

1995

The Tenth Amendment Shoots Down the Brady Act

Dyan Finguerra

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

Recommended Citation

Dyan Finguerra, *The Tenth Amendment Shoots Down the Brady Act*, 3 J. L. & Pol'y (1995).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol3/iss2/11>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

THE TENTH AMENDMENT SHOOTS DOWN THE BRADY ACT

*Dyan Finguerra**

INTRODUCTION

On March 30, 1981, John Hinckley, Jr. attempted to assassinate President Ronald Reagan in a desperate effort to impress an actress on whom he had an obsessive crush.¹ During the assassination attempt, the first of six bullets fired from Hinckley's gun entered the skull of the president's press secretary, James Brady.² Although Brady beat the ten-to-one odds against surviving the surgery, the bullet left him partially paralyzed.³ James Brady and his wife, Sarah, were outraged when it became known that, although Hinckley had a history of mental instability, he had easily obtained a handgun.⁴ Proponents of stricter handgun control began lobbying

* Brooklyn Law School Class of 1996. The author wishes to thank Professors Eve Cary and Susan Herman, Doug Nelson, Andrea Gallitano, Esq. and Sheriff J.R. Koog for their assistance in preparation of this Note. A special note of thanks to Teresa Scott, Esq. for her aid from the inception of this Note through her countless edits, and to my family for their continual support and to Seth DuCharme for foregoing a Sunday afternoon at the shooting range to edit my Note.

¹ Ron Shaffer & Neil Henry, *Hinckley Pursued Actress for Months, Letter Shows*, WASH. POST, Apr. 2, 1981, at A1.

² David S. Broder, *Jim and Sarah Brady: A Thumbs-Up Couple*, DET. FREE PRESS, Nov. 9, 1987, at 11A. President Reagan, a Secret Service agent and a District of Columbia police officer were also victims of Hinckley's gunfire. H.R. REP. NO. 344, 103d Cong., 1st Sess. 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984.

³ Broder, *supra* note 2, at 11A; *see also* Wayne King, *Sarah and James Brady*, N.Y. TIMES, Dec. 9, 1990, § 6 (Magazine), at 43.

⁴ David Behrens, *Ten Years of Survival*, NEWSDAY, Mar. 5, 1991, at 48. Giving a false address, Hinckley bought his .22-caliber RG 14 Rohm revolver for \$29.00 from a Texas pawn shop which did not conduct background checks. *Id.*

for stronger legislation than that provided by the Gun Control Act of 1968.⁵

Sarah Brady became a visible leader in the effort to strengthen America's gun control laws and prevent criminals and mentally unstable people from obtaining handguns.⁶ Sarah Brady became the chairperson of Handgun Control, Inc. in 1990,⁷ and worked to pass legislation, both on the state and national level, to toughen gun laws. Although several states passed more restrictive legislation than the federal government,⁸ state control over the transfer of firearms remained minimal. Consequently, proponents of gun

Such a check would have revealed incidents that reflect his mental instability and propensity for violence. For example, Hinckley was under psychiatric care and was taking Valium at the time of the shooting. He was also ousted from a neo-Nazi organization because the group's leaders considered him "extremist and too violent." See Shaffer & Henry, *supra* note 1, at A1. James Brady contends that if a mandatory waiting period had been in effect when Hinckley purchased his gun, he might not have been able to arm himself. Carolyn Skorneck, *James Brady Still Fights Pain, Gun-Control Foes, Firearms*, L.A. TIMES, Feb. 16, 1992, at A2. Brady commented, "And there's a good chance that I wouldn't be sitting in wheels today and walking around with a stick." *Id.*

At trial, Hinckley was found innocent of criminal charges by reason of insanity and he was committed to St. Elizabeth's Hospital in Washington. Laura A. Kiernan, *A Hinckley Interview*, WASH. POST, June 29, 1982, at A1.

⁵ Pub. L. No. 90-612, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921-930 (1988)). The Gun Control Act of 1968 was passed in the wake of the shooting deaths of the Reverend Martin Luther King, Jr. and Senator Robert F. Kennedy. Pierre Thomas, *Hit-or-Miss Control of Firearms: Sales Enforcers Can't Keep Up with Dealers*, WASH. POST, Nov. 29, 1992, at A1. The statute serves as the nation's primary gun control law, requiring comprehensive licensing of federal firearms dealers and detailed record keeping by those dealers. These procedures enable law enforcement officials to trace weapons used in violent crimes to their original purchasers. *Id.* The law also prohibits the sale of firearms to a person who the dealer "knows or has reasonable cause to believe" is a felon, a fugitive, a drug addict, an alien, or "a person who has been adjudicated as a mental defective or has been committed to any mental institution," dishonorably discharged from the Armed Forces, or to a person who has renounced his or her citizenship. 18 U.S.C. § 922(d).

⁶ King, *supra* note 3, at 43.

⁷ Sarah Brady joined Handgun Control, Inc. in 1984. She became vice chairperson in 1989, and succeeded co-founder Pete Shields as chairperson in 1990. See Behrens, *supra* note 4, at 48.

