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Constitutional Law - Tenth Amendment: The Supreme Court Strikes down the Brady Act as an Unconstitutional Infringement of Tenth Amendment State Sovereignty

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CONSTITUTIONAL LAW—TENTH AMENDMENT: THE SUPREME COURT STRIKES DOWN THE BRADY ACT AS AN UNCONSTITUTIONAL INFRINGEMENT OF TENTH AMENDMENT STATE SOVEREIGNTY

Printz v. United States, 117 S. Ct. 2365 (1997)

I. FACTS

The Gun Control Act of 1968 set forth federal regulatory guidelines governing the ownership and sale of firearms.[1] In 1993, Congress amended that Act in order to establish a national instant background check within five years.[2] In the interim, Congress sought state assistance in the implementation of the Act through certain statutory provisions.[3] Under the provisions, a city's Chief Law Enforcement Officer (CLEO) was required to obtain a copy of the Brady Form from the area gun dealers.[4] The Brady Form included the buyer's name, address, date of birth, a description of the identification offered, and a sworn statement that the buyer was not a member of any class forbidden by law to own a handgun.[5] From that information, the CLEO made a reasonable effort to ascertain within five days if the transaction would violate the law.[6] If the CLEO determined that the sale would be unlawful and chose to inform the dealer, then upon request, the CLEO would have to furnish the purchaser with a written statement of the reasons for that determination.[7] If the CLEO determined that the sale would not be unlawful, the CLEO had to destroy all records of the inquiry within twenty days.[8]

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1. Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921-28 (1994 & West Supp. 1998)); *see* Printz v. United States, 117 S. Ct. 2365, 2368 (1997). Under the Act, it is illegal for a firearms dealer to sell a handgun to anyone under 21, or anyone not a resident of the dealer's state, or anyone otherwise prohibited from purchasing a firearm. 18 U.S.C. § 922(b)-(g). In addition, the Act identifies felons, fugitives, illicit drug users, the mentally ill, illegal aliens, and dishonorably discharged veterans as among the class of citizens forbidden to possess or purchase a firearm. *Id.* The Act also enacted several sections of Title 26, though not relevant to this article. Pub. L. No. 90-618, § 101, 82 Stat. 1214-16 (codified in various sections of 26 U.S.C.).

2. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (codified as amended at 18 U.S.C. § 922 (1994)); *see also* Pub. L. No. 103-159, § 103(b) (codified at 18 U.S.C. § 922 note) *amended by* Pub. L. No. 103-322, 103 Stat. 2074 (1994) (requiring the Attorney General to establish a permanent background check system within 60 months of the Act's date of enactment).

3. 18 U.S.C. § 922(s).

4. *Id.* § 922(s)(1)(A)(i)(III). The "CLEO" is defined as the chief of police, sheriff, or equivalent officer of the transferee's city or county of residence. *Id.* § 922(s)(8).

5. *Id.* § 922(s)(1)(A)(i)(I).

6. *Id.* § 922(s)(2). The "reasonable effort" requirement included research in whatever state and local record-keeping systems were available, as well as a national system to be designated by the Attorney General. *Id.*

7. *Id.* § 922(s)(6)(C).

8. *Id.* § 922(s)(6)(B)(i).

In separate actions, the petitioners, Jay Printz and Richard Mack, the sheriffs and CLEOs of Ravalli County, Montana, and Graham County, Arizona, respectively, challenged the constitutionality of the interim provisions under the Fifth and Tenth Amendments.[9] The federal district courts held that the background check provision exceeded the congressional power conferred by the Commerce Clause and consequently violated the Tenth Amendment.[10] Moreover, both courts found that since the background check was severable from the rest of the Act, the remaining provisions became optional and as a result, they were not unconstitutional.[11]

However, after consolidating the two cases for appeal, the Ninth Circuit Court of Appeals reversed.[12] The Court of Appeals held that because the CLEOs did not engage in the sovereign processes of enacting legislation or regulation, the Brady Act was not an unconstitutional mandate to the states, or an unconstitutional infringement of Tenth Amendment state sovereignty.[13] The Supreme Court granted certiorari in order to determine whether Congress can direct state law enforcement officers to administer a federal regulatory program.[14] In a five-to-four decision, the Court *held* that such an empowerment of Congressional empowerment would destroy the fundamental principles of constitutionally established dual sovereignty set forth in the Tenth Amendment.[15]

II. LEGAL BACKGROUND

The United States Constitution arose from a need for the economic and social stabilization not realized under the Articles of the

9. *See* Mack v. United States, 856 F. Supp. 1372, 1374 (D. Ariz. 1994); Printz v. United States, 854 F. Supp. 1503, 1506-07 (D. Mont. 1994). Both Printz and Mack also claimed that in subjecting the CLEOs to criminal penalties without a clear definition of what constituted "reasonable efforts," the Act was unconstitutionally vague and violates the Fifth Amendment. *Mack*, 856 F. Supp. at 1381; *Printz*, 854 F. Supp. at 1509-10. However, only the court in *Mack* found that the criminal sanctions of the Act would apply to CLEOs, thereby implicating Due Process prohibitions of vagueness. *Mack*, 856 F. Supp. at 1382; *see also Printz*, 854 F. Supp. at 1510 (finding that the criminal sanctions contained in the Act did not apply to the CLEOs). Mack also claimed that the provisions constituted involuntary servitude in violation of the 13th Amendment. *Mack*, 856 F. Supp. at 1382. The court dismissed that claim on the grounds that Mack could simply quit his job and be free of the duties imposed by the Act. *Id.*

10. *Mack*, 856 F. Supp. at 1381; *Printz*, 854 F. Supp. at 1519-20.

11. *Mack*, 856 F. Supp. at 1383; *Printz*, 854 F. Supp. at 1519.

12. Mack v. United States, 66 F.3d 1025 (9th. Cir. 1995). The Ninth Circuit held that the provisions violated neither the Tenth Amendment nor the Thirteenth Amendment. *Id.* at 1034. In addition, the court dismissed the Fifth Amendment challenge as lacking ripeness and also dismissed the appeal of the district court's rulings on the severability of the provisions as moot. *Id.*

13. *Id.* at 1031.

14. Printz v. United States, 117 S. Ct. 2365, 2368 (1997).

15. *Id.* at 2384. Justice Scalia wrote the majority opinion and was joined by Justices Kennedy, O'Connor, Thomas, and Chief Justice Rehnquist. *Id.* at 2368. Justices Stevens, Souter, Ginsburg, and Breyer dissented. *Id.*

Confederation.[16] The principle problem facing the original drafters was how to increase national power in response to the crisis, while also preserving state sovereignty.[17] The result of those conflicting interests was a doctrine of dual sovereignty in which the powers not delegated to the federal government were reserved to the states through the Tenth Amendment.[18]

Although the Tenth Amendment has been interpreted in the past as having created a system of absolute, coequal sovereigns between the states and the federal government, that is not the law today.[19] The expansion of federal power under the taxing and spending powers, the commerce power, and the Fourteenth Amendment has gone largely unchecked by the Tenth Amendment.[20] However, the federal commandeering of state governments is a fairly recent phenomenon.[21] Nowhere is this more true than with the issue at hand; the federal commandeering of state executive officials.[22] Unfortunately, an examination of Supreme Court case law reveals that the Court has struggled to clarify what role the Tenth Amendment guarantees for the states within our federal

16. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 93 (12th ed. 1991). The Articles of the Confederation limited the powers of the central government to expressly delegated powers. *Id.* at 77. *See* ARTICLES OF THE CONFEDERATION ART. 2. Most notably, the central government lacked the power to regulate trade. *See* NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON AT XVIII (A. Koch ed. 1966). This lack of power was generally perceived as the root of the country's economic travails and was the focus of the Constitutional Convention. GUNTHER, *supra*, at 93.

