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Constitutional Law - Tenth Amendment - State Sovereignty

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CONSTITUTIONAL LAW — TENTH AMENDMENT — STATE SOVEREIGNTY — The Supreme Court of the United States held that a federal statute requiring state chief law enforcement officers to conduct background investigations on potential handgun purchasers was unconstitutional because it encroached upon the rights reserved to the states by the Tenth Amendment to the United States Constitution.

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

In 1993, Congress enacted the Handgun Violence Prevention Act ("Brady Act" or "Act"),[1] amending the Gun Control Act of 1968 ("GCA").[2] The GCA had established procedures for regulating the transfer and distribution of firearms.[3] To supplement the provisions of the GCA, Congress passed the Brady Act, a statute that requires the Attorney General to establish a national system to facilitate background checks on potential weapons purchasers.[4] Due to the time needed to implement the national background check system, the Act included interim provisions aimed at regulating the purchase and transfer of firearms.[5] These interim provisions

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1. The Brady Act, 18 U.S.C.A. § 922 (1976 & Supp. 1998). The Brady Act was named for James Brady, former White House Press Secretary to President Ronald Reagan. Dick Kaukas, *Brady Still Has Scars, Nightmares from Shooting*, THE COURIER-JOURNAL (Louisville, KY), Oct. 21, 1997, at 01B. Brady suffered brain damage and partial paralysis due to a head wound he received from a gun fired by John W. Hinckley, Jr. in a failed attempt to assassinate President Reagan on March 30, 1981. *Id.* President Reagan, a Secret Service agent, and a District of Columbia police officer were also seriously injured in the incident. *Almanac*, NEWSDAY, Mar. 30, 1997, at A02. Both Brady and his wife, Sarah, lobbied Congress in favor of more stringent gun control legislation. *Nightmares*, *supra*, at 01B.

2. The Gun Control Act of 1968, 18 U.S.C.A. § 921 (1976 & Supp. 1998).

3. The Brady Act makes it unlawful for a person, common or contract carrier, importer, manufacturer, or firearms dealer to knowingly transport, deliver, or transfer a firearm or ammunition to a person who is:

> (1) [u]nder indictment for, or has been convicted . . . of, any crime punishable by imprisonment for a term exceeding one year; (2) is a fugitive from justice; (3) is an unlawful user of or addicted to marihuana or any controlled substance . . . ; and (4) has been adjudicated as a mental defective or has been committed to any medical institution. . . .

18 U.S.C.A. § 921(d), (g) (1976 & Supp. 1998).

4. Printz v. United States, 117 S. Ct. 2365, 2368 (1997). The Act specified that the national background check system be fully operational by November 30, 1998. *Id.*

5. *Id.* Until the national background check system was in place, the Attorney General was required to establish a system of background checks that required a firearms dealer to:

> (1) receive from the transferee a statement (the Brady Form), § 922(s)(1)(A)(i)(I), containing the name, address and date of birth of the proposed transferee along with

estabilised three criteria for the regulation of any transfer or sale of handguns by firearms dealers to potential customers.[6] The criteria include: (1) firearms dealers must receive a completed Brady Form from the purchaser,[7] (2) dealers must verify the purchaser's identification,[8] and (3) dealers must provide the chief law enforcement officer ("CLEO") for the county or state with a copy of the purchaser's Brady Form.[9] Before completing a sales transaction, the dealer was required to wait five business days, unless the CLEO notified the dealer that the sale could be consummated earlier.[10]

Jay Printz ("Printz"), County Sheriff for Ravalli County, Montana, and Richard Mack ("Mack"), County Sheriff for Graham County, Arizona, separately challenged the constitutionality of these interim provisions requiring state CLEOs to process background checks.[11] In his suit, Printz sought to enjoin[12] implementation of the interim enforcement provisions.[13] The United States District Court for the District of Montana found the mandatory interim provisions unconstitutional, but concluded that these procedures were severable from the remainder of the Act.[14] The district court held that a *voluntary* background check system was constitutional, however.[15]

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a sworn statement that the transferee is not among any of the classes of prohibited purchasers, § 922(s)(3); (2) verify the identity of the transferee by examining an identification document, § 922 (s)(1)(A)(i)(II); and (3) provide the 'chief law enforcement officer' (CLEO) of the transferee's residence with notice of the contents (and a copy) of the Brady Form, §§ 922(s)(1)(A)(i)(III) and (IV).

Printz, 117 S. Ct. 2368-69; The Brady Act, 18 U.S.C.A. § 922 (1976 & Supp. 1998).

6. *Printz*, 117 S. Ct. at 2368; The Brady Act, 18 U.S.C.A. § 922.

7. *Printz*, 117 S. Ct. at 2368; 18 U.S.C.A. § 922(s)(1)(A)(i)(I). The Brady Form requires the purchaser's name, address, date of birth, and a sworn statement that the purchaser is not a member of the prohibited class of purchasers as defined by section 922(s)(3). 18 U.S.C.A. § 922(s)(3).

8. *Printz*, 117 S. Ct. at 2368; 18 U.S.C.A. § 922(s)(1)(A)(i)(II). Verification is accomplished by examining an identification document. *Printz*, 117 S. Ct. at 2369; 18 U.S.C.A. § 922(s)(1)(A)(i)(II).

9. *Printz*, 117 S. Ct. at 2368; 18 U.S.C.A. § 922(s)(1)(A)(i)(III) and (IV). The Brady Act provides two alternatives to its regulatory process. A dealer may sell a handgun immediately to a purchaser if: (1) the purchaser bears a state handgun permit that was issued subsequent to a state background check, or (2) if the state conducts an instant background check. 18 U.S.C.A. § 922(s)(1)(C) and (D).

10. *Printz*, 117 S. Ct. at 2369; 18 U.S.C.A. § 922(s)(1)(A)(i)(III) and (IV).

11. *Printz*, 117 S. Ct. at 2369.

12. *Id.* To "enjoin" is "[t]o require a [party], by writ of injunction, to perform, or to abstain or desist from, some act." BLACK'S LAW DICTIONARY 529 (6th ed. 1990).

13. *Printz*, 117 S. Ct. at 2369.

14. *Id.*

15. *Id.*

Similarly, in Mack's action, the United States District Court for the District of Arizona held that the compulsory background checks were unconstitutional.[16] Mack and Printz each appealed their respective district court decisions to the Ninth Circuit Court of Appeals.[17] After consolidating[18] the cases, the Ninth Circuit reversed, finding the interim provisions constitutional.[19] The Supreme Court of the United States granted certiorari,[20] and subsequently reversed the decision of the Ninth Circuit.[21]

Justice Scalia authored the opinion for a majority of five justices, holding that the interim provisions requiring state and local CLEOs to perform federal background checks were unconstitutional.[22] The majority examined: (1) the historical basis for the allocation of powers between the states and the federal government, (2) the Constitution's structure, and (3) Supreme Court precedents, and determined that the provisions commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers violated the Tenth Amendment to the Constitution.[23]

To establish a context for mandating state officials to perform acts pursuant to federal law, the Court analyzed several statutes enacted by the first Congresses.[24] These statutes required states to

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16. *Id.*

17. *Id.*

18. *Printz*, 117 S. Ct. at 2369. "Consolidation" is the combining of two or more separate actions "into one trial and judgment, by order of a court where all the actions" concern the same subject-matter, issues, and defenses. BLACK'S LAW DICTIONARY 309 (6th ed. 1990).

19. *Printz*, 117 S. Ct. at 2369.

20. *Id.* "Certiorari" is a common law writ issued by a superior court (most frequently, the Supreme Court of the United States) to a trial or appellate court, commanding the lower court to certify and return the record to the superior court for review. BLACK'S LAW DICTIONARY 228 (6th ed. 1990).

21. *Printz*, 117 S. Ct. at 2384.

22. *Id.* at 2368. Justice Scalia was joined in his opinion by Chief Justice Rehnquist, as well as Justices O'Connor, Kennedy, and Thomas. Justices O'Connor and Thomas also filed separate concurring opinions. Justice Stevens filed a dissenting opinion, in which Justices Souter, Ginsburg, and Breyer joined. Justice Souter also filed a separate dissenting opinion. Justice Breyer also filed a separate dissenting opinion, in which Justice Stevens joined. *Id.*

23. *Id.* at 2370; 18 U.S.C.A. § 922, Pub. L. No. 103-159, 103 Stat. 2074 (codified as amended by Pub. Law No. 103-322, in the note following the Brady Act). *Id.* State law enforcement officers were directed to temporarily administer the federally-enacted regulatory program. *Id.* The interim provisions required firearms dealers to send Brady Forms to CLEOs within five days of submission. *Id.* CLEOs are required to make a reasonable effort to determine whether the sale would be lawful under The Gun Control Act of 1968. 18 U.S.C.A. § 921.

