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The Brady Act: Shot Down by the Tenth Amendment

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THE BRADY ACT: SHOT DOWN BY THE TENTH AMENDMENT

INTRODUCTION

Shortly after the attempt on President Reagan's life, a major gun control lobby organization ran full-page ads in a dozen major newspapers. "The headline read, 'The Day the President Was Shot Was an Average Kind of Day,' average because [fifty] Americans were killed by handguns."[1] It is estimated that there are over 200 million firearms in this country with a growth rate of between three and four million per annum.[2] After years of public outcry about the increased violence in this country[3] and the ease of obtaining a handgun,[4] President Clinton signed the Brady

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[1] John Herbers, *Gun Control Group Builds in Intensity*, N.Y. TIMES, Oct. 22, 1981, at B14.

[2] *See* Andre Henderson, *Gun Control's Costly Ammunition*, 7 CONG. Q. DBA GOVERNING MAGAZINE 8, 23 (1994); *see also* William J. Vizzard, *The Impact of Agenda Conflict on Policy Formulation and Implementation: The Case of Gun Control*, JULY/AUGUST 1995, PUB. ADMIN. REV. 341, 347 n.5 (noting that the author spent 27 years with the Bureau of Alcohol, Tobacco, and Firearms in various capacities, including special agent, supervisor, and manager).

[3] *See* WARREN FREEDMAN, THE PRIVILEGE TO KEEP AND BEAR ARMS 1-2 (1989) (voicing concern of the public as violent crimes increase); *see also* LEE KENNETT & JAMES LAVERNE ANDERSON, THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA 231-32 (1975) (stating that a week after President Kennedy's death a dozen firearms bills had been placed before Congress); *see also* Kevin A. Fox & Nutan Christine Shah, Note, *Natural Born Killers: The Assault Weapons Ban of the Crime Bill – Legitimate Exercise of Congressional Authority to Control Violent Crime or Infringement of a Constitutional Guarantee?*, 10 ST. JOHN'S J. LEGAL COMMENT. 123, 123 (1994) (explaining that the title of this note was taken from a 1994 movie by the same name which portrays the lives of a couple who go on a murderous rampage throughout the country becoming heroes in the process); *see also* Ronald A. Giller, Note, *Federal Gun Control in the United States: Revival of the Tenth Amendment*, 10 ST. JOHN'S J. LEGAL COMMENT. 151, 151-52 (1994); *see also Violence Has Become a Way of Life*, UPI, Mar. 30, 1981, available in LEXIS, Nexis Library, UPI file.

[4] *See* David Nagy, *Saturday-Night Specials -- Plentiful and Easy to Get*, U.S. NEWS & WORLD REP., Apr. 13, 1981, at 29. The author chronicled the history of the gun John Hinckley, Jr. used in the attempted assassination of

Handgun Violence Prevention Act [hereinafter "Brady" or "The Act"][5] into law calling it "'step one in taking our streets back, taking our children back, reclaiming our families and our future.'"[6]

As Alexis de Tocqueville postulated, "[T]he power vested in the American courts of justice of pronouncing a statute to be unconstitutional, forms one of the most powerful barriers which has ever been devised against the tyranny of political assemblies."[7] This Comment discusses whether the Act's background check provision contravenes the constitutional principles of federalism[8] embodied in the Tenth Amendment.[9] Part I[10] sets forth the relevant provisions of the Act. Part II[11] explains recent Supreme Court decisions involving the Tenth Amendment. Part III[12] explores the split in the federal courts of appeal concerning this issue. Part IV[13] discusses the Supreme Court's decision in *Printz v. United States,*[14] that held the Act unconstitutional.[15] Part V[16] examines the underlying policy issues and presents an analysis of the Supreme Court decision.

President Reagan. *Id.* at 29. Hinckley purchased the gun from a pawn shop after filling out a federal form and showing his driver's license. *Id.* The fact that he had been arrested four days before and charged with carrying three guns was not recorded or required on the form. *Id.*

[5] Brady Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. § 922(s) (1994)).

[6] Nancy Mathis, *Emotional Ceremony Marks President's Signing of Brady Bill*, HOUSTON CHRON., Dec. 1, 1993 at A1.

[7] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 51 (Andrew Hacker ed., Washington Square Press 1964) (1835).

[8] BLACK'S LAW DICTIONARY 612 (6th ed. 1990) (defining federalism as a "[t]erm which includes interrelationships among the states and relationships between the states and the federal government.").

[9] 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.

[10] *See infra* notes 17-32 and accompanying text.

[11] *See infra* notes 33-57 and accompanying text.

