolina v. Katzenbach*, 383 U.S. at 315—where the Court upheld the Voting Rights Act, which confined its provisions to the areas of the country where voting discrimination was the most prevalent and contained a termination clause—and *Morgan*, 384 U.S. at 643-45, which targeted a voting qualification made on racial grounds).
80. *See id.* at 532; *see also* 42 U.S.C. § 2000bb-2(1).
81. *See* 42 U.S.C. § 2000bb-3(a).
82. *See Boerne*, 521 U.S. at 532.
83. *See id.* at 535-36.
84. *See id.* at 536.

E. Are There Parallels Between the Bill and RFRA?

Just as the Court's decision in *Smith* triggered RFRA, the Court's decision in *Garcia* helped trigger the Bill. Because *Garcia* holds that Congress is the sole judge of the boundaries of its commerce power, Congress may utilize the Bill to impose guidelines and limitations upon itself.[85] Such limits on its powers include declaring its intent to preempt state law and specifically citing constitutional authority to do so.[86] The Bill further extends Congress's efforts to restore federalism by also requiring that federal agencies not interfere with state or local powers without constitutional authority cited by Congress.[87] Finally, the Bill directs the courts on how to construe federal statutes that interfere with state authority and requires a presumption in favor of state power.[88] However, unlike RFRA, the Bill as a whole seems to operate as a valid exercise of congressional power in response to the erosion of states' Tenth Amendment protections.

While Congress does not use its Fourteenth Amendment Section 5 enforcement power in the Bill as it did with RFRA, it does use its parallel Article I, Section 8, Clause 18 "necessary and proper"[89] power. Section 5 enables Congress "to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment],"[90] whereas Section 8 gives Congress a more general power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[91] Thus, Congress's source of power stems from the parallel enforcement and necessary and proper clauses in the Fourteenth Amendment and in Article I.

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85. *See Hearing on EO 13,083*, *supra* note 2, at 266.

86. *See* 144 CONG. REC. S7280 (daily ed. June 26, 1998) (statement of Sen. Coverdell).

87. *See id.* (daily ed. June 26, 1998) (statement of Sen. Coverdell).

88. *See id.* (daily ed. June 26, 1998) (statement of Sen. Coverdell).

89. U.S. CONST. art. I, § 8, cl. 18.

90. *Id.* amend. XIV, § 5.

91. *Id.* art. I, § 8, cl. 18; *see also* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 618-19 (1842) (stating that Congress, through its necessary and proper power, has the "means to carry into effect rights expressly given. . .").

As distinguished from RFRA, section 6 of the Bill is drafted around RFRA's fatal flaws. As shown in the record, section 6 seems much more proportional to the remedial object—that of curtailing abuse of federal power under the Tenth Amendment—which, if allowed, would result in unconstitutional behavior. The Bill looks more akin to the statute at issue in the Voting Rights Cases, where the Court determined that the remedies were properly aimed at the evil. Here, the evil—as Congress perceives it—is a violation of states' rights by the federal government by weakening the guarantees of the Tenth Amendment.[92]

Senator Coverdell's introduction of the Bill and the hearing record for EO 13,083 lend support for a remedy of this type. Senator Coverdell stated:

> The Tenth Amendment was a promise to the States and to the American people that the Federal Government would be limited, and that the people of the States could, for the most part, govern themselves as they saw fit. Unfortunately, . . . that promise has been broken. The American people have asked us to start honoring that promise again: To return power to State and local governments which are close to and more sensitive to the needs of the people.[93]

Because the Bill is part of a series of bills introduced in response to EO 13,083, the hearing transcript of EO 13,083 is also indicative of the evil that Congress sought to address. Senator David M. McIntosh, chairperson of the subcommittee, noted that "the new order would wreak havoc on the balance of power envisioned by the Constitution between the States and the Federal Government."[94] The Senator further questioned why the President "stripped the most basic protection accorded the States, the preparation of a federalism assessment for all regulatory and legislative proposals . . . ."[95] Similar to the record of actual constitutional violations in the Voting Rights Cases, the record here contains examples of how the federal government has increased its power and has eviscerated the Tenth

92. *See* 144 CONG. REC. S7280 (daily ed. June 26, 1998) (statement of Sen. Coverdell).

93. *Id.* (daily ed. June 26, 1998) (statement of Sen. Coverdell).