17. *See* THE FEDERALIST NOS. 6, 17 (Alexander Hamilton), NO. 14 (James Madison).

18. U.S. CONST. amend. X.

19. FERC v. Mississippi, 456 U.S. 742, 761 (1982) (citing Kentucky v. Dennison, 24 How. 66, 107 (1861)).

20. *See* South Dakota v. Dole, 483 U.S. 203, 209 (1987) (noting that the 10th Amendment's limitations on the congressional regulation of state affairs did not limit the range of conditions that could be placed upon federal grants); Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding that the aggregate effects of personal farm excesses substantially affected interstate commerce and were subject to the commerce power). *But see* Gregory v. Ashcroft, 501 U.S. 452, 470-73 (1991) (upholding a state mandatory retirement age in conflict with the Age Discrimination in Employment Act of 1967, and noting that even though Congress may impose its will upon the states when exercising an enumerated power, the 10th Amendment requires that Congress do so expressly).

21. *See* Brown v. EPA, 521 F.2d 827, 840-41 (9th Cir. 1975). In the 1970s, the EPA promulgated regulations requiring the states to prescribe auto emissions testing and other programs to reduce pollution or face the possibility of sanctions. *See* Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C.). Both the Fourth and the Ninth Circuits found that the Amendments were sufficiently ambiguous to permit the courts to avoid deciding the constitutional ramifications of the amendments simply by holding that the amendments did not authorize sanctions against states for non-compliance. *See Brown*, 521 F.2d at 838-42; Maryland v. EPA, 530 F.2d 215, 226 (4th Cir. 1975). Once certiorari was granted to review the constitutional validity of the regulations, the government chose not to defend the regulations, leading the Court to vacate the opinions below and remand for considerations of mootness. EPA v. Brown, 431 U.S. 99, 103-04 (1977).

22. *See* New York v. United States, 505 U.S. 144, 176 (1992) (holding that the Federal Government may not commandeer the legislative processes of the states, but not directly addressing whether federal power could commandeer state executives).

system.[23] Consequently, the nature of the protections afforded to state executive officials to be free from the command of the federal government remains uncertain.[24]

Perhaps for the first time, in *Kentucky v. Dennison*,[25] the Supreme Court attempted to define the sovereign position of state executive officials with respect to the federal government.[26] In *Dennison*, Willis Lago, an Ohio man, was charged in Kentucky with assisting in the escape of a slave.[27] The Governor of Ohio refused to grant the State of Kentucky's ensuing extradition request.[28] As a result, the State of Kentucky brought an action directly to the Supreme Court seeking a mandamus to compel Lago's extradition.[29] The Court held that the Extradition Clause did not grant Congress the power to compel a state executive to extradite fugitives found within that state's territory.[30] Writing for the Court, Chief Justice Taney first determined that the Extradition Clause created a right for the executive authority in every state to seek the extradition of any fugitive from any state in which the fugitive could be found.[31] The Chief Justice then turned to the language of the Extradition Act of 1793 and determined that the language "shall be the duty," created a moral, rather than a mandatory obligation on the states' executives to deliver a fugitive upon request.[32]

The Court revisited *Dennison* in *Puerto Rico v. Branstad*.[33] In *Branstad*, the Governor of Puerto Rico requested that the Governor of Iowa extradite a murder suspect.[34] The Governor of Iowa refused to execute the extradition, and Puerto Rico subsequently filed a complaint in the United States District Court for the Southern District of Iowa, seeking a writ of mandamus to compel the Governor of Iowa to comply

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23. *Compare New York*, 505 U.S. at 149 (stating that the 10th Amendment prohibits Congress from compelling the states to enact or administer a federal regulatory program), *and* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985) (holding that the protection of state sovereignty should be accomplished through the procedural protection of a representative government, though not the judiciary).

24. *See New York*, 505 U.S. at 160 (refusing to reconsider the validity of *Garcia* and its allocation of state protections as procedural, rather than substantive).

25. 24 How. 66 (1861).

26. Kentucky v. Dennison, 24 How. 66, 107 (1861) (holding that the states have reserved rights which prevent the federal government from controlling the internal functions of states).

27. *Id.* at 67.

28. *Id.* at 69-70.

29. *Id.* at 71.

30. *Id.* at 107.

31. *Id.* at 103.

32. *Id.* at 107. The Act stated that the executive authority of a State or Territory to which a person flees shall cause the fugitive to be arrested and shall cause the fugitive to be delivered to the agent of that state. Extradition Act of 1793, 1 Stat. 302 (codified as amended at 18 U.S.C. § 3182 (1994)).

33. 483 U.S. 219, 222 (1987).

34. Puerto Rico v. Branstad, 483 U.S. 219, 222 (1987).

with the request.[35] The district court dismissed the complaint, holding that *Dennison* barred the federal courts from compelling a state to comply with the Extradition Act.[36]

In reversing the lower court, the Supreme Court found that the Extradition Clause spoke in unmistakably mandatory terms and that any person who sustains a personal injury from the failure of a state to uphold the Clause's requirements may have a mandamus to compel the performance of those duties.[37] As a result, the Court held that when duties are imposed upon the states by the Constitution, there is no need to weigh the performance of the federal obligation upon state executives against the powers reserved to the states under the Tenth Amendment.[38]

In addition to the obligation imposed by the Constitution on state executives through the Extradition Clause, in *Testa v. Katt,*[39] the Court held that the Supremacy Clause affirmatively required the state judiciary to enforce any claim arising under a valid federal law.[40] The point of contention in *Testa* was the Emergency Price Control Act, which allowed buyers to sue sellers for selling goods above a prescribed ceiling price for the merchandise.[41] The Rhode Island Supreme Court reversed a lower court decision granting relief on the grounds that the Act was a penal statute in the international sense and could not be maintained in the state courts of Rhode Island.[42] Justice Black, writing for the majority, determined that it made no difference how one classified the Act, because the obligation of the states to enforce federal law is not lessened by legal remedy or form.[43] Thus, *Testa* made it clear that state courts of adequate jurisdiction cannot refuse to entertain actions brought before them under federal law because the policy of a federal act is the prevailing policy in every state.[44]

While *Branstad* and *Testa* established that the federal government could require a state to perform any duty imposed directly by the Constitution, those cases did not address the question of whether Congress could commandeer state legislatures or executives through an enumerated power.[45] However, that question was addressed in *National*

35. *Id.* at 222-23.
36. *Id.* at 223.
37. *Id.* at 227 (citing Board of Liquidation v. McComb, 92 U.S. 531, 541 (1876)).
38. *Id.* at 228 (emphasis added).
39. 330 U.S. 386 (1947).
40. Testa v. Katt, 330 U.S. 386, 394 (1947).
41. *Id.* at 387; *see* 50 U.S.C. § 925 (1994).
42. *Testa*, 330 U.S. at 388.
43. *Id.* at 391.
44. *Id.* at 393.
45. *See, e.g.*, Puerto Rico v. Branstad, 483 U.S. 219, 228 (1986); *Testa*, 330 U.S. at 389.

