

# ARMING STATES' RIGHTS: FEDERALISM, PRIVATE LAWMAKERS, AND THE BATTERING RAM STRATEGY

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*This Essay provides an initial account of a strategic apparatus crafted by private lawmakers to influence federal policy. The “battering ram strategy” employs the legal powers of states and localities to challenge and weaken federal laws. Recently, a specific weapon, the “Commerce Battering Ram,” has developed to challenge current Commerce Clause jurisprudence, using the heft of the Tenth Amendment and numerous state legislatures to propel its argument forward. The weapon’s strength is augmented by the ability of private lawmakers, facilitated by Citizens United, to stack state legislatures with senators and representatives who are sympathetic to their goals. The Essay documents the core of a particular Commerce Battering Ram, the Firearms Freedom Act movement, which has proliferated and armed other Tenth Amendment platforms with a similar formula for challenging federal laws. This formula was drafted and promoted by a private*

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*citizen with a specific gun rights agenda. State legislators have enacted and cloned the formula, and its model has been adopted to challenge federal law in other regulatory domains, most notably healthcare reform. The compounding effect of these Commerce Battering Rams has not been studied. However, if their proponents—largely members of the Tea Party movement—are successful in their attempt to break through the walls of federal law, the result may have an enormous unintended impact on the American people.*

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## INTRODUCTION

Federal regulatory choices—whether they are decisions to enact particular laws and regulatory measures<sup>1</sup> or decisions not to regulate<sup>2</sup>—almost inevitably

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1. The critique of regulation is rich and extensive. For a brief commentary that addresses ideological opponents of regulation, see Kenneth K. Arrow, *Two Cheers for Government Regulation*, HARPER'S MAG., Mar. 1981, at 18 (borrowing from Jakob Burckhardt's reference to the "terrible simplifiers" to describe the regulatory agenda of Milton Friedman, Ronald Reagan, and "other critics of government intervention").

encounter objections from one interest group or another. Federal policies in controversial areas—such as the environment, financial markets, firearms, healthcare, immigration, and taxes—are particularly prone to criticism and attack.

Opponents of federal policies have designed and implemented myriad strategies for promoting particular agendas to influence federal policies. The most familiar and studied set of strategies is the manner in which interest groups directly interact with the federal government in order to protect and promote their own well-being.<sup>3</sup> Scholars have also identified and documented how states and local governments engage in legislative protests and related strategies to influence unpopular federal policies.<sup>4</sup> Jessica Bulman-Pozen and Heather Gerken coined the term “uncooperative federalism” to refer to this set of strategies that uses states’ regulatory powers to challenge the federal government.<sup>5</sup>

This Essay provides an initial account of a strategic weapon crafted by private lawmakers to influence federal policies using the legal arsenal available to state and local governments. We call this weapon the “battering ram strategy.” The battering ram strategy is conceptualized by a private lawmaker to harness states and localities in order to challenge federal policies. The states and localities carry and propel the ram forward, hammering the federal walls according to the target and general plan provided by the private lawmaker. The force of the ram increases with the number of states and localities joining the campaign. If the infiltration

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2. For example, in *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007), twelve states, four localities, and several environmental organizations challenged the Environmental Protection Agency’s (“E.P.A.”) reluctance to regulate greenhouse gas emissions from motor vehicles and brought suit against the agency asking to require the E.P.A. to exercise its authority under the Clean Air Act. E.P.A.’s position was that it had no authority to regulate greenhouse gas emissions. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922-02, 52925 (Sept. 8, 2003). For a broader framework of this point, see Kirsten H. Engel & Barak Y. Orbach, *Micro-Motives for State and Local Climate Change Initiatives*, 2 HARV. L. & POL’Y REV. 119 (2008).

3. This point of direct influence applies to interactions between interest groups and government at any level, not only the federal government. See generally MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955); KENNETH G. CRAWFORD, *THE PRESSURE BOYS: THE INSIDE STORY OF LOBBYING IN AMERICA* (1939); HARMON ZEIGLER, *INTEREST GROUPS IN AMERICAN SOCIETY* (1964); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371 (1983); Gary S. Becker, *Public Policies, Pressure Groups, and Dead Weight Costs*, 28 J. PUB. ECON. 329 (1985); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J. L. & ECON. 211 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGM’T SCI. 335 (1974); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGM’T SCI. 3 (1971).

4. See, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113 (2007); Gabriel J. Chin & Marc L. Miller, *Cracked Mirror: SB1070 and Other State Regulation of Immigration Through Criminal Law* (Ariz. Legal Studies, Discussion Paper No. 10-25, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1648685](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648685); Engel & Orbach, *supra* note 2; see also Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147 (1992).

5. Bulman-Pozen & Gerken, *supra* note 4, at 1259.

succeeds, the private lawmaker may influence federal policies. Put simply, the battering ram strategy is an apparatus that a private lawmaker devises to break open the fortified walls of federal laws utilizing the legal powers of states and localities.

A specific type of ram this Essay introduces is the “Commerce Battering Ram”: a political–legal apparatus that private lawmakers design and employ to challenge current Commerce Clause jurisprudence. The Commerce Battering Ram is a multipurpose platform that can be employed to influence various federal policies. Using the Tenth Amendment as its core log, the Commerce Battering Ram mobilizes states to challenge the federal government. The ram’s outer body is composed of a combination of legislation and litigation which uses a specific instrument, such as firearms or healthcare reform, as wheels on which to push the ram forward. These wheels typically relate to a private lawmaker’s pet cause. Though the private lawmaker’s actions may be primarily motivated by this cause, if a Commerce Battering Ram ever breaks open the fortification of our constitutional law, many federal policies—not just the ones related to the private lawmaker’s pet cause—will be subject to change.

The Commerce Battering Ram is not a hypothetical political–legal apparatus. This Essay documents the organization of the Firearms Freedom Act movement which, during the term of the 111th Congress, employed the Commerce Battering Ram to harness states and challenge the scope of the federal government’s Commerce Clause authority. The Firearms Freedom Act movement has inspired similar movements, including the healthcare reform nullification movement, to employ the Commerce Battering Ram apparatus. The Tea Party movement appears to endorse this apparatus, or at least to embrace its ideology.

A Montanan named Gary Marbut conceived and has been leading and mobilizing the Firearms Freedom Act movement. He frames his Battering Ram as a states’ rights movement that uses guns as a vehicle to challenge the federal government’s regulatory powers.<sup>6</sup> For more than a quarter of a century, Marbut has been successfully acting as a private lawmaker in Montana to promote one issue—firearms.<sup>7</sup> Marbut has ideological, philosophical, and legal objections to the present scope of the Commerce Clause,<sup>8</sup> but despite any narrative to the contrary, influencing federal firearms policies appears to be his primary motivation. The active players in states carrying Marbut’s Commerce Battering Ram have a variety of motivations beyond influencing gun control policies; as this essay documents, they are aware of and value the multipurpose function of the ram.

In January 2010, as Gary Marbut started to lift his Commerce Battering Ram, the Supreme Court delivered its decision in *Citizens United v. Federal Election Commission*,<sup>9</sup> striking down several provisions of the 2002 Bipartisan Campaign Reform Act, which had restricted certain forms of corporate funding of political campaigns. *Citizens United*, this Essay argues, boosts the power of battering rams.

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6. See *infra* Part II.B.

7. See *infra* Part II.B.

8. See *infra* Part II.B.

9. 130 S.Ct. 876 (2010).

Part I of this Essay explains how private lawmakers may take advantage of uncooperative federalism to launch a battering ram strategy. For this purpose, Part I briefly introduces the role of private lawmakers in society and the meaning of uncooperative federalism. Part II studies the rise of the Firearms Freedom Act movement and the work of the private lawmaker, Gary Marbut, who spearheaded this movement. Part III details the Firearms Freedom Act movement's legal position, discussing significant procedural and constitutional hurdles faced by Firearms Freedom Act supporters in the courtroom. Part IV explains how the Firearms Freedom Act movement has contributed to other Commerce Battering Rams. Part IV also discusses the significance of the rise of the Tea Party movement to the future impact of battering rams and several implications related to the healthcare reform nullification movement.

## I. PRIVATE LAWMAKING IN UNCOOPERATIVE FEDERALISM

### A. *Private Lawmaking*

In any democratic society, elected officials, agencies, courts, and other public organs originate and design laws and legal rules. This public lawmaking process often requires input from interested parties and tends to be subject to the influence of interest groups. Alongside traditional public legislating, private lawmaking has, over the last century, become pervasive in American law.<sup>10</sup> Most prominently, the American Law Institute ("ALI") and the National Conference of Commissioners on Uniform State Laws ("NCCUSL") have emerged as particularly influential private lawmaking groups.<sup>11</sup>

ALI is a private non-profit organization that publishes Restatements of the Law and model statutes that have been heavily relied upon by both courts and legislatures. The Institute comprises lawyers, judges, and law professors chosen by the organization. NCCUSL is an unincorporated non-profit that drafts uniform statutes in areas of the law that it determines would benefit from uniformity amongst the states. NCCUSL then proposes these laws to state legislatures, many of which enact the laws with little or no alteration. NCCUSL utilizes uniform law

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10. See generally Stewart Macaulay, *Private Government*, in LAW AND THE SOCIAL SCIENCES 445–518 (Leon Lipson & Stanton Wheeler eds., 1986); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995); David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371 (2003).

11. See, e.g., Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Law Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993); Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131 (1996); Edward L. Rubin, *The Code, the Consumer, and the Institutional Structure of the Common Law*, 75 WASH. U. L. Q. 11 (1997); Schwartz & Scott, *supra* note 10; Alan Schwartz, *The Still Questionable Role of Private Legislatures*, 62 LA. L. REV. 1147 (2002); Snyder, *supra* note 10; see also WALTER P. ARMSTRONG, A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1991); Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798 (1958); Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 GEO. WASH. L. REV. 1212 (1993); Jody S. Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 J. LEGAL STUD. 377 (1997).

commissioners, who are legislators, practicing attorneys, judges, and law professors. NCCUSL requires its commissioners to be members of the bar but otherwise leaves the appointment of commissioners to state officials. During the past century, both ALI and NCCUSL have had an enormous impact on American law.<sup>12</sup> Although ALI and NCCUSL are arguably the most prominent, there are many other private organizations that actively influence American law.<sup>13</sup>

Gary Marbut, the driving force behind the Firearms Freedom Act movement, has been successfully acting as a private lawmaker for over 25 years. He is not alone. Kris Kobach of Kansas developed the “mirror image” theory that proposes that states can enact and enforce criminal immigration laws based on federal statutes.<sup>14</sup> This theory has influenced a substantial number of state legislatures.<sup>15</sup> Matthew Pawa of Massachusetts is credited with pioneering the use of common law tort doctrines, such as public nuisance, in global warming actions.<sup>16</sup> In the course of history, there have been many other individuals, known and forgotten, who have acted as private lawmakers.<sup>17</sup>

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12. ALI was established in 1923. For more on the impact of ALI, see John P. Frank, *American Law Institute, 1923-1998*, 26 HOFSTRA L. REV. 615 (1998). For the impact of NCCUSL, see ARMSTRONG, *supra* note 11.

13. See Macaulay, *supra* note 10; Snyder, *supra* note 10.

14. Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 475–77 (2008). For analysis of Kobach’s theory, see Chin & Miller, *supra* note 4.

15. Kobach, *supra* note 14, at 459–83; see also Gabriel J. Chin, Carissa Byrnes Hessick, Toni Massaro & Marc L. Miller, *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. (forthcoming 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1617440](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1617440).

16. See, e.g., Matthew F. Pawa & Benjamin A. Krass, *Global Warming As a Public Nuisance: Connecticut v. American Electric Power*, 16 FORDHAM ENVTL. L. REV. 407 (2005); Matthew F. Pawa, *Global Warming: The Ultimate Public Nuisance*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10,230 (2009); Matthew F. Pawa, Keynote Lecture at the American Bar Association’s 38th Annual Conference on Environmental Law, *This Town Ain’t Big Enough for the Two of Us: Interstate Pollution and Federalism Under Milwaukee I and Milwaukee II* (March 12-15, 2009) (on file with Authors); see also James L. Huffman, *Beware of Greens in Praise of the Common Law*, 58 CASE W. RES. L. REV. 813, 825–26 (2008); Thomas W. Merrill, *Global Warming As a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293 (2005).

17. For example, in July 1910, William Shaw, the General Secretary of the United Society of Christian Endeavor, led a campaign to censor the film in which Jack Johnson, the first black heavyweight champion of the world, knocked out the Great White Hope, Jim Jeffries. Shaw sent a telegram to the United States President, all state governors, and many mayors across the country calling them to ban the film. As a result, the film was censored in many states and cities across the country. See Barak Y. Orbach, *The Johnson-Jeffries Fight and Censorship of Black Supremacy*, 5 N.Y.U. J. L. & LIBERTY 270, 295–316 (2010). Other scholars have pointed out that, in many ways, private attorneys and particularly class action lawyers influence the law and engage in private lawmaking. See, e.g., Bruce H. Kobayashi & Larry E. Ribstein, *Class Action Lawyers as Lawmakers*, 46 ARIZ. L. REV. 733 (2004); Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299 (2004); Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807 (1994).

While both public and private lawmakers function as the originators of legal rules, they differ in fundamental ways. For example, public lawmakers are held publically accountable and are subject to many restrictions related to the sources of funds that they may receive or deploy. By contrast, private lawmakers are not accountable to the public, can act entirely in the shadows, and are not subject to any direct funding restrictions.

The Bipartisan Campaign Reform Act of 2002 (“McCain-Feingold Act”)<sup>18</sup> prohibited corporations and unions from using funds for speech that expressly advocates the election or defeat of a candidate for federal office.<sup>19</sup> Among other things, this ban restricted the ability of private lawmakers to use corporate campaign funding as a means of stacking legislatures with public lawmakers willing to promote the private lawmakers’ agendas. In *Citizens United*,<sup>20</sup> the Supreme Court struck down this restriction and, in doing so, indirectly—and probably unconsciously—empowered private lawmakers.<sup>21</sup> After *Citizens United*, private lawmakers have at their disposal the ability to use corporate funds as a means of promoting or attacking public lawmakers.

Despite concerns regarding expertise, accountability, and the influence of private interests, state legislatures frequently endorse bills drafted and proposed by private lawmakers. As a standard practice, they endorse “uniform codes” and clone bills written by private citizens. They do so even when the governing ideology of the bill being adopted pertains to state sovereignty, which gives rise to an ironic conflict. One of the assumed advantages of federalism is that it encourages policy innovation by permitting states to legislate independently and act as laboratories.<sup>22</sup>

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18. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

19. 2 U.S.C. § 441b (2006), *invalidated by* *Citizens United v. Fed. Election Comm’n*, 130 S.Ct. 876 (2010).

20. 130 S.Ct. 876.

21. The decision was divided five-to-four. Writing for the majority, Justice Kennedy expressed the position that “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content.” *Id.* at 899. By contrast, Justice Stevens, writing for the dissent, stated:

The basic premise underlying the Court’s ruling is . . . the proposition that the First Amendment bars regulatory distinctions based on a speaker’s identity, including its “identity” as a corporation. . . .

