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S. 1629B The Tenth Amendment Enforcement Act of 1996: Hearings on S. 1629 Before the Committee on Governmental Affairs 104th Cong. 2d Sess. 232-241 & 247-257

Mary Brigid McManamon

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S. 1629—THE TENTH AMENDMENT
ENFORCEMENT ACT OF 1996

HEARINGS
BEFORE THE
COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
ONE HUNDRED FOURTH CONGRESS
SECOND SESSION
ON
S. 1629
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; TO ENFORCE THE TENTH AMENDMENT TO THE CONSTITUTION; AND FOR OTHER PURPOSES

MARCH 21, 1996—WASHINGTON, D.C.
JUNE 3, 1996—NASHVILLE, TENNESSEE
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line and wants to be sure that they have clean water, if Congress wants to be sure they have clean water and good sanitation, we have the power to act.

All I ask, all this bill asks is that we articulate the basis of that power. It is there. I voted for the clean water legislation. I introduced it, as a matter of fact, along with Senator Kennedy, and I am an avid supporter of the Tenth Amendment. This is another one of those red herrings we get every time we try to reassert the balance between the States and the Federal Government, and it is going to be an interesting debate. I am not sure we will get to it this year.

Senator GLENN. Mr. Chairman, I am not putting forth any red herrings here, and I do not like you saying that I am. But I want to know. I asked a very clear question. Is this going to make it more difficult to have clean water and clean air in the country and the answer to me is yes.

Chairman STEVENS. No. It is not.

Senator GLENN. Then you insert some different powers and we go ahead and do it, and maybe we do that.

Chairman STEVENS. The powers are there and you have to use the powers you have.

Gentlemen, we are going to have to move on. I said we would end this by 4 o'clock. But it is going to be a long debate. There is no question that the tendency of this town is to expand the powers of the Federal Government and ignore the fact that we have a series of 50 States which have equal—equal—Constitutional powers under our system. We are either going to preserve them or we are going to go to just a situation where we totally ignore the independent sovereign States of this Constitutional democracy. I am going to persist in this and I appreciate your support. Thank you very much.

Again, gentlemen, we will be submitting some questions. Take your time, but we would appreciate your answers. We appreciate your courtesy in being here.

We are going to hear the opposite point of view. If I had the time, I would take equal time to Senator Glenn in questioning his witnesses. These are Senator Glenn's witnesses.

Senator GLENN. I will give you some of mine.

Chairman STEVENS. The first one is Ms. McManamon, Associate Professor at Widener University School of Law from Wilmington, Delaware, and Edward Rubin, Professor of Law from the University of California at Berkeley.

You are the first witness, Ms. McManamon. Thank you.

TESTIMONY OF MARY BRIGID MCMANAMON, ASSOCIATE PROFESSOR OF LAW, WIDENER UNIVERSITY SCHOOL OF LAW, WILMINGTON, DELAWARE

Ms. MCMANAMON. Good afternoon, Mr. Chairman and Senator Glenn.

Before I begin my remarks, I would like to take a moment to say thank you first to the Committee staff members, in particular Dominique Apollon, who worked very hard to facilitate my appearance here this afternoon.
First, I would like to say that the Tenth Amendment Enforcement Act of 1996 is an extremely significant piece of legislation and I would like to thank you for organizing these hearings so that we can all come here and participate in the decision as to the wisdom of this Act.

Second, I would like to acknowledge my research assistants, Jennifer Harding and Rachel Lowy from the Widener University School of Law, who are with me here this afternoon. Their tireless efforts were invaluable to my preparation for this hearing.

Without further ado, let me now address the bill before this Committee. The findings, the purpose, and even the title of the Tenth Amendment Enforcement Act imply that all three branches of the Federal Government have violated the U.S. Constitution. To stop this supposedly illegal conduct, the Act would erect procedural hurdles intended to effect a change in the interpretation of the Tenth Amendment and, more importantly, to change from the judiciary to the legislature the power effectively to interpret the amendment in the future.

These changes would alter both the balance of power between Nation and States and the relation among the various branches of the Federal Government. In effect, therefore, the Act purports to amend the basic structure of our government, that is, our Constitution.

If it is true that the expectations of ordinary American citizens concerning the role of government in our society are incompatible with the Constitution, then we should be talking about a Constitutional amendment. Since we are not, all I can say is that trying to change the structure of government with a statute is problematic, at best.

First, let me address the change in the balance of power between Nation and States that the sponsors of this bill hope to bring about. The testimony before this Committee has uniformly claimed that this shift would be merely a return to the true meaning of the Tenth Amendment.

