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The Brady Bill: Surviving the Tenth Amendment

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I. INTRODUCTION

In late 1993, Congress passed the Brady Handgun Violence Prevention Act ("Brady Bill")[1] as an amendment to the Gun Control Act of 1968.[2] By mid-1994, several suits had been initiated challenging the constitutionality of the Bill.[3] Although the plaintiffs in each

1. 18 U.S.C. § 922 (1994 ed.). Congress enacted the Brady Bill on November 24, 1993, and President Clinton signed it into law on November 30, 1993. For a complete discussion of the political and congressional history of the Brady Bill, see Richard M. Aborn, *The Battle Over the Brady Bill and the Future of Gun Control Advocacy*, 22 Fordham Urban L. J. 417 (1995).

2. 18 U.S.C. § 921 et seq. (1994 ed.). The Gun Control Act of 1968 created a federal regulatory scheme governing the manufacture and distribution of firearms by private persons.

3. See *McGee v. United States*, 863 F. Supp. 321, 326-27 (S.D. Miss. 1994) (holding that the provision requiring local law enforcement officials to conduct background searches is unconstitutional); *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994) (same); *Frank v. United States*, 860 F. Supp. 1030, 1043-44 (D. Vt. 1994) (same); *Romero v. United States*, 1994 U.S. Dist. LEXIS 20653 (W.D. La.) (same).

case brought several claims,[4] the most viable and controversial challenge centers on the Tenth Amendment.[5] Plaintiffs have argued that certain provisions of the Bill unconstitutionally commandeer state resources by imposing mandatory duties on the chief law enforcement officer ("CLEO") of the place of residence of the prospective gun purchaser. Supreme Court decisions on tenth amendment questions have been ambiguous and at times inconsistent. The first two federal district courts to consider the constitutionality of the Brady Bill split over the tenth amendment issue. The cases that followed in other districts have relied heavily on the reasoning and conclusions of these first two cases.

The second Part of this Note will give a complete background of the Brady Bill, as well as a depiction of the Supreme Court's fragmented tenth amendment history up to and including the most recent tenth amendment case, *New York v. United States*.[6] Next, this Note describes in detail the two cases that created the district split regarding the constitutionality of the Brady Bill, *Printz v. United States*[7] and *Koog v. United States*.[8] Part III includes an analysis of the

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4. In addition to their tenth amendment claims, plaintiffs have consistently argued that Congress lacks power to regulate the sale of firearms under the Commerce Clause and that § 922(s)(2) is vague, violating the Due Process Clause of the Fifth Amendment. All courts that have entertained these arguments have rejected them. *Printz v. United States*, 854 F. Supp. 1503, 1509-10 (D. Mont. 1995); *Koog v. United States*, 852 F. Supp. 1376, 1388-89 (W.D. Tex. 1995); *Mack*, 856 F. Supp. at 1378-80.

Moreover, the Supreme Court has recently indicated that congressional action of the type used in the Brady Bill would be constitutional under the Commerce Clause. In *United States v. Lopez*, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), the Court held that the proper test of congressional power under the Commerce Clause "requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." Id. at 1630. Although the Court refused to "pile inference upon inference," it indicated that any direct regulation of commercial activity, such as firearms sales, would be sustained. Id. at 1631, 1634. Particularly applicable is the Court's acknowledgement of that line of cases "upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." Id. at 1631 (referring to *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981) (intrastato coal mining); *Perez v. United States*, 402 U.S. 146 (1971) (intrastate extortionate credit transactions); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (restaurants using substantial interstate supplies); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (inns and hotels catering to out-of-state guests); *Wickard v. Filburn*, 317 U.S. 111 (1942) (production and consumption of home grown wheat)). It is this line of cases that assures the validity, under the Commerce Clause, of congressional legislation directly regulating the sale of firearms. Furthermore, the legislative history of the Brady Bill contains specific findings that gun violence affects commerce. See Brady Handgun Violence Prevention Act, H.R. Rep. No. 103-344, 103d Cong., 1st Sess. (1993).

5. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amend. X.

6. 505 U.S. 144 (1992).

7. 854 F. Supp. 1503 (D. Mont. 1994).

8. 852 F. Supp. 1376 (W.D. Tex. 1994).

lower courts' holdings, including an interpretation of the Brady Bill's statutory language and a constitutional analysis under *New York*. Finally, this Note provides two suggestions that would remedy the tenth amendment issues that currently plague the Brady Bill, over which the lower courts have split.

II. LEGAL BACKGROUND: THE SUPREME COURT AND THE TENTH AMENDMENT

The Supreme Court's case law reflects a constantly evolving understanding of the Tenth Amendment. Generally speaking, there are two competing views of how the federalist system, as embodied in the Tenth Amendment, should operate. One view favors a strong central government, advocating cooperative federalism between the states and the federal government, and relying principally on the procedural protections of the political process for enforcement.[9] The other view favors strong state governments, maintaining that the Constitution requires a bright line between federal and state governmental action, which should be strictly enforced by the judiciary.[10]

The evolutionary struggle between these two schools began with *National League of Cities v. Usery*,[11] in which the Court held that Congress could not dictate minimum wage and maximum hour standards to the states as employers. *National League* marked the high point in the Court's protection of state sovereiguty. In subsequent cases, however, the Court steadily retreated from this strong stand, first establishing a strong burden to be overcome before congressional legislation directed at states would be found unconstitutional, and finally explicitly overruling precedent.[12]

In *Garcia v. San Antonio Metropolitan Transit Authority*,[13] nine years after the struggle began, the Court overruled *National*

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9. See Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Comandeer State Officers to Implement Federal Law?*, 95 Colum. L. Rev. 1001, 1008-15 (1995) (describing "two different visions of federal-state relations"); Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 Harv. L. Rev. 1959, 1960, 1976 (1994) (describing two differing views of federalism).

10. Caminker, 95 Colum. L. Rev. at 1008, 1015-22 (cited in note 9); Note, 107 Harv. L. Rev. at 1960, 1976 (cited in note 9).

11. 426 U.S. 833 (1976).

12. *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 287-88 (1981) (establishing a three-part test that must be met before federal legislation will be found unconstitutional); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556-57 (1985) (overruling *National League of Cities*, 426 U.S. at 833).

13. 469 U.S. 528 (1985).

League and allowed the federal government to regulate the states directly in certain instances.[14] Viewing the political legislative system as the protector of state sovereignty, the court upheld congressional regulation of states as employers through extension of the Fair Labor Standards Act.[15] *Garcia* thus seemed the death knell for proponents of states' rights.

Then in 1992, in what has been characterized as a return to the battle scene,[16] the Court reopened the issue with its holding in *New York* that again drew a line, albeit somewhat unsteadily, between federal and state governments. Relying on the Tenth Amendment, the Court invalidated portions of the Low Level Radioactive Waste Policy Act because they commandeered the states' legislative processes by compelling them to enact and enforce federal regulations.[17] The *New York* holding has been referred to as the "anti-commandeering" rule,[18] a strict prohibition against the enlistment of state governments as congressional agents. The decision has been criticized repeatedly, first by the dissenters, then by academics, for mischaracterizing the cases on which the Court relied and for misapplying the law. Congress adopted the Brady Bill against this backdrop of legal dissension and uncertainty.

A. The Brady Handgun Violence Prevention Act

Congress enacted the Brady Bill in late 1993 as an amendment to the Gun Control Act of 1968.[19] The primary objective of the Bill, as articulated by Congress, is to establish a waiting period before the purchase of a handgun and to create a national criminal background check database for use by firearms dealers before the transfer of any firearm.[20] Because the establishment of a national database is not feasible in the immediate future, however, the Brady Bill provides for interim provisions in section 922(s).[21] The current tenth amendment challenge arises out of these provisions.

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14. Id. at 556-57.
15. Id. (construing 29 U.S.C. §§ 203(d) (1988 ed.)).
16. See Wayne O. Hanewicz, New York v. United States: *The Court Sounds a Return to the Battle Scene*, 1993 Wis. L. Rev. 1605, 1605.
17. *New York*, 505 U.S. at 173.
18. Id. at 202 (White, Stevens, J.J., concurring in part and dissenting in part) (referring to the Court's holding as the " 'anti-commandeering' principle"); 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, 502 (1993).
19. 18 U.S.C. § 921 et seq.
20. H.R. Rep. No. 103-344 at 1 (cited in note 4).
21. 18 U.S.C. § 922(s).

The interim provisions of the Bill became effective ninety days after enactment of the Bill and will remain active for sixty months thereafter, until the end of 1998.[22] Under the Bill, it is unlawful for a licensed firearms importer, manufacturer, or dealer to sell, deliver, or transfer a firearm to any individual who is not licensed pursuant to these provisions.[23] To receive a license, a prospective firearm purchaser must present a statement to the transferor containing the purchaser's name, address, and date of birth, as they appear on a valid identification document.[24] Within one day, the transferor must give notice to the chief law enforcement officer of the place of residence of the purchaser.[25]

Upon notice, pursuant to section 922(s)(2), the CLEO "shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General."[26] The determination as to whether possession of a firearm would violate

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22. Id. § 922(s)(1) ("Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment . . . ").

23. Id. Section 922(s) states:

> [I]t shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer a handgun . . . to an individual who is not licensed . . . unless—
>
> (A) after the most recent proposal of such transfer by the transferee—
>
> (i) the transferor has—
>
> (I) received from the transferee a statement of the transferee containing the information [required under this Act];
>
> (II) verified the identity of the transferee by examining the identification document presented;
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> (III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and
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> (IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the place of residence of the transferee; and
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> (ii) (I) 5 business days . . . have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or
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> (II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or possession of the handgun by the transferee would violate Federal, State, or local law.