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. . . . The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process.

*Id.* at 930.

22. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); James A. Gardner, *The “States-As-Laboratories” Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475 (1996); see also ANDREW KARCH, *DEMOCRATIC LABORATORIES: POLICY DIFFUSION AMONG THE AMERICAN STATES* (2007); DAVID C. NICE, *POLICY INNOVATION IN STATE GOVERNMENT*

This advantage disappears when state legislatures adopt uniform codes and clone bills written by private lawmakers. This inconsistency may, in some circumstances, imply that state legislatures are affected by both the reach of private interests and hostility toward the federal government.

Private lawmakers deploy a variety of strategies. One strategy, employed by Gary Marbut and explored in this Essay, is the battering ram strategy of using states' rights as a platform with which to attack federal policies and promote a particular cause. This strategy is *not* the strategy of choice of all private lawmakers; many private lawmakers act in cooperation with the federal government and in areas where the federal government does not operate. Because private lawmaking is still a relatively unstudied area, the exact characteristics and distribution of private lawmaking in the United States are not well known.

### ***B. Uncooperative Federalism***

Federalism scholarship has examined a variety of measures adopted by states and localities in response to unpopular federal policies.<sup>23</sup> States and localities, moving in coalition or unilaterally, may attack federal laws by enacting state declaratory laws or laws that directly conflict with and challenge unpopular federal laws. They also may litigate unpopular federal regulatory choices.

The strategy of uncooperative federalism is not owned by any particular side of the political spectrum. States and localities deploy this strategy for causes that may be regarded as liberal, conservative, or politically neutral. For example, amidst concerns regarding racial profiling, invasions of privacy, unreasonable searches, and infringement on free speech, several states and localities adopted resolutions directing their officials not to cooperate with particular requirements of the USA PATRIOT Act signed into law by President Bush on October 26, 2001.<sup>24</sup>

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(1994); Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. POL. SCI. REV. 1174 (1973); Lawrence J. Grossback et al., *Ideology and Learning in Policy Diffusion*, 32 AM. POL. RES. 521 (2004); Michael Mintrom, *Policy Entrepreneurs and the Diffusion of Innovations*, 41 AM. J. POL. SCI. 738 (1997); Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980); Jack L. Walker, Jr., *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880 (1969). A related concept in policy innovation is the Tiebout model of local governments that offers a general framework for federalism and choice. See generally THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES (William A. Fischel ed., 2006); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

23. See, e.g., Bulman-Pozen & Gerken, *supra* note 4; Diller, *supra* note 4; Engel & Orbach, *supra* note 2.

24. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). For a brief overview of the USA PATRIOT Act, see Michael T. McCarthy, *USA PATRIOT Act*, 39 HARV. J. LEGIS. 435 (2002); see also Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1253-61 (2004).



Similarly, after President Bush signed the REAL ID Act of 2005 into law,<sup>25</sup> at least thirteen states passed laws or resolutions prohibiting their officials from complying with the Act or declaring that the state would make no appropriation to further the implementation of the Act.<sup>26</sup> In *Massachusetts v. E.P.A.*,<sup>27</sup> twelve states, several localities, and numerous environmental organizations brought suit against the Environmental Protection Agency in an effort to force the agency to regulate greenhouse gas emissions from motor vehicles in compliance with the Clean Air Act.<sup>28</sup> In a five-to-four decision, the Supreme Court held that the E.P.A. is authorized to regulate greenhouse gas emissions, rejecting the agency's 2003 determination that it had no such authority.<sup>29</sup>

### C. *The Battering Ram Strategy*

Private lawmakers are integrated in the process of public lawmaking, with public lawmakers frequently consulting with private citizens and groups and receiving proposals for laws from them. The nature of the legislative and regulatory processes often makes it difficult to determine the identity of the person or group that conceived of and drafted a particular law. This is particularly true when the private lawmakers who are engaged in these processes choose to operate in the shadows and shun publicity.

The battering ram strategy is a proposal for uncooperative federalism crafted by a private lawmaker. The strength of the ram corresponds to the effectiveness of its creator. For example, the private lawmaker's abilities as a lobbyist contribute to the ram's power because the force of the ram increases with the number of states (and localities, if applicable) that clone and enact the private lawmaker's proposed bill. The private lawmaker's effectiveness in several other dimensions—such as in the ability to draft a legally robust underlying proposal, create alliances among adopting states and localities, and formulate a sophisticated litigation strategy—also strengthens the ram. The organizational services provided by the private lawmaker are particularly valuable for the purposes of marketing the concept to the public and litigating against the federal government. A “uniform

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25. Pub. L. No. 109-13, 119 Stat. 231 (2005). The provisions of the REAL ID ACT were attached as a rider to the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, H.R. 1268, 109th Cong. (2005).

26. Alaska, Arizona, Colorado, Idaho, Louisiana, Maine, Michigan, Minnesota, Montana, South Carolina, Utah, and Virginia passed such laws or resolutions. ALASKA STAT. § 44.99.040 (2008 & Supp. 2010); ARIZ. REV. STAT. § 28-336 (2010); H.J.R. 1047, 66th Leg. (Colo. 2007); IDAHO CODE ANN. § 40-322 (2004 & Supp. 2010); Act No. 807 (La. 2008); 29-A ME. REV. STAT. ANN. § 1141 ; H.R. 176, 94th Leg. (Mich. 2007); H.B. 988, 86th Leg. (Minn. 2009) (signed into law on May 15, 2009); MONT. CODE ANN. § 61-5-128; CODE L. S.C. ANN. § 56-1-85; UTAH CODE ANN. § 53-3-104.5; VA CODE ANN. § 2.2-614.2.

27. 549 U.S. 497 (2007).

28. The petitioners include California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, the territory of American Samoa, Baltimore, New York City, Washington, D.C., the Center for Biological Diversity, and the Center for Food Safety. See Petition for Writ of Certiorari, *Massachusetts v. E.P.A.*, No. 05-1120 (Mar. 2, 2006), 2006 WL 558353.

29. *Massachusetts*, 549 U.S. 497. For the E.P.A.'s 2003 decision, see Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922 (Sept. 8, 2003).

code” drafted by an effective private lawmaker and adopted by multiple states to challenge the federal government thus offers significant potential organizational benefits.

The Commerce Battering Ram strategy is an elaborate political–legal apparatus of uncooperative federalism which targets current Commerce Clause jurisprudence in an effort to roll back the federal government’s role in the markets. The core log of this apparatus is the Tenth Amendment, which reserves to the states or the people all powers “not delegated to the United States by the Constitution nor prohibited by it to the states.”<sup>30</sup> The Tenth Amendment offers ideological justification for states to carry the Commerce Battering Ram.

The Commerce Battering Ram is a multipurpose tool which, if it ever succeeds, could have potentially far-reaching implications. The ram’s ultimate goal is to force a return to the Supreme Court’s pre-New Deal Commerce Clause jurisprudence. The full repercussions of wiping away the last three quarters of a century of Commerce Clause jurisprudence are difficult to fully comprehend or predict. The Supreme Court’s Commerce Clause jurisprudence has evolved in light of technological progress, developments in trade, and social transitions.<sup>31</sup> It is not solely the result of a simplistic power struggle between the federal government and the states. A return to pre-New Deal Commerce Clause jurisprudence could result in reversal of federal child labor laws,<sup>32</sup> significant implications for civil rights,<sup>33</sup> removal of federal bans on loan sharking,<sup>34</sup> elimination of the Food and Drug Administration’s (“FDA”) jurisdiction over tobacco products,<sup>35</sup> and radical transformation of the nation in almost every dimension of life and business. Considering today’s highly complex global economy and advanced technologies, conducting a study of the interrelated implications of a return to the Supreme

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30. U.S. CONST. amend. X.

31. See *United States v. Lopez*, 514 U.S. 549, 570 (1995) (Kennedy, J., concurring); see also Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003).

32. In 1916, Congress attempted to discourage child labor by prohibiting the sale in interstate commerce of products created by mines or factories employing children. Keating-Owen Child Labor Act of 1916, 39 Stat. 675 (1916). Two years later, the Supreme Court held this attempt to restrict the scope of child labor unconstitutional. *Hammer v. Dagenhart*, 247 U.S. 251 (1918). When Congress then imposed a federal tax on goods produced with child labor, the Supreme Court again struck down the effort at reform as unconstitutional. *The Child Labor Tax Case*, 259 U.S. 20 (1922). For the history of the child labor debate, see HUGH D. HINDMAN, *CHILD LABOR: AN AMERICAN HISTORY* (2002); KRISTE LINDENMEYER, *A RIGHT TO CHILDHOOD: THE U.S. CHILDREN’S BUREAU AND CHILD WELFARE, 1912–1946* (1997).

33. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that Congress acted within its power under the Commerce Clause when it banned racial discrimination in restaurants).

34. See *Perez v. United States*, 402 U.S. 146 (1971).

35. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1845 (2009) (granting FDA the power to regulate tobacco products).

Court's pre-New Deal Commerce Clause jurisprudence would be a challenging undertaking. If such a study has ever been conducted, we could not locate it.

Private lawmakers operating in the shadows without public accountability may or may not understand all of the potential consequences of launching a Commerce Battering Ram. More importantly, it is unclear whether legislators who endorse the Commerce Battering Ram proposals of private lawmakers understand the full implications of their endorsement. These unanswered questions are particularly important in the post-*Citizens United* era when private lawmakers have more funds at their disposal: funds that are dedicated to serve private interests. The Firearms Freedom Act movement illustrates these questions and concerns.

## II. THE RISE OF THE FIREARMS FREEDOM ACT MOVEMENT

### A. *The Obama Fear Effect*

In 2008, as the country was sinking into the deepest and longest recession since the Great Depression,<sup>36</sup> President George W. Bush signed into law three acts intended to reinvigorate the failing economy: the Economic Stimulus Act of 2008,<sup>37</sup> the Housing and Economic Recovery Act of 2008,<sup>38</sup> and the Emergency Economic Stabilization Act of 2008.<sup>39</sup> Explaining his endorsement of the last of these three acts, President Bush noted: "I know some Americans have concerns about this legislation, especially about the government's role and the bill's cost. As a strong supporter of free enterprise, I believe government intervention should occur only when necessary. In this situation, action is clearly necessary."<sup>40</sup>

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36. According to the Business Cycle Dating Committee of the National Bureau of Economic Research ("the Committee"), December 2007 marked the beginning of a recession. In September 2010, the Committee determined that the recession ended in June 2009, although it "did not conclude that economic conditions since that month have been favorable or that the economy has returned to operating at normal capacity." NAT'L BUREAU OF ECON. RESEARCH, ANNOUNCEMENT OF JUNE 2009 BUSINESS CYCLE TROUGH/END OF LAST RECESSION (2010). The *Associated Press Stylebook* added the term the "Great Recession" to its 2010 edition and defined it as "[t]he recession that began in December 2007 and became the longest and deepest since the Great Depression of the 1930s. It occurred after losses on subprime mortgages battered the U.S. housing market." DARRELL CHRISTIAN ET AL., ASSOCIATED PRESS 2010 STYLEBOOK AND BRIEFING ON MEDIA LAW 127 (2010).

37. Pub. L. No. 110-185, 122 Stat. 613 (2008).

38. Pub. L. No. 110-289, 122 Stat. 2654 (2008).

39. Pub. L. No. 110-343, 122 Stat. 3765 (2008).

40. *President Bush Discusses Emergency Economic Stabilization Act of 2008*, WHITEHOUSE ARCHIVES (Oct. 3, 2008), <http://georgewbush-whitehouse.archives.gov/news/releases/2008/10/20081003-11.html>. President Bush had support for his conclusion that governmental intervention was necessary. On October 23, 2008, testifying before the House Oversight and Government Reform Committee, Alan Greenspan, the former Chairman of the Federal Reserve, stated: "those of us who have looked to the self-interest of lending institutions to protect shareholder's [sic] equity (myself especially) are in a state of shocked disbelief." *The Financial Crisis and the Role of Federal Regulators: Hearing Before the H. Comm. on Gov't Oversight and Reform*, 110th Cong. 17 (2008) (testimony of Alan Greenspan). He continued, "The whole intellectual edifice . . . collapsed in the summer of last year." *Id.* Richard Posner also explained his support:

A month later, the November 2008 elections replaced concerns with nightmares for those who opposed government regulation. The Democrats maintained their control in the Senate and House of Representatives,<sup>41</sup> and Barack Obama won the Presidency on a platform promising “change” and “common sense regulation.”<sup>42</sup>

Uncertainties regarding the President-elect’s regulatory intentions, heightened by a general sense of insecurity and unease created by the sputtering economy, sparked fear in the hearts of many Americans. Particularly concerned were those with a passion for bearing arms. Immediately after Obama was declared victor and eleven weeks before his inauguration on January 20, 2009, Americans across the nation flocked to their local gun dealers. Concerned that the election could lead to an erosion of gun rights and higher taxes on firearms and ammunition, these Americans embarked upon what the media termed a “run on guns.”<sup>43</sup> In the midst of a severe recession, sales of firearms and ammunition surged across the country.<sup>44</sup> The Federal Bureau of Investigation (“FBI”), which administers background checks on potential buyers of firearms and explosives under the Brady Handgun Violence Prevention Act of 1993,<sup>45</sup> received a record

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Some conservatives believe that the depression is the result of unwise government policies. I believe it is a market failure. The government’s myopia, passivity, and blunders played a critical role in allowing the recession to balloon into a depression, and so have several fortuitous factors. But without any government regulation of the financial industry, the economy, would still, in all likelihood, be in a depression. We are learning . . . that we need a more active and intelligent government to keep our model of a capitalist economy from running off the rails. The movement to deregulate . . . went too far by exaggerating the resilience—the self-healing powers of laissez-faire capitalism.

RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF ‘08 AND THE DESCENT INTO DEPRESSION*, at xii (2009); *see also* RICHARD A. POSNER, *THE CRISIS OF CAPITALIST DEMOCRACY* (2010); JOSEPH E. STIGLITZ, *FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* (2010).

41. The Democrats gained control of both the House and Senate first in the 2006 midterm elections.

42. *See, e.g.*, David Leonhardt, *Obamanomics*, N.Y. TIMES MAG., Aug. 24, 2008, at 30 (interviewing Barack Obama during his Presidential campaign).

43. *See, e.g.*, Jason Blevins & Nancy Lofholm, *Obama’s Record on Firearms Triggers Run on Sales in State*, DENVER POST, Nov. 6, 2008, at A1; Paul Hampel, Sheena McFarland, *Election Triggers Gun Sales*, SALT LAKE TRIB., Nov. 6, 2008; Edie Ross, *Guns and Politics: Fear of Gun Bans Under Obama Fires Up Sales Despite Recession*, HUTCHINSON NEWS, Nov. 7, 2008; Howard Witt, *Obama Win Triggers Run on Guns*, CHICAGO TRIB., Nov. 12, 2008, at 6.

