FEDERALISM—INTERIM PROVISIONS OF THE BRADY HANDGUN VIOLENCE PREVENTION ACT COMMANDING STATE AND LOCAL LAW ENFORCEMENT OFFICERS TO CONDUCT BACKGROUND CHECKS ON PROSPECTIVE HANDGUN PURCHASERS VIOLATES THE CONSTITUTION—*Printz v. United States*, 117 S. Ct. 2365 (1997).

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We admit . . . that the powers of the government are limited . . . . But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.[1]

I. INTRODUCTION

The word "federalism" does not appear anywhere within the text of the United States Constitution.[2] Nonetheless, our Constitution provides for a system of dual sovereignty between the states and the federal government.[3] The

[1] McCulloch v. Maryland, 17 U.S. 316, 421 (1819) (emphasis added).

[2] *See* Shawn E. Tuma, *Preserving Liberty:* United States v. Printz *and the Vigilant Defense of Federalism*, 10 REGENT U. L. REV. 193, 215 (1998). "Federalism" is defined as the "[t]erm which includes interrelationships among the states and relationship between the states and the federal government." BLACK'S LAW DICTIONARY 612 (6th ed. 1990).

[3] For a more complete understanding of the concept of federalism and its development, see SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM (Harv. Univ. Press 1993); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Candace H. Beckett, *Separation of Powers and Federalism: Their Impact on Individual Liberty and the Functioning of Our Government*, 29 WM. & MARY L. REV. 635 (1988); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy:*

concept of federalism was designed by our Founding Fathers in an effort to provide for independent state governments, while vesting the federal government with authority in various enumerated areas.[4] Over a century ago, the United States Supreme Court stated that "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government."[5] This philosophy has enabled the United States Constitution to thrive as the oldest and most successful functioning written constitution.

Under our Constitution, the individual states retain a great deal of sovereign authority.[6] The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[7] The Founding Fathers sought to secure several advantages from this governmental structure, with "perhaps the principal benefit" being the "check on abuses of government."[8]

Federalism for a Third Century, 88 COLUM. L. REV. 1 (1988); Martin H. Redish, *Constitutionalizing Federalism: A Foundational Analysis*, 23 OHIO N.U. L. REV. 1237 (1997).

[4] *See* Merritt, *supra* note 3, at 1.

[5] Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) (quoting Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869)).

[6] *See* U.S. CONST. amend. X. In fact, James Madison stated that

> [t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

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

[8] *Gregory*, 501 U.S. at 458. The Court in *Gregory* articulated a substantial discussion on federalism and dual sovereignty. *See id.* at 457. Moreover, the Court relied upon the writings of Alexander Hamilton from the *Federalist Papers*:

> [I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state

Despite the Supreme Court's recognition of state sovereignty and its importance on the principles of federalism, the federal government realized a broad centralization of power with many of the Court's twentieth century rulings.[9] This era of Court deference for federal power began in 1937 with Franklin Roosevelt's New Deal policies and a proposed "court packing" plan.[10] In recent years, however, developments in the Court's jurisprudence indicate the presence of an ongoing shift in the Court's understanding and interpretation of state sovereignty.[11] It is amidst this shift in jurisprudence that the Court in

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governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.

THE FEDERALIST NO. 28, at 180-81 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In addition, Madison stated:

> In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. 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, at 323 (James Madison) (Clinton Rossiter ed., 1961).

[9] *See* Merritt, *supra* note 3, at 10; *see also* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[10] *See* Melanie K. St. Claire, *A Return to States' Rights? The Rehnquist Court Revives Federalism*, 18 N. ILL. U. L. REV. 411, 416 (1998); Melvin R. Faraoni, Printz v. United States: *Federalism Revisited or Madison and Hamilton Are At It Again*, 30 ARIZ. ST. L.J. 491, 498 (1998).

[11] The current Supreme Court, moving against the trend of federal power centralization, has addressed and answered recent questions of federalism on the side of state sovereignty. *See* Kevin Todd Butler, Printz v. United States: *Tenth Amendment Limitations on Federal Access to the Mechanisms of State Government*, 49 MERCER L. REV. 595, 597 (1998) (citing Fry v. United States, 421 U.S. 542, 549 (1975) (Rehnquist, J., dissenting)); Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 199 (citing City of Boerne v. Flores, 521 U.S. 507 (1997); Seminole Tribe v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995)); Faraoni, *supra* note 10, at 499-502, 504 (citing Seminole Tribe v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995); United States Term Limits, Inc. v. Thornton, 514

Printz v. United States was again asked to consider and answer a "question as old as the Constitution: . . . [what is] the proper division of authority between the Federal Government and the States[?]"[12]

II. STATEMENT OF THE CASE

In 1968, Congress passed the Gun Control Act in an effort to regulate and control the distribution of firearms.[13] In 1993, Congress amended the Gun Control Act by enacting the Brady Handgun Violence Prevention Act[14] ("Brady Act"), which required the establishment by the Attorney General of a national computer-based system to facilitate instant background checks for any potential weapons purchaser.[15] During the time needed by the Attorney General to cre-

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U.S. 779 (1995); New York v. United States, 505 U.S. 144 (1992); Gregory v. Ashcroft, 501 U.S. 452 (1991)); St. Clair, *supra* note 10, at 435 (citing City of Boerne v. Flores, 521 U.S. 507 (1997); Reno v. ACLU, 521 U.S. 844 (1997)).

[12] New York v. United States, 505 U.S. 144, 149 (1992).

[13] *See* Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified as amended at 18 U.S.C. §§ 921-922(d)(8) (1994)). The Gun Control Act made it unlawful to transfer a handgun to: any person under 21, or any person not a resident in the dealer's State, or any person prohibited by state or local law from purchasing/possessing a firearm. *See id.* §§ 922(b)(1)-(b)(3). The act also forbade possession of a firearm by, and transfer of a firearm to: convicted felons, fugitives from justice, unlawful users of controlled substances, persons adjudicated as mentally defective or committed to mental institutions, aliens unlawfully present in the United States, persons dishonorably discharged from the Armed Forces, persons who have renounced their citizenship, or persons who have been convicted of a misdemeanor offense involving domestic violence. *See id.* §§ 922(d)(1)-(d)(8).

[14] "The Brady Act" was named after former White House Press Secretary James Brady, who was injured during the assassination attempt by John Hinckley, Jr. on President Ronald Reagan in 1981. *See Brady Law Working* (visited Dec. 20, 1998) <http:// abcnews.go.com/sections/us/DailyNews/bradylaw980622.html>. Brady was shot in the head and suffered partial paralysis and brain damage. *See id.*

[15] *See* Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. § 922(s) (1994)). The national background check system was created in an effort to combat the epidemic of gun violence in America. Some startling facts and statistics indicated the desperate need for some form of control:

1) In 1995, 35,957 Americans were killed with firearms. In comparison, 33,651 Americans died in the Korean War and 58,148 were killed in Vietnam. *See Firearm Facts* (last modified May 14, 1998) <http:www.handguncontrol.org/protecting/d4/d4firefc.htm>.

2) In 1996, handguns were used to murder two people in New Zealand, 15 in Japan, 30

ate and implement the national background check system, the Brady Act established interim provisions which required the assistance of authorized firearms dealers[16] and state chief law enforcement officers ("CLEOs").[17] The duties

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in Great Britain, 213 in Germany, and 9,390 in the U.S. *See id.*

3) In 1996, firearms were used in two out of three murders committed in the U.S. *See id.*

4) In 1996, 80% of those murdered with firearms were murdered with handguns. *See id.*

5) There are 142,000 licensed gun dealers in America, and to put that into perspective, there are only 12,000 McDonald restaurants. *See* Jorgen Wouters, *ABC News.com: The Land of Guns and Death* (visited Dec. 20, 1998) <http://abcnews.go.com/sections/us/guns/guns_ romance. html>.

6) Two hundred and seventy million Americans collectively own an estimated 200-250 million firearms. *See id.* In Texas alone, there are enough firearms to arm every man, woman, and child with four guns each. *See id.*

Since the implementation of the Brady Act in February 1994, the statistics issued by the Justice Department's Bureau of Justice Statistics illustrate that over 300,000 proposed firearm sales to those persons prohibited from receiving or possessing a gun have been blocked. *See ATF-Brady Background Checks to Resume Nationwide* (last modified Aug. 25, 1998) <http://www.atf.treas.gov/core/firearms/information/brady/pr2157.htm>. In addition, 1996 FBI data indicates that crimes with firearms are dropping faster than violent crime overall. *See Crimes With Guns Down Faster Than Violent Crimes Overall* (visited Dec. 20, 1998) <http://www.handguncontrol.org/helping/gunuse.htm>.