League of Cities v. Usery,[46] where for the first time in forty years, the Court acknowledged the preceding decade's demands of state autonomy as a limit to congressional control by striking down a federal regulation based on the commerce power.[47]

At issue in *National League of Cities* were the 1974 amendments to the Fair Labor Standards Act (FLSA), which extended the Act's minimum wage and maximum hour provisions to public employees.[48] In declaring the amendments unconstitutional, the Court found that the Tenth Amendment is an express limitation within our federal system on the authority of Congress to regulate states as states through the commerce power.[49] Moreover, the authority to prescribe wages to be paid by a state rested in the state's capacity as a sovereign government.[50] Consequently, since the 1974 amendments operated to directly displace a state's freedom to structure integral operations in the areas of traditional governmental functions, they exceeded constitutional power by infringing upon state sovereignty.[51]

However, five years later, the Court rejected a similar Tenth Amendment challenge to the Surface Mining Control and Reclamation Act of 1977.[52] In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,[53] the Court dismissed the idea that *National League of Cities* compelled a finding that interference with traditional governmental functions alone contravened the Tenth Amendment.[54] The Court concluded that in

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46. 426 U.S. 833 (1976).

47. National League of Cities v. Usery, 426 U.S. 833, 854-55 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 496 U.S. 528 (1985); *see also* Fry v. United States, 421 U.S. 542, 547 n.7 (1975) (acknowledging that the 10th Amendment declares that Congress may not impair a state's ability to function within the federal system); Maryland v. Wirtz, 392 U.S. 183, 202-03 (1968) (Douglas, J., dissenting) (insisting that the 1966 amendments to the FLSA making all hospital employees, public and private, subject to minimum wage and overtime requirements created such an interference with the operations of a state government as to be inconsistent with the Constitution).

48. 426 U.S. at 836. The Fair Labor Standards Act was enacted in order to end labor conditions detrimental to the health and welfare of workers. Pub. L. No. 93-259, § 1, 88 Stat. 55 (1938) (codified as amended at 29 U.S.C. § 202 (1994)). It required employers to pay employees a minimum hourly wage and one and a half times that hourly wage for time worked over 40 hours in one week. 29 U.S.C. §§ 206(a), 207(a)(3) (1994). The 1974 amendment redefined "employer" to include public agencies, and deleted the previous exclusions for the United States, states, and the political subdivisions of states. 29 U.S.C. § 203.

49. *National League of Cities*, 426 U.S. at 854-55.

50. *Id.* at 852.

51. *Id.*

52. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 293 (1981). The purpose of the challenged Act was to protect society and the environment from the adverse effects of surface coal mining operations. Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (codified as amended at 30 U.S.C. §§ 1201-1328 (1994)).

53. 452 U.S. 264 (1981).

54. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981). Relying on *National League of Cities*, the district court held that §§ 515 (d) & (e) violated the 10th Amendment because those sections interfered with traditional governmental functions of regulating land use. *Id.* at 285. Those provisions provided that operations on ground slopes in excess of twenty degrees, or steep

order to fall within the *National League of Cities* paradigm, challenged legislation must satisfy three requirements.[55] First, the legislation must regulate "states as states."[56] Second, it must address indisputable attributes of state sovereignty.[57] Finally, compliance with the law must impair a state's ability to "structure integral operations in areas of traditional governmental functions."[58]

The Court held that the Surface Mining Act failed to meet the first *National League of Cities* requirement because it governed only private mine operators, and did not compel the state itself to participate in the regulatory program.[59] The Court characterized the Act as an example of cooperative federalism in which states are allowed, within certain federally prescribed limits, to administer their own regulatory programs in a field otherwise subject to complete preemption by federal law.[60] In a similar case, *FERC v. Mississippi*,[61] the Court distinguished the challenge to the Public Utility Regulatory Policies Act of 1978 (PURPA) from *National League of Cities*.[62]

As opposed to the FLSA, a law generally applicable to both private and public entities, PURPA sought to use only state agencies to promote federal aims.[63] The Court held that PURPA's more troublesome requirement that states implement federal rules was only a requirement that the states adjudicate claims arising under the statute, an activity customarily engaged in by state utility commissions.[64] As such, the Court reasoned that this guideline was nothing more than a requirement that state adjudicatory bodies apply federal law where appropriately directed by the

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slopes, had to: (i) return the site to its original contour; (ii) refrain from dumping spoil material onto the downslope below the mining cut; and (iii) refrain from disturbing land above the highwall unless otherwise permitted. § 515(d), 91 Stat. 494 (codified at 30 U.S.C. § 1265(d) (1994)). A steep slope operator could obtain a variance from the original contour requirement by showing that the post reclamation use is of a greater economic or public use than otherwise possible. § 515(e), 91 Stat. 494 (codified at 30 U.S.C. § 1265 (e)(3)(A)(1994)).

55. *Hodel*, 452 U.S. at 287.

56. *Id.* at 287-88.

57. *Id.* at 288.

58. *Id.* (quoting National League of Cities v. Usery, 426 U.S. 833, 852 (1976)).

59. *Id.* Under the regulation, a state could assume permanent regulatory authority over surface mining operations on state land, as long as the state program met federal requirements and was approved by the Secretary of the Interior. Pub. L. No. 95-87, § 503, 91 Stat. 470 (codified at 30 U.S.C. § 1253 (1994)). However, the Secretary would assume responsibility for the mining operations of states which failed to submit a satisfactory program. § 504, 91 Stat. 471 (codified at 30 U.S.C. § 1254 (1994)).

60. *Hodel*, 452 U.S. at 289-91.

61. 456 U.S. 742 (1982).

62. FERC v. Mississippi, 456 U.S. 742, 758-59 (1982).

63. *Id.* at 759. PURPA was enacted to combat the energy crisis occurring during the seventies. *Id.* at 745. In order to encourage the development of cogenerators and small power facilities, Section 210 directed the FERC to promulgate the necessary rules and required state authorities to implement the rules by, at a minimum, resolving disputes case by case. *Id.* at 751. Titles I and III of the Act directed the states to consider the implementation of federal rate designs and regulatory standards. *Id.* at 746.

64. *Id.* at 759-60.

Constitution.[65] In addition, PURPA's command that states consider federal rules was upheld in accordance with *Hodel*, as simply a condition for continued state participation in an otherwise federally preempted field.[66] As the Court noted, if a state did not want to participate, it did not have to, thus nothing in PURPA directly compelled a state to enact a federal program.[67] However, nine years later however the Court would change its posture with respect to Tenth Amendment challenges to congressional acts.[68]

In *Garcia v. San Antonio Metro Transit Auth.*,[69] the Transit Authority canceled overtime payments following the decision in *National League of Cities*, and Garcia sued.[70] Justice Blackmun, writing for the majority, surmised that judicial attempts to define a governmental function as "traditional" would lead to inconsistent results, and subsequently overruled *National League of Cities* as "unsound in principle and unworkable in practice."[71] For Justice Blackmun, the states' equal representation in the Senate was the constitutional recognition of state sovereignty. Thus, restraints on federal power were inherent in the procedural processes of the national government, rather than in judicially created limitations prompted by the Tenth Amendment.[72] As a result, the Court held that the FLSA wage and overtime requirements did not infringe on state sovereignty and did not violate the Constitution.[73]

Nonetheless, the Tenth Amendment as a protector of states' rights arose again only seven years after its fall in *Garcia*.[74] In *New York v. United States*,[75] the Court addressed the constitutionality of three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.[76] The provisions were to provide "incentives" for states to comply with the statutory obligation to provide disposal for waste generated

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65. *Id.*; *see also* Testa v. Katt, 330 U.S. 386, 394 (1947) (upholding the Emergency Price Control Act's grant of jurisdiction to state courts over claims arising under the Act). In *Testa*, the Court relied on the Supremacy Clause in determining that federal policy is the prevailing policy for the state courts. *Id.* at 393. *See also* U.S. CONST. Art. VI, § 2 (stating that the laws of the United States "shall be the supreme law of the Land; and the Judges of every State shall be bound thereby").

