COMMENT

The Disarming Nature of the Wyoming Firearms Freedom Act: A Constitutional Analysis of Wyoming's Interposition Between Its Citizens and the Federal Government

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I. INTRODUCTION

On March 11, 2010, the State of Wyoming enacted the Wyoming Firearms Freedom Act (the Act), which directly opposes federal authority by declaring federal law void as to firearms, accessories, and ammunition manufactured and retained inside Wyoming's borders.[1] The Act not only rejects federal power over the intrastate regulation of firearms, it also places Wyoming as a shield between the federal government and Wyoming citizens who comply with the Act but violate countervailing federal law.[2] The Act holds federal agents criminally liable for enforcing conflicting federal law and authorizes the Wyoming Attorney General

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[1] Wyoming Firearms Freedom Act, WYO. STAT. ANN. §§ 6-8-401 to -406 (2010), H.B. 95, 60th Leg., Budget Sess., 2010 Wyo. Sess. Laws 528 (effective March 11, 2010) (providing that firearms which are not fully automatic and which do not fire explosive projectiles, all firearms accessories, and all non-armor-piercing ammunition manufactured and kept exclusively within Wyoming are exempt from federal firearms regulation). For the purposes of this comment, the term "firearms" often serves as shorthand for firearms, firearms accessories, and ammunition.

[2] WYO. STAT. ANN. § 6-8-405(b)–(c).

to defend Wyoming citizens against federal criminal prosecution.[3] Wyoming bases its authority to void federal law regulating intrastate firearms manufacture and possession primarily on the Tenth Amendment to the United States Constitution.[4] Naturally, the federal government does not recognize the Act's validity.[5] In spite of the federal government's disdain, the muddy history of Tenth Amendment case law and state-federal relations over the course of American history render the constitutionality of the Act unclear.[6]

The Act demands analysis of its constitutionality both according to the jurisprudence of the United States Supreme Court and from a political perspective.[7] This comment addresses the legal arguments Wyoming should make in support of its exclusive authority over intrastate firearms regulation according to the current doctrine of the Supreme Court under the seminal case *United States v. Lopez*.[8] This comment also argues for a historical interpretation of the Tenth Amendment favoring Wyoming's assertions of sovereignty and provides a political basis as well as a second legal basis for the state's actions.[9] Specifically, this comment analyzes what James Madison and other framers and ratifiers of the Constitution intended with the inclusion of the Tenth Amendment and how early jurisprudence turned the Amendment's commonly understood meaning on its head.[10] Finally, this comment addresses the political actions Wyoming may take outside the courtroom in support of its sovereignty and the Act.[11]

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[3] *Id.* § 6-8-405(a)–(c). The Bureau of Alcohol, Tobacco, Firearms, and Explosives within the Department of Justice is responsible for enforcing federal firearms law. 28 U.S.C. § 599A(a)(1), (b)(1) (2006).

[4] WYO. STAT. ANN. § 6-8-406(a)(i) (declaring that the Tenth Amendment reserves to the state and the people of Wyoming the powers not granted to the federal government as they were understood when Wyoming was admitted to statehood in 1890); *see* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[5] Open Letter from Audrey Stucko, Acting Assistant Dir., Enforcement Programs & Servs., Bureau of Alcohol, Tobacco, Firearms, & Explosives, to All Wyoming Federal Firearms Licensees (May 28, 2010), *available at* http://www.atf.gov/press/releases/2010/05/052810-openletter-ffl-wyoming-legislation.html.

[6] *See infra* notes 75–131 and accompanying text. *See generally* Keith E. Whittington, *The Political Constitution of Federalism in Antebellum America: The Nullification Debate as an Illustration of Informal Mechanisms of Constitutional Change*, 26 PUBLIUS: THE J. OF FEDERALISM, Spring 1996, at 1 (asserting the need to analyze the Constitution in context with other contemporaneous sources and positing a theory of federalism with historical political considerations). The Act also calls upon the Ninth Amendment for authority, because "it guarantees to the people rights not granted in the constitution and reserves to the people of Wyoming certain rights, as they were understood at the time Wyoming was admitted to statehood in 1890." WYO. STAT. ANN. § 6-8-406(a)(ii); *see* U.S. CONST. amend. IX.

[7] *See infra* notes 142–223 and accompanying text.

[8] *See infra* notes 105–86 and accompanying text.

[9] *See infra* notes 61–104, 187–223 and accompanying text.

[10] *See infra* notes 73–104, 195–97 and accompanying text.

[11] *See infra* notes 224–49 and accompanying text.

II. BACKGROUND

This comment argues the constitutionality of the Wyoming Firearms Freedom Act according to current federal jurisprudence and a historical analysis of state sovereignty under the Tenth Amendment.[12] It also asserts Wyoming should politically interpose between the federal government and Wyoming citizens.[13] An analysis of the constitutionality and practicality of the Act first requires a background exposition of how the Act conflicts with existing federal statutory law.[14] Second, an explanation of the doctrines of *interposition* and *nullification* is necessary to understand Wyoming's political options for asserting its sovereignty.[15] Third, an exposition of the historical development and meaning of the Tenth Amendment will help the reader understand how Wyoming should use this historical meaning in its political and legal arguments.[16] Fourth, this section addresses current federal jurisprudence in the area of state sovereignty to provide a backdrop for the legal arguments Wyoming should make to defend the constitutionality of the Act.[17]

A. The Wyoming Firearms Freedom Act Versus Existing Federal Law

The major components of existing federal firearms regulation relevant to the Wyoming Firearms Freedom Act are the Gun Control Act of 1968, which amended the Federal Firearms Act of 1938, and the National Firearms Act of 1934.[18] Most importantly, no person under federal law may engage in the business of manufacturing or selling firearms unless licensed by the federal government, irrespective of whether the business occurs inter- or intrastate.[19] Federal law requires all interstate transfers of firearms to occur between federally licensed dealers, restricts the types of firearms a nonresident of a state may purchase, and mandates manufacturers and dealers to record the identity of purchasers.[20] Federal law also restricts the types of firearms that may be possessed by requiring

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[12] *See infra* notes 142–223 and accompanying text.

[13] *See infra* notes 224–49 and accompanying text.

[14] *See infra* notes 18–30 and accompanying text.

[15] *See infra* notes 31–60 and accompanying text.

[16] *See infra* notes 61–104 and accompanying text.

[17] *See infra* notes 105–31 and accompanying text.

[18] *Compare* WYO. STAT. ANN. §§ 6-8-401 to -406 (2010), *with* Gun Control Act of 1968, 18 U.S.C. §§ 921–931 (2006) (restricting the ability to sell firearms to registered Federal Firearms Licensees (FFLs), requiring interstate purchases and transfers of firearms to occur through FFLs, and requiring retail purchasers and interstate transferees to register their purchases with the federal government) (amending Federal Firearms Act of 1938, Pub. L. No. 75-785, 52 Stat. 1250), *and* National Firearms Act of 1934, 26 U.S.C. §§ 5801–5872 (2006) (requiring the registration and taxation of the sale of short-barreled rifles, short-barreled shotguns, and silencers).

[19] 18 U.S.C. § 923.

[20] *Id.* § 922(a)(1), (b)(3), (5), (m).

the registration of short-barreled guns and silencers, taxing such weapons upon transfer, and requiring every firearm to bear a serial number.[21] Finally, federal law prohibits certain classes of persons from possessing firearms.[22]

The Wyoming Firearms Freedom Act generally declares federal law void over most types of firearms manufactured in and remaining in Wyoming.[23] While the Act does not invalidate federal law over automatic weapons or destructive devices, the broad definition of firearm in the Wyoming statute conflicts with the federal definitions for most firearms.[24] Wyoming also restricts fewer classes of persons from possessing and purchasing firearms than the federal government restricts.[25] By declaring federal law void over firearms manufactured in and remaining in Wyoming, the state allows a broader class of people to possess all types of firearms except machineguns and destructive devices.[26] Wyoming law also removes the requirement for intrastate manufacturers and sellers to register with the federal government or keep records of their intrastate sales and transfers.[27] Thus, on a number of issues, the Act directly conflicts with federal law.[28] Moreover, the

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[21] 26 U.S.C. §§ 5811, 5841, 5845(a); *see* 18 U.S.C. § 922(m) (making it a crime not to keep proper records of transfers under the restrictions of 26 U.S.C. §§ 5811, 5841, 5845(a)).

[22] 18 U.S.C. § 922(d)(3), (5)–(9), (g)(3), (5)–(9), (n) (prohibiting transfers to and possession by users of controlled substances, illegal aliens, persons dishonorably discharged from the military, persons under the jurisdiction of a restraining order, misdemeanants convicted of domestic violence, and persons under indictment for but not yet convicted of a felony); *see* 28 C.F.R. §§ 25.1–25.57 (2010) (requiring a criminal background check on the purchaser for each retail purchase of a firearm).

[23] WYO. STAT. ANN. § 6-8-404(a). The statute also declares federal law void over "firearms accessories" and most types of ammunition. *Id.*

[24] *Compare id.* § 6-8-403(a)(iii) (defining "firearm" as "any weapon which will or is designed to expel a projectile by the action of an explosive" but not including automatic weapons or weapons designed to fire grenades or explosive projectiles), *with* 18 U.S.C. § 921(a)(3) (defining firearms to include "any weapon . . . designed to . . . expel a projectile by the action of an explosive" including silencers and destructive devices), *and* 26 U.S.C. § 5845 (defining firearms to include short-barreled rifles and shotguns, silencers, machineguns, and destructive devices). Under federal law, destructive devices include bombs, grenades, mines, certain rockets and missiles, similar devices, and weapons designed to fire such devices. 18 U.S.C. § 921(a)(4).

[25] *Compare* WYO. STAT. ANN. § 6-8-404(c)–(d) (prohibiting felons and legally incompetent or committed persons from possessing firearms and prohibiting persons under the age of twenty-one from purchasing handguns or persons under the age of eighteen from purchasing rifles or shotguns), *with* 18 U.S.C. § 922(d), (g), (n) (prohibiting the same classes of persons that Wyoming prohibits from possessing firearms as well as persons indicted for felonies, fugitives, unlawful users of controlled substances, aliens, dishonorably discharged persons, former citizens, persons subject to restraining orders, and domestic violence misdemeanants).

[26] *See* WYO. STAT. ANN. §§ 6-8-403(a)(iii), -404(a), (c)–(d). In fact, Wyoming allows citizens of the state to possess Wyoming-manufactured silencers and short-barreled guns. *Id.* §§ 6-8-403(a)(iii), -404(a).

[27] *Id.* § 6-8-404(a).

[28] *See supra* notes 18–27 and accompanying text.

Act holds federal agents criminally liable for enforcing contrary federal law.[29] Wyoming also calls upon—but does not require—the state attorney general to defend Wyoming citizens against such federal action.[30]

B. The Political Doctrines of Interposition and Nullification

A constitutional principle that has caused extraordinary confusion and debate over two centuries is federalism.[31] Federalism is the division of authority between the state governments and the national government to act as agents for the ultimate sovereign, the people of the United States.[32] At the founding of the country, political thinkers who desired a strong national government engaged in extraordinary debates with thinkers who embraced a theory of states' rights.[33]

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[29] WYO. STAT. ANN. § 6-8-405(b). In particular,

> Any official, agent or employee of the United States government who enforces or attempts to enforce any act, order, law, statute, rule or regulation of the United States government upon a personal firearm, a firearm accessory or ammunition manufactured commercially or privately in Wyoming and that remains exclusively within the borders of Wyoming shall be guilty of a misdemeanor and, upon conviction, shall be subject to imprisonment for not more than one (1) year, a fine of not more than two thousand dollars ($2,000.00), or both.

Id.

[30] *Id.* § 6-8-405(c). Specifically,

> The attorney general may defend a citizen of Wyoming who is prosecuted by the United States government for violation of a federal law relating to the manufacture, sale, transfer or possession of a firearm, a firearm accessory or ammunition manufactured and retained exclusively within the borders of Wyoming.

Id.

[31] *See* Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI-KENT L. REV. 883, 887 (2006) ("The Founding generation was deeply divided over . . . federalism."); Garrick B. Pursley, *The Structure of Preemption Decisions*, 85 NEB. L. REV. 912, 958–59 (2007) (identifying current issues of federalism that require further scholarship); *see also* THOMAS E. WOODS, JR., NULLIFICATION 115–20 (2010) (surveying the historical conflicts of power between societal authorities and centralized state government in western civilization from the fall of the Roman Empire).

[32] *See* Aviam Soifer, *Truisms That Never Will Be True: The Tenth Amendment and the Spending Power*, 57 U. COLO. L. REV. 793, 798 (1986) (acknowledging an assumption that federalism is a conflict between sovereignty and federal power); David M. Sprick, Ex Abundanti Cautela *(Out of an Abundance of Caution): A Historical Analysis of the Tenth Amendment and the Continuing Dilemma Over "Federal" Power*, 27 CAP. U. L. REV. 529, 529–30 (1999) ("Federalism is 'a constitutional principle involving a . . . division of powers . . . and mechanisms both legal and political to settle . . . disputes.'"). *But see* Soifer, *supra*, at 816 (describing the common assumption that there exists a fixed amount of power to be shared between the federal and state actors as a fallacy).

[33] THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 15–20 (Ralph Ketcham ed., 2003) (1787) [hereinafter THE ANTI-FEDERALIST PAPERS] (introducing and contrasting the profound differences between the proponents and opponents of the Constitution).

Nationalists vied for a national government with broad power while states' rights theorists believed the Constitution created a federal government with few, narrowly defined powers.[34] Nationalists desired to form a union led by a highly potent and supreme general government.[35] States' rights theorists believed the states had formed the general government by agreement and therefore retained sovereignty greater than, or at least equal to, that of the general government.[36] The debates over sovereignty and federalism from the time of the founding of the United States have often created a strong political tension.[37]

Both nationalists and states' rights theorists agreed unconstitutional laws, federal or state, were void.[38] States' rights theorists, however, including Thomas Jefferson, held states had the right *and duty* to nullify unconstitutional federal law on the premise that the states were the real check on federal power.[39] Predicating this theory was the notion that the constitution was a compact between states—an agreement made freely between independent sovereigns.[40] Each state, as a party to the compact, had a right and duty to interpret and enforce the compact's terms.[41] According to this theory, the federal government was supposed to be the states' agent for administering the terms of the compact—not above them in ultimate power.[42] The compact theory also rejected the notion that the United States Supreme Court, a federal entity, could be an exclusive, unbiased, or final judge of the extent of federal authority.[43] Rather, the compact theory entitled the states to judge for themselves what was an overreaching of power by the federal government and to act accordingly, precisely because there was no other unbiased

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[34] *See* THOMAS J. DILORENZO, HAMILTON'S CURSE 2–4 (2008) (describing Alexander Hamilton and Thomas Jefferson as the respective paragons of nationalism and states' rights theory and explaining the core purposes of each political theory); Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and "Expressly" Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1896 (2008) (introducing and framing the debate between Hamiltonian nationalists and Madisonian Federalists).

