NOTES

Legislating Gun Control in Light of *Printz v. United States*

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INTRODUCTION

Every year, firearms are responsible for approximately 38,000 deaths, 100,000 hospital emergency visits, and 20 billion dollars in costs to the United States.[1] Although gun proponents claim that guns are necessary for self-defense,[2] in reality, only one attacker is killed in self-defense for every 130 people killed for other reasons.[3] The self-defense argument championed by groups such as the National Rifle Association ("NRA")[4] is merely a myth, designed to in-

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[1] *See* Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 58-59 (1995) (noting that in 1991 more than 38,000 people died from gun shot wounds and that guns kill someone every 20 seconds); David E. Nelson et al., *Population Estimates of Household Firearm Storage Practices and Firearm Carrying in Oregon*, 275 JAMA 1744, 1744 (1996) (stating that firearms account for $20 billion in annual costs to United States); *see also* Josh Sugarmann, *Reverse Fire: The Brady Bill Won't Break the Sick Hold Guns Have on America*, MOTHER JONES, Jan.-Feb. 1994, at 36, 36 (stating that guns in America claimed approximately 37,000 lives in 1990); Gordon Witkin, *A Very Different Gun Culture; Britain Plans a Near Total Ban on Handguns*, U.S. NEWS & WORLD REP., Oct. 28, 1996, at 44 (noting that thousands of Americans were murdered by guns in 1994). The $20 billion in annual firearm-related costs to the United States includes public and private expenditures as well as lost productivity. *See* E-mail letter from Garen Wintemute, Professor, University of California, Davis, to author (Feb. 24, 1999) (on file with author).

[2] *See* Scott Sunde, *NRA Moves from Holster to Purse Gun Group Stresses Self-Protection to Draw in More Women*, SEATTLE POST, May 5, 1997, at B1 (explaining National Rifle Association's ("NRA") recent programs, magazine, and book which argue that Americans, in particular women, need guns for self-defense); *see also* JOSH SUGARMANN & KRISTEN RAND, CEASE FIRE: A COMPREHENSIVE STRATEGY TO REDUCE FIREARMS VIOLENCE 66 (1994) (discussing NRA's poorly researched claim that every year guns are used millions of times for self-defense); Robert B. Gunnison, *Governor Vetoes Bill Banning Cheap Guns, Crime Laws More Effective He Says*, S.F. CHRON., Sept. 27, 1997, at A1 (noting that California Governor Pete Wilson vetoed bill outlawing cheap handguns to protect law-abiding citizens' need for self-defense). After Wilson vetoed the bill, the NRA announced, "Governor Wilson's veto is an unmistakable signal to freedom's opponents that the fundamental right of self-defense belongs to all Californians." *Id.*

[3] *See Who We Kill*, MOTHER JONES, Mar.-Apr. 1996, at 36, 36. For every American killed by a gun in self-defense, sixty-three commit suicide, sixty are killed in homicides, and six die in firearms related accidents. *See id.*

[4] The NRA is a special interest group founded in 1871 by former Union Army officers who were alarmed that many Northern soldiers were unable to use their firearms properly. *See* Richard Lacayo, *Under Fire: The NRA Is More than Just Another Special-Interest Group — But Like Many Empires It Is Neither as Imposing nor as Invincible as It Looks*, TIME, Jan. 29, 1990, at 16, 18. The NRA was primarily an organization focused on marksmanship until the 1930s when Congress passed a law restricting sawed-off shotguns and machine guns. *See id.* The NRA then shifted its focus and began to concentrate on fighting gun control legislation. *See id.* Recently, the NRA has fought gun control measures including a proposed federal ban on "cop killer" bullets and a proposed federal ban on semi-automatic assault rifles. *See id.* at 19. The NRA is one of Washington, D.C.'s most powerful lobbies. *See Rifle Association Head Withstands Ouster Efforts*, ARIZ. REPUB., Feb. 10, 1997, at A2. However, according to the executive director of the NRA's political sector, it is more than that — it is an organization committed to gun safety, responsibility, and freedom. *See* Robert Dreyfuss, *Good Morning*

crease gun ownership and diminish gun regulation.[5]

In the past, members of Congress have succumbed to pressures by groups like the NRA[6] and, as a result, Congress has not passed effective gun control legislation.[7] However, in recent years, Congress has made some meaningful attempts to legislate gun use in

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Gun Lobby, MOTHER JONES, July-Aug. 1996, at 38, 40 (discussing speech given at NRA's 125th anniversary convention in April 1996).

[5] *See* ERIK LARSON, LETHAL PASSAGE 23-25 (1994) (describing NRA advertisements that argue gun ownership is necessary for self-defense); ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL 76 (1995) (noting that prospect of encountering armed victim may invite escalation of violence); SUGARMANN & RAND, *supra* note 2, at 66 (stating that although NRA magazine offers anecdotal evidence regarding self-defense gun use each month, NRA claims are not backed by sound research, and that "self-defense" itself is ambiguous term). One study found that a gun kept at home was 43 times more likely to kill its owner, a relative, or a friend than an intruder. *See* Arthur L. Kellermann, M.D. & Donald T. Reay, M.D., *Protection or Peril?*, 314 NEW ENG. J. MED. 1557, 1560 (1986). Another myth the NRA frequently perpetuates to rally support against gun control is that the Second Amendment guarantees every American the right to own guns. *See* LARSON, *supra*, at 213 (stating that despite NRA rhetoric, Second Amendment is not barrier to federal gun control legislation); SUGARMANN & RAND, *supra* note 2, at 66; *see also* Sarah Brady, *Working for a Safer America*, 10 ST. JOHN'S J. LEGAL COMMENT. 77, 82 (1994) (quoting Former Chief Justice Warren Burger's statement that NRA's attempts to promote Second Amendment as bar to gun control was fraud perpetrated on American public); Herz, *supra* note 1, at 67 (arguing that gun lobby's view that Second Amendment guarantees unlimited right to bear arms is fabrication). In fact, "that the Second Amendment poses no barrier to strong gun laws is perhaps the most well-settled proposition in American constitutional law." L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1316-17 (1997) (quoting former Solicitor General and Harvard Law School Dean Erwin Griswold).

[6] *See* Carl T. Bogus, *Pistols, Politics and Products Liability*, 59 U. CIN. L. REV. 1103, 1156 (1991) (arguing that efforts to enact gun control legislation have been inhibited due to NRA's powerful lobby); Herz, *supra* note 1, at 84-85 (stating that NRA spent more than $22.4 million on lobbying in 1993); LARSON, *supra* note 5, at 190 (noting that NRA's political action committee, NRA Political Victory Fund, spent $1.7 million on presidential and congressional campaigns in 1992); Michelle Capezza, Comment, *Controlling Guns: A Call for Consistency in Judicial Review of Challenges to Gun Control Legislation*, 25 SETON HALL L. REV. 1467, 1468 (1995) (stating that attempts to legislate gun control have failed due to lobbying power of NRA). The NRA and its supporters are able to combat proposed gun control legislation with phone calls, letters, and visits to legislators. *See* Herz, *supra* note 1, at 86 n.115. Also, the NRA influences legislators by funding political campaigns. *See id.* at 85 n.113 (stating that 80% of legislators who supported NRA-sponsored McClure-Volkmer Act of 1986 received campaign contributions from NRA). One example of the power of the NRA's contributions is its support of Republican Senator Phil Gramm. The NRA has been the biggest "lifetime patron" of Gramm, a vocal opponent of the assault weapons ban, having given his campaigns more than $440,000. *See* Dianne Feinstein, *Is the Federal Ban on Assault Weapons Working? Yes: The Weapons Are Harder to Get, and Police Fatalities Are down*, INSIGHT MAG., Feb. 26, 1996, at 26. As J. Edgar Hoover stated in 1964, "I think strong laws should be passed restricting the sale of guns, but when you try, you run head-on into collision with the National Rifle Association." CARL BAKAL, THE RIGHT TO BEAR ARMS 128 (1966) (quoting N.Y. TIMES, Nov. 19, 1964).

[7] *See* Herz, *supra* note 1, at 111-12, 121-22 (arguing that despite recent efforts of one legislator to repeal Second Amendment, most legislators have failed to adopt any measures that address gun violence); Capezza, *supra* note 6, at 1468 (noting that efforts to legislate gun control have failed due to NRA's lobbying power).

the United States.[8] Most significantly, Congress enacted the Brady Handgun Violence Prevention Act ("Brady Act") in 1993.[9] Notably, only a few days after Congress passed the Brady Act, NRA attorneys were plotting to overturn this law.[10]

The NRA's battle against the Brady Act has been somewhat successful.[11] The NRA decided to challenge the Brady Act as a violation of Tenth Amendment state sovereignty.[12] NRA attorneys orchestrated anti-Brady Act litigation by searching for sheriffs and police chiefs who were affected by the legislation and interested in fighting it.[13] Their successful search for challengers to the Brady Act resulted in *Printz v. United States*.[14]

In *Printz*, the United States Supreme Court struck down the Brady Act because the Court determined that the legislation un-

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[8] *See* 18 U.S.C. § 922(s)(1) (Supp. 1998); 18 U.S.C. § 922(q)(1) (1988 ed., Supp. V); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 42 U.S.C.); Lynn Murtha & Suzanne L. Smith, *"An Ounce of Prevention . . . ": Restriction Versus Proaction in American Gun Violence Policies*, 10 ST. JOHN'S J. LEGAL COMMENT. 205, 214-33 (1994) (discussing recent gun control legislation enacted by Congress including Brady Handgun Violence Prevention Act, and Violent Crime Control and Law Enforcement Act of 1994); *cf.* James D. Wright, *Second Thoughts About Gun Control*, *in* THE GUN CONTROL DEBATE 93, 95-96 (Lee Nisbet ed., 1990) (arguing that problem is not that federal gun legislation does not exist but rather that these laws are difficult to enforce).

[9] *See* 18 U.S.C. § 922(s)(1). Although the Brady Act is an example of the federal government's efforts to legislate gun control, it took seven years for Congress to pass the Act. *See* Ronald A. Giller, Note, *Federal Gun Control in the United States: Revival of the Tenth Amendment*, 10 ST. JOHN'S J. LEGAL COMMENT. 151, 172 (1994) (stating that enactment of Brady bill, which was delayed for seven years, was hindered by "extraordinarily partisan rhetoric").