66. *FERC*, 456 U.S. at 764.

67. *Id.* at 765.

68. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985) (holding that state sovereignty is provided by constitutional procedural protections).

69. 469 U.S. 528 (1985).

70. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 534 (1985).

71. *Id.* at 546-47.

72. *Id.* at 552.

73. *Id.* at 555-56.

74. *See* New York v. United States, 505 U.S. 144 (1992) (holding that a regulation based on the commerce power violates the 10th Amendment).

75. 505 U.S. 144 (1992).

76. New York v. United States, 505 U.S. 144, 149 (1992).

within the state.[77] Only one of the three provisions, the "take title" provision, was held to be unconstitutional.[78]

Under the "take title" provision, states had a choice either to take ownership of the waste, or to regulate according to the instructions of Congress.[79] For the Court, offering states a choice between two constitutionally impermissive alternatives was no choice at all.[80] Therefore, the Court held that the federal government may not compel the states to enact or administer a federal regulatory program.[81] While the holding in *New York* outlawed the federal commandeering of state legislative processes, it did not speak directly in terms of the federal government's ability to utilize state executive officials to implement federal policy.[82] Against this legal backdrop, Congress passed the Brady Act in 1992 in response to an epidemic of handgun violence.[83]

III. ANALYSIS

Justice Scalia, writing for the majority, concluded that because the Constitution itself did not directly answer the question of whether a federal regulation can require participation by state law enforcement officials, the answer had to be within historical constitutional practice, the structure of the Constitution, and the prior jurisprudence of the Supreme Court.[84]

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77. *Id.* at 152. The Low-Level Radioactive Waste Policy Act was a response to an impending shortage of waste storage sites. Pub. L. No. 96-573, 94 Stat. 3347 (1980) (codified as amended at 42 U.S.C. § 2021b-j (1994)). It provided for waste disposal by allowing states to enter into compacts, which ultimately could exclude waste from any non-member state. 94 Stat. at 3348. The 1985 amendments resulted from a lack of participation in forming these compacts. *See New York*, 505 U.S. at 151. At that time, 31 states were unsited, or non-members, in a compact. *Id.* Faced with the prospect that these states could be without a disposal outlet, the amendments were a compromise such that the sited states agreed to extend their acceptance of waste from unsited states for seven years, in exchange for an agreement that the unsited states would end any reliance on sited states by 1992. *Id.*

78. *New York*, 505 U.S. at 177. The first provision was a monetary incentive which allowed sited states to exact a surcharge for waste accepted from unsited states, with a quarter of the surcharge to be transferred to an escrow account to be held by the Secretary of Energy. *Id.* at 152. This money would be paid out to states who met the deadlines for providing for waste disposal. *Id.* at 153. This provision was upheld as no more than a federal tax on interstate commerce and an exercise of the Spending Clause. *Id.* at 185. The second provision was an access incentive which allowed sited states to exact excess surcharges from those states failing to meet the planning deadlines for waste disposal, with the possibility of denying access altogether. *Id.* at 153. This was held to be a choice for the state to regulate according to federal standards, or have state law be preempted by federal regulation. *Id.* at 173.

79. *Id.* at 176.

80. *Id.*

81. *Id.* at 177.

82. *Id.* at 161.

83. H.R. REP. No. 103-344, at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1985.

84. Printz v. United States, 117 S. Ct. 2365, 2370 (1995).

A. HISTORICAL CONSTITUTIONAL PRACTICE

The Court began its examination of historical practice on the premise that early congressional enactments "provide contemporaneous and weighty evidence of the Constitution's meaning."[85] The Court dismissed the government's argument that statutes of the first congresses, placing requirements on state courts to perform certain executive and adjudicative functions, were indicative of Congresses' ability to press the state executive into federal service.[86] The government had relied on early naturalization statutes, as well as other statutes requiring state courts to apply federal prescriptions within the court's judiciary role.[87] For the Court, there were no indications that the requirements under the naturalization statutes were applied to any states other than those that authorized the proceedings by their own accord.[88]

In addition, the Supremacy Clause makes it clear that state courts are constitutionally bound by federal law in matters falling within the judicial power.[89] The Court also noted that the only early statute that it considered which required action by a state executive was a direct implementation of the Extradition Clause itself.[90] Thus, the early statutes did not evidence any historical understanding that Congress could command state executives into federal service.[91]

The Government's second premise for a historical foundation was *The Federalist*.[92] The Government pointed to statements by Alexander Hamilton indicating that the collection of federal revenue would be made by state appointees, and that the national government could

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85. *Id.* (quoting Bowsher v. Synar, 478 U.S. 714, 723-24 (1986)).

86. *Id.* at 2370-71.

87. *Id.*; *see also* Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (conferring authority upon state courts to enforce naturalization laws); Act of June 18, 1798, ch: 54, § 2, 1 Stat. 567 (requiring state courts to transmit abstracts of citizenship applications); Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154-55 (requiring state courts to register aliens and issue certificates of registry); Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132 (requiring state courts to resolve disputes involving questions of ship seaworthiness); Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302-05 (requiring state courts to hear claims of slave owners seeking extradition of apprehended fugitive slaves).

88. *Printz*, 117 S. Ct. at 2370 (citing Holmgren v. United States, 217 U.S. 509 (1910)) (holding that the naturalization acts conferred authority upon state courts) and United States v. Jones, 109 U.S. 513 (1883) (holding that the naturalization acts' obligations were imposed with the consent of the states).

89. *Id.* at 2371 (referring to Testa v. Katt, 330 U.S. 386 (1947)). The Supremacy Clause reads: "the Laws of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. CONST. art VI, cl. 2.

90. *Printz*, 117 S. Ct. at 2371 (referring to Puerto Rico v. Branstad, 483 U.S. 219 (1987)); *see also* Extradition Act of 1793, ch. 7, § 1, 1 Stat. 302 (requiring state executive officers to deliver fugitives from justice within that state's jurisdiction to the state from which the fugitive fled).

91. *Printz*, 117 S. Ct. at 2371.