[35] *See* DILORENZO, *supra* note 34, at 2, 13–20 (describing the desire of Hamilton and his followers to consolidate power in the general government).

[36] Whittington, *supra* note 6, at 4 (describing the compact theory of governance).

[37] *See id.* at 1–2 (positing the strong political tension inherent in the Constitution).

[38] *See* WOODS, *supra* note 31, at 3, 5 (recounting that both Jefferson and Hamilton believed in this "axiomatic point").

[39] *Id.* at 3.

[40] *Id.*; *see* Tonya M. Gray, Note, *Separate but Not Sovereign: Reconciling Federal Commandeering of State Courts*, 52 VAND. L. REV. 143, 146 (1999) ("[T]he states themselves clearly preceded the national government. As natural successors to the British colonies, the states' legal and territorial existence was established prior to the ratification of the United States Constitution.").

[41] WOODS, *supra* note 31, at 3.

[42] *Id.*

[43] *Id.* at 3–5; *see* S. Candace Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829, 844–45 (1992) (calling the notion that neither a state nor the federal government retains power over the other a "plausible reading" of the Constitution).

judge.[44] Proponents of the notion that states should judge the scope of federal authority and nullify federal actions beyond that scope believed this was the final method, short of bloodshed, for states to protect their sovereignty from an illegitimate exercise of federal power.[45]

The Kentucky Resolutions, secretly authored by Thomas Jefferson, and the Virginia Resolutions, anonymously authored by James Madison, were among the first expressions of the right of states to nullify unconstitutional federal law.[46] Jefferson and Madison wrote the Resolutions in response to the passage of the Alien and Sedition Acts.[47] Federalists, fearful of the infiltration of French spies during a minor undeclared naval war, passed the Alien Laws to make immigration more difficult and deportation easier.[48] They passed the Sedition Act to criminally prohibit criticism of the Federalist-controlled national government.[49] Believing the Alien and Sedition Acts to be unconstitutional, Jefferson and Madison espoused the doctrines of nullification and interposition as appropriate state responses to federal overreaching.[50]

Interposition and nullification, often interchanged for one another, are not precisely the same doctrine.[51] Interposition is a proactive but ideally temporary stance by a state, which places its sovereignty between the federal government and its citizens, promising to void a federal law until the constitutionality of

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[44] WOODS, *supra* note 31, at 3–7.

[45] *See id.* at 3–7, 84 (describing nullification and distinguishing it from armed conflict).

[46] *Id.* at 42–46; STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 84 (2008); ADRIENNE KOCH, JEFFERSON AND MADISON—THE GREAT COLLABORATION 184–88 (2008); Ralph L. Ketcham, *Jefferson and Madison and the Doctrines of Interposition and Nullification: A Letter of John Quincy Adams*, 66 VA. MAG. OF HISTORY & BIOGRAPHY, April 1958, at 178, 178; Lash, *supra* note 34, at 1935. *Contra* Soifer, *supra* note 32, at 797 n.15 (calling the notion that Madison supported states' rights theory an "artificial construct").

[47] WOODS, *supra* note 31, at 46.

[48] Naturalization Act, 1 Stat. 566 (1798); Alien Friends Act, 1 Stat. 570 (1798); Alien Enemies Act, 1 Stat. 577 (1798); FELDMAN, *supra* note 46, at 79; WOODS, *supra* note 31, at 41–42.

[49] Sedition Act, 1 Stat. 596 (1798); FELDMAN, *supra* note 46, at 79. The Acts dubiously expired at the end of Federalist President John Adams's term. 1 Stat. 566, 570, 577, 596.

[50] Thomas Jefferson, Kentucky Resolutions of 1798 and 1799 [hereinafter The Kentucky Resolutions], *reprinted in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDEERAL CONSTITUTION 540 (Jonathan Elliot ed., Washington 1836) [hereinafter ELLIOT'S DEBATES]; James Madison, Virginia Resolutions of 1798 [hereinafter The Virginia Resolutions], *reprinted in* 4 ELLIOT'S DEBATES, *supra*, at 528; WOODS, *supra* note 31, at 3, 42–46.

[51] *See* Ketcham, *supra* note 46, at 178 (introducing Madison's arguments against John Calhoun's version of nullification while defending his own doctrine of interposition and, to a less "authoritative" extent, Jefferson's similar doctrine of nullification).

the federal law is resolved.[52] Nullification disregards the need to seek external or further resolution of the conflict.[53]

Specifically, Jefferson reasoned the federal government, as a creation of the states, could not be the arbiter of its own power.[54] Jefferson argued each state retained the right to judge the boundaries of federal power and concluded nullification was the "rightful remedy" when the federal government crossed those boundaries.[55] Madison, principal author of the Constitution, expressed a more moderate view than Jefferson.[56] Madison believed the Constitution was a

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[52] *See* Arthur S. Miller & Ronald F. Howell, *Interposition, Nullification and the Delicate Division of Power in a Federal System*, 5 J. PUB. L. 2, 18–20 (1956) (elucidating the differences between interposition, an act of a state to challenge federal power until a question of federalism can be resolved; practical nullification, the passive rejection of federal mandates; and nullification, the outright declaration of a federal act as void). *But see id.* at 18, 20 (questioning whether there is a real difference between the doctrines); K.R. Constantine Gutzman, *From Interposition to Nullification: Peripheries and Center in the Thought of James Madison*, *in* 36 ESSAYS IN HIST. 89, 103 (1994) (questioning the distinction between nullification and interposition).

[53] *See* Miller & Howell, *supra* note 52, at 18–20 (describing how nullification ignores federal power altogether). *But see* WILLIAM HARPER, THE REMEDY BY STATE INTERPOSITION, OR NULLIFICATION; EXPLAINED AND ADVOCATED 16 (1832) (1830) (arguing the counter-resolutions by Connecticut, Massachusetts, and other states to the Virginia Resolutions indicated those states understood Madison's interposition doctrine to be indistinguishable from nullification).

[54] The Kentucky Resolutions, *supra* note 50, at 540. Jefferson stated, "[T]he government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion . . . the measure of its powers." *Id.*; *see* MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 26 (1999) ("If members of Congress have an incentive to maximize the sphere of their power and responsibilities, so do Supreme Court justices with respect to *their* sphere."); Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U.L. REV. 145, 150 (1998) ("The lack of neutrality of federal courts is especially significant when one recalls that they are not only the enforcement mechanism for the agency relationship, but also are among the agents supposedly constrained by that relationship."); Spencer Roane, *A Virginian's "Amphictyon" Essays*, *reprinted in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 52, 58 (Gerald Gunter ed., 1969) ("[T]he states never could have committed an act of such egregious folly as to agree that their umpire should be altogether appointed and paid by the other party.").

[55] The Kentucky Resolutions, *supra* note 50, at 545. Jefferson stated,

> [T]he several states . . . are not united on the principle of unlimited submission to their general government; but that, by compact . . . they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force; . . . that, as in all other cases of compact among parties having no common judge, *each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress*.

Id. at 540 (emphasis added). *Contra* Baker v. Carr, 369 U.S. 186, 211 (1962) (calling the Court the "ultimate interpreter of the Constitution").

[56] *See* KOCH, *supra* note 46, at 192–93 (arguing Madison's propositions in the Virginia Resolutions were more moderate than Jefferson's in the Kentucky Resolutions); Lash, *supra* note 34, at 1952–53 ("When the nullifiers of the 1820s and '30s attempted to use Madison's arguments against the Alien and Sedition Acts in support of their claim that states could unilaterally nullify federal law, Madison opposed that effort as misreading his work.").

compromise between the nationalist and states' rights compact theories.[57] In the Virginia Resolutions of 1798, Madison wrote that the states "have the right, and are in duty bound, to *interpose for arresting the progress of the evil* and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them."[58] It appears Madison did not approve of outright nullification of federal law, believing it would disrupt proper government, even while his friend Jefferson espoused it expressly.[59] Madison held to the idea that the composite nature of the Constitution required a softer measure—interposition.[60]

C. The Historical Development and Meaning of the Tenth Amendment

How does a sovereign state properly determine when the federal government has overreached constitutional limits? The United States Constitution, as written, is incomplete and often ambiguous.[61] In some cases, the framers of the Constitution

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[57] THE FEDERALIST NO. 39 (James Madison). Madison wrote,

> The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.

Id.; *see* Sprick, *supra* note 32, at 539 (describing *The Federalist*'s commentary on American federalism); *see also* Lash, *supra* note 34, at 1951 ("There was, however, a middle way between the extremes of wholly nationalist and wholly localist . . . readings of the Constitution.").

[58] The Virginia Resolutions, *supra* note 50, at 528 (emphasis added).

[59] Whittington, *supra* note 6, at 15. Madison opposed both the federal Alien and Sedition Acts and the later Southern nullification movements as violative of "the Constitution's balance of federal and state authority." Lash, *supra* note 34, at 1952–53.

[60] Whittington, *supra* note 6, at 15. Madison, while denying the constitutionality of nullification outright, believed the system of government under the Constitution often would require interposition by the states. *Id.* Thus, the Virginia Resolutions use the word "interpose" instead of "nullification," which Jefferson employed in the Kentucky Resolutions. *See id.* In fact, interposition was a political tool commonly employed by states after the end of the Revolutionary War. Hoke, *supra* note 43, at 860–61. Ironically, six years after the Alien and Sedition Acts expired, the Federalists asserted the doctrine of interposition against federal embargoes, which were harming the interests of New England states. John Bach McMaster, *A Century of Constitutional Interpretation*, THE CENTURY ILLUSTRATED MONTHLY MAGAZINE, Apr. 1889, at 870; *see* Embargo Act of 1807, 2 Stat. 451. The Federalists claimed the embargoes were outside the scope of Congress's power and "oppressive, unconstitutional, null, and void." McMaster, *supra*, at 870. The federal government responded by enacting another law in 1809 that granted even more power to the Executive. *Id.* ("Since the days of the Alien and Sedition laws power so vast had never been bestowed on the President."); *see* Non-Intercourse Act, 2 Stat. 528 (1809). In a furor, Connecticut, Delaware, Maine, and Massachusetts interposed "'to dash in pieces the shackles of tyranny'" by denouncing the federal laws as "repugnant to the true intent and meaning of the Constitution." McMaster, *supra*, at 870. The federal government relented the following year and repealed the embargoes. Macon's Bill No. 2, 2 Stat. 605 (1810).

[61] Donald S. Lutz, *The United States Constitution as an Incomplete Text*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 23, 23–26, 30 (1988) (reasoning the U.S. Constitution is incomplete, because

purposefully equivocated its language to foreclose endless argument they could not otherwise resolve.[62] In other cases, the ambiguity was unintentional.[63] Each generation, therefore, must contend with the meaning of the Constitution, because it is not perfectly coherent.[64] Constitutional interpretation requires extrinsic analysis of other historical writings as well as analysis of the document's development in contrast to "alternative political traditions."[65] This is true in large part because the founding fathers did not agree about issues of governance.[66] They held drastically differing views on fundamental principles, especially federalism.[67]

Modern historical accounts of the dialectic between the Founders regarding federalism describe the arguments about the language of the Tenth Amendment as a battle of sorts between the Federalists and the Anti-Federalists.[68] The Federalists

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it requires analyses of state constitutions to inform its meaning, has no definition of citizenship, is amendable, and is only part of the collective foundational "text" of the "American political system," which also includes the Declaration of Independence); *see* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 643–44 (1989) ("No one has ever described the Constitution as a marvel of clarity.").

[62] Lutz, *supra* note 61, at 28. Even the mere fact that the Constitution is amendable demonstrates the framers did not intend it to be an integrated document. *Id.* at 32 ("The Constitution is incomplete, therefore, because it was looked upon as an experiment that needed careful control and some means for future adjustment. The provision of an amendment process is one clear manifestation of this perspective."); *see* U.S. CONST. art. V (specifying the Constitution's amendment process).

[63] Lutz, *supra* note 61, at 28.

[64] Cornell, *supra* note 31, at 887; *see* Whittington, *supra* note 6, at 1–2 (noting political considerations provide a way to interpret the Constitution).

[65] Whittington, *supra* note 6, at 23. Extrinsic factors necessary to understand the Constitution include the principles the ratifiers of the Constitution intended to govern the United States and the political traditions informing the beliefs and decisions of the framers and ratifiers. *Id.*; *see* Cornell, *supra* note 31, at 887 (noting the difficulty of weighing the intent of the Founders and asserting that extrinsic historical evidence for the states' rights view rebuffs an originalist view to the contrary); Peter A. Lauricella, Comment, *The Real "Contract with America": The Original Intent of the Tenth Amendment and the Commerce Clause*, 60 ALB. L. REV. 1377, 1403–04 (1997) (stating one must examine the writings and speeches of the framers to understand the Constitution).

[66] *See* Cornell, *supra* note 31, at 887 (tying the use of historical evidence to the deep divisions between Founders over significant issues of governance); Lutz, *supra* note 61, at 28 ("[O]ne can assume a perfect, complete text where there is none."). In fact, the framers who debated, wrote, and submitted the Constitution to the states for ratification did not include key figures such as Thomas Jefferson, John Adams, and Patrick Henry, whose principles and opinions were inextricably part of the political thought of the time. *Id.* at 31. Notably, not even all the states were represented: no delegates from Rhode Island attended. *See* William Pierce, *Character Sketches of Delegates to the Federal Convention*, *in* 3 FARRAND'S RECORDS CXIX, at 88–97 (1787), *available at* http://memory.loc.gov (use the search query '3 Farrand's Records CXIX').

[67] Cornell, *supra* note 31, at 887.

[68] *Id.*; Hoke, *supra* note 43, at 845 (noting the Anti-Federalists' vehement attack on the Constitution); Lash, *supra* note 34, at 1899 (calling it a tug of war). *Compare* THE FEDERALIST (Henry Cabot Lodge ed., 1889) (1787) (arguing for the ratification of the Constitution), *with* THE ANTI-FEDERALIST PAPERS, *supra* note 33 (opposing the Constitution).

favored the adoption of the new Constitution as the supreme expression of government in the newly founded United States.[69] The Anti-Federalists preferred the then-existing confederacy.[70] The Anti-Federalists opposed the Constitution, because they anticipated the document's ambiguity would allow the national government to gradually accrue unlimited power to the detriment of the states.[71] In order to assuage the Anti-Federalists whose skepticism of the Constitution threatened to disrupt and prevent its ratification, the Federalists conceded to amend the document with the Bill of Rights as a compromise to assure the Constitution's acceptance.[72]

The Bill of Rights included a final amendment, now known as the Tenth Amendment, which states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[73] Importantly, the ratified text of the Amendment did not include the word "expressly" as a modifier to the powers delegated to the federal government.[74] This was significant, because the omission of the word "expressly" became the basis for the classic view of federalism as embodied in Chief Justice John Marshall's foundational Supreme Court opinion in *McCulloch v. Maryland*.[75]

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[69] *See generally* THE FEDERALIST, *supra* note 68.