24. *Printz*, 117 S. Ct. at 2370.

record citizenship applications[25] and naturalization records,[26] as well as to register aliens.[27] After analyzing these mandates, the Court concluded that these obligations applied only to states that authorized their courts to conduct these proceedings. Moreover, the Court determined that although Congress does not have the power to impose executive obligations upon the states, a state may consent to perform acts pursuant to federal direction if the mandate directly implements the Constitution.[28]

Attempting to determine the Constitution's original meaning, the Court first analyzed *The Federalist Papers*.[29] After reviewing *The Federalist Nos.* 27[30] and 45,[31] the majority rejected the government's contention that the Framers originally intended to force state officials to execute federal laws.[32] Instead, the Court cited its decision in *FERC v. Mississippi*[33] to demonstrate that the government's reliance upon state courts for assistance was not

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25. *Id.* Congress passed the Act of Mar. 26, 1790, which required state courts to record applications for citizenship. *See* Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (1790).

26. *Printz*, 117 S. Ct. at 2370. The Act of June 18, 1798, required state courts to transmit abstracts of citizenship applications and other naturalization records to the Secretary of State. *See* Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567 (1798).

27. *Printz*, 117 S. Ct. at 2370. The Act of Apr. 14 1802, compelled the state courts to register aliens seeking naturalization and issue certificates of registry. *See* Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154-55 (1802).

28. *Printz*, 117 S. Ct. at 2371-72. The Court determined that the early laws indeed placed federal obligations upon state judges, but only to the extent to which these procedures related to judicial review. *See* Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957). The Court pointed to the Extradition Act of 1793 as a federal law that directly imposes a duty upon states to implement federal policy. *Printz*, 117 S. Ct. at 2371-72. The Extradition Clause of Article IV, section 2, clause 2 of the Constitution provides: "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." U.S. CONST. art. IV, § 2, cl. 2.

29. *Printz*, 117 S. Ct. at 2372. The Court stated that *The Federalist Papers* were indicative of the original meaning the Framers ascribed to the provisions of the Constitution. *Id.*

30. *The Federalist No.* 27 (Hamilton).

31. *The Federalist No.* 45 (Madison).

32. *Printz*, 117 S. Ct. at 2372. The government contended that *The Federalist Nos.* 27 and 45, written by Hamilton and Madison, respectively, establish:

> [A] general observation of the Constitution would 'enable the [national] government to employ the ordinary magistracy of each [State] in the execution of its laws' . . . and that it was 'extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the States will be clothed in the correspondent authority of the Union.'

Printz, 117 S. Ct. at 2372. *See The Federalist No.* 27 (Hamilton); *The Federalist No.* 45 (Madison).

33. 456 U.S. 742 (1982).

based on the federal government's power to bind state courts, but on the assumption that the states would consent to assist the federal government.[34] The Court also rejected the government's view that under the rationale of *The Federalist No.* 27 and the Supremacy Clause,[35] the Framers intended the federal government to have the power to compel the states to enforce federal laws.[36] Reiterating the holding of *New York v. United States*,[37] the Court held that state officials are not subject to federal direction, and therefore, are not required to implement federal laws.[38]

The Court completed its review of statutes by analyzing executive-commandeering statutes.[39] Until modern times, Congress had enacted few such commandeering statutes.[40] In support of its argument, the government cited the Act of May 18, 1917, a World War I draft statute that granted the President the authority to utilize the services of state departments, and provided a penalty for a state's refusal.[41] The majority viewed this act's penalty provision

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34. *Printz*, 117 S. Ct. at 2373. *See also* FERC v. Mississippi, 456 U.S. 742, 796 (1982).

35. U.S. CONST. art. VI., § 2. ("[T]he laws of the United States . . . shall be the supreme Law of the Land. . . .").

36. *Printz*, 117 S. Ct. at 2380.

37. 505 U.S. 144 (1992).

38. *Printz*, 117 S. Ct. at 2373. The court referred to *The Federalist No.* 27, which provides, in pertinent part:

> [T]he laws of the Confederacy as to the enumerated and legitimate objects of its jurisdiction will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial in each State will be bound by the sanctity of an oath. Thus, the legislatures, courts, and magistrates, of the respective members will be incorporated into the operations of the national government as far as its just and constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws.

The Federalist No. 27 (Hamilton). Justice Souter used this passage as the foundation for his dissent, stating that: "(1) federal laws will be supreme; (2) all state officers will be oath-bound to observe those laws; and thus, (3) state officers will be 'incorporated' and 'rendered auxiliary.' " *Printz*, 117 S. Ct. 2373. The majority criticized two aspects of Souter's analysis. *Id.* First, if the Court had followed Justice Souter's interpretation of the passage that reads, "incorporated into the operations of the national government and rendered auxiliary to the enforcement of its laws," it would mean that state officials must take an active role without the necessity for a congressional directive. *Id.* Second, reading the passage from Justice Souter's view would subject state legislatures to federal direction. *Id. See also* New York v. United States, 505 U.S. 144 (1992) (holding that state legislatures are not subject to federal direction).

39. *Printz*, 117 S. Ct. at 2375.

40. *Id.* The government pointed to the Act of August 3, 1882 that enlists state officials in the administration of local immigration affairs. *Id. See* Act of August 3, 1882, ch. 376, §§ 2, 4, 22 Stat. 214 (1882). The majority pointed out that this Act did not mandate duties to state officials, but merely empowered the Secretary of the Treasury to enter into contracts with state officials. *Printz*, 117 S. Ct. at 2375.

41. *Printz*, 117 S. Ct. at 2375. *See* Act of August 3, 1882, ch. §§ 2, 4, 22 Stat. 214 (1882).

as a limiting power, precluding the federal government from forcing states to carry out the laws of the nation.[42] In its analysis of executive-commandeering statutes, the Court also reviewed several federal statutes requiring state or local officials to implement federal regulatory schemes.[43] The Court construed these statutes as generally connected to federal funding measures, which require that the states participate in the scheme before they can receive federal funding.[44]

After rejecting all historical arguments supporting the government's position that state officials must enforce federal laws, the Court next examined the government's argument that the Constitution's structure provided a legitimate basis for allowing state enforcement.[45] The Framers originally established a system of "dual sovereignty" in the American Constitution — the states surrendered some of their rights and powers to the federal government.[46] It is well established that the states retain the rights not granted to the federal government, reflecting a "residuary and inviolable sovereignty."[47] This system is furthered by the Tenth Amendment to the Constitution, which provides, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[48] Citing *New York*, the Court reaffirmed the notion that "[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."[49] Justice Scalia reviewed the Court's decision in *U.S. Term Limits, Inc. v. Thornton*,[50] which held that the American system of dual sovereignty is a system in which two governmental forms operate, each protected from incursions by the other, allowing each to

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42. *Printz*, 117 S. Ct. at 2375. The subsequent history of the Act of May 18, 1917 reveals that the President did not commandeer state officers, but rather, *requested* the assistance of state governors. *See* Proclamation of May 18, 1917, ch.15, § 6, 40 Stat. 1665 (1917).

43. *Printz*, 117 S. Ct. at 2376.

44. *Id.* The Court held that the statutes in question have a limited impact upon the issue before the Court, and therefore, these statutes were not necessary for the decision of this case. *Id.* The Court, however, mentioned that the provisions in the statutes would only bind the states to the extent that they were willing to participate in the regulatory program. *Id.*

45. *Id.*

46. *Id.*

47. *Id. See The Federalist No.* 39 (Madison).

48. *Printz*, 117 S. Ct. at 2376. *See* U.S. CONST. amend. X.

49. *Printz*, 117 S. Ct. at 2377. *See also New York*, 505 U.S. at 161-66.

