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Printz v. United States: An Assault Upon the Brady Act or a Tenth Amendment Fortification?

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PRINTZ v. UNITED STATES: AN ASSAULT UPON THE BRADY ACT OR A TENTH AMENDMENT FORTIFICATION?

Laws, to be effective, therefore, must not be laid on states, but upon individuals.¹

Under the federal system of government, power is divided between the national government and the states.² Although the powers of the national government have gradually expanded, the Tenth Amendment (the "Amendment")³ has traditionally been available to protect the states from the unwarranted intrusion of federal legislation.⁴ The Supreme Court's struggle to fix the Amendment's parameters has resulted in an indefinite history,⁵

¹ J. Elliot, Debates on the Federal Constitution 56 (2d ed. 1863) (statement of Rufus King, delegate to the Constitutional Convention).


³ U.S. Const. amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Id.

⁴ See, e.g., New York v. United States, 112 S. Ct. 2408, 2417 (1992). The Court stated: "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." Id.; see also Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985) ("The States unquestionably do retain[n] a significant measure of sovereign authority.") They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.") (quoting EEOC v. Wyoming, 460 U.S. 226, 269 (1983) (Powell, J., dissenting)). In cases such as these, the court is asked to determine whether Congress has invaded a power of the state reserved to it by the Tenth Amendment. New York, 112 S. Ct. at 2417.

⁵ See New York v. United States, 112 S. Ct. at 2428 (finding section of Low-Level Radioactive Waste Policy Amendments Act of 1985, requiring states to either adopt plan consistent with Congress's standards or to take title to waste produced, unconstitutional under the Tenth Amendment because this commandeered powers of state); South Carolina v. Baker, 485 U.S. 505, 513 (1988) (finding section of Tax Equity and Fiscal Responsibility Act, which removed federal income tax exemption for interest earned on state and local government bearer bonds, unconstitutional because South Carolina did not show any defect in political process that adopted Act); Garcia, 469 U.S. at 557 (overruling National League of Cities v. Usery, 426 U.S. 833 (1976), by holding Federal Labor Standards Act ("FLSA") is
with many twentieth century commentators claiming that the Amendment no longer has any real legal force. In 1976, the Court breathed new life into the Tenth Amendment in National League of Cities v. Usery. Subsequent decisions eroded and eventually overruled National League of Cities, reasserting the strength of federal legislation. The recent Supreme Court decision in New

an extension of state and local government employees' constitutional rights because FLSA was enacted under one of Congress's delegated powers and constituted generally applicable law; EEOC v. Wyoming, 460 U.S. 226, 239 (1983) (upholding amendments to Age Discrimination in Employment Act which extended it to employees of state and local governments because intrusion on state's ability to structure its integral operations was minimal); FERC v. Mississippi, 466 U.S. 742, 760-61 (1982) (upholding constitutionality of Public Utility Regulatory Policies Act of 1978 because federal government has power to require state utility regulatory commissions, as equivalent to judicial tribunals, to enforce federal law); Hodel v. Virginia Surface & Mining Reclamation Ass'n, 452 U.S. 264, 287-88 (1981) (establishing that each of following three requirements must be met to invalidate congressional commerce power legislation on Tenth Amendment grounds: (1) challenged statute must "regulat[e] the States as States" (quoting National League of Cities, 426 U.S. at 854); (2) statute must impact on matters that are indisputably "attribute[s] of state sovereignty" (quoting National League of Cities, 426 U.S. at 845); and (3) state compliance with federal statute must directly impair the state's ability "to structure integral operations in areas of traditional governmental functions" (quoting National League of Cities, 426 U.S. at 862); National League of Cities v. Usery, 426 U.S. 833, 845 (1976), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). The Court found that amendments to the FLSA making the Act applicable to all employees of state and local governments were unconstitutional because they intruded upon an inviolable area of state sovereignty and were unconstitutional legislation of "States as States." Id.; United States v. Lopez, 2 F.3d 1342, 1366-67 (1993) (holding Gun-Free School Zones Act, 18 U.S.C. § 922(q) (1988), which makes it unlawful for any individual knowingly to possess firearm in school zone, invalid as beyond power of Congress under Commerce Clause), cert. granted, 114 S. Ct. 1536 (1994).

See, e.g., William T. Barrante, States Rights and Personal Freedom Breathing Life into the Tenth Amendment, 63 CONN. B.J. 262, 262 (1989) (concluding that Garcia was "death knell" for Tenth Amendment as effective limit on federal government); Kathryn Abrams, Note, On Reading and Using the Tenth Amendment, 93 YALE L.J. 723, 723 (1984) (taking note of many reports of death of Tenth Amendment, but feeling reports have been exaggerated). But see Van Alstyne, supra note 2, at 799 n.15 (stressing reservation of powers by Tenth Amendment "which ought not be lightly dismissed as merely tautological . . . [i]ts dismissal as a 'truism' by Justice Stone in United States v. Darby, 312 U.S. 100, 124 (1941) was more hubris than insight").

426 U.S. 833, 845 (1976). The Court stated that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that matter." Id.

See Barrante, supra note 6, at 273. National League of Cities was "not a strong Tenth Amendment case" because it misinterpreted the division of powers in the Tenth Amendment that certain powers are delegated to Congress, while other powers are reserved to the States. Id. The Court in National League of Cities misconstrued the Tenth Amendment by stating that Congress had a constitutional grant of authority through the Commerce Clause but was limited by the federal structure of government. Id. The Court should have found that Congress did not even have an affirmative grant of power under the Commerce Clause, not merely that this power was somehow limited. Id.; see also Garcia, 469 U.S. at 546-547 (rejecting as "unsound in principle and unworkable in practice, Hodel/National League of Cities rule of state immunity from federal regulation that turns on judicial appraisal of whether particular governmental function is "integral" or "traditional"); EEOC v. Wyoming, 460 U.S. at 239 (noting that even if state's ability to structure integral operations was impaired, degree of intrusion also had to be considered); Hodel, 452 U.S. at 287-
York v. United States, however, has brought this debate full circle, protecting state sovereignty and refusing to allow Congress to intrude upon states' rights through federal regulations. This interpretation further complicated the Tenth Amendment's historically dubious strictures because it created a conflict with congressional power.

Generally, federal statutes which present states with an unfunded mandate face a constitutional challenge. In these situa-

88. Hodel refined the broad principles announced in National League of Cities by establishing a three prong test to invalidate legislation under the Tenth Amendment: 1) the federal statute must regulate the States as States; 2) it must impact on indisputable attributes of state sovereignty; and 3) compliance with the statute must impair integral state operations in traditional government function areas. Id.


10 Id. at 2429 (holding that "take-title" provision of Low-Level Radioactive Waste Policy Amendments Act of 1985 was "inconsistent with the federal structure of our Government established by the Constitution").

11 Id. at 2428 (agreeing with petitioners' argument that Tenth Amendment would allow direct regulation of generators and disposers of waste, but would limit Congress's power with respect to state legislation). The Court stated: "A choice between two unconstitutionally coercive regulatory techniques [either requiring states to take title to waste or regulate it according to federal standards] is no choice at all." Id.; see also Hodel, 452 U.S. at 288 (holding that Congress cannot "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program"); Printz v. United States, 854 F. Supp. 1503, 1513 (D. Mont. 1994). The court concluded that "the ascertainment/background check provision of the Act exceeds the powers delegated to Congress and violates the Tenth Amendment of the Constitution because it substantially commandeers state executive officers and indirectly commandeers the legislative processes of the state . . . ." Id.

12 See U.S. CONST. art. I. This provision expressly delegates specific powers to Congress. Id. Section 8 of Article I contains the Commerce Clause powers: "The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . . ." Id. § 8. See New York v. United States, 112 S. Ct. 2408, 2417 (1992). The Supreme Court has noted that the Tenth Amendment question can be approached from two angles which become the "mirror images" of one another. Id. When deciding the division of authority between federal and state governments the inquiry is whether the statute exercises an Article I power or whether the question is exclusive of Article I, thereby reserved to the states by the Tenth Amendment. Id.; see also United States v. Darby, 312 U.S. 100, 124 (1941) (noting that Tenth Amendment "states but a truism that all is retained which has not been surrendered [as Article I power]").

13 See, e.g., Printz, 854 F. Supp. at 1507. The issue turned on the constitutionality of federally imposed unfunded mandates on the states. Id. Here the plaintiff-sheriff "testified that enforcement of the Act forces him to re-allocate already limited resources such that he is unable to carry out certain duties prescribed by state law." Id.; see also Edward A. Zelinsky, Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services, 46 Vand. L. Rev. 1355, 1356 (1993). The author explores "the tendency of federal and state officials to impose unfinanced obligations on lower levels of government despite the near universal condemnation of this practice." Id. Opponents of such mandates argue that where the federal government directs the state governments to provide certain important services, Congress should also supply the states with the requisite funds. Id. at 1363 (quoting JOSEPH E. STIGLITZ, ECONOMICS OF THE PUBLIC SECTOR 550 (1986)). Mr. Zelinsky concluded that unfunded mandates pose a constitutional conflict and therefore must be remedied by constitutional action and not by "supermajority and reimbursement rules." Zelinsky, supra, at 1414-15.
tions, the federal government is usually acting to remedy or protect a matter of national concern, and has decided that the states should bear the cost of curative legislation. The Brady Handgun Violence Prevention Act (the "Act"), amending the Gun Control Act of 1968, has been challenged as such an unfunded mandate. Recently, in Printz v. United States, the first judicial review of the background check provision contained in the Act, the Federal District Court of Montana applied the Supreme Court's current Tenth Amendment position. The Printz court found that the Act's gun purchaser background check provision


15 Printz, 854 F. Supp. at 1515 (noting that elected bodies of states would be indirectly required to utilize their resources to support Act if background check provision was held constitutional).