94. *Hearing on EO 13,083*, *supra* note 2, at 5 (statement of Sen. McIntosh).

95. *Id.* (statement of Sen. McIntosh).

Amendment guarantees to the states. Thus, even though the Order has been rescinded, the Bill would protect against future attacks on the Tenth Amendment, as well as remedy the problem of potentially excessive federal regulation over state and private activity.

The Bill also seems to pass the proportionality prong of *Boerne*. Distinguished from RFRA, the Bill is limited to the federal government and, more importantly, addresses an actual evil, that of federal violation of Tenth Amendment principles. Section 6 of the Bill allows federal law to trump state law in two instances: when the federal statute explicitly states its intent to preempt state law or when there is a direct conflict between state and federal law.[96] This provision is not an attempt to override the Court's Supremacy Clause jurisprudence. Rather, the provision passes muster because preemption, unlike the Free Exercise Clause, is ultimately an expression of congressional intent.

Unlike RFRA, section 6 is a limited attempt to remedy the evil Congress perceives, that of the erosion of state authority by the federal government. Thus, Congress does not mandate total deference to state law in every situation; rather, it provides exceptions in cases where the legislature intends to preempt state law. The additional exemption itself has the underlying purpose of encouraging Congress to "analyze the source of its power before it acts," one of the themes noted in the Governmental Affairs Committee hearings on the 1996 proposed bill to enforce the Tenth Amendment.[97] There is no problem with Congress directing itself. Here, as in *South Carolina v. Katzenbach*,[98] where the Voting Rights Act was upheld, the Bill affects a discrete group of laws, namely, those that affect an area reserved for the states by the Tenth Amendment.

At first blush it may appear that Congress is encroaching upon judicial power to define the law by directing the Court on how to construe the Tenth Amendment. According to the Bill, if a federal statute does not directly conflict with state law and Congress does

96. *See* S. 2250, 105th Cong. § 6 (1998).

97. 142 CONG. REC. S11,724 (daily ed. Sept. 28, 1996) (statement of Sen. Stevens, quoting constitutional lawyer Roger Marzulla's remarks on July 16, 1996 to the Governmental Affairs Committee).

98. 383 U.S. 301, 315 (1966) (finding that the challenged provisions were limited to areas with high voting discrimination and affected a confined group of state voting laws).

not declare its intent to preempt state law, arguably the Court would have no choice but to construe the federal law "in favor of preserving the authority of the States and the people."[99] However, the Court still has the power to say what the law is[100] because the Court must only begin its analysis by construing the law in favor of the states. The Court still has the authority to make a final decision when federal law trumps.

The Bill does not mandate that the Court find in favor of state law; it merely says that the Court must give deference to the states.[101] Certainly, Congress's intent is to return power to the states by giving deference to state law, but Congress carefully maneuvers around the *Boerne* problem by allowing the Court a narrow out. Thus, although Congress declares that deference be given to state law, it has preserved judicial autonomy because the Court can still exercise its established power to interpret the laws. Congress is merely reshaping its own lawmaking power in order to protect its interests. Section 6 thus appears to be a constitutional use of Congress's remedial power.

III. ANALYSIS OF SECTION 5: CONGRESS AND EXECUTIVE AGENCIES

A. The Text and Meaning of Section 5 of the Bill

Is section 5 of the Bill as carefully constructed as section 6, so as to avoid a constitutional problem? Typically, Congress passes federal laws without preemption language and the agency fills in the gaps to determine the specific rules of the statute by examining legislative intent or making a reasonable determination.[102] Section 5 makes it more difficult for an executive agency rule to get promulgated because the agency becomes powerless to preempt the state rule unless Congress expressly authorizes preemption.[103] This section removes all discretion from executive agencies:

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99. S. 2250 § 6(b).

100. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

101. *See* S. 2250 § 6(b).

102. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

103. *See* S. 2250 § 5(a).

> No agency shall construe any statutory authorization to issue rules as authorizing preemption of State law or local ordinance by rulemaking or other agency action unless—(1) the statute expressly authorizes issuance of preemptive rules; and (2) the agency concludes that the exercise of State power directly conflicts with the exercise of Federal power under the Federal statute, such that the State statutes and the Federal rule promulgated under the Federal statute cannot be reconciled or consistently stand together.[104]

Hence, only if the statute expressly authorizes preemption can the agency enforce federal statutes to trump state law. An important constitutional question is thus raised: By rendering the agency powerless, has Congress overstepped its constitutional power by telling the executive agencies—essentially, the President—how to use executive power?