[12] *See infra* notes 58-105 and accompanying text.

[13] *See infra* notes 106-126 and accompanying text.

[14] 117 S. Ct. 2365 (1997).

[15] *Id.* at 2384.

I. THE BRADY ACT

The Brady Act, which was named after former White House press secretary James Brady and passed as an amendment to the Gun Control Act of 1968 [hereinafter "GCA"],[17] placed additional restrictions on the sale of firearms.[18] In particular, it imposed a mandatory five-day waiting period and background check.[19] Prior to the passage of Brady, the GCA made it unlawful for a federally licensed firearm dealer [hereinafter "FLFD"] to sell or transfer a firearm to anyone who did not meet certain criteria established by Congress.[20] The FLFDs relied on the sworn statements of their customers attesting to their capacity to meet the government's criteria for firearm purchase. [21]

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[16] *See infra* notes 127-151 and accompanying text.

[17] 18 U.S.C. § 921 (1968).

[18] 18 U.S.C. § 922(s)(1) (1994).

[19] 18 U.S.C. § 922(s)(1) (1994).

[20] 18 U.S.C. § 922(d)(1)-(4) (1968). This section states:

> It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—
> (1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> (2) is a fugitive from justice;
> (3) is an unlawful user of or addicted to marihuana or any depressant or stimulant drug ... or narcotic drug ...or
> (4) has been adjudicated as a mental defective or has been committed to any mental institution.

Id.

[21] 27 C.F.R. § 178.124 (1997). The regulation states in pertinent part:

> The transferee also must date and execute the sworn statement showing that . . . the transferee is not prohibited by the provisions of the Act from shipping or transporting a firearm in interstate or foreign commerce or receiving a firearm which has been shipped or transported in interstate or foreign commerce or possessing a firearm in or affecting commerce; and that the transferee's receipt of the firearm

Under the Act, prospective handgun purchasers, in most cases,[22] are required to complete a new information form,[23] containing both a sworn statement and biographical data,[24] which must be transmitted within one day of its receipt by the FLFD to the Chief Law Enforcement Officer [hereinafter "CLEO"][25] of the community in which the applicant resides.

When the CLEO receives the information, pursuant to 18 U.S.C. § 922(s)(2), he or she "shall make a reasonable effort to ascertain within [five] business days whether receipt or possession would be in violation of the law, including research in

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> would not be in violation of any statute of the State or published ordinance applicable to the locality in which the transferee resides.

Id.

[22] 18 U.S.C. § 922(s)(1)(B)-(F) (1994). The statute states that there are several exceptions to the background check provisions of the Act including, among others: when the transferee has written permission from the CLEO of the transferee's state of residence and can prove that the gun is needed to protect the life of the transferee or the transferee's family; the transferee holds a gun permit issued within the last 5 years by the state in which the transferee resides showing compliance with similar background check provisions. *Id.*

[23] 27 C.F.R. § 178.102 (1997). The regulation states in pertinent part:

> [A] licensed dealer shall not sell, deliver, or transfer a handgun . . . to any individual who is not licensed . . . unless the licensee . . .
> (3) Within 1 day . . . provides notice of the contents of the statement . . . to the chief law enforcement officer of the place of residence of the transferee;
> (4) Within 1 day after the transferee furnishes the statement to the licensee, transmits a copy of Form 5300.35 to the chief law enforcement officer of the place of residence of the transferee; and
> (5)(I) Five business days . . . have elapsed from the date the licensee furnished actual notice of the contents of the statement to the chief law enforcement officer, during which period the licensee has not received information from such officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law . . ..

Id.

[24] 18 U.S.C. § 922(s)(1)(A)(ii)(I) (1994).

[25] 18 U.S.C. § 922(s)(1)(A)(i)(III)-(IV).

whatever State and local record-keeping systems[26] are available and in a national system designated by the Attorney General."[27] The FLFD is not allowed to sell or transfer the firearm until either the CLEO has notified the FLFD that it is not prohibited by law or five business days have elapsed.[28]

The CLEO's duties do not end, however, with the completion of the background check. If the CLEO ascertains that the applicant may legally purchase the gun from the FLFD, the CLEO must, within twenty business days after the applicant made the statement, destroy the information obtained and any records generated from it.[29] In addition, if the CLEO determines that a person is ineligible to purchase a firearm, the CLEO must, if requested by the disapproved applicant, provide the reasons in writing within twenty days.[30] The CLEO's responsibilities will

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[26] 18 U.S.C. § 922(g). This section provides in pertinent part:

> It shall be unlawful for any person—
> (1) who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year;
> (2) who is a fugitive from justice;
> (3) who is an unlawful user of or addicted to any controlled substance ...;
> (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
> (5) who, being an alien, is illegally or unlawfully in the United States;
> (6) who has been discharged from the Armed Forces under dishonorable conditions;
> (7) who, having been a citizen of the United States, has renounced his citizenship;
> (8) [who is subject to certain restraining orders involving an intimate partner]; or
> (9) who has been convicted in any court of a misdemeanor crime of domestic violence
> to ... possess ... or to receive any firearm ... which has been shipped or transported in interstate or foreign commerce.