21 Printz, 854 F. Supp. at 1513 (deciding that analysis Supreme Court used in New York v. United States, 112 S. Ct. 2408 (1992), finding regulation mandated by Congress unconstitutional, was applicable to background check provision of Act). The Printz court also specifically noted that: "This is not a case about the Second Amendment. This case turns on the proper relationship between the federal government and the several states ... ." Id. at 1506; see also Frank v. United States, 860 F. Supp. 1030, 1043 n.15 (declaring "although the subject of federal law challenged here is the transfer of handguns, this case has absolutely nothing to do with the Second Amendment or the right to bear arms"); Joe Albo, Background Checks, PHOENIX GAZETTE, July 21, 1994, at B6 (noting that Brady law's effect has no impact on Second Amendment debate).
exceeded congressional power because it substantially commandeered state executive officers and resources, and indirectly commandeered state legislatures. The court preserved the purpose and spirit of the Act by appropriately severing the unconstitutional provisions. Alternatively, an effective compromise could be reached through background checks enacted by states as a result of the federal government's persuasive taxation and spending powers.

This Note will present a constitutional analysis of a chronic controversy in American jurisprudence—the delicate balance of powers between the federal and state governments. Part One will briefly explore the historical and factual circumstances surrounding the Brady Act. Furthermore, it will demonstrate, in the context of Printz, how Tenth Amendment problems can arise. Part Two will discuss the struggle to define the Tenth Amendment's parameters and then evaluate the inconsistent judicial interpretations in light of New York. Part Three will discuss the Act's background check provision as a congressional mandate beyond the scope of the Commerce Clause and will compare Printz with New York. Part Four will discuss the viability of the Act and possible alternatives. Finally, Part Five will submit that although noteworthy, the goals of gun control do not automatically warrant a constitutional reading of the Act.

I. THE BRADY HANDGUN VIOLENCE PREVENTION ACT

On November 30, 1993, Congress enacted the Brady Handgun Violence Prevention Act, which changed the procedure for

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22 Printz, 854 F. Supp. at 1513.
23 Printz, 854 F. Supp. at 1519. Similar to the Low-Level Radioactive Waste Policy Act amendments under attack in New York, § 922(s)(2) of the Brady Act requires state and local officials to administer the act, bear accountability for its effectiveness, and bear the financial burden of its administration. Id. at 1517-18. The Low-Level Radioactive Waste Policy Act amendments, which require the states to either take title to any waste in their jurisdiction or to regulate it according to federally imposed standards, were found to be unconstitutional because of their inconsistency with the federal structure imposed by the Constitution. New York, 112 S. Ct. at 2429. State sovereignty protected by the Tenth Amendment and the inherent limitations imposed by the enumerated Article I powers composed the foundation of the decision. Id.
25 See infra notes 124-42 and accompanying text (detailing severability remedy).
26 See infra notes 143-50 and accompanying text (describing efforts certain states have taken in statutory provisions to control licensing, possession, and carrying of firearms by requiring permits that involve substantial background check).
purchasing handguns. The interim provision of the Act requires a waiting period of five business days before handgun purchases can be made from federally licensed gun dealers. During that time, the chief law enforcement officer ("CLEO") for each jurisdiction is required to exert a "reasonable effort to ascertain" whether the transferee's receipt or possession of a handgun would violate the law. The background check is based on a sworn statement that the prospective purchaser provides to the federal gun dealer, who in turn provides it to the local CLEO.

28 See supra note 16 and accompanying text (discussing legislative history of Brady Act).
29 See 18 U.S.C. § 922(t)(1) (Supp. V 1993) (stating that interim provisions of statute are to be replaced by national instant criminal background check system to be developed and maintained by Department of Justice within five years from date of enactment).
30 See 18 U.S.C. § 922(29) (Supp. V 1993). The Act defined "handgun" by amending 18 U.S.C. § 922(a) to create a new subsection, (29), which states that the term "handgun" means: "(A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and (B) any combination of parts from which a firearm described in subparagraph (a) can be assembled." Id. § 922(29).
32 See id. Section 922(s)(8) defines "chief law enforcement officer": "For purposes of this subsection, the term 'chief law enforcement officer' means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." Id.
33 Id. The provision, in its entirety states: A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(I)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General. Id.
34 18 U.S.C. § 922(s)(1)(A)(i)(I) (Supp. V 1993). This provision prohibits any licensed gun importer, manufacturer, or dealer from selling, delivering, or transferring a handgun to an individual unless the transferor has "received from the transferee a statement of the transferee containing the information described in paragraph (3)." Id. Paragraph (3) provides in relevant part:
   The statement referred to in paragraph (1)(A)(i)(I) shall contain only—
   (A) the name, address, and date of birth appearing on a valid identification document
   ... of the transferee containing a photograph of the transferee ... ;
   (B) a statement that the transferee—
   (i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year;
   (ii) is not a fugitive from justice;
   (iii) is not an unlawful user of or addicted to any controlled substance ... ;
   (iv) has not been adjudicated as a mental defective or been committed to a mental institution;
   (v) is not an alien who is illegally or unlawfully in the United States;
   (vi) has not been discharged from the Armed Forces under dishonorable conditions;
   and (vii) is not a person who, having been a citizen of the United States, has renounced citizenship;
   (C) the date the statement is made; and
   (D) notice that the transferee intends to obtain a handgun from the transferor.
35 18 U.S.C. § 922(s)(1)(A)(i)(IV) (Supp. V 1993). This section prohibits any licensed gun dealer, importer, or manufacturer from selling, delivering, or transferring a handgun to an individual unless the transferor "within 1 day after the transfer furnishes the statement,
The Act also requires the CLEO to destroy the sworn statement within twenty days of a determination that the prospective purchaser is ineligible to receive the handgun.\(^{36}\)

In May of 1994, Sheriff Jay Printz of Ravalli County, Montana commenced an action challenging the constitutionality of the Act’s background check provision.\(^{37}\) Sheriff Printz demanded the Act be declared unconstitutional and that it be permanently enjoined on grounds that the commands to the CLEO were beyond the enumerated powers delegated to Congress, and violated the Tenth\(^{38}\) and Fifth\(^{39}\) Amendments to the Constitution.\(^{40}\) Writing for the District Court of Montana, Judge Charles C. Lovell declared that the background check provision\(^{41}\) of the Act was a mandatory duty for the CLEOs\(^{42}\) and exceeded the powers delegated to Congress.

transmitted a copy of the statement to the chief law enforcement officer of the place of residence of the transferee.” *Id.*

\(^{36}\) 18 U.S.C. § 922(s)(96)(B) (Supp. V 1993). This provision states:

Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(IX)(V) determines that a transaction would violate Federal, State, or local law—

(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(IX)(III);

(ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

(iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

*Id.*


\(^{38}\) *Printz v. United States*, 854 F. Supp. 1503, 1506 (D. Mont. 1994). Sheriff Printz claimed that the mandates to the CLEOs surpass the powers delegated to Congress by the United States Constitution under article 1, section 8, and violate the Tenth Amendment to the Constitution. *Id.*

\(^{39}\) *Id.* at 1507. Sheriff Printz claimed that, due to “vagueness” the Act violates the Due Process Clause of the Fifth Amendment. *Id.*

\(^{40}\) *Printz*, 854 F. Supp. at 1506. To refute the Government’s claim that the background check was a “discretionary” duty of the CLEOs, Judge Lovell noted extensive legislative history that indicated otherwise. *Id.* at 1511-12. Judge Lovell dispelled any doubt as to the discretionary nature of the provision by noting that a proposed amendment making the background check discretionary was rejected by the House Judiciary Committee. *Id.* at 1512.
by the Constitution. Judge Lovell reasoned that the Supreme Court's holding in *New York v. United States* established that the federal government could not commandeer legislative processes of the states by directly compelling them to enforce a federal regulatory program.

II. THE TENTH AMENDMENT DEBATE: AN HISTORICAL OVERVIEW

The central tenet of federalism, that Congress has specific enumerated powers, with any remaining powers being reserved to the states, has never obtained universal approval. Hence, the concept of federalism presented the Supreme Court with a number of formidable questions involving state sovereignty and

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45 Printz, 854 F. Supp. at 1513. The court also noted that the Constitution grants Congress the power to regulate individuals, not states. Id. at 1514.