24. Id. §§ 922(s)(1)(A)(i)(I), (s)(3)(A).

25. Id. § 922(s)(1)(A)(i)(IV). "Chief law enforcement officer" is defined as the chief of police, the sheriff, or an equivalent officer or designee. Id. § 922(s)(8).

26. Id. § 922(s)(2).

the Bill is non-discretionary, as the standards are clearly defined in sections 922(d)(1)-(7).[27] If after five working days the transferor has received no notice from the CLEO that possession of a firearm by the purchaser would violate the law, or has received notice that the CLEO has no information to indicate that the transfer of the firearm would be unlawful, the transferor may complete the transaction.[28]

If the CLEO determines that a transfer would not violate the law, he or she must destroy the purchaser's statement and any related information.[29] If the prospective purchaser's application was denied, the CLEO must provide a reason for the denial in writing within twenty business days, if so requested.[30]

Those challenging the Brady Bill on tenth amendment grounds focus on the duties that the Bill imposes upon the CLEO. In general, they argue that by requiring any action by a CLEO of the place of residence of the prospective purchaser, the Bill violates the constitutional separation of state and federal governments embodied in the Tenth Amendment.[31]

B. National League of Cities *through* Garcia

The Court's recent tenth amendment law found its genesis in 1976 with *National League of Cities v. Usery*.[32] At issue was Congress's extension of minimum and maximum hour provisions of the Fair Labor Standards Act ("FLSA")[33] to employees of the state.[34] Plaintiffs, including a number of cities and states, acknowledged that Congress possessed a large breadth of power under the Commerce Clause, but argued that by regulating the states in their capacities as public employers, Congress had transgressed an affirmative limitation of that power.[35] Essentially, the contention was that the extension of the FLSA crossed a constitutional barrier because it

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27. Receipt of a firearm is in violation of federal law if the receiver is under indictment for, or has been convicted of, a crime punishable by imprisonment exceeding one year, is a fugitive from the law, is an addict or unlawful user of a controlled substance, is mentally defective, is an alien illegally in the United States, has been dishonorably discharged from the Armed Forces, or has renounced his citizenship in the United States. Id. §§ 922(d)(1)-(7).

28. Id. § 922 (s)(1)(A)(ii)(I).

29. Id. § 922(s)(6)(B)(i).

30. Id. § 922(s)(6)(C).

31. See *Frank v. United States*, 860 F. Supp. 1030, 1034 (D. Vt. 1994); *Mack*, 856 F. Supp. at 323-24; *Koog*, 852 F. Supp. at 1378; *Printz*, 854 F. Supp. at 1506-07.

32. 426 U.S. 833 (1976).

33. 29 U.S.C. § 203 (1970 ed. & Supp. IV).

34. *National League of Cities*, 426 U.S. at 836.

35. Id. at 841.

applied to the states as employers.[36] The Court, distinguishing between the ability of Congress to regulate individuals and its ability to regulate "states as states," framed the question as whether Congress had encroached on state sovereignty protected by the federalist structure.[37]

In answering that question, the Court sought to resolve whether the ability of a state to determine wage and hour requirements of its employees was a function "essential to separate and independent existence."[38] The Court focused intensely on the increased costs to the states of applying the FLSA, and the significant impact these costs would have on the governmental bodies involved.[39] The Court noted that, as a result of these burdens, states would be forced to restructure the traditional ways in which they have arranged their affairs.[40] Satisfied that this ability constituted a traditional aspect of state sovereignty, the Court held that in extending the Fair Labor Standards Act to states acting as employers, Congress had unconstitutionally wielded its authority in a way that impaired states' power to function effectively in a federal system.[41] This analysis demonstrated the majority's commitment to a strong federalist system, with a clear line between state and federal governments. State sovereignty constituted the Court's foremost concern; any legislation negatively impacting this concern would apparently be invalidated.

The dissenters, however, enunciated a vision of a strong central government, with no bright demarcation between federal and state powers. The dissent, written by Justice Brennan and joined by Justices White and Marshall, took issue with the majority's interpretation of the limitations on Congress's power to legislate state policies.[42] Instead, the dissent argued, the appropriate restraint upon

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36. Id.

37. Id. at 845. Although the Court in *National League of Cities* never identified the Tenth Amendment as the basis for its decision, subsequent cases have acknowledged it as such. See, for example, *South Carolina v. Baker*, 485 U.S. 505, 529 (1988) (Rehnquist, C.J., concurring) (referring to *National League of Cities* as a case espousing a "more expansive conception of the Tenth Amendment").

38. *National League of Cities*, 426 U.S. at 845.

39. Id. at 846-47.

40. Id. at 848-49. The Court explained that "congressionally imposed displacement of state decisions may substantially restructure traditional ways in which the local governments have arranged their affairs." Id. at 849.

41. Id. at 852.

42. Id. at 857-58 (Brennan, J., dissenting).

Congress's power under the Commerce Clause is the national legislative process.[43]

Six years later in *Hodel v. Virginia Surface Mining & Reclamation Association*,[44] the Court considered the constitutionality of the Surface Mining Control and Reclamation Act of 1977.[45] This Act required each state to adopt a regulatory program to reduce the negative environmental effects of surface coal mining, either by obtaining federal approval of a state's proposed program, or by adopting a federal program.[46] The plaintiff, the Commonwealth of Virginia, argued that these provisions violated the Tenth Amendment because they commandeered the state legislative process by forcing the states to pass legislation.[47]

Relying on the themes of *National League of Cities*, the Court articulated three requirements that must be met before it would deem an exercise of Congress's commerce power invalid under the Tenth Amendment. First, the challenged federal statute must regulate the "states as states."[48] Second, the statute must address areas that are clearly characteristics of state sovereiguty.[49] Third, it must be apparent that compliance with the federal law would negatively impact the state's ability to operate in areas of traditional governmental functions.[50]

The Court quickly noted that the *Hodel* statute did not satisfy the first inquiry because, in contrast to the statute in *National League*

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43. Id. In a separate dissent, Justice Stevens also noted that "[a]s far as the complexities of adjusting [state] departments to this sort of federal control are concerned, I presume that appropriate tailor-made regulations would soon solve their most pressing problems. After all, the interests adversely affected are not without political power." Id. at 881 (Stevens, J., dissenting).

44. 452 U.S. 264 (1981).

45. 30 U.S.C. §§ 1251-56 (1976 ed. & Supp. III).

46. Id. The Act was designed to establish a nationwide program te protect society and the environment from the adverse effects of surface coal mining operations. Id.

47. *Hodel*, 452 U.S. at 273. Plaintiffs also argued unsuccessfully that these provisions violated the Equal Protection and Due Process Clauses of the Fifth Amendment, as well as the Commerce Clause. Id. at 273, 276. In rejecting the commerce clause claim, the Court noted that it "must defer to a congressional finding that a regulatory activity affects interstate commerce, if there is any rational basis for such a finding," and inquire as te whether the chosen means are reasonably adapted. Id. (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964)). Finding that the Act met these criteria, the Court rejected the commerce clause argnment. Id. at 283.

48. Id. at 287.

49. Id. at 287-88.

50. Id. at 288. Because this three-pronged test was so soon abandoned in *Garcia*, 469 U.S. at 528, see text accompanying notes 85-87, the Court never clearly articulated the test. Specific applications and explanations of each prong are therefore lacking. For one Justice's interpretation of each prong, see *South Carolina v. Regan*, 465 U.S. 367, 419 n.8 (Stevens, J., concurring in part and dissenting in part).

of Cities, the provisions of the Act regulated the activities of individual coal mine operators, not states as states.[51] The Court pointed out that a state did not have to submit a program if it did not wish to do so; state sovereignty was therefore preserved.[52] In addition, the full regulatory burden would be borne by the federal government, leaving no suggestion of comandeering the state legislative process.[53] The Court thus held that Congress had not transgressed the limits imposed upon it by the Tenth Amendment.[54]

Although the *Hodel* Court maintained its emphasis on the preservation of state sovereignty, the articulated test narrowed the potentially expansive holding of *National League of Cities*. Additionally, by distinguishing the Act in *Hodel* as a regulation of individuals rather than states, the Court began an erosion of *National League of Cities* that would continue for several years.[55]

In fact, the following year, the Court took an opportunity to reaffirm and apply the holding of *Hodel*. In *Federal Energy Regulatory Commission v. Mississippi* ("*FERC*"),[56] the Court examined the limits imposed by the Tenth Amendment on the federal government's power in the context of congressional legislation that attempted to use state resources to accomplish federal goals. Under the Public Utility Regulatory Policies Act ("PURPA"), Congress required state utility regulatory commissions and nonregulated utilities to "consider" the implementation and adoption of certain regulatory standards.[57] The Act further required that these entities follow certain procedural requirements, including providing public hearings and written statements to explain any rejection of the federal standards.[58] The statute further required the state regulatory commissions to adjudicate disputes arising under the statute.[59]

Although the Act effectively compelled the state, through its regulatory commissions, to act pursuant to federal mandates, the Court upheld the challenged provisions of PURPA.[60] The Court first

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51. *Hodel*, 452 U.S. at 293.
52. Id. at 288.
53. Id.
54. Id. at 304-05.
55. Subsequent discussion will explain this erosion, which culminated in *Garcia*. See particularly notes 83-95 and accompanying text.
56. 456 U.S. 742, 759 (1982).
57. 16 U.S.C. §§ 2621, 2623-24 (1976 ed. & Supp. IV); 15 U.S.C. § 3203 (1976 ed. & Supp. IV).
58. 16 U.S.C. §§ 2621(b), (c)(2); §§ 2623(a), (c); 15 U.S.C. §§ 3203(a), (c).
59. 16 U.S.C. § 2633(c)(1) (1976 ed. & Supp. IV); 15 U.S.C. § 3207(b)(1) (1976 ed. & Supp. IV).
60. *FERC*, 456 U.S. at 769-71.

characterized the state commissions as quasi-judicial authorities. By so doing, the Court was able to analogize between the state judiciary and the state regulatory commission. Noting that state courts must enforce federal law where jurisdiction is proper, the Court declared that dispute resolution of the kind imposed by the Act was exactly the type of activity customarily engaged in by state regulatory commissions.[61] The Court, in upholding the obligation of the commission to adjudicate disputes, avoided a direct application of *Hodel*, instead emphasizing the "constitutional command"[62] that state courts must respect and enforce federal legislation.[63]

The Court next evaluated PURPA's requirement that state regulatory commissions "consider" adoption of federal standards.[64] Citing *National League of Cities*, the Court acknowledged that the ability to make fundamental decisions is essential to state sovereignty, but noted that the Court had upheld federal laws that effectively ordered state decisionmakers to act or refrain from acting.[65] The Court explained that Congress possesses limited power to enlist a branch of state government to accomplish federal goals.[66] The Court characterized *FERC* as "only one step beyond *Hodel*," a case in which Congress could have preempted the subject area, but had instead allowed the states to enter the field if they implemented regulations in accordance with federal guidelines.[67] Deferring a

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61. Id. at 760.

