PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 26 | Issue 3 Article 6

4-15-1999

Printz v. United States: The Revival of Constitutional Federalism

Lang Jin

Printz v. United States: The Revival of Constitutional Federalism

I. INTRODUCTION

In 1992, 15,377 Americans were murdered with firearms.[1] Among them, 12,489 were killed by handguns.[2]

Between 1988 and 1992, the United States experienced a forty-one percent surge in gun murders.[3]

Armed criminals robbed or attacked 530,000 Americans in 1991.[4]

On average, armed rapists assaulted forty-one American women everyday in 1992.[5]

The cost of treating firearm injuries in 1990 was estimated to be $1.4 billion.[6] The indirect cost of lost productivity as a result of those injuries exceeded $19 billion a year.[7]

In 1990, handguns killed a total of only eighty-seven people in Japan, sixty-eight in Canada, twenty-two in Great Britain, but over 24,000 in the United States.[8]

People can be numbed by such an epidemic of violence. On March 30, 1981, however, an attempted-presidential assassination shocked the American public.[9] John Hinckley, Jr. shot White House Press Secretary James Brady in the head with a .22 caliber handgun and wounded three others, including President Ronald Reagan.[10] Even though James Brady miraculously survived the shooting, he

---

1. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 18 (1992).
2. *See id.*
3. *See id.*
4. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 371 (1992).
5. *See id.* at 292.
6. *See* Wendy Max & Dorothy P. Rice, *Shooting in the Dark: Estimating the Cost of Firearm Injuries*, HEALTH AFF., Winter 1993.
7. *See id.*
8. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES (1990). The figures include murders, suicides, and accidents. *See id.*
9. *See* Marie Cocco, *For James Brady, A Trip Back to Terror*, NEWSDAY, Mar. 31, 1989, at 2.
10. *See id.*

became permanently paralyzed.[11] Outraged by the fact that Hinckley, who had a history of mental illness, freely obtained a firearm,[12] James Brady and his wife started to campaign for stricter gun control despite fervent opposition from the National Rifle Association.[13]

On November 30, 1993, Congress enacted the Brady Handgun Violence Prevention Act (the Brady Act)[14] as an amendment to the Gun Control Act of 1968.[15] The Brady Act requires that, until the Department of Justice develops a national computerized background check system, the chief law enforcement officer of a prospective gun purchaser's place of residence shall perform a background check within a five-day waiting period.[16] Soon after the Brady Act took effect, seven United States District Courts heard arguments on the constitutionality of the statute.[17] Five of these courts ruled that the background-check provision violated

---

11. *See* David S. Broder, *Jim and Sarah Brady: A Thumbs-Up Couple*, DET. FREE PRESS, Nov. 9, 1987, at 11A; Wayne King, *Sarah and James Brady, Target: The Gun Lobby*, N.Y. TIMES, Dec. 9, 1990, § 6 (Magazine), at 44.

12. *See* David Behrens, *10 Years of Survival*, NEWSDAY, Mar. 5, 1991, at 48. Using a false address, "Hinckley bought [a] .22-cal[iber] RG 14 Rohm revolver for $29 [from] a Texas pawn shop." *See id.* He was under psychiatric care at that time. *See* Ron Shaffer & Neil Henry, *Hinckley Pursued Actress for Months, Letter Shows*, WASH. POST, Apr. 2, 1981, at A8. Hinckley had been ousted from a neo-Nazi organization whose leaders deemed him "too violent." *See id.* At trial, Hinckley was found insane and committed to a mental institution. *See* Laura A. Kiernan, *A Hinckley Interview: 'I Thought for Sure I Would be Convicted,'* WASH. POST, June 29, 1982, at A1.

13. *See* Naftali Bendavid, *Handgun Control Group Reloads*, LEGAL TIMES, Dec. 20, 1993, at 1; Linda M. Harrington, *Gun Fighters, Jim and Sarah Brady May Finally Win the Battle for the Bill That Bears Their Name*, CHI. TRIB., Nov. 17, 1993, at 1. For discussions on gun control legislation, see Bob Dole, *The Brady Bill: It's Just Not Enough*, 3 KAN. J.L. & PUB. POL'Y, Winter 1993-94, at 135; Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53 (1992); Marc Christopher Cozzolino, Note, *Gun Control: The Brady Handgun Violence Prevention Act*, 16 SETON HALL LEGIS. J. 245 (1992).

14. 18 U.S.C. § 922(s) (1994).

15. *Id.* §§ 921-930. The Gun Control Act of 1968, enacted "after the shooting deaths of Rev. Martin Luther King, Jr. and Sen. Robert F. Kennedy," is the nation's principal gun control law. *See* Pierre Thomas, *Hit-or-Miss Control of Firearms Sales: Enforcers Can't Keep Up with Dealers*, WASH. POST, Nov. 29, 1992, at A1. The statute makes it illegal to sell firearm or ammunition to a person if the seller "know[s] or [has] reasonable cause to believe" that the person is a felon, fugitive, drug addict, illegal alien, one who is mentally defective, one who has been convicted of domestic violence, one who has been dishonorably "discharged from the Armed Forces," or one who has renounced his or her citizenship. *See* 18 U.S.C. § 922(d).

16. *See* 18 U.S.C. § 922(s)(2).

17. *See* Frye v. United States, 916 F. Supp. 546 (M.D.N.C. 1995), *overruled by* Printz v. United States, 117 S. Ct. 2365 (1997); Romero v. United States, 883 F. Supp. 1076 (W.D. La. 1994); McGee v. United States, 863 F. Supp. 321 (S.D. Miss. 1994), *aff'd sub nom.*, Koog v. United States, 79 F.3d 452 (5th Cir. 1996); Frank v. United States, 860 F. Supp. 1030 (D. Vt. 1994), *aff'd in part and rev'd in part*, 78 F.3d 815 (2d Cir. 1996), 129 F.3d 273 (2d Cir. 1997); Mack v. United States, 856 F. Supp. 1372 (D. Ariz. 1994), *aff'd in part and rev'd in part*, 66 F.3d 1025 (9th Cir. 1995), *rev'd sub nom.*, Printz v. United States, 117 S. Ct. 2365 (1997); Printz v. United States, 854 F. Supp. 1503 (D. Mont. 1994), *aff'd in part and rev'd in part sub nom.*, Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), *rev'd sub nom.*, Printz v. United States, 117 S. Ct. 2365 (1997); Koog v. United States, 852 F. Supp. 1376 (W.D. Tex. 1994), *rev'd*, 79 F.3d 452 (5th Cir. 1996).

the Tenth Amendment of the United States Constitution.[18]

In *Printz v. United States*,[19] the United States Supreme Court considered the Tenth Amendment challenges to the Brady Act, and held that the background-check provision impermissibly infringed upon the sovereignty of the States because it compelled state officials to administer a federal-regulatory program.[20]

This Note examines the constitutionality of the Brady Act's background-check provision by critically analyzing the Supreme Court's reasoning in *Printz* and its previous interpretations of the Tenth Amendment. Part II of this Note reviews the historical developments of the Supreme Court's jurisprudence in the Tenth Amendment area.[21] Part III provides the facts of *Printz* and the pertinent provisions of the Brady Act.[22] Part IV analyzes the majority, concurring, and dissenting opinions in *Printz*.[23] Part V demonstrates the ruling's immediate effects and far-reaching impact.[24] Part VI concludes with a summation of *Printz*'s holding and its significance.[25]

II. THE SUPREME COURT AND THE TENTH AMENDMENT

As one federal court recently observed: "Supreme Court decisions about the Tenth Amendment do not reflect a pattern of straight line development of a theme. Rather the cases seem to reflect a series of shifting perspectives on the nature and breadth of the powers reserved to the states . . . ."[26]

A. Early Developments

Commentators appear to agree that the Tenth Amendment is merely

---

18. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. *Frye* and *Koog* were the only two cases where the district courts found the background-check provision of the Brady Act constitutional. *See Frye*, 916 F. Supp. at 549; *Koog*, 852 F. Supp. at 1388.