50. 514 U.S. 779 (1995).

provide its own direction, privity, and a set of mutual rights and obligations to the people governed by it.[51]

The Court then discussed Madison's idea of "double security" to establish the division of power between the federal and state governments.[52] In the instant case, the majority stated that "double security" affects the separation and equilibrium among the three branches of the federal government.[53] Illustrating this point, the majority recognized that the Brady Act effectively transferred the responsibility of the President to "take care that the Laws be faithfully executed" to thousands of CLEOs in the fifty states.[54]

In analyzing the interim provisions' constitutionality, the majority refused to hold that the Necessary and Proper Clause[55] granted the federal government the power to impose duties upon the several states.[56] The Court found that the Tenth Amendment cannot be narrowly interpreted to prohibit only the exercise of delegated powers not authorized to the United States.[57] Rather, the Tenth Amendment imposes a limitation upon the delegated powers themselves.[58] Furthermore, the Court held that the combination of the Commerce Clause[59] with the Necessary and Proper Clause was

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51. *Printz*, 117 S. Ct. at 2377. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995).

52. *Printz*, 117 S. Ct. at 2378. The Court referred to *The Federalist No.* 51, which provides, in pertinent part:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

The Federalist No. 51 (Madison).

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

54. *Id. See also* U.S. CONST. art. II, § 2.

55. U.S. CONST. art. I § 8., cl. 18. (This section provides, in part, that Congress shall have the power "[t]o make all Laws which shall be necessary and proper. . . .").

56. *Printz*, 117 S. Ct. at 2378-79. *See also* U.S. CONST. art. I, § 8, cl. 18. The dissent defended the *ultra vires* congressional action in the Necessary and Proper Clause in its attempt to persuade the Court into adopting the constitutionality of the interim provisions. *Printz*, 117 S. Ct. at 2379.

57. *Printz*, 117 S. Ct. at 2379.

58. *Id.* The Court defused the dissent's argument that Congress would have the power to regulate the sale of guns if the Tenth Amendment was combined with the Commerce Clause and art. I, § 8, of the United States Constitution. *Id.* The dissent believed that this combination would render the interim provisions constitutional because the Tenth Amendment does not prohibit the exercise of delegated powers. *Id.* Rather, it "merely prohibits the exercise of powers 'not delegated to the United States.' " *Id.*

59. U.S. CONST. art. I, § 8, cl. 3. (Congress shall have the power "[t]o regulate Commerce . . . among the several States. . . .").

not sufficient to find the interim provisions constitutional.[60] The Court instead declared that the Necessary and Proper Clause, not the Tenth Amendment, defeats this proposition by holding that a law that violates state sovereignty is no law at all.[61]

After reviewing Article VI's Supremacy Clause and Oaths of Office, the majority concluded that when state executive and judicial officers take an oath to be bound to uphold the Constitution and laws enacted pursuant to the Constitution, the oath does not bind the officials to all laws enacted by Congress.[62] Specifically, the Court refused to hold that the application of the Supremacy Clause presumes that all laws enacted by Congress are constitutional.[63] A law enacted by Congress, but found unconstitutional by the Court, could not be upheld under the umbrella of the Supremacy Clause, and if the Clause were interpreted otherwise, the reasoning would, in effect, be circular.[64]

In its analysis of whether, under the Constitution, Congress may compel a state officer to execute a federal law, the Court focused on its past decisions.[65] The first time the Court addressed this issue was during the 1970's when Congress, through the Environmental Protection Agency ("EPA"), required states to prescribe auto emissions testing, monitoring, and retrofit programs, as well as designate preferential treatment for buses and car pools.[66] The United States District Courts for the Fourth and Ninth Circuits avoided the constitutional question by invalidating the regulations on statutory grounds.[67] Under similar circumstances, the United States District Court for the District of Columbia Circuit held the EPA Regulatory Act both unconstitutional and statutorily unsound.[68] The Supreme Court granted certiorari to determine the

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60. *Printz*, 117 S. Ct. at 2379.

61. *Id.* The majority found:

> [w]hen a 'la[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions . . . is not a '[l]a[w] . . . proper for carrying into Execution the Commerce Clause' and is thus, in the words of *The Federalist*, 'merely [an] ac[t] of usurpation' which deserve[s] to be treated as such.

Id. See The Federalist No. 33 (Hamilton).

62. *Printz*, 117 S. Ct. at 2379. *See* U.S. CONST. art. VI, cl. 2.

63. *Printz*, 117 S. Ct. at 2379.

64. *Id. See* U.S. CONST. art. VI, cls. 2, 3.

65. *Printz*, 117 S. Ct. at 2379.

66. *Id.*

67. *Id.*; Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975); and Brown v. EPA, 521 F.2d 827 (9th Cir. 1975).

68. *Printz*, 117 S. Ct. at 2378 (citing District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975)).

constitutional validity of the regulations, but the government declined to defend the regulations and rescinded them instead.[69]

In *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*,[70] the Court determined that the federal government may not compel the states to implement federal regulatory programs by legislative or executive action.[71] The *New York* Court had held that the federal government may not compel the states to enact or administer a federal regulatory program.[72] In the present case, the government relied on *Testa v. Katt*,[73] in which the Court held that, under the Supremacy Clause, state courts cannot refuse to apply federal law.[74] The *Printz* majority found no foundation for this proposition because the Supremacy Clause does not mention whether state executive officers must administer federal law.[75]

In *Printz*, the government contended that the holding in *New York* was not violated because the minute tasks delegated to the CLEOs did not diminish the accountability of federal officials.[76] The Court pronounced that the inability of handgun purchasers to recognize the federal government as the entity that rejected their handgun requests, unconstitutionally shifted accountability from the federal government to the state official.[77] To explain further its rejection of the government's interpretation of *New York*, the Court stated that when the Brady Act interim provisions are applied, it is likely that CLEOs will be the only officials standing between a dealer and a purchaser.[78] The federal government is completely unaccountable.[79]

The government contended that the CLEOs' great administrative importance offsets the small burden placed upon them, and therefore, the interim procedures should be found valid, at least on a temporary basis.[80] The Court categorically rejected this position,

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69. *Id.* at 2378 (citing EPA v. Brown, 431 U.S. 99 (1977)). Before the Court could decide these cases, the Court had to vacate the opinions and remand them for a consideration of mootness. *Id.*

70. 452 U.S. 264 (1981).

71. *Printz*, 117 S. Ct. at 2380; Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc., 452 U.S. 264 (1981).

72. *Printz*, 117 S. Ct. at 2378; New York v. United States, 505 U.S. 144 (1992).

73. 330 U.S. 386 (1947).

74. *Printz*, 117 S. Ct. at 2381 (citing Testa v. Katt, 330 U.S. 386 (1947)).

75. *Id.* at 2378; *New York*, 505 U.S. at 178-79.

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

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 2383.

stating that it is not an issue of balancing the federal objective and the state's autonomy, rather it is a question of whether such implementation is constitutional.[81] Relying on *New York*, the Court concluded that "[t]he Federal Government may not compel the states to enact or administer a federal regulatory program."[82] In applying this finding to the present case, the Court found that the Brady Act's interim provisions requiring CLEOs to perform federal background checks were unconstitutional.[83]

Justice O'Connor concurred with the majority's historical analysis, finding that the Brady Act interim provisions violate the Tenth Amendment.[84] Although the majority's holding invalidated the provisions requiring CLEOs to perform mandatory background checks of potential owners, Justice O'Connor reiterated that a voluntary participation in the program would be constitutional.[85] Justice O'Connor noted that the directives are only interim provisions, scheduled to terminate on November 30, 1998.[86] She reasoned that Congress is free to amend the program and may require CLEOs to perform the duties, if the federal government establishes the obligations pursuant to contracts with the individual states.[87]

Justice Thomas wrote a separate concurring opinion in which he emphasized that our Constitution grants enumerated powers only to the federal government.[88] Under Justice Thomas' self-styled "revisionist view," he found that the Commerce Clause grants only the federal government the authority to regulate commerce among the several states; it does not extend to intrastate point of sale

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81. *Printz*, 117 S. Ct. at 2383. The *New York* Court, rejecting a "balancing test" for constitutionality, stated:

> Much of the constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

New York, 505 U.S. at 187-88 (1992).

82. *Printz*, 117 S. Ct. at 2383; *New York*, 505 U.S. at 188.

83. *Printz*, 117 S. Ct. at 2383-84.