92. *Id.* at 2372.

employ the magistery of the states in the execution of national law.[93] However, the critical point for the Court was that these statements did not necessarily imply that Congress could make those impositions without the consent of the states.[94]

In his dissent, Justice Souter relied heavily on *The Federalist No. 27*, prompting the Court to examine that document in detail.[95] In that document, Alexander Hamilton states: "all officers, legislative, executive, and judicial in each state will be bound by the sanctity of an oath. Thus, the legislature, courts, and magistrates, of the respective members will be incorporated into the operations of the national government . . .; and will be rendered auxiliary to the enforcement of its laws."[96]

The Court rejected this passage as supporting a federal command over state executives in several ways.[97] First, the consequences "incorporated into" and "rendered auxiliary to" flowed automatically from the necessary oath by states to observe the supreme law of the land.[98] Therefore, if the passage was meant to require state officers to implement federal law, as Justice Souter suggested, then the officers would have to apply the law without any requirement for a congressional directive to do so.[99] According to the Court, no one had ever suggested that that was the law.[100]

Second, sole reliance on the natural reading of the passage would make state *legislatures* subject to federal direction as well.[101] However, the Court had consistently held that state legislatures were not subject to federal control.[102] In response, the Court offered its own interpretation that the passage simply meant that state officials have a duty not to enact laws obstructing the operations of the federal government.[103]

Finally, the Court refused to acknowledge congressionally funded mandates, or mandates which only require states to perform ministerial reporting functions, as in the case at hand.[104] Congressionally funded mandates are nothing more than preconditions for states to receive federal funding within a specified regulatory scheme.[105] Additionally,

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93. *Id.* (citing THE FEDERALIST NOS. 27, 36 (Alexander Hamilton)).
94. *Id.*
95. *Id.* at 2373.
96. *Id.*; *see* THE FEDERALIST NO. 27 (Alexander Hamilton).
97. *Printz*, 117 S. Ct. at 2373-75.
98. *Id.* at 2373.
99. *Id.*
100. *Id.*
101. *Id.* (emphasis added). The Court pointed out that legislatures are explicitly referred to in the passage. *Id.*
102. *Id.* (citing New York v. United States, 505 U.S. 144 (1992)).
103. *Id.* at 2374.
104. *Id.* at 2376.
105. *Id.*

ministerial reporting requirements are different from the Brady Act, in that they do not force state executives to administer a federal regulatory plan.[106] Thus, the Court concluded that historical constitutional practice did not support the existence of a congressional power to compel state executives into action.[107]

B. STRUCTURE OF THE CONSTITUTION

The Court's inquiry into the structure of the Constitution was necessary in order to determine if the congressional power asserted by the government was among the Constitution's essential postulates.[108] The Court reaffirmed the fact that the Constitution established a system of dual sovereignty.[109] This assertion was set forth implicitly through the enumerated powers and explicitly through the Tenth Amendment.[110]

Moreover, the Court observed that the experience of the Framers under the Articles of the Confederation led them to choose a constitution under which individuals, rather than states, are the only proper focus of government.[111] The Court acknowledged that a federal-state separation of powers is necessary to prevent a central government from controlling the states.[112] Therefore, the Court held that the powers of the federal government would be strengthened immeasurably if the government were able to press the executive officers of a state into service.[113]

The Court went on to determine that the Brady Bill implicated a federal separation of powers conflict as well.[114] Through Article II, section 3, the President ensures that the law is faithfully executed.[115] The Court determined that the Brady Act transferred that responsibility to the CLEOs of the states, and thereby impermissibly shattered the unity of the federal executive.[116] The Court then proceeded to attack the dissent's reliance on the Necessary and Proper Clause.[117] To the Court, when a law violates the constitutional principle of state sovereignty, it cannot be

106. *Id.* The Court's refusal to consider ministerial mandates in this case was not a constitutional endorsement of those mandates. *Id.* Rather, the Court simply reserved that question for a case challenging those mandates directly and properly. *Id.*

107. *Id.* at 2376.

108. *Id.*

109. *Id.*

110. *Id.* Justice Scalia reasoned that because the Constitution refrained from giving Congress a plenary power, that fact implied a residual state sovereignty. *Id.*

111. *Id.* at 2377.

112. *Id.* at 2378.

113. *Id.*

114. *Id.*

115. *Id.*; *see* U.S. CONST. art II, § 3.

116. *Printz*, 117 S. Ct. at 2378.

117. *Id.* at 2379.

a law necessary to the execution of an enumerated power.[118] As a result, the Brady Act was held to be inconsistent with both the structure of the Constitution and historical constitutional practice.[119]

C. PRIOR JURISPRUDENCE OF THE SUPREME COURT

Prior decisions of the Court also indicated that the federal government could not compel the states, through either its legislative or executive branches, to administer federal regulatory programs.[120] In particular, the Court definitively held in *New York* that the federal government "may not compel the states to enact or administer a federal regulatory program."[121] However, the government argued that the provisions at issue in the Brady Act were distinguishable from *New York* because the Act neither required state officials to make policy, nor diminished federal accountability.[122] The Court dismissed both arguments, reasoning that executive action without any policy-making component was rare, and that it was the state official who would get the blame for any erroneous determinations concerning handgun purchases.[123]

Finally, the government asserted that the Brady Act's important objectives would be most efficiently administered by local CLEOs, and that public policy demanded such a minimal and temporary burden on the state.[124] The Court agreed that if the Brady Act was a law of general applicability with incidental effects on state functions, such a balancing act would be appropriate.[125] In contrast, the Court concluded that in this case, the very object of the Brady Act was to direct state executives, a defect which no comparison of interests could overcome.[126]

Consequently, the Court struck down the background check provision and the implied duty that the CLEO accept the Brady Form from the gun dealer, as a violation of the Tenth Amendment.[127] The two

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118. *Id.*

119. *Id.* at 2378.

120. *Id.* at 2380. The Court cited *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) and *FERC v. Mississippi*, 456 U.S. 742 (1982). In *Hodel*, the Court clearly stated that Congress could not impair a state's ability to function within the federal system. 452 U.S. at 287-88. In both cases, the Court upheld the regulations because Congress could have regulated the individual parties directly. *See FERC*, 456 U.S. at 764-65; *Hodel*, 452 U.S. at 288. Thus, the regulations were merely requirements for continued state regulation in an otherwise preempted field. *FERC*, 456 U.S. at 764-65.

121. *Printz*, 117 S. Ct at 2380 (quoting New York v. United States, 505 U.S. 142, 188 (1992)).

122. *Id.* at 2380, 2382.

123. *Id.*

124. *Id.* at 2383.

125. *Id.*; *see* Garcia v. San Antonio Metro. Transit Auth., 468 U.S. 528 (1985). The challenged law in *Garcia* was said to be generally applicable because it applied equally to the state and to private party employers. *See id.* at 533.

126. *Printz*, 117 S. Ct. at 2383.

127. *Id.* at 2383-84.

remaining challenged provisions became voluntary.[128] Therefore, the Court held that Congress cannot issue directives requiring states to address particular problems, nor can it command the states' officers or their political subdivisions to administer or enforce a federal regulatory program.[129]

1. *Justice O'Connor's Concurrence*

Justice O'Connor fully joined the majority opinion with respect to the offending provisions of the Brady Act.[130] However, Justice O'Connor specified that Congress was free to amend the Act in such a way as to condition the receipt of federal funds upon its enforcement.[131] Further, Justice O'Connor reaffirmed the majority's position that the disposition of this case was inappropriate for congressional actions requiring only ministerial reporting requirements, such as requiring states to report missing children.[132]

2. *Justice Thomas' Concurrence*

Justice Thomas also joined fully the majority opinion with respect to the background check provision.[133] However, Justice Thomas continued his "revisionist" view of the commerce power first expressed in his concurrence to *United States v. Lopez*.[134] Justice Thomas again refused to accept the notion that purely intrastate point-of-sale transactions are subject to the commerce power.[135] Thus, in this case, Justice Thomas argued that Congress surely could not compel state law enforcement officers to do what Congress could not do directly.[136]

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128. *Id.* at 2384. The Court determined that the provisions of the Brady Act not affecting the CLEOs were severable from the rest of the Act, and declined to adjudicate the rights of parties not before the Court. *Id.*

129. *Id.* at 2384.

130. *Id.* at 2385.