There are two problems with that contention. One, while the lessons of history are indeterminate, American history and Constitutional practice do not support their contentions. Two, the true interpretation of a Constitutional provision under our Constitution is the interpretation given by the Supreme Court.

The U.S. Constitution was a resounding rejection of the Articles of Confederation. The following analogy by the historian Albert Beveridge captures the problem vividly: "The existing American system," that is, before the Constitution, "was a very masterpiece of weakness. The so-called Federal Government was like a horse with 13 bridle reins, each held in the hands of separate drivers who usually pulled the confused and powerless beast in different directions."

As early as 1784, George Washington, the father of our country, declared, "The States' unreasonable jealousy of Congress and of one another will, if there is not a change in the system, be our downfall as a Nation. They made the Federal establishment a half-starved limping government that appears to be always moving upon crutches and tottering at every step."
I mention this history because it gives context to the meeting in Philadelphia that formed our Constitution. The delegates who gathered in 1787 had a mission. They were seeking a central government with much stronger powers than under the Articles of Confederation. Their purpose was made plain in the opening lines of the Constitution. Its first three words, “We the people,” made clear at the outset that what followed was not a confederation of States.

The Tenth Amendment was added to the Constitution to reiterate the dual sovereignty embraced by the new American political science of separated powers. As the Supreme Court noted in United States v. Darby, “There is nothing in the history of the Tenth Amendment’s adoption to suggest that it was more than declaratory of the relationship between the national and State governments as it had been established by the Constitution before the amendment.”

Furthermore, unlike a similar clause in the Articles of Confederation, the Tenth Amendment did not reserve to the States only those powers that were not expressly given to the Federal Government. Implied powers were also given to the Federal Government. The doctrine of implied powers, and consequently fewer reserved powers, was clearly confirmed early in our history in the venerable cases of McCulloch v. Maryland and Gibbons v. Ogden.

The Supreme Court confirmed that, reading the Tenth Amendment with the necessary and proper clause and the supremacy clause, as long as Congress is seeking a legitimate end, it may use “all means which are appropriate, which are plainly adapted to that end, and which are not prohibited.” The U.S. Supreme Court has never repudiated this understanding of Congress’ power and the Tenth Amendment.

That brings me to my second point. Under our system of checks and balances, it is the judiciary that declares the true meaning of the Constitution. As the Supreme Court declared in Cooper v. Aaron, “Marbury v. Madison declared the basic principle that the Federal Judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this court and the country as a permanent and indispensable feature of our Constitutional system.”

The supporters of this bill contend that the Federal Judiciary has interpreted the Tenth Amendment incorrectly. To declare, as do the supporters of this bill, that the judiciary is no longer the branch to give the definitive ruling on the meaning of the Constitution is to reject 200 years of Constitutional tradition and is, therefore, to amend the Constitution.

Turning to the specifics of the Tenth Amendment Enforcement Act, it presents a multi-pronged attack on Federal power. I will address one aspect of it, the supermajority provision. If this Act is passed, a minority of the Members of either House will be able to kill a piece of legislation based on their interpretation of the Constitution. This new procedure would change the traditional rule that legislation is to be passed by a majority of a quorum. As James Madison said, “The fundamental principle of free government would be reversed. It would be no longer the majority that would rule; the power would be transferred to the minority.” Such
a provision would lead to the erosion of our central Constitutional commitments to majority rule and deliberative democracy.

Before the Congress takes such a revolutionary step, let me urge you to think about Edmund Burke's caution. He said, "Where the great interests of mankind are concerned through a long succession of generations, that succession ought to be admitted into some share in the councils which are so deeply to affect them. If justice requires this, the work itself requires the aid of more minds than one age can furnish. It is from this view of things that the best legislators have been often satisfied with the establishment of some sure, solid, and ruling principle in government, a power like that which some of the philosophers have called a plastic nature, and having fixed the principle, they have left it afterwards to its own operation."

This Burkean imperative has been embodied in the Supreme Court's common law approach to making the necessary adjustments in the distribution of power between the Federal Government and the States. Why, after 200 years, should we reject the way business has been done? Even now, the Supreme Court is in the process of fine tuning the balance of power. Moreover, the decisive election of 1994 gave us a Congress more than capable of enacting substantive measures favoring the States.

In short, the process our founders gave us is working as it was meant to. There is no need to tie the hands of future generations with this sweeping change. Thank you.