84. *Id.* at 2385 (O'Connor, J., concurring).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Printz*, 117 S. Ct. at 2385 (Thomas, J., concurring).

transactions.[89]

To find the original meaning of the Commerce Clause, Justice Thomas relied on a "substantial effect" test to determine whether Congress can require CLEOs to regulate the purchase and sale of handguns.[90] Justice Thomas pointed out that the Constitution places entire areas outside the scope of Congressional authority.[91] In particular, the Second Amendment appears to expressly limit Congress' authority to interfere with the regulation of firearms.[92] Justice Thomas reasoned that if the Second Amendment is interpreted to confer the right to "keep and bear arms" as a constitutional protection, then the federal government's regulation of the interstate sale or possession of firearms would be contrary to the amendment's protection.[93]

In Justice Stevens' dissenting opinion, he defined the issue as whether "Congress, acting on behalf of the people of the entire Nation, may require local law enforcement officers to perform certain duties during the interim needed for the development of a federal gun control program."[94] Justice Stevens found an affirmative answer to this question, stating that the interim provisions requiring CLEOs to perform background checks on potential handgun purchasers were analogous to: (1) Congress requiring state agents to collect federal taxes, and (2) Congress drafting state judges into federal service.[95] In essence, he found the ultimate issue was whether Congress could require state officials to perform duties for the federal government in times of national emergency before federal personnel can respond.[96] To support his finding, Justice Stevens analyzed Congress' authority to impose regulations on state officials as evidenced by the Constitution, early American history, the structure of the federal government, and Court precedents.[97]

Justice Stevens focused on four portions of the Constitution in developing the proposition that the Constitution itself provides the

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89. *Id.* Justice Thomas believed the Court must "temper our Commerce Clause Jurisprudence" and interpret the Clause in its original understanding. *Id. See also* Lopez v. United States, 514 U.S. 549, 584 (1995).

90. *Printz*, 117 S. Ct. at 2385 (Thomas, J., concurring).

91. *Id.*

92. *Id.* The Second Amendment provides, in part, "the right of the people to keep and bear Arms". U.S. CONST. amend. II.

93. *Printz*, 117 S. Ct. at 2386 (Thomas, J., concurring).

94. *Printz*, 117 S. Ct. at 2386 (Stevens, J., dissenting). Justice Stevens filed a dissent in which Souter, Ginsburg, and Breyer, JJ., joined. *Id.*

95. *Id.*

96. *Id.* at 2387 (Stevens, J., dissenting).

97. *Id.* at 2386 (Stevens, J., dissenting).

authority for the government to impose federal obligations on state officials.[98] First, he construed Article I, section 8, clauses 3 and 18, to support the contention that the Necessary and Proper Clause permits the federal government to use state officials temporarily for the implementation of federal programs.[99] Article I, section 8, clause 3, grants Congress the power to regulate Commerce among the several states, and Article I, section 8, clause 18, gives Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other powers vested by this Constitution in the Government. . . ."[100] Justice Stevens found that when these two clauses are combined, Article I provides Congress with the power to delegate its power to the states when necessary and proper.[101]

Next, Justice Stevens read the Tenth Amendment closely, finding that the powers granted under this Amendment did not place a limit upon Congress' ability to enforce the laws it enacts.[102] The dissent agreed with the majority's interpretation that the Ninth Amendment prohibits the enactment of laws that are enumerated within the Constitution, but concluded that the Tenth Amendment has no such restriction.[103] Combining the Tenth Amendment with Article VI, clause 3, of the Constitution, the dissent reasoned that because an oath of office binds state officials, it necessarily follows that federal law may impose duties upon state officials to enforce against private citizens of that state.[104]

Justice Stevens speculated that all congressional legislation establishes policies for the states to follow, as if the state legislatures had enacted the policies themselves.[105] To justify this hypothesis, Justice Stevens referred to Article VI, which provides

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98. *Id.* at 2386-89 (Stevens, J., dissenting).

99. *Printz*, 117 S. Ct. at 2387 (Stevens, J., dissenting). *See* U.S. CONST. art. I, § 8, cls. 3, 18.

100. *Printz*, 117 S. Ct. at 2387 (Stevens, J., dissenting). *See* U.S. CONST. art. I, § 8, cls. 3, 18.

101. *Printz*, 117 S. Ct. at 2387 (Stevens, J., dissenting).

102. *Id.* at 2387-88 (Stevens, J., dissenting).

103. *Id.* at 2387 (Stevens, J., dissenting). *See* U.S. CONST. amend. X. ("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.

104. *Printz*, 117 S. Ct. at 2388 (Stevens, J., dissenting). *See* U.S. CONST. art. VI, cl. 3, and U.S. CONST. amend. X (Article VI, cl. 3, provides: "all executive and judicial Officers, both of the United States and the several States, shall be bound, by Oath or Affirmation, to support this Constitution . . ."; whereas, the Tenth Amendment does not regulate powers delegated by the United States.). *See* U.S. CONST. art. VI, cl. 3, and U.S. CONST. amend. X.

105. *Printz*, 117 S. Ct. at 2388 (Stevens, J., dissenting).

that federal law will be the supreme law of the land and it will bind all states.[106] To support his finding that the interim provisions are constitutional, Justice Stevens declared, "[t]here is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I."[107]

After reviewing the Constitution, the dissent examined early American history to find authority for the federal government to impose federal enforcement duties on state officials.[108] Under the Articles of Confederation, the national government had the power to command the states, although it did not have this power over private citizens.[109] Due to the Articles of Confederation's ineffectiveness, the Framers changed the national government's character to augment its power over private citizens, as well as to preclude claims of immunity by state officers.[110]

The dissent rejected the majority's finding that history reveals Congress' lack of authority to impose nonconsensual duties upon state officials.[111] Justice Stevens agreed with Hamilton's explanation in *The Federalist No.* 27 that the national government derives its power from the people and their elected officials and that this power could be directly extended, thereby placing limitations or expectations upon the citizens themselves.[112] Justice Stevens pointed out that Hamilton's reasoning unequivocally confirmed that state executive and judiciary officials could be required to

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106. *Id.* at 2388 (Stevens, J., dissenting). *See also* U.S. CONST. art. VI, cl. 2.

107. *Printz*, 117 S. Ct. at 2389 (Stevens, J., dissenting).

108. *Id.* at 2389 (Stevens, J., dissenting).

109. *Id.*

110. *Id. See The Federalist No.* 13 (Hamilton). Hamilton explained that the power of the national government must extend to the citizens. *Id.* Hamilton further stated in *The Federalist No.* 27 that " . . . by extending the authority of the federal head to the individual citizens of the several States, [this] will enable the government to employ the ordinary magistracy of each, in the execution of its laws." *The Federalist No.* 27 (Hamilton). He further stated, "It is easy to perceive that this will tend to destroy, in the common apprehension, all distinction between the sources from which [the state and federal governments] might proceed; and will give the federal government the same advantage for securing a due obedience to its authority which is enjoyed by the government of each State." *Id.*

111. *Printz*, 117 S. Ct. at 2390 (Stevens, J., dissenting).

112. *Id. See The Federalist No.* 27 in which Hamilton stated, "the power of the government to act on 'individual citizens' — including 'employ[ing] the ordinary magistracy' of the States — was an answer to the problems faced by a central government that could act only directly upon the States in their political or collective capacities." *Id.*

implement federal policy when the policy was within the federal government's affirmative powers.[113]

Justice Stevens refuted the majority's contention that Hamilton's use of the Supremacy Clause suggested that the Framers did not intend to allow the federal government to impose obligations upon state officials.[114] He stated, "the Supremacy Clause is the source of the obligation of state officials to implement congressional directives"; and that this "does not remotely suggest that they might be 'incorporated into the operations of the national government' before their obligations have been defined by Congress."[115] Justice Stevens also analyzed *New York*, declaring that the *New York* holding does not affect the interpretation of *The Federalist No.* 27.[116]

The dissent refused to accept the majority's finding that there is little evidence supporting the federal government's authority to impose obligations on the states.[117] Justice Stevens' refusal centered upon four early legislative enactments where the federal government relied on the states to execute a variety of executive functions.[118] First, Congress required mandatory service by state judges and clerks to preside over matters of citizenship applications.[119] Second, the Fifth Congress required state clerks to report naturalization statistics, and imposed a fine if the obligations were not met.[120] Third, the Seventh Congress required state courts to maintain an alien naturalization registry.[121] Fourth, Congress passed legislation requiring state courts to certify the seaworthiness of vessels.[122] Justice Stevens determined that performing executive

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113. *Printz*, 117 S. Ct. at 2390 (Stevens, J., dissenting).