[16] The interim provisions under the Brady Act provided that a firearms dealer who proposes to transfer a handgun must observe the following steps:

1) The dealer must receive from the potential gun buyer a statement, known as a Brady Form. *See* 18 U.S.C. § 922(s)(1)(A)(i)(I).

2) The Brady Form must contain the name, address, and date of birth of the proposed gun purchaser, along with a sworn statement that the buyer is not among any of the classes of prohibited purchasers. *See* 18 U.S.C. § 922(s)(3)(A).

3) The dealer must verify the identity of the potential gun buyer by examining an identification document. *See* 18 U.S.C. § 922(s)(1)(A)(i)(II).

4) The dealer must provide the state chief law enforcement officer of the potential gun buyer's residence with notice of the contents, and a copy, of the Brady Form. *See* 18 U.S.C. §§ 922(s)(1)(A)(i)(III) and (IV).

5) With some exceptions, the dealer must then wait five business days before consum-

imposed upon CLEOs included, among other things, the completion of background checks on prospective handgun purchasers by making "a reasonable effort to ascertain . . . whether receipt or possession [of the handgun] would be in violation of the law."[18]

The performance of background checks by firearms dealers and CLEOs was challenged by Sheriff Jay Printz, of Ravalli County, Montana, and Sheriff Richard Mack, of Graham County, Arizona.[19] Sheriff Printz and Sheriff Mack each "object[ed] to being pressed into federal service" and filed separate actions protesting the validity of the interim provisions of the Brady Act contending "that congressional action compelling state officers to execute federal laws is unconstitutional."[20]

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mating the sale, unless the state chief law enforcement officer ("CLEO") earlier notifies the dealer that he has no reason to believe the transfer would be illegal. *See* 18 U.S.C. § 922(s)(1)(A)(ii).

[17] Two alternatives exist to the Brady Act which would relieve the CLEO from performing the duties set forth in the Act. *See* Printz v. United States, 117 S. Ct. 2365, 2369 (1997). First, a dealer may sell a handgun immediately if the purchaser is in possession of a handgun permit issued after a background check or if state law provides for an instant background check. *See* 18 U.S.C. § 922(s)(1)(C) & (D).

[18] 18 U.S.C. § 922(s)(2). Other duties included: If the CLEO finds no reason why the transfer would be in violation of the Act, the CLEO must destroy any records possessed relating to the transaction, including the copy of the Brady Form. *See* 18 U.S.C. § 922(s)(6)(B)(i). If a CLEO makes a determination that a prospective purchaser is ineligible to obtain a handgun, the purchaser can request a written statement from the CLEO containing the reasons for the ineligibility. *See* 18 U.S.C. § 922(s)(6)(C).

[19] *See Printz*, 117 S. Ct. at 2369. Pursuant to Montana Code § 7-32-2121, Sheriff Jay Printz was vested with the authority to preserve the peace, arrest persons who commit public offenses, suppress riots, attend court, keep the detention center, and lead search and rescue units. *See* Brief for Petitioner at 3, Printz v. United States, 117 S. Ct. 2365 (1997) (No. 95-1478). Sheriff Richard Mack, pursuant to Title 11 of the Arizona Revised Statutes, was responsible for maintaining the peace, arresting offenders, suppressing riots, attending the courts when violators are apprehended, maintaining the jail, serving process, and conducting search and rescue operations. *See* Brief for Petitioner at 6, *Printz* (No. 95-1503).

[20] *Printz*, 117 S. Ct. at 2369-70. Both Sheriff Printz and Sheriff Mack argued that the investigations required by the Act made it difficult to conduct ordinary duties. *See* Brief for Petitioner at 3, *Printz* (No. 95-1478). Sheriff Printz had a staff that included "an undersheriff, four detectives, a lieutenant, a patrol sergeant, and seven deputies." *Id.* at 3. This staff was responsible for Ravalli County, Montana which included 30,000 residents over a span of 2,400 square miles. *See id.* Printz argued that conducting background checks "will have to be done by pulling deputies off patrol and investigation duties." *Id.* at 3-4. Arguing that a background check might require anywhere between an hour to several days, Printz felt "the citizens of Ravalli County will be harmed by a significant reduction in patrol strength and the availability of law enforcement personnel for crime prevention, investigation, and

The United States District Court of Arizona and the United States District Court of Montana both considered the interim provisions of the Brady Act and found that compelling CLEOs to perform background checks was unconstitutional.[21] Each court relied on the holding of *New York v. United States*,[22] where the Supreme Court held that the "legislative processes of the states cannot be commandeered by directly compelling them to enact and enforce a federal regulatory program."[23] Based on the *New York* decision, both courts concluded that the interim provisions of the Brady Act violated the Tenth Amendment of the Constitution "because it substantially commandeers state executive officers and indirectly commandeers the legislative processes of the state to administer a federal program."[24] In so holding, however, both courts determined that the unconstitutional interim provisions were severable from the rest of the Brady Act, which allowed states to conduct the background checks on a voluntary basis.[25]

On appeal, a divided panel of the United States Court of Appeals for the Ninth Circuit reversed the decisions of the two district courts and held that none of the interim provisions under the Brady Act violated the Constitution.[26] The Ninth Circuit first refused to incorporate a broad interpretation of the holding in *New York v. United States* utilized by the district courts, which would have established "that the federal government is now flatly precluded from commanding state officers to assist in carrying out a federal program."[27] Instead, the court of appeals found that the provisions were constitutional because the duties imposed on CLEOs represented minimal intervention with state functions, and the requirements under the Brady Act were no different than other minor obligations imposed on state officials by Congress.[28]

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response." *Id.* at 4.

[21] *See* Printz v. United States, 854 F. Supp. 1503 (D. Mont. 1994); Mack v. United States, 856 F. Supp. 1372 (D. Ariz. 1994).

[22] 505 U.S. 144 (1992).

[23] *Printz*, 854 F. Supp. at 1513.

[24] *Id.*

[25] *See id.* at 1519; *Mack*, 856 F. Supp. at 1383.

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

[27] *Id.* at 1029.

[28] *See id.* at 1029-30.

The United States Supreme Court subsequently granted *certiorari*[29] and reversed the decision of the Ninth Circuit.[30] In a 5-4 decision, authored by Justice Scalia, the *Printz* Court examined the structure of the Constitution, the jurisprudence of the Court, and historical understanding and practice before determining that the interim provisions were unconstitutional.[31]

III. PRIOR CASE HISTORY

Several cases were examined by the *Printz* Court in making its determination that the interim provisions of the Brady Act were unconstitutional.[32] First, in *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*,[33] the Court considered whether a state may be compelled by the federal government to implement a program with federal regulations.[34] The program in *Hodel*, officially named the Surface Mining Control & Reclamation Act of 1977 ("Surface Mining Act"),[35] was enacted by the federal government in an effort to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations."[36] The Court upheld the

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[29] *See* Printz v. United States, 518 U.S. 1003 (1996) (granting *certiorari*).

[30] *See* Printz v. United States, 117 S. Ct. 2365, 2369 (1997).

[31] *See id.* at 2370.

[32] *See id.* at 2380; *see also* New York v. United States, 505 U.S. 144 (1992); Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982); Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981). In addition to these cases, several scholars have maintained that *Printz* is just another in a trend of recent decisions to protect state sovereignty and reshape the principles of federalism. *See* Butler, *supra* note 11, at 597 (citing Fry v. United States, 412 U.S. 542, 549 (1975) (Rehnquist, J., dissenting)); Caminker, *supra* note 11, at 199 (citing City of Boerne v. Flores, 521 U.S. 507 (1997); Seminole Tribe v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995)); Faraoni, *supra* note 10, at 499-502, 504 (citing Seminole Tribe v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995); United States Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995); New York v. United States, 505 U.S. 144 (1992); Gregory v. Ashcroft, 501 U.S. 452 (1991)); St. Clair, *supra* note 10, at 435 (citing City of Boerne v. Flores, 521 U.S. 507 (1997); Reno v. ACLU, 521 U.S. 844 (1997)).