62. Id. See U.S. Const., Art. VI, § 2 ("This Constitution and the Laws of the United States which shall he made in Pursuance thereof; and all Treaties made, or which shall he made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

63. *FERC*, 456 U.S. at 760 (citing *Testa v. Katt*, 330 U.S. 386, 393 (1947) (holding that under the Supremacy Clause, Rhode Island courts could not refuse to enforce the Federal Emergency Price Control Act)).

64. Id. at 761.

65. Id. at 762.

66. Id. at 762 (citing *Testa*, 330 U.S. at 393, and explaining that in *Testa* the Court recognized that the federal government has power to enlist the state judiciary to further federal ends).

In further support of this proposition, the Court explained in a footnote that courts have always been considered a coequal player in a state's sovereign decisionmaking mechanism. Id. at 762-763 n.27. The Court stated:

> [T]he courts have always been recognized as a coequal part of the State's sovereign decision-making apparatus, and it seems evident that requiring state tribunals to entertain federal claims interferes, at least te some degree, with the State's sovereign prerogatives .... Conversely, it is difficult to perceive any fundamental distinction between the state legislature's power to establish limits on the jurisdiction of state courts, and its prerogative to set ratemaking criteria for use by quasi-legislative utilities commissions.

Id. (citations omitted).

67. Id. at 764.

decision as to whether Congress had power to compel state regulatory activity, the Court emphasized that because PURPA required only consideration of federal standards in an area that Congress could preempt, there was no threat to the ability of the state to function effectively under the standards enunciated in *National League of Cities*.[68] This conclusion signified a substantial erosion of the once strong holding in *National League of Cities*: although the requirement to "consider" federal regulations left ultimate authority to the state, it still required states to take some action. In contrast to the Court's prior holdings, *FERC* clearly indicated that at least some type of federal commandeering would be permitted under the Tenth Amendment.

Foreshadowing her majority opinion in *New York*, Justice O'Connor dissented from the Court's tenth amendment analysis.[69] Justice O'Connor would have invalidated all challenged provisions of PURPA as conscripting state regulatory commissions into the "national bureaucratic army."[70] Explicitly applying the three inquiries identified in *Hodel*, Justice O'Connor found that PURPA clearly violated each prong. Importantly for Justice O'Connor, although the ultimate aim of PURPA was regulation of private utilities, the Act addressed its mandates only to the states, thereby addressing the "states as states."[71] In opposition to the majority, Justice O'Connor distinguished state courts from other branches of state government, emphasizing that state courts cannot set their own agenda, so state sovereignty is not threatened by requirements that they hear federal claims.[72] Conversely, Justice O'Connor argued, state agencies retain the authority to decide which proposals are worthy of consideration and debate.[73] Moreover, federal commandeering of state agencies interferes with political accountability, creating the appearance that state representatives are no longer responsive to the citizens' needs.[74]

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68. Id. Addressing the Act's requirement that the Commission follow certain notice and comment procedures, the Court reasoned that "[i]f Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement in a preemptible field—and we hold today that it can—there is nothing unconstitutional about Congress' requiring certain procedural minima as that body goes about undertaking its tasks." Id. at 770-71.

69. Id. at 774 (O'Connor, J., dissenting). See *New York*, 505 U.S. at 144.

70. *FERC*, 456 U.S. at 775 (O'Connor, J., dissenting).

71. Id. at 779.

72. Id. at 784-85.

73. Id. at 785.

74. Id. at 787.

Justice O'Connor concluded by rejecting the notion that Congress could employ state legislative power to advance federal ends.[75]

Only one year later, in *EEOC v. Wyoming*,[76] the Court continued its steady retreat from *National League of Cities*'s federalist position when it evaluated a tenth amendment challenge to Congress's extension of the Age Discrimination in Employment Act ("ADEA")[77] to employees of state and local governments. The extension made it unlawful for the state, as an employer, to discriminate against any employee between the ages of forty and seventy.[78] The Court began by reiterating the three step test first articulated in *Hodel*,[79] but went on to add that even where these three conditions are met, situations exist where the federal interest at stake may justify state submission.[80]

The Court found that the ADEA's impact did not directly inhibit the state's ability to structure integral operations. Although the ADEA directly regulated the states as employers, as did the statute in *National League of Cities*, the Court drew no parallels. Instead, the Court drew a fine distinction by finding that the ADEA intruded less into state sovereignty than did the FSLA provisions invalidated in *National League of Cities*.[81] Based on these findings, the Court upheld the challenged extension.[82] For the first time, the Court appeared to recognize the possibility that some federal interests would justify encroachment on the once inviolable state sovereignty. The retreat from *National League of Cities* continued, and the line between state and federal government grew fainter.

The Court completed its retreat from *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*.[83] The plaintiffs in *Garcia* argued that Congress's extension of federal wage requirements to state and local governmental employees under the FLSA constituted an invalid exercise of federal power under *National League of Cities*.[84] Justice Blackmun, writing for the Court began by

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75. Id. at 790-91.
76. 460 U.S. 226 (1983).
77. 29 U.S.C. § 630(b) (1982 ed.).
78. Id. § 631.
79. 452 U.S. at 287-88.
80. *Wyoming*, 460 U.S. at 237 (quoting *Hodel*, 452 U.S. at 288 n.29). Although in *Hodel* and *Wyoming* the Court has indicated that "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission," *Hodel*, 452 U.S. at 288 n.9, the Court has not articulated when such an instance would occur.
81. *Wyoming*, 460 U.S. at 242.
82. Id. at 240.
83. 469 U.S. 528 (1985).
84. Id. at 533.

discarding the standard enunciated in *Hodel*, which had protected traditional state governmental functions from federal regulation.[85] Justice Blackmun deemed the *Hodel* standard unsound and unworkable,[86] and also rejected the theory that limitations on Congress reside in the concept of state sovereignty derived from the Tenth Amendment.[87]

Instead, the Court found that state interests are effectively guaranteed by the procedural safeguards inherent in the federal system.[88] Specifically, the Court emphasized the states' role in the selection of both the executive and legislative branches of the federal government, as well as their substantial influence over the House of Representatives and the Senate.[89] Concluding that, in this case, the political process provided sufficient protection of state sovereignty, the Court upheld the extension of the FLSA, and in the process overruled *National League of Cities*.[90] In so doing, the Court erased any remnants of a distinct barrier between state and federal government.[91] Discarding *National League of Cities*'s vision of judicially enforced federalism, the *Garcia* holding implied that the Court would find any congressional action valid under the Tenth Amendment if it had passed through the political process.[92]

The dissenters, including three members of the *National League of Cities* majority and Justice O'Connor, vehemently criticized the majority for failing to protect the federal system embodied in the Constitution.[93] Justice O'Connor, while acknowledging that the national government must be capable of solving national problems, noted that the Framers of the Constitution established a system that diffused power between federal and state governments.[94] Stressing the preservation of state autonomy as the ultimate test of whether Congress had unconstitutionally encroached upon the states, Justice O'Connor, joined by Chief Justice Rehnquist, predicted a return to the principles of *National League of Cities*.[95]

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85. Id. at 537-47.
86. Id. at 546.
87. Id. at 548-49.
88. Id. at 552.
89. Id. at 551.
90. Id. at 556-57.
91. See Note, 107 Harv. L. Rev. at 1961-63 (cited in note 9) (analyzing the holding and implications of *Garcia*).
92. Id. at 1961-62.
93. *Garcia*, 469 U.S. at 557 (O'Connor, J., dissenting).
94. Id. at 582.
95. Id. at 589.

Nonetheless, the Court reaffirmed *Garcia* in *South Carolina v. Baker*[96] when confronted with a tenth amendment challenge to a section of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA").[97] The challenged act directly regulated states by prohibiting their issuance of bearer bonds.[98] The Court noted that *Garcia* established the limits on Congress's ability to regulate state activity.[99] Finding that South Carolina was not deprived in any way of its participation in the national political process, the Court held that the Tenth Amendment was not implicated.[100] The *Baker* decision exemplifies the decay of the federalist doctrine and the Court's view of the federal government's power over the states as virtually limitless.

