

CONTEMPORARY ASSERTIONS OF STATE SOVEREIGNTY
AND THE SAFEGUARDS OF AMERICAN FEDERALISM

*John Dinan**

Recent state statutes and constitutional amendments challenging federal health care legislation and other federal laws have attracted significant attention, both from critics who view them as nullification acts that are inconsistent with the Supremacy Clause and from some supporters who have been equally willing to embrace the nullification label for the purpose of defending such legislation. Upon closer examination, it becomes possible to view these measures as falling short of invoking the clearly repudiated doctrine of nullification and as capable of contributing under certain conditions to safeguarding federalism principles. An analysis of these recent assertions of state sovereignty—whether regarding health care, guns, drivers' licenses, or medical marijuana—can contribute to a better understanding of the range of opportunities for states to wield influence in the U.S. federal system by showing that state statutes challenging federal law can play a role, alongside of, and occasionally in place of, traditional mechanisms by which states can advance their interests in the national political process.

States have historically advanced their interests in the United States federal system through various mechanisms whose legitimacy and effectiveness are clearly established.¹ State officials have engaged in intergovernmental lobbying, individually and through organizations such as the National Governors Association,

* John Dinan is a Professor of Political Science at Wake Forest University. His research focuses on federalism, state constitutionalism, and American political development. Professor Dinan received his Ph.D. from the University of Virginia in 1996. He is grateful for the support of an Earhart Foundation grant and a James Madison Program fellowship.

¹ See JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 61–76 (2009) (explaining the various ways that states influence federal policy); JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 94–100 (2005); John Dinan, *The State of American Federalism 2007-2008: Resurgent State Influence in the National Policy Process and Continued State Policy Innovation*, 38 PUBLIUS 381, 382 (2008).

to frequent effect in shaping congressional legislation² and securing relief from administrative officials.³ State officials have also filed suit against federal laws seen as exceeding the legitimate reach of congressional power with occasional success.⁴

In recent years, states have gone beyond these longstanding mechanisms of state influence by enacting measures in direct opposition to federal statutes, as typified by the enactment of state statutes and constitutional amendments challenging the individual insurance mandate provision of the recently enacted federal health care legislation.⁵ These state health freedom measures, along with firearms freedom statutes passed in various states, have attracted significant scholarly attention.⁶

Many scholars have decried these state measures as nullification acts that are inconsistent with the Supremacy Clause of the United States Constitution and have no place or effect in the United States federal system. Sean Wilentz may be more forceful than most scholars in his denunciation of these measures—he refers to them as the product of “mendacity”—but, in general, he can be seen as expressing the dominant understanding.⁷ As he argues, recent

² DONALD H. HAIDER, WHEN GOVERNMENTS COME TO WASHINGTON: GOVERNORS, MAYORS, AND INTERGOVERNMENTAL LOBBYING 2, 20 (1974); ANNE MARIE CAMMISA, GOVERNMENTS AS INTEREST GROUPS: INTERGOVERNMENTAL LOBBYING AND THE FEDERAL SYSTEM 21 (1995).

³ Thomas Gais & James Fossett, *Federalism and the Executive Branch*, in THE EXECUTIVE BRANCH 486, 502–504 (Joel D. Aberbach & Mark A. Peterson eds., 2005); William T. Gormley, Jr., *Money and Mandates: The Politics of Intergovernmental Conflict*, 36 PUBLIUS 523, 538 (2006).

⁴ Most of these recent federal lawsuits have been unsuccessful, as with California’s challenge to the Motor Voter Act and Connecticut’s challenge to the No Child Left Behind Act, which were rejected by the Ninth Circuit Court in *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1412–13 (9th Cir. 1995), and the Second Circuit Court in *Connecticut v. Duncan*, 612 F.3d 107, 109–10 (2d Cir. 2010) respectively. But they are occasionally successful, as with New York’s challenge to the take-title provision of the Low-Level Radioactive Waste Policy Amendments Act in *New York v. United States*, 505 U.S. 144, 149 (1992), and various efforts to secure invalidation of statutory provisions that abrogated state sovereign immunity from federal damages suits. See, e.g., *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 630 (1999) (concerning intellectual property); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 66–67 (2000) (concerning age discrimination); *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 360 (2001) (concerning disability rights).

⁵ Richard Cauchi, *State Legislation and Actions Challenging Certain Health Reforms, 2010–2011*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/?tabid=18906> (last updated Aug. 12, 2011).

⁶ Firearms Freedom Act, *The Firearms Freedom Act (FFA) is Sweeping the Nation* (June 3, 2010), <http://firearmsfreedomact.com> (last visited July 31, 2011).

⁷ Sean Wilentz, *States of Anarchy: America’s Long, Sordid Affair with Nullification*, NEW REPUBLIC (Mar. 30, 2010), available at <http://www.tnr.com/article/politics/the-essence-anarchy>. Also typical are the comments of Washington and Lee law professor Timothy S. Jost, who argued that recent state measures challenging federal health-care legislation “are pure political theater” and seek to achieve a goal that “is constitutionally impossible.” Timothy S. Jost, *Can the States Nullify Health Care Reform?*, 362 NEW ENG. J. MEDICINE 869,

assertions of state sovereignty in regard to federal health care and gun laws are embodiments of the “discredited ideas” of “nullification and interposition” of the sort invoked by South Carolina in the 1830’s and other southern states in the 1950’s and with the effect of “subvert[ing] the constitutional pillars of American nationhood.”⁸

Meanwhile, some supporters have been equally willing to embrace the nullification label—not only regarding the recent health and gun measures, but also regarding challenges to federal driver’s license and drug laws—for the purpose of defending them as modern invocations of the doctrine of nullification embodied by Thomas Jefferson’s Kentucky Resolutions of 1798. Thus, Thomas E. Woods Jr., in his recent book, *Nullification: How to Resist Federal Tyranny in the 21st Century*, argues that “[t]wo dozen states nullified the REAL ID Act of 2005,” and “[o]ne of the most successful examples of modern-day nullification involves the medicinal use of marijuana,” wherein “states are openly resisting the federal government’s policy.”⁹ He writes that “[n]ullification is being contemplated in many other areas of American life as well—and not just in health care,” including passage of “Firearms Freedom Act[s].”¹⁰ Woods concludes that “[t]his is the spirit in which the Jeffersonian remedy of state interposition or nullification is once again being pursued.”¹¹

Upon closer examination, and contrary to the statements of supporters and critics alike, these recent state measures regarding health care, guns, driver’s licenses, and medicinal marijuana fall short of invoking the clearly discredited doctrine of nullification embodied in the Kentucky Resolutions of 1798,¹² the resolutions of

869 (2010).

⁸ Wilentz, *supra* note 7.

⁹ THOMAS E. WOODS, JR., NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY IN THE 21ST CENTURY 7, 8 (2010).

¹⁰ *Id.* at 12.

¹¹ *Id.* at 3. In a similar fashion, the Tenth Amendment Center, which is both a supporter and chronicler of recent state sovereignty measures, includes on its website various articles describing these recent measures as nullification acts. See Michael Boldin, *Health Care Nullification and Interposition*, TENTH AMENDMENT CENTER (Dec. 29, 2009), <http://www.tenthamendmentcenter.com/2009/12/29/health-care-nullification-and-interposition>; see also Jeff Taylor, *States’ Fights: Nullification Makes a Comeback—and Not Just on the Right*, THE AMERICAN CONSERVATIVE 32, 34 (2010), available at <http://www.amconmag.com/article/2010/jul/01/00032> (essay by a supporter who labels recent state measures regarding health care, guns, medical marijuana, and drivers licenses as acts of nullification, and who seeks to link them with classic acts of nullification).

¹² The Kentucky Resolutions, November 10, 1798, declared, in part, that the sedition act of 1798 “is not law, but is altogether void and of no effect” and the act of 1798 concerning alien friends “is not law, but is altogether void and of no force.” The Kentucky Resolutions, H.R. Res. 1798 (Ky. 1798), reprinted in 30 THE PAPERS OF THOMAS JEFFERSON 550, 551 (Barbara

several New England states in response to the Embargo of 1807,¹³ the South Carolina Nullification Ordinance of 1832,¹⁴ Wisconsin's nullification of the Fugitive Slave Law in 1859,¹⁵ and interposition acts adopted by eight southern states in 1956 and 1957 in response to the Supreme Court's school desegregation rulings.¹⁶ Rather, as I will argue, these recent state measures illustrate several ways that states are capable of safeguarding federalism principles without engaging in nullification.

These recent state measures can contribute to restraining federal power and preserving state autonomy in several ways. States have in some instances influenced congressional or executive decision-making by enacting measures that vow non-acquiescence to, or are inconsistent with, federal law and thereby raise the profile of federalism concerns so as to lead to a federal statute being enforced

B. Oberg ed., 2003), available at <http://princeton.edu/~tjpapers/kyres/kyadopted.html>.

¹³ See generally STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES (Herman V. Ames ed., 1900–1906) (1970) (providing the best source for these and other pre-Civil War nullification measures). The Massachusetts Resolutions on the Enforcement Act, February 15, 1809, stated

[t]hat the act of the Congress of the United States passed on the ninth day of January in the present year, for enforcing the act laying an embargo, and the several acts supplementary thereto, is, in the opinion of the legislature, in many respects, unjust, oppressive and unconstitutional, and not legally binding on the citizens of this state.

Id. at 35.

¹⁴ The South Carolina Ordinance of Nullification, November 24, 1832, stated

[t]hat the several acts and parts of acts of the Congress of the United States, purporting to be laws for the imposing of duties and imposts on the importation of foreign commodities . . . are unauthorized by the Constitution of the United States, and violate the true meaning and intent thereof, and are null, void and no law, nor binding upon this State, its officers, or citizens

Id. at 170–71.

¹⁵ In the aftermath of the United States Supreme Court's decision in *Ableman v. Booth*, 62 U.S. 506 (1859), the Wisconsin legislature declared on March 19, 1859 "[t]hat this assumption of jurisdiction by the federal judiciary, in the said case, and without process, is an act of undelegated power, and therefore without authority, void, and of no force." *Id.* at 304.