114. *Id.*

115. *Id.*

116. *Id.* at 2391 (Stevens, J., dissenting). *See* New York v. United States, 505 U.S. 144 (1992); *The Federalist No.* 27 (Hamilton). Justice Stevens stated that "since the *New York* opinion did not mention *The Federalist No.* 27, it does not affect either the relevance or the weight of the historical evidence provided by *No.* 27 insofar as it relates to state courts and magistrates." *Printz*, 117 S. Ct. at 2391 (Stevens, J., dissenting).

117. *Printz*, 117 S. Ct. at 2391 (Stevens, J., dissenting).

118. *Id.*

119. *Id.* The first Congress passed a statute that required state courts to administer a loyalty oath to the United States, and required clerks to record the applications. The Act of Mar. 26, 1790, ch. 3, §1, 1 Stat. 103 (1790).

120. *Printz*, 117 S. Ct. at 2391 (Stevens, J., dissenting). *See* Act of June 18, 1798, ch. 54 § 2, 1 Stat. 567 (1798).

121. *Printz*, 117 S. Ct. at 2391 (Stevens, J., dissenting). *See* Act of April 14, 1802, ch. 28 § 2, 2 Stat. 154-155 (1802).

122. *Printz*, 117 S. Ct. at 2392 (Stevens, J., dissenting). *See* Act of July 20, 1790, ch. 29 § 3, 1 Stat. 132-133 (1790).

functions was not unusual for state judges and clerks.[123] Furthermore, judges continue to perform federal executive functions today.[124]

The dissent found that, in light of the history of this issue, the majority had failed to distinguish between policy decisions influenced by state sovereignty and decisions compelled by the Constitution.[125] To clarify this distinction, the dissent cited President Wilson's congressionally granted authority to use state officers to implement the military draft during World War I.[126] The majority concluded that the power to utilize state officers in implementing the draft was in response to Wilson's request for state action.[127] Justice Stevens criticized the majority's finding by emphasizing that it was not Wilson's statesmanship, but rather, Wilson's constitutional power that allowed him to require state officials to implement the draft.[128]

Justice Stevens next reviewed the structure of the Court and rebutted the majority's presumption that the Framers' intent to maintain state sovereignty could prohibit federal obligations on state employees.[129] The dissent argued that the people of the several states elect Senators, who in turn make laws; therefore, it is unlikely that these legislators would enact laws and ignore the concerns of their constituents.[130] Justice Stevens reasoned:

> [G]iven the fact that the Members of Congress are elected by the people of the several States, with each State receiving an equivalent number of Senators in order to ensure that even the smallest States have a powerful voice in the legislature, it is quite unrealistic to assume that they will ignore the sovereignty concerns of their constituents. It is far more reasonable to presume that their decisions to impose modest burdens on state officials from time to time reflect a

123. *Printz*, 117 S. Ct. at 2392 (Stevens, J., dissenting).

124. *Id. See* Forrester v. White, 484 U.S. 219, 227 (1988).

125. *Printz*, 117 S. Ct. at 2393 (Stevens, J., dissenting).

126. *Id. See* Act of May 18, 1917, ch. 15, § 6, 40 Stat. 80-81 (1917).

127. *Printz*, 117 S. Ct. at 2393 (Stevens, J., dissenting).

128. *Id.*

129. *Id.* at 2394 (Stevens, J., dissenting). The dissent relied on the line of cases beginning with *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985), concluding that the majority's decision in this case conflicted with such Eleventh Amendment sovereign immunity cases that held that federal power may be exerted over local government officials. *Printz*, 117 S. Ct. at 2394. The dissent believed the same rule also should extend to legislative power. *Id.*

130. *Printz*, 117 S. Ct. at 2394 (Stevens, J., dissenting).

considered judgment that the people in each of the States will benefit therefrom.[131]

The dissent concluded its structural analysis by stating that the Framers created a system in which the Court would have the task "of creating a working structure of intergovernmental relationships around the framework authorized by the Constitution."[132] Justice Stevens found that no explicit or implicit notion was apparent from the writings of the Framers indicating that Congress is forbidden to impose federal duties on private citizens or local officials.[133] Justice Stevens relied on Justice Holmes' quotation, "the machinery of government would not work if it were not allowed a little play in its joints" to support his conclusion that Congress has the power to rely on state officials to perform occasional duties that are in the nation's best interest.[134]

Finally, Justice Stevens interpreted the Court's precedents as supporting his rationale.[135] In particular, Justice Stevens referred to *New York*, in which the Court held that the incentives offered by the government to the states to implement federal programs were not inconsistent with the Tenth Amendment.[136] He further noted that in reaching its decision, the majority relied upon what Justice Stevens characterized as "dicta" in *New York*. Justice Stevens pointed out that the language used by the *New York* Court ("the Federal Government may not compel the States to enact or administer a federal regulatory program")[137] was "wholly unnecessary to the decision of the case," and further, that dicta never binds the Court.[138]

In analyzing past decisions of the Court, Justice Stevens pointed to three cases that he found squarely on point: *Federal Energy Regulatory Comm'n ("FERC") v. Mississippi*, *Puerto Rico v. Branstad*, and *Testa v. Katt*.[139] In *FERC*, the Court held that the federal government could require state utility commissions to

131. *Id.*

132. *Id.* at 2397 (Stevens, J., dissenting).

133. *Id.*

134. *Id.* (citing Bain Peanut Co. of Texas v. Pinson, 282 U.S. 499, 501 (1931)).

135. *Printz*, 117 S. Ct. at 2397 (Stevens, J., dissenting).

136. *Id.*; New York v. United States, 505 U.S. 144, 173 (1992).

137. *Printz*, 117 S. Ct. at 2398, 2383 (Stevens, J., dissenting).

138. *Id.* at 2398; U.S. Bancorp Mortgage Co. v. Banner Mall Partnership, 513 U.S. 18, 24 (1994).

139. *Printz*, 117 S. Ct. at 2399 (Stevens, J., dissenting). *See* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982); Puerto Rico v. Branstad, 483 U.S. 219 (1987); and Testa v. Katt, 330 U.S. 386 (1947).

comply with federal energy standards, and that the only way states could avoid compliance with the federal standard was to refrain from attempting to regulate the field.[140] Since the statute in *FERC* did not set an alternative regulatory scheme, the commission had no real "choice," but to comply with the mandate.[141] Justice Stevens held that the burdens placed on the state officials in *FERC* were greater than the "minimal" burden required by the interim provisions of the Brady Act.[142]

In *Branstad*, the Court upheld the Extradition Act of 1793, granting the Commonwealth of Puerto Rico the authority to extradite a fugitive.[143] It is important to note that the majority conceded that this holding imposed duties directly upon state executive officers.[144]

The Court in *Testa* unanimously held that state courts must hear federal claims brought under the Federal Emergency Price Control Act of 1942, whatever their docket schedule.[145] Justice Stevens found that the imposition placed upon state sovereignty in *Testa* was much greater than the majority's "characterization of the case as merely holding that 'state courts can refuse to apply federal law.' "[146]

In the present case, the majority paid specific attention to the Supremacy Clause provision that judges are bound to apply federal law.[147] The dissent suggested that if the explicit language, rather than the central meaning, of the Supremacy Clause was afforded the proper weight, the majority's finding that the Framers did not intend to bind state officials was impossible.[148] Justice Stevens pointed out that history revealed that both state and federal judges were given the same respect as executive officials, and if the Framers had intended to isolate executive officials, then he felt "the learned and articulate men who fashioned the basic structure of our government, . . . would have said so."[149]

Justice Stevens concluded that the Brady Act was comparable to statutes requiring local law enforcement officers to report missing

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140. *Printz*, 117 S. Ct. at 2399 (Stevens, J., dissenting). *See FERC*, 456 U.S. at 742.
141. *Printz*, 117 S. Ct. at 2399 (Stevens, J., dissenting).
142. *Id.*
143. *Id. See Branstad*, 483 U.S. at 229-30.
144. *Printz*, 117 S. Ct. at 2399 (Stevens, J., dissenting).
145. *Id.* at 2400; Testa v. Katt, 330 U.S. 386 (1947).
146. *Printz*, 117 S. Ct. at 2400 (Stevens, J., dissenting).
147. *Id.*
148. *Id.* at 2401 (Stevens, J., dissenting).
149. *Id.*

children to the Department of Justice Crime Control Center, and if Congress had created such a statute in the belief that it serves the best interest of the nation, then the Court should respect the policy judgment and constitutional power of Congress and hold the Brady Act's interim provisions constitutional.[150]

Justice Souter joined Justice Stevens' dissenting opinion, but in his separate dissent based his argument on *The Federalist Papers*.[151] Justice Souter reiterated Hamilton's proposition that the federal government could use national law to "employ the ordinary magistracy of each [state] in the execution of its laws," and therefore, was authorized to bind individuals.[152] Hamilton also discussed the Supremacy Clause and Article VI, clauses 2 and 3, of the Constitution to support his view that state officials are incorporated into the national government's operations.[153] Upon further interpretation of *The Federalist No.* 27, Justice Souter stated that he believed that Hamilton thought state officials would support federal law as an auxiliary function, rather than exclusively support their own or the state's choices.[154]

Justice Souter supported his interpretation of Hamilton with a reading of Madison's *The Federalist No.* 44.[155] In *The Federalist No.* 44, Madison questioned why states should swear an oath to the national Constitution, when a reciprocal oath does not bind federal officers to uphold state governments.[156] Madison answered his own question by acknowledging that although federal officers do not apply state law, state officers apply federal law.[157] Justice Souter

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150. *Id.* (Justice Stevens stated that if Congress enacted a federal law requiring state implementation instead of creating a federal agency, Congress could avoid creating an enlarged federal bureaucracy in the interests of "cooperative federalism.").