46 See supra note 2 and accompanying text (defining concept of federalism and division of powers).

47 See, e.g., U.S. CONST. art. I, § 8, cl. 1 (granting Congress power to lay and collect taxes); U.S. CONST. art. I § 8, cl. 2 (granting Congress power to borrow money on credit of United States); U.S. Const. art. I, § 8, cl. 3 (granting Congress power to regulate commerce among several states); U.S. Const. art. I, § 8, cl. 18 (granting Congress power to make all laws which are necessary and proper).

48 U.S. CONST. amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Id.

49 See Joseph Lipner, *Imposing Federal Business on Officers of the States: What the Tenth Amendment Might Mean*, 57 GEO. WASH. L. REV. 907, 922 (1989). Prior to ratifying the Constitution, many feared that the strange federal system that would be established by the Constitution was "imperium in imperio," one sovereignty within the other, and that federal power would consume state power. Id.; cf United States v. Darby, 312 U.S. 100, 124 (1941). In Darby, Justice Harlan Fisk Stone, referred to the Tenth Amendment as a "truism" and noted that the Amendment, as interpreted by the Supreme Court, does not deprive the federal government "of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." Id. *But see* Fry v. United States, 421 U.S. 542, 547 n.7 (1975) (construing constitutionality of Economic Stabilization Act of 1970 under the Commerce Clause as applied to state employees).

50 See supra note 5 (providing examples of Supreme Court's struggle with interpretation of Tenth Amendment).
exemptions from federal regulatory power. The proper constitutional balance between federal and state powers is a volatile issue dividing the Court since the days of Chief Justice John Marshall. Whether the federal judiciary should intervene to defend the autonomy of state governments has given rise to many of the Court’s more perplexing cases.

From the early nineteenth century to the Supreme Court’s decision in New York v. United States, the Court stressed the constitutional value of viable autonomous states in our system. After changing its position four times in this century, including a reversal in Garcia v. San Antonio Metropolitan Transit Authority

51 See Tribe, supra note 39, §§ 5-20 to -22, at 378-97 (discussing importance of Supreme Court decisions regarding state sovereignty).

52 New York v. United States, 112 S. Ct. 2408, 2417 (1992). “[The task of ascertaining the constitutional line between federal and state power has given rise to many of the Court’s most difficult and celebrated cases.” Id.; see also United States v. Kahrig, 345 U.S. 22, 25 (1953) (holding that “bookie tax” was within Congressional power). Justice Stanley Reed observed that in the area of Congress’s power to tax, “a final definition of the line between state and federal power has baffled judges and legislators.” Id. at 29. Justice Felix Frankfurter dissented in Kahrig and argued that the tax was to regulate conduct outside the scope of congressional authority, and that, in order to legitimize the regulation of such conduct, “Congress wrapped the legislation in the verbal cellophane of a revenue measure.” Id. at 37-38 (Frankfurter, J., dissenting).

53 See McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316, 401 (1819). The main issue raised in McCulloch was whether Congress had the authority to incorporate a bank. Id. In holding that Congress did have such authority, Chief Justice John Marshall, noted the absence of the word “expressly” from the Tenth Amendment. Id. at 406. This absence, he argued, supports his conclusion that Congressional power is not limited to the powers expressly enumerated in the Constitution. Id. at 421-22.


55 See supra note 5 (citing Supreme Court cases involving Tenth Amendment issues).

56 See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 410 (1819). Writing for the Court, Chief Justice Marshall stated: “In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.” Id.

57 See supra note 4 and accompanying text (noting New York’s and Garcia’s recognition of importance of state sovereignty).

58 See Lipner, supra note 49, at 919 (commenting on Supreme Court’s importance of constitutional value of states in U.S. governmental system).

59 Compare Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (striking down statute removing products of child labor from interstate commerce as regulation of purely local activities) with Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985) (overruling National League of Cities by holding that state participation in congressional action is effective restraint on Congressional power) and National League of Cities v. Usery, 426 U.S. 833, 851 (1976) (holding that Congress’s imposition of minimum wage on state employees interferes with state’s ability to function as independent body) and United States v. Darby, 312 U.S. 100, 116 (1941) (overruling Hammer by holding that Congress’s power under Commerce Clause is limited only by specific prohibitions of Constitution); see also New York v. United States, 112 U.S. 2408, 2423 (1992) (finding that Commerce Clause forbids Congress from forcing states to regulate interstate commerce).
merely nine years ago,60 the Court has attempted to lay a more concrete foundation of Tenth Amendment limitations on federal power.61

A survey of the decisions interpreting the Tenth Amendment from National League of Cities v. Usery62 to New York63 demonstrates the Amendment’s fractious and complex history.64 Two standards for determining the constitutionality of a congressional act have emerged.65 One standard consists of generally applicable laws which regulate the activities of both state and private enterprises,66 while the other one involves federal laws that direct or influence states to legislate according to a federal regulation.67

60 See Garcia, 469 U.S. at 531 (overruling National League of Cities and holding that state sovereignty would be more adequately protected by procedural safeguards inherent in federal system rather than by judiciary).

61 Garcia, 469 U.S. at 531 (noting judiciary is not proper channel for protecting state sovereignty); see also New York, 112 S. Ct. at 2428 (commenting that states cannot be forced to choose between two unconstitutional coercive acts required by Congress).


63 112 S. Ct. 2408, 2420 (1992). Two separate schools of thought emerged from these cases. Id. One embraced the mandate that the states were adequately protected by the political processes of the federal government and that generally applicable laws were always constitutional. Id. The other branch reasserted the strength of Tenth Amendment interpretation to cast aside federal regulatory legislation that sought to commandeer the states as states. Id. For cases following National League of Cities, see New York v. United States, 112 S. Ct. 2408 (1992), South Carolina v. Baker, 486 U.S. 505 (1988), EEOC v. Wyoming, 460 U.S. 528 (1985), FERC v. Mississippi, 456 U.S. 742 (1982), Hodel v. Virginia Surface Mining and Reclamation Ass’n, Inc., 452 U.S. 264 (1981). See supra note 5 and accompanying text (recognizing modern-day struggle to define power of Tenth Amendment began in 1975 with National League of Cities and was followed by flurry of six lengthy opinions over period of fifteen years that modified and then overruled its theory).

64 See supra note 5 and accompanying text (describing recent history of Supreme Court Tenth Amendment cases).


66 Id. (noting that Justice O’Connor’s review of recent Tenth Amendment cases distinguishes between two lines of interpretation); see also South Carolina v. Baker, 485 U.S. 505, 513-14 (1988) (explaining generally applicable law which sought to control or influence state regulation in FERC v. Mississippi, 456 U.S. 742 (1982)); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985) (holding that Tenth Amendment protection is merely procedural presumption that generally applicable law is constitutional unless state can show that it was excluded from political process); National League of Cities, 426 U.S. at 836 (addressing generally applicable law, Fair Labor Standards Act which attempted to regulate activities of all state and local government employees).

67 See Gardner, supra note 65, at 882 (noting that Court in Hodel stated Congress cannot directly compel state legislatures to enforce or enact federal regulatory program); see also FERC v. Mississippi, 456 U.S. 742, 764-65 (1982) (upholding federal act since it did not compel states to legislate); Hodel v. Virginia Surface Mining and Reclamation Ass’n, 452 U.S. 264, 288 (1981) (upholding federal act since it did not compel states to legislate but gave option to legislate in accordance with federal standard or to face federal preemption in field or reduction in federal funding). But see New York, 112 S. Ct. at 2428 (declaring provision of federal act unconstitutional because it commandeered the states to choose between two unconstitutional regulatory programs).
In *Garcia*, the case that overturned the Tenth Amendment precedent established in *National League of Cities*, the Court held that the Fair Labor Standards Act ("FLSA") could be applied to a municipal transit system without violating the sovereignty of the several states. *Garcia*, casting aside the "traditional government acts" test for which *National League of Cities* and its progeny struggled to set parameters, decided that the states are protected by the procedural safeguards of the federal system and not by any external judicial enforceability. The Court also noted that generally applicable laws, such as the FLSA, are constitutional under the Commerce Clause. One commentator warned that the im-

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68 426 U.S. 833, 842-43 (1976). The *National League of Cities* test attempted to draw a line by using the Tenth Amendment to limit the exercise of one of Congress's enumerated powers. Id. But see Barrante, supra note 6, at 265. (noting that in this regard, Court was wrong.)

69 Barrante, supra note 6, at 262. The author stated that *Garcia* should be limited in its enforceability to specific applications of Congress’s power under the Commerce Clause. Id. *Garcia* was wrongly decided if courts can no longer apply the Tenth Amendment to unconstitutional acts of Congress. Id. at 263. The author noted that Justice Lewis Powell remarked that the Court rejected “almost 200 years of the understanding of the constitutional status of federalism.” Id. (quoting *Garcia*, 469 U.S. at 560).

70 See *National League of Cities*, 426 U.S. 823, 852 (1976) (describing how Tenth Amendment prevents federal government from interfering with functions traditionally performed by state and local governments; this test was overruled as being too difficult to consistently apply in *Garcia*).