131. *Id.*

132. *Id.* (citing 42 U.S.C. § 5779(a)) (1994) (requiring state and local authorities to report cases of missing children); *see also id.* at 2376 (refusing to consider the constitutionality of several statutes requiring state officers to perform reporting functions). However, Justice O'Connor did not indicate why the disposition of *Printz* was inappropriate for such ministerial functions. *Id.* at 2385; *see infra* pp. 70-73.

133. *Printz*, 117 S. Ct. at 2385.

134. *Id.*; *see also* United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (urging the Court to reconsider the "substantial effects" doctrine for validating congressional actions under the commerce power).

135. *Printz*, 117 S. Ct. at 2385.

136. *Id.* Justice Thomas also alluded to the idea that the Second Amendment might be implicated by the Brady Act as well. *Id.*; *see also* U.S. CONST. amend. II (conferring the right of the people to keep and bear arms). Justice Thomas acknowledged that the Court has not had an occasion to decide if the Second Amendment confers a substantive right to keep and bear arms. *Printz*, 117 S. Ct. at 2386. However, if such a right exists, it would possibly provide affirmative limitations on the regulation of firearms sales under the commerce power. *Id.*

3. *Justice Stevens' Dissent*

Justice Stevens asserted that the text of the Constitution plainly confers upon Congress the power to impose affirmative obligations on the executive officers of the states.[137] Moreover, the Tenth Amendment, unlike the First Amendment, does not provide a restriction upon Congress in the exercise of its enumerated powers.[138] Thus, Justice Stevens concluded that there was no clause, sentence, or paragraph in the Constitution disallowing Congress the power to commandeer local law enforcement officers in the exercise of its enumerated powers.[139] Justice Stevens then proceeded to address the historical, structural, and jurisprudential foundations of the majority opinion.[140]

a. Historical Foundation

Justice Stevens' principle difference with the majority in terms of the historical record was his interpretation of the motivations of the Framers in evolving governments.[141] Justice Stevens believed that the changes in government brought about by the Constitution were implemented to increase national power under *The Articles* to cover individuals, as well as the states, rather than to address concerns of state sovereignty.[142] Justice Stevens also categorically disagreed with the majority's rationale in examining the statutory enactments of the earliest congresses.[143] Pointing out that the naturalization statutes were clearly set out in mandatory terms, and that early legislation required courts to act as regulatory agencies, Justice Stevens argued that this was further "weighty and contemporaneous evidence" of the earliest understanding that the Consti-

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137. *Printz*, 117 S. Ct. at 2385. Justice Stevens was joined by Justices Souter, Ginsburg, and Breyer. *Id.* Justice Stevens pointed out that the Commerce Clause granted Congress the power to regulate commerce among the states. *Id.* at 2387 (citing U.S. CONST. art. I, § 8, cl. 3). In addition, Congress' authority was expanded by the Constitution to make all laws "necessary and proper" for its execution. *Id.* (citing U.S. CONST. art. I, § 8, cl. 18).

138. *Id.* at 2387 (citing the U.S. CONST. amend. X).

139. *Id.* at 2389.

140. *Id.* at 2389, 2394, 2397.

141. *See id.* at 2389.

142. *Id.* Justice Stevens' primary authority for his interpretation were the writings of Alexander Hamilton. *Id. See* THE FEDERALIST NOS. 15, 27 (Alexander Hamilton). Most notable were Hamilton's statements that the Constitution would "enable the government to employ the ordinary magistracy of each [state]," and that state legislatures, courts, and magistrates would be "incorporated into the national government" and "rendered auxiliary to" the enforcement of its laws. *Printz*, 117 S. Ct. at 2389-90 (citing THE FEDERALIST NO. 27 (Alexander Hamilton)). For Justice Stevens, Hamilton clearly meant to grant the Federal Government the power to demand that local officials implement national programs. *Id.*

143. *Printz*, 117 S. Ct. at 2391.

tution did confer upon Congress the power rejected by the majority.[144] Therefore, Justice Stevens believed that the unambiguous language of Alexander Hamilton, combined with the practices of the earliest congresses, discounted the existence of limitations on the commerce power announced by the majority.[145]

b. Constitutional Foundation

Justice Stevens also insisted that an acknowledgment that the Framers intended to preserve state sovereignty said nothing about the issue of whether Congress can direct state executives.[146] According to Justice Stevens, the means by which the Framers ensured the role of the states in the federal system were the procedural structures of a popularly elected federal government.[147] Perhaps even more significant was the apparent conflict of the majority's decision with previous Eleventh Amendment jurisprudence.[148] As Justice Stevens pointed out, the Court had "consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities."[149] Consequently, Justice Stevens could not reconcile the majority's extension of Tenth Amendment protection to local law enforcement officers, even in the event that the Amendment did insulate state officers.[150]

Justice Stevens also rejected the majority's contention that the Brady Act would diminish federal accountability and destroy the unity of the federal executive.[151] Justice Stevens accused the majority of relying on speculation with respect to accountability, and characterized any infringement on the federal executive power as simply cooperative federalism.[152] Justice Stevens viewed the majority rule as a threat to, rather

144. *Id.* at 2391-92 (quoting Bowsher v. Synar, 478 U.S. 714, 723-24 (1986)). For Justice Stevens, terms within the naturalization statutes, such as "shall record," "shall administer," and "shall be the duty" were indicative of mandatory requirements. *Id.*

145. *See id.* at 2393-94.

146. *Id.* at 2394.

147. *Id.* (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-51 (1985)). In making that assertion, Justice Stevens observed that the members of Congress are popularly elected by the people, and that each state is guaranteed equal representation at the federal level through the Senate. *Id.* Justice Stevens determined that it was unlikely that these elected officials would ignore the sovereignty concerns of their constituents when passing legislation. *Id.*

148. *Id.* at 2394 n.16.

149. *Id.* The 11th Amendment provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI.

150. *Printz*, 117 S. Ct. at 2394.

151. *Id.* at 2395-96.

152. *Id.* According to Justice Stevens, the majority was in direct conflict with the recognition in *New York v. United States* that programs can be designed at the federal level, yet implemented at the local level. *Id.* (citing New York v. United States, 505 U.S. 144, 166 (1992)).

than a protection of, state sovereignty by creating incentives for the federal government to aggrandize itself by directly implementing its policy through a vast federal bureaucracy.[153]

c. *Jurisprudential Foundation*

Justice Stevens had to look no further than *New York v. United States* for his inquiry into the prior jurisprudence of the Court.[154] Justice Stevens argued that giving a state "no option other than that of implementing legislation enacted by Congress," as in *New York*, was certainly different than the minimal requirements placed on CLEOs by the Brady Act.[155]

Justice Stevens also identified three additional cases which featured far more burdensome congressional mandates on the states than the Brady Act, but were nonetheless upheld.[156] First, the challenged act in *FERC v. Mississippi* was upheld despite offering the state no "real" choice in terms of adopting federal regulations.[157] Second, in *Puerto Rico v. Branstad*, the Court found no constitutional hurdles for imposing the Extradition Act's requirements on state executive officers.[158] Third, Justice Stevens claimed that the majority improperly dismissed the significance of *Testa v. Katt*.[159]

Justice Stevens considered the burdens placed upon state sovereignty by federal regulations in *Testa* to be much greater than the majority's characterization of *Testa's* holding that the Supremacy Clause only dictates that "state courts cannot refuse to apply federal law."[160] According to Justice Stevens, the Supremacy Clause confers a duty on state courts to apply federal law in cases that they decide to entertain, but does not empower Congress to command those courts to accept jurisdiction of federal claims, as *Testa* allowed.[161] Thus, Justice Stevens concluded that rather than announcing a newly defined constitutional threshold, the Court should respect the judgment of Congress and realize the effectiveness of cooperative federalism, as opposed to an enlarged federal bureaucracy.[162]

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153. *Id.* at 2396.
154. *Id.* at 2397.
155. *Id.* at 2398.
156. *Id.* at 2399-400.
157. *Id.* at 2399 (citing FERC v. Mississippi, 456 U.S. 742, 765-66 (1982)).
158. *Id.* (citing Puerto Rico v. Branstad, 483 U.S. 219, 228-29 (1987)).
159. *Id.* at 2400 (citing Testa v. Katt, 330 U.S. 386 (1947)).
160. *Id.* (citing *Testa*, 330 U.S. at 394).
161. *Id.* (citing *Testa*, 330 U.S. at 394).
162. *Id.* at 2401.