151. *Printz*, 117 S. Ct. at 2402 (Souter, J., dissenting). Justice Souter stated that *The Federalist No.* 27 gives the government such authority. *Id.* (His view is supported by *The Federalist No.* 44 and is consistent with *The Federalist Nos.* 36 and 45).

152. *Id. See The Federalist No.* 27 (Hamilton).

153. *Printz*, 117 S. Ct. at 2402 (Souter, J., dissenting). *See The Federalist No.* 27 (Hamilton) (Hamilton stated that "the Legislatures, Courts, and Magistrates of the respective members will be incorporated into the operations of the national government, as far as its just and constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws.").

154. *Printz*, 117 S. Ct. at 2403 (Souter, J., dissenting). Justice Souter believed that Hamilton meant that the state governmental machinery's auxiliary function would be used to support federal law. *Id. See also The Federalist No.* 27 (Hamilton).

155. *Printz*, 117 S. Ct. at 2403 (Souter, J., dissenting). *See The Federalist No.* 44 (Madison).

156. *Printz*, 117 S. Ct. at 2403 (Souter, J., dissenting). *See The Federalist No.* 44 (Madison).

157. *Printz*, 117 S. Ct. at 2403 (Souter, J., dissenting). *See The Federalist No.* 44

then referred to *The Federalist Nos.* 45 and 36 to demonstrate how the Framers used the issue of tax collection to support the state execution of a federal program.[158]

Justice Souter concluded his examination by looking at *The Federalist No.* 27, and stated his belief that the Framers intended the national government to exercise its commerce power and "to require state auxiliaries to take appropriate action."[159] In conclusion, Justice Souter declared that a national law requiring a state official to enforce that law would not exceed the reach of Congress as contemplated by Hamilton.[160]

Justice Breyer joined Justice Stevens' dissent, but in his separate dissent added that the Court should look to European nations to decide whether states should implement federal law.[161] He noted that some countries allow local officials to implement laws that safeguard individual liberty.[162] Although our Constitution is both politically and structurally different from those of European countries, Justice Breyer believed such a comparison would shed light upon the process of enabling a state to preserve its autonomy while enforcing a federal program.[163] Justice Breyer concluded by stating that the Constitution should be flexible enough to grant Congress the power to enact any law it believes necessary to solve a national problem.[164]

The issue of whether the federal government can require states to enforce federally mandated programs arose during the 1970's when the EPA imposed anti-pollution regulations requiring state enforcement.[165] In *Maryland v. EPA*,[166] the state challenged the

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(Madison).

158. *Printz*, 117 S. Ct. at 2403 (Souter, J., dissenting). *See The Federalist No.* 45 (Hamilton) (Hamilton stated that the "eventual collection [of the federal tax] under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States."). *Id. See also The Federalist No.* 36 (Hamilton) (Hamilton stated that the federal government could "employ the State officers as much as possible, and to attach them to the Union by an accumulation of their emolument."). *Id.*

159. *Printz*, 117 S. Ct. at 2403 (Souter, J., dissenting).

160. *Id.* at 2404 (Souter, J., dissenting).

161. *Printz*, 117 S. Ct. at 2404 (Breyer, J., dissenting).

162. *Id.*

163. *Id.* at 2405 (Breyer, J., dissenting).

164. *Id.*

165. *Printz*, 117 S. Ct. at 2379. *See* Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975); and Brown v. EPA, 521 F.2d 827 (9th Cir. 1975). (The majority started its historical analysis with the EPA line of cases in the 1970's, while the dissent referred to *Testa v. Katt*, 330 U.S. 386 (1947)). *Printz*, 117 S. Ct. 2379, 2400 (Stevens, J., dissenting).

Even though, in its historical analysis, the majority did not distinguish cases until the

EPA's authority to enact programs requiring states to establish bikeways, to re-evaluate the Baltimore Transportation Plan, and to require retrofitting of pollution control devices aimed at certain vehicle classes.[167] The statute provides that states have the primary responsibility for implementing and maintaining these air standards.[168] The EPA also required states to implement EPA standards including: emission limitations, compliance schedules for each standard, and other measures necessary to achieve and maintain the standards.[169] The district court did not permit a delay in submitting the plans; Maryland filed its plan, which the court later rejected.[170] In response, the EPA imposed its regulations upon Maryland.[171] Maryland subsequently sought to enjoin the regulations.[172]

A second EPA enforcement case arose in *Brown v. EPA*,[173] in which California was required to submit a state plan to implement, maintain, and enforce air quality standards that included land use and transportation controls.[174] California submitted its plan, which the EPA Administrator approved in part, and rejected in part.[175] California then revised its plan, which the Administrator again

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1970's, there is an earlier case that is relevant to the issue of whether the Court has held that the federal government can require states to enforce a federal law. *See* Kentucky v. Dennison, 65 U.S. 66 (1860) *overruled by* Puerto Rico v. Branstad, 483 U.S. 219 (1987).

In 1860, in deciding whether the Extradition Act of 1793 could force a Governor from an asylum state to return a fugitive to the forum state, the *Dennison* Court held that the Constitution did not grant the federal government the power to impose any duty upon a state officer and compel him to perform that duty. *Dennison*, 65 U.S. at 107-08. In 1987, the *Branstad* Court was once again confronted with the Extradition Act of 1793, but this time, the Court held that "basic constitutional principles" can require a state officer to perform duties arising from the Constitution, and these officers can be compelled to perform such duties. *Branstad*, 483 U.S. at 227-28. *See also* Brown v. Board of Educ., 349 U.S. 294 (1955).

166. 530 F.2d 215 (4th Cir. 1975).

167. *Maryland*, 530 F.2d at 217-18. The EPA based its authority on the Clean Air Act, as amended by 42 U.S.C.A. section 1857 (1955), which provides that the Administrator of the EPA shall publish national air quality standards for pollutants that the EPA has determined to be harmful to public health and welfare. *Id.* at 218. *See* 42 U.S.C.A. § 1857c-3 (1955).

168. 42 U.S.C.A. § 1857 c-2 (1955).

169. *See id.* § 1857 c-5(a)2(B) (1955). The statute also included a provision allowing the EPA to accept or reject the state's plan, and upon the latter, to issue its own implementation plan for the Area. *Id.*

170. *Maryland*, 530 F.2d at 217.

171. *Id.*

172. *Id.*

173. 521 F.2d 827 (9th Cir. 1975).

174. *See also* Clean Air Act § 110(a)(2)B, and 42 U.S.C.A. § 1857c-5(a)(2)(B) (West Supp. 1975).