¹⁶ Seven southern state legislatures adopted interposition resolutions in 1956 and 1957: Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. JOSEPH E. LOWNDES, FROM THE NEW DEAL TO THE NEW RIGHT: RACE AND THE SOUTHERN ORIGINS OF MODERN CONSERVATISM 43 (2008). Additionally, Arkansas voters in 1956 approved an initiated amendment and a legislative-referred resolution, both counseling interposition. *Id.*; see also Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade after Brown*, 89 NW. U. L. REV. 92, 93 n.5 (1994) (providing the sources for all of these acts, except Georgia's). As an example of these state acts, the Georgia Interposition Resolution, March 9, 1956, declared

[t]hat said decisions and orders of the Supreme Court of the United States relating to separation of the races in the public institutions of a State as announced and promulgated by said court on May 17, 1954, and May 31, 1955, are null, void and of no force or effect.

H.R. 185, 130th Gen. Assem., Reg. Sess. (Ga. 1956), available at <http://georgiainfo.galileo.usg.edu/interpos.htm>.

in a way that is more responsive to state concerns. In another set of instances, whose outcome is not yet determined, states can exploit or anticipate changes in Supreme Court doctrine on account of changes in the composition or disposition of the Justices by enacting statutes that might pave the way for a Court ruling deeming state acts not inconsistent with federal law.

One benefit of such an analysis is to provide a more accurate account of these recent assertions of state sovereignty. Affixing the nullification label to these measures—as critics and some supporters have both done—is misleading not only because it ignores important differences between nearly all of these recent measures and classic cases of nullification, but also because it ignores important differences among these recent measures.

Another benefit of this analysis is to contribute to a better understanding of the range of opportunities for states to wield influence in the United States federal system. Much of the scholarly commentary regarding these recent state measures fails to appreciate that the U.S. federal system does not provide clear and settled answers to a number of questions concerning federal-state relations, thereby enabling state officials to act in areas where federal law is uncertain or in flux. The Supremacy Clause makes clear that federal law prevails over conflicting state law, and any notion to the contrary has long ago been clearly and appropriately repudiated in a way that some supporters of these recent measures fail to appreciate. But to the extent that it is unclear if a federal law does in fact conflict with a state measure or it is uncertain if the federal law or its application in a particular circumstance is in fact legitimate, especially in areas where the law is unsettled, states can enact measures capable of shaping how federal law is enforced by executive officials or interpreted by judges. It is in this respect that state challenges to federal law have the potential to be effective in advancing state interests. Several scholars have in recent years called attention to these various ways that states are able to “talk back” to federal officials in various fashions. My aim in this paper is to continue this line of inquiry.¹⁷

The overriding benefit of this analysis is to contribute to an

¹⁷ See MARTHA DERTHICK, KEEPING THE COMPOUND REPUBLIC: ESSAYS ON AMERICAN FEDERALISM 40–41 (2001); NUGENT, *supra* note 1, at 64–67; GARDNER, *supra* note 1, at 92–98; see also Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1256 (2009) (providing a recent effort to set out a theory of “uncooperative federalism” and “provide an initial descriptive and normative account of this undertheorized aspect of our federalism”).

enduring inquiry into the mechanisms that preserve what James Madison referred to as the “compound republic of America”¹⁸ by showing that state challenges to federal law can, under certain conditions, contribute to the safeguarding of federalism principles. Alongside other mechanisms that can preserve federal principles, including the political process¹⁹ and judicial process,²⁰ it is also appropriate to consider assertions of state sovereignty, at least in the form they have generally taken in recent years.

I. PASSAGE OF STATE LAWS THAT VOW NON-ACQUIESCENCE TO OR ARE INCONSISTENT WITH FEDERAL STATUTES

A. *Driver’s Licenses*

Until recently, states had full power over issuance of driver’s licenses. In enacting the Drivers Privacy Protection Act (“DPPA”) in 1994,²¹ a law that survived a Tenth Amendment challenge in *Reno v. Condon*,²² Congress restricted the personal information that state motor vehicle agencies can release to the public. Aside from the limited requirements in the DPPA, states remained free to determine who qualified for a license, what documentation was required for obtaining a license, and what information was included on a license. This changed when the terrorist attacks of September 11, 2001 and concerns about illegal immigration led to the imposition of federal requirements on the issuance and format of state driver’s licenses. Congress took an initial step in December 2004 by passing the Intelligence Reform and Terrorism Prevention Act, which responded to a recommendation of the 9/11 Commission by directing the Transportation Secretary to initiate a process of

¹⁸ THE FEDERALIST NO. 51, at 291 (James Madison) (Clinton Rossiter ed., 1961).

¹⁹ See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

²⁰ See generally John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001); Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001); John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89 (2004); Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131 (2004).

²¹ Drivers Privacy Protection Act of 1994, Pub. L. No. 103-322, 108 Stat. 2099 (1994).

²² *Reno v. Condon*, 528 U.S. 141, 143, 147 (2000).

negotiated rulemaking to set minimum federal standards for driver's licenses.²³ Congress then went further in May 2005 and enacted the more stringent REAL ID Act as an amendment to a supplemental defense appropriations bill.²⁴ The REAL ID Act required that states demand and verify certain forms of documentation before issuing licenses and that the issued licenses include certain information and follow a particular format.²⁵ States were required to bring their licenses into compliance by May 2008 or else see their citizens unable to use them as documentation for boarding airplanes or entering federal buildings.²⁶

Between 2007 and 2009, twenty-five states enacted resolutions and statutes opposing the REAL ID Act.²⁷ Some states stopped short of vowing non-compliance with the law; rather, their actions were confined to passing resolutions expressing dissatisfaction with the law and urging members of their congressional delegation to work for its repeal or revision.²⁸ However, fifteen of these states enacted statutes vowing non-acquiescence in some fashion: Alaska, Arizona, Georgia, Idaho, Louisiana, Maine, Minnesota, Missouri, Montana, New Hampshire, Oklahoma, Oregon, South Carolina, Virginia, and Washington.²⁹

Although several of these laws prohibit state officials from complying with the REAL ID Act only insofar as doing so would violate the privacy of state residents, as stipulated in a 2009 Virginia law,³⁰ or until sufficient federal funds are appropriated to cover state costs, as with a 2009 Oregon law,³¹ the remaining states flatly bar state officials from complying with the federal act. Maine's anti-REAL ID law, the first to be enacted in January

²³ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7212, 118 Stat. 3638, 3827-30 (2004).

²⁴ REAL ID Act of 2005, Pub L. No. 109-13, 119 Stat. 302 (2005).

²⁵ REAL ID Act § 202.

²⁶ *Id.*

²⁷ *REAL ID Nullification Legislation*, TENTH AMENDMENT CENTER, <http://www.tenthamendmentcenter.com/nullification/real-id> (last visited July 31, 2011).

²⁸ *Id.* The ten states that passed resolutions of this sort are: Arkansas, Colorado, Hawaii, Illinois, Nebraska, Nevada, North Dakota, South Dakota, Tennessee, and Utah. *Id.*

²⁹ *REAL ID Nullification Legislation*, *supra* note 27; see also Priscilla M. Regan & Christopher J. Deering, *State Opposition to REAL ID*, 39 PUBLIUS 476, 482 (2009) (listing the states that acted in 2007 and 2008). The state laws enacted in 2009 are included in a separate database. See *REAL ID State Legislation Database*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/standcomm/sctran/REALIDdb.cfm> (last visited July 31, 2011).

³⁰ VA. CODE ANN. § 2.2-614.2 (2010).

³¹ S.B. 536, 75th Leg. Assem., Reg. Sess. (Or. 2009).

2007,³² is typical of the measures that followed. The Maine law, “[a]n Act to Prohibit Maine from Participating in the Federal REAL ID Act of 2005,” stipulates: “The State may not participate in the federal REAL ID Act of 2005 . . . [t]he Secretary of State may not amend the procedures for applying for a driver’s license or nondriver identification card under this chapter in a manner designed to conform to the federal REAL ID Act of 2005.”³³ Several states go further and not only prohibit state officials from complying with the REAL ID Act, but also require state transportation officials to report to the governor and legislature any Department of Homeland Security (“DHS”) effort to persuade them to comply.³⁴

State legislatures advanced various arguments to explain and justify these measures.³⁵ Some stressed the costs of compliance, estimated at \$11 billion for all of the states combined.³⁶ Others highlighted privacy concerns.³⁷ Several combined these policy concerns with arguments claiming that the law violates state sovereignty.³⁸ For instance, citing primarily to recent Supreme Court decisions in *New York v. United States*³⁹ and *Printz v. United States*,⁴⁰ which invalidated federal statutes as violative of the anti-commandeering principle, and citing also to a ruling in *United States v. Lopez*, which invalidated a federal statute on commerce-clause grounds,⁴¹ the Montana anti-REAL ID statute contended that the federal act is “an attempt to ‘commandeer’ the political machinery of the states and to require them to be agents of the federal government, in violation of the principles of federalism contained in the 10th Amendment.”⁴²

These anti-REAL ID laws are intended to serve two main purposes. At one level, they serve as a directive to other officials within the state not to change driver’s license policy to conform to the federal requirements contained in the Act. Rather than

³² Regan & Deering, *supra* note 29, at 481.

³³ ME. REV. STAT. ANN. tit. 29-A, § 1411 (2010).

³⁴ See, e.g., ARIZ. REV. STAT. ANN. 28-336 (Supp. 2010).

³⁵ See Regan & Deering, *supra* note 29, at 484 (identifying five possible explanations for state resistance).

³⁶ *Id.* at 484–87.

³⁷ *Id.* at 491.

³⁸ *Id.* at 487–89.

³⁹ *New York v. United States*, 505 U.S. 144, 149 (1992).

⁴⁰ *Printz v. United States*, 521 U.S. 898, 935 (1997).