Id.

[27] 18 U.S.C. § 922(s)(2).

[28] 18 U.S.C. § 922(s)(1)(A)(ii)(I)-(II).

[29] 18 U.S.C. § 922(s)(6)(B)(i).

[30] 18 U.S.C. § 922(s)(6)(C).

end in 1998[31] when the FLFDs will have access to a national background check system that will be implemented by the U.S. Department of Justice.[32] The FLFDs will be notified within three days should the prospective purchase violate the Act.[33]

II. THE TENTH AMENDMENT: FEDERALISM AND OUR NATION'S HIGHEST COURT

The Tenth Amendment provides that "[t]he 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."[34] In *New York v. United States*,[35] Justice Sandra Day O'Connor stated that the question of "the proper division of authority between the Federal Government and the States" is perhaps "our oldest question of constitutional law."[36] In recent years, cases challenging the constitutionality of statutes have caused the Supreme Court to address precisely this question.

In *National League of Cities v. Usery*,[37] the Court, by a five-to-four margin, held that the 1974 amendments to the Fair Labor Standards Act [hereinafter "FLSA"], that applied federal minimum wage and maximum hour provisions to almost all employees of state governments, were unconstitutional.[38] Justice Rehnquist, writing for the majority, championed the principles of federalism when he concluded that "[t]he [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[39] If

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[31] 18 U.S.C. § 922(t)(1).

[32] 18 U.S.C. § 922(t)(1)(B)(ii).

[33] 18 U.S.C. § 922(t)(1)(B)(ii).

[34] *See supra* note 9.

[35] 505 U.S. 144 (1992).

[36] *Id.* at 149.

[37] 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit. Auth., 469 U.S. 528 (1985).

[38] *Id.* at 852.

[39] *Id.* at 843 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)). In *Fry*, the Supreme Court held that that federal economic controls did not

Congress could remove from the States the authority to make decisions about their own employment policies, " 'we think there would be little left of the States' separate and independent existence.' "[40]

This understanding of the Tenth Amendment was short-lived, however, for in *Garcia v. San Antonio Metropolitan Transit Authority*,[41] the Court, by a five to four margin, overruled its decision in *National League of Cities*.[42] In *Garcia*, the Court once again considered the question of the constitutionality of the FLSA's minimum wage and maximum hour requirements, this time as applied to a publicly owned mass transit system.[43] Justice Blackmun, writing for the majority, held that the provisions of the FLSA did not contravene the limits of Congress' power, although he did state that "we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority ... must reflect that position."[44] The Court explained that the States were protected from federal overreaching by the "built-in restraints" of state participation in federal government and that the "political process" would ensure that the States were not "unduly burden[ed]" by unfair laws.[45]

Garcia and *National League of Cities* are not easily distinguished because both cases concern the same issue — the application of the FLSA to the States. Perhaps the distinction can best be understood by considering the difficulty the Court

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interfere with state affairs since it could be found that Congress had a "rational basis upon which to conclude that the state activity substantially affected commerce." *Fry*, 421 U.S. at 545.

[40] *Id.* at 851 (quoting Coyle v. Smith, 221 U.S. 559, 580 (1911)). In *Coyle*, the Supreme Court stated that "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution." *Coyle*, 221 U.S. at 580.

[41] 469 U.S. 528 (1985).

[42] *Id.* at 531.

[43] *Id.* at 530.

[44] *Id.* at 556.

[45] *Id.*

encountered when applying the *National League of Cities* analysis in subsequent cases. In *Garcia*, Justice Blackmun, writing for the majority,[46] explained that trying to decide whether "traditional governmental functions" were implicated (an integral part of the *National League of Cities* opinion) had proved extremely unworkable.[47] More likely than not it was this very dilemma that prompted the Court to overrule *National League of Cities* and abandon this test.[48] In essence, Justice Blackmun all but relinquished the role of the Court in reviewing the "oldest question of constitutional law,"[49] the division of power between the States and the federal government. It seemed as though the Tenth Amendment was all but dead.