[70] *See* THE ANTI-FEDERALIST PAPERS, *supra* note 33, at 193 (proclaiming America's "political salvation" lay in the Articles of Confederation).

[71] *See generally id.* Specifically, Brutus in *Essay I* writes,

> This government is to possess absolute and uncontrollable power, legislative, executive and judicial . . . for . . . "the Congress shall have power to make all laws which shall be necessary and proper for carrying into the execution the foregoing powers" . . . and . . . it is declared "that this constitution, and the laws of the United States, which shall be made in pursuance thereof . . . shall be the supreme law of the land." . . . It appears from these articles that there is no need of any intervention of the state governments, between the Congress and the people, to execute any one power vested in the general government, and that the constitution and laws of every state are nullified and declared void, so far as they are or shall be inconsistent with this constitution or the laws made in pursuance of it.

Id. at 271–72 (quoting U.S. CONST. art. I, § 8, cl. 18, art. VI, cl. 2).

[72] Lash, *supra* note 34, at 1900, 1906 ("Madison and the Federalists promised that . . . adding a Bill of Rights would be one of the first tasks of the new Congress. . . . Narrow interpretation of federal power emerged as a promise by those most interested in ratifying the Constitution."); *see* Cornell, *supra* note 31, at 893 (explaining that St. George Tucker had described the Bill of Rights, and the Second Amendment in particular, as a concession to Anti-Federalists); Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 S. CT. REV. 301, 303 (1990) ("Madison's primary purpose in supporting amendments was two-fold: to fulfill promises made to his constituents during his campaign for Congress and to undermine opposition to the Constitution.").

[73] U.S. CONST. amend. X.

[74] *See id.* (omitting the word "expressly" as in "powers not [expressly] delegated to the United States").

[75] Lash, *supra* note 34, at 1891–92; *see* 17 U.S. 316, 400–37 (1819) (holding an expansive interpretation of federal power).

In *McCulloch*, Marshall, a nationalist, deftly rejected the position of states' rights theorists that the Constitution limited the federal government to expressly enumerated powers.[76] According to *McCulloch*, the Constitution granted implied powers to Congress so it could practicably act under its express authority.[77] States could not constitutionally impede congressional action merely because Congress acted pursuant to implied power.[78] Marshall opined the omission of the word "expressly" as a descriptor of the federal delegated powers signified the Constitution imbued the federal government with very broad authority.[79] Marshall reasoned the states had impliedly surrendered authority by ratifying the Constitution and that the exercise of federal power "required not the affirmance, and could not be negatived, by the State Governments."[80] This became the orthodox view of federalism.[81]

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[76] 17 U.S. at 406 ("But there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers and which requires that everything granted shall be expressly and minutely described."); *see* DILORENZO, *supra* note 34, at 78–98 (explicating John Marshall's nationalism); Hoke, *supra* note 43, at 836 (stating that it is uncontroversial to call Marshall a nationalist and describing *McCulloch* as conclusive evidence of his nationalism); Lash, *supra* note 34, at 1890 ("Courts and the legal academy both generally agree that early efforts to limit the federal government to only 'expressly' delegated powers were decisively rebuffed by Chief Justice John Marshall in *McCulloch v. Maryland*.").

[77] 17 U.S. at 406.

[78] *Id.* at 406, 426–37.

[79] *Id.* at 406. The opinion reads,

> But there is no phrase which . . . excludes incidental or implied powers and which requires that everything granted shall be expressly and minutely described. *Even the 10th Amendment*, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people," thus leaving the question whether the particular power which may become the subject of contest has been delegated to the one Government, or prohibited to the other, to depend on a fair construction of the whole instrument.

Id. (emphasis added). The Supreme Court later expanded this view of federal power in *Gibbons v. Ogden*, wherein Marshall stated Congress's power under the Commerce Clause was plenary, constrained only by the express limitations of the Constitution. 22 U.S. (9 Wheat.) 1, 196–97 (1824). Marshall stated,

> [T]he power to regulate . . . to prescribe the rule by which commerce is to be governed . . . . like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce . . . among the several States, is vested in Congress as absolutely as it would be in a single government.

Id. The regulated commerce in question had to be interstate or merely "*necessary . . . for the purpose of executing some* of the general powers of the government" for Congress's plenary power to take hold. *Id.* at 195 (emphasis added).

[80] *McCulloch*, 17 U.S. at 404.

[81] *See* Paul D. Moreno, *"So Long As Our System Shall Exist": Myth, History, and the New Federalism*, 14 WM. & MARY BILL RTS. J. 711, 722 (2005) (describing the view of federalism as

In view of *McCulloch*, the Anti-Federalists demonstrated tremendous prescience when they first asserted that gradually more expansive judicial interpretations would dramatically increase federal power.[82] Given this fear (which later came to fruition), securing a countervailing clause in the Constitution reserving power to the states was of paramount importance to them.[83] While some Anti-Federalists never relented in their opposition to the Constitution, the ones who did would not have done so unless they believed the Bill of Rights contained an effectual limitation on federal power.[84] Yet, the Anti-Federalists were satisfied with the Bill of Rights even though the Tenth Amendment did not explicitly limit the national government to expressly delegated powers.[85]

Before *McCulloch*—even before James Madison wrote the Bill of Rights—Federalists such as Samuel Chase, Charles Pinckney, and Alexander Hamilton vocally supported a view of the Constitution that the document would limit Congress to expressly delegated powers.[86] While they did not deny Congress would have some implied powers, Federalists promised those powers would be limited to only the authority truly necessary for Congress to act according to its

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opined by Marshall in *McCulloch v. Maryland* as mainstream); Soifer, *supra* note 32, at 797 (claiming there is no historical basis for constitutional limitation on congressional power).

[82] *See* THE ANTI-FEDERALIST PAPERS, *supra* note 33, at 308 ("Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial. They will be able to extend the limits of the general government gradually, and by insensible degrees, and to accommodate themselves to the temper of the people."); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 471 (1969) (describing the transition from the Articles of Confederation to the Constitution as "a virtual revolution in American politics . . . a serious weakening, if not a destruction, of the power of the states").

[83] Lash, *supra* note 34, at 1915–16 ("Even if the Federalists could be taken at their word . . . declarations making this principle explicit ought to be adopted, if only for 'greater caution.'").

[84] *Id.* at 1915 ("Others, however, were open to being persuaded to be in favor of the Constitution, provided that certain safeguards were put in place.").

[85] *Id.* at 1915–17 (recounting the suspicion with which the Anti-Federalists viewed a Bill of Rights without a reservation of power not expressly delegated to the federal government).

[86] Calder v. Bull, 3 U.S. (3 Dall.) 386, 387 (1798) (Chase, J.) ("It appears to me a self-evident proposition, that the several State Legislatures retain all the powers of legislation, delegated to them by the State Constitutions; which are not EXPRESSLY taken away by the Constitution of the United States."); ALEXANDER HAMILTON, *New York Ratifying Convention, Third Speech of June 28*, *in* 23 THE PAPERS OF ALEXANDER HAMILTON 114, 117 (Harold C. Syrett & Jacob E. Cooke eds., 1962) ("[W]hatever is not expressly given to the federal head, is reserved to the members."); Lash, *supra* note 34, at 1892 ("Federalist Charles Pinckney insisted that 'no powers could be executed or assumed [by the federal government], but such as were expressly delegated.'"). *But see* DILORENZO, *supra* note 34, at 20 (describing how, before ratification, Hamilton "constantly sought" to assuage states' rights theorists that state sovereignty would remain intact under the Constitution, yet how he, after ratification, worked to destroy state sovereignty); ALEXANDER HAMILTON, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank*, *reprinted in* 8 THE PAPERS OF ALEXANDER HAMILTON, *supra*, at 97, 98–101 (repudiating the arguments he previously made during ratification and asserting that "every power vested in a Government is in its nature *sovereign*, and includes by *force* of the *term*, a right to employ all the *means* requisite, and fairly *applicable* to the attainment of the *ends* of such power").

enumerated powers.[87] Madison believed the Tenth Amendment simply confirmed the principle that the federal government was limited to an express delegation of power.[88] Madison, primary author of the Amendment, clearly believed the federal government had "few and defined" powers, leaving the infinite remainder to the states.[89] Yet, he did not add "expressly" to the text of the Tenth Amendment, because he was concerned the addition would prompt later readers to compare the Amendment to Article II of the Articles of Confederation and interpret the power of the federal government accordingly.[90] Madison believed the word "expressly" in the Articles of Confederation—very narrowly construed by the states—prevented the federal government from exercising any implied powers, even ones trivially necessary to effect the explicit mandates of the Articles.[91] He believed the word "expressly" rendered the document powerless to solve pressing problems that affected the states as a whole.[92] The Federalists had undertaken to write a new foundational governing document to replace the Articles of Confederation, precisely because they viewed the Articles as ineffectual.[93] Madison was anxious to avoid a legal comparison between the Constitution's would-be narrow definition of federal authority and the hamstrung nature of federal power under the Confederation.[94]

While Madison opposed the inclusion of the word "expressly" in the language of the Tenth Amendment, he explicitly agreed with the inclusion of the phrase "or to the people" at the end of the Amendment.[95] This was significant at the time,

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[87] *See* Finkelman, *supra* note 72, at 301 (describing how the Federalists believed the Bill of Rights to be unnecessary); Lash, *supra* note 34, at 1905–06 (noting the Federalists rejected the Tenth Amendment as unnecessary, because they believed the federal government was already truly restricted to enumerated powers).

[88] Lash, *supra* note 34, at 1895.

[89] THE FEDERALIST NO. 45 (James Madison).

[90] THE FEDERALIST NO. 44 (James Madison) (positing the inclusion of the word "expressly" in the enumeration of Congress's powers would have rendered Congress "exposed . . . to the alternative of construing the term 'expressly' with so much rigor, as to disarm the government of all real authority whatever, or with so much latitude as to destroy altogether the force of the restriction" just as the word had done for the Articles of Confederation); *see* ARTICLES OF CONFEDERATION of 1781, art. II ("Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation *expressly delegated* to the United States, in Congress assembled." (emphasis added)).

[91] THE FEDERALIST NO. 44 (James Madison); *see* RALPH L. KETCHAM, JAMES MADISON: A BIOGRAPHY 145 (1990) (1971) (outlining Madison's legal training).

[92] THE FEDERALIST NO. 44 (James Madison).

[93] *Id.*; *see* Max Farrand, *The Federal Constitution and the Defects of the Confederation*, 2 AM. POL. SCI. REV. 532, 535–37 (1908) (recounting the contemporary critique of the Articles of Confederation that they lacked power); Hoke, *supra* note 43, at 856 (stating the Articles of Confederation relied on "comity and forbearance . . . and possessed no police power . . . to enforce its law").

[94] THE FEDERALIST NO. 44 (James Madison).

[95] U.S. CONST. amend. X; 1 ANNALS OF CONG. 789 (Joseph Gales & William Winston Seaton eds., 1834).

because many of the nation's founders believed in a political theory of agency that the sovereign (the principal) retained any power it did not *expressly* relinquish to its agents.[96] The phrase "or to the people" thus represented a binding expression of ultimate popular sovereignty, implying that the people retained all power they did not expressly grant to their agents, the federal and state governments.[97] By further implication, the states as sovereigns retained all power they did not expressly grant to their agent, the federal government.[98] In fact, before the close of the Virginia Ratifying Convention, Madison insisted the federal government would be limited to "expressly delegated power" even though he had excised the word "expressly" from the Tenth Amendment.[99] He later explicitly reiterated this opinion in a famous speech opposing the creation of a national bank.[100] More strikingly, after the Supreme Court published its landmark decision in *McCulloch v. Maryland*, Madison rejected the decision's interpretation of federal power.[101]

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[96] Lash, *supra* note 34, at 1908–11. At the time of the framing of the Constitution, Emmerich de Vattel's 1752 work, *Le Droit des Gens* ("The Law of Nations"), was exceptionally influential. *Id.* at 1908. Vattel argued sovereigns as masters retain all powers they have not expressly delegated to their agents. *Id.* at 1909–11. The founding fathers commonly interpreted this political philosophy through the lens of popular sovereignty, believing the people were the ultimate sovereigns with the ability to assign power to their agents, the governments. *Id.* at 1910. Madison also stated quite clearly, "When the people have formed a Constitution, they retain those rights which they have not expressly delegated." 4 ANNALS OF CONG. 934 (Joseph Gales & William Winston Seaton eds., 1855).

[97] Lash, *supra* note 34, at 1893, 1910, 1916–17, 1922–24.

[98] *Id.* at 1910, 1916–17. This view was widely shared; the ratifiers of the Bill of Rights—particularly those from the states of New York, Virginia, South Carolina, Rhode Island, Massachusetts, and Maryland—proposed versions of the Tenth Amendment that incorporated express notions of popular sovereignty. *Id.* at 1916–17.

[99] *Id.* at 1918. Virginia's Governor Edmund Randolph stated, "All rights are . . . to be completely vested in the people, unless expressly given away," to which James Madison responded by stating Randolph's observations "correspond precisely with my opinion. . . . [E]very thing not granted, is reserved." 2 DEBATES, RESOLUTIONS AND OTHER PROCEEDINGS IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 437, 451 (Jonathan Elliot ed., 1828).

[100] *On the Establishment of a National Bank*, *in* 4 ELLIOT'S DEBATES, *supra* note 50, at 411, 414; Congressional Proceedings, FED. GAZETTE (Phila., Pa.), Feb. 12, 1791, at 2 (reporting on Madison's speech denouncing the National Bank). The report stated: "[Madison] adduced certain passages . . . fully in favor of this idea, that the general government could not exceed the expressly-delegated powers. In confirmation also of this sentiment, he adduced the amendments proposed by Congress to the constitution." Congressional Proceedings, *supra*, at 2; *see* Lash, *supra* note 34, at 1928–31 (noting how the account of Madison's speech in the *Gazette of the United States*, quoted much more frequently than the account in the *Federal Gazette*, does not include this particular summary of his belief the federal government was limited to expressly delegated powers, leaving this evidence often overlooked in historical treatments of the Tenth Amendment).