B. Congressional Power

As noted earlier, Congress has the power to enact the Bill under its necessary and proper power.[105] A strict textual reading of "proper," "for carrying into Execution," and "vested by this Constitution" indicates that, when Congress uses its necessary and proper power, it must act within the basic trinity, must identify an independent grant of power that it is executing, and must limit itself to carrying into execution that enumerated power.[106] The power merely allows Congress to assure that the branches of government have the tools necessary to effectively utilize and implement their powers; "it surely does not license Congress to wrest the power to administer

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104. *Id.* The amendment goes on to describe that the preemption must be "narrowly written" and must "explicitly describe" the scope of preemption. *Id.* Further, it describes numerous procedural agency rules regarding notice and opportunity to be heard for state officials and legislators, and a publication plan for a review of agency rules that preempt state law. *See id.*

105. *See* U.S. CONST. art. I, § 8, cl. 1, 18 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

106. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 587-89 (1994).

federal law away from the President."[107] Because the Constitution does not explicitly authorize the execution of federal law independent of the President, Congress does not possess power to do so.[108] Rather, Congress has the power to pass laws that help the other branches implement their respective powers.[109]

The necessary and proper power is about the means, not the ends.[110] Thus, while Congress can pass laws in aid of implementation, "it does not have the power to enact laws telling the other branches 'how they ought to carry into execution' one of their powers."[111] In other words, although Congress can create an agency to help the President use his or her executive power, Congress cannot dictate how the laws will be implemented.[112] If Congress passes a statute creating a regulatory scheme, it is the President who decides how best to execute the law.[113] The President, and only the President, is constitutionally responsible for deciding how to implement the laws.

C. The Constitutional Framework

Executive agencies occupy a unique position within the separation of powers structure because agencies exercise not only executive duties, but also quasi-judicial and quasi-legislative functions,[114]

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107. *Id.* at 623, 635.

108. *See id.* at 589 (citing Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 1011 (1993)).

109. *See id.* at 589-90.

110. *See id.* at 590.

111. *Id.* at 591.

112. *See id. But see* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 69 (1994) (arguing that Congress has the power to determine how the federal powers will be executed).

113. *See* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1286 (1996).

114. Executive, or administrative, agencies are considered part of the executive branch because that branch has the power of removal. Agencies are quasi-judicial because Congress empowers them with adjudicating authority. Agencies are quasi-legislative because Congress empowers them with rule-making authority. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935):

> The [FTC] is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other speci-

which include interpretation of the law.[115] Congress cannot control the administration of the law by passing a statute that tells the executive how to do its job: "It is hard to imagine that a document that forbids members of Congress from serving as executive officers would nonetheless allow such members to control indirectly the administration of the laws that they were disabled from controlling more directly."[116] The result, if Congress were allowed to tell the executive how to do its job, would be a merger of the executive and legislative branches and a usurpation by the legislature of executive authority.

Because agencies derive their power from the President, it is helpful to examine the source and extent of the President's power to execute the law.[117] In the ongoing "unitary executive" debate,[118] Professor Steven Calabresi and Saikrishna Prakash have persuasively argued that the President is "constitutionally empowered to administer *all* federal laws."[119] This exclusive authority includes the power to "enforce, administer, and implement federal laws."[120] Professor Calabresi and Mr. Prakash make their constitutional case based on a textual and historical analysis of the Constitution.[121]

The Constitution creates a trinity of powers[122] in the legislative, executive, and judicial branches, which are established by Articles I,

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fied duties as a legislative or as a judicial aid . . . . In administering the provisions of the statute[,] . . . that is to say in filling in and administering the details embodied by that general standard[,] the commission acts in part quasi-legislatively and in part quasi-judicially.

115. *See* PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW: CASES AND MATERIALS 423 (1996).

116. Calabresi & Prakash, *supra* note 106, at 582-83 (referring to U.S. CONST. art. I, § 6, cl. 2).

117. Even if one rejects this unitary executive view and instead adopts the view of agency independence, the agencies remain part of the executive branch; thus, this Note analyzes the agencies as such.