44. *See, e.g.*, *Guns Are ‘Flying Off the Shelf’*, LAS VEGAS REV.-J., Nov. 14, 2008, at 6B; *Gun Sales: Booming*, ECONOMIST, Nov. 22, 2008, at 74; Sean Holstege, *Gun Sales Soar; Fear of Limits Is Blamed*, ARIZ. REPUBLIC, Nov. 18, 2008, at A1; Editorial, Kirk Johnson, *Buying Guns, for Fear of Losing the Right to Bear Them*, N.Y. TIMES, Nov. 7, 2008, at A20.

45. Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. §§ 921–925 (2006)).

number of requests for background checks in November 2008.<sup>46</sup> The surge in purchases of firearms, a durable good, stood in stark contrast to the grim November 2008 Department of Commerce report announcing the fourth consecutive monthly decrease in sales of durable goods in general.<sup>47</sup>

Figure 1 presents national data on FBI background check requests for firearm purchases from the last decade, with the bar representing the year 2008 labeled. The figure shows that, at least during the past decade, interest in firearm purchases has followed a similar seasonal pattern, with slow summer months, rising interest during the fall, and peak interest during the month of December. The "Obama Fear Effect" is seen most clearly in the sharp jump in requests for the month of November 2008; the effect appears to slowly diminish in the months following President Obama's election.<sup>48</sup>

As the graph illustrates, the Obama Fear Effect of November 2008 was greater even than the "Christmas effect" of December 2008. Put simply, the run on

46. The National Instant Criminal Background Check System ("NICS") received 1,528,341 background check requests in November 2008, compared to 1,522,468 in December 2008. In 2007, the system received 1,079,062 requests in November and 1,229,610 in December. In 2009, the system received 1,217,229 requests in November and 1,401,109 in December. The following table presents trends in background check requests for the last ten years, with the Obama Fear Effect of 2008 illustrated in the bolded column.

National Instant Criminal Background Check System: November Records, 1999–2004						
Year	1999	2000	2001	2002	2003	2004
Requests	995,894	888,547	976,210	881,541	836,392	883,939
Change from Previous Year	N/A	-10.8%	9.9%	-9.7%	-5.1%	5.7%
November Records, 2005–2009						
Year	2005	2006	2007	<b>2008</b>	2009	
Requests	921,798	1,043,598	1,079,062	<b>1,528,341</b>	1,217,229	
Change from Previous Year	4.3%	13.2%	3.4%	<b>41.6%</b> <i>(Obama Fear Effect)</i>	-20.4%	

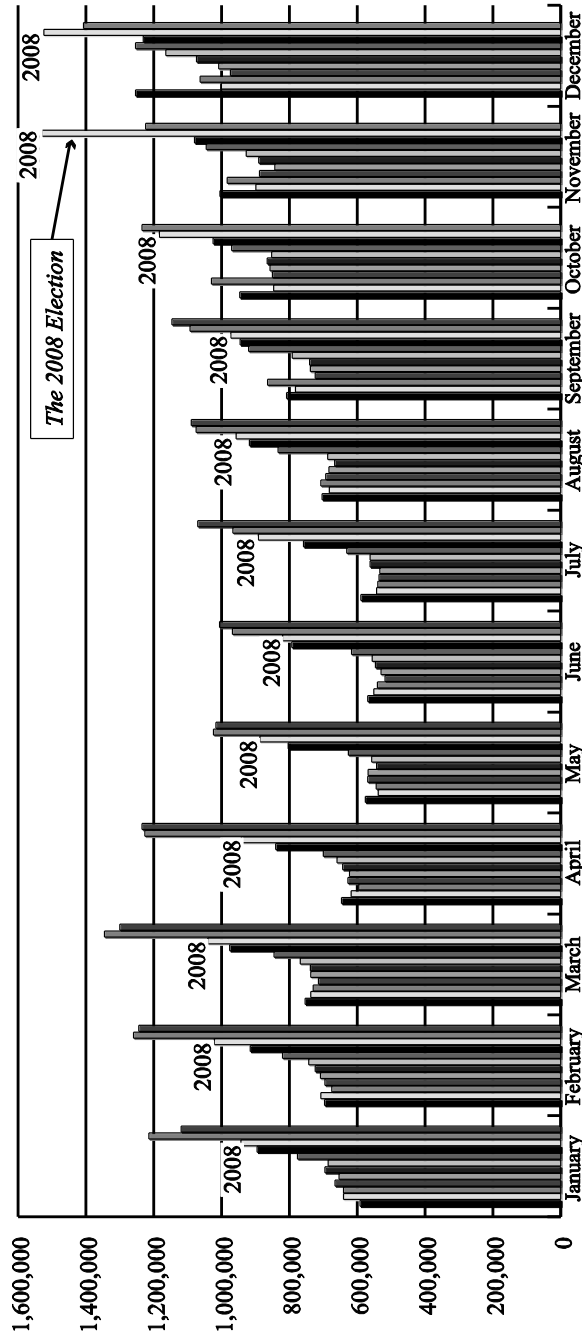
Data was taken from the website of the National Instant Criminal Background Check System at the Federal Bureau of Investigation. *National Instant Criminal Background Check System*, FBI, <http://www.fbi.gov/about-us/cjis/nics> (last visited Oct. 29, 2010). Figures reflect totals for NICS Firearms Background Checks.

47. U.S. CENSUS BUREAU, CB08-190, ADVANCE REPORT ON DURABLE GOODS MANUFACTURERS' SHIPMENTS, INVENTORIES AND ORDERS: NOVEMBER 2008 (2008). The reports for December 2008 and January 2009 continued to announce declines in transactions in durable goods. U.S. CENSUS BUREAU, CB09-17, ADVANCE REPORT ON DURABLE GOODS MANUFACTURERS' SHIPMENTS, INVENTORIES AND ORDERS: DECEMBER 2008 (2009); U.S. CENSUS BUREAU, CB09-32, ADVANCE REPORT ON DURABLE GOODS MANUFACTURERS' SHIPMENTS, INVENTORIES AND ORDERS: JANUARY 2009 (2009). For a general discussion of consumers' willingness and ability to invest in durable goods, see Barak Y. Orbach, *The Durapolist Puzzle: Monopoly Power in Durable-Goods Markets*, 21 YALE J. REG. 67, 70–75, 80–83 (2004).

48. The Obama Fear Effect may not be the exclusive cause of the increase in background check requests occurring in these months.

guns that the Obama Fear Effect generated was inconsistent not only with general consumer spending patterns during the recession but also with traditional seasonal patterns of gun purchases.

Figure 1  
National Instant Criminal Background Check for Firearms, 1999-2010



Data was taken from the website of the National Instant Criminal Background Check System at the FBI. *National Instant Criminal Background Check System*, FBI, <http://www.fbi.gov/about-us/cjis/nics>. Each bar represents data for a specific year, with the yearly data organized by month in order to show both seasonal trends and trends between years. The bar representing the year 2008 is labeled. For 2010, the graph presents only data for the months January through September.

The fear that inspired the run on guns turned out to be unfounded. In his Inaugural Address on January 20, 2009, President Obama articulated his approach toward regulation, and the approach had nothing to do with firearms:

The question we ask today is not whether our government is too big or too small, but whether it works—whether it helps families find jobs at a decent wage, care they can afford, a retirement that is dignified. Where the answer is yes, we intend to move forward. Where the answer is no, programs will end. And those of us who manage the public's dollars will be held to account, to spend wisely, reform bad habits, and do our business in the light of day, because only then can we restore the vital trust between a people and their government.<sup>49</sup>

As President Obama had promised during his campaign and indicated during his Inaugural Address, the Obama administration focused on ambitious matters: the financial crisis, the healthcare system, and the war in Iraq.<sup>50</sup> President Obama signed into law several bills that transformed the national regulatory landscape: the American Recovery and Reinvestment Act of 2009,<sup>51</sup> the Helping Families Save Their Homes Act of 2009,<sup>52</sup> the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the “Credit CARD Act”),<sup>53</sup> the Patient Protection and Affordable Care Act,<sup>54</sup> and the Dodd–Frank Wall Street Reform and Consumer Protection Act.<sup>55</sup>

The administration, however, never expressed, much less acted upon, any intention of eroding gun rights or instigating a battle over the interpretation of the Second Amendment. Far from suffering an erosion of their right to bear arms, gun rights supporters are experiencing important victories during President Obama's term of office. The 111th Congress, in order to finalize significant financial regulation legislation, eliminated a firearm control scheme in an earmark.<sup>56</sup> The controversial Patient Protection and Affordable Care Act includes a provision with a peculiar goal: “Protection of Second Amendment Gun Rights.”<sup>57</sup>

In addition, the United States Supreme Court issued *McDonald v. City of Chicago*,<sup>58</sup> which extended the Court's 2008 *District of Columbia v. Heller*<sup>59</sup>

49. President Barack Obama, Inaugural Address: Remarks Prepared for Delivery (Jan. 20, 2009).

50. For Obama's so-called “sweeping expansion” of the federal government, see *The Obama Revolution*, WALL ST. J., Feb. 27, 2009, at A16.

51. Pub. L. No. 111-5, 123 Stat. 115 (2009).

52. Pub. L. No. 111-22, 123 Stat. 1632 (2009).

53. Pub. L. No. 111-24, 123 Stat. 1734 (2009).

54. Pub. L. No. 111-148, 124 Stat. 119 (2010).

55. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

56. The Credit CARD Act, Pub. L. 111-24, 123 Stat. 1734 (2009), established new rules for the credit card industry that were intended to protect consumers against certain practices that had been common in the industry prior to the Great Recession. Section 512 of the Credit CARD Act legalized concealed firearms in national parks.

57. Patient Protection and Affordable Care Act of 2010 § 10101(e), 42 U.S.C. 300gg-17(c) (West 2010).

58. 130 S. Ct. 3020 (2010).

decision by concluding that the Fourteenth Amendment incorporates the Second Amendment's protection of the individual right to keep and bear arms for purposes of self-defense.

Despite the unfounded character of the fear that the election of President Obama inspired in gun owners, the fear and its residual effects nevertheless offered political ammunition to gun rights advocates and federal regulation foes. As the run on guns subsided, fear surrounding President Obama and his regulatory intentions persisted and evolved.

### **B. Gary Marbut: A Private Lawmaker**

Gary Marbut is a private lawmaker who takes credit for the drafting of over 30 pro-gun and pro-hunting Montana laws, including the Montana Firearms Freedom Act.<sup>60</sup> Mr. Marbut was raised on a cattle ranch in Western Montana and claims he began to use firearms at the age of eight. In the time since, he has styled himself as a gun safety expert and a prominent gun rights advocate. Mr. Marbut is a prolific writer. His published books include *Gun Laws of Montana*, *Allowable Uses of Lethal Force: A Review of Montana Law for Gun Owners*, and several others.<sup>61</sup>

Mr. Marbut is the President and Chairman of the Montana Shooting Sports Association, a gun rights advocacy and lobbying organization which he incorporated, in his own words, to "get the right candidates elected."<sup>62</sup> To promote his goals and vision, Mr. Marbut sought to use the organization's corporate funds "to support or oppose candidates depending on candidates' positions on issues dear to [the organization's] purpose."<sup>63</sup> Montana's 1912 Corrupt Practices Act, however, banned this pursuit by expressly prohibiting corporate campaign contributions supporting or opposing a particular candidate or political party.<sup>64</sup> Relying on the Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*,<sup>65</sup> Montana Shooting Sports Association and two other organizations challenged the constitutionality of this ban and secured a victory.<sup>66</sup> Two weeks before the 2010 midterm elections, a Montana district court judge

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59. 128 S. Ct. 2783 (2008).

60. See *Gary Marbut: Expert Witness, Legal Consultant and Trial Consultant*, MARBUT.COM, <http://www.marbut.com/expert> (last visited Nov. 11, 2010); see also Fredrick Kunkle, *Gun-Toting Soccer Moms a Scary Thought in D.C. but Not Out West*, WASH. POST, Aug. 18, 2010, at C1; Daniel Person, *Aggressive Gun-Rights Bill Widely Supported, Opposed*, BOZEMAN DAILY CHRON., Jan. 23, 2009; Valerie Richardson, *Gun Law Challenges Federal Powers*, WASH. TIMES, Jun. 15, 2009, at A3.

61. Marbut's biographical information was taken from his curriculum vitae. *Gary Marbut: Expert Witness, Legal Consultant and Trial Consultant*, *supra* note 60.

62. Jess Bravin, *A Lone Stance on Ad Spending*, WALL ST. J., Oct. 12, 2010, <http://online.wsj.com/article/SB10001424052748704127904575543920682786784.html>.

63. *W. Tradition P'ship, Inc. v. State*, No. BDV-2010-238 (MT. Dist. Ct. Oct. 18, 2010), at ¶ 3.

64. MONT. CODE ANN. § 13-35-227(1) (2007 & Supp. 2010).

65. 130 S.Ct. 876 (2010).

66. *W. Tradition P'ship, Inc. v. State*, No. BDV-2010-238 (MT. Dist. Ct. Oct. 18, 2010).



struck down the restrictions on independent expenditures to support or oppose political candidates or political parties<sup>67</sup> and, as a result, increased the political influence of private interests in Montana. Marbut, an experienced private lawmaker and lobbyist, championed this change.

### *C. Guns Made in this State*

In 2004, Gary Marbut drafted a bill—the Montana Firearms Freedom Act—which channeled his gun rights agenda into a states' rights platform. The bill, relying upon the theory that the federal government cannot regulate intrastate commercial activity, declares firearms, firearm accessories, and ammunition manufactured in Montana and remaining within Montana's borders to be immune from federal regulation. In 2005 and 2007, Marbut's Act passed in the state House but failed in the state Senate.<sup>68</sup> Marbut's efforts to lobby for the bill were unsuccessful until after the election of President Obama. Then, after being introduced in the Montana legislature on January 13, 2009,<sup>69</sup> the bill passed both houses and became law on April 15, 2009.<sup>70</sup>

Gary Marbut attributes the Montana Firearms Freedom Act's lack of success in the Montana Senate in 2005 and 2007 to a Democratic majority which blocked the bill's passage. He takes credit, on behalf of the Montana Shooting

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67. *Id.* Steve Bullock, the Attorney General of Montana, responded to the outcome:

Our state has a unique and compelling story where corporations, spending freely from their coffers, corrupted the political process. That history led to the Corrupt Practices Act of 1912, a law that has served us well for nearly a century.

Since that time, Montana's elections have been among the most fair and open in the country. Everyone has had an opportunity to have their voices heard—Republican and Democrat, business and labor union, conservative and liberal.

This isn't just about our history: two former secretaries of state and other experts in the field testified that an influx of corporate spending will corrupt the political process and drown out the voices of everyday Montanans. The facts in this case are markedly different from those considered by the U.S. Supreme Court in *Citizens United*. Those differences still matter.

While I have a great deal of respect for the district court, the people of Montana have long said that its citizens, not corporations, should decide the outcome of elections. We knew that this case would ultimately reach the Montana Supreme Court, and I will continue to stand up for the people's law and appeal the district court's decision.