[101] Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* SELECTED WRITINGS OF JAMES MADISON 333, 333–34 (Ralph Ketcham ed., 2006) ("[W]hat is of most importance is the high sanction given to a latitude in expounding the Constitution which seems to break down the landmarks intended by a specification of the Powers of Congress, and to substitute . . . a Legislative discretion . . . to which no practical limit can be assigned."); Lash, *supra* note 34, at 1946.

Moreover, although Thomas Jefferson was no Federalist, he shared the same view as Madison about the language of the Tenth Amendment. In his own *Opinion on the Constitutionality of a National Bank*, Jefferson identified the Tenth Amendment as the bedrock of the Constitution.[102] Jefferson presumed the Amendment accorded the federal government expressly delegated powers as he could not find a power "specially enumerated" to authorize a national bank anywhere in the Constitution.[103] The opinions of Jefferson, Madison, and like-minded Federalists demonstrate a common belief of the time that the Tenth Amendment restricted the federal government to a few express powers even though the word "expressly" had been removed from the Amendment's text.[104]

D. Current Constitutional Jurisprudence Under United States v. Lopez

After *McCulloch v. Maryland*, the Supreme Court eventually came to interpret federal power broadly.[105] While the Supreme Court still sanctions an expansive view of federal authority, it set limits on Congress's Commerce Clause power

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[102] THOMAS JEFFERSON, *Opinion on the Constitutionality of a National Bank*, *reprinted in* 3 THE WRITINGS OF THOMAS JEFFERSON 145, 146 (Andrew Adgate Lipscomb ed., 1903) (1791) [hereinafter WRITINGS OF JEFFERSON]. The timing of his statement was curious, given that this *Opinion* was published in February 1791 and the Tenth Amendment was not ratified until December of the same year. Paul Finkelman, *Thomas Jefferson, Original Intent, and the Shaping of American Law: Learning Constitutional Law from the Writings of Jefferson*, 62 N.Y.U. ANN. SURV. AM. L. 45, 66 (2006).

[103] JEFFERSON, *supra* note 102, at 146. In fact, Jefferson believed the Constitution created a government of limited powers and any attempt to go beyond the limitation of powers would, in effect, destroy the nation by destroying the states. *Id.* at 146, 148. *Contra* Alexander Hamilton, *Opinion as to the Constitutionality of the Bank of the United States*, *reprinted in* POLITICAL THOUGHT IN THE UNITED STATES: A DOCUMENTARY HISTORY 151, 151–54 (Lyman Tower Sargent ed., 1997) (1791) (arguing the necessity of a national bank to facilitate commerce).

[104] Lash, *supra* note 34, at 1906. Commentator Lash states,

> Despite conventional wisdom, it was not the . . . Antifederalists who originally insisted on strict construction of expressly delegated power. Narrow interpretation of federal power emerged as a promise by those most interested in ratifying the Constitution . . . . In the state ratifying conventions, the Federalists repeatedly insisted that the federal government would have only expressly delegated powers.

Id.

[105] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985) (deferring to Congress's power and leaving the question of state sovereignty to the political process); Perez v. United States, 402 U.S. 146, 156–57 (1971) (upholding federal prohibitions on loan-sharking, a traditionally local activity); Katzenbach v. McClung, 379 U.S. 294, 303–04 (1964) (describing the highly deferential rational basis test: "[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, *our investigation is at an end*." (emphasis added)); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (introducing the rational basis test for congressional action); Wickard v. Filburn, 317 U.S. 111, 115–16, 129–30 (1942) (holding Congress had the power to regulate a farmer's wheat production even if it were only used for personal consumption, reasoning his actions, aggregated with those of others, could affect the supply-and-demand curve of the interstate wheat market); United States v. Wrightwood Dairy Co., 315 U.S. 110, 125–26 (1942) (upholding the regulation of intrastate milk production); United States v. Darby, 312 U.S.

in *United States v. Lopez*.[106] In *Lopez*, the Court examined the Gun-Free School Zones Act of 1990 (GFSZA) after the federal government convicted a high school senior under the GFSZA for carrying a .38 caliber revolver onto school property.[107] The defendant moved to dismiss the criminal action as "beyond the power of Congress to legislate control over our public schools."[108] The district court denied the motion, opining Congress had a "well-defined power to regulate activities in and affecting commerce, and the 'business' of elementary, middle and high schools . . . affects interstate commerce."[109]

The Court examined the constitutionality of the GFSZA first by noting the federal government is one of "enumerated powers."[110] The Court quoted James Madison: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[111] Then, reviewing the Commerce Clause, the Court reiterated John Marshall's opposing view that Congress's commerce power is nearly plenary.[112] Specifically, the Court noted the holding of *Gibbons v. Ogden* stating that Congress retained broad power when commerce

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100, 108, 126–27 (1941) (holding federal minimum wage statutes constitutional); Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31, 49 (1937) (holding Congress could regulate intrastate labor disputes at manufacturing facilities); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196–97 (1824) (constraining Congress's "plenary" power only to limitations expressly enumerated in the Constitution). *But see* New York v. United States, 505 U.S. 144, 161 (1992) (prohibiting Congress from "'commandee[ring] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program'" (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981))); Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (indicating lower federal courts should construe a statute to "upset the usual constitutional balance of federal and state powers" only if Congress demonstrates its "intention to do so [is] unmistakably clear in the language of the statute"); Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976) (striking down minimum wage laws as applied to state agencies), *overruled by Garcia*, 469 U.S. at 557; Lochner v. New York, 198 U.S. 45, 64 (1905) (holding that Congress, under the Commerce Clause, could only regulate activity that directly affected interstate commerce); United States v. E.C. Knight Co., 156 U.S. 1, 16–18 (1895) (restricting the federal commerce power to exclude mining, manufacturing, and production).

[106] 514 U.S. 549, 556–57 (1995); *see* Finkelman, *supra* note 102, at 65 (noting the Court's Tenth Amendment jurisprudence has become more state-centered since *Lopez*).

[107] 514 U.S. at 551.

[108] *Id.*

[109] *Id.* at 551–52.

[110] *Id.* at 552.

[111] *Id.* (quoting THE FEDERALIST NO. 45 (James Madison)).

[112] *Id.* at 553. The Court stated the commerce power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in [C]ongress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.* (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824)).

concerned more than one state but also that wholly intrastate activity was not in Congress's purview to regulate.[113]

The *Lopez* Court then surveyed the history of Commerce Clause-Tenth Amendment jurisprudence and determined even the most deferential opinions in the case law subjected the Commerce Clause to "outer limits."[114] The Court stated Commerce Clause action must bear a "substantial relation to commerce," and defined three categories of activity Congress has authority to regulate under the Commerce Clause.[115] It decided Congress may regulate "the channels of interstate commerce," "the instrumentalities of interstate commerce," and "activities that substantially affect interstate commerce."[116] The Court quickly dispensed with any connection the GFSZA may have had to the channels or instrumentalities of interstate commerce, as those criteria relate to the modes and manners of actual transportation between states.[117] It then analyzed the GFSZA under the third category, determining whether the activity regulated by the GFSZA substantially affected interstate commerce.[118]

The Court reiterated that Congress's power to regulate economic activity was very broad, so long as the activity substantially affected interstate commerce.[119] Notably, the Court reaffirmed Congress had a legitimate power to regulate various commercial *intra*state activities.[120] The *Lopez* Court, however, opined that even the broadest interpretation of federal commerce power in case law, the regulation of the production of homegrown home-consumed wheat under *Wickard v. Filburn*, contemplated actual economic activity whereas "possession of a gun in a school zone does not."[121] Noting the GFSZA was a criminal statute having no relation to

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[113] *Id.* (quoting 22 U.S. at 194–95). The prohibition against regulating wholly intrastate activity was the one express limitation Marshall set forth in *Gibbons*. 22 U.S. at 194–95.

[114] 514 U.S. at 556–57. The Court also stated that the Constitution requires Congress to have "a rational basis . . . for concluding that a regulated activity sufficiently affected interstate commerce." *Id.* at 557.

[115] *Id.* at 555, 558–59.

[116] *Id.* at 558–59. Activities that substantially affect interstate commerce are activities "having a substantial relation to interstate commerce." *Id.* at 559.

[117] *Id.* at 559.

[118] *Id.*

[119] *Id.* at 559–61.

[120] *Id.* (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981); Perez v. United States, 402 U.S. 146 (1971); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942)). Such intrastate activities that Congress may regulate include loan sharking, consumption of wheat grown for personal purposes, hospitality activities "catering to interstate guests," coal mining, and restaurants using interstate supplies. *Hodel*, 452 U.S. at 276–80; *Perez*, 402 U.S. at 155–56; *Katzenbach*, 379 U.S. at 299–301; *Heart of Atlanta Motel*, 379 U.S. at 252–53; *Wickard*, 317 U.S. at 127–28.

[121] 514 U.S. at 560 (citing 317 U.S. at 127–28).

"any sort of economic enterprise," the Court also observed the GFSZA was not part of a larger "regulatory scheme" which required federal control of intrastate activity to preserve the scheme's integrity.[122] Thus, the Court held the GFSZA did not substantially affect interstate commerce.[123]

Lopez also stressed the need for a "jurisdictional element" in the statute that would allow the Court to evaluate whether the possession of a firearm in violation of the GFSZA affected interstate commerce.[124] The Court observed the GFSZA did not explicitly specify a commerce element in any of the delineated crimes.[125] The Court strongly suggested Congress should employ an express jurisdictional element limiting the purview of criminal statutes to crimes concerning interstate commerce for such laws to withstand the scrutiny of the "substantially affects" category.[126]

Nevertheless, if the text of the statute did not make the relationship to interstate commerce plain on its face, the Court indicated it was Congress's burden to demonstrate through findings that an activity substantially affected interstate commerce.[127] The Court did not require Congress to make formal findings as a prerequisite to legislation but stated such findings would have helped it evaluate Congress's judgment that guns in school zones had substantially affected interstate commerce.[128]

Finally, the Court noted it unlikely that the commerce power was ever unlimited in areas traditionally governed by states, such as education or criminal law enforcement "where States historically have been sovereign."[129] Justice Kennedy's concurrence reinforced the notion that the Court would evaluate whether congressional activity impinged on areas of "traditional state concern" in future review of federal statutes.[130] The Court struck down the GFSZA as

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[122] *Id.* at 561.

[123] *Id.*

[124] *Id.* As an example of what the Court was describing, it cited *United States v. Bass*, in which the Court reviewed a statute that had made it a crime for a convicted felon to "receive, possess, or transport" a firearm "in commerce or affecting commerce." *Id.* at 561–62 (quoting 404 U.S. 336, 337 (1971)). The *Lopez* Court noted *Bass* had imputed the additional jurisdictional element that the commerce must be interstate for the criminal prosecution to be valid. *Id.* at 562.

[125] *Id.*

[126] *See id.* ("Unlike the statute in *Bass*, [the GFSZA] has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.").

[127] *Id.* at 562–63.

[128] *Id.*

[129] *Id.* at 564.

[130] *See id.* at 577 (Kennedy, J., concurring) (noting that "[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory").

exceeding Congress's authority to regulate commerce because it did not clearly regulate a commercial activity or establish interstate commerce as an element of the specified crime.[131]

III. ANALYSIS

This analysis supports two theses. First, the enactment of the Wyoming Firearms Freedom Act was a constitutional exercise of state power, according to current federal jurisprudence and a historical understanding of state sovereignty under the Tenth Amendment.[132] Second, Wyoming is constitutionally right to interpose between its citizens and the federal government under the Act and the Tenth Amendment.[133] This analysis initially addresses the legal arguments Wyoming should make to judicially interpose between its citizens and the federal government when it finds itself haled into federal court.[134] Wyoming should assert the unconstitutionality of current federal firearms law under *United States v. Lopez*.[135] Wyoming should also assert the constitutionality of the Act according to an unorthodox but historically tenable view of state sovereignty: the framers and ratifiers of the Tenth Amendment intended to restrict federal authority to a narrow range of power.[136] Wyoming nonetheless faces a significant obstacle: the Supreme Court has held the opposite view for nearly two-hundred years.[137]

Moreover, because Wyoming faces a very high bar to convince the federal judiciary that stare decisis should not control its interpretation of the Tenth Amendment, Wyoming should use the Amendment's historically intended meaning for justification in the political process.[138] Relatedly, Wyoming must actively engage in political interposition between its citizens and the federal government with a combination of patience with, and active resistance to, federal power.[139] It must wait for the federal government to relent, which is fairly likely based on the federal response to state interposition on other issues.[140] Wyoming also must actively pressure the government to relent by carrying out the legislative enforcement directives of the Act.[141]

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[131] *Id.* at 551.

[132] *See infra* notes 142–223 and accompanying text.

[133] *See infra* notes 224–49 and accompanying text.

[134] *See infra* notes 142–200 and accompanying text.

[135] *See infra* notes 142–92 and accompanying text.

[136] *See infra* notes 193–94 and accompanying text.

[137] *See infra* notes 195–200 and accompanying text.

[138] *See infra* notes 201–02 and accompanying text.

[139] *See infra* notes 203–23 and accompanying text.

[140] *See infra* notes 214, 220–23 and accompanying text.

[141] *See infra* notes 224–49 and accompanying text.

A. *A Legal Analysis of the Wyoming Firearms Freedom Act Vis-à-vis Federal Jurisprudence*

The Wyoming Firearms Freedom Act requires Wyoming to arrest federal agents for enforcing federal law.[142] The provisions also encourage the state to defend in court its citizens charged with violating extant federal law.[143] The Act declares that Wyoming retains exclusive power over intrastate firearms regulation within its borders and that federal law over this area with respect to Wyoming's citizens is void.[144] Thus, Wyoming will appear in court either when the federal government sues the state for arresting its agents or when Wyoming defends its citizens in federal prosecutions.[145]

Federal jurisprudence and critics of a narrow interpretation of federal power under the Tenth Amendment usually cite the Supremacy Clause as prohibiting state law that directly conflicts with existing federal law.[146] The Supremacy Clause, however, suffers from the ambiguity that pervades the Constitution, because its language simply begs the question as to what actually is supreme law.[147] The Supremacy Clause states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[148] The heart of the ambiguity lies in the phrase "in [p]ursuance thereof," because it circularly

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[142] WYO. STAT. ANN. § 6-8-405(b) (2010).

[143] *Id.* § 6-8-405(c).

[144] *Id.* § 6-8-404(a).

[145] *See id.* § 6-8-405(b)–(c) (making it a misdemeanor for federal agents to enforce federal law in conflict with the Act and calling upon the Wyoming Attorney General to defend Wyoming citizens against federal prosecution); *see also* S. Candace Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 687 (1991) (opining political questions tend to transform into judicial questions).