118. The unitary executive debate focuses on whether the Constitution creates a "unitary" Executive with the President at the top of the executive hierarchy, or instead allows Congress to structure the executive branch with independent entities designed to administer the laws. *See* Calabresi & Prakash, *supra* note 106, at 582-83.

119. Calabresi & Prakash, *supra* note 106, at 550. *See generally* U.S. CONST. art. II.

120. Calabresi & Prakash, *supra* note 106, at 589.

121. *See id.* at 599.

122. *See id.* at 663.

II, and III, respectively.[123] This trinity has historical roots stemming from eighteenth century political theorists, early state constitutions, and the shortcomings of the Articles of Confederation.[124] The Framers were concerned about tyranny resulting from a porous system lacking a distinct separation among the branches.[125] For example, the French statesman, Montesquieu, was greatly admired for his principles of free government and of greater separation of powers.[126] He warned against a single legislative and executive branch in order to protect liberty and avoid governmental tyranny: "When the legislative and executive powers are united in the same person, . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."[127] At the time the Framers drafted the federal Constitution, state constitutions also divided power into three departments and mandated that the powers be separate and distinct.[128]

The Framers wanted to create an executive strong enough to counteract an overreaching legislature and to keep balance between the branches.[129] In *The Federalist*, Madison expounded the virtues of separation of powers and attempted to convince the future ratifiers that the Constitution incorporated this principle.[130] The Constitution thus divided executive from legislative power for the purpose of guarding against tyranny, and included an executive strong enough to counteract a strong legislature.[131]

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123. *See* U.S. CONST. arts. I, II, III.

124. *See* Calabresi & Prakash, *supra* note 106, at 605-26.

125. *See* THE FEDERALIST NO. 48, at 347 (James Madison) (Benjamin Fletcher Wright ed., 1961) ("[A] mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.").

126. *See id.* at 5 (editor's introduction).

127. BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 151-52 (Thomas Nugent trans., Hafner Press 1949) (1751).

128. *See* Calabresi & Prakash, *supra* note 106, at 607 (quoting VA. CONST. of 1776, *reprinted in* 10 SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 51 (William F. Swindler ed., 1979)).

129. *See* Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 138 (1994).

130. *See* THE FEDERALIST NO. 48, at 60 (editor's introduction).

131. *See* Greene, *supra* note 129, at 148; *see also* THE FEDERALIST NO. 47, at 336 (James Madison) (Benjamin Fletcher Wright ed., 1961) ("The accumu-

D. Separation of Powers

> The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question . . . . The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.[132]

The Supreme Court, consistent with the separation of powers doctrine, has struck down a number of laws in which Congress has impaired or sought to assume a function that the Constitution assigned to another branch.[133] One of the ways Congress intrudes on another branch is by telling that branch how to do its job. Although Congress may have created the executive agency that it attempts to direct, it cannot intrude upon the executive branch's central power to administer the laws without violating separation of powers.[134]

In *INS v. Chadha*,[135] the Court invalidated the legislative veto. The veto, which allowed either house of Congress to reject an agency's decision without presenting the rejection to the President, was held inconsistent with the bicameralism and presentment process of Article I, Section 7 of the Constitution.[136] Allowing Congress to intrude on executive power by negating the President's constitutionally given veto power violates separation of powers.[137] The theory

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lation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."); THE FEDERALIST NO. 48, at 343 (James Madison) (describing an executive strong enough to combat a legislature which was "everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex").

132. Humphrey's Ex'r v. United States, 295 U.S. 602, 629-30 (1935).

133. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 138-41 (1976) (per curiam) (holding sections of the Federal Election Campaign Act of 1971 violative of separation of powers where Congress assigned enforcement powers to the Federal Elections Commission).

134. *See, e.g., id.* at 138-39 (stating that Congress may undoubtedly create "offices" under the necessary and proper clause, but is inevitably bound by the express language of Art. II, § 2, cl. 2).

135. 462 U.S. 919 (1983).

136. *See id.* at 951-59; *see also* U.S. CONST. art. I, § 7.