⁴¹ *United States v. Lopez*, 514 U.S. 549, 551 (1995).

⁴² An Act Opposing the Implementation of the Federal REAL ID Act and Directing the Montana Department of Justice Not to Implement the Provisions of the Federal Act, ch. 198, 2007 Mont. Laws 916–17 (codified at MONT. CODE ANN. § 61-5-128 (2009)).

amounting to defiance of a direct federal order, however, these measures are better understood as proclaiming the state's willingness to accept the designated costs of non-compliance with the REAL ID Act (in this case, the inability of residents to use non-compliant driver's licenses as documentation for various federal purposes). In this sense, it should be noted, the choice facing states in deciding whether to participate in the REAL ID program differs somewhat from the calculus regarding participation in other programs. Non-participation usually entails financial costs, in that state legislatures declining to lower their speed limit to fifty-five miles per hour in the 1970s,⁴³ raise their drinking age to twenty-one in the 1980s,⁴⁴ or lower their blood-alcohol limit for drunk driving to .08 in the 2000s⁴⁵ suffered a loss of federal highway funding. In this case, non-participation imposes direct burdens on the citizens. Nevertheless, neither the federal speed-limit, drinking-age, or drunk-driving statutes nor the federal REAL ID Act impose a direct federal order and states are free to not comply and suffer the designated penalties.

On another level, these state laws are intended to influence federal executive and legislative decision-making. By declaring their willingness to accept the penalties for non-compliance and showing that a sizeable number of other states are also willing, states are trying to build political support that would lead to more sympathetic treatment by executive officials responsible for administering the law and from members of congress who might bring about its repeal. As the Montana statute declares, in part:

[T]he purpose of the Legislature in enacting [this act] is to refuse to implement the REAL ID Act and thereby protest the treatment by Congress and the President of the states as agents of the federal government and, by that protest, lead other state legislatures and Governors to reject the treatment by the federal government of the 50 states by the enactment of the REAL ID Act.⁴⁶

By this measure, state anti-REAL ID measures have been successful. Their passage led members of Congress in 2007 to

⁴³ Emergency Highway Energy Conservation Act, Pub. L. No. 93-239, § 2(b), 87 Stat. 1046 (1974).

⁴⁴ Highway Safety Amendments, Pub L. No. 98-363, § 158, 98 Stat. 435, 437 (1984).

⁴⁵ Department of Transportation and Related Agencies—Appropriations Act, Pub. L. No. 106-346, § 351, 114 Stat. 1356, 1356A-34 (2000).

⁴⁶ An Act Opposing the Implementation of the Federal REAL ID Act and Directing the Montana Department of Justice Not to Implement the Provisions of the Federal Act, *supra* note 42.

introduce measures to repeal the REAL ID Act and to propose similar relief measures in subsequent years, though they have not come up for a vote.⁴⁷ More important, and to more effect, these state measures put pressure on DHS to issue administrative rules giving states much more time to comply with the act, thereby alleviating some of their concerns. In March 2007, in issuing draft regulations for implementing REAL ID, DHS Secretary Michael Chertoff announced that states would have twenty additional months to bring their licenses into compliance, in effect moving the original May 2008 deadline to December 2009.⁴⁸ Partially in response to the passage of numerous other state non-compliance laws throughout 2007, Chertoff then gave states even more time for compliance when the final regulations were issued in January 2008, allowing states that apply for and receive extensions from DHS to have until May 2011 to begin issuing compliant licenses and until 2017 to bring all of their licenses into full compliance, nearly a decade after the time-frame envisioned in the original law.⁴⁹ In fact, DHS was so willing to give extensions (which were intended to be given only to states that agreed to eventually comply with the law) that it even granted them to several states that explicitly refused to promise to bring their laws into future compliance, as was the case notably with Montana and Tennessee.⁵⁰

This outcome, while falling well short of an ideal resolution from the vantage point of many states, is nevertheless more favorable than what states faced under the law as originally enacted. To be sure, states pursued various strategies other than passing these non-compliance statutes, including relying on standard forms of intergovernmental lobbying. However, these state statutes have been credited with playing the key role in building opposition to the federal law and influencing executive decision-making in the

⁴⁷ Regan & Deering, *supra* note 29, at 480; *see also* Shaun Waterman, *Reality Sets in for States on REAL ID*, WASH. TIMES (Aug. 4, 2010), <http://www.washingtontimes.com/news/2010/aug/4/reality-sets-in-for-states-on-real-id> (discussing the failure of the 111th Congress to enact the PASS ID Act, which was seen as an alternative to the REAL ID Act).

⁴⁸ Dinan, *supra* note 1, at 384.

⁴⁹ *Id.*

⁵⁰ Ryan Singel, *Feds Avoid Showdown by Giving Montana Real ID Waiver It Didn't Ask For*, WIRED (Mar. 21, 2008), <http://www.wired.com/threatlevel/2008/03/feds-avoid-show>; Ryan Singel, *New Hampshire Joins Montana in Real ID Victory*, WIRED (Mar. 27, 2008), <http://www.wired.com/threatlevel/2008/03/new-hampshire-j>. In the Obama Administration, DHS Secretary Janet Napolitano in March 2011 gave states even more time to begin complying, until January 2013. Stephen Clark, *Homeland Security Delays Launch of REAL ID—Again*, FOXNEWS.COM (Mar. 5, 2011), <http://www.foxnews.com/politics/2011/03/05/homeland-security-delays-launch-real-id>.

direction of more respect for state autonomy.⁵¹

B. Medicinal Marijuana

Prior to the early-twentieth century, states were solely responsible for regulating the distribution, possession, and use of narcotics, and even after passage of the federal Harrison Narcotic Act of 1914 and Marihuana Tax Act of 1937, states continued to play a prominent role in regulating illegal drugs.⁵² The Comprehensive Drug Abuse Prevention and Control Act of 1970 (“CSA”) then superseded these previous federal acts and established a comprehensive framework that ensured that the federal government would determine many, though not all, questions regarding illegal drugs.⁵³ Drugs were classified into various schedules, with marijuana labeled as a Schedule I drug, meaning that its cultivation, distribution, or possession is a federal crime unless authorized by the CSA.⁵⁴ One question not explicitly resolved in the CSA, however, because it was not discussed during the time of its passage, was the status of marijuana used for medicinal purposes.⁵⁵ In the absence of an explicit federal statutory prohibition on medicinal marijuana, sixteen states from 1996–2011 enacted measures that in some fashion legalized the use, possession, and cultivation of marijuana for medicinal purposes: Alaska, Arizona, California, Colorado, Delaware, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. In fourteen of these states, medicinal-marijuana measures were enacted as statutes. In two states, Colorado and Nevada, they were enacted as state

⁵¹ See Dale Krane, *The Middle Tier in American Federalism: State Government Policy Activism During the Bush Presidency*, 37 PUBLIUS 453, 457 (2007); Tim Conlan & John Dinan, *Federalism, The Bush Administration, and the Transformation of American Conservatism*, 37 PUBLIUS 279, 287 (2007); Regan & Deering, *supra* note 29, at 480; Dinan, *supra* note 1, at 384. On the other hand, the role of traditional forms of intergovernmental lobbying in bringing about more attention to state interests on the part of DHS is discussed in Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125, 2151–52 (2009).

⁵² See generally DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* (3d ed. 1999) (providing the best account of the historical development of federal drug control policy); see also *id.* at 54–68 (discussing the Harrison Act); *id.* at 224–29 (discussing the Marihuana Tax Act).

⁵³ *Id.* at 255–57.

⁵⁴ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1247, 1249, 1260 (1970).

⁵⁵ J. Mitchell Pickerill & Paul Chen, *Medical Marijuana Policy and the Virtues of Federalism*, 38 PUBLIUS 22, 46 (2007).

constitutional amendments.⁵⁶

These medicinal marijuana measures, enacted in ten of these sixteen states via the initiative process,⁵⁷ differ in particular respects,⁵⁸ but their common feature is the removal of state criminal penalties for physicians who prescribe, and individuals who use, marijuana for medicinal purposes. California was the first state to pass such a law, when voters in 1996 initiated and approved a Compassionate Use Act that is fairly typical of these state medical-marijuana measures. The California law declares: “Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medicinal purposes.”⁵⁹ It goes on to stipulate that state criminal penalties will not apply to a patient or his or her primary caregiver for possession or cultivation of marijuana in cases where a physician has approved its use for medicinal purposes.⁶⁰ Among the declared purposes of the law are “[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes,” and “[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.”⁶¹

These medicinal-marijuana laws are an effort by states to act in an area where the scope and enforcement of a federal statute is unsettled. States clearly have the power to determine whether use of marijuana for medicinal purposes is subject to state criminal penalties. But in the late 1990’s, when states began enacting laws eliminating state criminal penalties, it was uncertain whether the CSA would be interpreted as imposing federal criminal penalties on such behavior. Certainly, the CSA did not contain an explicit exemption for medical marijuana. However, there was no clear indication that the Department of Justice was prepared to interpret the CSA as applying to cultivation or possession of marijuana for

⁵⁶ These state measures and their dates of enactment are found at Medical Marijuana Procon.org. *16 Legal Medical Marijuana States and DC*, MEDICAL MARIJUANA PROCON (May 13, 2011), <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated May 13, 2011).

⁵⁷ The six state legislatures that enacted such laws—the others acted via the initiative process—are Delaware, Hawaii, New Jersey, New Mexico, Rhode Island, and Vermont. *Id.*

⁵⁸ Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1427–32 (2009).

⁵⁹ CAL. HEALTH AND SAFETY CODE § 11362.5(c) (West 2007).

⁶⁰ *Id.* §§ 11362.5(d)–(e).

⁶¹ *Id.* §§ 11362.5(b)(1)(A), (b)(1)(C).

medical purposes.