[146] *See* Altria Grp., Inc. v. Good, 129 S. Ct. 538, 543 (2008) (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)) ("[W]e have long recognized that state laws that conflict with federal law are 'without effect.'"); Hillsborough Cnty. v. Automated Med. Labs., 471 U.S. 707, 713 (1985) ("Under the Supremacy Clause, federal law may supersede state law in several different ways."); Hoke, *supra* note 43, at 831 ("Congress has long been accorded the power to protect the federal government from interference . . . by the states."); *see also* BERNARD SCHWARTZ, 1 A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 38 (1963) (praising Marshall's construction of the Supremacy Clause as a "bulwark of national power"). *But see* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 616 (1991) (holding federal law did not preempt a town ordinance because of a mere inconsistency).

[147] WOODS, *supra* note 31, at 14; *see* Hoke, *supra* note 43, at 844 (asserting the interpretation of the Supremacy Clause is as difficult as other "open-textured" provisions of the Constitution); Robert J. Reinstein & Mark C. Rahdert, *Reconstructing* Marbury, 57 ARK. L. REV. 729, 802 n.331 (2005) ("The term 'laws made in pursuance thereof' is of course ambiguous.").

[148] U.S. CONST. art. VI, cl. 2.

states the Constitution and *constitutional* federal law is supreme.[149] The crux of state interposition (or nullification) lies in that ambiguity: Jefferson, Madison, and others argued that states themselves had the duty and the right to void *un*constitutional federal law.[150] Federal law must be made in pursuance of the Constitution's meaning for it to have any weight at all.[151] Accordingly, the main thrust of any argument Wyoming raises before the federal judiciary must be that the federal law in conflict with the Act is illegal and void.[152]

The current view of the Supreme Court under *United States v. Lopez* does place some judicial limits on Congress's Commerce Clause power.[153] First, when Wyoming contends federal gun control law is illegal, the Supreme Court is likely to evaluate whether the federal statute in question addresses one of the three

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[149] WOODS, *supra* note 31, at 14; Hoke, *supra* note 43, at 845 ("The one threshold that national law must traverse on the way to obtaining the brass ring of supremacy is that the law in question must be 'in Pursuance of,' or consistent with, the Constitution.").

[150] The Kentucky Resolutions, *supra* note 50, at 540, 545; The Virginia Resolutions, *supra* note 50, 528–29; WOODS, *supra* note 31, at 14; *see id.* at 3–4 ("If the federal government has the exclusive right to judge the extent of its own powers, warned James Madison and Thomas Jefferson in 1798, it will continue to grow—regardless of . . . much-touted limits on government power."); Pursley, *supra* note 31, at 948 ("Nor is a plenary power of preemption a necessary feature of the government's federal structure."); *see also* Gray, *supra* note 40, at 162 (arguing the plain language in the Supremacy Clause, "and the judges in every state shall be bound thereby," only binds state judiciaries and not state executives or legislatures). *But see* Brutus, *Second Essay Opposing the Constitution*, *reprinted in* DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS 126, 131 (Jack N. Rakove ed., 1997) (anticipating the Supremacy Clause would prevent state limitation of exercises of federal power).

[151] Hoke, *supra* note 43, at 845, 850–53 (noting the phrase "in Pursuance" is a limit on federal power and examining the ambiguity inherent in the phrase "to the Contrary"). Even *McCulloch v. Maryland*, by its express language, agrees. 17 U.S. 316, 405 (1819) ("The government of the United States . . . and its laws, when made *in pursuance of the constitution*, form the supreme law of the land." (emphasis added)).

[152] *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); WYO. STAT. ANN. § 6-8-404(a) (2010) ("It is declared . . . that [intrastate firearms] have not traveled in interstate commerce. . . . The authority of the United States congress to regulate interstate commerce in basic materials does not include authority to regulate [intrastate firearms]."); Andrew Weis, Note, *Commerce Clause in the Cross-Hairs: The Use of* Lopez*-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 STANFORD L. REV. 1431, 1432 (1996) (discussing how attorneys have successfully used *Lopez* to constitutionally challenge federal criminal law); *see also* WYO. STAT. ANN. § 6-8-406(a) (expounding the constitutional reasons for Wyoming's assertions that federal law over intrastate firearms is invalid); Pursley, *supra* note 31, at 949 (asserting the notion that Congress has plenary power to void contrary state law is "inconsistent with history and the constitutional structure"). *But see* Gonzales v. Raich, 545 U.S. 1, 29 (2005) (stating federal law will prevail in any conflict with state law, presumably even legitimate conflicts with patently unconstitutional federal law).

[153] 514 U.S. 549, 558 (1995) (limiting congressional Commerce Clause power to three categories); *see* Finkelman, *supra* note 102, at 65 (noting the Court's vision of federalism has weighed more in favor of the states since *Lopez*); Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of* Lopez*, or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*,

categories of activity *Lopez* specifies as being under congressional purview.[154] Presuming the Court follows *Lopez*, it must determine whether the law addresses the use of channels of interstate commerce, the instrumentalities of interstate commerce, or activities that substantially affect interstate commerce.[155]

Just as the Court summarily disposed of the notion that the GFSZA had anything to do with the channels or instrumentalities of interstate commerce, Wyoming should argue federal firearms laws such as the National Firearms Act of 1934 (NFA) and the Gun Control Act of 1968 (GCA) also do not contemplate either *Lopez* category.[156] The parts of the federal firearms statutes in conflict with the Wyoming Firearms Freedom Act simply do not directly regulate the routes by which goods are shipped or transmitted from one party to another or the methods by which those goods are carried.[157] Additionally, these statutes do not concern potential sources of direct harm to the instrumentalities of interstate commerce, e.g., airplanes, trains, trucks, ships, automobiles, and the internet.[158]

2000 WIS. L. REV. 369, 370 (2000) (calling *Lopez* a "harbinger of change," and noting the Supreme Court, since then, has "stress[ed] the limited nature of federal power"); Weis, *supra* note 152, at 1444 (recognizing *Lopez* limits Congress). *But see* Weis, *supra* note 152, at 1444 (questioning the impact of *Lopez* on interpretations of Commerce Clause power in the lower courts).

[154] 514 U.S. at 558–59; *see* Weis, *supra* note 152, at 1445–62 (discussing how the federal judiciary applies the three *Lopez* categories).

[155] 514 U.S. at 558–59.

[156] *See id.* at 559 (dispensing with an analysis of the GFSZA under the instrumentalities and channels categories). In such a case, Wyoming should argue that because *Lopez* did not warrant a channels or instrumentalities analysis of criminal firearms regulation, such an analysis for other federal firearms legislation is also inappropriate. *See id.*; *see also* Lauricella, *supra* note 65, at 1402–06 (arguing the Commerce Clause was always supposed to be narrowly construed).

[157] *See Lopez*, 514 U.S. at 559 (noting the GFSZA did not regulate "the use of the channels of interstate commerce"). Since the Wyoming Firearms Freedom Act only contemplates firearms made and retained inside Wyoming, a discussion of the effects of firearms on channels or instrumentalities, which only exist when transport happens across state lines, appears to be moot. *See id.* On the other hand, some justices may elastically opine since the subject matter of the federal firearms legislation regards dangerous items, such items, having the potential to harm the instrumentalities of commerce while they are in transit, are properly regulated. *See id.* at 565 ("Justice Breyer focuses . . . on the threat that firearm possession in and near schools poses to the . . . potential economic consequences flowing from the threat."); *see also* Weis, *supra* note 152, at 1445–47 (examining how lower courts have avoided striking down federal criminal statutes with questionable constitutionality by manipulating the *Lopez* categories). *But see Lopez*, 514 U.S. at 559 (refuting Justice Breyer's dissent by noting his analysis would errantly subsume areas clearly outside the scope of federal law).

[158] *See Lopez*, 514 U.S. at 559 (noting the GFSZA did not seek to "protect an instrumentality of interstate commerce"); Brandon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1291 (2003) (advocating strict delineation between the three *Lopez* categories of commercial activity). *But see* United States v. Kirk, 70 F.3d 791, 796 (5th Cir. 1995) (holding the ban on machinegun possession was a congressional attempt to control supply and demand and therefore an attempt to control the transportation of commodities through channels of interstate commerce); United States v. Wilks, 58 F.3d 1518, 1521 (10th Cir. 1995) (upholding a challenge to the federal prohibition against transfers of machineguns as a "proper exercise of Congress' power to regulate 'things in interstate commerce'" (quoting *Lopez*, 514 U.S. at 557–58)).

By elimination, the only applicable analysis is whether federal gun control legislation substantially affects interstate commerce, and Wyoming should argue federal regulation of intrastate firearms is unconstitutional under this third *Lopez* category.[159] According to *Lopez*, the Court must examine whether federal legislation applies to commercial or non-commercial activity.[160] In this inquiry, Wyoming appears to be interposing for its citizens in two ways in the Act:

> A personal firearm, a firearm accessory or ammunition that is manufactured commercially or privately in Wyoming and that remains exclusively within the borders of Wyoming is not subject to federal law . . . under the authority of the United States congress to regulate interstate commerce.[161]

A firearm cannot exist without being manufactured. Federal gun control law does regulate manufacture of firearms—as well as their interstate commercial transmission—but it also regulates the possession of certain classes of firearms and the possession of firearms by specific classes of persons.[162] Thus, Wyoming's nullifying declaration addresses both the types of firearms Wyoming citizens are allowed to manufacture and the classes of citizens who may possess them.[163]

With regard to intrastate manufacturing, *Lopez* cites *Wickard v. Filburn* for the clear proposition that the Commerce Clause empowers Congress to regulate the production of goods, even if the goods *might* only affect markets in aggregate.[164] On its face, *Wickard* may apply to the manufacture of firearms

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[159] *See Lopez*, 514 U.S. at 558–61 (delineating, formalistically, between the three categories of activity Congress may regulate with its commerce power and applying the "substantially affects" category to all other activity not covered by the first two categories); *Kirk*, 70 F.3d at 801 (Jones, J., dissenting) (criticizing the majority for avoiding analysis of a federal firearms criminal statute under the third *Lopez* "substantially affects" category); Weis, *supra* note 152, at 1447 (noting the relevance of the third *Lopez* category to firearms regulation by discussing how federal circuit courts dubiously avoided analyzing a federal firearms statute under the third *Lopez* category to uphold the statute).

[160] *Lopez*, 514 U.S. at 560; *see* Weis, *supra* note 152, at 1450 (observing the Court avoided fixing a standard to help lower courts decide what is commercial versus what is not).

[161] WYO. STAT. ANN. § 6-8-404(a) (2010).

[162] *See* 26 U.S.C. § 5841 (2006) (requiring manufacturer registration of certain firearms); 18 U.S.C. §§ 922(d), (g), (n), 923 (2006) (regulating the manufacture, sale, and possession of certain firearms).

[163] *Compare* WYO. STAT. ANN. § 6-8-403(a)(iii) (defining firearms controlled by the Wyoming Firearms Freedom Act), *with* 26 U.S.C. § 5845 (defining regulated firearms), *and* 18 U.S.C. § 921(a)(3) (defining regulated firearms); *compare* WYO. STAT. ANN. § 6-8-404(c)–(d) (prohibiting the possession and purchase of firearms by certain persons), *with* 18 U.S.C. § 922(d), (g), (n) (prohibiting the same classes of persons from possessing firearms that Wyoming precludes as well as prohibiting possession by persons indicted for felonies, fugitives, unlawful users of controlled substances, aliens, dishonorably discharged persons, former citizens, persons subject to restraining orders, and domestic violence misdemeanants).

[164] *Lopez*, 514 U.S. at 556–57 (citing 317 U.S. 111 (1942)) (upholding congressional regulation of the production of an item or commodity even if the producer reserves the item or commodity for personal use or prevents it from crossing state lines).

even if those firearms remain in Wyoming, simply because Congress's power to regulate manufacture is so broad.[165] Deeper analysis, however, requires a look at the purpose of the wheat-growing regulation in *Wickard*.[166] The *Wickard* Court recognized the purpose of the regulation was to protect market supply and demand of wheat in aggregate over the whole nation.[167] By contrast, Congress's purpose in enacting extant federal gun control legislation was not to preserve the market pricing, supply, and demand of metal, metal alloys, polymers, sulfur, charcoal, or saltpeter.[168] Rather, Congress's purpose was to prevent crime by regulating concealable rifles, silencers, automatic weapons, and so-called destructive devices.[169] Accordingly, when the *Lopez* Court described the GFSZA, it noted the subject matter of the law addressed in *Wickard* actually contemplated economic activity whereas firearm possession near a school does not.[170] In this way, federal gun control legislation bears substantial similarity under *Lopez* to the GFSZA because Congress did not enact it for a commercial purpose.[171] Thus, federal prohibition of firearm possession by certain classes of persons is arguably not commercial in nature.[172] Desires to curtail crime and protect the

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[165] *See* 317 U.S. at 120, 133 (upholding congressional regulation of intrastate production).

[166] *See id.* at 129–30 (expounding why one of Congress's primary purposes in regulating intrastate production of wheat was economic in nature); John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545, 555 (stating interpretation of *Wickard* is at the heart of *Lopez*).

[167] 317 U.S. at 129–30. *Contra* Baker, *supra* note 166, at 555 (stating *Lopez* rejects the notion in *Wickard* that Congress can regulate non-commercial activity in aggregate).

[168] *See* S. REP. NO. 1303, 86th Cong., at 3 (1960), *reprinted in* 1960 U.S.C.C.A.N. 2111, 3112 (explaining the primary purpose of the National Firearms Act was to curtail crime); Bureau of Alcohol, Tobacco, Firearms, and Explosives, *National Firearms Act*, ATF.GOV, http://www.atf.gov/firearms/nfa/ (last visited Nov. 21, 2010) (stating the "underlying purpose was to curtail . . . transactions in . . . firearms" because "these firearms . . . pose[d] a significant crime problem").

[169] *See* Scott Temple Silverman, Case Comment, *Could Ignorance with Your Firearm Be Safer?*, United States v. Harris, *959 F.2d 246 (D.C. Cir.)*, cert. denied, *113 S. Ct. 362 (1992)*, 71 WASH. U. L. Q. 483, 485 n.18 (1993) (recognizing the purpose of firearms regulation has been to curtail crime).

[170] United States v. Lopez, 514 U.S. 549, 560 (1995).

[171] *See id.* at 551, 561 ("The [GFSZA] neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. . . . Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise."). *But see* Gonzales v. Raich, 545 U.S. 1, 18–20 (2005) (upholding the Controlled Substances Act, which sought to "control the supply and demand of controlled substances in both lawful and unlawful drug markets" even where the activity in question had nothing to do with buying or selling, because the production of marijuana substantially affected the national market).