19. 117 S. Ct. 2365 (1997).

20. *See id.* at 2384.

21. *See infra* notes 26-91 and accompanying text.

22. *See infra* notes 92-112 and accompanying text.

23. *See infra* notes 113-59 and accompanying text.

24. *See infra* notes 160-215 and accompanying text.

25. *See infra* notes 216-21 and accompanying text.

26. Koog v. United States, 852 F. Supp. 1376, 1381 (W.D. Tex. 1994), *rev'd*, 79 F.3d 452 (5th Cir. 1996). For a critical discussion of the Supreme Court's Tenth Amendment jurisprudence, see Richard E. Levy, New York v. United States: *An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 U. KAN. L. Rev. 493 (1993).

"declaratory of the division of powers between nation and states,"[27] and "probably reaffirm[s] the centralizing tendencies of the new [federal] system."[28] Early Supreme Court cases, however, judicially amended the plain language of the Tenth Amendment, limiting federal powers to only those "*expressly* delegated to the national government."[29]

During the New Deal era, federal power exploded in response to the economic emergencies.[30] In 1937, a narrow majority of the Supreme Court upheld the National Labor Relations Act[31] in *NLRB v. Jones & Laughlin Steel Corp.*[32] In subsequent decisions, the Supreme Court generally deferred to Congress and upheld expansive federal regulations, finding that the Tenth Amendment "states but a truism that all is retained which has not been surrendered."[33]

B. National League of Cities v. Usery: *A Test for State Immunity*

The Supreme Court's modern jurisprudence in this area continued, in the Court's own words, on "an unsteady path."[34]

The path began in 1976 when the Court, in *National League of Cities v. Usery*,[35] considered whether an amendment to the Fair Labor Standards Act of 1938,[36] imposing minimum wage and maximum hour requirements upon state and local governments, was a valid exercise of commerce power.[37] In a close decision, the Court invalidated the provision, holding that it impermissibly interfered with

---

27. *See* WALTER BERNS, *The Meaning of the Tenth Amendment, in* "GOVERNMENT FROM REFLECTION AND CHOICE": ESSAYS ON THE CONSTITUTION AND CONSTITUTIONAL LAW 162, 162 (Gary L. McDowell ed., 1981).

28. CHARLES A. LOFGREN, *The Origins of the Tenth Amendment, in* "GOVERNMENT FROM REFLECTION AND CHOICE": CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM 70, 111 (1986).

29. *See* Lane County v. Oregon, 74 U.S. 71, 76 (1868) (emphasis added). The Court quoted and reaffirmed this language in the famous case of *Hammer v. Dagenhart*, 247 U.S. 251, 275 (1918), *overruled in part by* United States v. Darby, 312 U.S. 100 (1941). The Tenth Amendment does not contain the word "expressly." *See* U.S. CONST. amend. X; 18 U.S.C. § 922(S)(2) (1994).

30. *See* Levy, *supra* note 26, at 495; *see also* GERALD GUNTHER, CONSTITUTIONAL LAW 121-28 (11th ed. 1985).

31. 29 U.S.C. §§ 151-169 (1994).

32. 301 U.S. 1 (1937).

33. *See* United States v. Darby, 312 U.S. 100, 124 (1941) (upholding the Fair Labor Standards Act which imposed minimum wage requirements).

34. *See* New York v. United States, 505 U.S. 144, 160 (1992).

35. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

36. 29 U.S.C. §§ 201-219 (1994).

37. *See National League of Cities*, 426 U.S. at 836-37. The Constitution provides that Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *See* U.S. CONST. art. I, § 8, cl. 3.

traditional governmental functions of the States and their political subdivisions.[38] Writing for the majority, Justice Rehnquist stated that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[39] The majority recognized, however, that "temporary enactments tailored to combat a national emergency" were permissible.[40]

Justice Brennan strongly dissented, noting that "nothing in the Tenth Amendment constitute[d] a limitation" when Congress acted within its delegated powers.[41] He further argued that external restrictions on congressional power rested, not in the judicial process, but the political process.[42]

Five years later, the Supreme Court refined the holding of *National League of Cities* in *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*[43] In this case, the plaintiffs challenged the constitutionality of the Surface Mining Control and Reclamation Act of 1977 (the Surface Mining Act),[44] which required states to enforce "compliance with the full panoply of federal performance standards."[45]

The Court developed a three-prong test for invalidating congressional legislation on Tenth Amendment grounds as follows: (1) the challenged statute must regulate the "States as States"; (2) the legislation must address an indisputable "attribute of state sovereignty"; and (3) the States' compliance must directly impair "their ability to structure integral operations in areas of traditional governmental functions."[46] A footnote to the majority opinion further indicated that, even if the three requirements were met, a strong federal interest might nonetheless justify a federal intrusion.[47]

---

38. *See National League of Cities*, 426 U.S. at 851-52. *National League of Cities* expressly overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968). *See id.* at 855. In *Wirtz*, the Court held that federal minimum wage standards could be applied to local schools and hospitals. *See Wirtz*, 392 U.S. at 193-94.

39. *Nat'l League of Cities*, 426 U.S. at 845.

40. *See id.* at 853.

41. *See id.* at 862 (Brennan, J., dissenting).

42. *See id.* at 857-58 (Brennan, J., dissenting).

43. 452 U.S. 264 (1981).

44. 30 U.S.C. §§ 1201-1328 (1988). The statute sets federal mining standards designed to promote safety and preserve the environment. *See id.*

45. *See Hodel*, 452 U.S. at 269.

46. *See id.* at 287-88 (quoting Nat'l League of Cities v. Usery, 426 U.S. 833, 845-54 (1976)).

47. *See id.* at 288 n.29.

Employing this analysis, the Court found the Surface Mining Act to be a valid exercise of commerce power because it did not regulate the "States as States," rather it targeted individual business.[48]

In 1982, the Supreme Court considered another Tenth Amendment challenge in *Federal Energy Regulatory Commission v. Mississippi*.[49] In response to a national energy crisis, the Public Utility Regulatory Policies Act of 1978 (PURPA)[50] required state utility commissions to consider federal rate-making standards and procedures and imposed specific reporting requirements.[51] The State of Mississippi challenged PURPA as beyond the scope of congressional power under the Commerce Clause.[52] The Court upheld the constitutionality of PURPA, finding that the statute presented the States with a choice between compliance and preemption, rather than "'directly compelling' the States to enact" legislation or threatening their sovereignty.[53]

In dissent, Justice O'Connor argued that the *Hodel* three-prong test would have invalidated the challenged provisions of PURPA.[54] Returning to the principles of *National League of Cities*, the dissent laid a foundation for the later significant ruling in *New York v. United States*.[55]

The Tenth Amendment and the congressional exercise of commerce power were once again before the Court in *Equal Employment Opportunity Commission v. Wyoming*.[56] In this case, Congress amended the Age Discrimination in Employment Act of 1967 (ADEA),[57] extending prohibition on age discrimination to state and local governments.[58] *Equal Employment Opportunity Commission* and *National League of Cities* had similar facts, but the Court narrowly distinguished them.[59]