In one sense, these state laws have proved ineffective in insulating citizens from federal prosecution for cultivation, distribution, and possession of marijuana for medicinal use, in that the United States Supreme Court was unwilling to interpret the CSA as providing an exemption for medicinal marijuana or limit the reach of the CSA by holding it inapplicable to personal cultivation of marijuana for medicinal purposes. In *United States v. Oakland Cannabis Buyers' Coop.*, the Supreme Court sided with the federal government in its efforts to enjoin operation of cannabis cooperatives that were growing and distributing marijuana pursuant to the California medical-marijuana law but in violation of the CSA.⁶² The Court noted that, “[f]or marijuana (and other drugs that have been classified as ‘schedule I’ controlled substances), there is but one express exception [in the CSA], and it is available only for Government-approved research projects,” which were not at issue in the instant case.⁶³ The Court went on to reject the suggestion that it “should construe the Controlled Substances Act to include a medical necessity defense” that would insulate cooperatives from federal prosecution.⁶⁴

Then, in *Gonzales v. Raich*, the Supreme Court upheld federal power to enforce the CSA against cultivation of marijuana for medicinal use in the face of a contrary state law.⁶⁵ The *Gonzales* case stemmed from federal agents’ seizure and destruction of marijuana in 2002 from an individual, Diane Monson, who was growing marijuana for her personal use in accordance with California law.⁶⁶ This prompted a federal suit brought by Monson and another California resident, Angel Raich, seeking to enjoin the Justice Department from enforcing the CSA in such instances. After a United States District Court Judge sided with the federal government, a panel of the Ninth Circuit Court reversed this ruling on the ground that enforcement of the CSA in such cases exceeded federal power under the commerce clause in light of recent Supreme Court decisions in *United States v. Lopez*⁶⁷ and *United States v. Morrison*⁶⁸ strictly construing the commerce clause.⁶⁹ However, in a

⁶² *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 486 (2001).

⁶³ *Id.* at 490.

⁶⁴ *Id.* at 494.

⁶⁵ *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

⁶⁶ *Id.* at 6–7.

⁶⁷ *United States v. Lopez*, 514 U.S. 549 (1995).

⁶⁸ *United States v. Morrison*, 529 U.S. 598 (2000).

⁶⁹ *Raich v. Ashcroft*, 352 F.3d 1222, 1231–35 (9th Cir. 2003).

six-three decision, the United States Supreme Court reversed the Ninth Circuit's ruling and held that the commerce clause could be read as authorizing enforcement of the CSA⁷⁰ even against contrary state laws, which were, by that time, in effect in nine states.⁷¹ Justice O'Connor in her dissent argued that "federalism principles . . . require that room for experiment be protected in this case,"⁷² and Justice Thomas in a separate dissent complained that "[h]ere, Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens."⁷³ But the majority rejected these arguments, with Justice Scalia declaring in a concurrence that he was unable to discern "any violation of state sovereignty of the sort that would render this regulation 'inappropriate.'"⁷⁴

States that enacted medicinal marijuana laws may have been ineffective in securing judicial protection for individuals acting pursuant to these laws. However, Barack Obama's election as president led to a change in the Justice Department's enforcement of the CSA such that persons acting pursuant to these state laws will not be subject to federal prosecution. Attorney General Eric Holder announced in October 2009 that "it will not be a priority to use federal resources to prosecute patients with serious illnesses or their caregivers who are complying with state laws on medical marijuana."⁷⁵ In an accompanying memo, Deputy Attorney General David Ogden told United States Attorneys that in their use of the Justice Department's "investigative and prosecutorial resources" they should "not focus federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."⁷⁶ For

⁷⁰ *Gonzales*, 545 U.S. at 9.

⁷¹ *Id.* at 5 n.1.

⁷² *Id.* at 57 (O'Connor, J., dissenting).

⁷³ *Id.* at 66 (Thomas, J., dissenting).

⁷⁴ *Id.* at 41 (Scalia, J., concurring).

⁷⁵ Carrie Johnson, *U.S. Eases Stance on Medical Marijuana*, WASH. POST, Oct. 20, 2009, at 1A.

⁷⁶ David W. Ogden, *Memorandum for Selected United States Attorneys*, THE JUSTICE BLOG (Oct. 19, 2009), <http://blogs.usdoj.gov/blog/archives/192>. It should be noted that in 2011 a series of U.S. Attorney letters emphasized several limits of this October 2009 policy, in that the Justice Department made clear that it will not permit state officials to license marijuana dispensaries, even if directed to do so by state statutes. For instance, U.S. Attorney Peter F. Neronha wrote to Rhode Island Governor Lincoln Chafee in April 2011, "I now write to ensure that there is no confusion regarding the United State Department of Justice's view of state-sanctioned schemes that purport to regulate the manufacture and distribution of medical marijuana." In particular, Neronha wrote that, "while the Department of Justice does not focus its limited resources on seriously ill individuals who use marijuana as part of a

practical purposes, therefore, states have succeeded in taking advantage of the significant degree of discretion accorded to federal officials in enforcing federal law, and in a way that permitted the operation of state laws inconsistent with federal statutes.

II. PASSAGE OF STATE LAWS CHALLENGING THE LEGITIMACY OR APPLICABILITY OF FEDERAL LAWS

A. *Guns*

Congressional passage of various gun-control laws in the twentieth century substantially increased federal power over the manufacture, distribution, and possession of guns; but these federal laws have not completely occupied the field.⁷⁷ The National Firearms Act of 1934 imposed a tax on the transfer of and required the registration of certain types of machine guns and other firearms generally associated with gangsters.⁷⁸ Several years later, the Federal Firearms Act of 1938 required all firearms manufacturers and dealers engaged in interstate or foreign commerce to obtain a federal license and prohibited them from selling guns to certain individuals.⁷⁹ The Gun Control Act of 1968 tightened some of these licensing requirements by making it more difficult for individuals to obtain licenses, and also extended the scope of the requirements to apply to individuals engaged in intrastate commerce.⁸⁰ It also required firearms dealers to comply with record-keeping and marking requirements.⁸¹ Other than a now-expired 1994 Assault Weapons Ban,⁸² the main federal law enacted in recent decades is the 1993 Brady Handgun Violence Protection Act, which requires background checks on all handgun purchases.⁸³ The checks were to

medically recommended treatment regimen in compliance with state law as stated in the October 2009 Memorandum of Deputy Attorney General David Ogden, the Department of Justice maintains the authority to enforce the CSA vigorously against individuals and organizations that participate in unlawful manufacturing and distribution activity involving marijuana, even if such activities are permitted under state law.” Letter from United States Attorney District of Rhode Island to the Honorable Lincoln D. Chafee (Apr. 29, 2011), available at <http://web5.msue.msu.edu/lu/pamphlet/Blaw/U-S-AttorneyLetter-RI.pdf>.

⁷⁷ See Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 138–40, 148–57 (1975) (detailing the history of these laws).

⁷⁸ National Firearms Act, 48 Stat. 1236, 1237–38 (1934).

⁷⁹ Federal Firearms Act, 52 Stat. 1250, 1250–51 (1938).

⁸⁰ Gun Control Act of 1968, Pub. L. No. 90-618, § 923, 82 Stat. 1213, 1221–22 (1968).

⁸¹ *Id.* § 5842.

⁸² Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110102, 108 Stat. 1796, 1996 (1994).

⁸³ Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 102, 107 Stat. 1536,

be conducted on an interim basis by local law enforcement officers (in a provision invalidated in *United States. v. Printz* in 1997 as an improper federal commandeering of state executive officials) and then through an instant computer background check (that began operating as scheduled in 1998).⁸⁴

In 2009 and 2010, eight states enacted firearms freedom acts that seek, as is aptly described in the full title of the Montana statute, to “exempt[] from federal regulation under the commerce clause of the Constitution of the United States a firearm, a firearm accessory, or ammunition manufactured and retained” within the state.⁸⁵ This Montana Firearms Freedom Act of 2009 (“MFFA”), the first of these laws to pass, is typical in most respects of the state measures that followed. Montana legislators drew in part on the Ninth and Tenth Amendments, arguing that

The regulation of intrastate commerce is vested in the states under the 9th and 10th amendments to the United States constitution, particularly if not expressly preempted by federal law. Congress has not expressly preempted state regulation of intrastate commerce pertaining to the manufacture on an intrastate basis of firearms, firearms accessories, and ammunition.⁸⁶

The MFFA goes on to stipulate: “A personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of congress to regulate interstate commerce.”⁸⁷ Finally, the MFFA requires that “[a] firearm manufactured or sold in Montana” pursuant to this state law “must have the words ‘Made in Montana’ clearly stamped on a central metallic part.”⁸⁸ The other firearms freedom laws, enacted in Tennessee in 2009 and Utah, South Dakota, Wyoming, Arizona,

1536–37 (1993).

⁸⁴ See John Dinan, *Congressional Responses to the Rehnquist Court’s Federalism Decisions*, 32 PUBLIUS 1, 13–14 (2002) (describing the design of the Brady Act and the modest and temporary effect of the *Printz* decision).

⁸⁵ H.R. 246, 61st Leg., Reg. Sess. (Mont. 2009). A list of states that have passed and considered these laws is maintained by advocates of these measures on their website. *The Firearms Freedom Act (FFA) is sweeping the Nation*, FIREARMS FREEDOM ACT (June 10, 2010), <http://firearmsfreedomact.com>. Passage of these eight state statutes is discussed in Barak Y. Orbach, Kathleen S. Callahan & Lisa L. Lindemann, *Arming States’ Rights: Federalism, Private Lawmakers, and the Battering Ram Strategy*, 52 ARIZ. L. REV. 1161, 1180 (2010).

⁸⁶ H.R. 246, *supra* note 85, at § 2(3).

⁸⁷ H.R. 246, *supra* note 85, at § 4.

⁸⁸ H.R. 246, *supra* note 85, at § 6.