[10] *See* Mark Johnson, *Brady Law in NRA's Sights*, TAMPA TRIB., June 10, 1997, at 8 (stating that NRA lawyers began brainstorming about how to overturn Brady Act days after Congress passed it).

[11] *See infra* notes 78-83 and accompanying text (discussing procedural history of *Printz* and noting that cases were brought by plaintiffs funded by NRA); *cf.* Dennis A. Henigan, *N.R.A. Should Not Rejoice: Brady Act Lives On*, NAT'L L.J., July 28, 1997, at A17 (arguing that NRA's objective to destroy Brady Act and establish precedent that would threaten other gun laws failed).

[12] *See* Johnson, *supra* note 10, at 8 (discussing NRA attorneys Gardiner and Baker's approach in challenging Brady Act). The Tenth Amendment states 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." U.S. CONST. amend. X.

[13] *See* Johnson, *supra* note 10, at 8 (stating that NRA lawyers spread word that NRA was seeking sheriffs willing to fight Brady Act). After locating sheriffs willing to fight the Brady Act, the NRA then financed litigation against the Act, which resulted in *Printz v. United States*, 117 S. Ct. 2365 (1997), the subject of this Note. *See id.*

[14] *See* Printz v. United States, 117 S. Ct. 2365, 2369 (1997) (stating that case was filed by Jay Printz and Richard Mack, law enforcement officers for Ravalli County, Montana, and Graham County, Arizona, respectively); Johnson, *supra* note 10, at 8 (noting that NRA located individuals who ultimately became *Printz* plaintiffs).

constitutionally infringed on state sovereignty.[15] The *Printz* decision reflects the Court's recent movement towards restoring principles of federalism.[16] This movement may inhibit Congress's ability or willingness to enact future gun control legislation.[17] After *Printz*, it appears that enacting constitutionally sound gun control legislation may be more difficult.[18] Nonetheless, with the increasing societal and economic costs of gun violence,[19] it is crucial that Congress strive to enact valid gun control legislation.[20]

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[15] *See Printz*, 117 S. Ct. at 2384 (ruling that burdens Brady Act interim provisions impose violate principles of state sovereignty).

[16] *See* Eric W. Hagen, Note, United States v. Lopez: *Artificial Respiration for the Tenth Amendment*, 23 PEPP. L. REV. 1363, 1374 (1996) (stating that Court in *New York v. United States*, 505 U.S. 549 (1992), restored federalism principles by acknowledging vitality of Tenth Amendment and reaffirming that reach of Commerce Clause is not unlimited); Timothy Jones & Janine Tyne, Note, Printz v. United States: *An Assault upon the Brady Act or a Tenth Amendment Fortification?*, 10 ST. JOHN'S J. LEGAL COMMENT. 179, 180-82 (1994) (discussing Tenth Amendment's resurgence as limitation on Congress's legislative powers). Federalism is defined as a term addressing interrelationships among the states as well as the relationships between the states and the federal government. *See* BLACK'S LAW DICTIONARY 612 (6th ed. 1990). The central tenet of federalism is that Congress has specific enumerated powers, with any remaining powers being reserved to the states. *See* Jones & Tyne, *supra*, at 186. Other authors have described the substantive conception of federalism as a limit on the federal government's power to legislate local matters. *See* Steven A. Delchin, *Viewing the Constitutionality of the Access Act Through the Lens of Federalism*, 47 CASE W. RES. L. REV. 553, 585 (1997) (defining federalism based upon Supreme Court rhetoric in *United States v. Lopez*, 514 U.S. 549 (1995)).

[17] *See infra* notes 178-82 and accompanying text (discussing obstacles that Congress will have to overcome in enacting legislation after *Printz*).

[18] *See Leading Cases: Federalism — Compelling State Officials to Enforce Federal Regulatory Regimes*, 111 HARV. L. REV. 207, 217 (1997) (stating that even if Supreme Court had intended to create blanket prohibition against federal commandeering in *Printz*, Congress still faces challenge of determining how it can enact constitutional federal gun control legislation).

[19] *See* Murtha & Smith, *supra* note 8, at 205-06 (stating that gun violence in America is national epidemic); Franklin E. Zimring, *Kids, Guns, and Homicide: Policy Notes on an Age-Specific Epidemic*, 59 LAW & CONTEMP. PROBS. 25, 25 (1996) (describing juvenile firearms use as epidemic problem in United States); Daniel J. French, Note, *Biting the Bullet: Shifting the Paradigm from Law Enforcement to Epidemiology: A Public Health Approach to Firearm Violence in America*, 45 SYRACUSE L. REV. 1073, 1087-89 (1995) (stating that gun violence in America has characteristics associated with epidemics: it affects health, requires warnings, restricts behavior, and curtails movement in infected areas); Elizabeth Fernandez, *Guns in America, A Matter of Public Health*, HOUSTON CHRON., Oct. 22, 1997, at A1 (discussing health community's view that gun violence is public health concern as significant as AIDS, cancer, or heart disease); Robert B. Gunnison, *Gun Violence Costing Billions, Report Says*, S.F. CHRON., Oct. 19, 1994, at A11 (noting that gun violence cost California more than $5 billion in medical expenses and lost productivity in 1993).

[20] *See* Kim Dayton & Tom Stacy, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 250-52 (1997) (arguing that crime has been underfederalized and Congress should take greater role in crime fighting to ensure greater uniformity and efficiency); Thomas J. Walsh, *The Limits and Possibilities of Gun Control*, 23 CAP. U. L. REV. 639, 663 (1994) (noting that tighter gun control laws and corresponding lower rates of gun violence in

This Note analyzes the Supreme Court's decision in *Printz* and discusses its effect on future gun control legislation. Part I explains the development of the law prior to *Printz*, focusing on the Tenth Amendment, the Commerce Clause, and the Brady Act. Part II discusses the facts, rationale, and holding in *Printz*. Part III analyzes the *Printz* decision and argues that the majority opinion is erroneous. Part IV proposes a solution in light of *Printz* that Congress can use in enacting future gun control legislation. This Note suggests that Congress can circumvent the *Printz* decision by invoking an alternative constitutional power, the Spending Clause.[21] This Note concludes that Congress should carefully enact gun control legislation to overcome *Printz* and continue to pursue federal gun control measures.[22]

I. BACKGROUND

The Commerce Clause[23] of the United States Constitution grants Congress authority to regulate interstate commerce.[24] Congress enacted the Brady Act, as it frequently does with gun control legislation, under its Commerce Clause powers.[25] For many years, the Supreme Court was extremely deferential to congressional legislation enacted under the Commerce Clause.[26] Similarly, the Court

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foreign countries suggest stricter gun control laws may reduce gun violence in United States); Mark Udulutch, Note, *The Constitutional Implications of Gun Control and Several Realistic Gun Control Proposals*, 17 AM. J. CRIM. L. 19, 23 (1989) (stating that rational, workable federal legislation is needed to stop misuse of firearms).

[21] *See infra* notes 185-96 and accompanying text (discussing possible use of Spending Clause to cure problems presented by *Printz*).

[22] *See infra* notes 197-98 and accompanying text (summarizing arguments in this Note).

[23] U.S. CONST. art. I, § 8, cl. 3.

[24] *See id.* The Commerce Clause gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.* The commerce power serves both "as a restraint on state action and as a source of national authority." GERALD GUNTHER, CONSTITUTIONAL LAW 93 (12th ed. 1991) (discussing scope and purpose of Commerce Clause powers).

[25] *See* SUGARMANN & RAND, *supra* note 2, at 11-12 (providing history of federal firearms legislation). Congress has enacted numerous gun control regulations under the Commerce Clause including: the Act of February 8, 1927, which prohibited the interstate mailing of concealable firearms to private individuals; the Federal Firearms Act of 1938, which required firearms dealers to obtain a license from the federal government and also prohibited dealers from selling weapons interstate to residents of states that required a permit to purchase firearms; the Gun Control Act of 1968, which extended a ban on interstate sales and shipment to include rifles, shotguns, and ammunition; and the Gun Free School Zones Act of 1990, which made it an offense to knowingly possess a firearm in a school zone. *See id.*

[26] *See* Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 921

rarely overturned legislation based on Tenth Amendment state sovereignty concerns.[27] Because of the Court's long history of deference to Congress, legal scholars concluded that the Commerce Clause no longer provided any real limit to Congress's legislative powers.[28] In addition, many scholars believed that the Tenth Amendment no longer served as an independent check upon federal power under the Commerce Clause.[29]

A. Supreme Court Deference to Congressional Legislation: Commerce Clause and Tenth Amendment Jurisprudence

In determining the boundaries of Congress's legislative authority in relation to the states' legislative authority, the Tenth Amendment and the Commerce Clause are necessarily linked.[30] Congress

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(1997) (stating that 1995 decision in United States v. Lopez, 514 U.S. 549 (1995), was first Supreme Court case since New Deal which rejected Congress's attempted exercise of Commerce Clause power); Russell L. Weaver, Lopez *and the Federalization of Criminal Law*, 98 W. VA. L. REV. 815, 815-16 (1996) (stating that Court adopted extremely deferential interpretation of Commerce Clause after 1930s); Lisa Yumi Gillette, Note, *Lawyers, Guns, and Commerce:* United States v. Lopez *and the New Commerce Clause Doctrine*, 46 DEPAUL L. REV. 823, 823 (1997) (noting that 1976 decision in National League of Cities v. Usery, 426 U.S. 833 (1976), was first instance since 1936 in which Supreme Court struck down legislation based on Commerce Clause).

[27] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (allowing Congress to regulate local activities under Commerce Clause if, in aggregate, activity affected interstate commerce); United States v. Darby, 312 U.S. 100 (1941) (bestowing Congress with wide latitude in determining which activities affected interstate commerce); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (granting Congress broad authority to regulate anything within "stream of commerce"); Weaver, *supra* note 26, at 817 (stating that Court's deferential approach to Commerce Clause accompanied determination that Tenth Amendment no longer provided independent limitation on federal power).

[28] *See* Anthony B. Ching, *Traveling down the Unsteady Path:* United States v. Lopez, New York v. United States, *and the Tenth Amendment*, 29 LOY. L.A. L. REV. 99, 141 (1995) (stating that Court's interpretation of Commerce Clause expanded Congress's power to legislate every activity that affects commerce); Julian Epstein, *Evolving Spheres of Federalism After* U.S. v. Lopez *and Other Cases*, 34 HARV. J. ON LEGIS. 525, 525 (1997) (stating that for nearly 50 years Congress used Commerce Clause authority in plenary manner); Weaver, *supra* note 26, at 819 (describing as radical *Lopez*'s reversal of 60 years of deference to Congress).