A five-member majority conceded that ADEA regulated the "States as States," but found the federal intrusion here was "sufficiently less serious than . . . [that in] *National League of Cities* so as to make it unnecessary . . . to override Congress' express choice to extend its regulatory authority to the States."[60] Echoing the dissenting Justices in *National League of Cities*, Justice Stevens stated in a concurring opinion that nothing in the Tenth Amendment warranted a judicial

---

48. *See id.* at 293.
49. 456 U.S. 742 (1982).
50. 15 U.S.C. § 3201 (1976 & Supp. IV); 16 U.S.C. § 2611 (1976 & Supp. IV).
51. *See Fed. Energy Regulatory Comm'n*, 456 U.S. at 746-49.
52. *See id.* at 752.
53. *See id.* at 765.
54. *See id.* at 778-79 (O'Connor, J., dissenting).
55. 505 U.S. 144 (1992). Justice O'Connor wrote the majority opinion in the case. *See id.*
56. 460 U.S. 226 (1983).
57. 29 U.S.C. §§ 621-634 (1992).
58. *See Equal Employment Opportunity Comm'n*, 460 U.S. at 228-29.
59. *See id.* at 237-39.
60. *See id.* at 239.

limitation on congressional power delegated by the Commerce Clause.[61]

Equal Employment Opportunity Commission restricted the application of *National League of Cities* and hinted its reversal.[62]

C. Garcia v. San Antonio Metropolitan Transit Authority: *The Political Process Protects State Sovereignty*

In the 1985 case of *Garcia v. San Antonio Metropolitan Transit Authority*,[63] the constitutionality of extending the Fair Labor Standards Act to state and local governments came before the Supreme Court for the second time.[64] This time, the Court expressly overruled *National League of Cities*.[65]

Finding that requiring the states to apply the federal statute to state employees did not infringe upon state sovereignty,[66] the Court rejected the holding of *National League of Cities* as "unsound in principle and unworkable in practice."[67] The Court declared that "the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority."[68] Thus, the *Garcia* Court agreed with the dissent in *National League of Cities* that the limits on congressional power lay in the political process, rather than the judicial process.[69]

Justice O'Connor firmly maintained in her dissenting opinion that the political process was ineffective in restraining expansive federal regulations, and firmly maintained that it was the Court's duty to resolve the conflict between federalism

---

61. *See id.* at 248 (Stevens, J., concurring); *see also* Nat'l League of Cities v. Usery, 426 U.S. 833, 862 (1976) (Brennan, J., dissenting), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

62. *See* Levy, *supra* note 26, at 497.

63. 469 U.S. 528 (1985).

64. *See id.* at 533; *see also supra* notes 35-40 and accompanying text (discussing *National League of Cities*).

65. *See id.*

66. *See id.* at 554.

67. *Id.* at 546-47 (overruling "a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'").

68. *Id.* at 552.

69. *See id.*; Nat'l League of Cities v. Usery, 426 U.S. 833, 862 (1976) (Brennan, J., dissenting), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); *see also* Jesse H. Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1557 (1977) (arguing that the issue of whether the federal government infringed upon state sovereignty should be "nonjusticiable, with [the] final resolution left to the political branches").

and commerce power.[70] Both Justice O'Connor and Justice Rehnquist claimed that, one day, the Court would resume this duty.[71]

In *South Carolina v. Baker*,[72] the Court followed the reasoning in *Garcia*.[73] *Baker* involved the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA),[74] which removed the federal income tax exemption for interests earned on bonds issued in unregistered form by state and local governments.[75] The State of South Carolina brought an original jurisdiction suit in the Supreme Court, contending that TEFRA violated the Tenth Amendment by compelling the states to issue only registered bonds.[76]

Writing the majority opinion, Justice Brennan stated that the political process was the states' principal protection against congressional overreach.[77] South Carolina's allegation that TEFRA was passed by "an uninformed Congress relying upon incomplete information" failed to establish a defect in the national political process.[78] Because TEFRA did not deprive South Carolina of the right to participate in the political process, the Court upheld the statute's constitutionality.[79] Some scholars read *Garcia* as an indication that the Supreme Court would no longer strike down federal law on the Tenth Amendment ground.[80] The tide, however, was once again reversed by the Supreme Court's 1992 decision in *New York v. United States*.[81]

---

70. *See Garcia*, 469 U.S. at 584, 587-89 (O'Connor, J., dissenting) (noting that a number of changes in congressional operations, such as the direct election of Senators under the Seventeenth Amendment and the expanded influence of national interest groups, "lessened the weight Congress gives to the legitimate interests of States as States").

71. *See id.* at 589. The claim became a reality in 1992, when Justice O'Connor wrote the majority opinion in *New York v. United States* and reclaimed the Tenth Amendment. *See* New York v. United States, 505 U.S. 144, 149 (1992).

72. 485 U.S. 505 (1988).

73. *See id.* at 512-13.

74. 26 U.S.C. § 103(j)(1) (1982).

75. *See id; see also Baker*, 485 U.S. at 507-08. The unregistered bonds were vehicles for tax evasion and other illegal activities. *See Hearings on H.R. 6300 Before the House Comm. on Ways and Means*, 97th Cong., 2d Sess. 35 (1982) (testimony of John Chapoton, Assistant Secretary of Treasury for Tax Policy).

76. *See Baker*, 485 U.S. at 508.

77. *See id.* at 513.

78. *See id.* at 512-13 (quoting South Carolina's brief). The Court appointed a Special Master to conduct fact-finding hearings. *See id.* at 510-11. South Carolina filed exceptions to the factual findings submitted by the Special Master. *See id.* at 511.

79. *See id.* at 527.

80. *See* 1 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURES § 4.10, at 310 (1986 & Supp. 1991).

81. 505 U.S. 144 (1992).

D. New York v. United States: *Reviving the Tenth Amendment*

New York v. *United States* examined the validity of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (the Waste Policy Act).[82] The Waste Policy Act contained three provisions to encourage the states' compliance with the federal regulation which are as follows: (1) a monetary incentive for states meeting certain deadlines;[83] (2) an access incentive allowing a host state to collect escalated surcharges and to deny access to exporting states who did not meet deadlines;[84] and (3) a take-title provision requiring states that do not enact the Waste Policy Act to take full liability for all the waste within their borders.[85]

Writing for the majority, Justice O'Connor found the monetary and access incentives to be valid exercises of commerce power.[86] She reasoned that Congress could encourage the states to act by allowing the states to choose between regulation and federal preemption.[87] The opinion, however, invalidated the take-title provision, because, even though this provision allowed the states to choose between enacting the Waste Policy Act and accepting liability for radioactive waste, both choices were "unconstitutionally coercive regulatory techniques."[88] The Court declared that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[89]

By revitalizing the Tenth Amendment, the Supreme Court affirmed that congressional power under the Commerce Clause has limits.[90] Nonetheless, how the Tenth Amendment would impact other manners in which Congress would exercise its commerce power was still unclear.[91]

---

82. 42 U.S.C. § 2021(b)-2021(j) (1988). To end a crisis in the disposal of radioactive waste, the Waste Policy Act provided that "[e]ach State shall be responsible for providing . . . for the disposal of . . . low-level radioactive waste generated within the State." *See* 42 U.S.C. § 2021(c)(a)(1) (1994). The statute also authorized the states to establish and operate regional disposal facilities, and to set a timetable for restricting access to existing disposal sites. *See* 42 U.S.C. § 2021(d).