Press Release, Mont. Attorney Gen. Steve Bullock, Statement on Corporate Electioneering Case (Oct. 18, 2010).

68. H.B. 366, 59th Leg. (Mont. 2005); H.B. 420, 60th Leg. (Mont. 2007).

69. H.B. 246, 61st Leg. (Mont. 2009).

70. MONT. CODE ANN. §§ 30-20-101 to -106 (2007 & Supp. 2010).

Sports Association, for helping Republican candidates take over the state Senate in 2009.<sup>71</sup>

The Montana Firearms Freedom Act sparked a movement: since the introduction of Marbut's bill in Montana, clones of the Act have been introduced in over half of the state legislatures in the country.<sup>72</sup> The Act has been endorsed by the legislatures of nine states—Alaska, Arizona, Idaho, Montana, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming—and is currently law in all of these states except Oklahoma.<sup>73</sup> The Acts have had little practical effect for residents of the states where they have become law, but, as a legislative trend, they have made an important impact on the states' rights movement. Their political–legal architecture functions as a multi-purpose Commerce Battering Ram that attracts and inspires challengers of federal regulation who hold a variety of primary concerns, from eliminating federal gun control regulations to nullifying the healthcare reform bill.

#### *D. Arming the Commerce Battering Ram*

##### *1. Purpose*

Gary Marbut has always been explicit and consistent about the primary purpose of Firearms Freedom Acts: “Guns are the object, but states’ rights are the subject.”<sup>74</sup> In June 2009, Mr. Marbut explained the rationale underlying his Firearms Freedom Act agenda to the *Washington Times*: “The Interstate Commerce Clause has grown and grown until the government asserts authority over everything under the sun. . . . The federal government is a creation of the states, and the states need to get their creation on a leash.”<sup>75</sup> Thus, though the Acts carry the label “firearms,” Marbut publically claims their fundamental purpose relates to states’ rights rather than guns.

Marbut’s public proclamations are inconsistent with his one-dimensional lifetime mission and work. As a private lawmaker he has drafted and lobbied for over thirty Montana laws, all of which relate to guns. His books are about guns. His business ventures center around guns. His organization, the Montana Shooting Sports Association, endorses and funds political candidates primarily based upon their views on guns. Viewed in light of Marbut’s lifetime interest in firearms and decades-long effort at altering Montana’s gun laws to fit his personal values, the Montana Firearms Freedom Act appears to be a logical next step. If the battering ram succeeds, Marbut’s Act would wipe out the influence of federal gun control regulations in Montana and leave the state’s citizens subject only to Montana’s gun laws, many of which Marbut either authored or backed.<sup>76</sup> Marbut is clearly

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71. E-mail from Gary Marbut to Authors (Oct. 26, 2010, 09:31 MST) (on file with Authors).

72. For the legislation introduced in these states, see Appendix A.

73. See Appendix A.

74. Richardson, *supra* note 60.

75. *Id.*

76. On his website, Marbut triumphantly lists various firearms restrictions, including registration and permit requirements, that Montana does *not* have on its books. *Successful Work of the Montana Shooting Sports Association*, MARBUT.COM,

interested in this particular possible implication of his Commerce Battering Ram. It is unclear, however, how much thought he has given to other implications of the ram. If his Commerce Battering Ram ever infiltrates the current Commerce Clause jurisprudence, it will likely carry many implications that Mr. Marbut probably has not envisioned or closely examined.

### 2. *Passing the Law in Montana*

A week before the 2008 election, Joel Boniek, a wilderness guide and Montana state representative, filed a draft of the first Firearms Freedom Act with the State House of Representatives. On January 13, 2009, Mr. Boniek formally introduced the bill, which he refers to as “Gary Marbut’s HB 246.”<sup>77</sup> In the bill’s House hearing, Mr. Boniek argued: “What we need here is for Montana to be able to handle Montana’s business and affairs.”<sup>78</sup> The bill received a majority of votes in the Senate and House. On January 13, 2009, Democratic governor Brian Schweitzer signed it into law, noting: “It’s a gun bill, but it’s another way of demonstrating the sovereignty of the State of Montana.”<sup>79</sup> After the bill passed into law, sponsor Boniek told a reporter that the law was “about states’ rights . . . Guns are just the vehicle.”<sup>80</sup> While the Commerce Battering Ram metaphor was not available at Mr. Boniek’s disposal, it is consistent with his vision. Guns are the vehicle—the framework and wheels of the Commerce Battering Ram—that carries the core log, the Tenth Amendment, as a promise of states’ rights.

The Montana Firearms Freedom Act cites the guarantees of the Ninth and Tenth Amendments as a contractual agreement between the state of Montana and the federal government which vests the authority to regulate intrastate commerce with the state.<sup>81</sup> The main provision of the Act provides: “A personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of congress [sic] to regulate interstate commerce.”<sup>82</sup> Under the Act, neither the incorporation of imported generic and insignificant parts into Montana-made firearms nor the attachment or use of imported firearm accessories will subject the firearm to federal regulation.<sup>83</sup> All firearms covered by the Act must have the words “Made in Montana” clearly stamped on a central metallic part of the gun,<sup>84</sup>

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<http://www.marbut.com/MSSASuccess/> (last visited Nov. 11, 2010).

77. *Vote Joel Boniek, An Update – June 2009*, VOTEJOELBONIEK.COM (June 30, 2009), <http://votejoelboniek.com/an-update-june-2009>.

78. Kahrin Deines, *New Gun Law Aimed at Asserting Sovereignty*, ASSOCIATED PRESS, Apr. 16, 2009.

79. *Id.*

80. Mark Z. Barabak, *Western States Want Reins on Federal Power*, L.A. TIMES, June 16, 2009.

81. MONT. CODE ANN. § 30-20-102 (2007 & Supp. 2010).

82. *Id.* § 30-20-104.

83. *Id.*

84. *Id.* § 30-20-106. This provision may be a response to *Gonzales v. Raich*, 545 U.S. 1 (2005), which was issued the same year that Marbut claims to have authored the original Montana Firearms Freedom Act. In *Raich*, the United States Supreme Court expressed concerns regarding the difficulty inherent in attempting to distinguish marijuana

and the Act expressly excludes from its provisions: (1) firearms that cannot be carried and used by only one person; (2) firearms that have a bore diameter greater than 1½ inches and use smokeless powder; (3) ammunition that uses a chemical energy explosion; and (4) automatic weapons (“firearms that discharge two or more projectiles with one activation of the trigger or other firing device”).<sup>85</sup>

### *E. The Cloning of the Marbut Model*

#### *1. The Proliferation of Cloned Firearms Freedom Acts*

In the time since the introduction of the original Firearms Freedom Act in Montana, and as of the publication of this Essay, clones of the Act have been introduced in twenty-six other states: Alabama, Alaska, Arizona, Colorado, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, New Hampshire, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming. State legislators introduced these clones between February 2009 and March 2010.<sup>86</sup> Nine state legislatures have endorsed the Act—Alaska, Arizona, Idaho, Montana, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming—and it became law in eight of them after the Oklahoma legislature’s attempts to override gubernatorial vetoes failed.<sup>87</sup>

As Figure 2 below illustrates, Firearms Freedom Act bills were introduced in ten state legislatures at various times scattered throughout 2009. In January and February 2010 alone, legislators in sixteen additional states introduced cloned bills of the Firearms Freedom Act. This legislative spike is related to political developments and events which occurred in October and December of 2009.

The Montana Firearms Freedom Act went into effect on October 1, 2009. On that symbolic day, Gary Marbut and the Montana Shooting Sports Association instigated a lawsuit intended to force a judicial showdown between the Act and federal law.<sup>88</sup> Both events drew welcome publicity to Marbut and his Montana affairs. Marbut denies lobbying other state legislatures to enact the Act, arguing that the filing of the suit heightened interest and that “word of the bill spread over the summer of 2009 to legislators whose legislatures were not in session.”<sup>89</sup> Marbut, however, proudly claims credit for recruiting states to file an *amici curiae* brief in opposition to the United States Attorney General’s Motion to Dismiss his

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grown and consumed locally from marijuana which has traveled in interstate commerce. *Raich*, 545 U.S. at 2–3. The “Made in Montana” stamp required by the Montana Firearms Freedom Act at least arguably provides a means of distinguishing purely intrastate firearms from those that have traveled across state lines.

85. *Id.* § 30-20-105.

86. See Appendix A for a detailed timeline of the introduction of the bills.

87. See *infra* notes 101–102 and accompanying text.

88. See discussion *infra* Part III.

89. E-mail from Gary Marbut to Authors (Oct. 27, 2010, 07:18 MST) (on file with Authors).

lawsuit.<sup>90</sup> The seven states that filed this brief introduced Firearms Freedom Act bills in their legislatures in early 2010, months after Marbut had filed his lawsuit.<sup>91</sup>

Mr. Marbut is an experienced, effective private lawmaker in Montana and is proud of his ability to influence officials in other states that cloned his bill. He crafted a significant political–legal apparatus that gains power with additional endorsement of states. In October 2009, when Mr. Marbut launched his apparatus, states' endorsement became particularly valuable for his campaign. He argues that he did not lobby for endorsement, but it would have been inconsistent with the design of the plan to sit idle at that stage. We, however, have no record of Marbut's actual actions.

In addition to a possible connection with lobbying surrounding Marbut's Montana lawsuit, the willingness of state legislators to adopt Marbut's political–legal apparatus appears to be related to the United States Senate's December 24, 2009 vote in favor of the Patient Protection and Affordable Care Act<sup>92</sup>—the so-called healthcare reform bill. The historic 60-to-39 vote<sup>93</sup> was a red flag for those who opposed increased federal regulation, and the months following the vote brimmed with intense negotiations and political struggles.<sup>94</sup> The jump in state legislative introductions of Firearms Freedom Acts during this time period (shown in Figure 2) reflects not only the impact that the Senate vote had on states' rights supporters but also the connection that Firearms Freedom Acts have with the broader states' rights platform. Marbut could not have anticipated the trend and possibly did not envision that the 2004 bill he drafted would function as a Commerce Battering Ram.

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90. E-mail from Gary Marbut to Authors, *supra* note 71. For the brief, see Brief of Utah, Alabama, Idaho, South Carolina, South Dakota, West Virginia, and Wyoming as Amici Curiae in Opposition to Defendant's Motion to Dismiss, *Mont. Shooting Sports Ass'n v. Holder*, CV-09-147 (D. Mont. Apr. 12, 2010).

91. These seven states are Utah, Alabama, Idaho, South Carolina, South Dakota, West Virginia, and Wyoming. For the dates of introduction of their Firearm Freedom Act bills, see Appendix A.

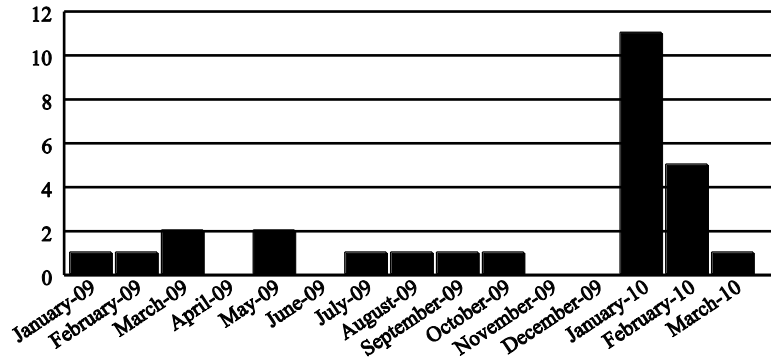
92. *Vote Summary on H.R. 3590 as Amended*, UNITED STATES SENATE, <http://www.senate.gov> (follow hyperlink "Legislation and Records"; then follow hyperlink "Votes"; then follow hyperlink "2009 (111th, 1st)" under "Roll Call Tables"; then follow hyperlink "00396" under "Vote").

93. *Id.*

94. Naftali Bendavid, *Both Parties to Highlight Bill in Bid to Win Over 2010 Voters*, WALL ST. J., Dec. 26, 2009, at A4; Greg Hitt & Janet Adamy, *Senate, House to Hagggle over Differences*, WALL ST. J., Dec. 28, 2009, at A9; Robert Pear, *Senate Passes Health Care Overhaul on Party-Line Vote*, N.Y. TIMES, Dec. 25, 2009, at A1.

Figure 2

## Introduction of Firearms Freedom Act Bills, 2009–2010



## 2. Imperfect Clones

The Firearms Freedom Acts introduced in various state legislatures around the country have not always been identical to the original Montana Firearms Freedom Act; some have omitted sections, added sections, or reorganized the provisions of the original. The “clones,” however, have all remained faithful to the constitutional theories expressed in the original, thus endorsing and joining Marbut’s Commerce Battering Ram.

When including sections from the original Act, the clones have rarely made significant alterations to the language of those sections. In fact, many clones include typos appearing in the original. For example, the Wyoming Firearms Freedom Act, signed into law by Governor Dave Freudenthal in March 2010, repeatedly references Wyoming’s year of incorporation into the Union as 1889, the year of Montana’s incorporation.<sup>95</sup> Wyoming was incorporated in 1890.

Though the Wyoming legislature did not alter most of the referenced dates of Wyoming’s incorporation in its Firearms Freedom Act, the legislature did include additions to its Act which do not appear in Mr. Marbut’s version. The Wyoming Act prohibits public servants and firearm dealers from enforcing or attempting to enforce federal laws relating to firearms, firearms accessories, or ammunition made in Wyoming.<sup>96</sup> It imposes criminal penalties upon officials enforcing federal firearms regulations against firearms covered by the Act.<sup>97</sup> The Act also permits the state’s Attorney General to defend anyone prosecuted under federal law for conduct made legal under the Act.<sup>98</sup> This “Firearms Freedom Act with teeth” model is similar to one of the Firearms Freedom Acts introduced in the New Hampshire legislature, which would have made the enforcement of federal firearms regulations against firearms covered by the Act a class B felony for

95. WYO. STAT. ANN. § 6-8-406 (2007 & Supp. 2010).

96. *Id.* § 6-8-405(a).

97. One section of the act provides for a misdemeanor conviction subject to maximum penalties of one year imprisonment, a \$2,000 fine, or both. *Id.* § 6-8-405(b)

98. *Id.* § 6-8-405(c).

federal officials and a class A misdemeanor for state officials.<sup>99</sup> The New Hampshire bill did not become law.<sup>100</sup>

### 3. *Two Rogue Governors*

Criticism of Firearms Freedom Acts has generally revolved around (1) public safety concerns implicated by the Acts and (2) the Acts' uncertain legal footing under current Commerce Clause jurisprudence. These concerns are reflected in the reactions of the only two governors who, as of the date of publication of this Essay, have opposed Firearms Freedom Acts endorsed by their respective state legislatures.

Oklahoma governor Brad Henry, citing safety concerns, has vetoed two versions of the Act: S.B. 1685 in April 2009 and H.B. 2994 in May 2009.<sup>101</sup> Commenting on his first veto, the governor stated: "As a strong supporter of the 2nd Amendment and the holder of an A rating from the National Rifle Association, I have consistently supported and approved laws that preserve and strengthen an individual's right to bear arms. This legislation does nothing to enhance 2nd Amendment protections . . . ." <sup>102</sup> The Oklahoma legislature's attempt to override the Governor's vetoes failed.