[29] *See* William T. Barrante, *States Rights and Personal Freedom Breathing Life into the Tenth Amendment*, 63 CONN. B.J. 262, 262 (1989) (discussing belief that after Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), Tenth Amendment no longer served to limit federal power); Ching, *supra* note 28, at 110 (stating that from 1941 until 1976 Tenth Amendment was "moribund"); Peter A. Lauricella, *The Real "Contract with America": The Original Intent of the Tenth Amendment and the Commerce Clause*, 60 ALB. L. REV. 1377, 1378-79 (1997) (noting that less than 10 years ago scholars believed Supreme Court had written off Tenth Amendment); Jones & Tyne, *supra* note 16, at 179-80 (stating that many legal commentators claimed "Tenth Amendment no longer had any real legal force").

[30] *See* New York v. United States, 505 U.S. 144, 156 (1992) (discussing connection between Tenth Amendment and Commerce Clause); Sheila A. Mikhail, *Reversing the Tide Under*

has the power to regulate interstate commerce under the Commerce Clause.[31] Under the Tenth Amendment, any powers that are constitutionally delegated to Congress are powers not reserved for the states.[32] Conversely, powers that are not delegated to Congress in the Constitution necessarily belong to the states.[33]

The Supreme Court applies an extremely deferential rational basis test[34] when reviewing congressional legislation enacted under the Commerce Clause.[35] Under this test, legislation is presumed constitutional unless the Court determines that Congress had no rational basis for finding that the regulated activity substantially affects interstate commerce.[36] The Court first demonstrated such a willingness to defer to congressional legislation in the late 1930s.[37]

Throughout the next several decades, the Court continued to uphold all congressional legislation enacted under the Commerce Clause.[38] In 1976, the Court handed down *National League of Cities*

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the Commerce Clause, 86 J. CRIM. L. & CRIMINOLOGY 1493, 1495 (1996) (stating that Commerce Clause and Tenth Amendment are interrelated issues). *See generally* Ching, *supra* note 28, at 103 (arguing that evolution of Commerce Clause jurisprudence is essentially evolution of Tenth Amendment jurisprudence). If Congress enacts legislation that is outside the scope of its delegated Commerce Clause power, it may also violate the Tenth Amendment. *See* Mikhail, *supra*, at 1495.

[31] *See* STONE ET AL., CONSTITUTIONAL LAW 139 (2d ed. 1991) (discussing power delegated to Congress in Commerce Clause).

[32] *See New York*, 505 U.S. at 156.

[33] *See id.* at 155-56 (discussing indispensable connection between Commerce Clause and Tenth Amendment).

[34] *See id.* (noting that Court uses extremely deferential rational basis test when reviewing legislation enacted under Commerce Clause); Mikhail, *supra* note 30, at 1523-24 (explaining rational basis standard of review); *see also* Maryland v. Wirtz, 392 U.S. 183, 189-90 (1968), *overruled by* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (stating that congressional legislation is upheld if there is any rational basis for legislation in question).

[35] *See* United States v. Lopez, 514 U.S. 549, 603 (1995) (Souter, J., dissenting) (noting that Supreme Court is deferential when reviewing congressional legislation).

[36] *See id.* (noting that Court should uphold legislation if congressional determination is within realm of reason). Congress presumes statutes created by Congress under the Commerce Clause are constitutional. *See* Hodel v. Indiana, 452 U.S. 314, 323 (1981).

[37] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 6-10 (1937). In the 1930s, Congress used the Commerce Clause to pass President Roosevelt's New Deal legislation. *See* Mikhail, *supra* note 30, at 1498. President Roosevelt was eventually able to obtain judicial approval of his legislation after he made several judicial appointments. *See id.* In *NLRB*, the Court held that the National Labor Relations Act of 1935 fell within Congress's power under the Commerce Clause. *See NLRB*, 301 U.S. at 30-31.

[38] In 1936, the *Carter* Court held that the Bituminous Coal Conservation Act of 1935 was unconstitutional because it regulated a purely local activity. *See* Carter v. Carter Coal Co., 298 U.S. 238, 303-05 (1936). After *Carter*, however, the Court did not invalidate any federal statute based on state sovereignty until *National League of Cities* in 1976. *See* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

v. Usery,[39] a case that temporarily resurrected the Tenth Amendment as a limitation on Congress's Commerce Clause powers.[40] The plaintiffs in *National League of Cities* challenged federal legislation that extended minimum wage and maximum hour requirements to almost all state employees.[41] The Court held that federal legislation that impacts areas traditionally regulated by the states violates state sovereignty unless justified by a sufficiently important federal interest.[42] However, the Court overruled its decision just nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*.[43]

The *Garcia* plaintiff sought a declaratory judgment that it was entitled to Tenth Amendment immunity from minimum wage and maximum hour provisions in congressional legislation.[44] In *Garcia*, the Court held that Congress, rather than the Court, should determine the extent of states' rights under the Tenth Amendment.[45]

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[39] 426 U.S. 833 (1976).

[40] *See id.* at 845, 851 (ruling unconstitutional congressional legislation that Court found violated state sovereignty); Ching, *supra* note 28, at 111 (stating that Supreme Court resurrected Tenth Amendment in 1976 in *National League of Cities*). In *National League of Cities*, the Supreme Court held that the Tenth Amendment barred Congress from applying federal minimum-wage and overtime requirements to state and city employees. *See National League of Cities*, 426 U.S. at 842-45. The Court noted that some federal laws enacted by Congress regulate matters that directly impair the states' ability to legislate areas of traditional governmental functions. *See id.* at 845, 852 (finding that states have power to determine whom they employ, hours employees work, compensation, and overtime). The Court held that such laws violate principles of state sovereignty unless they are justified by a sufficiently important federal interest. *See id.* at 852-55. The Court in *National League of Cities* reasoned that the laws in question were unconstitutional because they regulated traditional state functions, which were outside of Congress's reach, without justification. *See id.*

[41] *See National League of Cities*, 426 U.S. at 836-37 (discussing amendment to Fair Labor Standards Act that extended minimum wage and maximum hour provisions to almost all state employees and various political subdivisions).

[42] *See id.* at 852 (stating that Commerce Clause does not empower Congress to enforce Fair Labor Standards Act). Although the Court in *National League of Cities* supplied some examples of traditional governmental functions, it did not offer any explanation as to how a "traditional" function is to be distinguished from a "nontraditional" one. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530 (1985) (criticizing test created by Court in *National League of Cities*).

[43] *See Garcia*, 469 U.S. at 557 (overruling *National League of Cities*). In *Garcia*, the Court considered whether the minimum wage law applied to the municipal mass transit authority. *See id.* at 530-31. The Court noted the difficulty in identifying whether particular state functions are immune from federal regulation. *See id.* at 546-47. The Court rejected the traditional governmental function test established in *National League of Cities* and instead left state sovereignty issues to the national political process. *See id.* at 539, 546-47, 552-54 (stating that determining whether governmental function is integral or traditional is unworkable in practice).

[44] *See id.* at 530-32 (discussing plaintiff's charge that provisions of Fair Labor Standards Act should not apply to state and local transit systems).

[45] *See id.* at 546-47.

Garcia effectively abolished the Tenth Amendment as an independent limitation on the federal government's legislative powers.[46] After *Garcia*, legal analysts believed that the Supreme Court would no longer use the Tenth Amendment to restrict Congress's legislative powers.[47] The Court's rejection of the Tenth Amendment, combined with its long history of deference to Commerce Clause legislation, suggested that Congress's ability to legislate was limitless.[48]

B. The Supreme Court's Revival of State Sovereignty

Only seven years after *Garcia*, the Supreme Court once again changed its position. In *New York v. United States*,[49] the Court reestablished the Tenth Amendment as an independent limitation on Congress's ability to regulate under the Commerce Clause.[50] In *New York*, the state of New York and two counties challenged federal legislation that required states to dispose of radioactive waste generated within their borders.[51] The *New York* Court invalidated the legislation that commandeered the states' legislative processes by directly compelling them to implement a federal regulatory

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[46] *See id.* at 560 (Powell, J., dissenting) (stating that majority's opinion reduces Tenth Amendment to "meaningless rhetoric" when Congress enacts legislation under Commerce Clause); Ching, *supra* note 28, at 114 (arguing that *Garcia* relegated status of Tenth Amendment to "mere window dressing").

[47] *See supra* notes 28-29 and accompanying text (discussing belief by legal scholars that Tenth Amendment no longer limited Congress's legislative powers).

[48] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 631 n.187 (1992) (stating that Commerce Clause became limitless authorization for national regulatory legislation).

[49] 505 U.S. 144 (1992).

[50] *See id.* at 174-77 (finding "take-title" provision of Low-Level Radioactive Waste Policy Amendments Act of 1985 unconstitutional under Tenth Amendment); *see also* Hagen, *supra* note 16, at 1373-74 (arguing that *New York* revived Tenth Amendment and reestablished that Congress's Commerce Clause authority is not unlimited). The take-title provision provides:

> If a State . . . in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

42 U.S.C. § 2021e(d)(2)(C) (1994).

[51] *See New York*, 505 U.S. at 154 (discussing procedural history).

program.[52] The provision that the Court invalidated required states to either implement federal legislation or "take title" and possession of radioactive waste produced in their state.[53] The Court found that the provision, which merely offered states a choice between two unconstitutionally coercive alternatives, infringed upon state sovereignty reserved in the Tenth Amendment.[54]

However, the *New York* Court noted that Congress may offer states incentives to encourage the enforcement of such programs.[55] The Court determined that the challenged legislation was not an incentive because it compelled state action, providing states with no real choice.[56] Thus, the *New York* Court found the legislation unconstitutional.[57] The Court's decision in *New York* reaffirmed state sovereignty, revived the dormant Tenth Amendment,[58] and set the stage for *Printz*.