71 See *Garcia*, 469 U.S. at 550-55. It appeared implicit that Justice Blackmun’s referral to "externally imposed limits" meant that the judiciary should not use the Tenth Amendment to curb congressional intrusion onto the states. Id. However, *Garcia* should not be read in this light outside of powers specifically delegated to Congress under the Commerce Clause because the "[Supreme] Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States." *Garcia*, 469 U.S. at 581 (O'Connor, J., dissenting); Barrante, supra note 6, at 265. The commentator suggested that *National League of Cities* simply set the stage for *Garcia* because *National League of Cities* misconstrued the division of powers recognized and protected by the Tenth Amendment. *Id. National League of Cities* was not a strong Tenth Amendment case because it attempted to recognize Congress’s powers under the Commerce Clause as delegated powers which were limited. *Id. One important point that the *Garcia* Court neglected to address was that "[i]t was the basic philosophy of *Marbury v. Madison* that if Congress passed a law that did not comport with its powers under the Constitution, the courts were bound not to enforce such law." *Id.* at 274. The author argued that the *Garcia* Court limited the power of judicial review by claiming, “the state’s continued role in the federal system is primarily guaranteed not by any externally imposed limits on the commerce power.” *Id.*

72 See *Garcia* v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547-48 (1986). Writing for the *Garcia* majority, Justice Harry Blackmun found that state power was not guaranteed by any external limits imposed on the Commerce Clause. *Id.* However, this implication that the Tenth Amendment is not judicially enforceable should only apply to Commerce Clause powers and other specific delegated duties of Congress. *Id.* at 553-55. In this case, *Garcia* would overrule *Printz* on the basis that the political process of government, and not the Tenth Amendment, protects states’ rights. *Id.* at 551-53. “The states continued role in the federal system is primarily guaranteed not by any externally imposed limits on the commerce power, but by the structure of the federal government itself. In these cases, the political process effectively protected that role.” *Id.* at 528-29. However, the legislation *Gar-
plicit result of Garcia was that courts are instructed to not "consider whether the Tenth Amendment is a barrier to legislation that Congress claims is enacted under the commerce power." The cases between National League of Cities and Garcia struggled with National League of Cities' test and are not wholly pertinent to the Tenth Amendment equation.

Following Garcia, South Carolina v. Baker upheld the theory that representation by the states in the political process adequately protected state sovereignty against intrusive legislation. Garcia probably would not apply to Printz or the Act, because the

cia analyzed dealt specifically with Commerce Clause powers. Id. at 554. "[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation . . . ." Id. at 554. The Act does not appear to involve interstate commerce, although other sections of the Gun Control Act deal with the interstate commerce of weapons. See H.R. REP. NO. 103-344, 103d Cong., 1st Sess., n.12 (1993) (citing 18 U.S.C. § 922(g) (1988)). The report categorized specific classes of persons prohibited from receiving firearms which have moved in interstate commerce: those convicted of crimes punishable by more than one year of prison; fugitives; illegal users of controlled substances; mentally defective persons; persons committed to mental institutions; illegal aliens; persons who have been dishonorably discharged from the Armed Forces; and those who have renounced U.S. citizenship. Id. Furthermore, § 922(s)(2) is aimed specifically at requiring action by local law enforcement. Id.; see also 18 U.S.C. § 922(s)(2) (Supp. V 1993); Printz v. United States, 854 F. Supp. 1503, 1513 (D. Mont. 1994). Every post-enactment opinion, including the contrary holding of Koog v. United States, 852 F. Supp. 1376 (W.D. Tex. 1994) has noted this fact in its analysis of the Act. 854 F. Supp. at 1513; see, e.g., Frank v. United States, 860 F. Supp. 1030 (D. Vt. 1994); McGee v. United States, No. Civ.A. 2:94-CV-67PS, 1994 WL 506156 (S.D. Miss., June 3, 1994) (declaring section 922(s)(2) unconstitutional mandate that exceeds Congress's power); Koog v. United States, 852 F. Supp. 1376, 1378 (W.D. Tex 1994); Barrante, supra note 6, at 265. The author noted that the Garcia holding should only apply to Congress's powers under the Commerce Clause and commerce should be limited in definition to commercial activities and should not apply to pure state governmental functions such as law enforcement. Id.; Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine, 99 HARV. L. REV. 84, 85-88 (1985) (discussing power of Congress in relation to state sovereignty); Russell K. Osgood, Governmental Functions and Constitutional Doctrine: The Historical Constitution, 72 CORNELL L. REV. 553, 580-85 (1987) (discussing how courts interpreted commerce power following National League of Cities).

See Barrante, supra note 6, at 262.

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (holding that Fair Labor Standards Act ("FLSA") minimum wage and overtime requirements do not violate any constitutional provision and are not destructive of state sovereignty); EEOC v. Wyoming, 460 U.S. 226 (1983) (holding that specific language of Commerce Clause does not provide special limitation on actions of Congress with respect to states); FERC v. Mississippi, 456 U.S. 742 (1982) (stating that congressional conclusion that limited federal regulation of retail sales of electricity and natural gas, as supported by legislative history, was necessary to protect national economy as well as to protect interstate commerce). None of these three cases addressed the "commandeering of state legislatures" test that Hodel discussed, preferring to dispose of their issues on grounds other than the Tenth Amendment conflict.


Id. at 512.
Act is not a generally applicable law but rather specifically singles out only CLEOs.  

*New York* was a recent attempt by the Supreme Court to develop a balance between the powers of the federal government and the states' interests under the Tenth Amendment. Akin to *Printz*, *New York* addressed a federal law that compelled the states to follow federal regulations. In *New York*, two counties filed suit challenging the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (the "Low-Level Waste Act"). The amendments were passed in response to the nation's low-level waste disposal crisis, and required the states to develop low-level waste disposal sites either separately or in conjunction with other states. The Court held the Low-Level Waste Act's "take-title" provision, which required the states to either accept ownership of the waste or regulate according to Congress's instructions, unconstitutional because it exceeded Congress's enumerated powers and violated the Tenth Amendment. In *Printz*, the court applied the Supreme Court's current Tenth Amendment analysis and held that the background check provi-

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77 Printz v. United States, 854 F. Supp. 1503, 1515 (D. Mont. 1994) (holding CLEOs are singled out to perform specific duties, thus Act cannot be viewed as generally applicable laws).


79 Id. at 2417-18 (noting powers delegated to Congress in Constitution and powers reserved to state sovereignty as power of Constitution not conferred on Congress).

80 Id.

81 See id. at 2428-29 (holding "take-title" provision of Low-Level Radioactive Waste Policy Amendments Act of 1985 unconstitutional since it commandeered states to regulate according to Congress's instructions); *Printz*, 854 F. Supp. at 1519-20 (holding provision of Act unconstitutional since it forced states to administer federal regulatory program).

82 *New York*, 112 S. Ct. at 2417. The County of Allegheny had three potential sites and the County of Cortland had two potential sites. *Id.*

83 *New York v. United States*, 112 S. Ct. 2408, 2411 (1992) (stating compromise that states were to provide for disposal of low-level radioactive waste generated within state).


85 42 U.S.C. § 2021d(a) (1988). This section provides for regional compacts for disposal of low-level radioactive waste in general. *Id.* This section also provides that such disposal will be most safely and effectively achieved on a regional basis. *Id.* § 2021d(a). The statute also provides that "the states may enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low level radioactive waste." *Id.* § 2021d(a)(2).

86 *New York v. United States*, 112 S. Ct. 2408, 2429 (1992) (noting that provision is inconsistent based on Congress's enumerated powers or state sovereignty reserved by Tenth Amendment established by Constitution).

87 *Id.*
tion was an unconstitutional intrusion of federal legislation on the states and thereby violated the Tenth Amendment. It appears that the court appropriately choose the New York standard because Garcia is relevant to laws of general applicability, whereas the Act only mandates duties on local CLEOs.

III. ANALYZING PRINTZ: THE BRADY ACT’S BACKGROUND CHECK PROVISION AS AN UNCONSTITUTIONAL COMMANDEERING OF STATE POWER

In Printz, the court held that the background check provision unconstitutionally commandeered Montana’s powers and indirectly encroached on Montana's legislature. The Printz court recognized that the Act imposes an unfunded federal mandate on local government, thus exceeding Congress’s powers under the Constitution. In order to implement this provision, local CLEOs and state-elected bodies would be required to provide the funds for the background check, thus reducing state budgeting for other ar-

89 Printz v. United States, 854 F. Supp. 1503, 1519 (D. Mont. 1994) (noting that unfunded federal mandate is beyond Congress’s powers); see also New York v. United States, 112 S. Ct. 2408, 2417 (1992). The Supreme Court noted that Tenth Amendment questions can be viewed from two different angles: the court either can inquire whether an act of Congress is authorized by a power delegated to it in Article I of the Constitution, or whether an act of Congress invades a state’s sovereignty reserved by the Tenth Amendment. Id.; see, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531, 552 (1985) (upholding application of act regulating wages, hours of public and private employees to municipally-owned transit company, and holding that political process, not judiciary, was responsible for protecting state sovereignty from federal encroachment); Perez v. United States, 402 U.S. 146, 166-67 (1971) (finding that “loan sharking in its wide-scaled national setting affects interstate commerce, thereby violating Congressional legislation of Consumer Credit Protection Act, Title II); Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 81 (1869) (holding that clause in congressional act making United States notes legal tender for debts has no reference to taxes imposed by state); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (remarking that states cannot infringe upon Congress’s enumerated powers to restrict Congress’s act). When the case involves a dispute between federal and state division of authority, “the two inquires are mirror images of each other.” New York, 112 S. Ct. at 2417.
90 Printz, 854 F. Supp. at 1519. In reaching its conclusion, the Printz court used the rationale of drawing a parallel between the “take-title” provision ruled unconstitutional in New York and the background check provision of the Act concluding that “like the ‘take-title’ provision contained in the statute in New York, the Act contains provisions inconsistent with the Constitution’s division of authority between federal and state governments.” Id. at 1513.