[The prepared statement and letter to Senator Glenn of Ms. McManamon follows:]

PREPARED STATEMENT OF MARY BRIGID McMANAMON

Mr. Chairman and Members of the Committee, thank you for the invitation to testify before you. I come here as an academic, or more particularly, as a student of our federalism. The bill we are considering today has important implications for the over 200-year-old balance of power between Nation and States. I am, therefore, very happy to be a part of these discussions.

The findings, purpose, and even the title of the "Tenth Amendment Enforcement Act of 1996" imply that all three branches of the Federal Government have violated the U.S. Constitution. As one of the sponsors himself testified: "This legislation would begin to put an end to unaccountable Federal power by reminding Congress and the agencies that the Tenth Amendment's principle of limited government must be obeyed." To stop this supposedly illegal conduct, the provisions of the Act erect procedural hurdles intended to effect a change in the interpretation of the Tenth Amendment and, more importantly, to change which branch of government—legislature or courts—gets to effectively decide on its interpretation. Thus, the proposed scheme would transform the way this country develops much of its Constitutional law. To all intents and purposes, this legislation, therefore, would amend the Constitution as it has been interpreted since the very early days of our Nation without going through the Constitutionally prescribed procedure.

1 While the Bill implies that the actions of the Federal Government have been unconstitutional, supporters of the Act who testified on March 21, 1996, explicitly make that claim. See, e.g., Testimony of Atty. Gen. Charles Molony Condon, S.C., before the Senate Governmental Affairs (Mar. 21, 1996) ("What [Federal officials] were doing was illegal." "The legislation that is before you promises a meaningful solution to the Federal Government's continued disregard of the Tenth Amendment.") thereafter all testimony cited was before the Senate Committee on Governmental Affairs, Mar. 21, 1996); Testimony of Rep. Eldon Mulder, Alaska ("Violations of the Tenth Amendment and improper court interpretations conflicting with the Tenth Amendment which are occurring today should be corrected."); see also infra note 2 and accompanying text.

The Act presents a multi-pronged attack on Federal power. The aspects of the legislation that I will address are the assumptions embedded in the Act about the meaning of the Tenth Amendment and the provisions that limit the traditional judicial power to declare the meaning of the Constitution. Because the sponsors believe that the Federal courts have misinterpreted the Tenth Amendment, the Act provides:

1. It shall not be in order in either the Senate or House of Representatives to consider any bill, joint resolution, or amendment that does not include a declaration of congressional intent that it has Constitutional authority, is more competent than the States, and intends to interfere with State powers as required under section 3. The requirements of this subsection may be waived or suspended in the Senate or House of Representatives only by the affirmative vote of three-fifths of the Members of that House duly chosen and sworn. An affirmative vote of three-fifths of the Members of the Senate or House of Representatives duly chosen and sworn shall be required to sustain an appeal of the ruling of the chair on a point of order raised under this subsection. Thus, in many instances, the authority to determine the Constitutionality of legislation is in the hands of a minority of one house of the Congress. That is, if two-fifths plus one of one house vote "no" on an appeal of the ruling of the chair, the legislation cannot go forward. Additionally, the bill would limit judicial review of legislation.

The supporters of the bill hope, through these measures, to achieve an interpretation of the Tenth Amendment that tips the balance of power in favor of the States. These provisions fly in the face of two longstanding American Constitutional principles. First, since Marbury v. Madison, it is the duty of the Federal judiciary to declare the meaning of the Constitution. While the legislative branch must do its best to uphold the Constitution, it is nonetheless the responsibility of the Third Branch to rule definitively on the Constitutionality of laws. Second, our representative government has been based on rule by the majority. To place the determination of Constitutionality in many cases in the hands of a minority of one house of Congress is to change fundamentally the way the People are represented in Congress.

In effect, therefore, this Act is revolutionary and, as such, raises two major concerns: one historical and the other normative. The historical concern is important because history ties us—as we consider restructuring American government—to the founding vision of American Constitutionalism and the Constitutional practice derived from that vision. Our history gives us the authority to act according to legitimate American Constitutional tradition. The normative concern is important because it reveals the political and moral content of the ideals embedded in this tradition and how to realize and extend them in the best way for our Nation.

Let me start with the historical consideration. First, we need to examine the charge that the courts have misinterpreted the Tenth Amendment. Co-sponsors of this bill declared before this Committee that they wish to restore the balance of power to the States. They presumably wish to return to an earlier, halcyon day when the balance of power tipped in favor of the States. I am not sure what that day would be. Based on several references to the "Constitution of the Founders," I assume that the sponsors are thinking longingly of the days of Alexander Hamilton, James Madison, and George Washington. Those references are surely misplaced.