175. *Brown*, 521 F.2d at 829.

rejected in part, and promulgated a transportation control plan.[176] Following the EPA's action, the state and others petitioned the Ninth Circuit to review the regulations.[177] The Supreme Court held that the federal government could not impose legislation upon a state that required the state to ensure compliance with the enacted provisions.[178]

In *District of Columbia v. Train*,[179] Maryland, Virginia, and the District of Columbia sought to enjoin the EPA's "transportation control" regulations that were initiated pursuant to the Clean Air Act's National Capital Interstate Air Quality Control Region provision.[180] The committee and the EPA jointly established measures that added buses to the regional fleet, created reversible and exclusive express bus lanes, as well as inspection and maintenance programs, established bicycle lanes, and mandated vehicle retrofit programs.[181] After the programs were established, the petitioners sought to enjoin enforcement of the regulations.[182] Before the Court could review the constitutional issue, the EPA rescinded the regulations and the Court vacated the opinions.[183]

Six years later, in *Hodel v. Virginia Surface Mining and Reclamation Ass'n Inc.*, the Court addressed the question of whether the federal government may compel states to implement federal regulatory programs.[184] In *Hodel*, the plaintiffs brought a pre-enforcement action challenging the constitutionality of the Surface Mining Control and Reclamation Act of 1977 ("Surface Mining Act").[185] Congress designed the Surface Mining Act to "establish a nationwide program to protect society and the

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176. *Id.* The administrator's plan required: (1) reducing the amount of gasoline sold in several regions, (2) operating an inspection and maintenance program, (3) imposing limits on motorcycle use, (4) instituting an oxidating catalyst retrofit program, (5) controlling dry cleaning solvent vapor losses, (6) imposing surcharges on parking spaces, (7) developing a system designed to review and approve construction and modification of parking facilities, (8) establishing a computer aided car pool matching system, and (9) adding preferential bus and car pool lanes. *Id.* at 830.

177. *Id.* at 827.

178. *Id.*

179. 521 F.2d 971 (D.C. Cir. 1979).

180. *See* 42 U.S.C.A. § 1857c-5. (1955). *See also* 38 Fed. Reg. 33702 (Dec. 6, 1973). Various governmental units created an Air Quality Planning Committee to establish a transportation control plan. *Train*, 521 F.2d at 978.

181. *Train*, 521 F.2d at 979.

182. *Id.* at 971.

183. Brown v. EPA, 521 F.2d 827 (9th Cir. 1975).

184. Hodel v. Virginia Surface Mining and Reclamation Ass'n Inc., 452 U.S. 264 (1981).

185. *Id. See* 30 U.C.S.A. § 1201 (1977).

environment from [the] adverse effects of surface coal mining."[186] To accomplish its goals, the Surface Mining Act established interim and permanent provisions requiring states to immediately enforce federal standards.[187] The statute also allowed states to pursue their own programs during the interim phase, during which time they could assist the Secretary in enforcing the federal standards.[188] The *Hodel* Court ruled that the Surface Mining Act's provisions were constitutional because the federal government did not compel the states to administer federal law, and further, that the Act made compliance with the federal standards voluntary. If the state did not wish to implement regulations that mirrored those in the Surface Mining Act, then the burden of enforcement was placed solely upon the federal government.[189]

Whether the federal government may compel states to implement federal programs was again addressed by the Court in *FERC v. Mississippi*.[190] In *FERC*, Mississippi challenged the constitutional validity of Titles I and III, as well as Title II, section 210, of the Public Utility Regulatory Policies Act of 1978, ("PURPA").[191] Titles I

186. *Hodel*, 452 U.S. at 268. *See* 30 U.S.C.A. § 1202(a) (1976 ed. Supp. III § 102(a)).

187. *Hodel*, 452 U.S. at 268-69. To enforce the provisions, the Office of Surface Mining Reclamation and Enforcement ("OSM") was created, whereby the Secretary of the Interior, acting through the OSM, has the responsibility to implement, enforce, and administer regulatory provisions contained in Title V of the Act. *Id. See* 30 U.S.C.A. §§ 201(c) and 1211(c) (1976 ed. Supp. III) § 102(a). *See also* 91 Stat. 467-514, 30 U.S.C.A. §§ 1251-1279 (1976 ed. Supp. III, § 102(a); 30 U.S.C.A. §§ 501 and 1251 (1976 ed. Supp. III). Title V establishes both interim and permanent phases that call for the immediate promulgation and federal enforcement of performance standards. 30 U.S.C.A. §§ 1251-1279 (1976 ed. Supp. III, § 102(a)). The interim performance standards include:

1. Returning the land to the same condition prior to mining,
2. Restoring the land to its approximate original contour,
3. Segregating and preserving topsoil,
4. Minimizing the disturbance to the hydrological balance,
5. Using coal mine waste piles for dams and embankments,
6. Re-vegetating mined areas, and
7. Disposing of soil.

Hodel, 452 U.S. at 269. *See* 30 U.S.C.A. § 1265(b) (1976 ed. Supp. III) § 102(a). Until the permanent federal program is implemented in each state, the Secretary is in charge of enforcing and inspecting the established state programs. *Hodel*, 452 U.S. 270. *See* 30 U.S.C.A. § 1252 (1977).

188. *Hodel*, 452 U.S. at 270. Even though the states can assist the Secretary, they are not required to enforce the federal standards; likewise, the federal government may not intervene in enforcing regulatory programs implemented by a state. *Id. See* 30 U.S.C.A. § 1253 (1978) (giving the state exclusive jurisdiction). *See also* 30 U.S.C.A. § 1252(e)(4) (establishing financial reimbursement to states that assist the federal government during the interim phase). *Id.*

189. *Hodel*, 452 U.S. at 288.

190. FERC v. Mississippi, 456 U.S. 742 (1982).

191. *FERC*, 456 U.S. at 745. *See* 16 U.S.C.A. § 2601 (1978).

and III established regulatory policies for electricity and national gas providers that were administered by the Secretary of Energy, encouraging state adoption of retail regulatory practices.[192] Titles I and III also required state utility regulatory commissions and non-regulated utilities to "consider" the implementation of PURPA's regulatory standards.[193] Section 210 of Title II required state utility commissions to settle disputes arising under the statute.[194] The Court concluded that Titles I and III did not compel states to enforce federal laws, rather, the statutes only asked states to consider the federal standards.[195] The Court characterized Title II, section 210, as a regulation that only required states to regulate disputes, and did not compel states to enforce a federal program.[196]

The next opportunity the Court had to decide whether Congress is authorized to compel states to enforce federal law arose in *New York v. United States*.[197] In *New York*, the Court reviewed three incentive provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 aimed at encouraging states to comply with a federal statute that required states to take responsibility for the disposal of state-generated waste by specific deadlines.[198] The first provision was a monetary incentive that established an escrow account supervised by the Secretary of Energy.[199] The second provision was an access incentive that gave states without disposal sites the choice of either regulating waste disposal in accordance with federal standards or denying disposal to their residents.[200] The

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192. *FERC*, 456 U.S. at 746. Titles I and III were implemented to encourage: (1) "conservation of energy supplied by . . . utilities"; (2) "the optimization of the efficiency of use of facilities and resources by . . . utilities systems"; and (3) "equitable rates to consumers." *Id. See also* 15 U.S.C.A. § 3201 (1976 ed., Supp. IV) (establishing retail policies for natural gas utilities) and 16 U.S.C.A. § 2611 (1976 ed., Supp. IV) (establishing retail policies for electric utilities).

193. *FERC*, 456 U.S. at 746.

194. *Id.* at 760.

195. *Id.* at 764.

196. *Id.* at 760. The Court held that Mississippi's role in dispute resolution did not require the state to enforce a federal program but was merely an adjudicating activity that the state's Public Service Commission customarily engaged in. *Id.* (citing MISS. CODE ANN. §§ 77-1-31, 77-3-5, 77-3-13(3), 77-3-21, and 77-3-405 (1973)).

197. 505 U.S. 144 (1992).

198. *New York*, 505 U.S. at 149. *See* 42 U.S.C.A. § 2021b (1985).

199. *New York*, 505 U.S. at 152. *See* 42 U.S.C.A. § 2021e(d)(2)(A) (1985); 42 U.S.C.A. §§ 2021e(d)(1)(A), 2021e(d)(2)(B)(i), 2021e(e)(1)(B), and 2021e(d)(2)(B)(ii) (1985). (The Secretary of Energy takes one-fourth of the surcharges from sited states and then makes payments to states that comply with the act's deadlines.).