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[52] *See id.* at 176 (finding take-title provision unconstitutional). In *New York*, the State of New York brought an action challenging provisions of the Low-Level Radioactive Waste Policy Act ("Waste Act"). *See id.* at 154. Congress enacted the Waste Act after several states shut down their radioactive waste sites. *See id.* at 150. Congress was concerned that the trend of shutting down sites would continue and that the United States would have no locations to dispose of radioactive waste. *See id.* The Waste Act provided three types of incentives to encourage States to comply with their obligation to dispose of radioactive waste within their borders. *See id.* at 152. The Court determined that the first two types of incentives, the monetary incentives and the access incentives, were constitutional. *See id.* at 173-74. The third type of incentive was the take-title provision. *See id.* at 153-54. This provision required a state to "take title" of radioactive waste generated within its borders if it was unable to provide for the disposal of the waste. *See id.* Additionally, the state could be liable for any damages incurred if the state failed to take possession of the waste. *See id.* The Court noted that Congress has the ability to encourage or influence states to regulate in a particular way. *See id.* at 166. The Court ruled, however, that with regards to the take-title provision, Congress acted outside its authority to encourage state action. *See id.* at 176. The Court determined that the take-title provision does not provide states with a choice, but rather forces states to regulate according to federal instructions. *See id.* The *New York* Court held that, because the "Act commandeers the legislative processes of the [s]tates by directly compelling them to enact and enforce a federal regulatory program," it was unconstitutional. *Id.* (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc., 452 U.S. 264, 288 (1981)).

[53] *See id.* at 174-75 (explaining requirements of take-title provision).

[54] *See id.* at 177 (finding that take-title provision falls outside Congress's enumerated powers and is inconsistent with governmental structure established in Constitution).

[55] *See id.* at 166 (stating that Congress may use incentives to influence states' policy choices).

[56] *See id.* at 176-77 (stating that take-title provision does not constitute incentive because it offers state government no choice other than implementing federal legislation).

[57] *See id.* (ruling that take-title provision of legislation is unconstitutional).

[58] *See id.* at 177 (holding that take-title provision is inconsistent with structure of Constitution because it infringes upon state sovereignty reserved in Tenth Amendment).

II. THE *PRINTZ* DECISION

The gun control legislation challenged in *Printz* has a compelling history beginning in 1981 with the attempted assassination of President Ronald Reagan.[59] The would-be assassin, John Hinckley, Jr., shot and paralyzed presidential press secretary Jim Brady during the assassination attempt.[60] Since the shooting, Brady and his spouse, Sarah, have become well-known spokespersons for the national movement to curb gun violence.[61] One result of the Bradys' anti-gun crusade is the Brady Act.[62]

A. Background: The Brady Handgun Violence Prevention Act

Congress enacted the Brady Act as an amendment to the Gun Control Act of 1968 ("GCA").[63] The GCA provided detailed federal regulations governing the distribution of firearms, including pro-

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[59] *See* Howard Raines, *Reagan Wounded in Chest by Gunman; Outlook "Good" After 2 Hour Surgery; Aide and 2 Guards Shot, Suspect Held*, N.Y. TIMES, Mar. 31, 1981, at A1 (describing assassination attempt on President Ronald Reagan in 1981). John Hinckley, Jr. attempted to assassinate President Reagan in front of the Washington Hilton Hotel at 2:25 p.m. on March 30, 1981. *See 1981 Top 10 Attacks on World Leaders*, DAILY OKLA., Dec. 28, 1981, at A3 (discussing assassination attempt on President Reagan). Hinckley attempted to kill President Reagan because he believed that it would impress Jodie Foster, the actress with whom he was obsessed. *See* Mollie Dickenson, *Thumbs Up!*, HOUS. CHRON., May 8, 1988, at 9 (providing detailed account of events leading up to assassination attempt on President Reagan). Hinckley had been obsessed with Jodie Foster since 1976, when he first saw the movie *Taxi Driver*. *See id.* He began to stalk President Carter in the late 1970s, imitating the character Robert DeNiro played in the film, who also stalked a politician. *See id.* Hinckley got close to Carter on a few occasions in October 1980, but did not have a gun on him at the time. *See id.* Ronald Reagan became the target of Hinckley's stalking after winning the presidential election in November 1980. *See id.* President Reagan made a public appearance at the Hilton Hotel before the Building Tradesmen of the AFL-CIO in the afternoon of March 30, 1980. *See id.* As he left the building, Hinckley pulled out his gun and fired off six bullets. *See id.* The President was shot after one bullet ricocheted off a car and went into his chest area. *See id.* Another bullet went into the forehead of Jim Brady, the President's press secretary. *See id.* While President Reagan recovered from his injuries, the bullet left Jim Brady paralyzed. *See id.* At trial, a jury found John Hinckley, Jr. not guilty by reason of insanity of the offense of attempting to assassinate President Reagan. *See* Thomas Ferraro, *Attempt to Kill Reagan 5 Years Ago Changed Their Lives Forever*, SEATTLE TIMES, Mar. 30, 1986, at A3 (discussing effect of assassination attempt five years later).

[60] *See Outlook: Database*, U.S. NEWS & WORLD REP., Mar. 25, 1996, at 19 (stating that Reagan's press secretary, Jim Brady, was also shot during Hinckley's assassination attempt).

[61] *See* Brady, *supra* note 5, at 77 n.*, 87. Sarah Brady is the chair of Handgun Control, Inc. and the Center to Prevent Handgun Violence. *See id.* at 77 n.*.

[62] *See* Jill A. Tobia, *The Brady Handgun Violence Prevention Act: Does It Have a Shot at Success?*, 19 SETON HALL LEGIS. J. 894, 898-99 (1995) (stating that Brady Act is end result of Bradys' efforts).

[63] 18 U.S.C. § 922(b) (1994).

hibiting the sale of firearms to certain classes of individuals.[64] Although expansive gun control legislation, the GCA did not provide for effective enforcement.[65] For example, the GCA did not require background checks on firearm purchasers to ensure that they did not fall within one of its prohibited classes.[66] Rather, the GCA's sole enforcement provision required purchasers to sign a form certifying that they did not belong to one of the statute's prohibited classes.[67] Despite the apparent lack of effective enforcement provisions, the GCA remained untouched until the assassination attempt on President Reagan renewed interest in the issue.[68]

The presidential assassination attempt that paralyzed Jim Brady inspired enactment of the Brady Act.[69] Congress first introduced the Brady Act in Congress as an amendment to the GCA in 1988, seven years after Jim Brady was shot.[70] The Brady Act died in Congress in 1990, in 1991, and again in 1992.[71] Finally, on November 25, 1993, Congress passed the Brady Act into law.[72]

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[64] *See id.* (prohibiting firearms dealers from transferring firearms to any out-of-state resident less than 21 years of age, or to anyone who is prohibited by state or local law from purchasing or possessing firearms); *id.* § 922(d) (banning certain individuals from possessing or transferring firearms, including felons, drug users, deranged persons, illegal aliens, persons dishonorably discharged from armed forces, persons who have renounced their citizenship, or persons convicted of misdemeanors related to domestic violence).

[65] *See* Tobia, *supra* note 62, at 898 (addressing weaknesses of GCA).

[66] *See* 18 U.S.C. § 922(c)(1) (1968) (requiring purchasers to sign form stating that they are not prohibited from purchasing firearms); Tobia, *supra* note 62, at 898 (stating that GCA failed to provide effective method of enforcement).

[67] *See* 18 U.S.C. § 922(c)(1) (1994). The form that the purchaser must sign states:

> Subject to the penalties provided by law, I swear that, in the case of any firearm other than a shotgun or rifle, I am twenty-one years or more of age, or that in the case of a shotgun or rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United State Code, from receiving a firearm in interstate commerce or foreign commerce; and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside . . . .

Id.

[68] *See* Tobia, *supra* note 62, at 898 (stating that assassination attempt on President Reagan revitalized interest in enforcement problems of GCA).

[69] *See* H.R. REP. NO. 103-344, at 8 (1993) (explaining that Brady Act was passed in response to what Congress called epidemic of gun violence).

[70] *See* Murtha & Smith, *supra* note 8, at 214 (noting that although Reagan assassination attempt highlighted problem of gun violence, legislation was not introduced until seven years later).

[71] *See* James B. Jacobs & Kimberly A. Potter, *Keeping Guns out of the "Wrong" Hands: The Brady Law and the Limits of Regulation*, 86 J. CRIM. L. & CRIMINOLOGY 93, 98 (1995) (tracing legislative history of Brady Act).

[72] *See* 139 CONG. REC. S17083 (daily ed. Nov. 24, 1993) (reporting House vote as 238 to

The Brady Act requires the United States Attorney General to establish a national background check system by November 1998[73] for the purchase of guns.[74] The system would ensure that those not qualified for gun ownership under GCA standards are prevented from purchasing guns.[75] In addition, the Brady Act provides interim provisions effective until the national system becomes operative.[76] These interim provisions require state and local law enforcement officers to conduct background checks on prospective handgun purchasers.[77] The plaintiffs in *Printz* challenged the constitutionality of these interim enforcement provisions.

189, and Senate vote as 63 to 36).

[73] The national database, established by the Justice Department, provides an instant check system that will verify whether a prospective purchaser may lawfully buy a gun. *See* David Jackson, DALLAS MORN. NEWS, June 11, 1998 at 1A (discussing FBI's plan to unveil national database in November 1998). Although the national database will contain many criminal records, it will not be complete. *See id.*; Wendy Koch, *Instant Computer Checks to Replace Waiting Period for Guns, Budget Negotiations Also Agree Not to Impose Fee for Checks*, USA TODAY, Oct. 16, 1998, at 6A. The database will have limited access to felony convictions and will not contain local police records including domestic disputes, disorderly conduct, or misdemeanor drug offenses. *See id.* Attorney General Janet Reno recently noted that because "[n]o one knows more about state records than the states themselves . . . the system will work better if the states participate." Jackson, *supra*, at 1A. After the Court's decision in *Printz*, however, state participation in conducting background checks is merely voluntary. *See id.* (noting that federal government can no longer compel police to conduct background checks on gun buyers).

The FBI and state governments began using the instant check system on November 30, 1998. *See Gun-Buyer Background System Checks In*, WASH. POST, Nov. 30, 1998, at A5; *Gun Buyers Facing New U.S. Background Checks*, L.A. TIMES, Nov. 30, 1998, at A16. Authorities say they expect difficulties implementing the new system, which replaces the state and local government voluntary checks. *See id.* The new instant check system, however, will not affect states with stricter state systems. *See id.*

[74] *See* Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1537 (note following 18 U.S.C. § 922 (1994)).

[75] *See* Printz v. United States, 117 S. Ct. 2365, 2368 (1997) (explaining background check system).

[76] *See* 18 U.S.C. § 922(s)(1) (1994).