Idaho, and Alaska in 2010, follow the same template,⁸⁹ except that Wyoming goes further by making it a misdemeanor offense for any state or federal official to try to enforce federal law against a personal firearm manufactured in, and remaining entirely within, the borders of Wyoming pursuant to state law.⁹⁰

These state firearms freedom acts, which by themselves have no meaningful effect, represent an effort to take advantage of recent United States Supreme Court decisions that impose limits on the reach of Congress's interstate commerce power. In particular, supporters seek to take advantage of decisions in *Lopez* and *Morrison*, invalidating the Gun-Free School Zones Act of 1990 ("GFSZA") and the civil remedy provision of the Violence Against Women Act of 1994 ("VAWA"), respectively, on the ground that they exceeded Congress's power under the interstate commerce clause.⁹¹ In *Lopez*, the Court refused to view a federal prohibition on guns in or near schools as legitimate under the commerce power, because the regulated activity had "nothing to do with 'commerce' or any sort of economic enterprise," and was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." Nor did the law contain a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."⁹² The Court was no more prepared in *Morrison* to view the commerce clause as legitimating creation of a federal civil remedy for victims of gender-motivated violence. As the Court concluded: "We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."⁹³ Congress responded to the *Lopez* decision the next year by revising and reenacting the invalidated statute to add a jurisdictional element to make clear that the GFSZA only applies to a gun "that has moved in or that otherwise affects interstate or foreign commerce."⁹⁴ Congress has not reenacted the

⁸⁹ See, e.g., S. Res. 1610, 106th Gen. Assem, Reg. Sess. (Tenn. 2009).

⁹⁰ H.R. 0095, 2010 Leg. §§ 6-8-405(a)-(b) (Wyo. 2010).

⁹¹ *United States v. Lopez*, 514 U.S. 549, 551 (1995); *United States v. Morrison*, 529 U.S. 598, 601 (2000). *Morrison* also considered and rejected the possibility that the challenged provision of VAWA could be justified as an exercise of the enforcement power of the Fourteenth Amendment. *Morrison*, 529 U.S. at 609, 617, 619.

⁹² *Lopez*, 514 U.S. at 561.

⁹³ *Morrison*, 529 U.S. at 617.

⁹⁴ Dinan, *supra* note 84, at 5 (quoting 141 CONG. REC. H4680 (1995)).

invalidated portion of VAWA.⁹⁵

Lopez and *Morrison* marked the first Supreme Court rulings in six decades invalidating a congressional act on commerce clause grounds. Combined with numerous other decisions in the 1990's and early 2000's interpreting the Tenth Amendment, Eleventh Amendment, and Fourteenth Amendment enforcement clause to impose limits on congressional power and protect state sovereignty,⁹⁶ these decisions signaled that a majority of the Justices were receptive to arguments challenging the reach of federal power. To be sure, the Court rejected federalism-based challenges to other congressional statutes, such as the Driver's Privacy Protection Act in 2000 (*Condon*), and the application of the Controlled Substances Act to cultivation of marijuana for medical purposes in 2005 (*Raich*). And in *Raich*, as we have seen, the Court was willing to distinguish the instant case of personal cultivation of marijuana for medical use from cases of guns in schools and gender-motivated violence and to permit federal regulation of the former on the ground that "Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision [by the California law] is unquestionably substantial."⁹⁷ The *Raich* decision notwithstanding, there is no denying, and supporters of state firearms freedom acts are seeking to exploit, the Court's greater receptivity since the mid-1990's to federalism-based challenges to the legitimacy and application of congressional statutes.

As scholars have noted, alteration or extension of judicial doctrine requires that litigants generate cases that can provide a suitable occasion for the reconsideration of previous rulings or extension of recent rulings to new circumstances. The Court can signal its willingness to reconsider or extend doctrines in various areas, but appropriate cases must be brought in order for the Justices to have a chance to issue decisions that actually apply or extend these doctrines.⁹⁸

⁹⁵ Dinan, *supra* note 84, at 6–7.

⁹⁶ See generally Timothy J. Conlan & François Vergniolle de Chantal, *The Rehnquist Court and Contemporary American Federalism*, 116 POL. SCI. QUARTERLY 253 (2001) (discussing the Court's decisions within the context of congressional political dynamics).

⁹⁷ *Gonzales v. Raich*, 545 U.S. 1, 32 (2005).

⁹⁸ Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 503 (2001); see also Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 544 (2008) (discussing the way that state courts have occasionally taken the opportunity to issue decisions providing the Supreme Court with an opportunity to reconsider or extend constitutional doctrines in areas of substantively unsettled law).

Abortion is the most prominent policy area where states have sought, with some success, to pass statutes that have generated cases presenting the Court with an opportunity to relax earlier precedents so as to return some discretion to state elected officials. *Roe v. Wade* and *Doe v. Bolton* prevented states from outlawing abortions prior to fetal viability and contained some instruction as to which restrictions states could impose pre-viability; but it left for further determination a number of specific questions as to which particular restrictions states could adopt.⁹⁹ States in the years following *Roe* enacted numerous statutes designed to test the boundaries of the *Roe* limitations and present the Justices with opportunities to reconsider and relax these limitations. These state statutes have had some success in prodding the Court to restore some discretion to state policy-makers in this area.¹⁰⁰ After various periods of uncertainty about whether Court doctrine would permit states to enact informed consent provisions and waiting-period requirements, among other restrictions, the Court has over time—and generally as a result of personnel changes—made clear that states can enact each of these restrictions, as long as they do not unduly burden a woman’s ability to obtain an abortion prior to fetal viability and the ability to obtain an abortion post-viability where the woman’s health or life is at risk.¹⁰¹

In a similar fashion, and just as the Court’s imposition of various limits on federal power in the 1990’s and early 2000’s depended in

⁹⁹ *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

¹⁰⁰ See NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE 65 (1996) (discussing a 1986 Missouri statute “that took aim at *Roe v. Wade*” and “was designed to give the Court an opportunity to revisit *Roe*,” and was upheld by the United States Supreme Court in *Webster v. Reprod. Health Serv.*, 492 U.S. 490 (1989)).

¹⁰¹ Regarding informed consent provisions, the Supreme Court in *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 426 (1983), and *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986), invalidated state informed consent provisions; but in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the Court upheld such provisions, arguing:

To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the “probable gestational age” of the fetus, those cases go too far, are inconsistent with *Roe*’s acknowledgment of an important interest in potential life, and are overruled. *Id.* at 882. Regarding waiting-period requirements, the Court in *Akron* had invalidated such a provision; but in *Casey*, the Court upheld such a provision, arguing: “Our analysis of Pennsylvania’s 24-hour waiting period between the provision of the information deemed necessary to informed consent and the performance of an abortion under the undue burden standard requires us to reconsider the premise behind the decision in *Akron I* invalidating a parallel requirement.” *Id.* at 885.

part on state governments' willingness to litigate these cases and bring them before the Court,¹⁰² state firearms freedoms laws in 2009–2010 are intended to generate legal challenges to the legitimacy of enforcing federal gun control statutes against guns that move only in intrastate commerce. That is, given the opportunity created by the Court's recent federalism decisions, as typified by the invalidation of congressional statutes in *Lopez*¹⁰³ and *Morrison*,¹⁰⁴ and the resulting uncertainty about the reach of these decisions occasioned by the sustaining of a congressional statute in *Raich*,¹⁰⁵ supporters of state firearms freedom acts view the present judicial climate as providing a suitable occasion for the Court to reconsider the legitimate reach of federal gun laws and perhaps conclude, as in *Lopez* and *Morrison*, that federal power cannot be legitimately exercised under the commerce clause in this instance.

Pursuant to this strategy, supporters of the Montana law filed suit in the United States District Court in Montana in an effort to generate a case that might eventually provide a suitable occasion for issuance of a Supreme Court decision limiting the applicability of federal gun laws to the manufacture and sale of guns that move only in interstate commerce. After the Montana law's passage but before it took effect, Gary Marbut, president of the Montana Shooting Sports Association ("MSSA"), wrote to the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") stating his intention to manufacture firearms, accessories, and ammunition "consistent with the Montana Firearms Freedom Act" and asking whether "it is permissible under federal law" to do so either solely for personal use or solely for intrastate sale.¹⁰⁶ He received a response that manufacturing guns for personal use would likely not render him subject to federal licensing requirements, nor would the sale for purely intrastate use of most firearms accessories; however, "[t]he manufacture of firearms or ammunition for sale to others within Montana requires licensure by ATF."¹⁰⁷ At that point,

¹⁰² Whittington, *supra* note 98, at 503–04.

¹⁰³ *United States v. Lopez*, 514 U.S. 549 (1995).

¹⁰⁴ *United States v. Morrison*, 529 U.S. 598 (2000).

¹⁰⁵ *Gonzales v. Raich*, 545 U.S. 1 (2005).

¹⁰⁶ Letter from Gary S. Marbut, to Ken Bray, Resident Agent in Charge, United States Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (Aug. 21, 2009), <http://firearmsfreedomact.com/2009/09/29/929-batfe-letter-re-the-mffa>.

¹⁰⁷ Letter from Richard E. Chase, Special Agent in Charge, United States Dep't of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives, to Gary S. Marbut (September 29, 2009), available at <http://firearmsfreedomact.com/BATF%20Marbut%20Response%20Letter.pdf>.