200. *New York*, 505 U.S. at 153. *See* 42 U.S.C.A. § 2021e(e)(2)(A) (1985). *See also* 42 U.S.C.A. §§ 2021e(e)(2)(B), 2021e(e)(2)(C), 2021e(e)(1)(D), and 2021e(e)(2)(D) (1985).

third incentive was a "take title" provision requiring a state that generates waste, but is unable to dispose of it, to take title to that waste and become liable for all damages resulting from the waste.[201] New York had not entered into a regional pact, but enacted legislation to finance and establish a disposal site within its borders.[202]

Five sites were identified, but citizens of the targeted sites opposed having the site in their community.[203] In response to the citizens' refusal to accept a waste site, New York and the targeted counties sought to declare the act unconstitutional.[204] The Court ruled that the monetary incentives were conditional grants to the states, and that the access incentives were "simple regulation[s]" within Congressional authority.[205] With respect to the "take title" provision, the Court found this to be outside Congress' enumerated powers and an infringement upon state sovereignty under the Tenth Amendment.[206]

In analyzing whether the federal government can force a state to implement a federal program, the *Printz* Court reviewed the structure of the Constitution, the Framers' intent, and Court precedent.[207] Following a detailed analysis, the Court held that the Brady Act's interim provisions, requiring state and local law enforcement officers to conduct background checks on potential handgun owners, were unconstitutional.[208] On a broader scale, the Court has also determined that the federal government cannot require a state employee to enforce a federal program.[209]

The *Printz* Court extended the holding of *New York* to strike down a federal regulation that required state chief law enforcement officers to conduct background checks on potential handgun purchasers.[210] The *Printz* decision holds that federal legislation compelling state officials to execute federal laws is an unconstitutional infringement upon a state's Tenth Amendment sovereignty.[211] In *New York v. United States*, the Court held that the

201. *New York*, 505 U.S. at 153-54 (quoting 42 U.S.C. § 2021e(d)(2)(C) (1985)).
202. *Id.* at 154.
203. *Id.*
204. *Id.*
205. *Id.* at 173.
206. *New York*, 505 U.S. at 177.
207. Printz v. United States, 117 S. Ct. 2365, 2370 (1997).
208. *Id.*
209. *Id.* at 2365.
210. *Id.*
211. *Id.*

federal government cannot require states to enforce federal laws.[212] Following the precedent of *New York*, the *Printz* Court has further restricted the federal government's ability to require a state or the state's officials to enforce federal regulations.

Although the Court found that earlier statutes required states to enforce a federal program, the Court held that these intrusions upon state sovereignty were permissible.[213] In analyzing the commandeering statutes, the Court held that states could enforce a federal program as long as the states were asked, compensated, or already performing a function similar to that posed by the federal law.[214]

Although the Court's historical review began with the EPA line of cases, the Court first recognized the federal government's inability to require states to implement a federal program in *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*[215] The *Hodel* Court held that the Surface Mining Control and Reclamation Act of 1977 was constitutional because the federal government did not compel states to adopt regulations aimed at mitigating adverse effects from surface coal mining, but merely made the enforcement of the regulations voluntary and compensated the states for enforcement.[216] In the present case, Justice O'Connor, in her concurrence, stated that the interim provisions would be constitutional if the enforcement were voluntary.[217]

Similarly, the *FERC* Court held that the state's role in enforcing Title II, section 210 of PURPA, (using a state court to hear the case), was an activity already performed by the state and did not constitute forcing a state into federal service.[218] In addition, the Court held that Titles I and III did not compel states to enforce a federal law, but merely asked the states to *consider* the law.[219]

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212. New York v. United States, 505 U.S. 142 (1992).

213. *Printz*, 117 S. Ct. at 2375-76. (The Court held that although there were executive commandeering statutes requiring states to implement a federal law, these statutes were enforced by the states in return for federal funding grants and in response to federal *requests* for assistance.). *See* Act of August 3, 1882, ch. 376, §§2, 4, 22 Stat. 214 (1882); and Proclamation of May 18, 1917, ch.15, § 6, 40 Stat. 1665 (1917).

214. *See* Proclamation of May 18, 1917, ch.15, § 6, 40 Stat. 1665 (1917) (President Wilson requesting state assistance in enforcing the military draft); and Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957).

215. *Printz*, 117 U.S. at 2380.

216. Hodel v. Virginia Surface Mining and Reclamation Ass'n Inc., 452 U.S. 264, 288 (1981).

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

218. FERC v. Mississippi, 456 U.S. 742 (1982).

219. *Id.* at 764.

In *New York*, the Court held that the first two incentive provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1995 did impose a duty upon the states to enforce a federal program, but were conditional grants to persuade the states to perform the enforcement duties.[220] However, the Court ruled that the third provision (the "take title" provision) was unconstitutional, due to its interference with the state's Tenth Amendment right of sovereignty.[221] The *Printz* Court relied on *New York* and, therefore, held that the Brady Act interim provisions, requiring state CLEOs to perform background checks on potential handgun owners, were unconstitutional.[222] Despite the earlier decisions by the Court holding that the federal government cannot require a state to implement a federal regulation, the decisions in these earlier cases have delineated situations in which it is permissible for the federal government to require states to enforce a federal law. These exceptions to the general rule of the Tenth Amendment have created a system in which the federal government is thrust into a position where it must get state approval or acceptance before its laws are either enforced or followed, when the law compels state officials to enforce a federal regulation.

In the majority opinion, Justice Scalia cited the American system of "dual sovereignty" — that there is a line drawn between the federal and state governments that prevent one from intruding upon the rights of the other.[223] Taking a different view, Justice Stevens argued in his dissent that Senators are likely to make laws that benefit their own constituents and as such, are in a position to make laws that could burden officials of other states in an effort to benefit their own people.[224]

Justice Stevens posed the question of whether the American system of government, as envisioned by the Framers of the Constitution, is, indeed, a system of "dual sovereignty." If the political process works as Justice Stevens believes it should, then a federal regulation requiring state execution to fulfill the law's purpose would not be an unconstitutional intrusion on state sovereignty.

The majority analyzed the intent of the Framers, finding that they would not require states to enforce a federal program. Instead, the

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220. New York v. United States, 505 U.S. 144, 173 (1992).
221. *Id.* at 188.
222. *Printz*, 117 S. Ct. at 2384.
223. *Id.* at 2377. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995).
224. *Printz*, 117 S. Ct. at 2394 (Steven, J., dissenting).

majority reasoned that the Framers believed states would assist the federal government in reaching its objectives. In his rebuttal to the majority's opinion, Justice Souter recounted Alexander Hamilton's argument that a state would aid federal directives as an auxiliary function, rather than implementing its own choices.[225] If Justice Souter's rationale is followed, and the states perform duties as an auxiliary function, then state enforcement of federal laws would not be discretionary.

Since the Court has previously held that the federal government cannot require states to enforce federal laws, the burden on an already strained federal bureaucracy to enforce federal laws will markedly increase. Currently, the federal government can impose federal laws upon the states if the laws further the Constitution. The federal government cannot require the states or their officials to enforce such laws, however.

America's founding fathers met in Philadelphia at the Constitutional Convention of 1781 to revise the Articles of Confederation. The Framers realized that the Articles of Confederation lacked the authority needed to operate a centralized government. In an effort to meet both state and federal needs, the fifty-five men attending the Convention created and adopted a governing plan ceding a great amount of what had formerly been state authority to the federal government, while still reserving some powers to the states.

Printz effectively takes back some powers previously delegated to Congress and shifts some of the weight of governing back to the states. Although the Court has not completely abandoned the concept that the federal government can require a state to enforce a federal program, the federal government must get permission from the state, or compensate the state in some way, before execution can occur.[226]

The *Printz* Court expanded the scope of its holding in *New York*. After *Printz*, it is unconstitutional for a state employee to be compelled to enforce a federal regulatory provision. *Printz* holds that the federal government cannot circumvent state sovereignty by directly legislating the actions of state employees. Now, enforcement of a federal law that requires a state or state employee to assist in its execution will be left to the discretion of

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225. *Id.* at 2403 (Souter, J., dissenting). *See The Federalist No.* 27 (Hamilton).

226. *See Printz*, 117 S. Ct. at 2385. *See also* Hodel v. Virginia Surface Mining and Reclamation Ass'n Inc., 452 U.S. 264, 288 (1981); New York v. United States, 505 U.S. 142, 173 (1992).

the several states. The decision in *Printz* pronounces that any federal law that the federal government, alone, cannot enforce, no matter the urgency of the measures or the law's duration, will not be automatically enforceable. To ensure a system of government that meets the needs of the people, the decision in *Printz* should be altered to allow the Constitution to "have a little play in the joints,"[227] as Justice Holmes suggested, and be interpreted flexibly enough to allow Congress to pass laws that it "believe[s] necessary to solve an important national problem."[228]

Michael L. Johnson

227. *Printz*, 117 S. Ct. at 2397 (Stevens, J., dissenting) (citing Bain Peanut Co. of Texas v. Pinson, 282 U.S. 499, 501 (1931)).

228. *Printz*, 117 S. Ct. 2405 (Breyer, J., dissenting).