In Printz, the background check is comparable to the “take-title” provision because, despite the lack of official legislation, both are commands by federal government to state executives to administer portions of the respective Acts to achieve their purposes. 854 F. Supp. at 1513.

See also Albo, supra note 21, at B6 (stating that “Brady law went too far by illegally forcing local law enforcement agencies to do Washington’s bidding with local resources”).
The CLEOs would also be required to contribute worker hours to perform background checks ranging from "15 minutes to six hours" to determine whether a gun transaction would violate the law. To make such a determination, the CLEO would have to learn about pertinent federal and state law. Moreover, a diversion of funds could result in an adverse impact on the ability of the CLEO to interact with other law enforcement departments. Thus, the federal government has transferred responsibility and accountability for its regulatory program to the states, infringing upon their police power and singling out state officers.

91 854 F. Supp. at 1512-13 (noting that issue in Printz turns on the constitutionality of federally imposed, unfunded mandates); see also Mack v. United States, 856 F. Supp. 1372, 1375 (D. Ariz. 1994) (illustrating that sheriff did not have either personnel or funds to do what Act required of him); Zelinsky, supra note 13, at 1336 (addressing tendency of federal and state officials to impose unfinanced mandates on lower-level governments despite its universal condemnation).

92 Frank v. United States, 860 F. Supp. 1030, 1032 (D. Vt. 1994). The CLEOs are required to ascertain within five business days whether receipt or possession of the handgun by the applicant will violate the law. Id. (citing 18 U.S.C. § 922(sX2) (Supp. V 1993)). Such a determination involves researching whether local and state records are available as well as researching the national system maintained by the Attorney General. Id. The length of time to be devoted by the CLEO, apparently, will depend on the strength of the systems utilized. Id.; see also Mack, 856 F. Supp. at 1375 (discussing sheriff’s allegations that Act will require him to search nine categories of records which he does not have personnel or funds to do).

93 Printz v. United States, 854 F. Supp. 1503, 1515 (D. Mont. 1994). In addition to the time and effort which will be required to research local, state, and federal records, the CLEO must also expend a substantial amount of time to learn the relevant law so that he may perform these checks correctly. Id.; see also Mack, 856 F. Supp. at 1375 (addressing sheriff’s allegations that his state law responsibilities do not encompass or include type of investigations required by Brady).

94 Printz, 854 F. Supp. at 1514. Frustrated citizens might begin to hold public officials accountable for any inefficiency and unresponsiveness which results from a diversion of funds to support the Act’s provisions. Id.

95 Id. at 1515. The court addressed the accountability issue at great length, indicating that although CLEOs and state and local elected officials will be held accountable for the diversion or raising of funds to implement the Act, the program’s cost should be borne by the federal government. Id. The state is forced under this provision to expend its time and resources toward the implementation of a background check system. Id.; see Mack 856 F. Supp. at 1381 (stating that states are forced to expend time and resources toward implementation of Act); see also New York v. United States, 112 S. Ct. 2408, 2428 (1992). Justice O’Connor distinguished between encouragement from the federal government, which is constitutionally permissible, and federally mandated coercion. Id. Thus, by “encouraging a State to conform to federal policy choices, the residents of the state retain the ultimate decision as to whether the state will comply.” Id. Congress may condition receipt of federal funds upon specific requirements requested of the states or it may act pursuant to the Commerce Clause and preempt the state law through federal legislation. Id. However, when the federal government demands a state to perform a duty, without preempts the state law, such a “provision is inconsistent with the federal structure of Government established by the Constitution.” Id. at 2429.

96 See Barrante, supra note 6, at 269 (noting that power to penalize criminal activity and provide police to enforce laws is reserved to states). In each federal district court case that ruled on the Act, the sheriff, as CLEO of the jurisdiction, was found to have standing to bring the cause of action. See Mack v. United States, 856 F. Supp. 1372, 1378 (D. Ariz.
It is submitted that the Supreme Court would affirm the decision of Printz, as well as those of Mack v. United States,97 McGee v. United States,98 and Frank v. United States,99 because the Act's background check provision infringes on powers reserved to the states by the Tenth Amendment,100 and exceeds the scope of the Commerce Clause.101 The Printz, McGee, Mack, and Frank courts all based their rationales on New York.102 Conversely, only one federal district court thus far, in Koog v. United States,103 declined to follow the lead of Printz.104 To reach its conclusion, the Koog court applied the rationale from FERC v. 1994) (finding that Mack has standing because Act directed him, as county agent and chief law enforcement officer, to perform its statutory mandates). It appeared that in granting standing, the courts implicitly admitted that the sheriffs, as state officers, were being singled out by the Act and thus had capacity to sue. Id. at 1377.

101 U.S. CONST. art. I, § 8. Section 8 provides: "Congress shall have the Power . . . to regulate Commerce with foreign Nations, and among the several States." Id.
102 112 S. Ct. 2408 (1992). The Printz court found the check similar to the "take-title" provision ruled unconstitutional in New York, 854 F. Supp. at 1513. New York State sued the federal government, arguing that the Low-Level Radioactive Waste Disposal Amendments Act of 1985 violated the Tenth Amendment. New York, 112 S. Ct. at 2417. The Court's rationale in finding the Act's "take-title" incentive unconstitutional is noteworthy. Id. The Act sought to encourage each state to dispose of the low-level radioactive waste generated within its borders. Id. The "take-title" incentive was designed to accomplish this goal by requiring any state which did not take title to the waste to be liable for damages in connection with its disposal. Id. at 2415. Finding the "take-title" provision violative of the Tenth Amendment, the Court held that the "take-title" incentive did not represent the conditional exercise of any congressional power enumerated in the Constitution. Id. at 2428. "Congress . . . instead held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction." Id. Likewise, the Act mandated federal legislation on local CLEOs requiring performance of three tasks once they received notification from a gun seller of a proposed transaction: determination of whether receipt of the handgun would be unlawful, performance of a background check, and destruction of all documents once the transaction is approved. Printz, 854 F. Supp. at 1512.
104 Id. at 1387 (concluding that no single recent decision wholly controls interpretation of Tenth Amendment spectrum). The court held that the Act is constitutional and consistent with the Tenth Amendment. Id. at 1388.
Mississippi to find that the CLEOs' duties were minimal. Koog, however, failed to explain how it arrived at this conclusion, whereas Printz and its progeny all demonstrated how the duties placed on CLEOs can become overburdensome. Moreover, FERC would not apply to the Act because the provisions at issue in FERC were compelled by the Supremacy Clause, not the Tenth Amendment, and were only of a de minimis nature.

Justice Sandra Day O'Connor's assertion of the power of the Tenth Amendment to curb congressional intrusion in *New York* is particularly applicable to *Printz* because the Act unconstitution-

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106 *Koog*, 852 F. Supp at 1388 (finding that duties placed on the CLEOs are minimal and thus constitutionally protected as proper exercise of Congressional powers). In so ruling, the court drew a distinction between *New York* and an earlier Tenth Amendment case, *FERC*, 456 U.S. 742 (1982). *Koog*, 852 F. Supp. at 1388. The *Koog* court noted that the *FERC* court had to decide whether a federal regulation requiring a state regulatory commission to consider, but not adopt, various standards was constitutional. *Id.* at 1382. The *Koog* court recognized that the holding in *FERC* was that the regulations did not raise any Tenth Amendment concerns because: (1) the states only had to consider the regulations; and (2) the state utility regulatory commissions were equivalent to judicial tribunals and the federal government had the right to require them to enforce federal law. *Id.* at 1382-83.

107 *Koog*, 852 F. Supp. at 1388. "The court concludes that the duties imposed on chief law enforcement officers . . . resemble more the duties created under PURPA than the command to legislate . . . ." *Id.* This conclusory analogy does little to explain how the duties are actually minimal or why they are not excessive. *Id.*

108 See, e.g., *Frank* v. United States, 860 F. Supp. 1030, 1044 (D. Vt. 1994) (stating that Act doubled workload with respect to conducting background checks); *Mack* v. United States, 856 F. Supp. 1372, 1382-83 (D. Ariz. 1994) (noting that Act requires sheriff to perform duties that he does not have personnel or funds to be able to do); *Printz* v. United States, 854 F. Supp. 1503, 1518 (D. Mont. 1994) (discussing CLEOs' duties to include allocating resources, learning pertinent laws, and writing and destroying records).