83. *See* 42 U.S.C. § 2021(e)(d)(2) (1988).

84. *See id.* § 2021(e)(e)(2).

85. *See id.* § 2021(e)(d)(2)(C); *New York*, 505 U.S. at 174-75.

86. *See New York*, 505 U.S. at 173-74.

87. *See id.* at 177.

88. *See id.* at 176.

89. *Id.* at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

90. *See id.* at 156.

91. *See generally* Ronald A. Giller, Note, *Federal Gun Control in the United States: Revival of the Tenth Amendment*, 10 ST. JOHN'S J. LEGAL COMMENT. 151, 162 (1994) ("Courts reviewing federal gun control laws have interpreted these and other Supreme Court cases differently . . . .").

III. THE BRADY ACT AND THE FACTS OF THE CASE

The Brady Act requires the Department of Justice to develop a national instant background check system within five years of its enactment.[92] In the meantime, the Brady Act sets a five-business-day waiting period for proposed sales of handguns.[93] Firearm dealers must examine a potential gun buyer's identification,[94] require the buyer to make a sworn statement vouching his or her eligibility on a form known as "the Brady Form,"[95] and forward a copy of the form to the chief law enforcement officer of the prospective buyer's place of residence.[96] A chief law enforcement officer is defined as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual."[97]

Unless the state government already has an instant background check system,[98] or the state issued a handgun permit to the prospective buyer after a background check,[99] the chief law enforcement officer must "make a reasonable effort to ascertain within 5 business days [whether the proposed handgun sale would violate of the law,] including research in whatever State and local recordkeeping systems . . . and in a national system designated by the Attorney General."[100]

The chief law enforcement officer has the power to waive the waiting period by notifying the gun dealer that there is no basis for denying the sale.[101] If the chief law enforcement officer finds that the proposed gun sale would be illegal and notifies the dealer, the officer must, within twenty days of a request by the prospective buyer, provide written reasons for denial.[102] If the chief law enforcement officer approves the transaction, the Brady Form must be destroyed within twenty days after the sale.[103]

The Brady Act is part of the Gun Control Act, which provides that one who "knowingly violates [the statute] . . . shall be fined under this title, imprisoned for no more than one year, or both."[104] However, the Brady Act exempts chief law enforcement officers from civil liability "for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful," and "for preventing such a sale or transfer to a person who may lawfully receive

---

92. *See* 18 U.S.C. § 922(t) (1994).
93. *See id.* § 922(s)(1)(A)(ii)(I).
94. *See id.* § 922(s)(1)(A)(i)(II).
95. *See id.* § 922(s)(3).
96. *See id.* § 922(s)(1)(A)(i)(III)-(IV).
97. *See id.* § 922(s)(8).
98. *See id.* § 922(s)(1)(D).
99. *See id.* § 922(s)(1)(C).
100. *Id.* § 922(s)(2).
101. *See id.* § 922(s)(1)(A)(ii).
102. *See id.* § 922(s)(6)(C).
103. *See id.* § 922(s)(6)(B)(I).
104. *See id.* § 924(a)(5).

or possess a handgun."[105]

Petitioners Jay Printz and Richard Mack, sheriffs of Ravalli County, Montana, and Graham County, Arizona, respectively, were chief law enforcement officers under the Brady Act.[106] In 1994, Petitioners filed separate suits in two United States district courts, both seeking declaratory judgements that the interim provisions of the Brady Act requiring them to check prospective gun buyers' backgrounds and to perform related duties were unconstitutional.[107] They alleged that the interim provisions would require the use of already scarce personnel and financial resources available to them so as to interfere with the fulfillment of their duties under state laws.[108]

The district courts in Montana and Arizona both held as follows: (1) the sheriffs had standing to contest the constitutionality of the Brady Act;[109] and (2) the interim provisions of the Act violated the Tenth Amendment, but were severable from other provisions of the Brady Act.[110] On appeal, the United States Court of Appeals for the Ninth Circuit consolidated the two cases and reversed, holding that the Brady Act's interim provisions did not violate the Tenth Amendment.[111] The United States Supreme Court granted the Petitioners' writ of certiorari in 1996.[112]

IV. ANALYSIS OF THE COURT'S OPINION

A. *The Majority Ruling*

Justice Scalia delivered the opinion of the Court.[113] After a review of federal

---

105. *See id.* § 922(s)(7)(A)-(B).

106. *See* Printz v. United States, 117 S. Ct. 2365, 2369 (1997); *see also* 18 U.S.C. § 922(s)(8) (defining chief law enforcement officer).

107. *See* Mack v. United States, 856 F. Supp. 1372, 1375 (D. Ariz. 1994), *aff'd in part and rev'd in part*, 66 F.3d 1025 (9th Cir. 1995), *rev'd sub nom.*, Printz v. United States, 117 S. Ct. 2365 (1997); Printz v. United States, 854 F. Supp. 1503, 1506 (D. Mont. 1994), *aff'd in part and rev'd in part sub nom.*, Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), *rev'd sub nom.*, Printz v. United States, 117 S. Ct. 2365 (1997).

108. *See Mack*, 856 F. Supp. at 1375; *Printz*, 854 F. Supp. at 1507. For a discussion on reactions to the Brady Act, see Richard E. Gardiner & Stephon P. Halbrook, *NRA and Law Enforcement Opposition to the Brady Act: From Congress to the District Courts*, 10 ST. JOHN'S J. LEGAL COMMENT. 13 (1994) (discussing burden imposed on law enforcement officers by the Brady Act).

109. *See Mack*, 856 F. Supp. at 1378; *Printz*, 854 F. Supp. at 1509.

110. *See Mack*, 856 F. Supp. at 1383-84; *Printz*, 854 F. Supp. at 1519-20.

111. *See Mack*, 66 F.3d at 1034.

112. *See* Printz v. United States, 116 U.S. at 2521 (1996).

113. *See Printz*, 117 S. Ct. 2365, 2368-84 (1997). Chief Justice Rehnquist and Justice Kennedy joined in the judgement. *See id.* at 2368.

laws regulating the distribution of firearms,[114] Justice Scalia began his analysis of whether compelled enlistment of state and local executive officials for the implementation of federal laws was constitutional.[115] Concluding that no text in the Constitution spoke directly to the question before the Court, Justice Scalia sought answers "in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."[116]

First, Justice Scalia discovered no evidence in historical constitutional practice indicating the existence of a congressional power to compel a state's executive branch into federal service.[117] Rejecting the Government's argument that early congressional enactments implied such a power, Justice Scalia found instead that those early laws only allowed the federal government to impose duties upon state judges to enforce appropriate judicial matters.[118] Justice Scalia also found that the Government's reliance on portions of *The Federalist,* which suggested that the federal government could employ state officials to execute federal laws, was unpersuasive.[119] He reasoned that those statements did not indicate Congress could, without the states' consent, impose duties on the states.[120] Turning his attention to the nation's more recent history, Justice Scalia noted a continued absence of "executive-commandeering" laws until very recent years and regarded the two centuries of congressional avoidance of such legislation as illuminative.[121]

Second, Justice Scalia observed that the structure of the Constitution reflected a principle of "dual sovereignty."[122] He explained that the Framers designed a political structure where both federal and state governments exercise authority, instead of a central government "act[ing] upon and through the States."[123] Therefore, if state officials could be pressed into federal services at no cost to the federal government, federal power would be impermissibly expanded.[124]

---

114. *See id.* at 2368-69. The opinion reviewed the Gun Control Act of 1968, 18 U.S.C. §§ 921-30 (1994), and the Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(s) (1994). *See id.*

115. *See id.* at 2369-70.