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Marbut, together with the MSSA and Second Amendment Foundation, filed suit against Attorney General Eric Holder on October 1, 2009—the day the state law took effect—seeking to enjoin enforcement of federal prosecution of individuals for manufacturing firearms pursuant to the MFFA.¹⁰⁸

Upon filing this suit, Marbut and the MSSA made clear their intention to generate a case that would determine whether the Supreme Court was willing to extend its recent commerce clause rulings in *Lopez*¹⁰⁹ and *Morrison*¹¹⁰ to apply to intrastate manufacturing and distribution of firearms. As the organization stressed in an accompanying press release, “MSSA continues to strongly urge that no Montana citizen attempt to manufacture an MFFA-covered item, even after the law takes effect today, until MSSA can prove the principles of the MFFA in court.”¹¹¹ Marbut explained that

states and the federal government are widely recognized to share power and authority, with definite limits placed on federal power by the states, the creators of the federal government. The MFFA lawsuit is designed to test and define those limits, to assert states’ authority, and to limit what many see as overbearing authority assumed by Congress and the federal government.¹¹²

Acknowledging that the post-New Deal Era Court has generally upheld congressional acts as consistent with the commerce clause, most notably in *Wickard v. Filburn*,¹¹³ and most recently in *Raich*,¹¹⁴ the organization noted nevertheless that

other cases such as the 1995 case of *US v. Lopez* suggest that federal commerce power is not infinitely elastic, that there are limits to federal commerce power, and that it has just not yet been determined what those limits may be. The MFFA litigation is structured to clarify and affirm those limits.¹¹⁵

¹⁰⁸ First Amended Complaint, *Montana Shooting Sports Ass’n, Inc. v. Holder*, No. CV-09-147-M-DWM-JCL (D. Montana Dec. 17, 2009), available at <http://firearmsfreedomact.com/updates/5.%20US%20Attny%20General%20RE%201st%20Amended%20Complaint%20-%20121709.pdf>. See also *Gun Groups File Lawsuit to Validate Montana Firearms Freedom Act*, FIREARMS FREEDOM ACT (Oct. 1, 2009), <http://firearmsfreedomact.com/2009/10/01/gun-groups-file-lawsuit-to-validate-montana-firearms-freedom-act>.

¹⁰⁹ *United States v. Lopez*, 514 U.S. 549 (1995).

¹¹⁰ *United States v. Morrison*, 529 U.S. 598 (2000).

¹¹¹ *Gun Groups File Lawsuit*, *supra* note 108.

¹¹² *Id.*

¹¹³ *Wickard v. Filburn*, 317 U.S. 111 (1942).

¹¹⁴ *Gonzales v. Raich*, 545 U.S. 1 (2005).

¹¹⁵ *Gun Groups File Lawsuit*, *supra* note 108.

Plaintiffs in the lawsuit, *MSSA v. Holder*, filed an amended complaint on December 17, 2009,¹¹⁶ and the Justice Department submitted a motion to dismiss on January 19, 2010.¹¹⁷ Plaintiffs then filed a second amended complaint on April 9, 2010, seeking to buttress their claim that the case presents a live controversy by pointing to numerous customers who are interested in purchasing a “Montana Buckaroo” gun that would be compliant with the MFFA but who are unwilling to do so in light of the ATF’s current interpretation of federal law.¹¹⁸ Meanwhile, the state of Montana intervened in the case in order to defend the MFFA.¹¹⁹ Along with making clear that the law “does not require officers of the Executive Branch of Montana’s government to intercede to prevent enforcement of federal law,”¹²⁰ the state defended MFFA’s passage in part on the ground that the Supreme Court “has recognized that Commerce Clause principles, perhaps more than other constitutional tenets, are susceptible to possible shifts and nuances at the margin,” and therefore, cases such as *Raich* “are not controlling as to the question of whether the conduct covered by the MFFA is within the Commerce Clause power of Congress.”¹²¹

Although United States District Judge Donald Molloy issued an October 10, 2010 ruling dismissing the suit on jurisdictional and substantive grounds, the plaintiffs appealed to the Ninth Circuit

¹¹⁶ First Amended Complaint, *supra* note 108.

¹¹⁷ Defendant’s Motion to Dismiss, *Montana Shooting Sports Ass’n v. Holder*, No. 09-CV-147-DWM-JLC (D. Mont. Jan. 19, 2010), available at <http://firearmsfreedomact.com/updates/10.%20Def.%20Motion%20to%20Dismiss%20-%20011910.pdf>.

¹¹⁸ Second Amended Complaint at 9–10, *Montana Shooting Sports Ass’n v. Holder*, No. 09-CV-147-DWM-JLC (D. Mont. Apr. 9, 2010), available at <http://firearmsfreedomact.com/updates/33.%20Second%20Amended%20Complaint%20-%20040910.pdf>.

¹¹⁹ State of Montana’s Brief in Intervention, *Montana Shooting Sports Ass’n v. Holder*, No. 09-CV-147-DWM-JLC (D. Mont. Apr. 12, 2010), available at <http://firearmsfreedomact.com/updates/MT%20AG%20MtD%20brief.pdf>.

¹²⁰ *Id.* at 5.

¹²¹ *Id.* at 13 (citations omitted). The state took a similar view of the applicability of a Ninth Circuit Court decision in *United States v. Stewart*, 451 F.3d 1071 (9th Cir. 2006), in which the Ninth Circuit was led by the United States Supreme Court’s *Raich* decision to reconsider an earlier ruling regarding the legitimacy of a federal prosecution for possession of a homemade machine gun. *Id.* at 7–13. The Ninth Circuit, in a 2003 ruling, viewed such a prosecution as exceeding federal power under the commerce clause. *United States v. Stewart*, 348 F.3d 1132, 1142 (9th Cir. 2003). However, the Supreme Court’s decision in *Raich* led the Ninth Circuit to reverse its earlier holding and view such a prosecution as falling within the legitimate scope of the commerce power. *Stewart*, 451 F.3d at 1078. Utah Attorney General Mark Shurtleff also filed an amicus brief in support of the plaintiffs on behalf of the state of Utah as well as Alabama, Idaho, South Carolina, South Dakota, West Virginia, and Wyoming. Brief of Utah, Alabama, Idaho, South Carolina, South Dakota West Virginia, and Wyoming, as *Amici Curiae* in Opposition to Defendant’s Motion to Dismiss, *Montana Shooting Sports Ass’n v. Holder*, No. 09-CV-147-DWM-JLC (D. Mont. Apr. 12, 2010), available at <http://firearmsfreedomact.com/updates/Utah%20Brief%20MtD.pdf>.

Court of Appeals.¹²² Additional suits could also be filed in other courts by supporters of the other state laws in an effort to generate a case that could provide an occasion for the Supreme Court to determine whether federal power properly extends to regulation of guns that are made and remain within a state's boundary.

B. Health Care

Congress on March 21, 2010 approved and the President on March 23, 2010 signed the Patient Protection and Affordable Care Act of 2010 ("ACA"), which includes a provision to take effect in 2014, requiring nearly all individuals to purchase health insurance or face a financial penalty.¹²³ Whether Congress is constitutionally empowered to enact an insurance mandate inspired much discussion prior to the law's passage, with a July 2009 Congressional Research Service Report concluding that, "[w]hether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service."¹²⁴

Despite the uncertainty both in and out of the congressional chamber regarding constitutional authority for an individual mandate,¹²⁵ Congress included such a provision in the final version of the ACA and made a number of findings in support of the claim that "[t]he individual responsibility requirement . . . is commercial and economic in nature, and substantially affects interstate commerce."¹²⁶ The law stipulates that "[a]n applicable individual shall for each month beginning after 2013 ensure that the

¹²² Memorandum and Opinion Granting Defendant's Motion to Dismiss, *Montana Shooting Sports Ass'n v. Holder*, No. 09-CV-147-DWM-JCL (D. Mont. Oct. 18, 2010), available at <http://firearmsfreedomact.com/updates/MSSA%20v.%20Holder%20-%20108.%20Memorandum%20&%20Opinion%20Granting%20Def.%27s%20Mx%20to%20Dismiss%20-%20101810.pdf>.

¹²³ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 5000A, 124 Stat. 119, 244 (2010).

¹²⁴ JENNIFER STAMAN & CYNTHIA BROUGHER, CONG. RESEARCH SERV., REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS 3 (July 24, 2009), available at http://assets.opencrs.com/rpts/R40725_20090724.pdf.

¹²⁵ See generally MARK A. HALL, GEORGETOWN UNIV., O'NEILL INST. FOR NAT'L & GLOBAL HEALTH LAW, THE CONSTITUTIONALITY OF MANDATES TO PURCHASE HEALTH INSURANCE (2009), available at http://www.law.georgetown.edu/oneillinstitute/national-health-law/legal-solutions-in-health-reform/Papers/Individual_Mandates.pdf (providing a sample of the legal commentary regarding the constitutionality of the individual mandate prior to the passage of the ACA); David B. Rivkin, Jr., et al., *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. PA. L. REV. PENNUMBRA 93 (2009).

¹²⁶ Patient Protection and Affordable Care Act § 1501(a)(1).

individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.”¹²⁷ Individuals who fail to satisfy this requirement after 2013 are “imposed a penalty”¹²⁸ in the amount of \$95 in 2014, \$350 in 2015, and then \$750 in 2016, with cost-of-living increases applied above this amount in each subsequent year and an even higher penalty imposed on individuals whose income exceeds a certain level.¹²⁹

In response to the congressional debate about and passage of the ACA, fifteen states in 2010 and 2011 adopted statutes or constitutional amendments challenging the legitimacy of the individual mandate: Arizona, Georgia, Idaho, Louisiana, Missouri, Oklahoma, Utah, and Virginia in 2010 and Florida, Indiana, Kansas, Montana, New Hampshire, North Dakota, and Tennessee in 2011.¹³⁰ Arizona voters actually considered passing a health freedom amendment in November 2008, when they narrowly rejected (by less than half a percentage point)¹³¹ a voter initiated constitutional amendment that would have, among other things, prohibited any individual from being required to purchase health insurance.¹³² At that time, supporters of the Arizona amendment were seeking primarily to prevent the state legislature from imposing a health-insurance mandate of the type adopted by Massachusetts in 2006.¹³³ However, supporters of health freedom acts in 2009–2011, with assistance from the American Legislative Exchange Council, have been primarily concerned with preventing imposition of a federal mandate of the sort included in the bills that passed the House and Senate in 2009 and then became law in March 2010.¹³⁴ The Arizona legislature voted in June 2009 to place on the November 2010 ballot a slightly revised version of the

¹²⁷ *Id.* § 5000A(a). Exemptions are provided for certain individuals and groups, such as the Amish. *Id.* § 5000A(d)(2).

¹²⁸ *Id.* § 5000A(b)(1).

¹²⁹ *Id.* § 5000A(c)(3).