Not every member of the Court welcomed the Amendment's demise, as evidenced by Justice Powell's dissenting opinion.[50] Joined by Chief Justice Burger, Justice Rehnquist, and Justice O'Connor, he concluded that the result of the majority's holding, the relinquishment of judicial review, was "inconsistent with the fundamental principles of our constitutional system."[51] Justice Powell explained that the Court ignored the "integral role of the Tenth Amendment in our constitutional theory" and that "judicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers and adopted in the Constitution."[52]

Thus, in light of the previous dissent, it came as no surprise when in *New York v. United States*,[53] a majority of the Court held that a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985,[54] requiring States to either regulate the low-level radioactive waste generated within their borders or to

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[46] *Id.* at 530.
[47] *Id.* at 538-39.
[48] *Id.* at 546-47.
[49] New York v. United States, 505 U.S. 144, 149 (1992).
[50] *Garcia*, 469 U.S. 528, 557 (1985) (Powell, J., dissenting).
[51] *Id.* at 567 (Powell, J., dissenting).
[52] *Id.* at 570 (Powell, J., dissenting).
[53] *New York*, 505 U.S. at 177.
[54] Low-Level Radioactive Waste Policy Act of 1980, Pub. L. 96-573, 94 Stat. 3347 (1980).

"take title" to the waste and assume all legal responsibility, was "inconsistent with the federal structure of our Government established by the Constitution."[55]

New York involved the Low-Level Radioactive Waste Policy Act of 1980 [hereinafter "LRWPA"],[56] which had been passed by Congress to avert a possible nationwide crisis, since it appeared that soon there might be no sites left to dispose of radioactive waste.[57] The LRWPA allowed States to enter into regional compacts that, beginning in 1986, could restrict the use of the compacts' disposal facilities to member States.[58] Unfortunately, by 1985, only three of the regional compacts had made their disposal facilities operational.[59] Congress, with less than a year to go until the 1986 restrictions would become effective, approved the amendments to the LRWPA,[60] which became the source of the controversy.[61]

The amendments contained three varieties of incentives that encouraged the States to dispose of their radioactive waste.[62] Two of the incentives were not of concern in this litigation.[63] The third incentive, referred to as the "take title" provision,[64] precipitated the constitutional challenge.[65] That provision gave state governments two options -- accept ownership of the waste generated within its borders or regulate according to Congress' plan.[66] As the Court explained, the problem with these options was that they presented no options at all; no matter which direction states chose, they "[could] not decline to administer the

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[55] *New York*, 505 U.S. at 177.
[56] *See supra* note 54.
[57] *New York*, 505 U.S. at 150.
[58] *Id.* at 151.
[59] *Id.*
[60] 42 U.S.C. § 2021c-e (1986).
[61] *New York*, 505 U.S. at 151.
[62] *Id.* at 152.
[63] *Id.* at 173-74.
[64] *Id.* at 174.
[65] *Id.* at 174-75.
[66] *Id.* at 175.

federal program ... [they] must follow the direction of Congress."[67]

Justice O'Connor, writing for majority, noted that:

> Some truths are so basic that, like the air around us, they are easily overlooked. States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," (citation omitted) reserved explicitly to the States by the Tenth Amendment. Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.[68]

III. CONSTITUTIONAL CHALLENGES IN THE CIRCUIT COURTS OF APPEAL

Sheriff Richard Mack was quite troubled[69] when he received notice from the Bureau of Alcohol, Tobacco, and Firearms ("BATF") directing him to conduct the background checks mandated by Brady.[70] So much so that Mack, the Sheriff of a small Arizona county, sued to have the law declared

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[67] *Id.* at 177.

[68] *Id.* at 187-88.

[69] *See also* Evan H. Caminker, *State Sovereignty and Subordinary: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1002-03 (1995) (explaining that many local officials oppose instances where they must enforce laws regulating private behavior).

[70] *See* 18 U.S.C. § 922(s)(2) (1994).

unconstitutional.[71] After he won,[72] as did Sheriff Printz[73] in Montana, the Ninth Circuit consolidated the appeals.[74]

A. The Ninth And Second Circuits Find Brady Still Within Constitutional Bounds

In *Mack v. United States*,[75] the Ninth Circuit sought to resolve the conflict between the Act and the Tenth Amendment[76] by noting that the regulatory program was aimed not at the States but at individuals.[77] In its analysis of the Tenth Amendment challenge, the court noted that the Amendment " 'states but a truism that all is retained which has not been surrendered' "[78] and that the "Amendment does not purport to limit ... the power of Congress."[79] However, the court explained, recent interpretations of the Amendment have encompassed " 'any

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[71] *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), *cert. granted sub nom,* Printz v. United States, 116 S. Ct. 2521 (1996).