[33] 452 U.S. 264 (1981).

[34] *See id.* at 268.

[35] *See* 30 U.S.C. § 1202(a) (1976).

[36] *Hodel*, 452 U.S. at 268.

Surface Mining Act because it did not "commandeer" the states to regulate mining.[37] In fact, the Surface Mining Act's provisions were held to be constitutional upon the Court's finding that the states were not compelled to enforce safety standards, expend funds, or participate in the federal program.[38] Rather, the Surface Mining Act made compliance voluntary, and if a state did not wish to submit a proposed permanent program that complied with the Act and implement regulations, the full regulatory burden would be borne by the federal government.[39]

A similar determination was rendered by the Court the following year in *Federal Energy Regulatory Commission v. Mississippi*.[40] The federal statute at issue in *Federal Energy Regulatory Commission* was the Public Utility Regulatory Policies Act of 1978.[41] The statute was enacted as a response to the nation's energy crisis and was designed to encourage states to create programs to preserve energy.[42] The Court upheld the statute, as it did in *Hodel*, because the Court found that the statute merely required that states *consider* the federal standards and neither issued commands nor imposed directives upon the states.[43] The majority again noted how the Court had never "sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations."[44] In fact, the Court in *Federal Energy Regulatory Commission* continued by stating that if "a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals."[45] The Court concluded that, because the statute did not command or compel the states

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[37] *See id.* at 288.

[38] *See id.*

[39] *See id.*

[40] 456 U.S. 742 (1982).

[41] *See id.* at 745. The implementation of the Public Utility Regulatory Policies Act was a direct result of the Congressional determination that "conservation electricity utilities of oil and natural gas was essential to the success of any effort to lessen the country's dependence on foreign oil, to avoid a repetition of the shortage of natural gas that had been experienced in 1977, and to control consumer costs." *Id.* at 746.

[42] *See id.*

[43] *See id.* at 762.

[44] *Id.*

[45] *Id.* at 764.

to create preservation programs, the balance of authority between the federal government and the states was preserved.[46]

Ten years after *Federal Energy Regulatory Commission* was decided, the Court was again called upon to determine the constitutionality of a statute requiring the states to administer or enact a federal regulatory program.[47] In *New York v. United States*, the Court was asked to discern "the proper division of authority between the Federal Government and the States"[48] by analyzing the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("Low-Level Radioactive Waste Act").[49] The Low-Level Radioactive Waste Act was created by Congress in response to a shortage of disposal sites for low level radioactive waste.[50] It required states to provide for the disposal of waste generated within their borders, and offered several types of incentives designed to encourage compliance.[51] One incentive was a "take title" provision which provided that, if a state generated low-level radioactive waste and was unable to provide for the disposal of the waste by a certain date, the state was required to take title and possession of the waste.[52] Notwithstanding the other sections of the "take title" provision, the Low-Level Radioactive Waste Act also held states strictly liable for all damages resulting from the waste.[53] The

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[46] *See id.* at 764-65.

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

[48] *Id.* at 149.

[49] *See id.* Although entirely dissimilar from the regulation of handgun sales, the Court in *New York* faced a substantial public policy issue. *See id.* The Court noted:

> We live in a world of low level radioactive waste. Radioactive material is present in luminous watch dials, smoke alarms, measurement devices, medical fluids, research materials, and the protective gear and construction materials used by workers at nuclear power plants. Low level radioactive waste is generated by the Government, by hospitals, by research institutions, and by various industries. The waste must be isolated from humans for long periods of time, often for hundreds of years. Millions of cubic feet of low level radioactive waste must be disposed of each year.

Id. at 149-50.

[50] *See id.* at 150.

[51] *See id.* at 150-52.

[52] *See id.*

[53] *See id.*

Court held that the Low-Level Radioactive Waste Act unconstitutionally required the "States either to legislate pursuant to Congress's directions, or to implement an administrative solution."[54] Specifically, the *New York* Court found that "[w]hether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution."[55]

The determinations in *Hodel*, *Federal Energy Regulatory Commission*, and *New York* "make clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."[56] Moreover, the reasoning employed by the Court in these decisions set the stage for the Court to once again protect the sovereignty of the states during its scrutiny of the interim provisions of the Brady Act in *Printz v. United States*.

IV. THE SUPREME COURT'S TREATMENT OF THE INTERIM PROVISIONS OF THE BRADY HANDGUN VIOLENCE PREVENTION ACT: *PRINTZ V. UNITED STATES*

A. MAJORITY OPINION

Writing for the majority,[57] Justice Scalia began the Court's examination of whether the interim provisions of the Brady Act violated the Constitution by highlighting three principle areas.[58] Justice Scalia stressed that, in order for the

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[54] Printz v. United States, 117 S. Ct. 2365, 2380 (1997) (citing *New York*, 505 U.S. at 175-76).

[55] *New York*, 505 U.S. at 177.

[56] *Printz*, 117 S. Ct. at 2380.

[57] Justice Scalia delivered the opinion of the *Printz* Court, in which Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas respectively joined. *See id.* at 2368. In addition, Justice O'Connor and Justice Thomas each filed a concurring opinion. *See id.* at 2385 (O'Connor, J., concurring); *see id.* at 2385 (Thomas, J., concurring). Moreover, Justice Stevens filed a dissenting opinion, in which Justice Souter, Justice Ginsburg, and Justice Breyer joined. *See id.* at 2386 (Stevens, J., dissenting). Justice Souter also filed a separate dissenting opinion, *see id.* at 2401 (Souter, J., dissenting), and Justice Breyer filed a dissent in which Justice Stevens joined. *See id.* at 2404 (Breyer, J., dissenting).

[58] *See id.* at 2369.

Court to determine whether the Brady Act unconstitutionally commanded state officers to participate in the federal program, the majority must explore: (i) the historical understanding and practice between the state and federal systems; (ii) the structure of the Constitution; and (iii) the jurisprudence of the Court.[59]

1. HISTORICAL UNDERSTANDING AND PRACTICE

Justice Scalia began the majority's historical analysis by examining early legislation.[60] The Court rejected the government's contention that "the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws."[61] Recognizing that those early enactments by Congress would have provided substantial evidence of the Constitution's meaning, the Court carefully considered the government's contention.[62] Upon further examination, however, the Court concluded that the early statutes cited by the government[63] did not provide Congress with the power to order the state

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[59] *See id.* The Court turned to these sources due to the absence of any constitutional text that spoke to the precise issue at hand. *See id.*

[60] *See id.*

[61] *Id.* at 2370 (quoting Brief for the United States at 28, Printz v. United States, 117 S. Ct. 2365 (1997) (No. 95-1478)).

[62] *See id.* (citing Bowsher v. Synar, 478 U.S. 714, 723-24 (1986)).

[63] *See id.* The statutes cited by the Government included enactments that

> required state courts to record applications for citizenship, Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, to transmit abstracts of citizenship applications and other naturalization records to the Secretary of State, Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567, and to register aliens seeking naturalization and issue certificates of registry, Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154-55.

Id.

Other requirements on state courts, distinct from the above naturalization procedures, included:

> [R]esolving controversies between a captain and the crew of his ship concerning the seaworthiness of the vessel, Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132, hearing the claims of slave owners who had apprehended fugitive slaves and issuing certificates authorizing the slave's forced removal to the state from which he had fled, Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302-305, taking proof of the claims of Canadian

executives to participate in a federal program.[64] Rather, the Court reasoned that impositions placed upon the state courts was a permissible interpretation of the Constitution that did not extend to the legislature or the executive.[65] Justice Scalia reasoned that "these early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power."[66] The majority concluded that the duty placed upon state judges, and not executives or legislators, was permissible under the purview of the Supremacy Clause,[67] the Madisonian Compromise,[68] and

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refugees who had assisted the United States during the Revolutionary War, Act of Apr. 7, 1798, ch. 26, § 3, 1 Stat. 548, and ordering the deportation of alien enemies in times of war, Act of July 6, 1798, ch. 66, § 2, 1 Stat. 577-578.

Id.

[64] *See id.* at 2371.