There was a time when the States were, for the most part, independent sovereigns. In those days, the document that defined the terms of our union was the Articles of Confederation. It is true that, under that regime, the State legislatures enacted some very creative pieces of legislation that responded to the needs of their citizens. Very popular, for example, were statutes that provided various forms of debtor relief to aid citizens in financial difficulty. Unfortunately, even staunch supporters of States' Rights acknowledged that there had to be some sort of change. The inability of the Federal Government to raise revenue, to regulate

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4 Id. §8.
5 5 U.S. (1 Cranch) 137 (1803).
6 Testimony of Sen. Robert Dole ("We are going to shift power out of Washington and return it to our States."") (emphasis added); Testimony of Sen. Orrin Hatch ("I will work with you Mr. Chairman to make sure that (the bill) achieves passage and that we once again take care to see that the Tenth Amendment's principles are observed.") (emphasis added); Testimony of Sen. Don Nickles (quoting Sen. Dole's remarks with approval).
commerce, and to stop the destructive competition among the States spurred the calling of the Constitutional Convention.

It is in this context that we must understand the drafting of the Constitution. The men who gathered in Philadelphia were for the most part Federalists; that is, they were seeking a central government with much stronger powers than under the Articles. Two of the Framers who have been cited in support of this legislation, Alexander Hamilton and James Madison, were among the more ardent Federalists. Hamilton actually wished to abolish the States. Short of that, he proposed a plan to the Constitutional Convention that "would make the States mere administrative districts of the central government—their relation to the Federal Government under his plan would be much like the relation of a county to a State. Moreover, he would have given the national government the power to enact any laws whatsoever."

It is therefore odd to cite these men in support of a bill that would revolutionize the relationship between the Federal Government and the States by increasing the States' sovereignty. It should also alert us to the danger of evaluating historical evidence too superficially. History is important, but its lessons are often indeterminate concerning the great Constitutional controversies of our time. For the supporters of this bill, history is at best indeterminate. At worst, American history and Constitutional practice have convincingly rejected their position.

The Constitution presented to the States for ratification was a document of compromise. It was, nonetheless a Federalist document. It boldly declared so in the opening lines: "The preamble was noteworthy chiefly for its first three words, 'We the people,' which made clear at the outset that what followed was not a confederation of States." To clarify the dual sovereignty embraced by the new American political science of separated powers, the people insisted on the inclusion of the Tenth Amendment. This amendment, however, did not herald a return to the era of confederation and its obstacles to effective national government. While under the Articles, the States reserved "every power, jurisdiction and right, which is not by the Constitution precluded to the United States," the Tenth Amendment expressly delegated to the United States "the powers not by this Confederation expressly delegated to the United States." In other words, the new Federal Government was to have implied as well as express powers. In short, fewer powers are reserved to the States under the Constitution.

What then is the role of the Tenth Amendment? It is a structural feature of American government. In a document whose essential purpose is to create a central government, it reminds us that the Federal Government does not replace all government. The States still have a governmental role to play. But the Tenth Amendment says nothing about the parity between the "dual sovereigns." Nothing in the Tenth Amendment Constitutionally precludes the Federal Government from acting on implied powers should the circumstances warrant it, as long as the governmental role of the States is not obliterated.

How was the Tenth Amendment interpreted in the early republic? The very first Supreme Court opinion to discuss the Tenth Amendment is McCulloch v. Maryland. At issue in that case was the legality of the Bank of the United States as well as the ability of one of the States to tax it. The Court, speaking through Chief Justice John Marshall, himself instrumental in the ratification debates, recognized that the omission of the word "expressly" from the Tenth Amendment indicated that the Federal Government had implied powers as well as those expressly noted in the Constitution. Moreover, according to the Court, the scope of those powers is broad: as long as the end is legitimate, Congress may use "all means which are appropriate, which are plainly adapted to that end, [and] which are not prohibited." This broad power given to the Federal Government in the "necessary and proper clause" has important implications for the States. That clause and the Tenth Amendment.