4. Justice Souter's Dissent

Justice Souter found that only *The Federalist* provided a truly forceful argument in favor of the government's position.[163] Specifically, Justice Souter relied on *The Federalist No. 27*, in which Alexander Hamilton addressed the combined effect of the Supremacy Clause and the oath requirement.[164] According to Justice Souter, the natural reading of Hamilton's words, "incorporated into" and "auxiliary to," created obligations on the states to support federal law.[165]

In addition, Justice Souter distinguished his reading of *The Federalist No. 27* from *New York* by differentiating executive power from legislative power.[166] An executive's power is to enforce the law, and as such, is an auxiliary which could be under the command of a sovereign.[167] A legislator, however, makes discretionary decisions on what the law should be. Therefore, any coercion of legislative discretion necessarily damaged the legislator itself.[168]

Justice Souter found support for his interpretation of Alexander Hamilton from James Madison in *The Federalist No. 44*.[169] In that passage, Madison stated that officers of state governments will have an "essential agency" in giving effect to the Constitution.[170] In *The Federalist No. 45*, Madison identified an essential agency as the collection of federal taxes by state officers.[171] In *The Federalist No. 36*, Madison stated that the Federal government would employ state officers as much as possible.[172] Justice Souter believed that these statements, taken together with his reading of Hamilton, could only mean that the Framers intended for the national government to have the power to require state auxiliaries to take action in response to a legal exercise of power.[173] However, Justice Souter acknowledged that Congress could not require state administrative support without an obligation to pay for it, thus the case should have been remanded in order to develop a budget provision for the Brady Act.[174]

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163. *Id.* at 2402.
164. *Id.*
165. *Id.* at 2402 (citing THE FEDERALIST No. 27 (Alexander Hamilton)).
166. *Id.* at 2402 n.1.
167. *Id.*
168. *Id.*
169. *Id.* at 2403.
170. *Id.* (citing THE FEDERALIST NO. 44 at 307 (James Madison)).
171. *Id.* (citing THE FEDERALIST NO. 45 at 313 (James Madison)) (stating that the collection of federal taxes would generally be made under the rule, and by the officers of the state).
172. *Id.* (citing THE FEDERALIST NO. 36 at 228 (James Madison)).
173. *Id.* at 2403-04.
174. *Id.*

5. *Justice Breyer's Dissent*

Justice Breyer sought to add to Justice Stevens' dissent empirical evidence of the experiences of other democratic nations in preserving the autonomy of constituent entities.[175] Justice Breyer noted that the federal systems of Germany, Switzerland, and the European Union all use their constituent bodies to implement laws of the central body.[176] According to Justice Breyer, they do this in order to increase the freedoms recognized through a reduced central bureaucracy.[177] These experiences of our European counterparts led Justice Breyer to conclude that there was no need in this case to set forth a principle forbidding the assignment of any federal duty upon a state official.[178]

IV. IMPACT

The *Printz* decision struck a quick blow to the Driver's Privacy Protection Act of 1994 (DPPA) in *Condon v. Reno*.[179] The Act was a congressional response to criminal activities carried out, at least in part, through information obtained in state motor vehicle records.[180] The DPPA prohibits a state department of motor vehicles, or any agent thereof, from knowingly disclosing to any person or entity, personal information obtained by the department through a motor vehicle record.[181]

The DPPA also authorized the motor vehicle departments to establish the procedures for informing individuals that their information has been requested.[182] These procedures required a statement that the information would not be released unless the individual consented.[183] In addition, any state found to be in "substantial noncompliance" can be fined up to $5,000 per day.[184] The Federal District Court for the District of South Carolina held that the DPPA was an unconstitutional infringement

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175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 2405.
179. 972 F. Supp. 977, 979 (D.S.C. 1997)
180. Condon v. Reno, 972 F. Supp. 977, 979 (D.S.C. 1997) (noting congressional findings that criminals use information contained in motor vehicle records to locate potential victims in furtherance of criminal activities).
181. 18 U.S.C. § 2721(a) (West Supp. 1998).
182. *Id.* § 2721(d). The statute identified several exceptions involving persons or entities, usually governmental bodies in official actions, who are allowed to receive the proscribed information. *Id.* § 2721(b).
183. *Id.* § 2721(d).
184. *Id.* § 2723(b).

on state sovereignty, and granted an injunction permanently enjoining its application in South Carolina.[185]

The court found that motor vehicle records are the property of the states, and that the states have historically maintained such records in their sovereign capacities.[186] The Court concluded that in enacting the DPPA Congress decided to require the states to regulate the dissemination of motor vehicle records, thereby commanding the states to implement a federal policy.[187]

The court rejected the argument promulgated by the United States, that since the DPPA did not compel the state to control the activities of its citizens, the Act did not offend *New York* or *Printz*.[188] First, the court noted that the take-title provision struck down in *New York* did not require the state to regulate the conduct of its citizens.[189] In fact, under the take-title provision the state was free to refrain from addressing the radioactive waste problem at all if the state was willing to take title to that waste.[190] According to the Court, the point of contention in *New York* was that the state was required to take-title to the waste, rather than a requirement that the state regulate the conduct of its citizens.[191]

Second, assuming that *New York* and *Printz* could be read so prohibitively as to preclude only congressional acts which require a state to control the conduct of its citizens, the Act would still fail because it requires that the state control the conduct of two classes of citizens. Those classes include individuals employed with the state's motor vehicle department and private citizens wishing access to the department's information.[192] Therefore, the court concluded that the Act was an impermissible congressional command under *New York* since the Act required the state to perform a regulatory function.[193]

The court also determined that the United States' reliance on *Garcia v. San Antonio Metro Transit Auth.* as controlling was similarly misplaced.[194] In contrast to the Act in *Garcia*, the DPPA is not an incidental application of a federal law of general applicability imposed on the states.[195] Rather, the DPPA was passed specifically to regulate the

185. *Condon*, 972 F. Supp. at 979, 986.
186. *Id.* at 984.
187. *Id.* at 984-85.
188. *Id.*
189. *Id.* at 985.
190. *Id.*
191. *Id.* (citing New York v. United States, 505 U.S. 144, 176 (1992)).
192. *Id.*
193. *Id.*
194. *Id.* (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)).
195. *Id.* (citing Printz v. United States, 117 S. Ct. 2365, 2383 (1997)).

control of state property, and to require the state to control the access and use of its information.[196]