[72] *See Mack*, 856 F. Supp. at 1381.

[73] *See* Printz v. United States, 854 F. Supp. 1503, 1519 (D. Mont. 1994), *aff'd in part and rev'd in part,* Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), *cert. granted,* Printz v. United States, 116 S. Ct. 2521 (1996).

[74] *See* Printz v. United States, No. 95-1478 (D. Mont. filed June 17, 1996) (order consolidating appeal); *see also* Mack v. United States, No. 95-1503 (D. Ariz. filed June 17, 1996) (order consolidating appeal).

[75] *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995).

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

[77] *Mack,* 66 F.3d at 1031.

[78] *Id.* at 1029 (quoting United States v. Darby, 312 U.S. 100, 124 (1941)). In *Darby*, the Supreme Court found the Fair Labor Standards Act of 1938 did not violate the Tenth Amendment noting that:

> There is nothing in the history of [the Tenth Amendment's] adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

Darby, 312 U.S. at 124.

[79] *Mack*, 66 F.3d at 1029.

implied constitutional limitation on Congress' authority to regulate state activities ...' "[80]and that it must consider whether Brady has transgressed such limitations.[81]

In *Mack* it was argued that, as a result of *New York*, the federal government was no longer allowed to commandeer employees of the State to carry out its programs.[82] However, the court noted that the holding in *New York* concerned itself with a different type of commandeering -- attempting to have the States legislate following a federal formula.[83] The court reasoned that "[t]he Brady Act is a regulatory program aimed at individuals and not the States."[84] Because the CLEOs are not involved in policy-making for which the state might be held accountable, but rather serve in typical law enforcement functions, Brady is "not different from other minor obligations that Congress has imposed on state officials."[85] Therefore, the court concluded that the Act did not violate the Tenth Amendment.[86]

Further support was gathered for Brady when the Second Circuit found the Act consistent with the structure of the Tenth Amendment.[87] In *Frank v. United States*,[88] the court explained that "the severity of the burden placed on States is the touchstone for determining whether national legislation is so onerous as to threaten the effectiveness of the States in our federal system."[89] The court, when comparing the "take title" provision in *New York* with the Act, noted that Brady is different because States are required neither to enact regulations fashioned from their own solutions nor to become politically responsible in the handgun

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[80] *Id.* (quoting South Carolina v. Baker, 485 U.S. 505, 511 n. 5 (1988) (finding that federal tax on the interest paid on state bonds did not violate Tenth Amendment)).

[81] *Id.*

[82] *Id.* at 1030.

[83] *Id.*

[84] *Id.* at 1031.

[85] *Id.*

[86] *Id.* at 1034.

[87] *See* Frank v. United States, 78 F.3d 815, 820 (2d Cir. 1996), *vacated,* 117 S. Ct. 2501 (1997).

[88] *Id.*

[89] *Id.* at 826.

control field.[90] The court concluded that because there is no compelled regulation "the roles of the federal government and the States under the Brady Act are consistent with the values underlying federalism."[91]

B. The Fifth Circuit Finds Brady Has Gone Too Far

The Fifth Circuit came to exactly the opposite conclusion in *Koog v. United States*[92] when it held the background check provision of Brady unconstitutional.[93] The court noted that the opinion in *New York* would guide its decision in *Koog* and proceeded to examine it carefully.[94] The court explained that when a statute allows a state the choice of whether to participate in a federal program, a political choice is made by the state for which it may be held accountable by its constituents.[95] On the other hand, if the government demands enactment of a federal regulatory program, this "strips state officials of control over state policies and diminishes the accountability of both state and federal officials."[96]

From this examination, the court derived four guiding principles.[97] First, the states may not be coerced into "administering a federal regulatory program or into legislating according to a federal formula."[98] The court found that because the Act imposes duties upon the CLEOs not prescribed by state statute it is "tantamount to forced state legislation."[99]

Second, impermissible coercion occurs when "the States are precluded from rejecting the role envisioned for them by the

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[90] *Id.* at 828.
[91] *Id.*
[92] 79 F.3d 452 (5th Cir. 1996), *cert. denied sub nom*, United States v. Gonzalez, 117 S. Ct. 2507 (1997).
[93] *Koog*, 79 F.3d at 453.
[94] *Id.* at 455.
[95] *Id.* at 456-57.
[96] *Id.* at 457 (citing *New York*, 505 U.S. at 167-69).
[97] *Id.* at 457.
[98] *Id.*
[99] *Id.* at 458.