8 John C. Miller, Alexander Hamilton: Portrait in Paradox 161-63 (1959); see 1 The Records of the Federal Convention of 1787, at 281-311 (Max Farrand ed., 1911) (noting Hamilton's address to the Convention).
10 Article IX of the Articles of Confederation.
11 As the Supreme Court declared: "Our conclusion is unaffected by the Tenth Amendment. ... The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and State governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise fully their reserved powers. United States v. Darby, 312 U.S. 100, 123-24 (1940).
13 Id. at 406-07.
14 Id. at 421 (emphasis added).
Amendment are two sides of the same coin. With a greater array of powers given to the central government, there are fewer powers “reserved” to the States. Furthermore, the Court held, because of the Supremacy Clause, “the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the Constitutional laws enacted by Congress to carry into execution the powers vested in the general government.”

This understanding of the implied powers given to the Congress was cemented in *Gibbons v. Ogden.* In that case, Marshall, again speaking for the Court, held that the Federal Government’s power to regulate interstate commerce is plenary. He declared:

If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.

With this holding, the Court rejected “the Tenth Amendment as an active principle of limitation.”

In sum, it is difficult to understand how the supporters of this legislation find authority in the Founders’ Constitution. The Tenth Amendment must be read in its historical context. From the moment that the majority of the country decided to reject the Articles of Confederation and form a more perfect union, the role of the States as sovereigns was significantly reduced. Moreover, any lingering doubts over the independent sovereignty of the States was definitively answered by the outcome of the Civil War.

I do not mean to imply that the history of Federal power is monolithic. Quite the contrary. In fact, that is the beauty of our Constitution. Each generation has been able to make the adjustments in the balance of power between Nation and States necessary to meet its own problems. For example, perhaps in response to an overly nationalistic Congress following the Civil War, the Supreme Court pulled back a little in its blessing of Federal power. This trend in the Court continued into the early twentieth century, with the Court refusing to let the Federal Government deal with pressing issues. In the face of a catastrophic financial emergency, however, the political branches persisted, and during the mid-1930’s, the Court relaxed its stance vis-à-vis Federal power.

The same continuous, albeit subtle, adaptation of the balance to meet society’s changing needs is continuing today. Supporters of the bill acknowledge that the Supreme Court has recently showed a tendency to readjust the balance to give the States a little more power. Only last year, in *United States v. Lopez,* the Court held that the Congress had overstepped the bounds of its Commerce Clause powers in passing the Gun-Free School Zones Act. Just three weeks ago, the Court held in *Medtronic, Inc. v. Lohr* that the States’ historic police powers cannot be supplanted, that is Federal law will not preempt them, unless that intent is clearly found in the legislation. In *Medtronic,* the Court held that the Medical Device Amendments of 1976 did not preempt the development of State tort law.

Thus, the plastic structure given to our government in the Constitution has allowed the various elements of government to devise appropriate solutions to the problems before them. Whatever the adjustments each generation has made to the balance of power between Nation and States, however, the doctrine of implied powers set out in *McCulloch* has never been repudiated.

The second lesson from history important to our discussions is the import of the Supreme Court’s opinions from *McCulloch* to *Lopez.* The Act’s supporters refer to misinterpretation of the Tenth Amendment by the judiciary, and they wish to replace that interpretation with their own. To do so would be a radical break with tradition. Since *Marbury v. Madison* in 1803, reaffirmed in our own century in

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15 *Id.* at 436.
17 *Id.* at 197.
19 For an in-depth discussion of the development of the Federal commerce power and its relation to the Tenth Amendment, see Laurence H. Tribe, American Constitutional Law ch. 5–6 (2d ed. 1988).
22 5 U.S. (1 Cranch) 137 (1803).
Cooper v. Aaron, it has been the role of the judiciary to declare what the law is. One may not believe that judicial review is the best way to determine the meaning of the Constitution. To reject it now, however, is to effect a fundamental change in our Constitution, that is, the structure of American government.

The third lesson of history is the traditional representational expectations of “We the People.” Except in certain, specified instances, such as overriding a presidential veto, legislation is to be passed by a majority of a quorum. In the words of James Madison: “If a supermajority were required, it would be no longer the majority that would rule; the power would be transferred to the minority.” It makes no difference that this measure is presented in the guise of a Rule of Congress, the result is the same: The power will be transferred to a minority. Such a change is a break with longstanding tradition.

This bill cannot be seen as a return to mythical idyllic early days. It must, therefore, be evaluated as a normative political choice. The drafters have chosen to revolutionize the way power is divided between the Federal Government and the States and between the Congress and the judiciary. I have two normative concerns with the proposed legislation. First, I question the wisdom of using the legislative process to effect so fundamental a change. Second, I am concerned about the reduction in the People’s representation in the legislature.