[172] 18 U.S.C. § 922(d), (g), (n) (2006); *see Lopez*, 514, U.S. at 561 (observing the GFSZA had nothing to do with economic enterprise). The classes of persons for whom the Wyoming Firearms Freedom Act would otherwise protect the right to possess firearms in spite of countervailing federal law are users of controlled substances, illegal aliens, persons dishonorably discharged from the military, persons under the jurisdiction of a restraining order, and misdemeanants convicted of domestic violence. *See* Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes,* 47 CASE W. RES. L. REV. 921, 929

public from harm may have been sympathetic reasons for Congress's enactment of the GCA and the NFA, but they have little to do with commerce.[173] Wyoming should argue by analogy to the GFSZA that federal firearms law regulating intrastate firearms possession, manufacture, and transfer is non-commercial and, therefore, unconstitutional.[174]

The *Lopez* Court also required the presence of a jurisdictional element in federal statutes specifying their relationship to interstate commerce.[175] The Court looks to see whether a statute expressly provides such an element or whether it can be read into the statute by implication.[176] Wyoming should take the opportunity to argue that many parts of the national firearms statutes do not include the proper interstate commerce jurisdictional element, expressly or impliedly.[177] The GCA does contain a significant number of interstate commerce jurisdictional elements for its prohibitions, but not in all its parts.[178] For instance, the GCA prohibits the sale or transfer of a firearm to someone with a domestic violence conviction.[179] There is no express jurisdictional element mandating such a sale

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(1997) (asserting because the Court found possession of a firearm was non-commercial, it could not overcome the "substantially affects" barrier). *Compare* WYO. STAT. ANN. § 6-8-404(c)–(d) (2010), *with* 18 U.S.C. § 922(d), (g), (n). *But see* Weis, *supra* note 152, at 1450 (noting the lack of a legal standard to distinguish between commercial and non-commercial activities).

[173] *See* Silverman, *supra* note 169, at 485 n.18 (1993) (recognizing the purpose of firearms regulation has been to curtail crime); *cf. Lopez*, 514 U.S. at 561 (observing the GFSZA had nothing to do with economic enterprise). *See generally* 18 U.S.C. §§ 921–931 (restricting the ability to deal in firearms to registered Federal Firearms Licensees (FFLs), requiring interstate purchases and transfers of firearms to occur through FFLs, and requiring retail purchasers and interstate transferees to register their purchases with the federal government); 26 U.S.C. §§ 5801–5872 (requiring the registration and taxation of the sale of short-barreled rifles, short-barreled shotguns, and silencers); 28 C.F.R. §§ 25.1–25.57 (2010) (requiring a criminal background check on the purchaser for each retail purchase of a firearm).

[174] *See Lopez*, 514 U.S. at 567 ("The possession of a gun . . . is in no sense an economic activity."). *But see* Weis, *supra* note 152, at 1450 (discussing the lack of clear distinction between commercial and non-commercial activity under *Lopez*).

[175] 514 U.S at 561.

[176] *Id.* at 561–62. The standard, however, for this requirement is minimal, because if a court finds that a federal statute contains the necessary jurisdictional element, it will not independently evaluate whether the statute substantially affects interstate commerce. Weis, *supra* note 152, at 1454 ("[T]he mere presence of a jurisdictional element . . . automatically renders a statute constitutional.").

[177] *See Lopez*, 514 U.S. at 561–62 (specifying the need for an interstate commerce jurisdictional element in congressional criminal statutes); United States v. Kirk, 70 F.3d 791, 796 (5th Cir. 1995) (observing the federal statute prohibiting machinegun possession and transfer contained no interstate commerce jurisdictional element); Weis, *supra* note 152, at 1447–48 (arguing courts should require jurisdictional elements for all three *Lopez* categories). *See generally* 18 U.S.C. §§ 921–931; 26 U.S.C. §§ 5801–5872 (lacking, in many parts, the required interstate commerce jurisdictional element).

[178] *See generally* 18 U.S.C. §§ 921–931.

[179] *Id.* § 922(d)(9), (g)(9) (prohibiting the sale of a firearm to and possession of a firearm by a person with a domestic violence conviction).

or transfer occur in interstate commerce.[180] Meanwhile, the NFA contains few references to interstate commerce but broadly prohibits the manufacture and transfer of certain firearms irrespective of whether the weapons are crossing state lines.[181] Thus, when Wyoming is defending one of its citizens against federal prosecution, if the federal court cannot find sufficient nexus between interstate commerce and the regulation of firearms, *Lopez* requires the court to dismiss the indictment or set aside a conviction as unconstitutional.[182]

Moreover, Wyoming should argue Congress has not explicitly found that most of the activities regulated by the major federal firearms statutes affect interstate commerce.[183] While the *Lopez* Court did not precisely require Congress to make findings about the statutes it enacts, the Court strongly indicated findings would compensate for the lack of an express jurisdictional element where the commercial nature of the statute was not readily apparent.[184] Only one of the federal firearms regulations contains findings by Congress concerning the activities it regulates.[185] Thus, a federal court cannot readily determine whether Congress believed activities such as intrastate manufacture and possession of firearms bore a substantial relation to interstate commerce and, thus, cannot compensate for the lack of interstate commerce jurisdictional elements in the statutes.[186]

Finally, Wyoming should argue federal law regulating intrastate firearms encroaches on an area "where States historically have been sovereign."[187] The

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[180] *Id.* (omitting any express jurisdictional element of interstate commerce for the prohibition on the sale of a firearm to and possession of a firearm by a person with a domestic violence conviction).

[181] *See generally* 26 U.S.C. §§ 5801–5872.

[182] 514 U.S at 561–62 (citing United States v. Bass, 404 U.S. 336, 347 (1971)); *see* Weis, *supra* note 152, at 1446–47 (noting the relevance of the third *Lopez* category to firearms regulation).

[183] *See Lopez*, 514 U.S. at 562–63 (stating the lack of congressional findings prevented the Court from evaluating whether the GFSZA had anything to do with interstate commerce); United States v. Wilks, 58 F.3d 1518, 1519 (10th Cir. 1995) (discussing how the federal statute prohibiting machinegun possession and transfer had no legislative history and, therefore, no findings of substantial effect on interstate commerce); Weis, *supra* note 152, at 1461 (discussing whether *Lopez* "created a *de facto* findings requirement").

[184] *Lopez*, 514 U.S. at 562–63; *see* Gonzales v. Raich, 545 U.S. 1, 20 (2005) (stating that congressional findings provided the necessary "causal connection between the production for local use and the national market"); Weis, *supra* note 152, at 1461 ("[T]he Court essentially forced Congress to posit findings.").

[185] *See* 18 U.S.C. § 922(q)(1) (finding firearms-related crime in school zones affects interstate commerce); Pub. L. 104-208, 110 Stat. 3009-369 (1996) (amending the GFSZA to include findings not present when the Supreme Court decided *Lopez*). *See generally* 18 U.S.C. §§ 921–931; 26 U.S.C. §§ 5801–5872.

[186] *See Lopez*, 514 U.S. at 562–63 (stating the lack of congressional findings prevented the Court from evaluating whether the GFSZA had anything to do with interstate commerce).

[187] *See Lopez*, 514 U.S. at 564; Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 783 (1995) (arguing national

Lopez Court discussed the notion that areas of traditional state concern subject Congress to limits on its commerce power.[188] *Lopez* noted education and "criminal law enforcement" are two such areas.[189] Congress has broad authority to define and prohibit criminal activity while the Executive enforces federal criminal law daily.[190] Thus, the use of the phrase "criminal law enforcement" in the *Lopez* concurrence cannot be meant literally and appears to be a euphemism for firearms regulation.[191] Wyoming, thus, has a colorable legal argument that *Lopez* impliedly leaves intrastate firearms regulation to the states as an area of traditional state concern, rendering federal firearms laws as applied to intrastate activity unconstitutional.[192]

Wyoming should also argue the Act is a constitutional exercise of state sovereignty under the Tenth Amendment.[193] A common understanding of Federalists and Anti-Federalists at the time of ratification of the Constitution was that the Tenth Amendment limited the federal government to the exercise of expressly enumerated powers.[194] Unfortunately for Wyoming, the Supreme

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control of an area of regulation is inappropriate where state laws are the result of state citizens seeking to "have their own social, cultural, and community fabrics" or "maintain a close local hold on local law enforcement functions").

[188] *See Lopez*, 514 U.S. at 564 ("Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."); *id.* at 580–81 (Kennedy, J., concurring) (discussing "whether the exercise of national power seeks to intrude upon an area of traditional state concern" and positing "[i]n these circumstances, we have a particular duty to ensure that the federal-state balance is not destroyed").

[189] *Id.* at 564; *see* Calabresi, *supra* note 187, at 803 ("[T]here is nothing to be gained and much to be lost from allowing the federal behemoth to get involved in matters as overwhelmingly local in their impact as the ones involved in *Lopez*.").

[190] *See* Weis, *supra* note 152, at 1436–38 (discussing the federal government's broad criminal jurisdiction).

[191] *See Lopez*, 514 U.S. at 564 (reiterating state historical sovereignty over "criminal law enforcement").

[192] *See id.* at 564, 580–81; Calabresi, *supra* note 187, at 752, 831 (arguing the Supreme Court's proper role is to limit national power and use *Lopez* to return to a more balanced federalism); Lauricella, *supra* note 65, at 1380 ("*Lopez* is a positive case for advocates of stronger state power."). Nevertheless, while *Lopez* supports the argument that intrastate firearms regulation belongs wholly to the states, the Constitution prohibits the states from infringing upon the rights of the people to keep and bear arms. McDonald v. Chicago, 130 S. Ct. 3020, 3050 (2010) (holding states may not improperly restrain the people from exercising their rights under the Second Amendment).

[193] *See* Pursley, *supra* note 31, at 946 (2007) (calling reliance on regulation of interstate commerce under the Commerce Clause to preempt state law a "questionable premise"). *But cf.* Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959, 960 (1997) (arguing the Constitution does not allocate power between the federal government and the states).

[194] Calder v. Bull, 3 U.S. (3 Dall.) 386, 387 (1798) (Chase, J.) ("It appears to me a self-evident proposition, that the several State Legislatures retain all the powers of legislation, delegated to them by the State Constitutions; which are not EXPRESSLY taken away by the Constitution of the

Court's view of congressional power as expressed in *McCulloch v. Maryland* enjoys unquestioned stature in federal jurisprudence.[195] The expansive view of federal power has been accepted as truth for so long that it may be difficult for some to realize the *McCulloch* interpretation of federalism is a complete inversion of the Tenth Amendment.[196] Regardless whether a federal law actually pertains to an enumerated power of Congress, *McCulloch* and its progeny allow Congress to use most means to do most things.[197] In *Lopez*, the Supreme Court returned to a formalistic analysis of, rather than complete deference to, Congress's commerce power.[198] Still, the Court holds to the view that Congress retains enormous "discretion and control over the federal balance" of power.[199] The Supreme

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United States."); HAMILTON, *supra* note 86, at 117 ("[W]hatever is not expressly given to the federal head, is reserved to the members."); Lash, *supra* note 34, at 1889 (describing, generally, how James Madison intended the Tenth Amendment to limit the federal government to express powers); *id.* at 1892 ("Federalist Charles Pinckney insisted that 'no powers could be executed or assumed [by the federal government], but such as were expressly delegated.'"). James Madison, the author of the Bill of Rights, both agreed with contemporaries who espoused this view and declared it himself. THE FEDERALIST NO. 44 (James Madison); THE FEDERALIST NO. 45 (James Madison). In other words, Wyoming ought to argue the Tenth Amendment always intended a form of inverse preemption over powers not expressly granted to Congress. *See* Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1360 (6th Cir. 1995) (using "inverse preemption" to describe the supremacy of state law over federal).

[195] Lash, *supra* note 34, at 1891–92 ("Contemporary scholars frequently cite Marshall's argument regarding the omitted word 'expressly' in support of broad interpretations of federal power."); Moreno, *supra* note 81, at 722 (describing the view of federalism as opined by Marshall in *McCulloch v. Maryland* as mainstream).

[196] Lash, *supra* note 34, at 1945; *see id.* at 1893 ("[T]here exists a longstanding tradition . . . whereby the principle underlying the Tenth Amendment is presented as containing the very word its Framers rejected."); *id.* at 1892 ("Marshall's point in *McCulloch* about the missing word 'expressly' is probably one of the least controversial claims about the original understanding of [the] Tenth Amendment. It is also almost certainly wrong."); Hoke, *supra* note 43, at 836 ("[T]he Marshall Court systematically established the national government as the political and legal superior to the state governments."); *see also* Gonzales v. Raich, 545 U.S. 1, 57–58 (2005) (Thomas, J., dissenting) (rebuking the majority for its expansive view of federal commerce power). Justice Thomas writes,

> Respondents . . . use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.

Id.

[197] Lash, *supra* note 34, at 1945 (arguing *McCulloch* transformed the federal government into a government with only "expressly enumerated *restrictions*" instead of "expressly enumerated *powers*").

[198] United States v. Lopez, 514 U.S. 549, 577 (1995); *see* Calabresi, *supra* note 187, at 752 ("*United States v. Lopez* marks a revolutionary and long overdue revival of the doctrine that the federal government is one of limited and enumerated powers.").

[199] *Lopez*, 514 U.S. at 577; *see* Jodi Fowler Jayne, Note, *Constitutional Law:* United States v. Morrison*: The Gender Motivated Violence Act Takes a Beating by the Supreme Court's New Commerce Clause Jurisprudence*, 54 OKLA. L. REV. 805, 809 n.37 (inferring reluctance in the *Lopez* concurrence to move away from deference to Congress).

Court, operating on 191 years of precedent since *McCulloch v. Maryland*, is unlikely to rule in Wyoming's favor that the Court originally misinterpreted the Tenth Amendment.[200]

B. Nullification and Interposition by Wyoming

The uncertainty of judicial review and the conservatism inherent in stare decisis will likely leave Wyoming where it began when it enacted the Wyoming Firearms Freedom Act: seeking political rather than legal resolution.[201] Especially outside the courtroom, Wyoming should invoke the historical textual argument that the Tenth Amendment reserves vast power to the states.[202] In passing the Act, Wyoming has joined a growing movement of states seeking to restore the full measure of their sovereignty by actively declaring federal power over certain areas of regulation void.[203] Some state legislatures have passed resolutions generally reiterating their sovereignty pursuant to the Tenth Amendment.[204] Directly

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[200] *See* 17 U.S. 316, 404 (1819) (interpreting broad congressional power vis-à-vis the Tenth Amendment); Payne v. Tenn., 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."); *cf.* Pursley, *supra* note 31, at 958 (acknowledging the difficulty of judicially limiting federal power under current federal preemption doctrine). *But see* Maryland v. Wirtz, 392 U.S. 183, 196 (1968) ("The Court has ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity.'"); William H. Pryor, Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1181–82 (2002) (exhorting the Court to use judicial review to increase the recognition of state sovereignty); *cf.* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 288 (2000) (stating the Court recognizes its preemption doctrine "risks displacing too much state law").