federal government."[100] Here, the court found that because the Act has no "walk-away opportunity" for the states, the states are "victims of impermissible federal coercion."[101] Third, this coercion "threatens state sovereignty because it strips States of choice and control over state policies."[102] The court said that state sovereignty was undermined by "requiring a state to allow CLEOs to perform duties that the State obviously prefers to avoid."[103]

Lastly, federal commandeering "blurs political accountability, a democratic value protected by the principles of federalism."[104] The court reasoned that because the CLEOs have to make decisions concerning what constitutes a "reasonable search," political accountability is shifted from federal officials to state officials.[105] The court concluded that Brady is not another "instance of cooperative federalism" because in this instance, "one party [was] never given the opportunity to decide whether to cooperate."[106]

IV. THE SUPREME COURT DECISION

On June 27, 1997, the Supreme Court put the background check requirement of the Act to rest.[107] Justice Scalia, writing for the majority, noted that not only is there a paucity of "executive-commandeering statutes in the early Congress," but until recently such statutes were absent in this country's later history.[108] The Court illustrated this proposition with such examples as the Act of

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[100] *Id.* at 457.
[101] *Id.* at 459-60.
[102] *Id.* at 457.
[103] *Id* at 460.
[104] *Id.* at 457.
[105] *Id.* at 460.
[106] *Id.* at 462.
[107] *See* Printz v. United States, 117 S. Ct. 2365 (1997).
[108] *Id.* at 2375.

August 3, 1882,[109] and the World War I selective draft law,[110] among others.

The Court explained that it was "incontestable that the Constitution established a system of 'dual sovereignty'"[111] and that although the States had given up much of their power to the emerging government, there still remained "a residuary and inviolable sovereignty."[112] Justice Scalia noted that the Framers chose a system in which state and federal government enjoyed concurrent authority as opposed to a system that utilized a central government.[113] He explicitly declined to elaborate any further on the historical record, instead referring to the Court's opinion in *New York v. United States*.[114]

The Court then stated that the Framers chose a Constitution that allowed Congress to regulate individuals not States.[115] One of the innovations of this design, the Court postulated, was that the citizens of this country would have two orders of government — one federal and one state.[116] Thus, the Constitution contemplated that a State government would "represent and remain accountable to its own citizens."[117] In this section of the opinion, the Court concluded these "securities" preserved the

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[109] *Id.* (citing Act of August 3, 1882, ch. 376, §§ 2, 4, 22 Stat. 214-15 (1882)). This statute enlisted state officials to assist with immigration matters in local ports. *Id.* Justice Scalia made certain to point out however, that the duties required of the state officials by the statute were not actual mandates. *Id.*

[110] *Id.* (citing Act of May 18, 1917, ch. 15, § 6, 40 Stat. 80-81 (1917)). The draft law authorized President Wilson "to utilize the service of any or all departments and any or all officers or agents of the United States and of the several States . . . in the execution of this Act." *Id.* Once again, Justice Scalia noted that it was not clear, that this authorization, utilizing the service of the state officers, was actually an authorization to compel them. *Id.*

[111] *Id.* at 2376 (citing Gregory v. Ashcroft, 501 U.S. 452, 457 (1991)).

[112] *Id.* (further citations omitted).

[113] *Id.* at 2377.

[114] *Id.* (citing New York v. United States, 505 U.S. at 161-66).

[115] *Id.* (citing *New York*, 505 U.S. at 166).

[116] *Id.* (citing U.S. Term Limits, Inc. v. Thornton, 514 U.S. 799, 838 (1995) (Kennedy, J., concurring)).

[117] *Id.* (citing *New York*, 505 U.S. at 168-69).

division of power between the state and the federal government.[118]

The majority turned finally to the prior jurisprudence of the Court and stated that recent opinions have made it clear that the "[f]ederal [g]overnment may not compel the States to implement, by legislation or executive action, federal regulatory programs."[119] Justice Scalia made it clear that when the Court was faced with a federal statute that "unambiguously required the States to enact or administer a federal regulatory program," the Court held that the federal government could do neither.[120]

The Court explained that the Act is distinguishable from the "take title" provisions held unconstitutional in *New York v. United States* because the Act is addressed to individuals (the CLEOS) while the "take title" provision in *New York* was addressed to the State itself.[121] This difference did not seem particularly troublesome to the Court. The majority reasoned that although the Act is "directed to individuals," it is directed to individuals in their capacity as state officers.[122] These officials then function as agents for the state, making the distinction between this case and *New York* one more of form rather than substance.[123]

In conclusion, the Court quoted Justice O'Connor's opinion in *New York v. United States* in which she theorized that the division of power embodied in the Constitution was designed to protect the people from "their own best intentions."[124] Justice Scalia reiterated that the Court would adhere to the principles stated in *New York* and categorically concluded that "'the Federal Government [would] not compel the States to enact or administer a federal regulatory program.'"[125] The mandatory obligation

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[118] *Id.* at 2378.