Edmund Burke cautioned against just such revolutionary lawmaking when he reflected on the actions of the French General Assembly. In his view, only with slow change, step by step, with constant adjustments, can we derive wise solutions. As he so eloquently stated:

Where the great interests of mankind are concerned through a long succession of generations, that succession ought to be admitted into some share in the councils which are so deeply to affect them. If justice requires this, the work itself requires the aid of more minds than one age can furnish. It is from this view of things that the best legislators have been often satisfied with the establishment of some sure, solid, and ruling principle in government—a power like that which some of the philosophers have called a plastic nature; and having fixed the principle, they have left it afterwards to its own operation.

This Burkean imperative has been embodied in the Supreme Court’s common law approach to making the necessary adjustments in the distribution of power between the Federal Government and the States. Why, after over 200 years, should we reject the way business has been done?

American Constitutionalism has developed its own unique dual character: First, it steadfastly seeks change that is tested by experience, and second, it eschews extremism and embraces accommodation and compromise. This pragmatic approach has served our Nation well, especially since its most notable breakdown during the Civil War. The founding generation was tempered with this pragmatist imperative and generations of legislators, judges, and Americans have learned to value its teachings. What does it imply for our present concern? Simply put, it abhors the sweeping radical change this bill will engender. Instead, if change is needed, it counsels incremental case-by-case changes more suitable to a court. Moreover, courts are the primary interpreters of the Constitution. If the sweeping enforcement of the Tenth Amendment is indicated, “We the People” should be asked to decide the matter. When “We the People” are not given the opportunity for Constitutional change, the pragmatist imperative should be embraced.

As my second concern, I will simply quote the eloquent plea of several other law professors on a similar issue:

This proposal violates the explicit intentions of the Framers. It is inconsistent with the Constitution’s language and structure. It departs sharply from traditional congressional practice. It may generate Constitutional litigation that will encourage Supreme Court intervention in an area best left to responsible congressional decision.

Unless the proposal is withdrawn now, it will serve as an unfortunate precedent for the proliferation of supermajority rules on a host of different subjects in the future. Over time, we will see the continuing erosion of our
central Constitutional commitments to majority rule and deliberative democracy.  

Why do the sponsors of this legislation seek to revolutionize the way our law is shaped? Even they recognize that the Supreme Court is in the process of fine tuning the balance of power. Moreover, the decisive election of 1994 gave us a Congress more than capable of enacting substantive measures favoring the States. In short, the process our Founders gave us is working as it was meant to. There is no need to bindly tie the hands of future generations with this sweeping change. To suddenly ‘lift the balance of power in this way fails to take into account that today’s solution may not be the best for the country now or in 20 or 30 years. To choose the solution that is preferred now may hamper creative solutions to our unforeseen woes. If what they are saying is that the expectations of ordinary Americans concerning the role of government in contemporary society are incompatible with the Constitution, then they should put it to the test. Go to “We the People” and ask them if they wish to amend the Constitution. Otherwise, we should leave well enough alone. The system is working. Any perceived imbalance in the relation between Nation and States can be adjusted in the way provided in the Constitution.

WIDENER UNIVERSITY
Wilmington, DE, July 24, 1996

Hon. JOHN GLENN
U.S. Senate, Washington, DC.

DEAR SENATOR GLENN: As you know, the Tenth Amendment Enforcement Act of 1996 is an important piece of legislation. I was glad to have the opportunity to voice my concerns about it at the July 16, 1996, hearing before the Senate Governmental Affairs Committee. At that time, you expressed apprehension over the Act’s provisions directing the Federal courts “to strictly construe Federal laws and regulations which interfere with State powers with a presumption in favor of State authority and against Federal preemption.” S. 1629, 104th Cong., 2d Sess. § 2(e) (1996); see id. § 6. I, too, find aspects of those provisions problematic. From your questions, however, I believe my comments may not have conveyed my concerns clearly. I would, accordingly, like to clarify my remarks on that matter. Would you please, therefore, include this letter in the record along with my previously submitted testimony?

In deciding cases, Federal judges frequently need to interpret statutes, and in so doing, must divine the intent of Congress. For example, Judge Thomas J. Meskill of the Second Circuit found that in 1988 alone, “Federal courts discussed congressional intent in at least 1,516 cases.” Thomas J. Meskill, Caseload Growth: Struggling To Keep Pace, 57 Brook. L. Rev. 299, 301 (1991). Unfortunately, Judge Meskill went on to say, “Anyone reading our published opinions and those of other circuits will see the words ‘silent,’ ‘scant’ and ‘inconclusive’ over and over again in courts’ discussions of the legislative history of particular statutes. Judges spend valuable judicial resources trying to determine what Congress meant by what it said, resources that could profitably be devoted to other matters.” Id. at 301–02. Other Federal judges concur: “A consistent complaint from Federal judges is the lack of guidance from Congress as to how it wants Federal courts to handle particular statutes.”