Tennessee Governor Phil Bredesen allowed the Tennessee Firearms Freedom Act to become law without his signature, explaining his decision in a letter to the Speaker of the House:

This bill is not about firearms. It represents a fringe constitutional theory that I believe will be quickly dispensed with by the federal courts.

The Tennessee General Assembly lacks any Constitutional authority to limit the power and authority of the United States government in this manner.

While I share the General Assembly's commitment to federalism, this legislation contravenes our Constitution. I am allowing it to become law so that it can quickly be dealt with by the federal courts.<sup>103</sup>

### 4. *Preparing to Pound the Commerce Clause Jurisprudence: A Seven Step Program*

On March 17, 2010, *The New York Times* published a front page article about the states' rights legislative trend, framing the issue as follows: "Whether it's correctly called a movement, a backlash or political theater, state declarations of their rights—or in some cases denunciations of federal authority, amounting to

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99. H.B. 1285, 2010 Leg. (N.H. 2010).

100. See Appendix A.

101. Gov. Brad Henry, Veto Message on Bill No. H.B. 2994, S.B. 1685 (May 18, 2010).

102. *Id.*

103. Letter from Phil Bredesen, Governor, Tenn., to Kent Williams, Speaker of the House, Tenn. (June 12, 2009) (on file with Authors).

the same thing—are on a roll.”<sup>104</sup> Crediting Mr. Marbut for leading the drive behind the Montana Firearms Freedom Act, *The New York Times* quoted his explanation of the trend: “There’s a tsunami of interest in states’ rights and resistance to an overbearing federal government; that’s what all these measures indicate.”<sup>105</sup>

Marbut’s architectural model for opposing the federal government includes not only promoting Firearms Freedom Acts but forcing them into judicial show-downs. On his personal website, Marbut lists a seven-step program for instigating a legal challenge to federal Commerce Clause authority using a Firearms Freedom Act:

Step 1: Get an FFA bill passed

Step 2: Recruit Plaintiffs and Partners

Step 3: Recruit Attorney(s)

Step 4: Bolster Standing

Step 5: Craft a Complaint

Step 6: Recruit *Amicus* Parties

Step 7: Communicate<sup>106</sup>

Marbut followed this seven-step program himself when he instigated a federal lawsuit in Montana. He is currently promoting the lawsuit’s replication in other jurisdictions with the goal of not only garnishing attention and support but, with luck, creating a circuit split with which to entice the United States Supreme Court into a grant of certiorari.<sup>107</sup>

This written seven-step program reveals something about Marbut’s plan, but also suggests that he did not fully appreciate the compounding effect of a battering ram that harnesses several states. Had he appreciated this effect, he would have presented a plan that envisioned moving forward as a unified front rather than as individual states. He is a private lawmaker who has been principally acting in Montana and has limited experience with attacking the federal government. Apparently he did not realize the potential future utilization of his apparatus.

### III. GUNS TESTING: THE MOVEMENT ON TRIAL

#### A. *The Loss in Montana*

On July 16, 2009, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) issued an open letter to all federally licensed firearms dealers

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104. Kirk Johnson, *States’ Rights Is Rallying Cry for Lawmakers*, N.Y. TIMES, Mar. 17, 2010, at A1.

105. *Id.*

106. *FFA Lawsuit Template*, <http://www.marbut.com/FFATemplate/>, MARBUT.COM (last visited Nov. 9, 2010).

107. E-mail from Gary Marbut to Authors, dated October 26, 2010 (on file with Authors).



in Montana and Tennessee, the first two states to adopt Firearms Freedom Acts.<sup>108</sup> The letter stated that federal law preempts the Montana and Tennessee Firearms Freedom Acts and all federal gun control regulations still apply in full force in Montana and Tennessee. The ATF's position put gun dealers in Firearms Freedom Act jurisdictions in limbo, continuing to follow federal gun control regulations until some sign—in the form of judicial developments or otherwise—indicated they would be safe relying upon the proclamations of their state's Firearms Freedom Act. In August 2009, Gary Marbut requested further clarification from the ATF, expressing an interest in manufacturing firearms, firearms accessories, or ammunition consistent with the Montana Firearms Freedom Act. In response, he received a letter detailing his continued obligations to comply with federal gun control regulations.<sup>109</sup>

The Montana Firearms Freedom Act became effective on October 1, 2009. On that symbolic day, Gary Marbut as an individual, with his organization, the Montana Shooting Sports Association, and with the Second Amendment Foundation, filed a complaint in federal District Court in Missoula, Montana, seeking a declaratory judgment and injunction.<sup>110</sup> The complaint asked the court to declare that:

- (1) the United States Constitution confers no power on Congress to regulate the special rights and activities contemplated by the [Montana Firearms Freedom Act];
- (2) [u]nder the 10th Amendment of the United States Constitution, all regulatory authority of all such activities within Montana's political borders is left in the sole discretion of the State of Montana; and
- (3) [f]ederal law does not preempt the [Montana Firearms Freedom Act] and cannot be invoked to regulate or prosecute Montana citizens acting in compliance with the [Act].<sup>111</sup>

The complaint also asked the court to permanently enjoin the United States

and any agency . . . from prosecuting any civil action, criminal indictment or information under the [National Firearms Act] or the [Gun Control Act], or any other federal laws and regulations, against Plaintiffs or other Montana citizens acting solely within the

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108. Open Letter from Carson W. Carroll, Assistant Dir., Bureau of Alcohol, Tobacco, Firearms, and Explosives, to All Montana Federal Firearms Licensees (Jul. 16, 2009) (on file with Authors); Open Letter from Carson W. Carroll, Assistant Dir., Bureau of Alcohol, Tobacco, Firearms, and Explosives, to All Tennessee Federal Firearms Licensees (Jul. 16, 2009) (on file with Authors).

109. Letter from Richard E. Chase, Special Agent in Charge, Denver Field Division, Bureau of Alcohol, Tobacco, Firearms, and Explosives, to Gary Marbut (Sept. 29, 2009) (on file with Authors).

110. Complaint, *Mont. Shooting Sports Ass'n v. Holder*, No. CV-09-147-DWM-JCL (D. Mont. Oct. 1, 2009).

111. *Id.* at 8.

political borders of the State of Montana in compliance with the [Montana Firearms Freedom Act].<sup>112</sup>

The language of the complaint spells out the rationale behind the Montana Firearms Freedom Act:

The activity authorized under the [Montana Firearms Freedom Act] is primarily political. It has a commercial element, but the purpose is to allow Montanans who wish to avoid interference by the United States government in their legitimate activity (specifically, manufacturing and selling small arms and small arms ammunition), to do so if they strictly confine such activity to the political boundaries of their own state.

Passage of the [Act] was an express exercise by the State of Montana of powers reserved to the states and to the people under the 10th Amendment of the United States Constitution.<sup>113</sup>

In a joint press release issued by Gary Marbut and Alan Gottlieb, the founder of the Second Amendment Foundation, Mr. Marbut explained his intentions for the *Montana Shooting Sports Ass'n v. Holder* lawsuit: “We feel very strongly that the federal government has gone way too far in attempting to regulate activity that only occurs in-state. It’s time for Montana and her sister states to take a stand against the bullying federal government.”<sup>114</sup> Despite his enthusiastic rhetoric, Mr. Marbut was not optimistic about his chances in court. In June 2009, he told *The Los Angeles Times*: “No federal employee in a black robe is going to roll back the power of the federal government.”<sup>115</sup> Mr. Marbut’s instinct was prescient.

On January 19, 2010, United States Attorney General Eric Holder moved to dismiss the entire action for lack of standing, lack of subject matter jurisdiction, and failure to state a claim upon which relief may be granted.<sup>116</sup> In his motion to dismiss, the Attorney General expressly questioned the constitutionality of the Montana Firearms Freedom Act.<sup>117</sup> Montana subsequently intervened as of right and submitted a brief in favor of the Act, arguing that the powers reserved to the states under the Tenth Amendment include the power to enact laws like the Firearms Freedom Act.<sup>118</sup>

Several amici curiae also filed briefs on the motion to dismiss. On April 12, 2010, seven states—Utah, Alabama, Idaho, South Carolina, South Dakota,

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112. *Id.* at 8–9.

113. *Id.* at 4.

114. Press Release, Gary Marbut & Alan Gottlieb, Mont. Shooting Sports Ass’n, Gun Group Files Lawsuit to Validate Montana Firearms Freedom Act (Oct. 1, 2009), available at <http://firearmsfreedomact.com/2009/10/01/gun-groups-file-lawsuit-to-validate-montana-firearms-freedom-act/>.

115. Barabak, *supra* note 80.

116. Defendant’s Motion to Dismiss, *Mont. Shooting Sports Ass’n v. Holder*, No. CV-09-147 (D. Mont. Jan. 19, 2010), 2010 WL 3557434.

117. *Id.* at 26–29.

118. Brief for the State of Montana in Intervention, *Mont. Shooting Sports Ass’n*, No. CV-09-147, 2010 WL 3557182.

West Virginia, and Wyoming—filed an amici brief in opposition to the defendant's motion to dismiss, largely reiterating the Firearms Freedom Act movement's theory that the Commerce Clause does not grant Congress the power to regulate purely intrastate activities.<sup>119</sup> Specifically, the amici states identified their "vital interest in the recognition and preservation of the rights reserved to them and to their citizens under the United States Constitution, including those under the Tenth Amendment."<sup>120</sup> They also expressed a "substantial, ongoing interest in cases that call into question the constitutionality of their statutes that regulate activities within their own borders."<sup>121</sup>

Later that month, thirty-eight Montana legislators filed their own amici brief in opposition to the defendant's motion to dismiss. In their brief, the legislators stated that their Firearms Freedom Act is "largely a truism" and raised various constitutional arguments, including the theory that *Heller*'s announcement of the fundamental right of individuals to keep and bear arms for self-protection required applying a higher level of scrutiny than rational basis review to the case at hand.<sup>122</sup> The next month, the Brady Center to Prevent Gun Violence, along with the National Network to End Domestic Violence, Montanans United to Stop Gun Violence, the Montana Human Rights Network, and several police officer organizations, filed an amici brief in support of the defendant's motion to dismiss, highlighting public safety concerns implicated by Firearms Freedom Acts.<sup>123</sup>

On August 31, 2010, a month and a half after hearing oral arguments in the case, Magistrate Judge Jeremiah Lynch issued a decision finding that *Montana Shooting Sports Ass'n v. Holder* could not be dismissed for lack of subject matter jurisdiction but should be dismissed for lack of standing.<sup>124</sup> In his standing analysis, the judge reasoned that, because Gary Marbut's intent to violate federal gun control laws was merely hypothetical and the ATF had not indicated any intent to personally prosecute him, Mr. Marbut had failed to make the showing of an imminent threat of prosecution required for establishing standing in a pre-enforcement constitutional challenge.<sup>125</sup> Furthermore, the court found that Mr. Marbut's alleged economic injury was insufficient to confer standing because it

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119. Brief of Utah, Alabama, Idaho, South Carolina, South Dakota, West Virginia, and Wyoming as Amici Curiae in Opposition to Defendant's Motion to Dismiss, *Mont. Shooting Sports Ass'n*, No. CV-09-147 2010 WL 3557180.

120. *Id.* at 3.

121. *Id.*

122. Brief of Montana Legislators as Amici Curiae in Opposition to Defendant's Motion to Dismiss, *Mont. Shooting Sports Ass'n*, No. CV-09-147, 2010 WL 3557187. The other amici curiae that filed in opposition to the motion to dismiss were the Goldwater Institute Scharf-Norton Center for Constitutional Government, et al.; Weapons Collectors Society of Montana; the Paragon Foundation; the Center for Constitutional Jurisprudence; state lawmakers from seven states; and the Gun Owners Foundation, et al.

123. Brief of Brady Center to Prevent Gun Violence, et al. as Amici Curiae in Support of Defendant's Motion to Dismiss, *Mont. Shooting Sports Ass'n*, No. CV-09-147, 2010 WL 3557189.

124. *Mont. Shooting Sports Ass'n v. Holder*, No. CV-09-147, 2010 WL 3926029, at \*10–13 (D. Mont. Aug. 31, 2010).

125. *Id.* at \*9–13.

was hypothetical and speculative.<sup>126</sup> Because neither the Montana Shooting Sports Association nor the Second Amendment Foundation had successfully identified an individual member with standing to sue, the organizations themselves also lacked standing.<sup>127</sup>

### ***B. Constitutional Challenges***

Although the Montana case failed on procedural grounds, *Montana Shooting Sports Ass'n v. Holder* resulted in a decision on the constitutionality of broad Tenth Amendment state laws. “In the interest of judicial economy,” the magistrate judge thoroughly analyzed the plaintiffs’ arguments on the merits, even after concluding that the plaintiffs lacked standing to sue.<sup>128</sup> In his merits analysis, the judge relied predominantly upon the United States Supreme Court’s opinion in *Gonzales v. Raich*<sup>129</sup> and the Ninth Circuit’s decision in *United States v. Stewart*<sup>130</sup> in concluding that the Montana Firearms Freedom Act was preempted by constitutional federal gun control regulations.<sup>131</sup>

*Raich* upheld application of the federal Controlled Substances Act (“CSA”) to purely local production and consumption of medical marijuana and, in doing so, overturned an order to grant an injunction which had previously been issued by the Ninth Circuit.<sup>132</sup> The *Raich* Court relied upon and reaffirmed the Court’s 1942 case *Wickard v. Filburn*,<sup>133</sup> noting that *Wickard* “establishes that Congress can regulate purely intrastate activity . . . if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.”<sup>134</sup> After examining factors such as the “undisputed magnitude”<sup>135</sup> of the “established, and lucrative, interstate market”<sup>136</sup> for marijuana, congressional findings on the dangers of marijuana use,<sup>137</sup> the difficulty of “distinguishing between marijuana cultivated locally and marijuana grown elsewhere,”<sup>138</sup> and concerns regarding “diversion into illicit channels,”<sup>139</sup> the Court had “no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.”<sup>140</sup> The Court made it explicitly clear that the fact

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126. *Id.*  
 127. *Id.* at \*14.  
 128. *Id.* at \*14–23.  
 129. 545 U.S. 1 (2005) (overturning *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003)).  
 130. 451 F.3d 1071 (9th Cir. 2006).  
 131. *Mont. Shooting Sports Ass'n*, No. CV-09-147, 2010 WL 3926029, at \*14–23.  
 132. 545 U.S. 1.  
 133. 317 U.S. 111 (1942).  
 134. *Raich*, 545 U.S. at 18.  
 135. *Id.* at 32–33.  
 136. *Id.* at 26.  
 137. *Id.* at 32–33.  
 138. *Id.* at 22.  
 139. *Id.*  
 140. *Id.*

that the CSA “ensnare[d] some purely intrastate activity” played no part in its Commerce Clause analysis.<sup>141</sup>