[77] *See id.* § 922(s)(2). A handgun dealer must obtain the buyer's name, address, date of birth, and a sworn statement that the buyer does not belong to a class of prohibited purchasers. *See id.* § 922(s)(3). The dealer must verify the information and then provide the chief law enforcement officer ("CLEO") of the local jurisdiction with the buyer's residence address and a copy of the form. *See id.* § 922(s)(1)(A)(i)(III), (IV). The dealer must wait five business days before completing the sale unless the CLEO informs the dealer earlier that he believes the transfer would be legal. *See id.* § 922(s)(1)(A)(ii). However, the dealer may sell the handgun immediately if the buyer presents a state handgun permit issued after a background check or if the state provides an instant background check. *See id.* § 922(s)(1)(C), (D). The CLEO receiving the form must make a reasonable effort to determine, within five business days, whether receipt or possession would violate the law. *See id.* § 922(s)(2). This includes conducting research in available state and local record keeping systems and in a national system designated by the attorney general. *See id.* The penalty for a person who knowingly violates the Brady Act is a fine, imprisonment up to one year, or both. *See id.* § 924(a)(5) (1994).

B. Factual and Procedural Setting of Printz

Jay Printz and Richard Mack, the Chief Law Enforcement Officers ("CLEOs") for Ravailli County, Montana, and Graham County, Arizona, respectively, filed separate actions challenging the constitutionality of the Brady Act's interim provisions.[78] The CLEOs, with financial backing by the NRA,[79] argued that the enforcement provisions compelling them to execute federal law violated the U.S. Constitution.[80] The district court in each case agreed and held that the provisions requiring them to perform background checks were unconstitutional.[81] After consolidation of the cases,[82] the Ninth Circuit reversed on appeal, finding that the Brady Act's interim provisions were constitutional.[83]

C. The Court's Rationale and Holding in Printz

At the outset, the Supreme Court stated that looking to the Constitution's text would not resolve whether the Brady Act's interim provisions were unconstitutional.[84] The Court found no constitutional text specifically addressing whether Congress could require state officers to enforce federal legislation.[85] Thus, the Court turned to three other sources to analyze the constitutionality of the

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[78] *See* Printz v. United States, 854 F. Supp. 1503, 1510 (D. Mont. 1994), *aff'd in part, rev'd in part, dismissed in part sub nom.* Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), *rev'd sub nom.* Printz v. United States, 117 S. Ct. 2365 (1997); Mack v. United States, 856 F. Supp. 1372, 1374 (D. Ariz. 1994) *aff'd in part, rev'd in part, dismissed in part*, 66 F.3d 1025 (9th Cir. 1995), *rev'd sub nom.* Printz v. United States, 117 S. Ct. 2365 (1997). In both cases, the district courts ruled unconstitutional the Brady Act provision requiring background checks. *See Printz*, 117 S. Ct. at 2369 (discussing procedural history). A divided panel for the Ninth Circuit reversed and found that the Brady Act interim provisions were constitutional. *See* Mack v. United States, 66 F.3d 1025, 1027 (9th Cir. 1995), *rev'd sub nom.* Printz v. United States, 117 S. Ct. 2365 (1997).

[79] *See* Johnson, *supra* note 10, at 8 (noting that NRA found *Printz* plaintiffs and paid for their lawyers).

[80] *See Printz*, 117 S. Ct. at 2369 (explaining procedural history leading to current case). The CLEOs argued that the Brady Act violated the Tenth Amendment, the Fifth Amendment, and the Thirteenth Amendment. *See* Mack, 66 F.3d at 1028. The Supreme Court did not address all of the CLEOs' claims, but rather, focused on the Tenth Amendment state sovereignty challenge. *See Printz*, 117 S. Ct. at 2384.

[81] *See Printz*, 117 S. Ct. at 2369.

[82] *See id.*

[83] *See Mack*, 66 F.3d at 1027 (rejecting plaintiffs Mack's and Printz's challenges to Brady Act).

[84] *See Printz*, 117 S. Ct. at 2370 (stating that no constitutional text speaks to precise issue in this case).

[85] *See id.*

challenged provisions: (1) the historical understanding of Congress's legislative authority,[86] (2) the structure of the government as established in the Constitution,[87] and (3) past Supreme Court decisions.[88]

The *Printz* Court first considered whether historically, state officers were required to enforce federally mandated programs.[89] In defending the Brady Act, the United States argued that many early laws required state officials to participate in the implementation of federal laws.[90] The Court, however, determined that these early laws merely imposed obligations on the state judiciary.[91] According to the Court, these laws did not imply a congressional power to require state executive officers to enforce federal law.[92] In addition, the Court noted a lack of federal statutes commandeering state executive officers.[93]

The Court then turned to the structure of the government, which it described as a system of dual sovereignty.[94] The Constitution's Framers intended to provide citizens with a state and federal government that ensures a balance of power and reduces the risk of abuse of power.[95] The *Printz* Court determined that the federal

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[86] *See id.* at 2370-71 (examining whether Congress has traditionally compelled state officers to administer and enforce federal programs).

[87] *See id.* at 2370, 2376 (discussing structure of Constitution as system of dual sovereignty).

[88] *See id.* at 2370. The Court indicated that it will look to other Supreme Court decisions addressing whether Congress may compel states to enforce federal regulatory programs. *See id.* at 2379-81.

[89] *See id.* at 2370-71.

[90] *See id.* (noting that early statutes required state courts and court clerks to record applications for citizenship, register aliens, and issue citizenship certificates).

[91] *See id.* at 2371 (stating that these laws only establish that Congress could impose obligations on state judges to enforce federal legislation relating to their judicial power). The Court acknowledged that an early law did exist that imposed duties on state executive officers, the Extradition Act of 1793. *See id.* However, the Court found this law constitutional as a direct implementation of the Extradition Clause of the Constitution. *See* U.S. CONST. art. IV, § 2; *Printz*, 117 S. Ct. at 2372.

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

[93] *See id.* at 2375 (stating that early and recent history lack statutes commandeering state officials). The Court also distinguished recent statutes that condition state participation on federal funding. *See id.* at 2376 (stating that conditional statutes do not involve *Printz* issues).

[94] *See id.* at 2376. Examples of constitutional text that demonstrate state sovereignty include the prohibition on any involuntary reduction or combination of a state's territory (Article IV, Section 3); the Judicial Power Clause (Article III, Section 2); the Privileges and Immunities Clause (Article IV, Section 2); the amendment provision (Article V); and the Guarantee Clause (Article IV, Section 4). *See id.*

[95] *See id.* at 2377 (discussing Framers' choice to create Constitution providing Congress power to regulate individuals, not states). The Court noted that the great innovation of the design of the Constitution was the creation of two governments, state and federal. *See id.*

government's power would be "augmented immeasurably" if it were able to require state officers to enforce its laws.[96] Thus, the Court concluded that the Brady Act's interim provisions violated the Constitution's system of dual sovereignty by requiring state officials to enforce federal law.[97]

Having addressed the historical understanding and the government's structure, the *Printz* Court turned to past decisions of the Court.[98] The Court noted that federal commandeering of state governments is so novel that the Supreme Court did not face this issue until the 1970s.[99] The Court found *Printz* indistinguishable from the *New York* decision, the primary case on state sovereignty.[100] The *Printz* Court only briefly addressed other cases offered by the United States as support for the constitutionality of the Brady Act, and dismissed them as distinguishable.[101] The *Printz* Court concluded that under *New York*, Congress cannot compel states to enact or enforce federal regulatory programs.[102]

Further, the Court determined that the Framers rejected the concept of a powerful central government that would act upon the States. *See id.* (citing THE FEDERALIST NO. 15 (Alexander Hamilton)). Instead, the Framers chose a system where the federal and state governments would exercise concurrent authority over the people. *See id.* In the United States, the power surrendered by the people is divided between two distinct governments, state and federal. *See id.* at 2378 (referring to THE FEDERALIST NO. 51 (James Madison)). This division provides enhanced security of the people's constitutional rights. *See id.* The two "governments" each exercise a level of control over the other, while simultaneously controlling itself. *See id.*

[96] *See id.* at 2378. Justice Stevens's dissent argued that together, the Commerce Clause and the Necessary and Proper Clause establish the constitutionality of the Brady Act. *See id.* at 2387. In addition, the dissent pointed out that the Tenth Amendment does not impose any limitations on the exercise of delegated powers. *See id.* at 2387-88. The majority disagreed and argued that under *New York*, although Congress may pass laws requiring or prohibiting certain acts, it cannot directly compel states to require or prohibit those acts. *See id.* at 2383.

[97] *See id.* at 2384.

[98] *See id.* at 2379-81.

[99] *See id.* at 2379.

[100] *See id.* at 2382 (stating that difference between Brady Act and take-title provision in *New York* is not constitutionally significant). The government argued that *New York* was distinguishable because, unlike the take-title provision, the Brady Act does not require states to make policy. *See id.* at 2380.

[101] *See id.* at 2381 (distinguishing other cases offered by United States in support of constitutionality of Brady Act). The *Printz* Court ruled that *Testa v. Katt*, 330 U.S. 386 (1947), stated nothing about Congress's ability to require state executive officers to administer federal law. *See id.* In addition, the *Printz* Court ruled that *FERC v. Mississippi*, 456 U.S. 742 (1982), was also distinguishable as it only imposed preconditions to continued state regulation of an otherwise federally preempted field. *See id.*

[102] *See id.* at 2380, 2384 (discussing holding of *New York*). *But cf. id.* at 2398 (Stevens, J., dissenting) (arguing that majority in *New York* relied upon language that was dictum wholly unnecessary to decision of that case).

The *Printz* Court relied on a number of arguments in striking down the interim provisions of the Brady Act. The Court found that historical understanding of congressional power and past Supreme Court decisions did not support the Brady Act's interim provisions. Furthermore, the Court determined that the Brady Act's requirement that state CLEOs conduct background checks would disrupt the constitutional system of dual sovereignty.[103] Specifically, the Court determined that Congress lacks the authority to direct states or state officials to enact or enforce federal legislation.[104] Thus, the Court held the Brady Act's interim provisions unconstitutional.[105]

III. ANALYSIS OF THE *PRINTZ* DECISION

The Supreme Court's analysis in *Printz* is flawed for several reasons. First, the Court incorrectly asserted that there is no constitutional text addressing the issue in *Printz*.[106] Second, the Court disregarded substantial historical evidence suggesting that the Brady Act's requirements fall well within Congress's delegated powers.[107] Third, the Court misapplied precedent, dishonestly interpreting the *New York* holding, while disregarding other applicable Supreme Court cases.[108]

A. Support for the Brady Act Within the United States Constitution

The Court stated that nothing in the constitutional text addressed the issue presented in *Printz*.[109] Although the constitutional text may not fully resolve the issue, it does offer support for the constitutionality of the interim provisions.[110] Article I, Section 8 of the U.S. Constitution specifically grants Congress authority to regu-

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[103] *See id.* at 2384.