[119] *Id.* at 2380 (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); FERC v. Mississippi, 456 U.S. 742 (1982)).

[120] *Id.* (citing *New York*, 505 U.S. at 188).

[121] *Id.* at 2382. *See supra* notes 51-55 and accompanying text.

[122] *Id.*

[123] *Id.*

[124] *Id.* at 2383 (citing *New York*, 505 U.S. at 187).

[125] *Id.* (quoting *New York*, 505 U.S. at 188).

imposed on the CLEOS by the Act clearly "runs afoul of [this] rule."[126]

V. THE UNDERLYING POLICY ISSUES

On December 3, 1996, Sheriffs Printz and Mack argued their case before the Supreme Court.[127] At issue was the constitutionality of the background check provision of the Act.[128]

Both Petitioner and Respondent relied extensively on *New York*, just as the Fifth Circuit did in *Koog*.[129] In *New York*, the Court considered whether Congress could direct the States to regulate in a specific field or in a specific way.[130] In doing so, the Court was guided by several principles,[131] as it was in the instant case.[132]

First, even though Congress has the power to directly govern the Nation, the Constitution does not give Congress the absolute power to mandate that the States govern according to its wishes.[133] By requiring the CLEOs to carry out specific tasks in a specified manner, Congress removed the prerogative of the States to mandate and enforce policies in the manner that the individual States saw fit. In the words of Chief Justice Chase, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the

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[126] *Id.*

[127] *See* Steve Lash, *U.S. Supreme Court Weighs Constitutionality of Brady Handgun Violence Protection Act*, Dec. 4, 1996, *available in* 1996 WL 690714.

[128] *Id.*

[129] *See Koog v. United States*, 79 F.3d 452 (5th Cir. 1996).

[130] New York v. United States, 505 U.S. 144, 161 (1992).

[131] *Id.*

[132] The decision in *New York* was a major factor in the Court's decision in the *Printz* decision. In *Printz*, Justice Scalia stated "We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly." *Printz v. United States*, 117 S. Ct. 2365, 2384 (1997).

[133] *New York*, 505 U.S. at 162.

Constitution as the preservation of the Union and the maintenance of the National government."[134]

The question of whether Congress could use state governments to administer its regulations was hotly debated at the Constitutional Convention.[135] Two models of structure for the nascent government came to the forefront: the Virginia Plan and the New Jersey Plan.[136] Under the Virginia Plan, Congress would legislate directly upon individuals without using the States as go-betweens.[137] Under the New Jersey Plan, Congress would still need the approval of the States to legislate.[138] Eventually, the Framers adopted the Virginia Plan, favoring direct Congressional authority over individuals rather than States.[139]

In a spirit of cooperative federalism, Congress would be able to encourage States to regulate in a specific way.[140] For example, in *New York*, the Court found that there were two methods where Congress could regulate States and still fall within constitutional bounds.[141] First, Congress could " 'attach conditions [to] the receipt of federal funds.' "[142] Since no federal money was held

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[134] Texas v. White, 74 U.S. 700, 725 (1868), *overruled on other grounds by* Morgan v. United States, 113 U.S. 476 (1885), *quoted in New York*, 505 U.S. at 162. *See also* Printz, 117 S. Ct. at 2381 (explaining that "it is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority") (citing Texas v. White, 74 U.S. at 725).

[135] *New York*, 505 U.S. at 164.

[136] *Id.* at 164 (citing 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 18, 242 (M. Farrand ed. 1911)).

[137] *Id.*

[138] *Id.*

[139] *Id.* at 165. *See also Printz*, 117 S. Ct at 2377 ("The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict.").

[140] *New York*, 505 U.S. at 166.

[141] *Id.* at 167.

[142] *Id.* (quoting South Dakota v. Dole, 483 U.S. 203, 206 (1987) (conditioning the receipt of highway funds upon the States' adoption of a minimum drinking age)). *See also Printz*, 117 S. Ct at 2376 (distinguishing statutes that "are connected to federal funding measures" as "more accurately

out to the States to encourage them to participate in the Act, Brady did not utilize this method.