The *Printz* decision and its subsequent application in *Condon* begs the question of how Congress will be able to implement its programs to the states in the future.[197] Under the current law, Congress may encourage and influence state policy-making in two ways.[198] First, Congress may attach regulatory conditions to the receipt of federal funding by the states.[199] However, the conditions must relate to federal spending.[200] Such a system is constitutional because it allows a state the "choice" of accepting federal funding and regulating according to federal prescriptions, or of declining the funding and regulating according to the state's own will.[201]

A second way by which Congress may influence state policy-making is through "cooperative federalism."[202] Under "cooperative federalism" two things must happen.[203] Congress must first have the power to regulate the targeted activity through a valid exercise of an enumerated power.[204] Thereafter, Congress may offer states the "choice" of regulating according to federal standards, or the federal regulation will pre-empt the state law.[205] Thus, if state residents choose to allocate state resources to areas other than those subject to pre-emption, the federal government, and not the state, must bear the expense of the regulatory scheme.[206] Consequently, the *Printz* decision, by expanding the above doctrines to include state executive officials as well as state legislatures, defines the Tenth Amendment as an express limitation on Congress' authority to require the states to act in virtually any capacity, congressional funding notwithstanding.[207]

Perhaps the *Printz* decision foreshadows the eventual challenge to all recent congressional enactments which require a state to perform a reporting function.[208] While the Court specifically declined to consider

196. *Id.* at 985-86.
197. *See* Printz v. United States, 117 S. Ct. 2365, 2383-84 (1997); *Condon*, 972 F. Supp. at 986.
198. New York v. United States, 505 U.S. 144, 166 (1992).
199. *Id.* at 167 (citing South Dakota v. Dole, 483 U.S. 203, 206 (1987)).
200. *Id.* (citing *South Dakota*, 483 U.S. at 207-08).
201. *Id.* at 168.
202. *Id.* at 167 (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289 (1981)).
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 168.
207. Printz v. United States, 117 S. Ct. 2365, 2383-84 (1997) (emphasis added).
208. *See, e.g.*, 15 U.S.C. § 2645(e) (1994) (requiring governors to report certain activities of local educational agencies); 20 U.S.C. § 4013(a) (1994) (requiring governors to submit plans for asbestos removal); 23 U.S.C. § 402(a) (1994) (requiring state officials to report traffic fatalities); 42 U.S.C. § 5779(a) (1994) (requiring state law enforcement to report missing children); 42 U.S.C. §

the validity of any statutes not challenged in this case, Justice O'Connor's language in her concurrence hinted that requiring states to perform only ministerial tasks might not infringe on state sovereignty.[209] Assuming that was in fact Justice O'Connor's intent, then federal mandates requiring no more than "ministerial functions" from state officials would probably withstand constitutional challenge at the present time.[210] Whether Justice O'Connor meant to establish a new constitutional "ministerial" boundary for federal regulatory actions will perhaps be answered when the challenge arises.[211]

Moreover, the *Printz* decision underscores the uncertainty surrounding Tenth Amendment jurisprudence.[212] Such a conclusion precipitates from two sources.[213] Principally, this assertion flows expressly from the strong dissent of four Justices.[214] In addition, by not overruling *Garcia* and its procedural paradigm for protecting state sovereignty, the Court has left in place precedential authority, fully adopted by the dissent, which is potentially counter to the *Printz* holding.[215] While the recent trend of Supreme Court interpretations of federalism seem to focus on the states' role in that system, the division of the Court makes it impossible to predict the future of cases like *Printz*. It seems as though the outcome may likely be determined by the political philosophies of future Supreme Court appointees, rather than upon a strong constitutional foundation.[216]

Finally, in finding the Brady Act provisions not affecting CLEOs severable from the rest of the Act, the Court leaves the fate of gun dealers and gun purchasers unanswered.[217] The remaining question is whether gun dealers and purchasers are still required to submit a copy of the Brady Form to the CLEO, even if the CLEO refuses to accept them, and then wait five days before consummating the transaction.[218] The

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6933(a) (1994) (requiring state inventories of hazardous waste); 42 U.S.C. § 11001, 11003 (1994) (requiring collection and reporting of data of the release of hazardous waste); *see also* Brief for Respondent at 31; Printz v. United States, 117 S. Ct. 2365 (Nos. 95-1478, 95-1503) (stating that accepting Printz's argument would invalidate several recent congressional enactments).

209. *See Printz*, 117 S. Ct. at 2385. Justice O'Connor referred to the statutes not before the Court as "purely ministerial," in contrast to the invalid portions of the Brady Act which "directly compel" state administration. *Id.*

210. *See id.* at 2385-86. This assertion assumes that the interpretation of Justice O'Connor's intent is correct and that at least the four dissenters in *Printz* would join that opinion. *Id.* at 2386.

211. *Id.* at 2376 (stating that the most recent congressional mandates to the states would only be considered when the proper case is brought before the Court).

212. *Id.* at 2386 (Justices Stevens, Souter, Ginsburg, and Breyer, dissenting).

213. *Id.* (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985)).

214. *Printz*, 117 S. Ct. at 2386.

215. *Id.* at 2383; *see also Garcia*, 469 U.S. at 552 (holding that state sovereignty should be protected procedurally through the 10th Amendment, rather than judicially).

216. *See Printz*, 117 S. Ct. at 2404-05 (Breyer, J., dissenting) (discussing the political philosophies of other democratic nations in order to contradict the majority's holding).

217. *Id.* at 2384.

218. *Id.*

immediate answer is probably, yes.[219] The most apparent support for this assertion rests in the fact that those provisions are still the law, and Justice Scalia made it clear that those provisions would remain the law until challenged by a proper party, namely, a gun dealer.[220] Therefore, the requirements of the Brady Form and the waiting period are probably firmly in place until the interim period expires.[221]

V. CONCLUSION

In *Printz*, the Supreme Court has clearly stated that the federal government may not compel states as states to implement federal policy through the states' executive or legislative branches. However, the Court did not include in its holding the fate of federal legislation requiring states to act in only a "ministerial" capacity. Therefore, what remains is whether the Court will use the *Printz* holding in future challenges to federal legislation as establishing a threshold of interference with state functions which are beyond the reach of the federal government, or whether *Printz* stands as a wholesale prohibition on the federal government's ability to require the states to act in any capacity whatsoever.

Christopher D. Owens

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219. *Id.* (noting that Justice Scalia stated that the Court had no business deciding the rights of parties not presently before it).

220. *Id.* However, perhaps more importantly a future challenge by a gun dealer would probably not be successful. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981). This result is probable because once an activity is found to substantially affect interstate commerce, a court must then only determine that the regulation is rationally related to the end sought in controlling the targeted activity. *Id.* The argument that a gun dealer would thus have to make would be that handgun violence does not substantially affect interstate commerce, or that the remaining provisions of the Brady Act have no rational relationship toward curbing handgun violence. *Compare* United States v. Lopez, 514 U.S. 549, 561 (1995) (striking down the Gun Free School Zones Act because possession of a firearm is not an economic activity affecting commerce) *with Hodel*, 452 U.S. at 276 (holding that the means chosen [to regulate] by Congress must only be rationally related to the end sought). Neither argument would likely prevail. *See* FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993) (giving great judicial deference to congressional decisions relating to regulatory means and ends); H.R. REP. NO. 103-344, at 8, *reprinted in*, 1993 U.S.C.A.A.N. 1984, 1985 (finding that the United States is beset with an epidemic of handgun violence).

221. *See Printz*, 117 S. Ct. at 2383 (noting that CLEOs can voluntarily implement the federal program).