137. *See Chadha*, 462 U.S. at 955.

behind the Court's decision in *Chadha* is that, "although Congress may delegate legislative power to administrative agencies, it may not delegate such power back to itself."[138] Even though Justice Powell, in his concurrence, characterized the legislative veto as an improper use of congressional power through adjudication, one can draw a parallel to the improper use of congressional execution of power as well.[139] In essence, Congress can regulate executive power by creating agencies to help the President carry out his or her duties, by limiting agency funding, or by curtailing its personnel or jurisdiction.[140] However, Congress cannot tell another branch how to do its business.

E. Is Section 5 of the Bill Consistent with the Constitution and Case Law?

Keeping the constitutional framework and established case law in mind, has Congress abused its power by telling executive agencies how to administer the law? First, let us take a closer look at the main points of section 5 of the Bill. Under section 5(a), if Congress does not explicitly authorize federal preemption of state law, and the state and federal rules directly conflict and cannot stand together, then an agency is powerless to preempt state law.[141] Thus, the executive agency can no longer preempt state law unless Congress explicitly authorizes it on a statute-by-statute basis. The remainder of section 5 lays out various procedural rules.[142]

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138. Greene, *supra* note 129, at 165; *see also Chadha*, 462 U.S. at 954-55 (finding that once Congress delegated its deportation authority to the Attorney General, Congress was bound to abide by the Attorney General's decisions until the delegation is altered or revoked).

139. *See* Greene, *supra* note 129, at 163.

140. *See id.* at 171.

141. *See* S. 2250, 105th Cong. § 5(a) (1998).

142. *See id.* Within section 5(a), Congress directs itself to write preemption authorizations narrowly, with an eye toward the objectives of the statute, and to explicitly lay out the scope of preemption. The section also lays out what the agency must do once it "finds" that a state law is preempted: (1) provide the affected state(s) with notice and an opportunity to be heard; (2) provide notice of the extent and purpose of the preemption to the state governor, attorney general, and presiding officers of each chamber of the state legislature; and (3) publish a list of preemptive rules in the table of contents of each Federal Register. Finally, there is a requirement that each agency publish in the Fed-

Perhaps Congress is trying to keep too much control over executive enforcement of the laws by directing federal agencies on how to construe federal statutes. Congress can clearly tell itself what to do, and part of section 5(a) does exactly that. Section 5(a) tells Congress how to make the laws; such authority falls within its Article I, Section 1 powers. Promulgating the procedural sections that regulate executive agency powers are also within Congress's power. Although, in a sense, Congress is telling the agencies how to do their jobs—provide notice and opportunity to be heard, etc.—Congress is not intruding upon the agencies' central function, which is to assist the President in executing the laws. Instead of telling agencies how to construe federal statutes, the procedural provisions of section 5(a) constitutionally curtail agency power by mandating faithfulness to certain procedural requirements.[143]

However, constitutional problems arise with what Congress attempts to do in the first part of section 5(a), where it takes away all agency authority to independently find federal preemption of state law.[144] This part is inconsistent with the separation of powers doctrine. In stating that no federal law preempts unless Congress explicitly says so, Congress reserves for itself the sole power to determine how to construe federal statutes and completely robs executive agencies of their core executive function of deciding how to carry out the law.

Arguably, because Congress has the power to create and empower federal agencies, it has the right to take away whatever power it grants to such agencies.[145] Besides, if agencies look to congressional intent when construing federal statutes, what is wrong with

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eral Register a plan for periodic review of rules that preempt, at least in part, state or local law. *See id.*

143. *See id.* (stating that an agency must comply with notice requirements).

144. *See id.*

145. In numerous areas of constitutional law, the Court has recognized that the greater power does not include the lesser power. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 395-96 (1992) (holding that a state ordinance regulating an unprotected category of speech was unconstitutional because it was impermissibly content-based); Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970) (holding that procedural due process requires holding a pretermination evidentary hearing before public assistance payments to welfare recipients are discontinued, even though public assistance benefits are a "privilege" and not a "right").

Congress laying out those situations in which agencies should find preemption? After all, preemption could be viewed as strong medicine because it displaces what the majority wants and what is established through the state legislative process. Congress's intent behind the Bill is to protect the states from an overreaching federal government; in essence, to safeguard and maintain federalism.[146]

This view is problematic because, although the ends are legitimate, the means violate the essence of separation of powers. Congress's intent to protect federalism simply cannot justify congressional intrusion into another branch's duties or a reduction in the multiple repositories of power among the three branches of the federal government. Further, *Chadha* demonstrates that, even though Congress may delegate legislative power to agencies, it may not delegate such power back to itself.[147] Quite simply, Congress cannot tell members of the executive branch how to do their jobs.