Far from craving the unfettered right to declare whatever they want to be the meaning of a statute, Federal judges would love to have some guidance as to the intent of Congress. See, e.g., Hearings on Statutory Interpretation and the Uses of Legislative History Before the Subcomm. on Courts, Intellectual Property and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 53–54 (1990) (testimony of Stephen G. Breyer, Chief Judge, U.S. Court of Appeals for the Second Circuit); Ruth Bader Ginsburg & Peter W. Huber, The Intercircuit Committee, 100 Harv. L. Rev. 1417 (1987); Meskill, supra, at 302–03; Patricia M. Wald, The “New Administrative Law”—With the Same Old Judges in It? 1991 Duke L.J. 647, 667. In fact, after a congressionally-mandated study, the Federal Courts Study Committee concluded that to solve this problem, “[o]ne reasonable step is a checklist that could be used by the staffs of substantive committees of the Congress, and the Office of Legislative Counsel in the Senate and the House (and counsel and

26Letter from Prof. Bruce Ackerman et al. to Speaker Newt Gingrich, reprinted in LEGAL TIMES, p. 10 (Jan. 9, 1995).
central Constitutional commitments to majority rule and deliberative democracy.26

Why do the sponsors of this legislation seek to revolutionize the way our law is shaped? Even they recognize that the Supreme Court is in the process of fine tuning the balance of power. Moreover, the decisive election of 1994 gave us a Congress more than capable of enacting substantive measures favoring the States. In short, the process our Founders gave us is working as it was meant to. There is no need to blindly tie the hands of future generations with this sweeping change. To suddenly shift the balance of power in this way fails to take into account that today's solution may not be the best for the country now or in 20 or 30 years. To choose the solution that is preferred now may hamper creative solutions to our unforeseen woes. If what they are saying is that the expectations of ordinary Americans concerning the role of government in contemporary society are incompatible with the Constitution, then they should put it to the test. Go to "We the People" and ask them if they wish to amend the Constitution. Otherwise, we should leave well enough alone. The system is working. Any perceived imbalance in the relation between Nation and States can be adjusted in the way provided in the Constitution.

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Wilmington, DE, July 24, 1996

Hon. JOHN GLENN
U.S. Senate, Washington, DC.

DEAR SENATOR GLENN: As you know, the Tenth Amendment Enforcement Act of 1996 is an important piece of legislation. I was glad to have the opportunity to voice my concerns about it at the July 16, 1996, hearing before the Senate Governmental Affairs Committee. At that time, you expressed apprehension over the Act's provisions directing the Federal courts "to strictly construe Federal laws and regulations which interfere with State powers with a presumption in favor of State authority and against Federal preemption." S. 1629, 104th Cong., 2d Sess. § 2(e) (1996); see id. § 6. I, too, find aspects of those provisions problematic. From your questions, however, I believe my comments may not have conveyed my concerns clearly. I would, accordingly, like to clarify my remarks on that matter. Would you please, therefore, include this letter in the record along with my previously submitted testimony?

In deciding cases, Federal judges frequently need to interpret statutes, and in so doing, must divine the intent of Congress. For example, Judge Thomas J. Meskill of the Second Circuit found that in 1988 alone, "Federal courts discussed congressional intent in at least 1,516 cases." Thomas J. Meskill, Caseload Growth: Struggling To Keep Pace, 57 Brook. L. Rev. 299, 301 (1991). Unfortunately, Judge Meskill went on to say, "Anyone reading our published opinions and those of other circuits will see the words 'silent,' 'scant' and 'inconclusive' over and over again in courts' discussions of the legislative history of particular statutes. Judges spend valuable judicial resources trying to determine what Congress meant by what it said, resources that could profitably be devoted to other matters." Id. at 301-02. Other Federal judges concur: "A consistent complaint from Federal judges is the lack of guidance from Congress as to how it wants Federal courts to handle particular statutes." Erwin Chemerinsky, Reporter's Draft for the Working Group on Principles To Use When Considering the Federalization of Civil Law, 46 Hastings L.J. 1305, 1317 (1995).