[65] *See id.*

[66] *Id.* The authority cited by the Court to allow imposition upon state courts, but not upon the legislature or the executive was Article III, Section 1, the Supremacy Clause of the United States Constitution. *See id.*

[67] *See* U.S. CONST. art. VI, cl. 2. The Supremacy Clause of the United States Constitution reads as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

[68] The Madisonian Compromise established only a Supreme Court. *See Printz*, 117 S. Ct. at 2371. It made the creation of lower federal courts optional with the Congress. *See id.* This was the case even though it was apparent that a single Supreme Court could not hear all the federal cases in the United States. *See id.* It stated:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

the Full Faith and Credit Clause.[69] In fact, the Court observed that the distinction among the courts, legislature, and the executive created by these constitutional principles was permissible and did not illustrate Congressional authority to impose duties upon state officers.[70] The majority continued by observing that the lack of early legislation which imposed duties on state executives justified the Court's perception that this power was presumed by Congress not to exist.[71]

Justice Scalia next considered and rejected the government's argument that several portions of the Federalist Papers[72] could be interpreted to provide Congress with the ability to order state executives into federal service.[73] At the outset, the *Printz* Court found that the statements in the Federalist Papers appeared to be based "on the assumption that the states would consent to allowing their officials to assist the Federal Government."[74] The majority's rejection of the Federalist Papers' argument rested on the proposition that none of the sections cited by the government "necessarily implies—what is the critical point here—that Congress could impose these responsibilities without the consent of the States."[75]

U.S. CONST. art. III, § 1.

[69] *See* U.S. CONST. art. IV, § 1. The Full Faith and Credit Clause generally required that laws which operated elsewhere created obligations in justice that courts of the forum state would enforce. *See Printz*, 117 S. Ct. at 2371. Moreover, the Clause states, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof." U.S. CONST. art. IV, § 1.

[70] *See Printz*, 117 S. Ct. at 2371.

[71] *See id.* Justice Scalia noted that the Government provided the Court with only one example of an early federal law which imposed duties on state executive officers. *See id.* This early federal law was known as the Extradition Act of 1793, which obligated the Executive branch "to cause the arrest and delivery of a fugitive from justice upon the request of the executive authority of the State from which the fugitive had fled." *Id*; *see also* Act of Feb. 12, 1793, ch. 7, § 1, 1 Stat. 302 (1793).

[72] *See Printz*, 117 S. Ct. at 2372. Specifically, the Court referred to THE FEDERALIST Nos. 27, 36 (Alexander Hamilton), No. 45 (James Madison). *See id.*

[73] *See id.*

[74] *Id.*

[75] *Id.*

Finally, the Court completed the examination of the historical record with an observation that there was not only a lack of executive-commandeering statutes enacted by the early Congresses, but subsequent history illustrated a dearth of such legislation as well.[76] The Court rejected the interpretation of two early statutes advanced by the government: (i) the Act of August 3, 1882, which enlisted state officers to perform various duties relating to immigration;[77] and (ii) the World War I selective draft law, which authorized the President to "utilize the service" of state departments and officers in executing this Act.[78] Justice Scalia first distinguished the Act of August 3, 1882 from the Brady Act by proffering that the statute did not mandate duties, but rather gave the Secretary of the Treasury the power to enter into contractual arrangements with the state officers.[79] The Court next considered the World War I selective draft law and concluded that it was not clear that this authorization included the power to "compel the service of state officers."[80]

The Court further distinguished several *recent* federal statutes enacted by Congress which required state or local officials to participate in the implementation of federal regulatory schemes.[81] First, the Court noted that some of the recently enacted statutes were closely tied to "federal funding measures, and can perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the states."[82] Second, the statutes merely impose an obligation on state officials to provide information to the federal government.[83] In conclusion, Justice Scalia distinguished those recent statutes from the Brady Act because they do not touch upon the issue at hand: whether it is permissible to force the participation of the states' executives when ad-

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[76] *See id* at 2375.

[77] *See id.* Specifically, these duties included taking "charge of the local affairs of immigration in the ports within such State, and to provide for the support and relief of such immigrants therein landing as may fall into distress or need of public aid;" and to inspect and exclude any immigrant found to be a "convict, lunatic, idiot," or indigent. *Id.*

[78] *See id.*

[79] *See id.*

[80] *Id.*

[81] *See id.* at 2376.

[82] *Id.*

[83] *See id.*

ministering a federal program.[84]

2. STRUCTURE OF THE CONSTITUTION

While acknowledging that the examination of historical understanding and practice seemed "to negate the existence of the Congressional power" required to sustain the Brady Act, Justice Scalia noted that such an examination was not entirely conclusive.[85] Accordingly, the Court turned to an analysis of the structure of the Constitution, where the majority considered the structural principles of dual sovereignty, separation of powers, and the Necessary and Proper Clause.[86]

a. Dual Sovereignty

The majority began this examination by setting forth the established constitutional principle of "dual sovereignty."[87] Although the states originally surrendered many powers to create the federal government, the Court noted that the states' sovereignty from the federal government remains intact.[88] This "residuary and inviolable sovereignty"[89] between the federal and the state systems, Justice Scalia noted, can be found within the text of the Constitution[90] and the fundamental division of power[91] under the Tenth Amendment's proclamation

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[84] *See id.*

[85] *Id.*

[86] *See id.* at 2376; U.S. CONST. art. I, § 8, cl. 18. In fact, the Necessary and Proper Clause reads as follows: "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 of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

[87] *See Printz*, 117 S. Ct. at 2376; *see also* Gregory v. Ashcroft, 501 U.S. 452, 457 (1991); Tafflin v. Levitt, 493 U.S. 455, 458 (1990).

[88] *See Printz*, 117 S. Ct. at 2376; *see also* THE FEDERALIST NO. 39 (James Madison) (Clinton Rossiter ed., 1961).

[89] *Printz*, 117 S. Ct. at 2376 (quoting THE FEDERALIST NO. 39 (James Madison) (Clinton Rossiter ed., 1961)).

[90] *See id.*

[91] *See id.*; *see also* Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869); Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869). The examples of this fundamental division of

power included Article IV, Section 3 of the United States Constitution which read as follows:

> [1] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress. [2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

U.S. CONST. art. IV, § 3. In addition, Art. III, Section 2 read in pertinent part:

> [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of another State;-between Citizens of different States;-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1. Moreover, Article IV, Section 2 continues:

> [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. [2] 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. [3] No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

U.S. CONST. art IV, § 2. In addition, Article V continues:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which

that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[92]

The Court again turned to the Federalist Papers for support and specifically reiterated how the experience gained by the Framers during the Articles of Confederation[93] led to the construction of a government that was not highly centralized, but rather would preserve the states as independent entities.[94] The Court reasoned that the Framers predicted that a system of government, where the states were mere instruments of a highly centralized federal government, would be both ineffective and produce conflict and strife between the federal and state governments.[95]

Justice Scalia concluded the Court's examination of the dual sovereignty system by opining that the separation of state and federal government is just

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may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. art. V. Finally, Art. IV, Section 4 states:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. CONST. art IV, § 4.

[92] *Printz*, 117 S. Ct. at 2377 (quoting U.S. CONST. amend. X).

[93] The "Articles of Confederation" is the "name of the instrument embodying the compact made between the thirteen original states of the Union, operative from March 1, 1781 to March 4, 1789, before the adoption of the present Constitution." BLACK'S LAW DICTIONARY 112 (6th ed. 1990).

[94] *See Printz*, 117 S. Ct. at 2377. The Court set forth how this design would operate by stating "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other . . . a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Id.* (quoting United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995)).

[95] *See id.* The Court stated, "The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.* (quoting New York v. United States, 505 U.S. 144, 166 (1992)).

one of many protections afforded by the structure of the Constitution.[96] Thus, the majority resolved that allowing the federal government to "impress into its service—and at no cost to itself—the police officers of the [fifty] States" would violate the protection of dual sovereignty set forth by the Framers in the Constitution.[97]

b. Separation Of Powers

The second structural principle examined by the majority was the separation and interplay of the federal government into three branches: executive, legislative and judicial.[98] Justice Scalia wrote that allowing the federal government to have control of state officers pursuant to the Brady Act, clearly violated the separation of powers doctrine between the executive and legislative branches of government.[99] The majority proffered that the Constitution makes it very clear that the President, as the Executive branch, is responsible for administering the laws enacted by Congress[100] and the Brady Act would have unconstitutionally transferred "this responsibility to thousands of CLEOs in the [fifty] States, who are left to implement the program without meaningful Presidential control."[101] Further, the Court observed that the "vigor and accountability" of the executive was critically important to the Framers and their dual system of government.[102] The Court reasoned, therefore, that a lack of meaningful control vested in the Executive branch would clearly diminish the power of the Executive branch by giving Congress the ability to act, with or without the President, by simply requiring the execution of its laws by state officers.[103] Accordingly,

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[96] *See id.* at 2378. The Court stated, "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id.* (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

[97] *Id.*

[98] *See id.*

[99] *See id.*

[100] *See id.*; *see also* U.S. CONST. art. II, § 3.