[104] *See id.*

[105] *See id.*

[106] *See id.* at 2370 (stating that no constitutional text speaks to issue at hand).

[107] *See infra* notes 127-43 and accompanying text (discussing historical evidence that supports Brady Act).

[108] *See infra* notes 146-74 and accompanying text (arguing that Court's analysis misapplies precedent).

[109] *See Printz*, 117 S. Ct. at 2370.

[110] *See id.* at 2387 (Stevens, J., dissenting) (arguing that constitutional text provides sufficient basis for disposition of case). Justices Souter, Ginsburg, and Breyer joined Justice Stevens's dissent. *See id.* at 2386.

late interstate commerce.[111] Congress's direct regulation of handgun sales in the Brady Act falls firmly within Congress's Commerce Clause powers.[112] The Necessary and Proper Clause,[113] also found in Article I, Section 8, provides Congress additional authority to make all laws that are necessary and proper for executing its delegated powers.[114]

The *Printz* Court never explicitly stated that the interim provisions fall outside of Congress's constitutionally delegated authority.[115] Nonetheless, that must be the Court's conclusion, because the Tenth Amendment itself imposes no restriction on the exercise of delegated powers.[116] If the *Printz* Court believed that the interim provisions fell within Congress's delegated authority, the Court's discussion of the Tenth Amendment would not be necessary.[117] Because the Court failed to explain its position adequately, it is unclear why it determined that Congress's constitutionally delegated powers did not encompass the interim provi-

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[111] *See* U.S. CONST. art. I, § 8.

[112] *See Printz*, 117 S. Ct. at 2387 (Stevens, J., dissenting) (arguing that Brady Act interim provisions fall within Congress's Commerce Clause powers). In his dissent, Justice Stevens noted that despite *Lopez*, the Brady Act is a constitutional regulation of interstate commerce. *See id.* Unlike the "Gun Free School Zones Act" that *Lopez* struck down, because the Brady Act regulates the sale of handguns, it directly regulates interstate commerce. *See* Mack v. United States, 66 F.3d 1025, 1028 n.5 (9th Cir. 1995), *rev'd sub nom.* Printz v. United States, 117 S. Ct. 2365 (1997) (distinguishing Brady Act from act struck down in *Lopez*). Apparently, even the *Printz* plaintiffs recognized this because they did not question the regulation of handgun sales, which falls within Congress's ability to regulate interstate commerce. *See id.* (noting that parties did not challenge Brady Act as outside Congress's Commerce Clause authority).

[113] U.S. CONST. art. I, § 8.

[114] *See* U.S. CONST. art. I, § 8, cl. 18. Congress has authority "[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." *Id.* The Necessary and Proper Clause, as explained by Chief Justice Marshall, by "[i]ts terms purport[s] to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420 (1819).

[115] *See Printz*, 117 S. Ct. at 2379 (discussing dissent's argument that Brady Act is constitutional under Commerce Clause and under Necessary and Proper Clause). The Court apparently concedes that the Brady Act falls within Congress's Commerce Clause authority. *See id.* The Court went on to argue, however, that even if Congress has authority to enact laws, it lacks authority to regulate state governments' regulation of interstate commerce. *See id.* This discussion by the Court does not support the Court's ultimate conclusion because the interim provisions in no way constitute congressional regulation of states' regulation of interstate commerce.

[116] *See id.* at 2387-88 (Stevens, J., dissenting).

[117] *See* New York v. United States, 505 U.S. 144, 156 (1992) (stating that Tenth Amendment and Commerce Clause are mirror images of each other).

sions.[118] Instead, the Court evaded the issue, noting that even if Congress had constitutional authority to pass the Brady Act, Congress could not require the states to participate.[119] Consequently, the Court's conclusion that the Constitution did not address the issue is unpersuasive in light of the Court's incomplete analysis of Congress's delegated powers.

To find the Brady Act's interim provisions constitutional, the Court only needed to acknowledge the narrow scope of the provisions — specifically, the temporary nature of the requirements.[120] For years, the Court's policy has been to construe statutes, if possible, in a manner that avoids rendering the statute unconstitutional.[121] Applying this principle, the Court should have ruled that the interim provisions do fall within the authority delegated to Congress in Article I, Section 8 of the Constitution.[122]

Congress enacted the Brady Act to prevent illegal gun purchases.[123] The Act's measures, which merely require temporary assistance from state officers in conducting background checks and mandating waiting periods, are essential to the public safety.[124] Moreover, the provisions serve as an effective deterrent to gun violence.[125] Under the Commerce Clause and the Necessary and Proper Clause, Congress may temporarily enlist local officers to ensure that only legal gun sales are made.[126]

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[118] *See Printz*, 117 S. Ct. at 2387 (Stevens, J., dissenting) (arguing that Article I provides ample authority for Brady Act interim provisions).

[119] *See id.* at 2369-70.

[120] *See* 18 U.S.C. § 922 (1994).

[121] *See* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (noting that if presented with conflicting views of federal requirements on states, Court will construe federal statutes to avoid constitutionality issues provided that such construction is not contrary to Congress's intent); *see also New York*, 505 U.S. at 170.

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

[123] *See* 137 CONG. REC. H2831-02, H2841-42 (daily ed. May 8, 1991) (statement of Rep. Hayes) (arguing that Brady Bill will work to prohibit sale of firearms to criminals); Tobia, *supra* note 62, at 905-06 (stating that because Brady measures only prohibit illegal gun purchases, impact on law abiding gun owners is minimal).

[124] *See Brady Law Background Checks Blocked 70,000 Gun Sales in '96*, CHI. TRIB., Sept. 5, 1997, at 10 (listing Justice Department statistics stating that from 1994, when Brady Bill was enacted, through 1996, more than 250,000 sales were blocked under background check laws); Jerry Zremski, *Study Says Brady Law Reduced Guns Entering State*, BUFF. NEWS, Sept. 21, 1997, at B5 (noting that study determined Brady Act prompted huge reduction in gunrunning into New York); *see also* HANDGUN CONTROL, INC., WAITING PERIODS WORK 10 (1993) (discussing findings which demonstrate that mandatory waiting periods in handgun sales reduce handgun violence).

[125] *See supra* note 124 and accompanying text.

[126] *See* U.S. CONST. art. I, § 8, cl. 18; *Printz*, 117 S. Ct. at 2387 (Stevens, J., dissenting) (noting that affirmative delegation of power to Congress in Article I provides ample author-

B. Historical Understanding Supports the Constitutionality of the Interim Provisions of the Brady Act

In support of the Brady Act, the United States argued that since the first congressional sessions, Congress enacted laws requiring the participation of state officials.[127] These early laws required state officials to arrest and deliver fugitives to other states, record citizenship applications, and register aliens.[128] Even the majority in *Printz* acknowledged that such early laws provide "contemporaneous and weighty evidence of the Constitution's meaning."[129]

However, the Court wrongly dismissed the government's argument that these early laws imply congressional authority to require state officials to assist in implementing the Brady Act.[130] The existence of these early laws negates the *Printz* Court's argument that compelled enlistment of state officers is novel.[131] In these early laws, Congress required state officers to assist in the enforcement of federal regulatory programs, the very thing it attempted in the Brady Act.[132] Thus, the Court unreasonably suggests that Congress lacked this power.[133]

To bolster its argument that historical understanding supported the Brady Act's constitutionality, the United States also introduced compelling excerpts from *The Federalist Papers*.[134] The U.S. Supreme Court recognizes *The Federalist Papers*[135] as evidence of the Framers'

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ity for legislation). The *Printz* dissent noted that state officials, obligated to support the Constitution, must adhere to federal law, which is supreme. *See id.* at 2400 (discussing mandate of Article VI, which states that federal law shall be supreme). Further, the dissent argued that nothing in the Constitution supports the proposition that state officers can ignore a command contained in a lawfully enacted congressional statute. *See id.*

[127] *See Printz*, 117 S. Ct. at 2370; *see, e.g.*, Act of July 31, 1789, ch. V, 1 Stat. 29 (1789) (establishing and appointing districts, ports, and state officers to collect duties imposed on tonnage of ships, vessels, goods, wares, and merchandise imported into United States); Act of Aug. 11, 1790, ch. XLIII, 1 Stat. 184-85 (1790) (requiring congressional consent to state procedures for collecting other tonnage duties).

[128] *See Printz*, 117 S. Ct. at 2370-71.

[129] *Id.* at 2370.

[130] *See id.* at 2371.

[131] *See id.* at 2370.

[132] *See id.* at 2392 (Stevens, J., dissenting) (arguing that majority erred in dismissing early laws that imposed federal obligations on state officials).

[133] *See id.* at 2391 (Stevens, J., dissenting) (arguing that Court's description of early laws compelling state action is misleading and incomplete).

[134] *See id.* at 2372.

[135] *The Federalist Papers* consist of 86 essays arguing in favor of adopting the Constitution. *See* THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961). The first *Federalist Paper* appeared in a New York newspaper on October 27, 1787. *See id.* at vii. They were first published under the pseudonym "Publius." *See* ALBERT FURTWANGLER, THE AUTHORITY OF PUBLIUS: A

intent.[136] Several excerpts support the argument that Congress acted within its authority in enacting the Brady Act.[137] For example, Alexander Hamilton explicitly stated that the federal government's authority enables the government to employ state citizens in the execution of federal laws.[138] Additionally, James Madison noted that the federal government's collection of taxes would be made by state officers.[139]

Admittedly, *The Federalist Papers* alone is insufficient to validate the Brady Act's provisions.[140] Nonetheless, historical evidence is a factor the Court considers when analyzing the constitutionality of a statute.[141] These documents indicate that the Framers intended to give the federal government power to require local officials' assistance in implementing national policy programs.[142] Given the evidence of the Framers' intent, and the acts taken by early congresses, the Court erred in failing to give adequate weight to this

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READING OF THE FEDERALIST PAPERS 51-53 (1984). Justice Clarence Thomas has described *The Federalist Papers* as the most famous example of political writing written during the ratification of the Constitution. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 360 (1995) (Thomas, J., concurring).