116. *See id.* at 2370.

117. *See id.* at 2370-76.

118. *See id.* at 2371.

119. *See id.* at 2371-73 (citing THE FEDERALIST NOS. 27, 36 (Alexander Hamilton) NO. 45 (James Madison)).

120. *See id.*; *see also* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 796 n.35 (1982) (O'Connor, J., concurring in part and dissenting in part) (finding the claims in *The Federalist* rested on the natural assumption that the states would consent).

121. *See Printz,* 117 S. Ct. at 2375-76.

122. *See id.* at 2376 (citing Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) (recognizing the dual sovereignty established by the Constitution)). For a discussion on the preservation of state sovereignty, see Vince Lee Farhat, *Term Limits and the Tenth Amendment: The Popular Sovereignty Model of Reserved Powers,* 29 LOY. L.A. L. REV. 1163 (1996).

123. *See Printz,* 117 S. Ct. at 2377.

124. *See id.* at 2378. *But see* Patricia T. Northrop, Note, *The Constitutional Insignificance of Funding for Federal Mandates,* 46 DUKE L.J. 903, 903-30 (1997) (advocating that courts should not consider lack of federal funding in determining the constitutionality of federal mandates imposed upon states).

Third, Justice Scalia pointed out that using state officials for federal governance would have adverse effects upon the balance of power between the three branches of the federal government.[125] He observed that the Brady Act practically put the responsibility of administering a federal regulatory program upon state and local officials, while the Constitution clearly designated the President and officers of the President as the ones who should bear that responsibility.[126] Justice Scalia warned that a law like the Brady Act would effectively reduce the power of the President and destroy the unity of the Federal Executive.[127]

Next, Justice Scalia rejected the dissent's theory that the Brady Act was constitutionally valid as a law "necessary and proper" for congressional exercise of the Commerce Clause power.[128] He reasoned that where a law violated the principle of dual sovereignty, it could not be a law "'proper for carrying into [e]xecution the Commerce Clause,'" because the Commerce Clause did not allow Congress to regulate "'state governments' regulation of interstate commerce.'"[129]

Finally, the majority examined the most important factor in reaching its decision–the Court's own jurisprudence.[130] Justice Scalia rejected the dissent's four attempts to distinguish the Brady Act from the Waste Policy Act invalidated in *New York* as follows: (1) the Waste Policy Act was not distinguishable on the ground that it involved policy-making decisions while the Brady Act did not because "[e]xecutive action that has utterly no policy-making component is rare";[131] (2) even though the state and local officials only perform ministerial tasks under the Brady Act, they would still have to take the blame for the defects in a federal regulatory program;[132] (3) although the Waste Policy Act addressed the states, and the Brady Act addressed individuals, the Brady Act directed individuals in their

---

125. *See Printz*, 117 S. Ct. at 2378.

126. *See id.* The Constitution mandates that the president "shall take Care that the Laws [of the United States] be faithfully executed." *See* U.S. CONST. art. II, § 3.

127. *See Printz*, 117 S. Ct. at 2378.

128. *See id.*; *see also* U.S. CONST. art. I, § 8, cl. 3; *supra* note 37. The Necessary and Proper Clause grants Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* cl. 18.

129. *See Printz*, 117 S. Ct. at 2379 (quoting New York v. United States, 505 U.S. 144, 166 (1992)); *see also* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297-326, 330-33 (1993).

130. *See Printz*, 117 S. Ct. at 2379-84.

131. *See id.* at 2381 (stating that leaving no policy-making discretion to the states would worsen the federal intrusion).

132. *See id.* at 2382 (finding that Congress could take credit for solving the problem without paying for the program's implementation, while the states might take the blame for the program's possible errors).

official capacities as agents of the states;[133] and (4) a balancing of interests approach was inappropriate in the present case, because a comparative assessment could not overcome fundamental defects in the Brady Act.[134]

For the above reasons, the Court reversed the Ninth Circuit's ruling and invalidated the provisions of the Brady Act that required state officials to conduct background checks of potential handgun buyers.[135] The Court did not consider the constitutionality of other provisions that imposed duties upon firearm dealers, because no firearm dealer was before the Court.[136]

B. The Concurrences

1. Justice O'Connor

Justice O'Connor concurred with the majority,[137] writing separately only to emphasize that the Court's holding did not totally destroy the Brady Act.[138] Specifically, Justice O'Connor observed that the state and local law enforcement officers could still voluntarily perform background checks of handgun purchasers, and that Congress could ask the states to participate in the regulatory scheme on a contractual basis.[139]

2. Justice Thomas

Justice Thomas wrote an opinion concurring in the judgement.[140] Justice Thomas stressed the notion that the federal government could act "only where the Constitution authorizes it to do so."[141] He stated that because Congress did not have the power under the Commerce Clause to regulate what he considered "intrastate" transfers of firearms, Congress could not have the consequent power to compel state officials to enforce the regulation.[142]

---

133. *See id.*

134. *See id.* at 2383 (finding the whole object of the Brady Act was to compromise the structure of dual sovereignty).

135. *See id.* at 2384.

136. *See id.*

137. *See id.* at 2385 (O'Connor, J., concurring).

138. *See id.* (O'Connor, J., concurring).

139. *See id.* (O'Connor, J., concurring) (citing 23 U.S.C. § 402 which conditioned states' receipt of federal highway funds on compliance with certain federal requirements).

140. *See id.* at 2385-86 (Thomas, J., concurring).

141. *See id.* at 2385 (Thomas, J., concurring).

142. *See id.* (Thomas, J., concurring).

C. *The Dissents*

1. Justice Stevens

Justice Stevens, joined by Justices Souter, Ginsberg, and Breyer, filed a dissenting opinion.[143] Justice Stevens first maintained that there were sufficient bases in the text of the Constitution to find the Brady Act valid.[144] According to Justice Stevens, the regulation of firearm sales fell within the congressional power under the Commerce Clause together with the Necessary and Proper Clause.[145] Because the Tenth Amendment did not restrict the methods of exercising such a delegated power, the federal government could require state officials to administer its laws.[146] Next, Justice Stevens argued that historical practices suggested that the Framers allowed the federal government to extend its capacity by acting through the states.[147] He analogized the challenged provisions of the Brady Act to the drafting and financing of the Confederate Army through the states,[148] the federal tax collection by state agents in the nation's early years,[149] and the early federal laws requiring state judges to process citizenship applications.[150] Justice Stevens also disagreed with the majority's analysis of dual sovereignty.[151] While conceding the existence of such a principle, he explained that preserving state sovereignty was irrelevant to the question of whether the federal government could require individual state employees to perform certain duties.[152] Finally, Justice Stevens distinguished *New York*, the precedent heavily relied upon by the majority.[153] He argued that the Brady Act addressed individual law enforcement officers, while the statute invalidated in *New York* directed the state as entities.[154]

---

143. *See id.* at 2386-2401 (Stevens, J., dissenting).
144. *See id.* at 2387 (Stevens, J., dissenting).
145. *See id.* (Stevens, J., dissenting); *see also* U.S. CONST. art. I, § 8, cl. 3, 18; *supra* notes 37 and 128.
146. *See Printz*, 117 S. Ct. at 2387 (Stevens, J., dissenting); *see also* U.S. CONST. amend. X; *supra* note 18.
147. *See Printz*, 117 S. Ct. at 2389 (Stevens, J., dissenting).
148. *See id.* (Stevens, J., dissenting).
149. *See id.* at 2390 (Stevens, J., dissenting).
150. *See id.* at 2391 (Stevens, J., dissenting).
151. *See id.* at 2394 (Stevens, J., dissenting).
152. *See id.* (Stevens, J., dissenting).
153. *See id.* at 2397-99 (Stevens, J., dissenting).
154. *See id.* at 2399 (Stevens, J., dissenting).