[101] *Printz*, 117 S. Ct. at 2378.

[102] *See id.*; *see also* THE FEDERALIST NO. 70 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[103] *See Printz*, 117 S. Ct. at 2378.

the *Printz* Court held that this shift of power from the Executive branch to the CLEOs under the Brady Act would violate the separation of power principles under the Constitution.[104]

c. *The Necessary And Proper Clause*

Finally, the Court focused on an argument advanced by the dissent which maintained that the Necessary and Proper Clause,[105] coupled with the Commerce Clause,[106] permitted the implementation of the Brady Act's interim provisions.[107] Justice Scalia rejected the reasoning employed by the dissent by turning to the text of the Necessary and Proper Clause itself, along with the Court's decision in *New York*.[108] Assuming that Congress could act and regu-

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[104] *See id.*

[105] *See* U.S. CONST. art. I, § 8, cl. 18. The clause states that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.*

[106] *See* U.S. CONST. art. I, § 8, cl. 3. Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

[107] *See Printz*, 117 S. Ct. at 2378-79. The *Printz* majority noted that the dissent reasoned that

> the power to regulate the sale of handguns under the Commerce Clause, coupled with the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers," Art. I, § 8, conclusively establishes the Brady Act's constitutional validity, because the Tenth Amendment imposes no limitations on the exercise of delegated powers but merely prohibits the exercise of powers "not delegated to the United States."

Id.

[108] *See id.* In addition, Justice Scalia in *Printz* noted that the Court in *New York* held that

> even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts . . . [T]he Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

late pursuant to the Necessary and Proper Clause under an expansive reading of the Commerce Clause as suggested by the dissent, the Court indicated that there would be absolutely no limitation on the ability of the federal government to tread on state sovereignty.[109] Justice Scalia concluded by explaining that when a law, enacted pursuant to the Necessary and Proper Clause and the Commerce Clause, violates a state's sovereignty, "it is not a 'La[w] . . . proper for carrying into Execution the Commerce Clause,' and is thus, 'merely [an act] of usurpation' which 'deserve[s] to be treated as such.'"[110]

3. PRIOR JURISPRUDENCE

Although the *Printz* Court examined several areas of law before concluding that the federal government lacked the power to compel the enlistment of state officers, Justice Scalia found that the Court's prior jurisprudence provided the most conclusive support for its holding.[111] The Court began its analysis by examining cases that arose under federal auto emission regulations promulgated by the Environmental Protection Agency ("EPA") in the 1970's.[112] The regulations were aimed at improving air quality by reducing emissions from automobiles, and expressly required that each state develop various programs to reduce emission levels to the federal standard.[113] These regulations were deemed invalid by the United States Court of Appeals for the Fourth and Ninth Circuits, along with the District of Columbia Circuit, based on what the courts perceived to be "grave constitutional issues" or on statutory grounds.[114] The Supreme Court subsequently granted *certiorari* to examine the validity of the

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Id. at 2379 (quoting New York v. United States, 505 U.S. 144, 166 (1992)).

[109] *See id.*

[110] *Id.*

[111] *See id.* Recognizing that "[f]ederal commandeering of state governments is such a novel phenomenon that this Court's first experience with it did not occur until the 1970's," the Court nonetheless found various precedential support for its holding. *Id.*

[112] *See id*; *see also* Brown v. Environmental Protection Agency, 521 F.2d 827 (9th Cir. 1975); Maryland v. Environmental Protection Agency, 530 F.2d 215 (4th Cir. 1975); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975).

[113] *See Printz*, 117 S. Ct. at 2379. Specifically, states were instructed by the Environmental Protection Agency ("EPA") to "prescribe auto emissions testing, monitoring and retrofit programs, and to designate preferential bus and carpool lanes." *Id.*

[114] *See id.*

EPA regulations, but the government conceded that they were invalid and declined to even defend them.[115]

Justice Scalia next turned to a consideration of *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, and *Federal Energy Regulatory Commission v. Mississippi*, which made it clear that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."[116] In fact, the majority noted that the statutes were sustained in those cases only after the Court recognized that "they did not require the States to enforce federal law."[117]

Continuing the majority's analysis of prior jurisprudence, Justice Scalia next examined the Court's decision in *New York v. United States*.[118] In that case, the Court declared unconstitutional a federal statute which expressly required the states to administer or enact a federal regulatory program.[119] In *Printz*, the government attempted to distinguish *New York* from the present case by asserting that, unlike the statute at issue in *New York* which required the states to create federal policy, the statute in *Printz* merely "issues a final directive to state CLEOs."[120] Nonetheless, Justice Scalia rejected the government's attempt to distinguish "between 'making law' and merely 'enforcing' it, between 'policymaking' and mere 'implementation.'"[121]

In addition, the Court also expressed doubts about the government's con-

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[115] *See id.*

[116] *Id.* at 2380.

[117] *Id.*

[118] *See id.*

[119] *See id.* The *Printz* Court commented that its decision in *New York* to strike down provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 "should have come as no surprise." *Id.* The Act would have required "States either to enact legislation providing for the disposal of radioactive waste generated within their borders, or to take title to, and possession of the waste—effectively requiring the States either to legislate pursuant to Congress's directions, or to implement an administrative solution." *Id.*

[120] *Id.*

[121] *Id.* This attempted distinction by the government caused Justice Scalia to comment that the line "is perhaps not meant to be the same as, but it is surely reminiscent of, the line that separates proper congressional conferral of Executive power from unconstitutional delegation of legislative authority for federal separation-of-power purposes." *Id.*; *see also* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 428-29 (1935).

tention that the Brady Act could be carried out by the CLEOs without forcing them to engage in policymaking.[122] In rejecting the government's argument, Justice Scalia articulated that "[e]xecutive action that has utterly no policymaking component is rare, particularly at an executive level as high as a jurisdiction's chief-law-enforcement officer."[123] Assuming, that no "policymaking" discretion was left to the states, as the government contended, the Court failed to see how the federal intrusion upon state sovereignty was improved, rather than worsened.[124] In fact, Justice Scalia explained that the sovereignty of the states may be undermined more when this discretion is not available to the states when implementing programs or making decisions pursuant to their implementation.[125]

The majority also rejected the government's contention that its distinction from the holding in *New York* could be supported by the Court's decisions in *Testa v. Katt*[126] and *Federal Energy Regulatory Commission.* The Court held neither case relevant to the government's distinction, and the Court noted that *Testa* stood "for the proposition that state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause."[127] The Court continued, "[T]hat says nothing about whether state executive officers must administer federal law."[128] *Federal Energy Regulatory Commission* was also deemed irrelevant to the government's attempted distinction since the statutes there "did not commandeer state government, but merely imposed preconditions to continued state regulation of an otherwise pre-empted field, in accordance with *Hodel*, and required state administrative agencies to apply fed-

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[122] *See Printz*, 117 S. Ct. at 2381.

[123] *Id.* Justice Scalia continued by giving the example that policymaking would be required when a CLEO determined what "reasonable efforts" would be expended to conduct the required background checks. *See id.* The Justice asked, "Is it really true that there is no policymaking involved in deciding, for example, what 'reasonable efforts' shall be expended to conduct a background check?" *Id.* The issue, Justice Scalia felt, would then inevitably go from "no policymaking" into an imprecise line of "not too much policymaking." *Id.*

[124] *See id.* The States would effectively be reduced "to puppets of a ventriloquist Congress." *Id.* (quoting Brown v. Environmental Protection Agency, 521 F.2d 827, 839 (9th Cir. 1975)).

[125] *See id.*

[126] 330 U.S. 386 (1947).

[127] *See Printz*, 117 S. Ct. at 2381.