It is important to recognize a nuance in tenth amendment jurisprudence added by the Court in 1991. In *Gregory v. Ashcroft*,[101] the Court enunciated a plain statement rule by which all federal legislation must be evaluated when potentially encroaching upon the division between state and federal governments.[102] Under this rule, when congressional action would upset the traditional balance between federal and state governments, Congress must make its intention to do so unquestionably clear in the statutory language.[103] When ambiguity exists regarding whether or not the congressional mandate is directed at a traditional aspect of state sovereignty, the plain statement rule requires that the ambiguity be construed in favor of preserving state autonomy.[104] Some writers have suggested that implicit in this rule are principles of federalism, protecting the states from federal interference unless such interference is authorized by explicit statutory langnage.[105] It is conceivable that even when a federal statute would be properly applicable to states under the

96. 485 U.S. 505 (1988).

97. 26 U.S.C. § 103(j)(1) (1982 ed.). This section of TEFRA removed the federal income tax exemption for interest earned on publicly offered long-term bonds issued by states unless those bonds were issued in registered form. Id.

98. *Baker*, 485 U.S. at 511. The plaintiffs argued and the defendant agreed that TEFRA required states to issue bonds in registered form. Id. The rationale behind TEFRA was that if states issued unregistered bonds, competition from other non-exempt bonds would force states to increase the interest paid, making state bond issuance an unprofitable endeavor. Id.

99. Id. at 512.

100. Id. at 527.

101. 501 U.S. 452 (1991).

102. Id. at 460-61.

103. Id. at 460.

104. Id. at 470.

105. Note, 107 Harv. L. Rev. at 1960 (cited in note 9) ("[S]ome commentators have chosen to see in [plain statement rules] the machinations of an 'activist' conservative Court selectively giving expression to principles of federalism that are judicially unenforceable under the modern federalism jurisprudence set forth in *Garcia*").

authority recognized by *Garcia*, it would not apply to traditional operations of state governments under *Gregory*.[106]

This development troubled Justices White and Stevens, who dissented from this portion of the decision. The dissent stressed the majority's departure from accepted methods of statutory interpretation, such as reviewing legislative history to determine the intent of Congress.[107] Characterizing the majority's plain statement rule as unprecedented, the dissent, relying on *Garcia*, reiterated the principle that the states' protection from congressional regulation lies in the national political process alone.[108]

C. New York v. United States: *New Life for the Tenth Amendment?*

Only by understanding the Court's complex and fragmented tenth amendment decisions can one fully appreciate the Court's most recent tenth amendment case, *New York v. United States*.[109] Justice O'Connor delivered the majority opinion in which the Court evaluated the constitutionality of three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.[110] The Act required each state to take responsibility for waste generated within its borders.[111] To encourage this responsibility, Congress provided monetary incentives, access incentives, and a "take title" provision requiring each state that failed to appropriately provide for the disposal of internally generated waste to take title to and become liable for that waste.[112]

Reasserting the themes from her earlier dissents,[113] Justice O'Connor turned once again to the notion of state sovereignty which she found to be protected by limits inherent in the Tenth Amendment.[114] Justice O'Connor first dealt with the problem of distinguishing the case at hand from the precedent set by the *Garcia* line of cases. She characterized those cases as instances in which

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106. Id. at 1973. For a complete discussion of the court's development and use of the plain statement rule, see id.

107. *Gregory*, 501 U.S. at 478 (White and Stevens, J.J., concurring in part, dissenting in relevant part, concurring in judgment).

108. Id. at 477.

109. 505 U.S. 144 (1992). The *New York* Court generously characterized the Court's tenth amendment jurisprudence as traveling an "unsteady path." Id. at 160.

110. 42 U.S.C. § 2021h et seq. (1982 ed. & Supp. III).

111. *New York*, 505 U.S. at 150-51.

112. Id. at 152-53.

113. See *FERC*, 456 U.S. at 775 (O'Connor, J., dissenting) (explaining that she would strike down the challenged act because it forced states to implement federal legislation); id. at 779 (focusing on state sovereignty); *Garcia*, 496 U.S. at 589 (O'Connor, J., dissenting) (stressing state autonomy).

114. *New York*, 505 U.S. at 155-56.

Congress subjected the states to generally applicable legislation. Because *New York* did not involve legislation applicable to both private parties and states, but rather involved legislation directed only at state officials, there was no need to follow the *Garcia* cases.[115] Instead, Justice O'Connor framed the issue as one concerning the conditions under which Congress may employ the states as implements of federal regulation.[116]

Moreover, the *New York* majority cited both *Hodel* and *FERC* for the proposition that Congress cannot commandeer a state's legislative process by compelling it to enact and enforce a federal program.[117] The Court emphasized the privileged position a state government holds in relation to its citizens.[118] When elected state officials cannot conduct their office in accordance with the wishes of their electorate, but instead must comply with congressional orders, diminished accountability results.[119]

Evaluating the Act under these principles, the Court upheld the monetary and access incentives as a permissible exercise of Congress's power under the Spending Clause and the Commerce Clause.[120] Turning to the "take title" provision, the Court noted that the states had the choice of regulating according to federal direction, or taking title to and possession of internally generated waste.[121] Justice O'Connor addressed each alternative as if it were standing alone. She first found that requiring states to take title to and become liable for waste products would essentially compel states to subsidize and assume the liabilities of resident waste producers.[122] Explaining that such action would commander state governments into

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115. Id. at 160.
116. Id. at 160-61.
117. Id. at 161.
118. Id. at 168.
119. Id. The Court explained:

> If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always he preempted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the states to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program remain insulated from the electoral ramifications of their decisions.

Id.

120. Id. at 171-74. The Court specifically noted that "where Congress encourages state regulation rather than compelling it, . . . state officials remain accountable to the people." Id. at 168.
121. Id at 174-75.
122. Id. at 175.

the service of federal purposes, the Court held this alternative to unconstitutionally encroach upon the division between federal and state government.[123]

Justice O'Connor next found that the second alternative—regulating according to federal direction—would constitute a command to state legislatures to enact and enforce federal legislation.[124] Such commandeering of a branch of state government that is presumed to be autonomous diminishes the accountability of both federal and state officials, and therefore violates the Tenth Amendment.[125] Because it found both alternatives to be beyond the power of Congress, the Court held that Congress may not force the states to choose between the two options.[126]

Attempting to overcome the Court's characterization of the "take title" provision, the government made several compelling arguments. Citing *Wyoming* and *National League of Cities,* the government argued that state submission could be justified when the federal interest is sufficiently important.[127] Admitting the precedential grounding of this argument,[128] the Court nonetheless dismissed it, explaining that even when a federal interest is sufficiently important, Congress must act directly rather than enlisting state governments to achieve federal regulatory purposes.[129]

The government's most compelling argument posited that the Act should stand under *Garcia* because it had been properly adopted through the political process.[130] In response, the Court expanded its earlier explanation regarding the inapplicability of the *Garcia* line of cases. The Court stated that the division between federal and state governments exists not to protect the sovereiguty of the states, but to protect individuals.[131] Distinguishing *Garcia* as involving legislation generally applicable to individuals and states engaged in the same activity rather than legislation directed at states alone, the Court

123. Id. at 175-76.
124. Id.
125. Id. at 168-69.
126. Id. at 175.
127. Id. at 175-76. See also *Wyoming*, 460 U.S. at 242 n.17; *National League of Cities*, 426 U.S. at 853; note 78 and accompanying text.
128. *New York*, 505 U.S. at 178. See note 82 and accompanying text.
129. *New York*, 505 U.S. at 178 (stating that Congress may not "conscript state governments as its agents"). The government also argued that the Court had in prior cases permitted Congress to give directives to state governments. Id. The Court distinguished these instances as cases involving congressional regulation of individuals rather than of state governments. Id. at 180-81.
130. Id. at 179-84.
131. Id. at 181.

reasoned that when Congress oversteps its bounds as to states, the unconstitutional action cannot be validated by the consent of state officials.[132] In sum, the Court explained that the authority of Congress cannot be increased by the consent of the state whose domain is thereby narrowed.[133] Although the outer limits of state sovereignty may not be well defined, it is clear that the federal government cannot compel the states to enact or enforce a federal regulatory program.[134] Any federal legislation that enlists state governments as agents to serve federal regulatory purposes is unconstitutional.[135]

In a harsh dissent, Justice White, joined by Justices Blackmun and Stevens, found fault with the majority for having "mischaracterized the essential inquiry, misanalyzed the inquiry it has chosen to undertake, and undervalued the effect."[136] Justice White stressed the imminent crisis in waste management, as well as the large role New York had played in formulating and adopting what was essentially a federally-approved compact among the states as opposed to a federally-imposed mandate, a complexity the majority failed to recognize.[137] As a result, the dissent would have estopped New York from asserting the unconstitutionality of the agreement.[138] Furthermore, the dissent sharply criticized the majority's use of precedent, stating that the Court had relied on cases that did not support its ruling.[139] The dissent stated that the majority's reliance on *Hodel* in support of its rule against congressional comandeering was misplaced, because any language that would buttress the majority's conclusion was "classic dicta."[140] Unpersuaded by the

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132. Id. at 182.

133. Id.

134. Id. at 188.

135. Id. at 173 ("Either type of federal action would 'comandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between state and federal governments"); id. at 178 ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority te require the states to regulate"); id. at 188 ("Whatever the outer limits of [state] sovereignty may be, one thing is clear: the Federal Government may not compel the States to enact or administer a Federal program").

136. Id. at 189 (White, Blackmun, and Stevens, J.J., concurring in part and dissenting in part).

137. Id. at 190-94, 196-98.

138. Id. at 198-99.

139. Id. at 201 (stating that the Court "builds its rule around an unsupportable and illogical distinction in the types of alleged incursions on state sovereignty; it derives its rule from cases that do not support its analysis; it fails to apply the appropriate tests from the cases on which it purports to base its rule; and omits any discussion of the most recent and pertinent test for determining the take title provision's constitutionality" (referring to *Garcia*)).