The procedural history of *Stewart* illustrates how *Raich* affects federal gun control regulation. The *Stewart* case originated with the conviction of Robert W. Stewart for various violations of federal gun control laws, including unlawful possession of machine guns in violation of 18 U.S.C. § 922o.<sup>142</sup> Federal officials searching Stewart’s home pursuant to a valid warrant had found thirty-one homemade guns, including five machine guns.<sup>143</sup> When initially hearing the case on appeal, the Ninth Circuit concluded that section 922o was an unlawful extension of Congress’s Commerce Clause authority as applied to Stewart’s case.<sup>144</sup> The United States Supreme Court, which had issued *Raich* in the interim, granted certiorari, vacated the Ninth Circuit’s 2003 *Stewart* opinion, and remanded the case for reconsideration in light of *Raich*.<sup>145</sup> The remand, and the strong language of *Raich*, sent a clear message. The Ninth Circuit reversed its earlier decision and, noting the striking similarities between Section 922o and the CSA, held that Congress had a rational basis for concluding that the local manufacturing and use of machine guns could have a substantial effect on interstate commerce.<sup>146</sup> “Guns, like drugs, are regulated by a detailed and comprehensive statutory regime designed to protect individual firearm ownership while supporting ‘Federal, State and local law enforcement officials in their fight against crime and violence,’” the court stated.<sup>147</sup> “Homemade guns, even those with a unique design, can enter the interstate market and affect supply and demand.”<sup>148</sup>

The magistrate judge in *Montana Shooting Sports Ass’n v. Holder* noted that the plaintiffs did not disagree with his holding that *Raich* and *Stewart*, read together, “compel the conclusion that Congress’[s] power under the Commerce Clause is almost unlimited where the prohibited product has significant economic value such as with drugs or guns.”<sup>149</sup> The plaintiff’s primary argument, which the magistrate judge termed “novel,” was to “attempt to reverse the course of current Commerce Clause jurisprudence” by asking the magistrate court to recommend overruling the United States Supreme Court and the Ninth Circuit.<sup>150</sup> Not surprisingly, the magistrate judge determined that he was not authorized to take that course of action.<sup>151</sup>

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141. *Id.*

142. *United States v. Stewart*, 451 F.3d 1071, 1073 (9th Cir. 2006).

143. *Id.* at 1072–73.

144. *United States v. Stewart*, 348 F.3d 1132, 1143 (9th Cir. 2003).

145. *United States v. Stewart*, 545 U.S. 1112 (2005).

146. *Stewart*, 451 F.3d at 1078.

147. *Id.* at 1076 (citing Gun Control Act of 1968, Pub. L. No. 90-618, § 101, 82 Stat. 1213 (codified at 18 U.S.C. §§ 921–928 (2006))).

148. *Id.* at 1078.

149. *Mont. Shooting Sports Ass’n v. Holder*, No. CV-09-147, 2010 WL 3926029, at \*18 (D. Mont. Aug. 31, 2010) (quoting *United States v. Rothacher*, 442 F. Supp. 2d 999, 1007 (D. Mont. 2006)).

150. *Id.* at 18.

151. *Id.* at 18.

The magistrate judge also rejected the plaintiffs' alternative argument that *Raich* was distinguishable.<sup>152</sup> The magistrate found that firearms, like marijuana, were "commodities for which there is an established, lucrative interstate market"<sup>153</sup> and that Congress had a rational basis for concluding that failing to regulate intrastate firearms would leave a "gaping hole" in the detailed and comprehensive federal gun control regulatory scheme.<sup>154</sup> The judge also found that the *Raich* opinion's concern regarding the aggregate effects on interstate commerce of numerous state medical marijuana statutes was especially relevant in light of the number of states which had introduced or enacted Firearms Freedom Acts.<sup>155</sup> The judge found no support in *Raich* for the plaintiffs' suggestion that *Raich* should be limited to the context of illegal drugs, and found that the Ninth Circuit's application of *Raich* to the context of illegal firearms in *Stewart* foreclosed that possibility.<sup>156</sup> The judge also rejected the plaintiffs' argument that firearms covered by the Montana Firearms Freedom Act could be distinguished from the fungible good at issue in *Raich*.<sup>157</sup> The plaintiffs had argued that the Act's requirement of a "Made in Montana" stamp on all covered firearms allowed law enforcement to easily distinguish between intrastate firearms and those that had moved in interstate commerce and thus were no longer covered by the Act. The magistrate judge called this view "myopic," noting that *Raich*'s discussion of the difficulty of distinguishing home-grown marijuana from marijuana that had traveled in interstate commerce was only one factor of many that the court relied upon in reaching its holding.<sup>158</sup> Other factors, such as the Court's concern regarding entry into illicit channels, were unaffected by the Act's "Made in Montana" stamp requirement.<sup>159</sup> Because the Supreme Court in *Raich* made no indication that it was treating marijuana's fungibility as a dispositive factor in the case or would treat it as dispositive in a future case, and because the other factors analyzed in *Raich* applied equally to the context of firearms covered by a Firearms Freedom Act, the plaintiffs' fungibility argument failed.

The magistrate judge also rejected the argument that a higher standard of review than rational basis review should apply to the case in light of *Heller*'s holding that the Second Amendment confers an individual right to keep and bear arms.<sup>160</sup> At oral argument, the plaintiffs argued that strict scrutiny review should apply given the fundamental nature of the right announced in *Heller*.<sup>161</sup> The magistrate judge rejected this argument because (1) the plaintiffs had not pled a Second Amendment case; (2) the Second Amendment right announced in *Heller* was not implicated in the plaintiffs' case; and (3) express language from *Heller* and *McDonald* indicated that the United States Supreme Court did not intend for

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152. *Id.* at 18–22.

153. *Id.* at 17.

154. *Id.* at 17.

155. *Id.* at 20.

156. *Id.* at 18.

157. *Id.* at 19–20.

158. *Id.*

159. *Id.* at 19.

160. *Id.* at 20–22.

161. *Id.* at 22.

the decisions to undermine existing federal laws regulating the manufacture and sale of firearms.<sup>162</sup>

In the final section of its findings and recommendations, the magistrate judge concluded that the Montana Firearms Freedom Act was in direct conflict with federal firearm regulation statutes such as the Gun Control Act and the National Firearms Act; this conflict was, in fact, what had instigated the lawsuit.<sup>163</sup> Because the conflicting federal laws were constitutional, they preempted the Montana Firearms Freedom Act.<sup>164</sup> Since valid exercises of federal Commerce Clause authority cannot constitute a violation of the Tenth Amendment, the magistrate judge recommended dismissing the plaintiffs' case for failure to state a claim.<sup>165</sup>

On September 29, 2010, the District Court in Missoula issued an order adopting the findings and recommendations of Judge Lynch and dismissing the *Montana Shooting Sports Ass'n v. Holder* case.<sup>166</sup> The ruling was lauded by supporters of gun control concerned about the possible public safety effects that firearms immune from federal regulation could create.<sup>167</sup> Gary Marbut also took the news well. "We expected an adverse ruling in district court, which is fine, because it will give us control of the appeals process," he explained to the Associated Press.<sup>168</sup> "We need to get in front of the Supreme Court. . . . Truly we need to overturn a half century of Commerce Clause precedent and only the Supreme Court can do that."<sup>169</sup>

#### IV. BEYOND GUNS: ARMING TENTH AMENDMENT PLATFORMS

The Firearms Freedom Act movement is a political–legal architecture, unconcerned with its legal footing under current Supreme Court precedent and instead demanding that the law be adjusted to fit its vision. The abstract vision is about shifting the balance of power between the federal government and the states. It is unclear whether supporters of the movement have considered the full implications of this vision or whether they have considered the extent to which they wish to pursue the vision. Whether they have considered the full implications or not, the abstract vision has gained increasing political popularity with the rise of the Obama backlash and the Tea Party movement.

By design or luck, Gary Marbut created a Commerce Battering Ram strategy and recruited states to carry and propel the ram. Political events have

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162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 23.

166. *Mont. Shooting Sports Ass'n v. Holder*, No. CV-09-147, 2010 WL 3909431 (D. Mont. Sept. 29, 2010).

167. Paul Helmke, President of the Brady Center to Prevent Gun Violence, commented on the magistrate's findings: "The gun lobby's so-called 'freedom' acts would threaten public safety by circumventing lifesaving federal laws. . . . The magistrate's recommendation was correct that the lawsuit, and the Act itself, should be thrown out." Matt Gouras, *Gun Law Freedom Lawsuit Dealt Blow*, ASSOCIATED PRESS, Sep. 2, 2010.

168. *Id.*

169. *Id.*

provided additional heft for his battering ram.

### A. *The Tea Party Movement*

The new regulatory era embarked upon by the Obama administration has frustrated many individuals and lawmakers. The Tea Party movement, a vocal political force fighting against “big government” in general and the Obama administration in particular, was born slightly after the Firearms Freedom Act movement but emerged from the same sociopolitical frustrations. The trigger for the Tea Party movement was a rant of CNBC correspondent Rick Santelli against the federal Home Affordable Modification Program (“HAMP”).<sup>170</sup> On February 19, 2009, a day after the announcement of the program, Mr. Santelli spoke out against HAMP in a live broadcast. Standing on the trade floor of the Chicago Board of Trade, Santelli criticized the government for “promoting bad behavior” and called for a referendum on whether “we want to subsidize the losers’ mortgages.”<sup>171</sup> Mr. Santelli then turned to a group of traders seated behind him and shouted, “How many of you people want to pay for your neighbor’s mortgage that has an extra bathroom and can’t pay their bills? . . . We’re thinking about having a Chicago tea party in July.”<sup>172</sup> After this broadcast, Tea Party protests—invoking emblematic themes from the Boston Tea Party and the Revolutionary War—began sprouting up across the country.<sup>173</sup>

The Tea Party movement has taken on steam ever since. In July 2010, it formed the House Tea Party Caucus, listing 28 house representatives.<sup>174</sup> In the 2010 midterm elections, approximately 35% of the Tea Party candidates running for office in the United States Congress were elected, giving the movement at least

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170. For a study of HAMP, see Jean Braucher, *Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster First Year of the Home Affordable Modification Program (HAMP)*, 52 ARIZ. L. REV. 727 (2010).

171. *Id.* at 787.

172. *Id.*; see also Jill Lepore, *Tea and Sympathy*, NEW YORKER, May 3, 2010, at 26; Ben McGrath, *The Movement*, NEW YORKER, Feb. 1, 2010, at 40, 42–43; William Voegeli, *The Meaning of the Tea Party*, 10 CLAREMONT REV. BOOKS 12 (2010). A month after Santelli made these statements, his CNBC colleague Jim Cramer acknowledged his responsibility for giving bad advice to investors, some of whom became the “losers” referred to by Santelli. See Thomas Frank, *Financial Journalists Fail Upward*, WALL ST. J., Mar. 14, 2009, at A13; Alessandra Stanley, *High Noon on the Set: Cramer vs. Stewart*, N.Y. TIMES, Mar. 19, 2009, at C1.

173. The sentiments that unite the Tea Party movement have more in common with the sentiments that ignited the 1794 Whiskey Rebellion than with the 1773 Boston Tea Party. The Whiskey Rebellion was a response to the Washington Administration’s decision to finance national debt, among other things, through tax on whiskey. See LELAND D. BALDWIN, *WHISKEY REBELS: THE STORY OF A FRONTIER UPRISING* (1939); RICHARD TAYLOR WILEY, *THE WHISKEY INSURRECTION* (1912); Jacob E. Cooke, *The Whiskey Insurrection: A Re-Evaluation*, 30 PENN. HIST. 316 (1963); Richard H. Kohn, *The Washington Administration’s Decision to Crush the Whiskey Rebellion*, 59 J. AM. HIST. 567 (1972); David O. Witten, *An Economic Inquiry Into the Whiskey Rebellion of 1794*, 49 AGRIC. HIST. 491 (1975).

174. Jennie Lorber, *Republicans Form Caucus for Tea Party in the House*, N.Y. TIMES, Jul. 22, 2010, at A18.



40 new seats in the House and 5 new seats in the Senate.<sup>175</sup> Among the victors was Florida Tea Party favorite and new young Senator Marco Rubio, who is fondly known as the “Great Right Hope.”<sup>176</sup> South Carolina Senator Jim DeMint, who bucked Republican leaders to endorse Tea Party candidates all over the country, wrote an op-ed in the *Wall Street Journal* congratulating “all the tea party-backed candidates who overcame a determined, partisan opposition to win their elections.”<sup>177</sup> DeMint declared that “Tea Party Republicans were elected to go to Washington and save the country.”<sup>178</sup> To his Tea Party comrades he wrote, “So put on your boxing gloves. The fight begins today.”<sup>179</sup> Victorious Tea Party candidates echoed DeMint’s tone. Rand Paul of Kentucky, who won a seat in the Senate, pledged not to compromise, announcing, “[T]here’s a Tea Party tidal wave and we’re sending a message.”<sup>180</sup>

The 2010 midterm election also marked a significant shift in state legislatures. The Republican Party has strengthened its hold, promoting an anti-federal regulation agenda.<sup>181</sup> For example, in Arizona, the Republican Party took twenty-one of the thirty open Senate seats. Russell Pearce, the leader of the Republican party in the Arizona Senate who has titled himself the “Tea Party Senate President,” posted a note on the state’s Tea Party blog:

Today I am humbled by my fellow Republicans [sic] decision to put their trust in me as the Senate President. . . .

[In the 2010 election] we saw America stand up and say “NO. We do not like the direction we are headed and want to change course.” We all know this as the Tea Party movement, that I am proud to be a member of. . . . In 2010 we passed some tremendous legislation that has made Arizona a national leader. We have passed legislation to enforce the laws of the land, improve school choice, protect mothers and their babies, restore our lost 2nd Amendment rights, Healthcare Freedom Act to protect your choice in healthcare, elimination of Affirmative Action and much more. Thanks to my fellow [sic] colleagues in both the House of Representatives and the Senate we are a national model as to what states can do; we passed SB1070 . . .

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175. *How Tea Party Candidates Fared*, N.Y. TIMES, Nov. 4, 2010, at P8.

176. *See, e.g.*, Damien Cave, *In Florida’s New Senator, Some Conservatives See Rise of the ‘Great Right Hope,’* N.Y. TIMES, Nov. 4, 2010, at P1; Larry Thornberry, *GOP Soul Check*, AM. SPECTATOR, Sep. 30, 2009. The title “Great Right Hope” is a play on the “Great White Hope,” a title reluctantly received by retired white boxer Jim Jefferies. After Jack Johnson became the first black heavyweight champion of the world and appeared to be undefeated, white racists forced Jefferies to the ring with this title, where Johnson knocked him out. *See* Orbach, *supra* note 17.