109 See *FERC* v. Mississippi, 456 U.S. at 764 (finding regulations of state private utilities constitutional and not directly compelling where Congress adopts less intrusive scheme allowing states to continue individual regulation in otherwise federally preemptible field on condition that they consider federal standards). The Court found that the regulations only required a consideration of federal proposals, that states could cease their own regulation and thus avoid federal demands, and finally, that despite regulation, the federal government can simply preempt the states in their regulation of private utilities. *Id.*; see also *Printz*, 854 F. Supp. at 1516 (noting that federal program in *FERC* was upheld by rationale of *Testa* v. *Katt*, 330 U.S. 386 (1947), which involved application of Supremacy Clause as supreme law of land); see also *Frank*, 860 F. Supp. at 1042 (noting that cases such as *Testa* and *FERC* are not relevant to Tenth Amendment conflicts because they involved Congress's ability to pass laws enforceable in state courts and therefore involve only application of Supremacy Clause). Since *FERC* and *Testa* do not support the Act's proposition of commanding a nonadjudicatory state official (the local CLEO) to carry out a federal program, they cannot control here. *Id.*; see also Stephen P. Halbrook, *Letters to the Editor - Another Look at the Brady Law*, WASH. POST, Oct. 8, 1994, at A18. "One court upheld the [Act], but only because that court interpreted it to mean that record checks are optional." *Id.* Stephen Halbrook was counsel for four of the sheriffs who brought suit against the Act. *Id.*

ally imposes congressional legislation on officers of the states. This coercive legislation mirrors the statute struck down in New York, which likewise imposed an unfunded mandate on the state without allowing a permissible alternative. In New York, the third provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 required states to either accept ownership of waste or regulate according to the instructions of Congress. The statute’s approach in New York, of requiring the state to “take-title” to waste or follow federally imposed regulations, mirrors Printz’s unfunded mandate of background checks. The New York Court found that this was a choice between two unconstitutionally coercive regulatory programs. To explain its finding, the Court noted that the “take-title” provision would commandeer the states “into the service of federal regulatory programs” which is a violation of the division of authority between federal and state governments.

The statute in Printz, much like that struck down in New York, was found to be an unfunded mandate, clearly infringing upon state autonomy. In Printz, the Government argued that the Act is constitutional because it does not place a mandatory requirement upon the CLEOs, and it is a law of general applicability. First, the United States argued that the Act only required CLEOs to “consider performing” a background check. The Printz major-

112 New York, 112 S. Ct. at 2428.
113 Id.
114 Id.
115 See supra note 89-123 and accompanying text (discussing parallels between New York and Printz).
116 Id.
117 Id.
118 Printz, 854 F. Supp. at 1519.
119 See Printz, 854 F. Supp. at 1515-16 (explaining general applicability as governing both private and public actions). But see Frank v. United States, 860 F. Supp. 1030, 1041 (D. Vt. 1994) (noting that Government overlooked last phrase of § 922(s)(2) which requires check to include research in whatever state and local records are available); H.R. REP. No. 344, 103d Cong., 1st Sess. 1, 38-39 (1993) (rejecting amendment that would have changed “shall make a reasonable effort” to “will make a reasonable effort”). This report stressed the mandatory nature of the Act throughout its description of the bill: “Local law enforcement officials are required to use the waiting period to determine whether a prospective handgun purchaser . . . is prohibited by law from buying a gun.” Id. at 7. “The bill requires local law enforcement officials to make a reasonable effort to ascertain whether the purchase would be lawful.” Id. at 10-11. “A background check of the prospective purchaser will be conducted” before a lawful gun transfer can be made. Id. at 17.
120 See Printz v. United States, 854 F. Supp. at 1515-16 (D. Mont. 1994). The Government contended that the Act was constitutional because the Act only directed the states to
ity, however, pointed to several factors, including a House Judiciary Committee Report, that disputed this contention.\textsuperscript{121} Second, the Government argued that the Act is a law of general applicability which does not infringe specifically upon the states as states.\textsuperscript{122} Nevertheless, the court emphasized that the nature of the background check provision unconstitutionally singled out officers of the states and required them to perform specific duties.\textsuperscript{123}

IV. ALTERNATIVES TO THE UNCONSTITUTIONAL BACKGROUND CHECK PROVISION

Severing the background check provision from the Act provides one judicially appropriate and effective remedy for preserving the Act's goals and does not destroy the purpose of the statute.\textsuperscript{124} In

engage in the types of activities in which they would normally engage. \textit{Id.} at 1516. The Government's belief that the Act is constitutional was based upon four factors: (1) the law is generally applicable and is not aimed solely at the states as states, but instead governs both public and private actors; (2) the residual state sovereignty protected by the Tenth Amendment is secured primarily by a state's representation in Congress; (3) the Act merely directs a state to consider taking action; and (4) the Act only directs CLEOs to perform their normal activity. \textit{Id.} at 1515-16. As an alternative argument, the Government contended that the duties placed on the CLEOs are de minimis. \textit{Id.} at 1517. Several of these points have been argued in subsequent cases. See \textit{Frank}, 860 F. Supp. at 1036 (Government interpreted Act as suggesting mandatory "discretionary" duty); \textit{Mack}, 856 F. Supp. at 1383 (recognizing argument that CLEO was not under mandatory obligation to determine legality of handgun transfers).

\textsuperscript{121} Printz, 854 F. Supp. at 1512. The House Judiciary Committee Report indicated that the intent of Congress was to provide for mandatory background checks by the CLEOs. \textit{Id.}; \textit{see also supra} note 119 and accompanying text (discussing House Report).

\textsuperscript{122} Printz, 854 F. Supp. at 1515. The \textit{Printz} court rejected the Government's argument that the Act is constitutional because it governed both public and private actions. \textit{Id.} The court noted that unlike previous cases cited by the Government where laws were determined to be of a generally applicable nature, this is not the case, because the Act does not subject the states to the same requirements as private actors. \textit{Id.} at 1515-16 (citing \textit{Garcia} v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)). The court reasoned that since the Act was not generally applicable but instead legislated directly upon officers of the states, this issue fell squarely within the holding of \textit{New York}, in deciding that the federal government may not compel states to administer a regulatory program. 854 F. Supp. at 1515.

\textsuperscript{123} Printz, 854 F. Supp. at 1512 (finding that Act mandated that CLEOs perform specific tasks before gun transfer can be lawfully made).

\textsuperscript{124} \textit{Id.} Besides the severability argument, some might question the idea of ruling on an interim provision of the Act which will become moot by the year 1998 when a federal background check system is installed. See James Podgers, \textit{Gun Law Under Fire, Court Challenges to Brady Bill Produce Conflicting Results}, A.B.A. J., August 1994, at 84. This view fails to recognize the fact that the Brady issue is relevant not only to the gun control controversy, but also to the province of the Tenth Amendment. \textit{See Printz}, 854 F. Supp. at 1503. Finally, underlying these debates is the possibility that the Act may face other constitutional challenges on Second or Fourteenth Amendment grounds. The federal district courts that have confronted the Tenth Amendment issue presented here have also heard claims on the Fifth Amendment. \textit{See Mack v. United States}, 856 F. Supp. 1372, 1375 (D. Ariz. 1994); \textit{Printz}, 854 F. Supp. at 1507; Koog v. United States, 852 F. Supp. 1376, 1377. Furthermore, the Thirteenth Amendment has also been implicated. \textit{See Mack}, 856 F. Supp. at
New York, the Court noted that first, severability is only unwarranted if it is evident the legislature would not have enacted the constitutional provisions independently of those that were found beyond congressional power.\textsuperscript{125} Second, the remaining provisions of the statute must be "fully operative" as law.\textsuperscript{126} As to this requirement, courts must decide if the unconstitutional provisions are "functionally independent" from the rest of the Act.\textsuperscript{127} Their elimination must not in any way alter the substantive reach of the statute nor change its basic operation.\textsuperscript{128} Furthermore, a provision is not independent if it is so intertwined with the constitutional portions that the statute would have to be rewritten to allow it to stand.\textsuperscript{129} In New York, the Court applied the severability standard\textsuperscript{130} to its constitutional problem and effectively preserved the strength of the Low-Level Radioactive Waste Management Amendments Act.\textsuperscript{131}

Applying these standards to the Act, eliminating the background check does not alter its substantive reach, change its basic operation, nor require the court to rewrite the statute to allow it to stand.\textsuperscript{132} The five-day waiting period is kept intact, purchasers still need to provide sworn statements, and if CLEOs do decide to perform a check, they must write an explanatory letter to any re-

\textsuperscript{125} 1375. For now, the \textit{Printz} decision provides yet another opportunity for the Supreme Court to construct a more definitive interpretation of the Tenth Amendment. \textit{See Printz}, 854 F. Supp. at 1507. "This case turns on the proper relationship between the federal government and the several states, and in particular, on the constitutionality of federally imposed, unfunded mandates." \textit{Id.}

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} Board of Nat. Resources v. Brown, 992 F.2d 937, 948 (9th Cir. 1993) (discussing questions that must be answered to satisfy severability test) (quoting United States v. Jackson, 390 U.S. 570, 586 (1968)).