[136] *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 806 (1995) (acknowledging that *The Federalist Papers* may be source of Framers' intent); Buckley v. Valeo, 424 U.S. 1, 120 (1976) (recognizing *The Federalist Papers* as evidence of Framers' intent); Boris I. Bittker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is?*, 19 HARV. J.L. & PUB. POL'Y 9, 33 (1995) (stating that originalists frequently rely on *The Federalist Papers* for evidence of Framers' intent).

[137] *See Printz*, 117 S. Ct. at 2389 (Stevens, J., dissenting) (noting that excerpts from *The Federalist Papers* support government's position that Brady Act is within Congress's constitutional authority). Specifically, Justice Stevens pointed to Alexander Hamilton's writings in *The Federalist Papers Nos. 15, 27, 36,* and *45*. *See id.* at 2389-90.

[138] *See* THE FEDERALIST NO. 27 (Alexander Hamilton). Specifically, Hamilton stated that extending the authority of the federal government to the individual citizens of the states, enables the government to employ citizens in the execution of its laws. *See id.*

[139] *See* THE FEDERALIST NO. 45 (James Madison). Madison noted that the federal government's power to tax would "not be resorted to, except for supplemental purposes of revenue . . . and that the eventual collection, under the immediate authority of the Union, will generally be made by the officers . . . appointed by the several States." *Id.*

[140] *See* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 16 (1988) (questioning whether *The Federalist Papers* should be closely followed because they often conflict with each other).

[141] *See supra* note 129 and accompanying text.

[142] *See Printz*, 117 S. Ct. at 2389 (Stevens, J., dissenting) (arguing that Hamilton's meaning in *The Federalist No. 27* was unambiguous); Amicus Brief in Support of Respondent at 21, Printz v. United States, 117 S. Ct. 2365 (1997) (Nos. 95-1478, 95-1503) *available in* 1996 WL 585868 (citing Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1962 (1993), who stated that historical records demonstrate that Framers intended Congress to have power to require that state executives and state courts help implement its constitutional powers).

compelling historical information.[143]

C. *Prior Jurisprudence of the Court Supports the Constitutionality of the Interim Provisions of the Brady Act*

The *Printz* Court relied heavily on *New York* to declare the interim provisions of the Brady Act unconstitutional.[144] The facts underlying *New York* are somewhat similar to *Printz*, namely, both cases involved federal legislation that imposed obligations on the states.[145] Nonetheless, *New York* is distinguishable and, thus, its application to *Printz* was unduly broad.[146]

By expanding *New York's* application to *Printz*, the Court revived the Tenth Amendment and state sovereignty doctrine that the Court long recognized as invalid.[147] The Brady Act, unlike the legislation in *New York*, does not compel the states to enact federal legislation.[148] The Brady Act respects the well-established sovereignty of states and state legislatures.[149] More importantly, the Brady Act does not compel the states to advance any federal law.[150] The Brady Act's interim provisions merely require the temporary assistance of state officials to enforce federal gun control legisla-

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[143] *See Printz*, 117 S. Ct. at 2390 (asserting that Court's response to government's historical evidence is weak).

[144] *See Printz*, 117 S. Ct. at 2383 (agreeing with *New York* ruling).

[145] *See supra* note 50 and accompanying text (discussing provision Supreme Court struck down as unconstitutional in *New York*).

[146] *See infra* notes 147-54 and accompanying text (stating that *Printz* Court incorrectly interpreted *New York*).

[147] *See Printz*, 117 S. Ct. at 2400 n.30 (Stevens, J., dissenting) (discussing outdated state sovereignty doctrine in Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1861), *abandoned by* Puerto Rico v. Branstad, 483 U.S. 219 (1987)). The nineteenth century view, expressed in a slavery case, was that federal government "has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1861), *abandoned by* Puerto Rico v. Branstad, 483 U.S. 219 (1987). The Supreme Court has since recognized that this rigid and isolated statement is not representative of the law in the twentieth century. *See Branstad*, 483 U.S. at 230 (stating that relationship between federal and state governments in *Kentucky* is fundamentally incompatible with more than 100 years of constitutional development); FERC v. Mississippi, 456 U.S. 742, 759-62 (1982) (noting that Court has since upheld federal statutes that directed state decision makers to take or refrain from taking certain actions).

[148] *See Printz*, 117 S. Ct. at 2369 (describing Brady Act requirements).

[149] *See id.* at 2397 (Stevens, J., dissenting) (noting that Brady Act does not mandate state legislatures to enact new rules but rather only requires imposition of modest duties on state officers).

[150] *See id.* (noting that Brady Act does not contain commands directed at states or state legislatures).

tion.[151] These provisions neither command the states to take any action, nor command the states to adopt similar legislation.[152] Furthermore, unlike the legislation in *New York*, the Brady Act does not disrupt the states' power to make laws or govern — the very crux of sovereignty.[153] Therefore, the Court's broad reliance on *New York* is misplaced.[154]

The Court also erred in failing to acknowledge the significance of other Supreme Court cases, specifically, *Federal Energy Regulatory Commission v. Mississippi* (*FERC*)[155] and *Testa v. Katt*.[156] In *FERC*, the Court upheld a federal regulatory scheme that required state public utilities to hold public hearings, to review detailed federal statutes, and to file public explanations if the standards were not adopted.[157] The interim provisions of the Brady Act are far less intrusive than the legislation upheld in *FERC*.[158] The Brady Act does not require any state regulatory or legislative action whatsoever.[159] Rather, it requires only temporary assistance from state officials to eliminate illegal gun sales.[160] Therefore, under *FERC*, the minimal requirements imposed on state officials by the Brady Act are constitutional.

In addition, the *Printz* Court disregarded *Testa*, a case advanced by the government in support of the Brady Act.[161] In *Testa*, the Supreme Court unanimously upheld a requirement that state courts

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[151] *See id.* at 2368-69 (discussing requirements of Brady Act interim provisions). The requirements of the interim provisions would expire in November 1998, the deadline for implementation of the attorney general's national instant background check system. *See id.* at 2368.

[152] *See id.* at 2399 (Stevens, J., dissenting) (noting that Brady Act does not command states to enact specific policy).

[153] *See* Amicus Brief for the United States at 10, Printz v. United States, 117 S. Ct. 2365 (1997) (Nos. 95-1478, 95-1503) *available in* 1996 WL 585868 (quoting THE FALLACIES OF THE FREEMAN DETECTED BY A FARMER (1788), *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 183 (Herbert J. Storing ed., 1981), which supports argument that Brady Act does not infringe on state sovereignty).

[154] *See Printz*, 117 S. Ct. at 2386 (Stevens, J., dissenting) (distinguishing issue before *Printz* Court from issues resolved in *New York*).

[155] 456 U.S. 742 (1982).

[156] 330 U.S. 386 (1947).

[157] *See FERC*, 456 U.S. at 764.

[158] *See Printz*, 117 S. Ct. at 2399 (Stevens, J., dissenting) (stating that burden on state officials approved in *FERC* is more intrusive than burden imposed by Brady Act); Amicus Brief for the United States, *available in* 1996 WL 585868 at 10 (noting that Brady Act is less burdensome than federal statutes upheld in *FERC*).

[159] *See Printz*, 117 S. Ct. at 2397 (Stevens, J., dissenting) (noting that Brady Act does not affect states' lawmaking powers and does not force states to enact federal rules).

[160] *See id.* at 2369 (delineating requirements of Brady Act interim provisions).

[161] *See id.* at 2381 (rejecting government's argument that *Testa* applies).

adjudicate claims brought under the Emergency Price Control Act of 1942.[162] States faced this requirement even though state court claims crowded their dockets.[163]

The *Printz* Court described the *Testa* holding as merely standing for the notion that state courts cannot decline to apply federal law under the Supremacy Clause.[164] However, as the *Printz* dissent correctly points out, the majority wrongly limits the significance of the *Testa* holding.[165] Under the Constitution's Supremacy Clause,[166] if a state and federal statute conflict, courts must apply the federal law.[167] However, *Testa* required more than mere application of the appropriate law.[168] The federal act upheld in *Testa* required state courts to adjudicate cases brought under a federal statute that they normally would have no obligation to hear.[169]

Moreover, *Testa* required state court judges, who were elected or appointed under state laws, to follow the command of Congress.[170] These individuals were not federal judges appointed under the United States Constitution.[171] Rather, they were state officials.[172] The *Testa* Court upheld this congressionally imposed burden without limiting its decision to members of the judiciary.[173] Therefore, the *Printz* Court's argument that *Testa* only indicates that Congress can require a state judiciary to enforce federal laws is an inaccurate reading of *Testa*.[174]

The *Printz* Court's decision is flawed because it incorrectly interpreted *FERC* and *Testa*. Additionally, the Court inappropriately

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[162] *See* Testa v. Katt, 330 U.S. 386, 394 (1947).

[163] *See id.*

[164] *See Printz*, 117 S. Ct. at 2381 (stating proposition of *Testa* that states must apply federal law).

[165] *See id.* at 2400 (Stevens, J., dissenting) (arguing that majority in *Printz* provides incomplete description of holding in *Testa*).

[166] U.S. CONST. art. VI, cl. 2.

[167] *See Printz*, 117 S. Ct. at 2400 (Stevens, J., dissenting) (discussing distinction between Supremacy Clause and requirements in *Testa*).

[168] *See id.* (discussing requirements on state courts upheld in *Testa*).

[169] *See id.*; Testa v. Katt, 330 U.S. 386, 394 (1947) (requiring state courts to hear claims brought under federal statute).

[170] *See Testa*, 330 U.S. at 390 (noting that historical evidence indicates that state courts are obligated to enforce federal civil laws and federal penal laws).

[171] *See id.* at 388 n.3 (explaining that issue involves Rhode Island's superior court and supreme court judiciary).

[172] *See id.*

[173] *See Printz*, 117 S. Ct. at 2400 (Stevens, J., dissenting) (noting that *Testa* decision did not focus on fact that burden imposed affected only judges).

[174] *See id.*

expanded the holding of *New York*, the only case offered by the Court in support of its decision. Finally, the *Printz* Court's absolute prohibition against federal commandeering of state legislative and executive officials is overly broad and unsupportable.