[128] *Id.*

eral law while acting in a judicial capacity, in accordance with *Testa*." [129]

The Court next examined and rejected the government's attempt to once again distinguish the case at bar from the principle set forth in *New York*.[130] The government unsuccessfully argued that the performance of discrete, ministerial tasks by CLEOs under a federal directive "does not violate the principle of *New York* because it does not diminish the accountability of state or federal officials."[131] Justice Scalia rejected this argument by noting that the cost of implementing the plan under *Printz* would be improperly shifted to the states, along with blame for any defects encountered while executing the program.[132]

The majority considered another attempt by the dissent to distinguish *New York* from the facts presented in *Printz*.[133] The dissent's theory, which Justice Scalia rejected, asserted that the "take title" provisions in *New York* were different from the Brady Act provisions because the Brady provisions were being directed toward individuals, while the *New York* provisions were directed at the state.[134] The majority disagreed, and held that the distinction created by the dissent was not constitutionally significant.[135] While the Court conceded that the Brady Act was directed toward "individuals," Justice Scalia noted that the Brady Act was directed toward individuals in their official capacities.[136] Justice Scalia failed to see the logic in a policy that prohibited the federal government's control of the state, while simultaneously allowing its control of the

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[129] *Id.*

[130] *See id.* at 2382.

[131] *Id.*

[132] *See id.* Specifically, the majority stated that ". . . [m]embers of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects." *Id.*

[133] *See id.*

[134] *See id.*

[135] *See id.*

[136] *See id.* Justice Scalia later noted, "We have observed that 'a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office . . . . As such, it is no different from a suit against the State itself.'" *Id.* (quoting Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989)).

state's officers.[137]

Lastly, the *Printz* Court addressed several other government arguments in favor of upholding the Brady Act.[138] Justice Scalia, however, refused to evaluate such arguments with a balancing test between the government's interest and the intrusion on state sovereignty, and reasoned that such an analysis was inappropriate and could not overcome the fundamental Constitutional violations present in the Brady Act.[139] The *Printz* Court justified its position by reiterating its reasoning in *New York*,[140] and held that the interim provisions of the Brady Act clearly violated that rule.[141]

B. THE CONCURRENCES

Considering the Court's examination of historical understanding and practice, the structure of the Constitution, and jurisprudence of the Court complete, Justice O'Connor and Justice Thomas wrote separate concurring opinions emphasizing "precedent and our Nation's historical practices," and the Tenth

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[137] *See id.* The Court stated, "To say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance." *Id.*

[138] *See id.* at 2383. The Court grouped these arguments under the heading: "The Brady Act serves very important purposes, is most efficiently administered by CLEOs during the interim period, and places a minimal and only temporary burden upon state officers." *Id.*

[139] *See id.* In fact, the Court reasoned that "such a 'balancing' analysis is inappropriate. It is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect." *Id.*

[140] *See id.* Justice Scalia repeated the reasoning employed by the Court in *New York* by stating that

> [m]uch 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.

Id. (citing New York v. United States, 505 U.S. 144, 187 (1992)).

[141] *See id.*

Amendment, respectively.[142]

Justice O'Connor concurred in the judgment of the Court and cited precedent, historical practices, and the Tenth Amendment as support.[143] Justice O'Connor, however, noted that the Court's holding would not prohibit the states and CLEOs from *voluntarily* participating in the government's program.[144] In fact, the Justice noted that Congress could potentially amend the Brady Act to constitutionally cure the interim provisions and to continue the interim provisions on a contractual basis until the federal system became operational.[145]

Justice Thomas also concurred in the Court's holding, and wrote separately to emphasize the limits that the Tenth Amendment places on the federal government.[146] In addition, the Justice called for a return by the Court to an interpretation of the Commerce Clause that is "better rooted in the Clause's original understanding."[147] The "temper[ing] [of] . . . Commerce Clause jurisprudence," Justice Thomas indicated, would prevent Congress from having the

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[142] *Id.* at 2385 (O'Connor, J., concurring); *see id.* (Thomas, J., concurring).

[143] *See id.*

[144] *See id.*

[145] *See id.* Justice O'Connor stated: "Congress is also free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs." *Id.* For example, Justice O'Connor cited "23 U.S.C. § 402 (conditioning States' receipt of federal funds for highway safety program on compliance with federal requirements)." *Id.*

[146] *See id.* at 2385 (Thomas, J., concurring). In fact, Justice Thomas noted that

> [a]lthough I join the Court's opinion in full, I write separately to emphasize that the Tenth Amendment affirms the undeniable notion that under our Constitution, the Federal Government is one of enumerated, hence limited powers. See, e.g., McCulloch v. Maryland, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819) ("This government is acknowledged by all to be one of enumerated powers"). "[T]hat those limits may not be mistaken, or forgotten, the constitution is written." Marbury v. Madison, 1 Cranch 137, 176, 2 L.Ed. 60 (1803). Accordingly, the Federal Government may act only where the Constitution authorizes it to do so. Cf. New York v. United States, 505 U.S. 144, 112 S. Ct. 2408, 120 L.Ed. 2d 120 (1992).

Id.

[147] *Id.*

"authority to regulate the intrastate transfer of firearms."[148]

Finally, Justice Thomas pointed to the rights provided by the Second Amendment as further support for a decision to hold the interim provisions unconstitutional.[149] Despite the fact that neither party in *Printz* cited support from the Second Amendment, Justice Thomas nonetheless noted that "a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections."[150]

C. THE DISSENTS

Justice Stevens, with whom Justices Souter, Ginsburg, and Breyer joined, dissented.[151] The dissent argued that the interim provisions of the Brady Act should be upheld because Congress "may impose affirmative obligations on executive and judicial officers of state and local governments as well as ordinary citizens."[152] In support of this position, Justice Stevens cited an examination of: (i) the text of the Constitution; (ii) the nation's early history; (iii) prior jurisprudence; and (iv) the structure of the federal government.[153]

Before conducting an analysis of these areas, however, the dissent noted that the Court's decision could have a dramatic impact on the federal government's ability to act during times of national emergency.[154] Since this is a case

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[148] *Id.* The Court stated, "Absent the underlying authority to regulate the intrastate transfer of firearms, Congress surely lacks the corollary power to impress state law enforcement officers into administering and enforcing such regulations." *Id*

[149] *See id.* at 2385-86 (Thomas, J., concurring). The Second Amendment provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." U.S. CONST. amend. II.

[150] *Printz*, 117 S. Ct. at 2386 (Thomas, J., concurring).

[151] *See id.* at 2386 (Stevens, J., dissenting).

[152] *Id.*

[153] *See id.*

[154] *See id.* at 2387 (Stevens, J., dissenting). Justice Stevens commented:

> Indeed, since the ultimate issue is one of power, we must consider its implications in times of national emergency. Matters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist, may require a national re-

about "power," Justice Stevens initially questioned whether any of the principles cited by the majority[155] would hinder a national response in the face of a national emergency, which would require the enlistment of state officers into federal service.[156] Without referring to the enactment of the Brady Act as a response to a "national emergency," the dissent nonetheless emphasized the devastating impact of handgun violence on this country[157] and suggested that Congressional action to protect the citizens warranted more respect than was accorded in the Court's majority decision.[158]

1. DISSENT'S ANALYSIS OF THE TEXT OF THE CONSTITUTION

Justice Stevens first examined the text of the Constitution,[159] and referring directly to the Commerce Clause,[160] the dissent reasoned that Congress acted well within its power when it enacted the interim provisions of the Brady Act.[161] The dissent further suggested that, in addition to Congress' ability to regulate commerce, the additional grant of authority under the Necessary and Proper Clause demonstrated the Congressional ability to obtain the temporary support of state officers in the implementation of the Brady Act.[162]

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sponse before federal personnel can be made available to respond.

Id.

[155] *See id.* The principles specifically cited by the majority were: historical understanding and practice, prior jurisprudence, or the Constitutions structure. *See id*; *see also supra* text accompanying note 59.

[156] *See Printz*, 117 S. Ct. at 2387 (Stevens, J., dissenting).

[157] *See id.* Moreover, the dissent cited statistics to indicate that 12,489 deaths were caused by handguns in 1992. *See id.* In addition, the dissent pointed to statistics that demonstrated the positive impact the Brady Act had between 1994 and 1996. *See id.* During this time period, the background check imposed by the Brady Act prevented approximately 6,600 firearm sales per month. *See id.* In addition, the dissent noted that more than 70% of the rejected purchasers were indicted or convicted felons. *See id.*

[158] *See id.*

[159] *See id.*

[160] *See* U.S. CONST. art. I, § 8, cl. 3.