140. Id. at 202. The dissenters also criticized the majority for selectively quoting from *FERC* in a manner that "subtly alters the Court's meaning." Id. at 202-03.

majority's "hollow" attempt to distinguish more recent case law, the dissent would have relied on the *Garcia* line of cases even though *New York* did not involve a federal law generally applicable to the states and private citizens. The dissent would have focused on the political process as the primary constitutional protector of state sovereignty.[141] Finding no fault with the challenged provisions or the political process by which they were adopted, the dissenters would have upheld the Act in its entirety.[142]

III. THE BRADY BILL AND THE TENTH AMENDMENT: TWO COMPETING FRAMEWORKS

Little more than a year after the *New York* decision was handed down, Congress enacted the Brady Bill.[143] Shortly thereafter, opponents of the Bill realized that Congress had failed to anticipate fully the implications of the *New York* decision. Within months of the Bill's enactment, some of these opponents filed the first lawsuit against the United States; others have since brought additional suits. The two competing views regarding the effect the *New York* decision has on the Bill's legitimacy are set forth in the first two cases addressing the issue, *Printz v. United* States[144] and *Koog v. United States.*[145]

A. Printz v. United States

In *Printz,* the United States District Court for the District of Montana decided the constitutionality of section 922(s)(2) of the newly enacted Brady Bill.[146] Jay Printz, Sheriff of Ravalli County, Montana, contended that by placing mandatory duties upon CLEOs, section 922(s)(2) exceeded the power delegated to Congress under the Commerce Clause[147] and as such violated the Tenth Amendment.[148] In examining this challenge, the court first turned to the language of the statute in an effort to discern what if any obligations the Act places on

141. Id. at 205-08.
142. Id. at 206-07.
143. 18 U.S.C. § 922 (1994 ed.).
144. 854 F. Supp. 1503 (D. Mont. 1994).
145. 852 F. Supp. 1376 (W.D. Tex. 1994).
146. 18 U.S.C. § 922 (s). See notes 19-30 and accompanying text.
147. The Commerce Clause states: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8.
148. *Printz,* 854 F. Supp. at 1507.

a CLEO. The government argued that the provision requires a CLEO only to determine whether performing a background check would be reasonable under the circumstances, thus allowing for the possibility that in some instances no background check may be needed.[149] Printz countered that the background check was not subject to discretion, but was mandatory in every case.[150] Acknowledging that a court must construe legislation to avoid serious constitutional problems when possible, the court nonetheless found that the government's interpretation was clearly contrary to the intent of Congress.[151]

In making this determination, the court cited congressional reports interpreting the Brady Bill as requiring local law enforcement officials to perform a background check.[152] The court also noted that the House Judiciary Committee had rejected an amendment to change "shall" to "may" in the background check provision, supporting the inference that Congress intended a non-discretionary obligation.[153] The court concluded that the Brady Bill requires CLEOs to perform three tasks: ascertain through a background check whether a prospective gun transfer was legal, destroy the background statement if approved, and provide reasons for an applicant's disapproval when asked.[154]

Having found that the Brady Bill mandates action from a state CLEO, the court next addressed the constitutionality of these mandates under the Tenth Amendment. Printz argued that because the interim provisions force CLEOs to perform a background check in every case, the Brady Bill violates the Tenth Amendment by compelling a state official to enforce federal legislation, in contravention of *New York*'s holding.[155] The government responded that even if section 922(s)(2) requires CLEOs to perform a background check, it does not violate the Tenth Amendment because Congress, as the body that passed the Bill, remains fully accountable to the electorate,[156] and because the state sovereiguty secured by the Tenth Amendment is protected by the states' representation in Congress.[157] Finally, the government, relying on *FERC*, contended that the Bill is

149. Id. at 1511.
150. Id. at 1510-11.
151. Id. at 1511 n.19.
152. Id. at 1511-12 (citing H.R. Rep. No. 103-344 at 7, 10-11, 17 (cited in note 4)).
153. Id. at 1512 (citing H.R. Rep. No. 103-344 at 38-39 (cited in note 4)).
154. Id.
155. Id.
156. Id. at 1516.
157. Id. at 1515.

constitutional because it only requires CLEOs to perform duties in which they normally engage.[158]

The Court distinguished *FERC* by noting that in that case the Act required the state agency only to "consider" federal regulations, whereas the Brady Bill imposes specific duties, including the execution of background checks and the provision of follow-up information when necessary.[159] The court also reasoned that the government had overlooked the negative consequences that the unpopularity of the Brady Bill would have on CLEOs.[160] Under the Bill, CLEOs become the front-line administrators of federal legislation; they could thereby become associated with the Bill and its unpopularity.[161] Additionally, the court pointed out that the government had not addressed the problems of accountability in terms of allocation of state resources.[162] Because implementation of the Brady Bill would necessarily require CLEOs to allocate resources toward that end, possibly diverting funds from other areas of operation, CLEOs would be held accountable for the decrease in services in those areas.[163] Construing *FERC* as inapplicable, the *Printz* court relied on *New York*, holding that section 922(s)(2) violates the Tenth Amendment by commandeering state executive officers in the administration of federal regulatory law.[164]

Concluding that the background check provision was unconstitutional, the court went on to consider its severability.[165] The court noted that it would not need to rewrite the law to allow it to stand, believing that Congress would have passed the law even without the challenged provisions.[166] The court thus severed the unconstitutional provision from the remainder of the statute.[167]

B. Koog v. United States

Less than three weeks after *Printz* was decided, the United States District Court for the Western District of Texas reached the

158. Id. at 1516. The government also argued that the mandated activities are de minimis, and thus do not go so far as to invoke the Tenth Amendment. Id. at 1517. The court, while admitting that under tenth amendment jurisprudence there may be a de minimis exception, found that the impact of the Act was far from minimal. Id.

159. Id. at 1516.

160. Id. at 1514-15.

161. Id. at 1514.

162. Id. at 1515.

163. Id.

164. Id. at 1513.

165. Id. at 1518.

166. Id. at 1518-19.

167. Id. at 1519.

opposite result in *Koog v. United States*.[168] The *Koog* court faced the same task as the court in *Printz*: determining the constitutionality of section 922(s)(2) of the Brady Bill. Sheriff J.R. Koog's primary argument was that this section effectively incorporates state governments into the services of the federal government in violation of the Tenth Amendment.[169] Sheriff Koog contended that the Bill left no discretion to the CLEO, who must perform a background check on all prospective handgun purchasers.[170] The government, however, characterized the CLEO's duties as largely discretionary, and therefore constitutionally permissible.[171] It pointed to the language of section 922(s)(2), which requires a CLEO, after receiving information on a prospective gun purchaser, to make a "reasonable effort" to determine, within five days, whether the sale would be lawful.[172] The government argued that the Brady Bill only requires the CLEO to perform a background check if he or she determines that it is reasonable to do so.[173]

The court, in determining the requirements of the Brady Bill, relied heavily on a statement of policy issued by the Bureau of Alcohol, Tobacco, and Firearms ("BATF"), describing the duty imposed by the Bill as one requiring a CLEO to perform a background check only when reasonable under the circumstances.[174] The court thus found the Brady Bill to give great discretion to CLEOs in determining whether to perform a background check.[175]

The court noted that the decisions of the Supreme Court regarding the Tenth Amendment are not uniform.[176] In the court's estimation, the best approach was to align the cases on a continuum and determine where the current case rested.[177] After a thorough analysis of Supreme Court precedent from *National League of Cities* through *New York*, the court refused to adopt Koog's "broad reading"

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168. 852 F. Supp. 1376 (W.D. Tex. 1994).
169. Id. at 1377.
170. Id. at 1378.
171. Id. at 1379.
172. Id. at 1378.
173. Id.
174. Id. at 1379. The "Open Letter to State and Local Law Enforcement Officials" (January 21, 1994) from the BATF stated that "[e]ach law enforcement agency serving as the CLEO will have to set it[s] own standards based on its own circumstances, i.e., the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction. . . . In rural, sparsely populated counties where many handgun purchasers are personally known to the CLEO, little or no research may be necessary in many cases." Id.
175. Id. at 1379.
176. Id. at 1381 ("Supreme Court decisions about the Tenth Amendment do not reflect a pattern of straight line development of a theme").
177. Id.

of *New York*.[178] Instead, the court placed *New York* at the extreme end of the continuum in prohibiting the federal government from commandeering state legislatures, and found that the Brady Bill did not go so far as to invoke *New York*'s holding.[179] The court noted that the duties imposed on CLEOs in the Brady Bill more closely resembled the directive made to state regulatory commissions to consider adopting federal regulations under the Act upheld in *FERC*.[180] The court thus held that the section 922(s) requirement that the CLEO perform a "reasonable background check" did not overreach the limits on Congress imposed by the Tenth Amendment.[181]

IV. ANALYSIS: SURVIVING THE TENTH AMENDMENT

A. Statutory Interpretation

As the *Printz* and *Koog* courts recognized, the correct tenth amendment analysis must begin with a determination of the nature of the duty the Brady Bill imposes on a CLEO. The *Printz* court examined legislative history in making its determination that the Bill imposed mandatory duties on CLEOs.[182] The *Koog* court, relying on the language of the statute and BATF policy letters, found the statute to grant broad discretionary power to the CLEO.[183] These determinations greatly influenced the final outcome in both cases.