Far from craving the unfettered right to declare whatever they want to be the meaning of a statute, Federal judges would love to have some guidance as to the intent of Congress. See, e.g., Hearings on Statutory Interpretation and the Uses of Legislative History Before the Subcomm. on Courts, Intellectual Property and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 53-64 (1990) (testimony of Stephen G. Breyer, Chief Judge, U.S. Court of Appeals for the Second Circuit); Ruth Bader Ginsburg & Peter W. Huber, The Intercircuit Committee, 100 Harv. L. Rev. 1417 (1987); Meskill, supra, at 302-03; Patricia M. Wald, The "New Administrative Law"—With the Same Old Judges in It? 1991 Duke L.J. 647, 667. In fact, after a congressionally-mandated study, the Federal Courts Study Committee concluded that to solve this problem, "[o]ne reasonable step is a checklist that could be used by the staffs of substantive committees of the Congress, and the Office of Legislative Counsel in the Senate and the House (and counsel and

26 Letter from Prof. Bruce Ackerman et al. to Speaker Newt Gingrich, reprinted in LEGAL TIMES, p. 10 (Jan. 9, 1995).
solicitors in Executive Branch agencies) reminding them to include items such as these in their review of legislation:

- whether a private cause of action is contemplated;
- whether pre-emption of State law is intended;
- whether a proposed bill would repeal or otherwise circumscribe, displace, impair, or change the meaning of existing Federal legislation;
- whether State courts are to have jurisdiction and, if so, whether an action would be removable to Federal court; and
- the types of relief available."


In light of these judicial cries for congressional guidance, I conclude that advice from Congress to the courts as to whether a particular statute should be strictly construed on the issue of preemption does not violate our system of separated powers. Indeed, such counsel would aid in implementing congressional intent. But I do not believe that the adoption of a blanket rule of construction covering all legislation is wise or appropriate.

The Tenth Amendment Enforcement Act would do much more than direct Congress to be explicit in each piece of legislation about its intentions vis-à-vis preemption. The proposed Act would create a default rule of construction for all laws enacted in the future that, in Senator Stevens' words, "really is a concept of trying to tell the courts to narrowly construe the powers of the Federal Government, and to broadly construe the powers of the people." Hearing on S. 1629 Before the Senate Comm. on Governmental Affairs, 104th Cong., 2d Sess. (Jul. 16, 1996) (question by Sen. Ted Stevens). I fear that, for many reasons, such a course would probably lead to mischievous results.

First, issues of Federal preemption arise in myriad contexts. As one commentator noted, "In recent years, the [Supreme Court's pre-emption decisions have involved challenges to State civil rights, consumer and whistleblower protection, nuclear safety, and environmental, tort, anti-trust, and similar regulations." Charles Rothfeld, Federalism's Smoking Guns, Legal Times, Sept. 30, 1991, at 34. To assert that Congress should establish a uniform approach to preemption in all of those areas, and others perhaps not even imaginable at this time, is to deny political reality. The same Congress may wish to use its power to the fullest to regulate one area, and in another, allow the States to develop concurrently their own methods of handling a particular problem. To deny all future Congresses this flexibility unless they have the foresight to make the right declarations at the outset is to make Congress' normally difficult job of governing the country much more difficult.

In addition to the changing context of preemption issues, there may very well be unforeseen developments in a particular area. Many areas of Federal regulation, such as the labor laws, are the work of generations. Yet the Tenth Amendment Enforcement Act would require clairvoyance on the part of Congress as to how a particular statute will ultimately fit into what may become an extremely complex scheme. Moreover, State legislatures may create new laws that interfere with a Federal statute after it is enacted. Thus the initial congressional declaration of intent may no longer be accurate. Congress might have had a different position on the question of preemption had it anticipated this later-enacted State law. But because Congress was not prescient, the Tenth Amendment Enforcement Act would tie the hands of the courts in attempting to find Congress' intent in the face of such changed circumstances.

Finally, insofar as these provisions of the Act are an attempt to change the Constitution without an amendment, they raise serious concerns about the legality and the wisdom of the proposed law. I addressed those concerns in my previously submitted testimony, however, and I will not repeat my remarks further.

I hope these comments have clarified my answer to your question. If you would like further explanation, be sure to let me know.

Very truly yours,

MARY BRIGID McMANAMON,
Associate Professor of Law.

Chairman STEVENS. Dr. Rubin?

TESTIMONY OF EDWARD L. RUBIN, PROFESSOR OF LAW,
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Mr. Rubin. Thank you for having me.