[161] *See Printz*, 117 S. Ct. at 2387 (Stevens, J., dissenting).

[162] *See Printz*, 117 S. Ct. at 2387-88 (Stevens, J., dissenting).

Justice Stevens also disagreed with the Court's interpretation of the Tenth Amendment and stated that such an interpretation "does not purport to limit the scope or the effectiveness of the exercise of powers that are delegated to Congress."[163] Just as the Court turned to portions of the Federalist Papers to support its textual interpretation of the Constitution, the dissent relied upon similar authority.[164] Moreover, the dissent suggested that state officials "have an essential agency in giving effect to the federal Constitution,"[165] and Justice Stevens accordingly interpreted the Supremacy Clause to establish policy which directs the states to follow not only the Constitution but also laws enacted by Congress.[166]

2. THE DISSENT'S REVIEW OF EARLY HISTORY OF THE NATION

After examining the text of the Constitution, the dissent looked to history to support its belief that the federal government may impose duties upon state officers.[167] While enumerating the "cumbersome and inefficient" characteristics of the government under the Articles of Confederation,[168] the dissent argued

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[163] *Id.*

[164] *See id.* at 2388 (Stevens, J., dissenting).

[165] *Id.* (quoting THE FEDERALIST NO. 44, at 287 (James Madison) (Clinton Rossiter ed., 1961)). James Madison continued by stating:

> It has been asked why it was thought necessary that the State magistracy should be bound to support the federal Constitution, and unnecessary that a like oath should be imposed on the officers of the United States, in favor of the State constitutions. Several reasons might be assigned for the distinction. I content myself with one, which is obvious and conclusive. The members of the federal government will have no agency in carrying the State constitutions into effect. The members and officers of the State governments, on the contrary, will have an essential agency in giving effect to the federal Constitution.

THE FEDERALIST NO. 44, at 287 (James Madison) (Clinton Rossiter ed., 1961).

[166] *See Printz*, 117 S. Ct. at 2389 (Stevens, J., dissenting). Justice Stevens concluded, "There 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." *Id.*

[167] *See id.*

[168] *See id.* The dissent commented that while the Government under the Articles of

that the Framers recognized the systemic defects under the Articles and created provisions in the Constitution to eliminate those inefficiencies and allow for the assistance of state officers.[169] Once again turning to the Federalist Papers for support, Justice Stevens noted that it was the intent of the Framers to change the inefficient nature of a government under the Articles of Confederation, which only provided "indirect control over individual citizens."[170] The dissent further suggested that the Framers intended to "enhance the capacity of the federal government by empowering it—as a part of the new authority to make demands directly on individual citizens—to act through local officials."[171] Justice Stevens again relied upon the teachings of Alexander Hamilton and James Madison encapsulated in the Federalist Papers to demonstrate how the Framers chose to create a system that would provide the government with the power to order the assistance of states in the implementation of national programs.[172]

Ultimately, Justice Stevens refused to accept the Court's proposition that the government's failure to exercise such a power throughout history indicated an absence of such authority.[173] While Justice Stevens acknowledged that the use of federal power to realize state involvement in federal programs would have provided evidence to support the existence of such power, the Justice disagreed with the majority's notion that the power failed to exist due to a lack of use.[174] Instead, the dissent noted that the Court has "never suggested that the failure of the early Congresses to address the scope of federal power in a particular area or to exercise a particular authority was an argument against its existence."[175]

Confederation could "issue commands to the several sovereign states . . . it had no authority to govern individuals directly." *Id.*

[169] *See id.*

[170] *Id.* at 2389 (Stevens, J., dissenting).

[171] *Id.* Specifically, Justice Stevens observed that Alexander Hamilton once explained that "we must extend the authority of the Union to the persons of the citizens." *Id.* (quoting THE FEDERALIST NO. 15, at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

[172] *See id.* Specifically, the dissent quoted Hamilton for the proposition that the Constitution, "by extending the authority of the federal head to the individual citizens of the several states, will enable the government to employ the ordinary magistracy of each, in the execution of its laws." *Id.* (quoting THE FEDERALIST NO. 27, at 176 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

[173] *See id.* at 2391 (Stevens, J., dissenting).

[174] *See id.*

[175] *Id.*

Moreover, if that was the position held by the Court, Justice Stevens noted that most of the Court's post New-Deal Commerce Clause jurisprudence would be effectively undermined.[176]

The dissent next pointed to several early federal statutes that indicated the ability of Congress to rely on state judges and clerks to perform various executive functions.[177] Dismissing the Court's analysis of the early statutes[178] as incomplete and misleading, the dissent refuted the majority's contention that the duties imposed on state officials "shed[] no light on the question whether executive officials might have an immunity from federal obligations."[179] On the contrary, Justice Stevens found that these statutes were indicative of evidence supporting the power of the federal government to impose obligations upon the states.[180]

3. DISSENT'S ANALYSIS OF THE STRUCTURE OF THE CONSTITUTION

The dissent next turned to a review of the Court's "structural" arguments.[181] From the outset, Justice Stevens maintained that preserving the sovereignty of the states, as the Framers intended, did not address the issue raised by *Printz*

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[176] *See id.* The dissent pointed to a portion of the holding in *New York* in which Justice O'Connor noted:

> The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role.

New York v. United States, 505 U.S. 144, 157 (1992).

[177] *See Printz*, 117 S. Ct. at 2391 (Stevens, J., dissenting). The dissent also pointed to the duties imposed during applications for citizenship, reporting requirements relating to naturalization, and the maintenance of a registry of aliens who were seeking naturalization. *See id*; *see also supra* note 63.

[178] *See supra* note 63.

[179] *Printz*, 117 S. Ct. at 2392 (Stevens, J., dissenting).

[180] *See id.*

[181] *See id.* at 2394 (Stevens, J., dissenting).

under the Brady Act.[182] In fact, the dissent argued that the "structure" of the Constitution itself, rather than the preservation of state sovereignty, would allow for the utilization of state officers in federal programs.[183] The dissent proffered that because the members of Congress were duly elected by the people and must remain faithful to the needs and desires of the electorate, Congress would not look past the importance of state sovereignty when implementing a federal program.[184] Additionally, the dissent opined that it is more likely that Congressional decisions made "to impose modest burdens on State officials from time to time reflect a considered judgment that the people in each of the States will benefit therefrom."[185]

The dissent continued by arguing that recent legislation enacted by Congress also provided protection for the principles of federalism set forth under the Constitution.[186] Justice Stevens acknowledged the majority's concern that Congress could impose obligations upon the states without having to finance the programs, which would essentially impose unfunded mandates and threaten concepts of federalism.[187] The dissent, however, pointed to the Unfunded Mandates Reform Act of 1995,[188] which permitted individual members of Con-

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[182] *See id.*

[183] *See id.* The dissent quoted directly from the Court's previous holding in *Garcia* that "the principle means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress." *Id.* (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-51 (1985)).

[184] *See id.*

[185] *Id.* Justice Stevens reasoned:

> Given 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 considered judgment that the people in each of the States will benefit therefrom.

Id.

[186] *See id.* at 2395 (Stevens, J., dissenting).

[187] *See id.*

gress to object to and prevent the realization of such a bill.[189]

Justice Stevens also indicated that the Court's decision to limit the federal government's ability to enlist the aid of state officers "seem[ed] more likely to damage than to preserve the safeguards against tyranny provided by the existence of vital state governments."[190] By preventing the federal government from obtaining the assistance of state officers, the dissent reasoned that the federal government would be forced to become unnecessarily large in order to implement its programs, thereby subjecting states to a much greater risk of tyranny and intrusion into state sovereignty.[191]

Significantly, the dissent also relied on the entrustment of constitutional authority granted to Congress by the Framers.[192] It is the responsibility of Congress, Justice Stevens opined, to create "a working structure of intergovernmental relationships around the framework that the Constitution authorized."[193] The dissent argued that this Congressional mandate to develop a viable federal system of government should allow for the federal government's reliance upon state officials when issues of national security and interest arise.[194]

4. DISSENT'S EXAMINATION OF THE COURT'S PRIOR JURISPRUDENCE

Finally, Justice Stevens turned to a review of the Court's prior jurisprudence for further support.[195] The dissent began its analysis by examining the

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[188] *See* 2 U.S.C. § 1501 (1995).