2. Justice Souter

Justice Souter wrote a brief dissenting opinion.[155] While joining in Justice Stevens's dissent, Justice Souter pointed out that, to him, selected readings of *The Federalist* were more persuasive than the numerous examples of states executing federal regulatory programs.[156]

3. Justice Breyer

Justice Breyer filed a separate dissenting opinion, in which Justice Stevens joined.[157] Justice Breyer examined the federal systems of Switzerland, Germany, and the European Union.[158] He contended that, from a practical standpoint, the states' implementation of federal laws would be a better alternative than the creation of more federal bureaucracies, and could better promote both state sovereignty and individual liberty.[159]

V. IMPACT

The impact of the Supreme Court's ruling in *Printz* is two-fold. First, it eliminated the mandatory background checks of prospective handgun purchasers until November 30, 1998, when the Attorney General was expected to establish a national instant background check system.[160] This effect is likely to prompt amendments of the Brady Act by Congress.[161] Second, after the invalidation of the Brady Act's interim provisions, other executive-commandeering federal statutes are also subject to the same scrutiny.[162]

A. Impact on the Brady Act

1. Immediate judicial and societal effects

By invalidating the Brady Act's interim background-check provisions, *Printz*

---

155. *See id.* at 2401-04 (Souter, J., dissenting).

156. *See id.* (Souter, J., dissenting).

157. *See id.* at 2404-05 (Breyer, J., dissenting).

158. *See id.* (Breyer, J., dissenting). *See generally* Cliona J.M. Kimber, *A Comparison of Environmental Federalism in the United States and the European Union*, 54 MD. L. REV. 1658 (1995) (comparing the legal structures of the United States and the European Union).

159. *See Printz*, 117 S. Ct. at 2404-05 (Breyer, J., dissenting).

160. *See* 18 U.S.C. § 922(t)(1) (1994).

161. *See infra* notes 173-87 and accompanying text (discussing likely amendments to the Brady Act).

162. *See Printz*, 117 S. Ct. at 2376; *see also infra* notes 188-215 and accompanying text (discussing the vulnerability of executive-commandeering statues to Tenth Amendment invalidation).

overruled the lower courts that upheld the Brady Act[163] and effectively nullified the urgent intent of Congress to control the distribution of handguns.[164] However, the Supreme Court's holding in *Printz* did not necessarily make it easier for convicted felons and other ineligible persons to purchase handguns.[165] First, the Court refused to consider the validity of the duties imposed on firearm dealers by the Brady Act without the presence of any firearm dealer or purchaser before the Court.[166] Therefore, firearm dealers remain obligated to send Brady Forms to chief law enforcement officers, regardless of whether such officers would accept the forms, and to wait for five business days before making a sale. Second, as pointed out by Justice O'Connor in her concurring opinion, the states and chief law enforcement officers could still voluntarily conduct background checks.[167] There is a general expectation that most law enforcement agencies will do so because every major police organization supported the passage of the Brady Act.[168] Finally, even without the federal regulatory program, twenty-three states already passed some legislation restricting the sale of firearms.[169] Among them, thirteen states have waiting periods ranging from forty-eight hours to fifteen days;[170] ten states require a permit to purchase a handgun;[171] and two states require a telephone

---

163. *See supra* notes 17-18 (listing the lower courts which upheld the Brady Act).

164. *See Printz*, 117 S. Ct. at 2384.

165. *See* Dennis A. Henigan, *N.R.A. Should Not Rejoice: Brady Act Lives On*, NAT'L L.J., July 28, 1997, at 17 (predicting that *Printz* would have little impact on gun control because the five-day waiting period and the rest of the Brady Act remained intact). *But see* Stephen P. Halbrook, *'Printz' Will Have Effect on U.S. Gun Legislation*, NAT'L L.J., Aug. 18, 1997, at 18 (asserting that the waiting-period requirement had no force after the Supreme Court struck down the background-check provision).

166. *See Printz*, 117 S. Ct. at 2384. The Court explained that "[t]hese provisions burden[ed] only firearm dealers and purchasers, and no plaintiff in either of those categories is before us here." *Id.* Thus the Court declined "to speculate regarding the rights and obligations of parties not before the Court." *Id.* (citing New York v. United States, 505 U.S. 144, 186-87 (1992)).

167. *See id.* at 2385 (O'Connor, J., concurring).

168. *See* Henigan, *supra* note 165, at 17 (noting the widespread support of the Brady Act from the law enforcement community).

169. *See* H.R. Rep. No. 103-344, at 23 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984 (estimating the costs that state and local governments would incur under the Brady Act).

170. *See* ALA. CODE § 13A-11-77 (1994) (48 hours); CAL. PENAL CODE § 12071 (West Supp. 1998) (15 days); CONN. GEN. STAT. ANN. § 29-37(a) (West Supp. 1998) (two weeks); FLA. STAT. ANN. § 790.065 (West Supp. 1998) (three days); MD. CODE ANN. art. 27, § 442 (1996) (seven days); MINN. STAT. ANN. § 624.7132 (West Supp. 1998) (seven days); OR. REV. STAT. § 166.420 (1993) (15 days); 18 PA. CONS. STAT. ANN. § 6111 (West 1983) (48 hours); R.I. GEN. LAWS § 11-47-35 (Supp. 1997) (seven days); S.D. CODIFIED LAWS § 23-7-9 (Michie 1988) (48 hours); TENN. CODE ANN. § 39-17-1316 (1997) (15 days); WASH. REV. CODE ANN. § 9.41.090 (West 1998) (five days); WIS. STAT. ANN. § 175.35 (West Supp. 1996) (48 hours subject to a three-day extension).

171. *See* HAW. REV. STAT. § 134-2 (1993); 430 ILL. COMP. STAT. ANN. 65/2 (West 1993); IND. CODE ANN. § 35-47-2-1 (Michie 1994); IOWA CODE ANN. § 724.15 (West 1993); MASS. GEN. LAWS ANN. ch. 140, § 129C (West Supp. 1998); MICH. COMP. LAWS ANN. § 28.422 (West Supp. 1998); MO.

background check.[172] Consequently, the *Printz* ruling's adverse effect on gun control is likely to be most noticeable in the twenty states that neither require background check of gun purchasers, nor allow local officials to get involved in handgun transactions.[173]

2. Possible amendments of the Brady Act

Although the Supreme Court struck down the Brady Act's background-check provision, some amendments may achieve the congressional intent to immediately regulate handgun distribution and, at the same time, satisfy the constitutional requirements of the current Court.[174]

a. A Federal Gun Control Agency

Because the Court found compelled enlistment of state and local officials in federal regulatory schemes unconstitutional, Congress could create a federal agency or require existing federal agencies in each state to carry out the tasks of conducting background checks until the establishment of a nationwide computerized system.[175]

However, such an operation would be costly and inefficient, as the responsible federal agency would need to go to individual state and local law enforcement agencies to research in unfamiliar recordkeeping systems.[176] The problem is especially conspicuous in rural areas where a background check by "reasonable effort" under the Brady Act[177] may simply mean relying on a local sheriff's personal knowledge of the gun purchaser.[178] Most importantly, as Justice Breyer questioned in his dissenting opinion, "[w]hy, or how, would what the majority sees as a constitutional alternative – the creation of a new federal gun-law bureaucracy, or the expansion of an existing federal bureaucracy – better promote either state sovereignty or individual liberty?"[179]

ANN. STAT. § 571.090 (West 1995); N.J. STAT. ANN. § 2C:58-3 (West 1995); N.Y. PENAL LAW § 400.00 (McKinney Supp. 1998); N.C. GEN. STAT. § 14-402 (1993).