¹³⁰ Cauchi, *supra* note 5.

¹³¹ *2008 General Election*, ARIZ. SEC. OF STATE, <http://www.azsos.gov/results/2008/general/BM101.htm> (last updated Nov. 25, 2008).

¹³² Arizona Proposition 101 (2008), ARIZ. SEC. OF STATE, *available at* <http://www.azsos.gov/election/2008/info/pubpamphlet/english/prop101.htm>.

¹³³ Sarah McIntosh, *Virginia Passes Health Freedom Bill, Setting Up Legal Challenge to Individual Mandate*, HEARTLAND INST. (Mar. 22, 2010), http://www.heartland.org/healthpolicy-news.org/article/27323/Virginia_Passes_Health_Freedom_Bill_Setting_Up_Legal_Challenge_to_Individual_Mandate.html.

¹³⁴ *See, e.g., Q&A with Rep. Nancy Barto*, INSIDE ALEC, July 2009, at 3, *available at* www.alec.org/am/pdf/Inside_July09.pdf.

defeated 2008 amendment.¹³⁵

On March 10, 2010, Virginia became the first state to enact a health freedom statute, followed by Idaho on March 17, Utah on March 22, Georgia on June 2, and Louisiana on July 2; the Missouri legislature, meanwhile, agreed on May 11 to submit a health freedom statute for voter approval in an August 2010 referendum in which it passed with seventy-one percent of the vote.¹³⁶ Additionally, following Arizona's lead, the Oklahoma legislature in May 2010 approved a health freedom amendment for placement on the November 2010 ballot.¹³⁷ Voters approved the Arizona and Oklahoma amendments in November 2010,¹³⁸ at the same time that Colorado voters rejected a citizen-initiated health freedom amendment.¹³⁹ The Arizona and Oklahoma health freedom amendments were approved, making these the seventh and eighth states to approve health freedom measures, whether on a statutory or constitutional basis. Seven more states approved health freedom statutes in their 2011 legislative sessions, bringing to fifteen the number of states that have approved such measures on a statutory or constitutional basis.¹⁴⁰

The state measures are similar in prohibiting residents from being required to purchase health insurance, but some go further in certain respects. The Virginia law states in its relevant portion that “[n]o resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage,” with several exceptions provided.¹⁴¹ Meanwhile, the Idaho law frames this central provision as follows:

The power to require or regulate a person's choice in the mode of securing health care services, or to impose a penalty related thereto, is not found in the Constitution of the United States of America, and is therefore a power reserved to the people pursuant to the Ninth Amendment, and to the several states pursuant to the Tenth Amendment. The state of Idaho hereby exercises its sovereign power to declare the public policy of the state of Idaho regarding the right of all persons residing in the state of Idaho in choosing the mode of

¹³⁵ See *id.* (discussing the pending congressional health care legislation serving as the motivation behind the Arizona legislature's approval of this amendment).

¹³⁶ Cauchi, *supra* note 5.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ S. 417, Ch. 108, Gen. Assem. (Va. 2010).

securing health care services.¹⁴²

The Idaho law also prohibits any state or local official from acting “to impose, collect, enforce, or effectuate any penalty in the state of Idaho that violates the public policy set forth in” the act.¹⁴³ Moreover, it directs the state attorney general

[t]o seek injunctive relief . . . as expeditiously as possible to preserve the rights and property of the residents of the state of Idaho . . . in the event that any law or regulation violating the public policy set forth in the Idaho health freedom act . . . is enacted by any government, subdivision or agency thereof.¹⁴⁴

The Utah law makes specific reference to federal health legislation. In addition to stating that “[a]n individual in this state may not be required to obtain or maintain health insurance,”¹⁴⁵ it prohibits any state department or agency from implementing “any part of federal health care reform . . . that is passed by the United States Congress after March 1, 2010, unless the department or agency reports” to the relevant legislative committees on a variety of questions, including the availability of any waiver options, the costs of implementing the federal law, and “the consequences to the state if the state does not comply.”¹⁴⁶

On March 23, 2010, the day the federal law was signed, Virginia Attorney General Kenneth Cuccinelli filed a federal lawsuit in the Eastern District of Virginia challenging the constitutionality of the individual mandate provision of the ACA.¹⁴⁷ On the same day, Idaho Attorney General Lawrence Wasden and Utah Attorney General Shurtleff joined eleven other attorney generals in a suit filed by Florida Attorney General Bill McCollum in the Northern District of Florida.¹⁴⁸ Although the multi-state suit brought by Florida (and eventually consisting of twenty-six plaintiff states)¹⁴⁹

¹⁴² H.B. 391, 2010 Leg., 60th Sess., § 39-9003 (Id. 2010).

¹⁴³ *Id.* § 39-9004(1).

¹⁴⁴ *Id.* § 67-1401(15).

¹⁴⁵ H.B. 67, 2010 Gen. Sess., § 1(4)(a) (Utah 2010).

¹⁴⁶ *Id.* §§ 1(2)(a), 1(2)(c)(vi).

¹⁴⁷ *Commonwealth v. Sebelius*, No. 3:10-CV-00188-HEH (E.D. Va. Mar. 23, 2010).

¹⁴⁸ *Florida v. Sebelius*, No. 3:10-cv-91-RV-EMT (N.D. Fla. Mar. 23, 2010).

¹⁴⁹ The thirteen original states are Florida, South Carolina, Nebraska, Texas, Utah, Louisiana, Alabama, Michigan, Colorado, Pennsylvania, Washington, Idaho, and South Dakota. Erika Bolstad, *Alaska to Join States' Health Bill Lawsuit*, ANCHORAGE DAILY NEWS (April 20, 2010), available at <http://www.adn.com/2010/04/20/1241989/alaska-to-join-states-health-bill.html>. The other thirteen states to join are Alaska, Arizona, Georgia, Indiana, Iowa, Kansas, Maine, Mississippi, Nevada, North Dakota, Ohio, Wisconsin, and Wyoming. *More States Join Florida Lawsuit Against Healthcare Law*, MIAMI HERALD (Jan. 18, 2011),

contains additional arguments challenging the Act's directives to states regarding their participation in the Medicaid program,¹⁵⁰ both lawsuits seek to enjoin enforcement of the ACA on the grounds that it exceeds the legitimate reach of congressional power.

Although a lawsuit presenting a challenge to the constitutionality of the ACA could be filed in the absence of these state acts—and in fact, the multi-state suit includes a number of plaintiff states that have not yet passed such acts—the purpose of these state acts, which by themselves are seemingly preempted by the ACA and therefore have no independent meaningful effect, is to increase the likelihood that the Court will deem such a challenge justiciable prior to 2014 when the individual mandate actually takes effect.¹⁵¹ Thus, the Virginia complaint explains that “[a]lthough the federal mandate does not take effect for several years, PPACA imposes immediate and continuing burdens on Virginia and its citizens. The collision between the state and federal schemes also creates an immediate, actual controversy involving antagonistic assertions of right.”¹⁵² As the complaint asserts, “[t]he Commonwealth of Virginia has an interest in asserting the validity of its anti-mandate enactment. The Virginia enactment is valid despite the Supremacy Clause of the United States Constitution because, as demonstrated below, the individual mandate and PPACA as a whole are unconstitutional,” because, as the complaint goes on to explain, “the individual mandate exceeds the enumerated powers conferred upon Congress.”¹⁵³ In fact, when U.S. District Judge Henry Hudson refused to dismiss the Virginia lawsuit in the first meaningful ruling in one of these federal court proceedings on August 2, 2010, he made clear that the passage of a state measure that conflicted with the ACA was crucial to his determination that the lawsuit was justiciable.¹⁵⁴

available at <http://www.miamiherald.com/2011/01/18/2022545/more-states-join-florida-lawsuit.html>.

¹⁵⁰ *Sebelius*, No. 3:10-cv-91-RV-EMT at 9–11, 17.

¹⁵¹ See David White, *Alabama Senate Passes Health Care Opt-Out Bill*, BIRMINGHAM NEWS (April 1, 2010), available at http://blog.al.com/spotnews/2010/04/senate_passes_health_care_opt.html (providing an argument to this effect by an Alabama state senator defending the Alabama senate's passage of a health freedom act). According to the news account, although “opponents said the bill was a waste of time, since by long legal precedent, state constitutions or other state laws cannot overrule, or trump, federal laws such as the health care law,” state senator Scott Beason “said his bill or a similar bill from another state could serve as a vehicle for a court challenge claiming the health care law violated the U.S. constitution's 10th amendment.” *Id.*

¹⁵² *Commonwealth*, No. 3:10-CV-00188-HEH at 2.

¹⁵³ *Id.* at 3.

¹⁵⁴ *Commonwealth v. Sebelius*, 702 F.Supp.2d 598, 608 (E.D. Va. 2010).

In this respect, state health freedom acts are intended to serve a similar purpose as state firearms freedom acts: both are geared toward generating a Supreme Court ruling on the legitimacy of a federal law in an area where judicial doctrine is in flux. The main difference is that, whereas firearms freedom laws are intended to present the Court with the occasion to limit the reach of a longstanding federal law in a way that would upset settled expectations, health freedom laws are intended to lead the Court to disallow a recently enacted law whose passage raises a “novel” question, in the words of the Congressional Research Service.¹⁵⁵ At bottom, however, the state firearms and health care laws seek to take advantage of the same set of recent Court decisions concerning the commerce clause and to gain clarity as to the reach and application of congressional power pursuant to that clause.

In essence, these state health freedom acts are trying to force clarity regarding the degree to which the current Court is inclined to emphasize the limited application of the commerce power in *Lopez* and *Morrison* versus its more expansive application in *Raich*. In *Lopez* and *Morrison* the Court read the commerce power as meaning something other than a general police power and, therefore, as imposing some limits on the activities that Congress can regulate. As Chief Justice Rehnquist remarked in his Opinion for the Court in *Lopez*:

To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further.¹⁵⁶

Raich, although not retreating from any doctrinal pronouncements in *Lopez* and *Morrison*, nevertheless envisioned a more limited role for the Court in policing these boundaries of the commerce power. Justice Stevens wrote in his Opinion for the Court that “[i]n assessing the scope of Congress’ authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents’ activities, taken in the

¹⁵⁵ See STAMAN & BROUGHER, *supra* note 124, at 3.