[189] *See Printz*, 117 S. Ct. at 2395-96 (Stevens, J., dissenting). The statute was created "to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State . . . governments without adequate Federal funding, in a manner that may displace other essential State . . . governmental priorities." *Id.* (quoting 2 U.S.C. § 1501(2)).

[190] *Id.* at 2396 (Stevens, J., dissenting).

[191] *See id.*

[192] *See id.* at 2397 (Stevens, J., dissenting).

[193] *Id.* Justice Stevens cited an opinion authored by Justice Holmes which stated that "the machinery of government would not work if it were not allowed a little play in its joints." *Id.* (quoting Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931)).

[194] *See id.*

[195] *See id.*

majority's interpretation of *New York v. United States*.[196] Justice Stevens argued that the decision in *New York* did not decide the issue before the Court in *Printz*.[197] The dissent proffered that the majority incorrectly relied on dictum in *New York*,[198] which was unnecessary to the ultimate resolution of the central issue in *New York*.[199] The dissent also maintained that the statements from *New York* were not relevant to decide the present issue in *Printz* as to "whether state executive officials as opposed to state legislators—may in appropriate circumstances be enlisted to implement federal policy."[200]

Justice Stevens' dissent further scrutinized other Supreme Court jurisprudence by examining three cases that it felt the majority ignored or misconstrued.[201] The support of these cases, along with the belief that the Court should respect Congress' "policy judgement and its appraisal of its constitutional power," bolstered the dissent's argument that the Brady Act did not vio-

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[196] *See id.*

[197] *See id.* at 2398 (Stevens, J., dissenting).

[198] *See id.* Specifically, Justice Stevens maintained that the dicta relied upon by the majority read as follows: "[t]he Federal Government may not compel the States to enact *or administer* a federal regulatory program." *Id.* (quoting New York v. United States, 505 U.S. 144, 188 (1992)).

[199] *See id.* Justice Stevens also restated the well established principle that the Court is not bound by the dicta set forth in prior opinions. *See id*; *see also* United States Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 24 (1994).

[200] *Printz*, 117 S. Ct. at 2398 (Stevens, J., dissenting).

[201] *See id.* at 2399 (Stevens, J., dissenting). Justice Stevens argued that the Court misinterpreted *Federal Energy Regulatory Commission 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). In *Federal Energy Regulatory Commission* the Court upheld a federal statute that required "state utilities commissions, *inter alia*, to take the affirmative step of considering federal energy standards in a manner complying with federally specified notice and comment procedures, and to report back to Congress periodically." *Id.* Justice Stevens argued that the burden on state officials which was approved in *Federal Energy Regulatory Commission* was much more substantial than the temporary provisions of the Brady Act. *See id.* In *Puerto Rico*, it was held "that the Extradition Act of 1793 permitted the Commonwealth of Puerto Rico to seek extradition of a fugitive from its laws without constitutional barrier." *Id.* Although the Act imposed a duty on state executive officers, the court found no violation on the issue of federalism. *See id.* at 2400 (Stevens, J., dissenting). Finally, in *Testa*, the Court "unanimously held that state courts of appropriate jurisdiction must occupy themselves adjudicating claims brought by private litigants under the federal Emergency Price Control Act of 1942, regardless of how otherwise crowded their dockets might be with state law matters." *Id.*

late the principles of federalism.[202]

Despite joining the dissent authored by Justice Stevens, Justice Souter also wrote a separate dissenting opinion which emphasized certain Constitutional interpretations provided by the Federalist Papers.[203] Specifically, Justice Souter found support for the government's position from Federalist No. 27 authored by Alexander Hamilton, which Justice Souter felt was supported by Federalist No. 44 and consistent with Federalist Nos. 36 and 45.[204]

Justice Souter first observed that Hamilton's view in No. 27 suggested that the National Government was authorized by the Constitution to bind individuals directly through federal law, and therefore, the federal government could "employ the ordinary magistracy of each [State] in the execution of its laws."[205] Justice Souter further noted that Hamilton expressly relied on the Supremacy Clause of the Constitution and state officers' oath requirement to conclude 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."[206]

Justice Souter also argued that Hamilton's view of the federal government's ability to bind state officials, which supported the argument advanced by the government, could also be justified by James Madison in Federalist No. 44.[207] Reiterating the philosophy expounded by Madison, Justice Souter rhetorically questioned why "state magistrates should have to swear to support the National Constitution, when national officials will not be required to oblige themselves to support the state counterparts."[208] The answer, Justice Souter believed, was that national officials would not have the responsibility of carrying the state constitution into effect, while members and "officers of the State Governments, on the contrary, would have an essential agency in giving effect to the Federal

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[202] *Id.* at 2401 (Stevens, J., dissenting).

[203] *See id.* 2401 (Souter, J., dissenting).

[204] *See id.* at 2402 (Souter, J., dissenting).

[205] *Id.* (quoting THE FEDERALIST NO. 27, at 176 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

[206] *Id.* (quoting THE FEDERALIST NO. 27, at 177 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

[207] *See id.* at 2403 (Souter, J., dissenting).

[208] *See id.*

Constitution."[209]

Finally, Justice Breyer, with whom Justice Stevens joined, also dissented from the majority opinion in *Printz*.[210] Justice Breyer agreed with the government's position based on an examination of the experiences of other countries and their federal systems of government.[211] Recognizing that the issue presented in *Printz* required an analysis of the United States Constitution, and not those of other nations, Justice Breyer wrote that an outside examination of other countries[212] facing the same fundamental problem "may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity."[213]

V. CONCLUSION

Many problems exist in society that beg for legislative solutions. The control of handguns is no exception. Regardless of the need for a solution, however, each problem must be solved within the bounds of the Constitution. The Court correctly recognized the limitations on its ability to address problems when it opined that "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."[214]

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[209] *Id.* (quoting THE FEDERALIST NO. 44, at 287 (James Madison) (Clinton Rossiter ed., 1961)).

[210] *See id.* at 2404 (Breyer, J., dissenting).

[211] *See id.*

[212] *See id.* Specifically, Justice Breyer examined the federal systems of Germany, Switzerland, and the European Union and determined that each of these systems "provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central 'federal' body." *Id.* (citing Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 237 (1990); D. Currie, *The Constitution of the Federal Republic of Germany*, 66, 84 (1994); Mackenzie-Stuart, Forward, *Comparative Constitutional Federalism: Europe and America* ix (M. Tushnet ed. 1990); Kimber, *A Comparison of Environmental Federalism in the United States and the European Union*, 54 MD. L. REV. 1658, 1675-77 (1995)).

[213] *Id.* at 2405 (Breyer, J., dissenting).

[214] *Id.* at 2383 (quoting New York v. United States, 505 U.S. 144, 187 (1992)).

The Court's ruling in *Printz*, as some may fear, will not prevent the federal government from enacting future legislation in an effort to protect society from various threats. The *Printz* decision should, however, generate more respect for the doctrine of federalism. In fact, as Justice O'Connor noted, instead of issuing commands upon the states, the federal government will merely need to obtain the cooperation of the states on a contractual basis.[215]

Additionally, when a problem exists that clearly demands a solution, it will be unlikely that the states will resist a Congressional attempt to formulate a solution unless the principles of the Constitution are clearly violated. In fact, on January 14, 1998, Attorney General Janet Reno announced, after meeting with national law enforcement leaders, that background checks on prospective handgun purchasers under the Brady Act were being conducted on a voluntary basis in all fifty states.[216]

Threats to the rights of citizens arise from many diverse places. By disregarding the principles of federalism, the threat in *Printz* arose not from handguns, but rather from the imposition of obligations on sovereign states by the federal government. The Framers devised the doctrine of federalism to divide power between the state and federal governments and to provide that the power between each would be offset in an effort to prevent against the abuse of power. Allowing the federal government to unilaterally impose duties upon state officials, at no cost to itself, would clearly violate the doctrine of federalism and fly in the face of the Framers' intent. Thus, the Court in *Printz* properly held that the interim provisions of the Brady Act violated bedrock principles ingrained within the Constitution.

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[215] *See id.* at 2385 (O'Connor, J., concurring). Specifically, Justice O'Connor stated, "Congress is also free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs." *Id.*

[216] *See Brady Background Checks To Resume Nationwide* (visited Dec. 20, 1998) <http://www.atf.treas.gov /core/firearms/information/brady/pr2157.htm>.