177. Jim DeMint, Op-Ed., *Welcome, Senate Conservatives*, WALL ST. J., Nov. 3, at A25.

178. *Id.*

179. *Id.*

180. Campbell Robertson, *Rand Paul Vows to Stay on Message in Senate*, N.Y. TIMES, Nov. 3, 2010, at P7.

181. *See, e.g.*, Michael Cooper, *Decisive Gains at State Level Could Give Republicans a Boost for Years*, N.Y. TIMES, Nov. 4, 2010, at P6; *Revolution in the States*, WALL ST. J., Nov. 5, 2010, at A18.

put on the ballot [the] Healthcare Freedom Act, Proposition 107 to eliminate government discrimination and the Marriage Amendment.

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I consider this to be the Tea Party Senate and we intend to take back America one state at a time.<sup>182</sup>

The Tea Party movement overlaps with the Firearms Freedom Act movement in terms of supporters, leaders, visions, and goals. Though the Tea Party's political goals extend well beyond a re-envisioning of the Commerce Clause and the Tenth Amendment, the Tea Party movement consolidates and encompasses the various overlapping Tenth Amendment movements currently sweeping the nation. Furthermore, the Tea Party movement endorses the apparatus of the Commerce Battering Ram, or at least embraces its ideology. Members of the Tea Party movement have been carrying Marbut's Commerce Battering Ram and endorsing similar Commerce Battering Rams. Whatever the ideological reasons may be, Tea Party members believe that attacking the current Commerce Clause jurisprudence could promote social prosperity. Thus, the success of the Tea Party movement in Congress and in state legislatures will add power to Commerce Battering Rams and increase the social costs of these rams.

### ***B. Tenth Amendment Platforms***

State legislators—in many cases the same legislators who sponsored their states' respective Firearms Freedom Act—have experimented with various other forms of Tenth Amendment legislation. For example, during the term of the 111th Congress, fourteen states passed cloned declaratory Tenth Amendment resolutions. These resolutions, which were introduced but not adopted in many other states, claim sovereignty for the state over all powers not specifically granted to the federal government by the United States Constitution. Furthermore, they demand that the federal government cease enacting mandates beyond the scope of its specifically designated constitutional powers and prohibit or repeal “all compulsory federal legislation that directs states to comply under threat of civil or criminal penalties or sanctions or requires states to pass legislation or lose federal funding.”<sup>183</sup>

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182. Note from Russell Pearce, Tea Party Senate President-Elect, ARIZ. TEA PARTY (Nov. 7, 2010, 7:30 p.m.), available at <http://arizonateaparty.ning.com/profiles/blogs/a-note-from-russell-pearcetea>.

183. Alabama, Alaska, Arizona, Idaho, Kansas, Louisiana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and Wyoming passed such resolutions. S.J.R. 27, 2010 Leg. (Ala. 2010) (introduced on January 14, 2010, signed into law on January 22, 2010); H.J.R. 27, 26th Leg. (Alaska 2009) (introduced on March 19, 2009, filed without the Governor's signature on August 5, 2009); H.C.R. 2001, 49th Leg. (Ariz. 2010) (introduced on January 11, 2010, filed with the Secretary of State on April 22, 2010); H.J.M. 4, 60th Leg. (Idaho 2009) (introduced on March 4, 2009); S.C.R. 1615, 2010 Leg. (Kans. 2010) (introduced on March 16, 2009, effective date is March 29, 2010); S.C.R. 2, 2009 Leg. (La. 2009) (introduced on April 27, 2009); L.R. 539, 101 Leg. (Neb. 2010) (introduced on March 30, 2010, adopted on April 13, 2010); H.C.R. 3063, 2009 Leg. (N.D. 2009) (introduced on March 20, 2009); H.J.R. 1003, 52nd Leg. (Okla. 2009) (introduced on February 2, 2009, vetoed by the Governor on April 24, 2009); H.C.R. 1028, 52nd Leg.

State Representative Mike Kelly of Alaska introduced the Alaska Tenth Amendment Resolution one week after introducing the Alaska Firearms Freedom Act bill, stating: “[o]ften the broad manner in which laws are written in congress [sic] can most politely be described as overreaching and cavalier. . . . [This proposed resolution] tells the feds to back off, that Alaska has the authority and right to determine how best to govern our state.”<sup>184</sup>

State legislators have also introduced bills that attempt to use the same Commerce Battering Ram employed by the Firearms Freedom Act movement but that declare alternative instruments to be beyond the scope of federal regulation. For example, Montana state representative Joel Boniek, the same legislator who sponsored the original Firearms Freedom Act, requested and served as co-sponsor of a bill that asserted “state rights and challeng[ed] federal authority” with respect to federal regulations protecting gray wolves.<sup>185</sup> One of the sponsors of the Oklahoma Firearms Freedom Act also introduced the Oklahoma Communications Freedom Act, which stated the same constitutional theory of the Firearms Freedom Act but declared intrastate radio communications beyond the scope of the federal government’s Commerce Clause authority.<sup>186</sup> A group of state legislators in Arizona who sponsored the Arizona Firearms Freedom Act also sponsored a mirror bill that declared incandescent light bulbs manufactured in Arizona and not exported to other states as purely intrastate goods not subject to federal regulation under the Commerce Clause.<sup>187</sup>

Though state legislatures have experimented with a variety of instruments to use in Commerce Battering Arms, firearms—at least for a period of time—were the most successful and promising. Arizona Governor Janice Brewer acknowledged this when she vetoed her state’s proposed “light bulb freedom” bill:

While I have vetoed HB 2337, I share the bill’s underlying sentiment. The federal government continually infringes on the rights of States guaranteed in the United States Constitution and by over-regulating the lives of everyday Americans. . . . HB 2337 was modeled in large part after [Arizona Firearms Freedom Act,] HB 2307. Both bills invite lawsuits that would restore our Founding Fathers’ vision of a limited federal government based on the Tenth

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(Okla. 2009) (introduced on April 29, 2009, filed with Secretary of State without Governor’s signature on May 14, 2009); S.B. 424, 118 Leg. (S.C. 2010) (introduced on February 12, 2009, adopted on March 9, 2010); H.C.R. 1013, 85th Leg. (S.D. 2009) (introduced on March 2, 2009); S.J.R 311, 106th Leg. (Tenn. 2009) (introduced on April 16, 2009); S.C.R. 3, 2010 Leg. Gen. Sess. (Utah 2010) (introduced January 7, 2010, signed into law on March 26, 2010); H.J.R. 2, 60th Leg. (Wyo. 2010) (introduced on February 9, 2010, signed into law on March 8, 2010).

184. Representative Mike Kelly, H.J.R. 27 Sponsor Statement (Mar. 24, 2009).

185. S.B. 0183, 61st Leg. (Mont. 2009) (bill died in committee).

186. H.B. 2812, 52nd Leg., 2d Sess. (Okla. 2010).

187. H.B. 2337, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (introduced on January 19, 2010).

Amendment. I believe that the Firearms Freedom Act is the more immediate and practical vehicle for achieving this objective.<sup>188</sup>

The light bulb freedom bill was a Commerce Battering Ram with a Tenth Amendment log at its center, just like its prototype the Firearms Freedom Act. The ram was constructed with an identical legal theory and ideological philosophy but contained a less emotionally resonant and politically popular instrument as its wheels. Because Commerce Battering Rams gain strength as more states sign on to push them, Governor Brewer came to the strategic conclusion that focusing on one particular ram, rather than dividing the strength of the state between multiple rams, would best promote the goal of breaking down the walls of federal policy.

Prior to March 2010, the Firearms Freedom Act movement appeared to be the most promising Commerce Battering Ram. For this reason, in January and February of 2010, states' rights advocates concerned with the Senate's endorsement of the federal healthcare reform bill turned to Firearms Freedom Acts as a means of voicing their frustration.<sup>189</sup>

On March 22, 2010, however, a new Commerce Battering Ram emerged. On that day, the healthcare reform bill passed the House with a 219-to-212 vote.<sup>190</sup> The next day, President Obama signed the bill into law.<sup>191</sup> In the time since and as of the publication of this Essay, 40 state legislatures have introduced bills aimed at nullifying the law.<sup>192</sup> These bills employ the same Commerce Battering Ram strategy used in the Firearms Freedom Act movement and use as wheels an even more compelling instrument than guns.

Many of the healthcare reform nullification bills share sponsors with the relevant state's Firearms Freedom Act. In Indiana, some of the state senators who sponsored the Indiana Firearms Freedom Act also sponsored a Health Care Choice Bill that declared: "[h]ealth care choice rights are reserved to the residents of Indiana under the Ninth, Tenth, and Fourteenth Amendments to the Constitution of the United States, are wholly intrastate activities exempted from the Commerce Clause . . . and are not subject to federal law."<sup>193</sup> Some state legislators even

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188. Gov. Janice Brewer, Veto Letter on House Bill 2337 to Ken Bennett, Sec'y of State (May 11, 2010).

189. See *supra* Part I.A.

190. Jonathan Weisman, *Parties Joust over Next Steps on Health*, WALL ST. J., Mar. 23, 2010, at A1.

191. Pub. L. No. 111-148, 124 Stat. 119 (2010); see Sheryl Gay Stolberg & Robert Pear, *Obama Signs Healthcare Overhaul Bill, With a Flourish*, N.Y. TIMES, Mar. 24, 2010, at A19.

192. For discussions of this movement, see Jack M. Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, 362 NEW ENG. J. MED. 482 (2010); Randy Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 6 N.Y.U. J.L. & LIBERTY (forthcoming 2011); Timothy S. Jost, *Can the States Nullify Health Care Reform*, 362 NEW ENG. J. MED. 869 (2010); Elizabeth Weeks Leonard, *Notes from the Tea Party: The Affirmative Case for the Health Care Reform Nullification Movement*, 39 HOFSTRA L. REV. (forthcoming 2011).

193. S.B. 319, 2010 Leg. § 8 (Ind. 2010).

mimicked the branding employed in the Firearms Freedom Act movement, titling their healthcare nullification bills Health Care Freedom Acts.<sup>194</sup>

Like the Firearms Freedom Act movement, the healthcare reform nullification movement uses legislation in conjunction with litigation. Armed with the experience and legal architecture of the Firearms Freedom Acts and the *Montana Shooting Sports Ass'n* case, over fifteen legal challenges to the federal healthcare reform bill have been filed since the bill became law. The most prominent of these are: *Thomas More Center v. Obama*<sup>195</sup> from Michigan, *Florida v. U.S. Department of Health & Human Services*<sup>196</sup> from Florida, and *Virginia v. Sebelius*<sup>197</sup> from Virginia. These legal challenges have enjoyed greater judicial success than *Montana Shooting Sports Ass'n v. Holder*, at least in part because the law they challenge arguably regulates economic inactivity rather than activity.

The Court in *Virginia v. Sebelius* not only concluded that the plaintiff—the Commonwealth of Virginia—had standing to sue but that it “advance[d] a plausible claim with an arguable legal basis.”<sup>198</sup> Analyzing the constitutional challenge to the healthcare reform bill advanced in the case, the court noted that “[t]he guiding precedent [on the Commerce Clause]” was “informative but inconclusive” because the Clause had never before been extended so far as to purportedly authorize federal regulation of economic inactivity.<sup>199</sup> In the court’s opinion, “the Minimum Essential Coverage Provision [of the Patient Protection and Affordable Care Act] literally forges new ground and extends the Commerce Clause powers beyond its current high watermark.”<sup>200</sup> The court in *Florida v. U.S. Department of Health & Human Services* came to a similar conclusion after characterizing the healthcare reform bill as “a controversial and polarizing law about which reasonable and intelligent people can disagree in good faith.”<sup>201</sup>

The battering ram of the healthcare reform nullification movement has several strategic advantages over that of the Firearms Freedom Act movement. Because the Minimum Essential Coverage provision of the Patient Protection and Affordable Care Act applies widely to American citizens and requires those citizens to take what for some may be involuntary action, standing can be established by individuals challenging the Act more easily and without as much risk as in Firearms Freedom Act lawsuits. Healthcare reform challenges also have access to Commerce Clause arguments that are unavailable in Firearms Freedom Act lawsuits. Where plaintiffs in Firearms Freedom Act lawsuits are seeking the opportunity to carry on commercial activities prohibited by the federal government, plaintiffs in healthcare reform cases are simply seeking to avoid being punished by the federal government for economic inactivity. Even the court in

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194. See, e.g., S.B. 26, 2010 Leg. (La. 2010); H.B. 10, 2010 Leg. (Va. 2010).

195. *Thomas More Law Ctr. v. Obama*, No. 10-CV-11156, 2010 WL 3952805 (E.D. Mich. Oct. 7, 2010).

196. *Florida ex rel. McCollum v. U.S. Dep’t of Health & Human Servs.*, No. 3:10-cv-91, 2010 WL 4010119 (N.D. Fla. Oct. 14, 2010).

197. *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010).

198. *Id.* at 612.

199. *Id.*

200. *Id.* at 609.

201. *Florida*, No. 3:10-cv-91, 2010 WL 4010119, at \*1.

*Thomas More Center v. Obama*, which ultimately dismissed the case, agreed that the economic activity versus inactivity argument advanced by the plaintiffs was arguably one of first impression.<sup>202</sup> In addition, the activity versus inactivity distinction gives healthcare reform challenges a farther-reaching emotional appeal. Whereas most Americans have no interest in manufacturing and selling firearms, all but the relatively apathetic have an opinion regarding whether the federal government should require them to purchase health insurance under threat of economic sanction.

Because the Commerce Battering Ram of the healthcare reform nullification movement is a stronger weapon than that of the Firearms Freedom Act movement, states will likely focus their future effort primarily on healthcare reform nullification bills and litigation. Whatever the future holds for the healthcare reform nullification challenges and other Tenth Amendment platforms, however, these political movements owe the origins of their political–legal apparatus to Gary Marbut, who promoted the first successful Commerce Battering Ram of the era.

### CONCLUSION

Private lawmaking is pervasive in American law. Some private lawmaking organizations, such as ALI and NCCUSL, are composed of experts who draft laws through processes that assess the potential consequences of the proposed laws. Other private lawmakers are individual activists who draft laws in furtherance of political causes. Private lawmakers are not publically accountable for their actions. They can choose how much or how little to disclose of their political strategy and goals. They can, if they so decide, operate entirely in the shadows and remain virtually unknown in the public eye. Campaign funding restrictions and disclosure requirements imposed upon public lawmakers have no applicability to private lawmakers. After *Citizens United*, private lawmakers have much more power to use corporate funds as a means of stacking legislatures with senators and representatives of their choosing. This in turn gives private lawmakers a much greater ability to see their laws through to enactment.

States' willingness to adopt uncooperative federalism provides fertile ground for private lawmakers. By drafting state laws that challenge federal regulatory power, private lawmakers can use the narrative of states' rights to recruit an army of states to attack the fortified wall of federal policy in a manner which primarily promotes the political cause of the private lawmaker. A uniform code in the form of uncooperative federalism created by a private lawmaker and adopted by state legislatures thus arms the private lawmaker with significant power.

Gary Marbut has dedicated his life to lobbying for gun rights, and the original Montana Firearms Freedom Act was just one in a long line of gun rights bills which he has drafted and promoted. Cloaking the bill in the language of states' rights allowed Marbut to attract the attention of state legislators frustrated with the regulatory agenda of the 111th Congress and the Obama administration.