¹⁵⁶ United States v. Lopez, 514 U.S. 549, 567 (1995) (citation omitted).

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aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”¹⁵⁷

The Court has not taken the opportunity in the half-decade since *Raich*, during which time four new Justices have joined the bench, to decide another notable commerce clause case and thus to indicate whether the current Justices are still prepared to impose meaningful limits on congressional power pursuant to that clause.¹⁵⁸ State health freedom acts are intended to present the Court with such an opportunity.

III. CONCLUSION

The framers of the United States Constitution expected the federal system to be preserved through various institutions and processes. As Madison noted in *The Federalist*, the balance of power between federal and state governments would be determined in large part through the political process and would therefore depend on “the predilection and support of the people,” given that “[t]he federal and State governments are in fact but different agents and trustees of the people.”¹⁵⁹ Madison also counted on the judicial process to police the boundaries of the federal system and preserve the original understanding that federal power “extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.”¹⁶⁰ As he explained:

It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most

¹⁵⁷ *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

¹⁵⁸ See generally John Dinan, *The Rehnquist Court's Federalism Decisions*, 41 PUBLIUS 158 (2010). The closest that the Court has come in the post-*Raich* era to rendering a decision that might signal its current position regarding the extent of federal power is *United States v. Comstock*, 130 S. Ct. 1949 (2010), in which seven of the nine Justices (Stevens, Breyer, Ginsburg, Sotomayor, Roberts, Kennedy, and Alito) were willing to interpret the Necessary and Proper Clause as authorizing congressional power to enact a statute permitting civil confinement of mentally ill and sexually dangerous prisoners after the conclusion of their sentence. *Id.* at 1965. In that case, however, two of the Justices in the majority—Kennedy and Alito—wrote concurring opinions distancing themselves from particular aspects of the Court's reasoning. *Id.* at 1965, 1968. Justice Thomas, in a dissenting opinion joined by Scalia, undertook a sustained rejection of the majority's interpretation. *Id.* at 1970.

¹⁵⁹ THE FEDERALIST NO. 46, at 262 (James Madison) (Clinton Rossiter ed., 1961).

¹⁶⁰ THE FEDERALIST NO. 39, at 213 (James Madison) (Clinton Rossiter ed., 1961).

effectual precautions are taken to secure this impartiality.¹⁶¹

Political and judicial processes did not, however, exhaust the safeguards of federalism in the view of the framers. As Madison wrote:

[S]hould an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to cooperate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.¹⁶²

My purpose has been to demonstrate the continued vitality of this final means of safeguarding federalism by showing that it is possible in the contemporary era to undertake assertions of state sovereignty without engaging in classic nullification measures of the sort that Madison steered clear of in crafting the Virginia Resolutions of 1798 and explicitly condemned in the 1830s.¹⁶³ In

¹⁶¹ *Id.* at 213–14.

¹⁶² THE FEDERALIST NO. 46, *supra* note 159, at 265–66. Madison continued in the next paragraph by setting out still another possible path of state resistance:

But ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combinations, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case as was made in the other.

Id. at 266.

¹⁶³ As has been well noted, and as Madison himself emphasized during the debate about South Carolina's invocation of nullification in the late 1820s and 1830s, the Madison-authored Virginia Resolutions did not follow the Jefferson-authored Kentucky Resolutions in explicitly endorsing the power of an individual state to nullify a federal statute. Further, Madison would on various occasions in the 1830's explicitly reject the notion that nullification was consistent with the Supremacy Clause and the nature of the United States federal system. See, e.g., Letter from James Madison to William Cabell Rives (Mar. 12, 1833), in 9 THE WRITINGS OF JAMES MADISON, 1819–1836, at 511–13 (Gaillard Hunt ed., 1910); Letter from James Madison to Edward Coles (Aug. 29, 1834), in THE WRITINGS OF JAMES MADISON,

advancing this argument, I have challenged the conventional tendency to presume that all assertions of state sovereignty are necessarily equivalent to classic invocations of nullification. In particular, I have highlighted a number of contemporary assertions of state sovereignty that fall short of nullification and might be capable of restraining federal power and preserving state autonomy.

Scholars have not fully appreciated the continued vitality of these sorts of assertions of state sovereignty in part because they have often misunderstood recent state challenges to federal law and what they aim to accomplish. Scholarly supporters and critics alike have been complicit in this misunderstanding, with critics understandably seeking to de-legitimize recent state measures by associating them with the repudiated doctrine of nullification, especially as practiced by southern states in the 1830's and 1950's, and some supporters equally willing to embrace the nullification label out of a desire to associate them with the Jeffersonian doctrine of nullification invoked in the 1790's. However, when we undertake a close examination of these recent state sovereignty measures, it is evident that they partake of something short of, and other than, nullification.

The inability to appreciate the contributions that contemporary assertions of state sovereignty can make to safeguarding federalism principles also stems from a broader failure to recognize the full range of opportunities by which states can wield influence in the United States federal system. In particular, scholars often fail to appreciate the various ways that states can "talk back" to federal officials, without running afoul of the Supremacy Clause by engaging in the discredited practices of declaring a federal law null and void or defying a federal court decision directly upholding the legitimacy of a federal law or illegitimacy of a state act. This study has called attention to two such opportunities.

First, states have numerous opportunities to take advantage of the broad discretion that federal executive officials enjoy in interpreting and enforcing federal statutes, as illustrated by successful state resistance to driver's license and marijuana laws.

supra, at 540–42; see also Adrienne Koch & Harry Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties*, 5 WM & MARY QUART. 145, 161–62 (1948) (discussing the differences between Madison and Jefferson in 1798); THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 229–30 (Marvin Meyers ed., Brandeis Univ. Press 1981); JAMES H. READ, MAJORITY RULE VERSUS CONSENSUS: THE POLITICAL THOUGHT OF JOHN C. CALHOUN 42–47 (2009) (providing a recent discussion of Madison's position in the 1830s).

Because Congress is often unable or unwilling to issue direct orders to states, state officials are frequently given a choice of whether to comply with federal directives or accept certain penalties, as in the case of the REAL ID Act. When a number of states are willing to make the choice to accept the penalties rather than cede state policy discretion and to do so in a sufficiently public fashion, this can put pressure on Congress to repeal or revise the federal law or lead executive officials to administer the law in a manner more respectful of state authority. Thus, in enacting statutes vowing not to comply with the REAL ID Act, states were in one sense simply announcing their willingness to accept the designated penalties for non-compliance with the federal law; however, because so many states enacted such laws and in such a public fashion, this led DHS to authorize a significant relaxation of the time frame and mechanisms for implementing the law.

A slightly different dynamic is at work with state medicinal marijuana laws. Once again, although supporters and critics have tended to categorize these as acts of nullification, they did not in any way nullify a 1970 federal drug law. Rather, they removed state criminal penalties on growing, distributing, and using marijuana for medical purposes, and then individuals filed suit challenging the legitimacy of federal enforcement of the federal law against individuals acting pursuant to these state acts. Although this lawsuit was unsuccessful, the growing number of state medicinal marijuana laws played an important role in leading the Justice Department to exercise its discretion in enforcing federal law in such a way as to permit states to exercise effective autonomy in this area.

Second, states have various opportunities to exploit or anticipate changes in Supreme Court doctrine that create uncertainty about the legitimacy or applicability of federal directives. This is illustrated by the recent passage of state firearms and health freedom statutes. In neither case have states nullified federal laws in the sense of declaring them void or defying direct federal judicial orders. Rather, states enacted statutes that are intended to serve as vehicles for generating a Supreme Court case to determine the legitimate reach of congressional power. Drafters of these state laws were generally clear about their desire that the constitutional questions be resolved by the Supreme Court.

Such was the case with the firearms freedom acts passed in eight states to date. Supporters immediately filed suit on the day the first of these acts took effect, with an eye toward securing a federal

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court decision limiting congressional power to enforce federal gun control laws against guns that move solely in intrastate commerce. Supporters were clear that state residents should not act contrary to the existing federal law until and unless a federal court decision is issued in favor of state autonomy. The one questionable act is a Wyoming provision imposing criminal penalties on federal officials who try to enforce the existing federal statute against individuals acting pursuant to the new state law.

The health freedom measures enacted in fifteen states to date can be viewed in a similar fashion. These measures have not blocked operation of the recently enacted federal health care law, whose individual mandate provision does not take effect until 2014. Rather, as indicated by the lawsuits filed on the day the federal health care act became law, these state measures, which by themselves have no independent effect, are intended to assist state attorneys general in bringing a federal lawsuit that might be deemed justiciable and lead to a Supreme Court decision holding that imposition of an insurance mandate exceeds Congress's constitutionally enumerated powers.

Even if it is clear that these state firearms freedom and health freedom laws, like recent driver's license and medical-marijuana laws, fall short of nullification, it is not yet possible to pass judgment on whether the former measures will have the same sort of influence as the latter measures have had in preserving state autonomy; such a judgment will have to await decisions in pending federal lawsuits. Nevertheless, an analysis of these various recent state challenges to federal laws might be instructive for scholars and practitioners alike insofar as it directs attention away from long-discredited concepts of nullification and focuses attention instead on ways that states can wield effective influence in the federal system. These include passage of state laws that are intended, by vowing non-acquiescence to or diverging from federal law, to take advantage of and seek to influence executive discretion in enforcing federal law. Such resistance measures also include, in an approach which has received scant attention from federalism scholars but is receiving increased attention from state officials, state laws that are intended, by creating a conflict between state and federal law, to exploit or anticipate changes in Supreme Court doctrine that create uncertainty about the legitimacy or applicability of federal directives and present the Court with an opportunity to restrict federal power or preserve state autonomy.