Section 5 is also inconsistent with current judicial respect for executive autonomy. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[148] the Court gave deference to agency interpretation of federal law, thereby respecting executive autonomy. In *Chevron*, the Court deferred to the Environmental Protection Agency's judgment regarding permit requirements because Congress did not expressly address the issue in the relevant statute or in its legislative history.[149] In construing a statute, the Court reasoned, the agency must give effect to an unambiguously expressed intent of Congress.[150] If the statute is silent or unclear regarding congressional intent, the agency is free to interpret the statute based on a "permissible construction."[151] Thus, as long as the agency's interpretation is reasonable and is one that Congress would have sanctioned, the Court gives deference to the agency's decision.[152] In other words, *Chevron* deference is triggered when: (1) Congress has

146. *See* 144 CONG. REC. S7280 (daily ed. June 26, 1998) (statement of Sen. Coverdell).
147. *See* INS v. Chadha, 462 U.S. 919, 954-55 (1983).
148. 467 U.S. 837 (1984).
149. *See id.* at 841, 858.
150. *See id.* at 842-43.
151. *Id.* at 843.
152. *See id.* at 844-45.

not expressly declared its intent in a statute, and (2) when the agency's interpretation is reasonable.[153]

Although *Chevron* did not discuss preemption, when a federal law is passed without preemption language, *Chevron* deference is given to agency interpretation if both prongs of *Chevron* are satisfied.[154] Thus, section 5 attempts to narrow *Chevron* by taking away agency interpretation and reserving sole interpretative authority regarding preemption to Congress. Proponents of section 5 may also assert that the Supremacy Clause[155] applies only when the national legislature acts, and thus it follows that only Congress can authorize preemption. However, *Chevron* established that "the Laws of the United States which shall be made in Pursuance thereof"[156] include reasonable regulations by a federal agency. Thus, agencies have the power to preempt state law.

Section 5 tightens up preemption laws and drastically narrows the rule in *Chevron*. Although agency preemption displaces state law—and thus the will of the people—through unelected agency members, allowing Congress to do the agency's job is not the answer. Section 5 ironically exposes the people to the worst form of governmental tyranny: It collapses the executive and legislative branches into one and diminishes the safety mechanism of a balance of power through separation of powers.

IV. CONCLUSION

The Bill is a proper use of Congress's remedial power; however, section 5 must be severed if the Bill is to survive a constitutional attack. As the Bill stands, section 5 is problematic because Congress directs the executive branch on how to do its job and thus merges the legislative and executive branches into one. The result is a violation

153. *See id.* at 845.

154. *See, e.g.*, INS v. Aguirre-Aguirre, 119 S. Ct. 1439, 1445 (1999) (holding that the Federal Court of Appeals failed to give deference to the Board of Immigration Appeals' statutory interpretation regarding an alien's entitlement to withholding of deportation); *see also* Your Home Visiting Nurse Servs., Inc. v. Shalala, 119 S. Ct. 930, 934 (1999) (holding that the Secretary of Health and Human Services's decision was within the bounds of reasonable interpretation and entitled to deference under *Chevron*).

155. U.S. CONST. art. VI, § 2.

156. *Id.*

of fundamental notions of separation of powers. The remainder of the Bill, including section 6, in which Congress directs the judiciary, could withstand an attack on its constitutionality. Section 6 leaves open judicial discretion to exercise the Court's established power to interpret the laws, and thus does not suffer from the separation of powers problems of section 5.

There may be other ways in which Congress can provide greater protection to the states. Congress might impose restrictions on the use of grants to indirectly regulate the states or reform federal court jurisdiction by limiting diversity of citizenship jurisdiction.[157] The wisdom and constitutionality of these methods are beyond the scope of this Note. However, by placing safeguards in the legislative process, providing guidance to the federal courts, and drafting a reintroduced Bill in a future Congress that is passed without section 5, Congress will then make great strides toward its goal of enforcing the Tenth Amendment, returning power to the states, and protecting individual liberties.

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157. *See Hearing on EO 13,083, supra* note 2, at 267, 270 (report of the Working Group on Federalism of the Domestic Policy Council, Nov. 1986).

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