The *Printz* court's reliance on legislative history to determine the CLEO's duties appears to contradict the plain statement rule of *Gregory*.[184] As previously explained, the rule requires that, where congressional action would upset the traditional balance between state and federal governments, Congress must make its intention clear in the statutory language. Furthermore, where any ambignity exists, the rule requires that the language be construed so as to preserve state autonomy.[185]

According to section 922(s)(1)(a)(ii), a transferor may complete a transaction if within five working days he has heard nothing from

178. Id. at 1387-88.
179. Id.
180. Id. at 1388.
181. Id.
182. See notes 152-54 and accompanying text.
183. See notes 174-81 and accompanying text.
184. See notes 101-06 and accompanying text.
185. See notes 103-04 and accompanying text.

the CLEO.[186] One might interpret this section as implying that when reasonable, a CLEO may have no duty to act. This interpretation is also consistent with the BATF Policy Statement relied on by the *Koog* court, stating that, under certain circumstances, the Brady Bill would not require a CLEO to perform a background check of a prospective gun purchaser.[187] The existence of the latter interpretation renders section 922(s) at least somewhat ambiguous. As the *Gregory* Court explained, when such ambiguity exists, a court must not attribute to Congress the intent to encroach on the autonomy of state governments.[188]

The *Printz* court, however, rejected the government's contention that the Brady Bill imposes broad discretionary power on CLEOs, finding instead that the Bill requires a background check in every case.[189] The *Printz* court focused on congressional committee reports and legislative history in determining the meaning of section 922(s).[190] There is arguably no room for this type of analysis under a proper application of the plain statement rule, particularly when a reasonable determination can be made by focusing on the statutory language. Even the *Gregory* dissenters voiced concern over this implication, questioning whether, in light of the majority's holding, it was proper to consider the legislative history of the federal statute in defining its application.[191] The interpretation of the Brady Bill as articulated and adopted by the *Koog* court thus appears sounder than the interpretation adopted by the *Printz* court.[192]

Nonetheless, the question remains whether the *Koog* interpretation avoids all tenth amendment problems. Although the *Koog* court's view would lead to a lesser imposition on the state, thus remaining consistent with the spirit behind the plain statement rule

186. 18 U.S.C. § 922(s)(1)(a)(ii).

187. *Koog*, 852 F. Supp. at 1379 (quoting the BATF's "Open Letter" and noting that in certain instances the only reasonable background check is no background check).

188. *Gregory*, 501 U.S. at 470.

189. *Printz*, 854 F. Supp. at 1512.

190. Id. at 1511-12.

191. *Gregory*, 501 U.S. at 478 (White, Stevens, J.J., concurring in part, dissenting in part, and concurring in the judgment).

192. See *Koog*, 852 F. Supp. at 1379; *Printz*, 854 F. Supp. at 1511 n.19. The interpretation that the Bill grants broad discretionary power to CLEOs in performing their duties is soundly supported by *Gregory* and the purpose behind the plain statement rule, which require Congress to speak clearly whenever it addresses areas that are traditional functions of state governments. *Gregory*, 501 U.S. at 460-61. As the *Gregory* court stated, when Congress speaks ambiguously, its language must be construed in favor of retaining traditional aspects of state government. Id. at 470. The *Koog* court's interpretation results in the state's retention of ultimate decision-making authority and discretion over the allocation of its resources, a power not retained under the *Printz* court's interpretation.

and with controlling precedent, an imposition still exists. The *Koog* court analogized the impositions of the Brady Bill on states to those in *FERC*, equating the CLEO's duty to decide whether a background check is needed with the state regulatory commission's duty to consider adopting federal regulations under PURPA.[193] Yet the CLEO's determination of whether to perform a background check involves significantly more responsibility than a regulatory commission's consideration of whether to take action. When a regulatory commission considers action, its final choice is truly discretionary; the commission need not qualify or justify its final determination. The final decision may be random, arbitrary, and completely illogical. As such, the imposition is truly minimal.

On the other hand, deciding whether performing a background check on a prospective gun purchaser is reasonable entails balancing competing factors and justifying decisions. The CLEO is asked to do more than "consider" taking action. The final decision cannot be arbitrary; it must, by definition, be a reasonable decision.[194] The standard thus becomes subject to the challenge that it was not reasonable; it is therefore no longer purely discretionary. Furthermore, when performing a background check is reasonable, as it inevitably will be in some situations, a CLEO must also comply with other mandates—destroying the information if the application is granted and justifying the denial if it is not. Labeling such an increase in duties as minimal would be unfounded and artificial.[195] Thus, the duties imposed by PURPA requiring state commissions to "consider" federal regulations are significantly less demanding than are the duties imposed by the Brady Bill requiring CLEOs to determine the reasonableness of performing a background check.[196]

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193. 852 F. Supp. at 1388. In upholding PURPA's mandate to "consider" federal regulation, the Supreme Court relied primarily on tenth amendment jurisprudence rather than the analogy to the judicary. See notes 64-68 and accompanying text.

194. See 18 U.S.C. § 922(s)(2). See also note 26 and accompanying text.

195. According to the plaintiff CLEO in *Frank*, 860 F. Supp. at 1032, performing a background check took between fifteen minutes and six hours. Furthermore, the plaintiffs' departments' workloads with respect to background checks approximately doubled after the Brady Bill became effective. Id.

196. The distinction between the mandate to "consider" an issue versus the mandate to decide if an action is "reasonable," as well as the substantial duties triggered once it is decided a background check is reasonable, take the Bill outside of any analogy that might be made to the federally-imposed duties to report missing children, 42 U.S.C. § 5779(a) (1988 ed. & Supp. II), or traffic fatalities, 23 U.S.C. § 402(a) (1988 ed. & Supp. V). Although this analogy has been made, the types of burdens imposed are fundamentally different. Under the duty to report legislation, state officials merely pass on information—no decision must be made, explanations given, or factors balanced. Conversely, as explained in the text, the Brady Bill requires each of these burdens and many more. There are such clear differences between the duties of reporting

Under either the *Printz* or the *Koog* courts' interpretation of the Brady Bill's mandates, the federal government has added a new duty to the job description of the CLEO. Only the size of the job varies under the two interpretations—a variation that is inconsequential under the Court's tenth amendment jurisprudence. Because the Brady Bill imposes a federal mandate on a state official, it still raises a tenth amendment issue.

B. *Surviving* New York v. United States

Assuming that the Brady Bill imposes some mandatory duties on a CLEO, the question remains as to whether this imposition constitutes an impermissible exercise of Congress's power under the Tenth Amendment. As noted by the *Koog* court, it is difficult to discern a single standard from the Supreme Court's tenth amendment cases. The *Printz* court, like each court striking down the challenged provisions thereafter, has rested its holding on the Supreme Court's decision in *New York*.[197]

The *New York* opinion has drawn heavy criticism from scholars.[198] The criticism focuses primarily on the shaky precedential ground on which Justice O'Connor relied in reaching her decision.[199] Even those who applaud *New York*'s revitalization of federalism must concede to many of these complaints. For instance, Justice O'Connor failed to explain why Congress may compel enforcement of federal programs by quasi-judicial officials within the executive branch of a state, as in *FERC*, but not by other parts of state government.[200]

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statutes such as 42 U.S.C. § 5779(a) and those imposed by the Brady Bill in § 922(s), it is clear that the Brady Bill could not be sustained by reference to reporting statutes.

197. See *McGee*, 863 F. Supp. at 326-27 (holding that the Brady Bill violated the Tenth Amendment); *Mack*, 856 F. Supp. at 1381 (holding that the provision requiring local law enforcement officials to conduct background searches is unconstitutional); *Frank*, 860 F. Supp. at 1043-44 (same); *Romero*, 1994 U.S. Dist. LEXIS 20653 (same).

198. See generally Levy, 41 U. Kan. L. Rev. 493 (cited in note 18) (criticizing the *New York* decision for misapplying the constitutional principle of federalism); William A. Hazeltine, New York v. United States: *A New Restriction on Congressional Power vis-à-vis the States*, 55 Ohio St. L. J. 237, 250-53 (1994) (criticizing the Court's holding in *New York* as failing to address prior precedent); Martin H. Redish, *Doing It With Mirrors:* New York v. United States *and Constitutional Limitations on Federal Power to Require State Legislation*, 21 Hastings Const. L. Q. 593, 593 (1994) (criticizing the *New York* Court for imposing constitutional limits on congressional power that cannot be found in the text of the Constitution); Saikrishna B. Prakash, *Field Office Federalism*, 79 Va. L. Rev. 1957, 1990-2032 (1993) (arguing that the Founders envisioned the comandeering of state executive and judicial officers).

199. See Levy, 41 U. Kan. L. Rev. at 502-15 (cited in note 18). See also Hazeltine, 55 Ohio St. L. J. at 250-53 (cited in noto 198).

200. See Levy, 41 U. Kan. L. Rev. at 505 (cited in note 18). In fact, the *FERC* majority clearly noted that "there are instances where the Court has upheld federal statute structures

Further, the *FERC* majority expressly rejected the statement in Justice O'Connor's *FERC* dissent that the Framers of the Constitution intended to prohibit the federal government from exercising legislative power over state governments.[201] *FERC*, like *Hodel*, ultimately deferred adoption of a rule prohibiting any comandeering of state governments by the federal government, yet Justice O'Connor's *New York* opinion implies that these decisions support the anti-comandeering principle.[202]

In further support of the anti-commandeering rule, Justice O'Connor cited both *Baker* and *Garcia*. Critics have characterized this as misleading.[203] In *Baker*, the Court explicitly questioned the plausibility of such a rule in light of the holding in *Garcia*.[204] Furthermore, *Garcia*'s holding that the states' role in the federal system was effectively protected by the structure of the political process was expansive, undermining the proposition of limits on federal compulsion.[205]

Although a target of substantial criticism, *New York* is the Court's most recent and controlling precedent on tenth amendment jurisprudence. The federal statute challenged in *New York* presented a question of first impression to the Court. It was the first challenged federal statute to mandate that the states enact federal legislation as their own. Although the Tenth Amendment draws no clear line between federal and state authority, the federal regulations at issue in *New York* clearly crossed that boundary. *New York*, however, also binds those cases where federal intrusion into state authority may not be as great. The *New York* Court emphasized the fact that the statute in question blurred the line of political accountability.[206] If the federal government could commandeer a state's legislature to enact federal legislation, the state legislature would have no choice in enacting the legislation, but the public would still assume that it did have such a choice, creating a false sense of accountability.[207]

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that in effect directed state decisionmakers to take or to refrain from taking certain actions." *FERC*, 456 U.S. at 761-762.