[201] *See Lopez*, 514 U.S. at 566 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)) (opining its duty was "to say what the law is," and that the elimination of such legal uncertainty would only come "at the expense of the Constitution's system of enumerated powers"). By implication, this is an admission that judicial review favors an expansive construction of federal power, since the federal government's powers are the ones enumerated and because the Supreme Court's authority would be the authority attenuated if the Court were to impose legal certainty on the question of federalism. *See id.*; *see also* Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 686–89 (1995) (advocating state interposition against extra-constitutional acts by the federal government, even when sanctioned by the federal judiciary).

[202] *See* Pryor, *supra* note 200, at 1175 (describing Madison's design for federalism contemplated states exercising sovereignty in all areas not specifically enumerated and granted to the federal government); Pursley, *supra* note 31, at 917, 951 & n.223 (noting the "prevailing view" is that the federal government and the states should actively participate in the political process and opining judicial intervention is the wrong method for resolving issues of federalism); *see also* Hoke, *supra* note 43, at 890 (arguing the remoteness of national government requires a reassessment of how federal power is determined).

[203] Pryor, *supra* note 200, at 1171 (explaining how Madison foresaw the states would check the federal government to prevent an abuse of power and vice versa).

[204] *See* Paulsen, *supra* note 201, at 686 (advocating state interposition as a protective function of federalism); *see, e.g.*, S.J. Res. 27, 2010 Reg. Sess. (Ala. 2010) ("Claiming Sovereignty under the Tenth Amendment to the Constitution of the United States over certain powers, serving notice to the

pertinent to Wyoming's Act, Alaska, Arizona, Idaho, Montana, South Dakota, Tennessee, and Utah have also enacted laws declaring firearms manufactured and retained within their respective state borders exempt from federal power.[205] All but one of these states rely on assertions of Tenth Amendment authority to invalidate federal intrastate firearms regulation.[206] These states undoubtedly would find the historical arguments that the framers intended the Tenth Amendment to be a strong limitation on federal power compelling for their own political confrontations.[207]

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federal government to cease and desist certain mandates, and providing that certain federal legislation be prohibited or repealed."); S. Con. Res. 3, 2010 Gen. Sess. (Utah 2010) ("[T]he Legislature of the state of Utah, the Governor concurring therein, acknowledge and reaffirm residuary and inviolable sovereignty of the state of Utah under the Tenth Amendment to the Constitution of the United States over all powers not otherwise enumerated and granted to the federal government by the Constitution of the United States."); H.J. Res. 2, 60th Leg., 2010 Budget Sess. (Wyo. 2010) ("A Joint Resolution demanding Congress cease and desist from enacting mandates that are beyond the scope of the enumerated powers granted to Congress by the Constitution of the United States.").

[205] Alaska Firearms Freedom Act, ALASKA STAT. § 44.99.500 (2010) (declaring certain firearms manufactured and remaining in Alaska not subject to federal regulation); ARIZ. REV. STAT. ANN. § 13-3114 (2010) (declaring certain firearms manufactured and remaining in Arizona exempt from federal regulation); Idaho Firearms Freedom Act, IDAHO CODE ANN. § 18-3315A (2010) (prohibiting federal regulation of firearms manufactured and remaining within the borders of Idaho); MONT. CODE ANN. §§ 30-20-101 to -106 (2009) (declaring certain firearms manufactured and remaining in the borders of Montana exempt from federal firearms regulation); S.D. CODIFIED LAWS §§ 37-35-1 to -5 (2010) (declaring certain firearms manufactured and kept within the borders of South Dakota not subject to federal firearms regulation); Tennessee Firearms Freedom Act, TENN. CODE ANN. §§ 4-54-101 to -106 (2010) (providing that certain firearms manufactured and kept exclusively within Tennessee shall be exempt from federal firearms regulation); Utah State-made Firearms Protection Act, UTAH CODE ANN. §§ 53-5b-101 to -202 (2010) (declaring federal regulation inapplicable to firearms manufactured and remaining in Utah).

[206] Alaska Firearms Freedom Act, ch. 23, § 1(1), 2010-23 Alaska Adv. Legis. Serv. 1, 1 (LexisNexis) (citing the Tenth Amendment guarantee of reservation of powers to the states as a matter of compact between Alaska and the United States); H.B. 2307, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (citing the Tenth Amendment guarantee of reservation of powers to the states as a matter of compact between Arizona and the United States); 2010 Idaho Sess. Laws 627, 627 (citing the Tenth Amendment guarantee of reservation of powers to the states as a matter of compact between Idaho and the United States); MONT. CODE ANN. § 30-20-102(1) (relying on the Tenth Amendment guarantee of reservation of powers to the states as a matter of compact between Montana and the United States); TENN. CODE ANN. § 4-54-102(1) (relying on the Tenth Amendment guarantee of reservation of powers to the states as a matter of compact between Tennessee and the United States); UTAH CODE ANN. § 53-5b-102(1) (instructing courts to consider Tenth Amendment guarantees when interpreting the State-made Firearms Protection Act). South Dakota did not expressly call upon constitutional authority in passing its firearms freedom act. *See* S.D. CODIFIED LAWS §§ 37-35-1 to -5; S.B. 89, 85th Leg., 2010 Sess. (S.D. 2010).

[207] *See* THE FEDERALIST NO. 45 (James Madison) ("The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former."); 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, 545 (1954) (asserting American federalism puts the burden of persuasion on proponents, not the opponents, of national action).

Furthermore, states have forged ahead in efforts to nullify or interpose against other federal law, even without a clear historical argument for their sovereignty under the Tenth Amendment.[208] Fourteen states since 1996 have passed laws allowing for the use and sale of medical marijuana in direct opposition to the federal Controlled Substances Act.[209] Thirteen years after California started the medical marijuana movement, the Department of Justice issued a memorandum directing United States Attorneys not to expend resources on prosecuting marijuana cases in states that had decriminalized the drug for medical use.[210] In these cases, no state legislated a method to protect its citizens from prosecution under—or prescribed active state-level resistance to—federal laws.[211] Instead, it can be said the states passively interposed between the federal government and their citizens simply by legislating law that conflicted with a federal statute.[212] In a way, these acts of legislative defiance appear to have been just enough to encourage citizens to defy the federal government themselves.[213] When a sufficient number

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[208] WOODS, *supra* note 31, at 1–19 (surveying the increase of nullification movements among the states over the past fifteen years).

[209] *Compare* Controlled Substances Act of 1970, 21 U.S.C. §§ 801–971 (2006), *with* ALASKA STAT. § 11.71.090 (providing an affirmative defense for the medicinal use of marijuana so long as the defendant is properly enrolled in a state patient registry), Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (2009) (removing criminal penalties on the use, possession, and cultivation of medical marijuana), COLO. CONST. art. XVIII, § 14 (amended 2000) (eliminating criminal penalties on the use, possession, and cultivation of medical marijuana), Medical Use of Marijuana Act, HAW. REV. STAT. §§ 329-121 to -128 (2009) (repealing criminal penalties on the use, possession, and cultivation of medical marijuana), Maine Medical Marijuana Act, ME. REV. STAT. ANN. tit. 22, §§ 2421–2430-A (2009) (removing criminal penalties on the use, possession, and cultivation of medical marijuana), MICH. CONST. art. 1, § 27 (amended 2008), Montana Medical Marijuana Act, MONT. CODE ANN. §§ 50-46-201 to -210 (2009), NEV. CONST. art 4, § 38 (amended 2000), New Jersey Compassionate Use Medical Marijuana Act, N.J. STAT. ANN. §§ 24:6I-1 to -16 (2010), Lynn and Eric Compassionate Use Act, N.M. STAT. §§ 26-2B-1 to -7 (2010) (allowing the "beneficial use of medical cannabis"), Oregon Medical Marijuana Act, OR. REV. STAT. §§ 475.300–.346 (2009), Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, R.I. GEN. L. §§ 21-28.6-1 to -11 (2009), VT. STAT. ANN. tit. 18, §§ 4472–4474d (2009), *and* WASH. REV. CODE. §§ 69.51A.005–.902 (2010).

[210] Memorandum for Selected United States Attorneys from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Justice (Oct. 19, 2009), *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf [hereinafter Memorandum from David W. Ogden] (directing the attorneys not to prosecute "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana").

[211] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11362.5 (removing criminal penalties on the use, possession, and cultivation of medical marijuana); COLO. CONST. art. XVIII, § 14 (eliminating criminal penalties on the use, possession, and cultivation of medical marijuana); WASH. REV. CODE §§ 69.51A.005–.902.

[212] *See* sources cited *supra* note 209.

[213] *See* Gonzales v. Raich, 545 U.S. 1, 29 (2005) (holding federal drug law valid despite the respondent's defense that state law allowed growth and use of marijuana); *see also* Hoke, *supra* note 145, at 695–96, 713 (conceiving of states as the proper vehicles of citizen participation with respect to federal policy and criticizing orthodox theories of federalism for attenuating citizen

of states over a decade and a half began to act in a manner contrary to federal law, the Justice Department gave up enforcement.[214]

In 2005, the federal government mandated significant security changes to official identification cards, including state driver licenses, by passing the REAL ID Act of 2005.[215] REAL ID required substantial action by the states, including the collection of significant amounts of private data from citizens.[216] Because of this intrusive mandate, many states have refused to participate in REAL ID.[217] It only took four years from the advent of REAL ID for sixteen states to expressly interpose themselves between their citizens and the federal government on this issue.[218] Instead of merely legalizing certain citizen behavior under state law, the states which oppose REAL ID have proactively prohibited their officials from complying with the federal mandate.[219] The federal government delayed the

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participation at the federal level); *cf.* TUSHNET, *supra* note 54, at 25 ("[E]fforts to bring about a gradual transformation in public views about judicial supremacy may be acceptable when able political leaders lead the public to understand that the people's vital interests are at stake.").

[214] *See* Memorandum from David W. Ogden, *supra* note 210 (directing U.S. Attorneys not to prosecute medical marijuana cases).

[215] REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005) [hereinafter REAL ID]; 6 C.F.R. §§ 37.1–.71 (2010).

[216] *See* 6 C.F.R. §§ 37.11, .51(a) (outlining the documents and data REAL ID requires states to collect from applicants and describing the general requirements for state compliance).

[217] ALASKA STAT. § 44.99.040 (2010) (prohibiting expenditure of funds to implement REAL ID); ARIZ. REV. STAT. ANN. § 28-336 (2010) ("This State shall not participate in the implementation of the Real ID Act of 2005."); GA. CODE ANN. § 40-5-4.1 (2010) (authorizing delay of compliance with REAL ID to protect "the economic privacy or biological sanctity" of Georgia residents); IDAHO CODE ANN. § 40-322 (2010) (prohibiting participation in implementing REAL ID); H.B. 715, 2008 Reg. Sess. (La. 2008) (prohibiting state compliance with REAL ID); ME. REV. STAT. ANN. tit. 28-A, § 1411 (2009); H. File 988, 86th Leg. Sess. (Minn. 2009); MO. REV. STAT. §§ 302.171, .183 (2010); MONT. CODE ANN. § 61-5-128 (2009) (declaring non-participation in implementing REAL ID); H.B. 685, 160th Gen. Ct. (N.H. 2007); OKLA. STAT. tit. 47, § 47-6-110.3 (2010); OR. REV. STAT. §§ 801.060–.066 (2009) (prohibiting compliance with REAL ID unless the federal government meets certain requirements); S.C. CODE ANN. § 56-1-85 (2009) (prohibiting state participation in implementing REAL ID); VA. CODE ANN. § 2.2-614.2 (2010); WASH. REV. CODE §§ 41.43.390, 46.20.191, 46.20.1911 (2010); UTAH CODE ANN. § 53-5-104.5 (2010).

[218] *Compare* REAL ID, *with* sources cited *supra* note 217. Nine other states have passed resolutions opposing or urging Congress to repeal REAL ID. S. Con. Res. 16, 86th Gen. Assem., Reg. Sess. (Ark. 2007); H.J. Res. 07-1047, 66th Gen. Assem., 1st Reg. Sess. (Colo. 2007); S. Con. Res. 31, 24th Leg. (Haw. 2007); H.J. Res. 27, 95th Gen. Assem., Reg. Sess. (Ill. 2007); Leg. Res. 28, 100th Leg., 1st Sess. (Neb. 2007); Assem. J. Res. 6, 74th Reg. Sess. (Nev. 2007); S. Con. Res. 4040, 60th Leg. Assem., Reg. Sess. (N.D. 2007); S. Con. Res. 7, 83d Leg. (S.D. 2008); H.J. Res. 285, 106th Gen. Assem. (Tenn. 2009).

[219] *See, e.g.*, ARIZ. REV. STAT. ANN. § 28-336 ("This State shall not participate in the implementation of the Real ID Act of 2005."); IDAHO CODE ANN. § 40-322 (prohibiting participation in implementing REAL ID); MONT. CODE ANN. § 61-5-128 (declaring non-participation in implementing REAL ID).

implementation of REAL ID several times and did so indefinitely at the end of 2009 in apparent capitulation to state pressure.[220] Because of these states' efforts, the willpower of the federal Executive to resist them on certain issues has waned.[221] Therefore, as the movement among states to pass firearms freedom acts continues to grow, Wyoming may observe a decline in federal interest in enforcing firearms law against wholly intrastate activities.[222] Patience may be the virtue necessary for Wyoming to resolve this political dispute in its favor, since it is unknown how long the federal government may take to relent.[223]

The difference, however, between the Act and the laws states have passed to interpose in the areas of medical marijuana and identification card security is that the Act threatens to stir up a hornet's nest by authorizing the arrest of federal agents.[224] If Wyoming simply had declared federal law over intrastate firearms void, the Act would have been analogous to the expressly defiant but passive interposition of the states opposing REAL ID.[225] Wyoming's criminalization of the enforcement of conflicting federal law demands the state decide ahead of time what it will do when faced with a serious potential conflict.[226]

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[220] *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 515 (1954) (cognizing the difficulty of enforcement of affirmative federal mandates on the states). *Compare* 6 C.F.R. § 37.51(b) ("States must be in material compliance by January 1, 2010."), *with* 74 Fed. Reg. 68,477, 68,478 (Dec. 28, 2009) (staying 6 C.F.R. § 37.51(b) "from January 1, 2010 until further notice"), *and* 73 Fed. Reg. 5,271, 5,274 (Jan. 29, 2008) (setting final regulations for compliance with REAL ID but extending the deadline for compliance to May 11, 2011).