\textsuperscript{128} \textit{See generally Printz}, 854 F. Supp. at 1518; \textit{Mack}, 856 F. Supp. at 1383; \textit{Frank}, 860 F. Supp. at 1044.

\textsuperscript{129} \textit{Id.}

\textsuperscript{130} \textit{See New York}, 112 S. Ct. at 2434 (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)).

\textsuperscript{131} 112 S. Ct. at 2434. In \textit{New York}, the Court observed that the "take-title" penalty at issue was "simply in aid of the main purpose of the statute. . . . [It] may fail, and still the great body of the statute have operative force. . . ." \textit{Id.} (quoting Reagan v. Farmers' Loan and Trust Co., 154 U.S. 362, 396 (1894)). Furthermore, the Low-Level Waste Act was formed to still serve the objective of encouraging state self-sufficiency in the waste disposal area, thereby the purpose of the Act was not defeated by excising the "take-title" provision. \textit{Id.}

jected purchasers. In addition, the Act does not need to be rewritten because CLEOs may retain the option of conducting their own checks.

When a statute contains a severability clause there is a presumption that the unconstitutional part of the statute is severable. Since Congress could have enacted the remaining portions of the Act without the severed provisions, the remaining portions can stand alone. The Gun Control Act, which the Act amends, contains a severability clause, therefore the presumption in favor of elimination of the unconstitutional section arises. Without the mandatory background check, the Act would still achieve congressional goals. CLEOs would then have the option, rather than the obligation, to conduct background checks during the five-day waiting period. Although the plaintiffs in each case argued that the Act would not have been enacted but for the background check, they did not show enough evidence to overcome the presumption. Thus, each court found that the Act remained fully operative after the unconstitutional provisions were excised, and that Congress would have enacted the remaining sections even without support of the severed provisions. The central focus of the Act is also preserved because the waiting period remains intact and the prospects of a federal check system are still available.

The Act could also be constitutionally improved if Congress implemented an amendment urging, but not demanding CLEOs to perform background checks. Congress could exercise its taxing and spending powers under the Constitution to provide incentives

134 Id.
139 Id.
141 Frank, 860 F. Supp. at 1044.
142 Printz, 854 F. Supp. at 1517 (noting that severing § 922(s)(2) does not substantively alter Act because provisions affecting targets of Act are left intact).
143 Id. The court recognized that severing the "ascertainment/background check" provision does not prevent CLEOs from performing such checks. Id. It simply becomes the choice of each CLEO, not a mandated requirement forced upon him by the federal government. Id.
to states that independently require background checks without interfering with state police powers.\textsuperscript{144} Congress has the ability to tax almost any activity, even when the tax might affect an area Congress is not authorized to regulate directly.\textsuperscript{145} In addition, Congress may use tax proceeds to raise national revenue and spend for the "general welfare of the United States."\textsuperscript{146} Thus, Congress may persuade the states, through federal funding incentives, to adopt federal legislation short of actual coercion.\textsuperscript{147} For instance, Congress may require states to meet certain conditions to be eligible for federal funds.\textsuperscript{148} Furthermore, conditions may be imposed to influence a state's legislative choices.\textsuperscript{149} Thus, as Congress has done before, it could pass legislation offering incentive programs or withholding federal funds for those states which do or do not require their CLEOs to perform background checks.\textsuperscript{150}

\textsuperscript{144} New York v. United States, 112 S. Ct. 2408, 2423-27 (1992). Similar to the provisions of the Low-Level Radioactive Waste Policy Amendments Act found to be constitutional in New York, Congress could enact incentive measures to urge the states, without forcing them, to perform background checks. \textit{Id}. Such incentives could include a graduated basis of reimbursement based on the amount of checks performed by each CLEO. \textit{Id}. Special awards could also be built into the system. \textit{Id}. \textit{New York} contains a description of constitutional incentives. \textit{Id}.

\textsuperscript{145} U.S. CONST. art. I, cl. 8; Massachusetts v. United States, 435 U.S. 444, 467-68 (1978) (holding that registration tax imposed on civil aircraft to recoup costs of federal aviation programs does not violate immunity of state government from federal taxation when applied to state owned police plane); United States v. Sanchez, 340 U.S. 42, 44 (1950) (tax statute does not fail because it reaches activities Congress might not regulate); Sonzinsky v. United States, 300 U.S. 506, 513 (1937) (tax is not any less so even if it has regulatory effect, is burdensome, or tends to restrict activity taxed); \textit{Treh}. \textit{supra} note 39, at 318.

\textsuperscript{146} U.S. CONST. art I, cl. 8. Congress has broad power to spend for the general welfare. \textit{Id}.; see Buckley v. Valeo, 424 U.S. 1, 4 (finding "for the general welfare" clause is not limit on congressional power but grant of power of expansive scope especially when viewed in conjunction with Necessary and Proper Clause).

\textsuperscript{147} Gorrie v. Bowen, 809 F.2d 508 (8th Cir. 1987) (Congress may impose conditions on state receipt of federal funds under Spending Clause as effort to regulate areas it does not have power to directly administer); \textit{see also} New York v. United States, 112 S. Ct. 2408, 2423 (1992) (finding Congress may attach conditions to receipt of federal funds by state but such conditions must bear some relationship to federal purpose).

\textsuperscript{148} South Dakota v. Dole, 483 U.S. 203, 206 (1987) (holding that Secretary of Transportation could withhold federal highway funds if state failed to adopt federal minimum drinking age).


\textsuperscript{150} New York v. United States, 112 S. Ct. 2408, 2427 (1992). The Court allowed the Secretary of Energy to collect taxes derived from state waste disposal and apportion it out to states which meet federal milestones for creating their own disposal mechanisms because the incentive is supported by an affirmative grant of congressional power and is consistent with Tenth Amendment. \textit{Id}. Furthermore, allowing states with disposal sites to increase the cost of access and then deny it altogether to those states which fail to meet federal deadlines is a constitutional incentive that permits Congress to discriminate against interstate commerce consistent with the Commerce Clause. \textit{Id}.
The states should implement their own mandatory background check systems for gun transfers, and the federal government should pass incentive legislation for such an operation and reimburse the states for their efforts. This solution appears to avoid any constitutional conflict because the federal government would be achieving its goals through cooperative federalism and its persuasive "Spending Powers". Consequently, the goals of the Act would be met.

V. NOTEWORTHY GOALS DO NOT OVERRIDE THE ACT'S UNCONSTITUTIONALITY

Although public policy concerns behind the enforcement of the Act are fundamentally sound, they cannot override a constitu-

151 See, e.g., FLA. STAT. ch. 790.06 (1993) (requiring purchasers who wish to carry concealed weapons (defined as handguns, etc.) to obtain license which is only granted by Department of State if applicant is resident of United States, has not been convicted of felony or controlled substance abuse, has legitimate reason to carry such weapon, and demonstrates competence with that weapon); ILL. ANN. STAT. ch. 720 para. 5/24-3 (Smith-Hurd 1994) (stating that person commits offense of unlawful sale of firearms if he knowingly "delivers any firearm of a size which may be concealed upon the person, incidental to a sale without withholding delivery of such firearm for at least seventy-two hours after application for its purchase has been made"); N.J. REV. STAT. § 2C:58-4 (1994) (requiring each application for permit to carry handgun to be submitted to chief police officer of each respective jurisdiction who shall then take fingerprints, compare prints with all necessary records, record full description of all guns intended to be carried, determine purchaser does not suffer from any statutory disabilities, and has justifiable need to carry gun); N.Y. PENAL LAW § 400.00 (McKinney 1994) (requiring that before any license to carry, possess, repair, or dispose of firearms is granted, gun owner must undergo complete investigation of his mental health, his criminal record, his fingerprints, and his purposes and intentions to use weapon); 18 PA. CONS. STAT. ANN. § 6109 (1994) (requiring gun purchasers in Pennsylvania to fill out application requiring statement of purpose, competency, and legitimacy and requiring sheriffs of each jurisdiction to make complete investigation into criminal records and into applicants' character and reputation); see also Albo, supra note 21, at B6. Although Phoenix was one jurisdiction that challenged and defeated the Act, Arizona already has established instant background check system for gun purchasers allowing retailers to access several criminal records databases with no charge to them. Id. These states already have statutory provisions requiring extensive background checks to be performed prior to obtaining a gun or a permit to carry, possess, or repair one. Id.