201. Levy, 41 U. Kan. L. Rev. at 506 (cited in note 18) (citing *FERC*, 456 U.S. at 761-62 n.25).

202. Id. at 502.

203. Id. at 508.

204. *Baker*, 485 U.S. at 512-15.

205. Levy, 41 U. Kan. L. Rev. at 508-09 (cited in note 18).

206. 505 U.S. at 168.

207. Id. Justice O'Connor first articulated this concern regarding political accountability in *FERC*, 456 U.S. at 787 (O'Connor, Burger, Rehnquist, J.J., concurring in judgment and dissenting in relevant part).

The Court's cases have articulated varying reasons for invalidating legislation under the Tenth Amendment, and accountability has emerged as a watchword. When federal legislation subjects states to the same regulations as individuals, as did the legislation in *Garcia*, no loss of accountability results.[208] When both states and individual citizens must comply with generally applicable federal laws, there is no false impression of state promulgation or control of such legislation. Thus, the federal government still remains accountable to the people. Likewise, in *FERC*, when the federal government required a state decision-making body to "consider" implementing federal regulations, following specific procedures,[209] there was no loss of accountability. The state commission retained ultimate decision-making authority.[210]

As the *New York* Court pointed out, however, it is when the federal government requires state law-making bodies to adopt a federal law as their own that the line of accountability becomes heavily blurred.[211] The state legislature, a body assumed to have final lawmaking authority, is forced to promulgate another's decisions, thus breaking the direct line of accountability.[212]

The challenged provisions of the Brady Bill, however, do not interfere with the line of accountability between the federal and state governments.[213] This conclusion results whether one interprets the Bill's provisions to place a discretionary duty on CLEOs or a manda-

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208. See *Garcia*, 469 U.S. at 528.

209. See notes 64-68 and accompanying text.

210. The focus on accountability as the insurer of a federal system is supported by Saikrishna Prakash's article, *Field Office Federalism*, in which he demonstrates that the constitution does erect a barrier to congressional commandeering of state legislatures, although this barrier does not run to state administrative or judicial branches. Prakash, 79 Va. L. Rev. at 1966-71 (cited in note 198). Professor Tushnet, commenting on Prakash's work, notes that "perhaps the distinction, then, is not between state legislatures and state executives, but between those who, under local law, have final lawmaking authority over the relevant subject, and those who take the law given to them and administer it." Mark Tushnet, *Why the Supreme Court Overruled* National League of Cities, 47 Vand. L. Rev. 1623, 1650 (1994). See also Caminker, 95 Colum. L. Rev. at 1056-57 (cited in note 9) (explaining the argument that Congress may comandeer judicial and executive, but not legislative officials). These observations reflect the concerns voiced by Justice O'Connor.

211. As Justice O'Connor explained, "where the federal government compels states to regulate, the accountability of both state and federal officials is diminished." *New York*, 505 U.S. at 168.

212. Id.

213. But see Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 Vand. L. Rev. 1563, 1579 (1994). In a cursory inquiry into the provisions of the Brady Bill, Professor Merritt notes that under her autonomy model of federalism, the Bill unacceptably interferes with state enforcement officers and confuses the lines of political accountability. Contra, Tushnet, 47 Vand. L. Rev. at 1650-51 (cited in note 210) (taking a critical view of Professor Merritt's autenomy model).

tory duty to perform background checks in every case. Much like the judiciary or quasi-judiciary systems in *FERC*, law enforcement officers do not set their own agendas.[214] Sheriffs must often enforce laws and regulations that they do not agree with, or even believe to be a waste of office resources. The public does not hold the enforcement agency responsible for the laws themselves or for the diversion of resources required to enforce them.[215] The firearm transferor and transferee understand that they are complying with federal law, not a local ordinance, when they transmit the required information to the CLEO. Furthermore, when a firearm purchaser is denied, the denial is pursuant to clear federal mandate as to what constitutes a violation, a decision over which the CLEO has no discretion[216]—the CLEO is nothing more than a conduit of information. Thus, the federal government remains completely accountable for its own legislation. The electorate knows where to turn to effect a change.

The Court's holding in *New York,* however, did not turn on a finding of a lack of accountability. The Court, while emphasizing accountability in its reasoning, ended up with an anti-commandeering rule. The rule and its reasoning, as articulated in *New York* and the cases that led to it, are not a close fit. Instead of narrowly tailoring the *New York* holding to prohibit congressional commandeering of state legislatures, a body that is supposed to have final decision-making authority, the Court held more broadly. This is the problem the Brady Bill makes painfully apparent, a problem recognized by critics of the Court's tenth amendment jurisprudence.[217] Congress enacted the Brady Bill to regulate the activities of individuals. Only a portion of the Bill is addressed to the states in requiring action from the CLEO to effectuate the regulation. Because the Bill does not blur the lines of political accountability, it comports with the rationale behind *New York*. It fails the "black letter" rule, however, by commandeering the CLEOs' services into the enforcement of federal legislation.

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214. See *FERC*, 456 U.S. at 784-85 (O'Connor, J., dissenting) (discussing the judiciary's inability to control an agenda).

215. In support of this contention see Tushnet, 47 Vand. L. Rev. at 1646-49 (cited in note 210); Caminker, 95 Colum. L. Rev. at 1062-63 (cited in note 9).

216. See note 27.

217. See generally Caminker, 95 Colum. L. Rev. at 1001 (cited in note 9). Professor Caminker explains that "*New York*'s categorical rejection of nonjudicial commandeering reflects a wooden, simplistic response to a problem that is conceptually and normatively complex. . . . [A] strict nonjudicial anti-commandeering rule reflects an overinclusive and arbitrary line that sacrifices various national interests for speculative state autonomy concerns." Id. at 1087-88. Professor Caminker refers periodically to the Brady Bill throughout his piece in demonstrating the complexities and complications of the *New York* holding.

V. SURVIVING THE TENTH AMENDMENT: TWO OPTIONS

The Brady Bill, as it currently reads, stumbles along a fine line of constitutionality. The type of mandate imposed by the Bill has never been directly addressed by the Supreme Court, and the Court's current tenth amendment law leaves enormous gray areas in which to argue. The road the Court has traveled in developing its tenth amendment jurisprudence is far from straight, and it is not certain what creature will emerge from this process. To ensure the ultimate survival of the Brady Bill, and to avoid the tenth amendment problems that plague the current Bill, the Bill must sidestep the entire issue.

A. Severability

The first option, one of judicial creation, is to sever the problematic portion of the Bill. After finding that section 922(s)(2) of the Bill violated the Tenth Amendment, the *Printz* court did just that.[218] The court's reasoning was sound and coincides with the controlling precedent. The *New York* Court reiterated this standard, noting that only when it is apparent that the legislature would not have enacted those sections which are within its authority, independently of that which is not, the invalid part may be severed if what is left is fully operative."[219] If section 922(s)(2) is severed from the Bill, what remains is a mandate to individual firearm dealers to transmit to CLEOs the required identification information.[220] The state can act upon this information if it so chooses during the five day waiting period. Thus, until a national criminal database is established, the essence of the legislation becomes the waiting period and transmission of purchaser information to the states.

Although the resulting Bill is left without much bite, it is not inconsistent with Congress's stated objectives of establishing a waiting period and creating a national criminal background database.[221] Furthermore, Congress provided for severance by including a severability clause in the Gun Control Act (which the Brady Bill amends),[222] creating a presumption that the validity of the legislation

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218. *Printz*, 854 F. Supp. at 1518-19.

219. *New York*, 505 U.S. at 106 (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)).

220. See 18 U.S.C. § 922(s)(1).

221. See H.R. Rep. No. 103-344 at 1 (cited in note 4).

222. 18 U.S.C. § 928 (1988) ("If any provision of this chapter . . . is held invalid, the remainder of the chapter . . . shall not be affected thereby"). See also *Alaska Airlines*, 480 U.S.

as a whole should not depend on the validity of any one provision. Although the objective of creating a national criminal database will not be realized for at least several years, and there would be no interim provisions once section 922(s)(2) was severed, the severance does not hinder the accomplishment of this goal.[223] Admittedly, severance leaves the Bill relatively powerless; however, it is a valid course, of action preferable to eliminating the Bill entirely, and one the courts should take until further action by Congress.

B. Recommended Amendment

Severing the requirement for background checks leaves the Bill relatively impotent when compared to its former self. To realize the original implications of the Bill, while avoiding serious tenth amendment problems, Congress must amend the Bill so as to regulate individuals without the assistance of state officials. Instead of forcing the CLEO to perform background checks, Congress need only leave this duty to firearm dealers.