[221] *See* 74 Fed. Reg. at 68,478 (staying REAL ID "from January 1, 2010 until further notice"); Memorandum from David W. Ogden, *supra* note 210 (staying prosecution of medical marijuana cases).

[222] *See* Note, *Defending Federalism: Realizing Publius's Vision*, 122 HARV. L. REV. 745, 752 (2008) (stating the federalists intended "vertical competition" between the states and the federal government to be a substantial check against federal tyranny).

[223] *See* Pursley, *supra* note 31, at 948 (noting that Congress and the Executive, even when they believe they have the authority to preempt state action, may avoid enforcement of federal law); *cf.* Letter from Thomas Jefferson to John Taylor (June 4, 1978), *in* 18 WRITINGS OF JEFFERSON, *supra* note 102, at 205, 209 (writing about the Alien and Sedition Acts: "A little patience and we shall see the reign of witches pass over, their spells dissolve, and the people, recovering their true sight, restore their government to its true principles."); KENNETH W. ROYCE, MOLÔN LABÉ! 377 (2004) (advocating "gradualism" as the preferred method to restore individual freedoms and convince the federal government to abate enforcement). *Compare* Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (2009) (removing criminal penalties on the use, possession, and cultivation of medical marijuana), *with* Memorandum from David W. Ogden, *supra* note 210 (authorizing U.S. Attorneys not to prosecute marijuana charges pursuant to state law).

[224] WYO. STAT. ANN. § 6-8-405(b) (2010) (providing for the arrest of federal agents enforcing federal firearms laws upon intrastate activity in Wyoming).

[225] *Compare id.* §§ 6-8-401 to -406, *with, e.g.*, MONT. CODE ANN. § 61-5-128 (2009) (declaring non-participation in implementing REAL ID), *and* S.C. CODE ANN. § 56-1-85 (2009) (prohibiting state participation in implementing REAL ID).

[226] *See* WYO. STAT. ANN. § 6-8-405(b) (providing for the arrest of federal agents enforcing federal firearms laws upon intrastate activity in Wyoming).

Following the current jurisprudence of federal supremacy, the United States District Court of Wyoming is not likely to forebear the arrest of federal agents acting in accordance with existing federal law.[227] Absent a cataclysmic shift by the Supreme Court revoking the broad implied power of Congress, the District Court is likely to issue a writ of habeas corpus to inquire why the agents have been imprisoned.[228] Assuming the court orders the release of the agents, Wyoming must decide in advance whether it will honor the court's writ and release the imprisoned federal agents.[229] If it does not immediately release the prisoners, Wyoming should also determine in advance what it will do when federal marshals show up to demand custody of the prisoners or to arrest Wyoming state officials for contempt of federal court.[230]

If Wyoming were to singularly attempt this course of action, it is impossible to predict the outcome.[231] On the other hand, Wyoming could employ its enforcement mechanisms selectively.[232] Instead of escalating to an unknowable

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[227] *See* United States v. Lopez, 514 U.S. 549 (1995) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824)) ("The commerce power . . . 'may be exercised to its utmost extent, and acknowledges no limitations.'"); *see also* Karen Cordry, *Sovereign Immunity—Time to Come in from the Cold!*, AM. BANKR. INST. J., Sept. 1994, at 19, 34 (asserting federal courts retain a strong contempt power to protect federal supremacy).

[228] *In re* Neagle, 135 U.S. 1, 40–41, 70–72 (1890) (holding any federal court may issue a writ of habeas corpus to inquire about the imprisonment of persons for acts "done or omitted in pursuance of a law of the United States" and requiring the discharge of such federal agents from custody).

[229] *See* Paulsen, *supra* note 201, at 686–89 (arguing state officials have a duty to resist usurpations of power by the federal government, even when sanctioned by the judiciary). *But see* 18 U.S.C. §§ 401(3), 402 (2006) (giving federal courts the power to hold persons in contempt for disobeying their orders and defining criminal contempt to be willful disobedience). Of course, if the district court does not order the release of federal agents, there will be no conflict with the federal judiciary. *Id.* This is highly unlikely in light of *Neagle*, which compels the release of federal agents imprisoned for executing federal law. 135 U.S. at 41.

[230] *See* 37 U.S.C. § 566(a) (providing that the primary role of the United States Marshals Service is to "obey, execute, and enforce all orders of the United States District Courts . . . as provided by law"); Cooper v. Aaron, 358 U.S. 1, 18–19 (1958) (dismissing the notion that a state governor has "power to nullify a federal court order"); Cordry, *supra* note 227, at 34 (asserting federal courts retain a strong contempt power to protect federal supremacy).

[231] *See* WOODS, *supra* note 31, at 18–19 (acknowledging criticism that nullification leads to disorderly government). As an ancient strategist stated,

> These things cannot be clearly explained in words. You must research what is written here. In these three ways of forestalling, you must judge the situation. This does not mean that you always attack first; but if the enemy attacks first you can lead him around. In strategy, you have effectively won when you forestall the enemy, so you must train well to attain this.

MIYAMOTO MUSASHI, A BOOK OF FIVE RINGS 72 (Victor Harris trans., The Overlook Press 1974) (1645).

[232] Jahnke v. State, 692 P.2d 911, 929 (Wyo. 1984) ("Any decision to initiate criminal proceedings is vested in the prosecuting attorney, and the decision is discretionary.").

resolution, the state should use the enforcement mechanisms sparingly to create precedent over time.[233] While due process after a federal court's order of release may foreclose convictions of federal agents charged with violating the Act, Wyoming still could arrest federal agents to impress upon the federal government how serious it is about its sovereignty.[234]

It may be more effective at first, however, for Wyoming to let its enforcement provisions lie as a model for other states to adopt just as Wyoming followed the lead of Montana in adopting the Act.[235] If Wyoming can convince its sister states to amend their acts to include similar enforcement provisions, or convince new states to enact firearms freedom acts, the states in aggregate will become more potent in their resistance to federal law.[236] Even ten or fifteen states threatening to arrest Bureau of Alcohol, Tobacco, Firearms, and Explosives agents for enforcing federal law against intrastate uses of firearms should be enough to give the Department of Justice pause.[237] If Wyoming is longsuffering enough and not too quick to escalate with the federal government, it may effect exactly what its legislature intended by enacting the Wyoming Firearms Freedom Act.[238]

Meanwhile, Wyoming should strengthen the Act by adding further mandates and incentives.[239] For instance, Wyoming should *require* the attorney general to defend citizens against federal firearms prosecution for intrastate activity.[240] In so doing, the state would send the resolute message that it rejects federal power in this area and is willing to defend its populace—citizen by citizen if necessary.[241] To

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[233] *See id.* (holding the prosecutor's decision to charge a defendant is discretionary, meaning the Wyoming Attorney General would not always have to charge a federal agent in violation of the Act).

[234] *See* WYO. STAT. ANN. § 6-8-405(b) (2010) (authorizing the arrest of federal agents for violation of the Wyoming Firearms Freedom Act); Joseph R. Stromberg, *License to Kill*, AM. CONSERVATIVE, Sep. 2009, at 35, 36 (cognizing federal agents possess prosecutorial immunity under *Neagle* but arguing the immunity is overbroad).

[235] *Compare* MONT. CODE ANN. §§ 30-20-101 to -106 (2009) (declaring certain firearms manufactured and remaining in the borders of Montana exempt from federal firearms regulation), *with* WYO. STAT. ANN. §§ 6-8-401 to -406.

[236] *See* 74 Fed. Reg. 68,477, 68,478 (Dec. 28, 2009) (staying REAL ID "from January 1, 2010 until further notice"); Memorandum from David W. Ogden, *supra* note 210 (directing U.S. Attorneys not to prosecute medical marijuana cases).

[237] Stromberg, *supra* note 234, at 36 (noting the fear the federal government has about allowing states to arrest federal agents).

[238] HAMPDEN, THE GENUINE BOOK OF NULLIFICATION 52 (1831) (advocating a peaceful and systematic use of nullification as a method of countering federal law).

[239] *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1498–99 (1987) (cognizing state adoption of popular policies and incentives as a primary way by which local governments "make things better for most people").

[240] *See* WYO. STAT. ANN. § 6-8-405(c) (authorizing, but not requiring, the Wyoming Attorney General to defend Wyoming citizens in federal firearms prosecutions).

[241] *See id.* (authorizing the Wyoming Attorney General to defend Wyoming citizens in federal firearms prosecutions).

promote intrastate firearms manufacture and sales, Wyoming should also consider offering tax incentives to firearms makers who contravene the federal law but abide by the Act.[242] The state should contemplate abolishing the retail sales tax for dealers of intrastate firearms not registered with the federal government.[243] Wyoming must act strategically and creatively to free its citizens from federal interference in intrastate firearms manufacture and sales.[244]

While the language of the Act appears to nullify federal law outright, a more subtle approach of interposition may, as has occurred with medical marijuana and REAL ID, effect the change Wyoming desires.[245] Wyoming must carefully anticipate how its political actions are likely to play out, based on its officials' personal experience and expertise in federal-state relations. Disagreement between sovereigns is inherently political.[246] In a political contest of wills, adjudicatory finality does not exist: no outcome is certain.[247] Therefore, most of all, Wyoming must be circumspect, deliberate, and sure when it acts.[248] In any case, if State officials truly believe federal law was not enacted "in pursuance" of constitutional

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[242] *See* WYO. STAT. ANN. § 39-15-105 (providing numerous exemptions to the collection of retail sales tax); Peter D. Enrich, *Saving States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 382–87 (1996) (describing the longstanding and increasing practice of states to offer tax breaks to encourage particular areas of development).

[243] Kirk J. Stark & Daniel J. Wilson, *What Do We Know About the* Interstate *Economic Effects of State Tax Incentives?*, 4 GEO. J.L. & PUB. POL'Y 133, 140 (2006) (cognizing the use of "selective reduction[s] in sales taxes" by states to promote business operations).

[244] *See* THE FEDERALIST NO. 51 (James Madison) (arguing the citizens of the United States would retain more freedom, because "[t]he different governments will control *each other*" (emphasis added)); *see also* Calabresi, *supra* note 187, at 776 (arguing the "jurisdictional monopoly" of the federal government leads to the abrogation of "fundamental individual liberties").

[245] HAMPDEN, *supra* note 238, at 52 (advocating peaceful and systematic resistance to federal law); *see, e.g.*, 74 Fed. Reg. 68,477, 68,478 (Dec. 28, 2009) (staying REAL ID "from January 1, 2010 until further notice"); Memorandum from David W. Ogden, *supra* note 210 (ordering U.S. Attorneys not to prosecute medical marijuana cases).

[246] Nicholas Aroney, *Formation, Representation and Amendment in Federal Constitutions*, 54 AM. J. COMP. L. 277, 315 (2006) (discussing the political nature of sovereignty); *see* Whittington, *supra* note 6, at 1 (stating resolution of the tension in federalism is a political process).

[247] Whittington, *supra* note 6, at 1–2 (asserting "the core ambiguity of federalism cannot be dispelled through traditional legal analysis").

[248] *See* James Madison, *Virginia General Assembly Report of 1800*, *reprinted in* WOODS, *supra* note 31, at 171, 177 (describing the prerequisites for lawful interposition). In defense of the Virginia Resolutions, Madison states,

> The resolution has accordingly guarded against any misapprehension of its object, by expressly requiring for such an interposition, "the case of a *deliberate, palpable,* and *dangerous* breach of the Constitution, by the exercise of *powers not granted* by it." It must be a case, not of a light and transient nature, but of a nature dangerous to the great purposes for which the Constitution was established.

Id. (quoting The Virginia Resolutions, *supra* note 50, at 528).

authority, their own duties to uphold and defend the Constitution of the United States and the Wyoming Constitution require decisive and honest action as well as wisdom.[249]

IV. CONCLUSION

Although the Wyoming Firearms Freedom Act conflicts with existing federal law, the Act is a constitutionally valid exercise of state power.[250] The Act is a manifestation of the doctrines of interposition and nullification espoused by James Madison and Thomas Jefferson in the early history of the United States.[251] The Act is also a clear exercise of state sovereignty that comports with the historical development of the Tenth Amendment.[252] Furthermore, if Wyoming finds itself haled into federal court because it has enforced the provisions of the Act, the state should employ the framework of *United States v. Lopez* to argue that existing federal law as applied to intrastate firearms is unconstitutional.[253] Wyoming should also assert the constitutionality of the Act pursuant to the historical meaning of the Tenth Amendment, by which Madison and the other framers intended to restrict federal authority to expressly enumerated powers.[254]

Nevertheless, Wyoming faces a significant jurisprudential obstacle.[255] The federal judiciary has held an expansive view of federal power since 1819 and the Supreme Court is unlikely to overturn the broad interpretation of federal power under *McCulloch v. Maryland*.[256] Thus, Wyoming ought to use the historical argument that the Tenth Amendment reserved substantial sovereignty to the states as justification for its actions in the political process.[257] To that end, Wyoming

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[249] WYO. CONST. of 1889, art. VI, § 20 (2008) ("'I do solemnly swear (or affirm) that I will support, obey and defend the constitution of the United States, and the constitution of the state of Wyoming.'"); *accord* WYO. STAT. ANN. § 97-6-20 (2010); *see* the Supremacy Clause, U.S. CONST., art. VI, § 1, cl. 2 (making supreme "[t]his Constitution, and the Laws of the United States which shall be made *in Pursuance thereof*" (emphasis added)); Paulsen, *supra* note 201, at 686–89 (1995) (arguing state officials' oaths to the federal Constitution require them to resist usurpations of power by the federal government); *cf.* ROYCE, *supra* note 223, at 284 ("'All this country needed was one bold example to remind them of the freedom they started out with in the early 18th century. Wyomingites will never go back to the way it was.'").

[250] *See supra* notes 18–30, 142–200 and accompanying text.

[251] *See supra* notes 31–60, 201–23 and accompanying text.

[252] *See supra* notes 61–104, 193–200 and accompanying text.

[253] *See supra* notes 142–92 and accompanying text.

[254] *See supra* notes 193–94 and accompanying text.

[255] *See supra* note 195 and accompanying text.

[256] *See supra* notes 196–200 and accompanying text.

[257] *See supra* notes 201–23 and accompanying text.

should not hesitate to use the Act to interpose between Wyoming citizens and the federal government.[258] Wyoming's bold statutory threat of criminal liability to federal agents indicates a seriousness of purpose unmatched by its sister states.[259] Accordingly, the Cowboy State must act with firm resolve and with wisdom.[260]

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[258] *See supra* notes 224–44 and accompanying text.

[259] *See supra* notes 224–26 and accompanying text.

[260] *See supra* notes 245–49 and accompanying text.