152 See supra notes 145-49 and accompanying text.

153 See Albo, supra note 21, at B6 (detailing Arizona's background check system as alternative to Act). Since the states may mandate requirements on their own police powers through state legislation, a state funded background check meets the goals of the Act without causing the dilemma of an unconstitutional unfunded federal mandate. Id.

tional violation.\textsuperscript{155} Congressional regulatory schemes that do not involve commerce should be controlled by the Tenth Amendment. The state police power should not be impeded by emergency public policy measures, nor under the auspices of the Commerce Clause.\textsuperscript{156} Although gun control is a laudable goal, a crisis of similar proportion did not blind the \textit{New York} Court when it encountered unconstitutional federal legislation.\textsuperscript{157}

The fear of violence and crime has caused a majority of the nation's citizens to favor gun control and to overlook contrary constitutional authority.\textsuperscript{158} This is evidenced by the failure of major U.S. newspapers to report on \textit{Printz}.\textsuperscript{159} While Koo\textsuperscript{g} received

\textsuperscript{155} See Frank, 860 F. Supp. at 1043 (noting that although Act was created for laudable ends, unconstitutional means cannot be used to justify noteworthy purpose).

\textsuperscript{156} See Barrante, supra note 6, at 269. In addition to violating the power of the states, the author notes that federal regulatory schemes can also violate individual rights. \textit{Id.} “[F]ederal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.” \textit{Garcia}, 469 U.S. at 572 (Powell, J., dissenting). Professor Laurence Tribe sums this argument up best, stating that when Congress passes policy-based legislation, “that endangers the provision of certain vital services... [it] is constitutionally problematic... because it hinders and may even foreclose attempts by states... to meet their citizens’ legitimate expectations of basic government services.” \textit{Tribe}, supra note 39, at 313-14.

\textsuperscript{157} See Barrante, supra note 6, at 269 (discussing how police powers are reserved exclusively to states). The powers of government are reserved to the states insofar as any power is not specifically granted to Congress under the Constitution. \textit{Id.}

\textsuperscript{158} See ACLU, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION, Policy No. 47 (rev. ed. 1992) (arguing that “[e]xcept for lawful police and military purposes, the possession of weapons by individuals is not constitutionally protected”). The debate over gun control stems from the divergent views of state's rights versus individual's rights under the Second Amendment right to bear arms. \textit{Id.; see also} Stanford Levinson, The Embarrassing Second Amendment, 99 YALE L.J. 637, 640 n.19 (quoting \textit{LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW} 299 n.6 (2d ed. 1988) (stating that “history of the [Second] Amendment indicate[s] that the central concern of [its] framers was to prevent such federal interference with the state militia as would permit the establishment of a standing national army”). \textit{But see} Wagner, supra note 154, at 1434-44. The author cites numerous sources from the Federalist Papers and notes that the Framers intended the Second Amendment to confer an individual right to keep and bear arms because the people needed the opportunity for defense if an organized military ever attempted oppression. \textit{Id.; see also} New York v. United States, 112 S. Ct. 2408, 2414 (1992) (discussing problems confronting nation during 1980's concerning disposal of low-level radioactive waste). In \textit{New York}, the Court found that although the federal government was trying to rectify a serious crisis, offering a choice between two unconstitutional federal regulatory programs is no choice at all. \textit{Id.; Lingelbach, supra note 14, at 560 (giving brief history of crisis that erupted around debate of what to do with low-level radioactive waste).}

\textsuperscript{159} See Federal Judge in Texas Upholds Brady Gun Control Measure, \textit{WASH. POST}, June 2, 1994, at A13. Several major newspapers reported the outcome of \textit{Koo\textsuperscript{g} v. United States}, which upheld the constitutionality of the Brady Act while hardly giving any attention to \textit{Printz v. United States} which was decided before \textit{Koo\textsuperscript{g}} and ruled the Act unconstitutional. \textit{Id.; see also Federal Judge Upholds Brady Gun Law, MIAMI HERALD, June 2, 1994, at 9A (each article only briefly mentioning \textit{Printz} outcome in one line of text); Judge Upholds Background Checks in Handgun Purchases, BOSTON GLOBE, June 2, 1994, at 4 (no mention of \textit{Printz} holding).
lengthy examination, Printz was minimized and even neglected. Furthermore, the perception of the National Rifle Association (the "NRA") as a group moving away from the mainstream\textsuperscript{160} has convinced many people of the necessity of "Brady-type" legislation,\textsuperscript{161} although the NRA maintains a strong resolve to defend and advance their rights under the Second Amendment.\textsuperscript{162} Nevertheless, "laudable ends cannot be used to justify unconstitutional means."\textsuperscript{163} When confronting an urgent situation in New York,\textsuperscript{164} Justice O'Connor explained the fundamental importance of main-

\textsuperscript{160} Philip Weiss, Why They Shoot: A Hoplophobe Among the Gunnies, N.Y. TIMES, September 11, 1994, § 6 (Magazine), at 66; see also Joan Biskupic, Gun-Control Supporters Take Aim at Swing Votes, 49 CONG. Q. 604, 607 (1991). The author notes that groups such as the National Rifle Association feel gun control is a violation of individual rights evidenced by one member stating "[w]e need to have a meateating NRA that won't be kind to any legislator who votes against the citizen's right to keep and bear arms." Id.

\textsuperscript{161} See Message of the Brady Bill, WASH. POST, November 25, 1993, at A30. Although perhaps a small step, the passage of the Act was an important event because it sends message to the NRA and gun lobbyists that "[t]here's no reason on civilized Earth for quickie sales of handguns to almost anyone who comes in the door of a gun shop." Id. The Act is also an important first step because the "absurdly cheap and loose provisions" for obtaining a federal firearms license have been toughened through the increase of fees. Id. Richard B. Saltman, Why Not Mandatory Gun Insurance?, WASH. POST, January 11, 1994, at A19 (noting that legislators finally have courage to challenge gun violence through passage of Act, suggesting that such statute is only first step in confronting handgun issue, and explaining that requiring gun purchasers to buy liability insurance would be best way to prevent handgun misuse). But see Bill Hart, No Simple Answers or Easy Statistics in Debate on Gun Law, PHOENIX GAZETTE, July 4, 1994, at B1 (noting opponents to Act believe criminals seldom buy guns legally and that Act only imposes unconstitutional restrictions on law-abiding citizens and that in reality people turned down for guns under Act were denied permits because of minor misdemeanors such as shoplifting, trespass and traffic offenses and not major felony offenses); Stephen P. Halbrook & Francis G. Haas, Letters to the Editor-Another Look at the Brady Law, WASH. POST, October 8, 1994, at A18. Halbrook's letter noted that in Phoenix, Arizona, thirty-five denials for permits under the Act were related to warrants for traffic or misdemeanor offenses while only four denials involved felonies, and noted that the Act does not even apply in half of the states due to availability of instant checks or other control methods. Id. In his letter, Haas noted that original conjecture about the Act has been misleading because, for example, Illinois recorded 117,099 checks with no denials and Vermont had a possible 6.2 percent denial rate while "peaceful New York had a rate of 1.6 percent." Id.

\textsuperscript{162} See Letter from Wayne LaPierre, Executive Vice President, National Rifle Association, to potential members (November 1994) (on file with the St. John's Journal of Legal Commentary) (stressing need to join NRA to protect individual's right to own and bear arms). LaPierre states: "[Y]our right to own and use a firearm is in jeopardy like never before" and "[t]he handwriting is on the wall . . . the gun control alliance is winning. They are coming closer to their goal [of] disarming law-abiding citizens . . . ." Id. at 1. LaPierre characterizes restrictive gun legislation as "harmful" to an individual's Second Amendment rights. Id.


\textsuperscript{164} New York, 112 S. Ct. at 2414-15 (discussing major crisis New York faced in disposing of low-level radioactive waste).
taining the separation of powers and preserving the sanctity of our federal system.\textsuperscript{165}

CONCLUSION

Although a line of modern Supreme Court decisions weakened the Tenth Amendment, \textit{New York v. United States} revitalized it by establishing the difference between generally applicable legislation, permissible under the Commerce Clause, and prohibited federal legislation that commandeers state power. The Act fell into this trap by mandating a regulation that intruded upon the state's police power, a power reserved to states under the Tenth Amendment. Moreover, even though the Act was designed to serve the noble purpose of preventing the transfer of handguns to criminals and the mentally insane, the Constitution cannot be trampled in the process. The Act and its purpose, however, were saved when the unconstitutional background check provision was found to be severable.

Furthermore, a feasible proposed alternative to section 922(s)(2) would be for Congress to pass incentive legislation, similar to the constitutional provisions of the Act at issue in \textit{New York} to persuade the states to implement their own mandatory check system. This would constitutionally accomplish the Act's purpose allowing federal and state governments to achieve their goals through cooperative federalism.

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\textsuperscript{165} \textit{New York}, 112 S. Ct. at 2434. "[T]he Constitution protects us from our own best intentions: It divides power . . . so that we may resist temptation to concentrate power in one location as an expedient solution to the crisis of the day. [The issue before the Court] is a pressing national problem but a judiciary that licensed extra-constitutional government with each issue of comparable gravity would in the long run be far worse." \textit{Id.}