172. *See* DEL. CODE ANN. tit. 11, § 1448A (1995); VA. CODE ANN. § 18.2-308.2:2 (Michie 1996).

173. *See* Halbrook, *supra* note 165, at 18 (discussing *Printz* as applied to states not requiring background checks for the purchase of guns).

174. *See* Printz v. United States, 117 S. Ct. 2365, 2385 (1997) (O'Connor, J., concurring) (stating that there are constitutionally permissible ways to implement federal policies).

175. *See id.* at 2384 (holding Congress could not directly conscript state officers).

176. The Brady Act called for "research in . . . State and local recordkeeping systems." 18 U.S.C. § 922(s)(2) (1994).

177. *Id.*

178. *See* BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, U.S. DEP'T OF JUSTICE, OPEN LETTER TO STATE AND LOCAL LAW ENFORCEMENT OFFICIALS (Jan. 21, 1994) (interpreting the meaning of "reasonable effort" under the Brady Act).

179. *See Printz*, 117 S. Ct. at 2405 (Breyer, J., dissenting).

b. Inducing the States' Participation

A more practical approach, as suggested by Justice O'Connor, is "to amend the interim program [of the Brady Act] to provide for its continuance on a contractual basis with the States . . . as [Congress] does with a number of other federal programs."[180] Congress can exercise its taxing and spending powers to enact incentive measures urging the States, without forcing them, to implement federal programs.[181] Such incentives may include special awards, a progressive schedule of reimbursement based on the number of background checks performed by the state, and the withholding of federal funding from states that do not implement the federal program.[182] Under this approach, the federal government could achieve its goals through its spending power and cooperative federalism, thus avoiding constitutional problems under the Supreme Court's Tenth Amendment jurisprudence.[183]

c. Regulating Firearm Dealers Directly

To accomplish the original goal of the Brady Act, Congress may also amend the Act to directly regulate individuals without mandatory assistance from the states.[184] This type of regulation would not implicate the Tenth Amendment because enforcement of the federal law would require no state resource, unless a state chooses to participate in the program, and Congress would remain publicly accountable for the regulation.[185]

---

180. *See id.* at 2385 (O'Connor, J., concurring) (citing 23 U.S.C. § 402 which conditions States' receipt of federal funds for highway safety program on compliance with federal requirements); *accord* South Dakota v. Dole, 483 U.S. 203, 204-12 (1987) (holding federal government could withhold federal highway funds if the state fails to adopt federal minimum drinking age requirement).

181. *See* New York v. United States, 505 U.S. 144, 167 (1992) (finding Congress may attach conditions to receipt of federal funds by the states if such condition bear some relationship to the federal purpose).

182. *See id.* at 171-74 (upholding the monetary and access incentives contained in the Waste Policy Act that provided for a surcharge to be distributed to states complying with the federal regulation).

183. For a general discussion on the interplay of federal funding and state sovereignty, see Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role,* 79 COLUM. L. REV. 847 (1979).

184. *See New York,* 505 U.S. at 161-66 (reviewing constitutional history and finding that Congress should exercise its legislative authority directly over individuals rather than over the states); *see also* Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 779 (1982) (O'Connor, J., concurring in part and dissenting in part) (stating that the Public Utility Regulatory Policies Act impermissibly attempts to regulate states as states rather than as individual companies); Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 293 (1981) (upheld the Surface Mining Control and Reclamation Act which targeted individual businesses rather than the states).

185. *See supra* note 184.

The amended Act could place the obligation to conduct background checks directly upon firearm dealers instead of state and local officials. The states would then have several choices including providing background checks to firearm dealers for a charge,[186] conducting gratuitous background checks, or doing nothing and letting the firearm dealers hire private background-check companies.[187]

B. Impact Beyond the Brady Act

1. Executive-commandeering legislative enactments are vulnerable to Tenth Amendment challenges

The significance of finding the Brady Act unconstitutional extends far beyond the realm of the Brady Act itself. It could lead to the invalidation of other federal statutes that require state and local officials' participation.[188] When rejecting the federal government's contention that a series of statutes could fall following the Brady Act as irrelevant to the precise issue in *Printz*, Justice Scalia suggested that the Court would be interested in looking at those laws "if and when their validity is challenged in a proper case."[189]

---

186. *See, e.g.*, COLO. REV. STAT. § 12-26.5-107 (Supp. 1994) (charging a fee for each background check required by state law); UTAH CODE ANN. § 76-10-526 (Supp. 1997) (requiring all firearm dealers to collect $7.50 for every criminal background check required by state law); VA. CODE ANN. § 18.2-308.2:2(J) (Michie Supp. 1998) ("All licensed firearms dealers shall collect a fee of two dollars for every transaction for which a criminal history record information check is required [by state law].").

187. *See* Susan R. Miller, *More Background Checks in Store for Health Care Workers*, S. FLA. BUS. J., Aug. 11, 1995, at B2 (private companies responding to the increased demand for background checks); Stuart Silverstein, *Applicants: Past May Haunt You*, L.A. TIMES, March 7, 1995, at A1 (reviewing the prospering business of background checks); Stuart Silverstein, *Background Checking is a Threat to Fairness*, THE PLAIN DEALER, April 9, 1995, at 21 (examining the rise of private businesses conducting background checks).

188. *See* Brief for Respondents at 31, Printz v. United States, 117 S. Ct. 2365 (1997) (Nos.95-1478, 95-1503) (listing federal legislation that could be implicated by an adverse ruling on the Brady Act). Federal statutes that command state officials to implement federal policies include the following: Fire Prevention Control Guidelines for Places of Public Accommodation, 15 U.S.C. § 2224 (1994) (requiring the states to compile and submit a list of places of public accommodation to the federal government); the Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. § 620 (1994) (requiring several western states to enact regulations reducing export of unprocessed timber on public lands); Asbestos Hazards Abatement Program, 20 U.S.C. § 4013 (1994) (requiring state governors to submit asbestos records to federal agencies); the 1993 Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21 (1994) (requiring the states to negotiate with Indian tribes regarding gaming business); the National Voter Registration Act of 1993, 42 U.S.C. § 1973(gg)-3 (1994) (requiring state motor vehicle agencies to manage voter registration for federal elections); Regulation of Underground Storage Tanks, 42 U.S.C. § 6991(a)(c) (1994) (requiring the states to submit inventory data of all underground storage tanks to the federal government); Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C. § 11001 (1994) (requiring the states to establish commissions and plans to address the problem of hazardous materials).