Ironically enough, the CLEOs were required to spend the time and money of their respective States to check numerous records with no federal remuneration. This can hardly be categorized as cooperative federalism, because "there is nothing 'cooperative' about a federal program that compels state agencies ... to function as bureaucratic puppets of the Federal Government."[143] Most certainly, this could not pass Constitutional muster under *New York*.[144]

Secondly, it is well recognized that Congress has the power to offer States a choice — either regulate an activity according to federal directives or have that activity preempted.[145] Under the Act, Congress offered no choice to the States because it did not choose to preempt state law and administer the program directly. Rather, Congress commandeered the CLEOs to bear the burden of administering Brady or face criminal penalties.[146] The Act did not merely encourage, as the aforementioned methods did, it compelled, and in doing so it did not allow the States the prerogative of compliance. Such behavior on the part of

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described as conditions upon the grant of federal funding than as mandates to the States.").

[143] FERC v. Mississippi, 456 U.S. 742, 783 (1982) (O'Connor, J., concurring and dissenting) (highlighting the difference between federal programs that offer States a choice and those that do not). *See also Printz*, 117 S. Ct. at 2381 (noting that Congress may not make the states "ventriloquist puppets" (quoting Brown v. EPA, 521 F.2d 827, 839 (9th Cir. 1975)).

[144] *See Brady Act Found Unconstitutional*, 10 FIREARMS LITIG. REP. 2, 5 (1996) (stating that the Brady Act is not an example of cooperative federalism).

[145] *New York*, 505 U.S. at 167 (citing Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981) (recognizing that if a State chooses not to participate in a federal program Congress may bear the regulatory burden and directly administer the program)). *See also Printz*, 117 S. Ct. at 2381 (explaining that the Court has upheld statutory provisions merely imposing "preconditions to continued state regulation of an otherwise pre-empted field" (citing FERC v. Mississippi, 456 U.S. at 759-71)).

[146] 18 U.S.C. § 924(a)(5) provides: "Whoever knowingly violates subsection (s) ... of section 922 shall be fined not more than $1,000, imprisoned for not more than [one] year, or both." *Id.*

Congress blurs, and thereby diminishes, the accountability of both state and federal officials,[147] a situation that is clearly an affront to the very concept of the Bill of Rights.[148]

The Court realized, as it did in *New York*, that compelling the CLEOs to administer the Act would ultimately subject them to the disapproval of their constituents.[149] Since Congress was actually behind the program, voter disapproval would be misplaced.[150] As the majority wrote in *New York*, accountability will be "diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation."[151] Congress has the power to preempt States in various fields and has done so in many other areas.[152] Preemption in the gun control area would put the responsibility for the program where it belongs, with Congress. The CLEOs must not be conscripted to carry out the wishes of Congress for it is clear that "[t]he Federal

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[147] *See* Caminker, *supra* note 51, at 1065.

[148] U.S. CONST. amend. I-X.

[149] *See Printz*, 117 S. Ct at 2382 In *Printz*, Justice Scalia stated:

> By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

Id.

[150] *Id.*

[151] *New York*, 505 U.S. at 169.

[152] *See* Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc., 452 U.S. 264, 288-90 (1981) (noting Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977)); Perez v. Campbell, 402 U.S. 637, 649-50 (1971); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141-43 (1963); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 772-76 (1947).

Government may not compel the States to enact or administer a federal regulatory program."[153]

CONCLUSION

Although the public policy concerns that instigated the background-check provision of Brady are laudable, they cannot be used as the basis for ignoring the precepts that underlie the Constitution. The Supreme Court realized this when it stated:

> [T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day. The [present issue] is a pressing national problem, but a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse.[154]

Brady purports to address an admittedly real danger. However, there are far greater dangers inherent in its implementation. As Justice Brandeis illuminated:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[155]

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[153] *New York,* 505 U.S. at 188. *See also Printz,* 117 S. Ct at 2384 ("Congress cannot compel the States to enact or enforce a federal regulatory program.").

[154] *New York,* 505 U.S. at 187-88.

[155] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) *overruled in part,* Berger v. New York, 388 U.S. 41 (1967).

We should be reminded that " 'those who give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.' "[156]

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[156] People v. Scott, 79 N.Y.2d 474, 501, 593 N.E.2d 1328, 1345, 583 N.Y.S.2d 920, 937 (1992) (quoting BENJAMIN FRANKLIN, HISTORICAL REVIEW OF PENNSYLVANIA (1759)).

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