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202. *Thomas More Law Ctr.*, No. 10-CV-11156, 2010 WL 3952805, at \*8.

With the support of these legislators, Marbut has spearheaded a movement whose stated goal is to overturn the last three quarters of a century of Supreme Court Commerce Clause jurisprudence. Overturning post-New Deal Commerce Clause precedent could grant Marbut greater power to influence gun control regulations affecting Montanans. It could also do much more. When private lawmakers such as Gary Marbut employ Commerce Battering Rams, success could mean the upheaval of a huge array of federal legislation.

The Supreme Court's Commerce Clause jurisprudence has evolved in response to the changing practical realities of the nation's economy. Reverting back to the Commerce Clause jurisprudence of the late nineteenth and early twentieth century would mean returning to a jurisprudence created for a nation with an economy much less complex and networked than what we have today. It would also render uncertain the constitutionality of a wide variety of federal laws. Reinvigorating the Court's pre-New Deal distinction between commerce and manufacturing would place doubt on Congress's ability to pass laws prohibiting child labor, regulating working conditions and hours, protecting civil rights, banning loan sharking, mandating disclosure of nutritional information, and protecting the public in many other ways.

It is unclear whether Gary Marbut or any of the state legislators sponsoring clones of his Firearms Freedom Act have carefully considered the full spectrum of the implications that a return to pre-New Deal Commerce Clause jurisprudence would have on the nation. Marbut appears to have been primarily concerned with gun rights, and state legislators cloning his Act appear to have been primarily concerned with the Obama administration's regulatory agenda and the healthcare reform bill. Success in the United States Supreme Court on the Commerce Clause theory expressed in Firearms Freedom Acts—whether that success comes by means of the Firearms Freedom Act movement or the healthcare reform nullification movement—could carry constitutional surprises even for those creating and pushing the corresponding battering rams.

Although the Commerce Battering Ram may not ultimately prevail at the Supreme Court or in the political arena, its social costs are significant. The Commerce Battering Ram, as a legal apparatus and political theory attacking federal regulation, has proven popular among states and is a favorite weapon in the Tea Party movement's arsenal. The attack begun by the Firearms Freedom Act movement is poised to continue and has inspired other arguably more sophisticated Commerce Battering Rams, such as that of the healthcare reform nullification movement. Lawsuits have been and will be filed. Substantial private and public funds have been and will be spent in this litigation and its ancillary campaigns. The time and abilities of many talented individuals have been and will be diverted from productive activities as these individuals enter tactical battles generated by Commerce Battering Rams. Thus, even if the United States never sees the consequences of a Commerce Battering Ram's success in breaking down the walls of federal policy, the rams still create a threat to and impose a burden on society.

## APPENDIX A

## THE FIREARMS FREEDOM ACT MOVEMENT: TIMELINE

<p><b>Montana</b>  H.B. 246, 61st Leg. (Mont. 2009)  <i>Introduced: January 13, 2009</i>  <i>Signed into Law: April 15, 2009</i>  MONT. CODE ANN. §§ 30-20-101 to -106 (Supp. 2010).</p>	<p><b>Tennessee</b>  S.B. 1610, 106th Leg. (Tenn. 2009)  H.B. 1796, 106th Leg. (Tenn. 2009)  <i>Introduced: February 12, 2009</i>  <i>Returned by Governor Without Signature: June 22, 2009</i>  <i>Effective Date: June 29, 2009</i>  TENN. CODE ANN. §§ 4-54-101 to -106 (Supp. 2010).</p>
<p><b>Texas</b>  H.B. 1863, 81st Leg. (Tex. 2009)  <i>Introduced: March 4, 2009</i>  <i>Did Not Pass by End of Session</i></p>	<p><b>Alaska</b>  H.B. 186, 26th Leg. (Alaska 2010)  <i>Introduced: March 12, 2009</i>  <i>Signed into Law: May 27, 2010</i>  ALASKA STAT. § 44.99.500 (Supp. 2010)</p>
<p><b>South Carolina</b>  S.B. 794, 118th Leg. (S.C. 2009)  H.B. 4022, 118th Leg. (S.C. 2009)  <i>Introduced: May 6, 2009</i>  <i>Did Not Pass by End of Session</i></p>	<p><b>Minnesota</b>  H.B. 2376, 86th Leg. (Minn. 2009)  <i>Introduced: May 7, 2009</i>  <i>Did Not Pass by End of Session</i></p>
<p><b>Florida</b>  H.B. 21, 112th Leg. (Fla. 2010)  <i>Introduced: July 6, 2009</i>  <i>Died in a House Committee: April 30, 2010</i></p>	<p><b>Michigan</b>  H.B. 5232, 95th Leg. (Mich. 2009)  <i>Introduced: August 11, 2009</i>  <i>Did Not Pass by End of Session</i></p>



**Pennsylvania**

H.B. 1988, 2009 Leg. (Pa. 2009)

*Introduced: September 18, 2009**Did Not Pass by End of Session***Kentucky**

H.B. 87, 2010 Leg. (Ky. 2010)

*Introduced: January 5, 2010**Did Not Pass by End of Session***Indiana**

S.B. 200, 2010 Leg. (Ind. 2010)

S.B. 276, 2010 Leg. (Ind. 2010)

S.B. 416, 2010 Leg. (Ind. 2010)

*Introduced: January 11, 2010**Did Not Pass by End of Session***Virginia**

H.B. 69, 2010 Leg. (Va. 2010)

H.B. 886, 2010 Leg. (Va. 2010)

*Introduced: January 13, 2010**Did Not Pass by End of Session***Ohio**

H.B. 0315, 128th Leg. (Ohio 2010)

*Introduced: October 16, 2009**Did Not Pass by End of Session***Missouri**

H.B. 1230, 2010 Leg. (Miss. 2010)

H.B. 1506, 2010 Leg. (Miss. 2010)

*Introduced: January 6, 2010**Did Not Pass by End of Session***New Hampshire**

H.B. 1285, 2010 Leg. (N.H. 2010)

H.B. 1433, 2010 Leg. (N.H. 2010)

*Introduced: January 6, 2010**Did Not Pass by End of Session***Alabama**

H.B. 48, 2010 Leg. (Ala. 2010)

*Introduced: January 12, 2010**Did Not Pass by End of Session***Washington**

H.B. 2709, 61st Leg. (Wash. 2010)

*Introduced: January 12, 2010**Did Not Pass by End of Session*

<p><b>Colorado</b> S.B. 10-92, 67th Leg. (Colo. 2010) <i>Introduced: January 20, 2010</i> <i>Postponed Indefinitely by a Senate Committee: February 10, 2010</i></p>	<p><b>Arizona</b> S.B. 1098, 49th Leg. (Ariz. 2010) <i>Introduced: January 14, 2010</i> H.R. 2307, 49th Leg. (Ariz. 2010) <i>Signed into Law: April 5, 2010</i><sup>203</sup> ARIZ. REV. STAT. §§ 13-3114 (2010)</p>
<p><b>Utah</b> S.B. 11, 2010 Leg. (Utah 2010) <i>Introduced: January 25, 2010</i> <i>Signed into Law: February 26, 2010</i> UTAH CODE ANN. §§ 53-5b-101 to -202 (2004 &amp; Supp. 2010)</p>	<p><b>South Dakota</b> S.B. 89, 85th Leg. (S.D. 2010) <i>Introduced: January 22, 2010</i> <i>Signed into Law: March 12, 2010</i> S.D. CODIFIED LAWS §§ 37-35-1 to -5 (2003 &amp; Supp. 2010)</p>
<p><b>Kansas</b> H.B. 2620, 2010 Leg. (Kan. 2010) <i>Introduced: February 2, 2010</i> <i>Died in a Senate Committee (May 28, 2010)</i></p>	<p><b>Oklahoma</b> H.B. 2884, 52nd Leg. (Okla. 2010) H.B. 2994, 52nd Leg. (Okla. 2010) S.B. 1685, 52nd Leg. (Okla. 2010) <i>Introduced: February 1, 2010</i> <i>Vetoed: April 26, 2010</i> <i>Veto Override Failed: May 5, 2010</i></p>
	<p><b>West Virginia</b> H.B. 4316, 2010 Leg. (W. Va. 2010) S.B. 555, 2010 Leg. (W. Va. 2010) <i>Introduced: February 3, 2010</i> <i>Did Not Pass by End of Session</i></p>

203. H.R. 2307, which is essentially identical to S.B. 1098, replaced S.B. 1098 when it was introduced on January 25, 2010. The Governor signed a version of H.R. 2307.

**Wyoming**

H.B. 28, 2010 Leg. (Wyo. 2010)  
*Introduced: February 9, 2010*  
*Signed into Law: March 11, 2010*  
WYO. STAT. ANN. §§ 6-8-401 to -406  
(2007 & Supp. 2010)

**Idaho**

H.B. 589, 60th Leg. (Idaho 2010)  
*Introduced: February 19, 2010*  
*Signed into Law: April 8, 2010*  
IDAHO CODE ANN. § 18-3315A (2004  
& Supp. 2010)

**Louisiana**

S.B. 175, 2010 Leg. (La. 2010)  
*Introduced: March 29, 2010*  
*Did Not Pass by End of Session*

## APPENDIX B

## GARY MARBUT'S MODEL FOR A FIREARMS FREEDOM ACT

The model bill below was taken from [www.FirearmsFreedomAct.com](http://www.FirearmsFreedomAct.com) and adjusted to make it generic to any state. The Marbut model is Montana House Bill 246 with minor adjustments based on the experience of other states. Marbut's model came with the following explanation:

There has been some helpful critique of the FFA since it was passed in Montana. The version below incorporates two effective language changes in the bill recommended by Gary Marbut, original drafter of the bill and President of the Montana Shooting Sports Association (the lead proponent for H.B. 246 before the Montana Legislature).

*A Firearms Freedom Act Model*

*Section 1. Short Title.* [Sections 1 through 6] may be cited as the "[STATE] Firearms Freedom Act."

*Section 2. Legislative Declarations of Authority.* The Legislature declares that the authority for [Sections 1 through 6] is the following:

(1) The Tenth Amendment to the United States Constitution guarantees to the states and their people all powers not granted to the federal government elsewhere in the Constitution and reserves to the state and people of [STATE] certain powers as they were understood at the time that [STATE] was admitted to statehood in [YEAR]. The guaranty of those powers is a matter of contract between the state and people of [STATE] and the United States as of the time that the compact with the United States was agreed upon and adopted by [STATE] and the United States in [YEAR].

(2) The Ninth Amendment to the United States Constitution guarantees to the people rights not granted in the Constitution and reserves to the people of [STATE] certain rights as they were understood at the time that [STATE] was admitted to statehood in [YEAR]. The guaranty of those rights is a matter of contract between the state and people of [STATE] and the United States as of the time that the compact with the United States was agreed upon and adopted by [STATE] and the United States in [YEAR].

(3) The regulation of intrastate commerce is vested in the states under the Ninth and Tenth Amendments to the United States Constitution, ~~particularly if not expressly preempted by federal law. Congress has not expressly preempted state regulation of intrastate commerce pertaining to the manufacture on an intrastate basis of firearms, firearms accessories, and ammunition.~~<sup>204</sup>

(4) The Second Amendment to the United States Constitution reserves to the people the right to keep and bear arms as that right was understood at the time

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204. The deleted language appeared in the bill that Montana passed.

that [STATE] was admitted to statehood in [YEAR], and the guaranty of the right is a matter of contract between the state and people of [STATE] and the United States as of the time that the compact with the United States was agreed upon and adopted by [STATE] and the United States in [YEAR].

(5) [Section •] of the [STATE] Constitution clearly secures to [STATE] citizens, and prohibits government interference with, the right of individual [STATE] citizens to keep and bear arms. This constitutional protection is unchanged from the [YEAR] [STATE] Constitution, which was approved by Congress and the people of [STATE], and the right exists as it was understood at the time that the compact with the United States was agreed upon and adopted by [STATE] and the United States in [YEAR].

*Section 3. Definitions.* As used in [sections 1 through 6], the following definitions apply:

(1) “Borders of [STATE]” means the boundaries of [STATE] described in [•].

(2) “Firearms accessories” means items that are used in conjunction with or mounted upon a firearm but are not essential to the basic function of a firearm, including but not limited to telescopic or laser sights, magazines, flash or sound suppressors, folding or aftermarket stocks and grips, speedloaders, ammunition carriers, and lights for target illumination.

(3) “Generic and insignificant parts” includes but is not limited to springs, screws, nuts, and pins.

(4) “Manufactured” means that a firearm, a firearm accessory, or ammunition has been created from basic materials for functional usefulness, including but not limited to forging, casting, machining, or other processes for working materials.

*Section 4. Prohibitions.* A personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in [STATE] and that remains within the borders of [STATE] is not subject to federal law or federal regulation, including registration, under the authority of Congress to regulate interstate commerce. It is declared by the Legislature that those items have not traveled in interstate commerce. This Section applies to a firearm, a firearm accessory, or ammunition that is manufactured in [STATE] from basic materials and that can be manufactured without the inclusion of any significant parts imported from another state. Generic and insignificant parts that have other manufacturing or consumer product applications are not firearms, firearms accessories, or ammunition, and their importation into [STATE] and incorporation into a firearm, a firearm accessory, or ammunition manufactured in [STATE] does not subject the firearm, firearm accessory, or ammunition to federal regulation. It is declared by the Legislature that basic materials, such as unmachined steel and unshaped wood, are not firearms, firearms accessories, or ammunition and are not subject to Congressional authority to regulate firearms, firearms accessories, and ammunition under interstate commerce as if they were actually firearms, firearms accessories, or ammunition. The authority of Congress to regulate interstate commerce in basic materials does not include authority to regulate firearms,

firearms accessories, and ammunition made in [STATE] from those materials. Firearms accessories that are imported into [STATE] from another state and that are subject to federal regulation as being in interstate commerce do not subject a firearm to federal regulation under interstate commerce because they are attached to or used in conjunction with a firearm in [STATE].

*Section 5. Exceptions.* [Section 4] does not apply to:

- (1) a firearm that cannot be carried and used by one person;
- (2) a firearm that has a bore diameter greater than 1 1/2 inches and that uses smokeless powder, not black powder, as a propellant;
- (3) ammunition with a projectile that explodes using an explosion of chemical energy after the projectile leaves the firearm; or
- (4) other than shotguns, a firearm that discharges two or more projectiles with one activation of the trigger or other firing device.<sup>205</sup>

*Section 6. Marketing of Firearms.* A firearm manufactured or sold in [STATE] under [Sections 1 through 6] must have the words “Made in [STATE]” clearly stamped on a central metallic part, such as the receiver or frame.

*Section 7.* [State-specific codification instructions].

*Section 8. Applicability.* This Act applies to firearms, firearms accessories, and ammunition that are manufactured, as defined in [Section 3], and retained in [STATE] after [DATE].

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205. This Section is an improvement stemming from the bill introduced in Minnesota.