189. *See Printz*, 117 S. Ct. at 2376 (discussing the fate of federal statutes similar to the Brady Act).

a. The Brady Act II

The proposed Brady Act II[190] would require the States to enact handgun registration and to mandate licensing and fingerprinting of handgun owners.[191] This would be unconstitutional under *New York*, because Congress could not "'commandee[r] the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.'"[192] The Brady Act II would also compel local law enforcement officers to administer the tasks, just as the Brady Act did.[193] This provision would be an impermissible infringement upon state sovereignty under *Printz* because the federal government could not directly conscript state officials.[194] Thus, if Congress enacts the Brady Act II, courts will strike it down as violative of the Tenth Amendment.

b. The Driver's Privacy Protection Act of 1994

Within three months after the Supreme Court rendered its decision in *Printz*, two federal district courts invalidated the Driver's Privacy Protection Act of 1994[195] by relying on the reasoning of *Printz*.[196]

Designed to protect motorists' privacy, this federal statute prohibited the states from disclosing personal information contained in state motor vehicle records.[197] Finding that Congress impermissibly commanded the states to implement federal policy by requiring them to regulate the dissemination and use of motor vehicle records, both district courts easily concluded that the statute violated the Tenth Amendment.[198]

c. The National Child Search Assistance Act of 1990

The duties placed on state law enforcement agencies to report traffic fatalities

---

190. S. 1882, 103d Cong. § 101(a) (1994).

191. *See id.*

192. *See* New York v. United States, 505 U.S. 144, 161 (1992) (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981)); *see also supra* notes 82-89 and accompanying text.

193. *See* 18 U.S.C. § 922(s) (1994); S. 1882, § 101(a).

194. *See Printz*, 117 S. Ct. at 2384; *see also supra* notes 112-36 and accompanying text.

195. 18 U.S.C. §§ 2721-2725 (1994).

196. *See* Oklahoma *ex rel.* Oklahoma Dep't of Pub. Safety v. United States, 994 F. Supp. 1358 (W.D. Okla. 1997); Condon v. Reno, 972 F. Supp. 977 (D.S.C. 1997).

197. *See Condon*, 972 F. Supp. at 980-81; *see also* 18 U.S.C. §§ 2721-2725.

198. *See* Oklahoma *ex rel.* Oklahoma Dep't of Pub. Safety, 994 F. Supp. at 1363-65; *Condon*, 972 F. Supp. at 982-86.

and missing children information to various federal authorities could also come under scrutiny in light of *Printz*.[199] Under the National Child Search Assistance Act of 1990,[200] "[e]ach Federal, State, and local law enforcement agency shall report each case of a missing child under the age of 18 to the national Crime Information Center of the Department of Justice."[201] Thus, the statute directly enlisted state and local officials to implement a federal program in the same manner as the Brady Act, and will be struck down if properly challenged in court.[202]

2. Protection of state rights will not be sweeping

Although *Printz* clearly pointed lower courts in the direction of protecting state rights and sovereignty, its effect of overturning executive-commandeering federal statutes will not be universal.[203]

a. City of New York v. United States

Three weeks after the Supreme Court decided *Printz*, the United States District Court for the Southern District of New York summarily dismissed Tenth Amendment challenges to two federal statutes.[204] *City of New York v. United States* involved several provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996[205] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[206] The statutes provided, in direct conflict with New York City's ordinance, that no state or local government entity can be prohibited from sharing information about aliens' immigration status with federal authorities.[207] The court recognized that the provisions displaced New York City's chosen policy, and that such provisions could compromise city officials' political

---

199. *See* Koog v. United States, 852 F. Supp. 1376, 1387 n.22 (W.D. Tex. 1994), *rev'd*, 79 F.3d 452 (5th Cir. 1996).

200. 42 U.S.C. § 5779 (1994).

201. *Id.*

202. *See Printz*, 117 S. Ct. at 2384.

203. *See, e.g., Deregulation: Attorneys See Restructuring Bills Safe From Constitutional Challenge*, INDUS. ENERGY BULL., July 11, 1997, at 4 (reporting that the utility restructuring bills, which would require retail electricity competition, would not be found unconstitutional if Congress drafts the law within the parameters of *Printz* and *New York*); *see also* Richard M. Kuntz, *States' Rights Clash with Federal Mandates*, CHI. DAILY L. BULL., July 28, 1997, at 6 (concluding that, if federal environmental regulations fell within individual states, the Tenth Amendment could not protect the states from congressional overreach).

204. *See* City of New York v. United States, 971 F. Supp. 789, 799 (S.D.N.Y. 1997).

205. 8 U.S.C.A. § 1644 (West Supp. 1998) (providing that "[n]ot withstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or . . . restricted from sending or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States").

206. 8 U.S.C.A. § 1373(a) (West Supp. 1998).

207. *See City of New York*, 971 F. Supp. at 792-93. The New York City ordinance forbade city officials and employees from sharing such information with the federal government. *See id.*

accountability – a concern raised by the Supreme Court in *Printz*.[208] Nevertheless, the court found the statutes to be constitutional because they did not directly conscript state and local officials to implement federal immigration policy or compel the states to regulate immigration.[209]

b. The National Voter Registration Act of 1993

The National Voter Registration Act of 1993[210] compels state motor vehicle agencies to manage voter registration in federal elections.[211] Even though the statute requires the states to regulate a federal program and directly conscripts state officials, it is not vulnerable to Tenth Amendment challenges.[212] The Constitution expressly authorizes Congress to regulate the time, place, and manner of federal elections.[213] Furthermore, under Section 5 of the Fourteenth Amendment, Congress has the power to implement the guarantees of individual rights and liberties, including the right to vote.[214] Therefore, a constitutional challenge to this statute will most likely fail.[215]

VI. CONCLUSION

Furthering the revitalization of the Tenth Amendment started in *New York*, *Printz* stands for the proposition that Congress can not enlist state or local officials to implement federal policies.[216] As the dissenting opinions pointed out, however, there is no need or reason to find such an absolute principle.[217] It is unnecessary to read the Brady Act "as permitting the Federal Government to overwhelm a

---

208. *See id.* at 795-97.

209. *See id.* at 797 (declaring that political accountability by itself could not invalidate a congressional legislation).

210. 42 U.S.C. § 1973 (1994).

211. *See id. See generally* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1002 (1995) (analyzing the dynamics between federalism and congressional commandeering).

212. *See* Jennifer Modell & Jonathan Feldman, *Motor Voter Act Will Survive Printz Challenge*, NAT'L L.J., July 28, 1997, at A16 (rebutting a claim that the Motor Voter Act might be struck down).

213. *See* U.S. CONST. art. I, § 4, cl. 1 (providing that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators").

214. *See* U.S. CONST. amend. XIV, § 5 (stating that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article").

215. *See* Modell & Feldman, *supra* note 212, at 16.

216. *See* Printz v. United States, 117 S. Ct. 2365, 2384 (1997).

217. *See id.* at 2405 (Breyer, J., dissenting).

state['s] civil service," because "[t]he statute uses the words 'reasonable effort,'[218] words that easily can encompass the consideration of . . . time or cost, necessary to avoid any such result."[219] The inflexibility of the present Supreme Court decision frustrates "the enactment of a law that Congress believed necessary to solve an important national problem."[220]

In the words of James Madison, the drafter of the Tenth Amendment, to members of the First Congress: "Interference with the power of the State was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the law, or even the Constitution of the States."[221]

LANG JIN

218. *See* 18 U.S.C. § 922(s)(2) (1994).
219. *Printz*, 117 S. Ct. at 2405 (Breyer, J., dissenting) (citations omitted).
220. *See id.*
221. 2 ANNALS OF CONG. 1897 (1791).