The proper Bill would require that firearm dealers make a reasonable effort, including performance of a background check of every prospective purchaser, to ascertain within five business days whether receipt or possession would be in violation of the law. This leaves the state in control of several options. It can provide the background check to firearm dealers for free; it can provide it for a fee, as many already do;[224] or it can provide nothing, leaving the dealers to retain private companies to perform the checks. While fee charging on the part of the state or the hiring of private services on the part of the dealer would result in increased prices, the increase would be relatively slight, particularly in comparison to the costs of placing firearms in the hands of criminals.[225]

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at 686 (establishing the standard for severability); *Printz* 854 F. Supp. at 1518 (reaching the same conclusion).

223. See 18 U.S.C. § 922(t)(1).

224. See, for example, 1995 Colo. Rev. Stat. § 12-26.5-107 (establishing a fee to be charged to a firearm transferor for each requested background check required by state law); Utah Code Ann. § 76-10-526 (1995) (declaring that all firearm dealers shall collect a five dollar fee for every criminal history background check required under state law); Va. Code § 18.2-308.2:2 (Supp. 1995) ("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]").

225. For example, one newspaper article reported based on findings by the state government that each background check would cost the state ten dollars to perform. Rhonda Cook, *Legislature: The Gun Bill*, Atlanta J. & Const. 6B (March 16, 1995).

Another article placed the cost of retaining a private company to perform a background check to run anywhere from 20 to 200 dollars, depending on the complexity of the check. Stuart Silverstein, *Applicants: Past May Haunt You*, L.A. Times A1 (March 7, 1995).

Furthermore, the state electorate can vote for other options to prevent an increase in firearm prices, namely having the state provide the service for free. This type of legislation is not unprecedented. Several states have enacted analogous legislation, and many more are considering it.[226] For example, in late 1994, Michigan enacted legislation requiring privately owned security guard providers to request a background check of each prospective employee.[227] The state provides the check service at a cost of five dollars to the business.[228] Furthermore, in several other states, private companies have developed this niche by providing thorough background checks for a minimal cost.[229]

As the Court has recognized, this type of legislation would clearly be constitutional for tenth amendment purposes. When Congress addresses its mandates to individuals alone, the Tenth Amendment is not implicated.[230] Justice O'Connor, dissenting in *FERC*, made the same point. Although she would have found that PURPA violated the Tenth Amendment by addressing its directives to state agencies, she freely admitted that there would have been no constitutional issue if Congress had directed its request at private companies. Under this proposal, state governments would not be implicated because no state resources would be required to enforce the Bill unless the state chose to provide them. There would be no false impression that state officials promulgated or even agreed with the federal decision to regulate firearms in this manner.

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226. See, for example, Va. Code § 63.1-248.7:2 (1995) (requiring as a condition of employment that every residential facility for juveniles which is regulated or operated by the Department of Social Services, the Department of Education, the Department of Youth and Family Services, or the Department of Mental Health shall require a criminal background check, with the cost to be borne by the employee, unless the facility decides to pay the cost); Cal. Health & Safety Code §§ 1337.6 to .7, 15671 (West, 1995) (requiring a criminal background check for nurse assistants and home health aides as a component of certification, with the cost to be borne by applicants).

227. Mich. Comp. Laws Ann. § 338.1068 (West, 1995).

228. Id.

229. This development is in response to the increasing desire that private businesses be required to check the backgrounds of potential employees and customers in some instances. See, for example, Stuart Silverstein, *Backgrond Checking is a Threat to Fairness*, The Plain Dealer, Business 21 (April 9, 1995) (discussing the recent growth in private businesses conducting background checks); Silverstein, L.A. Times at A1 (cited in note 225) (discussing the "flourishing" business of background checks); Susan R. Miller, *More Background Checks in Store for Health Care Workers*, S. Fla. Bus. J. B2 (Aug. 11, 1995) (discussing the increased demand for background checks and the response of privato companies).

230. *FERC*, 456 U.S. at 779.

VI. CONCLUSION

The Brady Bill exemplifies the problems that riddle current tenth amendment jurisprudence. The Court's questionable reasoning in *New York*, and the fragmented precedential groundwork on which it was based, do not support an obvious resolution to the problems that plague the Bill. Firearms control is an area in which the exercise of congressional power is greatly needed. Unfortunately, as the legislation currently stands, and in light of *New York*'s ultimate holding, it will not withstand constitutional scrutiny. The Court cannot continue forward with a rule based on such shaky ground, a rule whose reasoning does not always support the necessary outcome. The Brady Bill typifies the problem and as such is a potential tool of clarification. Until then, to ensure longevity of congressional legislation, Congress must avoid any potential problems. In the case of the Brady Bill, this goal can most effectively be achieved by amending the Bill to regulate individuals, and individuals only.

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VII. APPENDIX

During the final stages of publishing this Note, the United States Court of Appeals for the Ninth Circuit upheld the constitutionality of the Brady Bill,[231] reversing *Printz* and *Mack*. In upholding the Brady Bill, the Ninth Circuit relied primarily on *Baker* and *FERC* for the proposition that the federal government may compel action by states or their representatives in certain instances.[232] With this permissive interpretation of tenth amendment jurisprudence, the court concluded that there would be nothing "unusually jarring" in allowing the mandates of section 922(s) to stand.[233] This reasoning, however, is fatally flawed. The Brady Bill imposes much greater duties than did the statutes in *FERC* or *Baker*, which helps explain why many local governments are staunchly resisting the federal mandates of the gun control legislation. Requiring a state regulatory commission to *consider* a matter, as in *FERC*, is wholly different from requiring a CLEO to *decide* when a background check will be conducted and what research would be reasonable.[234]

The Ninth Circuit compared these statutory impositions to the federally-imposed duties of state officials to report missing children and traffic fatalities to federal agencies.[235] Yet the Ninth Circuit's analogy to federal reporting statutes is weak at best.[236] The types of burdens imposed are fundamentally different here as well. Under a duty to report, state officials simply pass on information—no decisions must be made, explanations given, or factors balanced. Conversely, the Brady Bill requires the performance of each of these duties and many more.[237]

To uphold the Bill, the court was forced to distinguish the Supreme Court's most recent tenth amendment case, *New York*.[238] In so doing, the Ninth Circuit mischaracterized the breadth of the *New York* decision. First, the court viewed *New York* as involving a congressional intrusion on the states of a different type and greater magnitude than the intrusion involved in the Brady Bill.[239] The Ninth

231. *Mack v. United States*, 1995 U.S. App. Lexis 25263.
232. 1995 U.S. App. Lexis 25263, *9-10.
233. Id. at *10.
234. See text accompanying notes 193-96.
235. *Mack*, 1995 U.S. App. Lexis 25263, at *10. See text accompanying notes 193-96.
236. See note 196.
237. See notes 28-29 and accompanying text.
238. 505 U.S. at 144.
239. 1995 U.S. App. Lexis 25263, *10-11.

Circuit then interpreted *New York* to hold that "the federal government is not entitled to coerce the states into legislating or regulating according to the dictates of the federal government."[240] This narrow interpretation enabled the Ninth Circuit to uphold the Brady Bill as the Bill does not coerce a state into enacting federal legislation or regulations.[241]

In reality, however, the *New York* Court made no attempt to limit its holding to federal legislation directed to state legislatures and regulatory agencies. Although the *New York* legislation coerced states into legislating for the federal government, the *New York* Court prohibited more than that. The *New York* Court held, in broad terms, that the federal government could not compel states to enact or enforce federal legislation.[242] Thus, the Brady Bill, in requiring CLEOs to act as agents of the federal government through administering and enforcing background checks and related duties, violates the prohibitions of *New York*.

To support its characterization of *New York*, the Ninth Circuit also focused on the decision's accountability language.[243] The court pointed out that accountability between state and federal governments is not blurred under the Brady Bill.[244] Yet, *New York* did not enunciate accountability as the tenth amendment standard. Rather, the Court clearly established an anti-commandeering rule as the measure of constitutionality.[245] It is this standard that the Brady Bill fails.[246]

In a final effort to strengthen its conclusion, the Ninth Circuit noted that the Brady Bill is a regulatory policy directed at individuals and not the states.[247] However, while the Bill's ultimate objective is to

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240. Id. at *13. The court explained in a footnote that "when the Court in *New York* stated that 'the Federal Government may not compel States te enact or administer a federal regulatory program,' the Court meant 'administer' in the sense of heing in charge of a prograin and making policy decisions with respect te the prograin." Id. at *14 n.7 (quoting *New York*, 505 U.S. at 188).

241. Id. at *15.

242. 505 U.S. at 173 ("Either type of federal action would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments"); id. at 178 ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States te regulate"); id. at 188 ("Whatever the outer limits of [state] sovereignty may be, one thing is clear: the Federal Government may not compel the States to enact or administer a federal regulatory program").

243. See notes 124-26 and accompanying text.

244. 1995 U.S. App. Lexis 25263, *15-16. See also text accompanying notes 213-216 reaching the same conclusion.

245. See note 135 and accompanying text.

246. See Part IV.B.

247. 1995 U.S. App. Lexis 25263, *16.

regulate individuals, section 922(s)(2) is directed to states alone.[248] The Ninth Circuit readily admits that this section directs CLEOs to serve "as law enforcement functionaries in carrying out a federal program."[249] This admission is strikingly contradictory to *New York*'s admonition against conscripting state governments as agents for Congress.[250] This type of enlistment falls within the prohibitions created under *New York*. The duties imposed by the Brady Bill stand far from the "mimimal" impositions of federal reporting statutes and *FERC*'s mandate to "consider" certain matters. For these reasons the Ninth Circuit's decision further confuses, not clarifies, tenth amendment jurisprudence.

248. See notes 26-30 and accompanying text.
249. 1995 U.S. App. Lexis 25263, *16.
250. 505 U.S. at 178.