IV. PROPOSED SOLUTION: STATE PARTICIPATION IN ENFORCING FEDERAL GUN CONTROL LEGISLATION AFTER *PRINTZ*

In *Printz*, the Supreme Court held that Congress cannot require states or state officials to administer or enforce a federal regulatory program.[175] The Court emphasized that allowing Congress to commandeer state officials would violate fundamental principles of state sovereignty.[176] Because the Court determined that the Brady Act's interim provisions would violate these principles, it struck down the provisions as unconstitutional.[177] Thus, after *Printz*, gun control legislation cannot compel states or even state officials to enforce federal laws.[178]

Clearly, federal crime legislation would have much greater success if states assisted the federal government with enforcement.[179] In particular, gun control legislation would benefit from the uniformity that is achieved when every state directly participates. Without uniformity, a state's stringent gun control laws can easily be undermined if bordering states do not enact similar measures.[180] Moreover, the federal government currently does not have the resources necessary to adequately ensure that only legal gun sales are made.[181] State involvement in the process would decrease the amount of illegal gun purchases through licensed dealers.[182] Although *Printz* established that Congress cannot require states to participate directly in enforcing federal legislation, Congress does

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[175] *See id.* at 2384.

[176] *See id.*

[177] *See id.*

[178] *See id.*

[179] *See* Gary Kleck, *Policy Lessons from Recent Gun Control Research*, *in* THE GUN CONTROL DEBATE 148, 157-59 (Lee Nisbet ed., 1990) (stating that federal gun control laws have been unsuccessful largely because federal government cannot enforce them); LARSON, *supra* note 5, at 211-13 (asserting that lack of uniformity is problematic and uniform gun control legislation is overdue); *see also* SUGARMANN & RAND, *supra* note 2, at 13 (arguing that legislative efforts to curtail gun violence must be at federal level for any chance of success).

[180] *See* Dayton & Stacy *supra* note 20, at 285 (noting that one state's stringent gun control measures can be thwarted if nearby states fail to enact similar measures).

[181] *See* LARSON, *supra* note 5, at 123 (stating that Bureau of Alcohol Tobacco and Firearms has only 400 inspectors that police more than 245,000 firearms dealers).

[182] *See id.* at 208-13.

have other means of enlisting the states.[183] For example, to get around the restrictions of *Printz* and obtain state participation, Congress should enact future gun control legislation under the Spending Clause.[184]

Enacting federal gun control legislation under the Spending Clause[185] enables Congress to procure state participation. This Clause allows Congress to lawfully attach conditions on the receipt of federal funds which Congress has done in the past to further its policy objectives.[186] For example, in 1987, Congress conditioned the grant of federal highway funds upon states' enactment of a minimum drinking age of twenty-one.[187] This strategy was successful, and the Supreme Court acknowledged it as a valid exercise of congressional authority.[188]

Under the spending power, Congress's actions must be in pursuit of the general welfare.[189] However, it is not difficult to establish that gun control legislation is in the interest of the general welfare. There is no shortage of alarming statistics that reveal the effect of gun violence in the United States.[190] The problem of gun violence

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[183] *See infra* notes 185-96 and accompanying text (explaining how Congress can enact legislation like Brady Act through Spending Clause).

[184] *See infra* notes 185-96 and accompanying text (discussing how Congress can enact gun control legislation through Spending Clause).

[185] U.S. CONST. art. I, § 8. The Spending Clause grants Congress the "Power To . . . provide for the common Defence and general Welfare of the United States." *Id.*

[186] *See* South Dakota v. Dole, 483 U.S. 203, 206 (1987) (holding constitutional Congress's conditional grant of federal highway funds to states with minimum drinking age of 21); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143 (1947) (holding constitutional Congress's conditional grant of federal funding on states' curtailment of partisan political activities by selected officials). Under the Spending Clause, Congress may condition federal funding and has done so to further broaden policy objectives. *See Dole*, 483 U.S. at 206. The spending power of Congress may be direct or conditional grants of federal funds. *See id.* (discussing scope and nature of spending power).

[187] *See Dole*, 483 U.S. at 210.

[188] *See* Printz v. United States, 117 S. Ct. 2365, 2385 (1997) (O'Connor, J., concurring) (stating that Congress may amend Brady Act conditioning federal funding on compliance with interim requirements on contractual basis); New York v. United States, 505 U.S. 144, 175 (1992) (recognizing that conditional grants of federal funding under *Dole* is valid exercise of congressional authority).

[189] *See* Helvering v. Davis, 301 U.S. 619, 640-41 (1937); United States v. Butler, 297 U.S. 1, 66 (1936). The term "general welfare" is recognized as having a broad meaning. *See* Alexander Hamilton, *Final Version of the Report on the Subject of Manufactures* (1791), *reprinted in* 10 THE PAPERS OF ALEXANDER HAMILTON 230, 303 (Harold C. Syrett et al. eds., 1966) (noting that term "general welfare" is comprehensive).

[190] *See supra* note 1 and accompanying text (listing statistics demonstrating effect of gun violence in United States); SUGARMANN & RAND, *supra* note 2, at 1 (stating that for more than 30 years gun violence has been recognized as significant threat to public health and safety in United States). Gun violence in the United States results in thousands of deaths

in the United States has even been recognized as an epidemic.[191] Congress has a compelling and legitimate interest in protecting citizens from gun violence,[192] and Congress should continue to enact gun control legislation.

Congress regularly enacts legislation that provides states with federal funds.[193] In recent years, the federal government has given states funding for police, prisons, and jails.[194] Congress could easily condition the funding of local law enforcement programs and the building of state jails on state participation in federal gun control regulations.

Congress could enact gun control legislation successfully under the Spending Clause. Consider, for example, the Brady Act's interim provisions. To enact such legislation, Congress could simply inform states that to obtain federal grants for law enforcement they must require firearm dealers to conduct background checks on prospective purchasers. States could choose whether to participate in the grant program. If a state wanted federal grants for law en-

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each year, substantial economic costs, and creates debilitating societal fear. *See id.*

[191] *See supra* note 19 and accompanying text; *see also* Frederic Golden, *Drop Your Guns! Fed Up with the Constant Carnage He Deals With in His Emergency Room, a Doctor Pleads with the Nation's Youth*, TIME, Oct. 1, 1997, at 56 (discussing medicine professor's crusade against gun violence epidemic); Mary J. Vassar & Kenneth W. Kizer, *Hospitilizations for Firearm-Related Injuries: A Population-Based Study of 9562 Patients*, 275 JAMA 1734, 1734 (1996) (noting that in United States firearm-related violence has become epidemic with 39,720 firearm deaths in 1994 alone); Garen J. Wintemute, M.D., M.P.H., *The Relationship Between Firearm Design and Firearm Violence: Handguns in the 1990s*, 275 JAMA, 1749, 1749 (1996) (stating that firearms now rank close second to motor vehicles as leading cause of traumatic deaths nationwide).

[192] *See* Webster v. Reproductive Health Servs., 492 U.S. 518, 519 (1989) (stating that protection of human life and health are compelling governmental interests).

[193] *See* OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES, FISCAL YEAR 1995 169 tbl. 11-2 (U.S. G.P.O. 1994) (noting 1995 prediction that federal grants for 1996 will reach almost $250 billion). Federal grants to states and localities have constituted a substantial portion of total state and local revenues, increasing from 11% in 1950 to 20% in 1991. *See* Thomas Lundmark, *Guns and Commerce in Dialectic Perspective*, 11 BYU J. PUB. L. 183, 188 n.40 (1997) (citing U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, 2 SIGNIFICANT FEATURES OF FISCAL FEDERALISM, REVENUES AND EXPENDITURES, 56 tbl. 23 (1992), which notes that federal funding of states and cities has dramatically increased).

[194] *See, e.g.*, Stacy Hawkins Adams, *Fighting to Ease Domestic Violence Advocates Are Armed with New Laws, More Funds*, RICHMOND TIMES, July 20, 1997, at B1 (noting that training for domestic violence situations for state police officers was funded through $2.6 million federal Violence Against Women Act grant); *Maine to Get $807,500 for Criminal Records*, BANGOR DAILY NEWS, Nov. 14, 1997, at A5 (announcing that federal government awarded Maine and 48 other states funds to improve criminal history record system); Lisa Renfro, *Federal Funds Help Put Police on Street: Eighty California Cities Were Recently Awarded More than $9.7 Million*, PRESS-ENTERP. (Riverside, CA), June 14, 1998, at B3 (discussing federal grants program in numerous cities in California and nationwide aimed at increasing size of police force on streets rather than in offices).

forcement, the state would have to ensure that the interim provisions were followed. However, if a state did not wish to participate, it would not be required to do so. Enacting such legislation under the Spending Clause would successfully circumvent the potential problems created by *Printz*.[195]

By conditioning the receipt of federal grants on participation, Congress would merely be offering states an incentive, which under both *Printz* and *New York* is constitutional.[196] Enacting legislation such as the Brady Act under the Spending Clause enables Congress to avoid the problems presented by *Printz*. Because the choice whether to participate is left to the states, the legislation will not infringe on state sovereignty or improperly commandeer state officials.

CONCLUSION

In light of the prevalent problem of gun violence, continued enactment of effective federal gun control legislation like the Brady Act is necessary. However, *Printz* may inhibit Congress's ability to enact future legislation under the Commerce Clause.[197] *Printz* bars Congress from requiring states or even state officials to assist in enforcing federal gun control legislation.[198]

Congress can avoid the restrictions that *Printz* imposes on its ability to legislate under the Commerce Clause. Congress can enact legislation under the Spending Clause without fear that the *Printz* limitations will be applied. Legislation enacted under the Spending Clause provides states a choice, and thus, does not infringe upon state sovereignty in violation of the Tenth Amendment. By using its spending power, Congress can sidestep *Printz* and continue to enact much needed gun control legislation similar to the Brady Act.

Melissa Ann Jones

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[195] *See supra* notes 185-96 and accompanying text (explaining how Congress can enact legislation under Spending Clause to avoid limitations imposed by *Printz*).

[196] *See supra* note 188 and accompanying text (discussing recent Supreme Court rulings that describe Congress's ability to enact legislation under Spending Clause).

[197] *See supra* notes 102-05 and accompanying text (explaining *Printz* Court's holding).

[198] *See* Printz v. United States, 117 S. Ct. 2365, 2384 (1997) (ruling that Congress cannot require states or state officers to administer or enforce federal regulatory programs).