⁸ See *infra* notes 15-18 and accompanying text.

control intensified their efforts to draft federal legislation that would require all handgun purchasers to submit to a background check and waiting period.⁹ Sarah Brady and Handgun Control, Inc. lobbied on behalf of the "Brady Bill," but their efforts were stymied for seven years¹⁰ due largely to fierce resistance from the National Rifle Association of America ("NRA").¹¹

By instituting a five-day waiting period and mandatory background check by local law enforcement authorities, the Brady Bill was intended to "prevent convicted felons and other persons who are barred by law from purchasing guns from licensed gun dealers, manufacturers or importers."¹² According to members of Handgun Control, Inc., the Brady Bill is important because it

⁹ Tom Kenworthy, *House Easily Defeats "Brady Amendment,"* WASH. POST, Sept. 16, 1988, at A1 (discussing the House debate surrounding the ineffectiveness of current gun control laws). A 1993 Gallup poll revealed that 88% of American citizens favor a waiting period. H.R. REP. NO. 344, 103d Cong., 1st Sess. 9, *reprinted in* 1993 U.S.C.C.A.N. 1984. A "waiting period" is the time between when a purchaser commits to buying a gun and the time when he or she may actually leave the store in possession of the gun. Within that time period, a law enforcement official performs a background check of the purchaser. *See id.* at 10.

¹⁰ The Brady Bill was first introduced in Congress in 1987, but quickly became the subject of Senate filibusters, amendments, inclusion and removal from other legislation and presidential veto threats. H.R. REP. NO. 344, 103d Cong., 1st Sess. 12-13 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984; *see also* Naftali Bendavid, *Handgun Control Group Reloads*, LEGAL TIMES, Dec. 20, 1993, at A1; *Free For All—Free the Crime Bill*, WASH. POST, Sept. 19, 1992, at A19; Linda M. Harrington, *Gun Fighters; Jim and Sarah Brady May Finally Win the Battle for the Bill That Bears Their Name*, CHI. TRIB., Nov. 17, 1993, (Tempo), at 1.

¹¹ For a further discussion of the debate surrounding gun control legislation, and the Brady Act in particular, see Bob Dole, *The Brady Bill: It's Just Not Enough*, 3 KAN. J.L. & PUB. POL'Y 135 (1993/1994); Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53 (1992); Marc Christopher Cozzolino, Note, *Gun Control: The Brady Handgun Violence Prevention Act*, 16 SETON HALL LEGIS. J. 245 (1992).

¹² H.R. REP. NO. 344, 103d Cong., 1st Sess. 7 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984. In contrast to the Gun Control Act of 1968, where it was sufficient for a purchaser to swear on a federal form that he or she was mentally stable, not a fugitive, *inter alia*, the Brady Bill background check requires verification of the purchaser's statement.

allows people to "cool off from their anger and from whatever is disturbing them at the time [that they attempt to purchase the gun], and also allows for information to get into the system so when [the chief law enforcement officers] do a background check, it is accurate."¹³ On November 30, 1993, the Bradys and Handgun Control, Inc. celebrated a victory over the NRA's lobbying power when President Bill Clinton signed the Brady Handgun Violence Protection Act ("Brady Act") into law.¹⁴

Prior to the Brady Act's passage, only fourteen states had mandatory waiting periods,¹⁵ nine states required a permit to purchase a handgun,¹⁶ and two states required a telephone background check,¹⁷ but under the Brady Act all states must meet minimum federal requirements. Local officials must "make a reasonable effort to ascertain within five business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are

¹³ *CNN News: President Clinton's Brady Bill Signing Ceremony*, (CNN television broadcast, Nov. 30, 1993) (transcript available in LEXIS, News library, CNN file).

¹⁴ Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended in 18 U.S.C. § 922(s) (1988 & Supp. V 1993)). The Brady Handgun Violence Protection Act ("Brady Act") amended the Gun Control Act of 1968.

¹⁵ ALA. CODE § 13A-11-77 (1975) (48 hours); CAL. PENAL CODE § 12071 (West 1992) (15 days); CONN. GEN. STAT. ANN. § 29-37a (West Supp. 1992) (2 weeks); FLA. STAT. ANN. § 790.065 (West 1992) (3 days); IND. CODE § 35-23-4.1-7 (1976) (7 days); MD. ANN. CODE art. 27, § 442 (1987) (7 days); MINN. STAT. ANN. § 624.7132 (West Supp. 1994) (7 days); OR. REV. STAT. § 166.420 (1993) (15 days); 18 PA. CONS. STAT. ANN. § 6111 (1983) (48 hours); R.I. GEN. LAWS § 11-47-35 (Supp. 1991) (72 hours); S.D. CODIFIED LAWS ANN. § 23-7-9 (1988) (48 hours); TENN. CODE ANN. § 39-17-1316 (1991) (15 days); WASH. REV. CODE ANN. § 9.41.090 (West 1988) (5 days); WIS. STAT. ANN. § 175.35 (West Supp. 1994) (48 hours subject to a 3-day extension).

¹⁶ HAW. REV. STAT. § 134-2 (Supp. 1992); ILL. ANN. STAT. ch. 430, para. 65/3 (Smith-Hurd 1994); IOWA CODE ANN. § 724.16 (West 1993); MASS. GEN. LAWS ANN. ch. 140, § 129C (West 1981); MICH. COMP. LAWS ANN. § 28.422 (West 1994); MO. ANN. STAT. § 571.080 (Vernon Supp. 1994); N.J. STAT. ANN. § 2C:58-3 (West 1982); N.Y. PENAL LAW § 400.00 (McKinney 1989); N.C. GEN. STAT. § 14-402 (1993).

¹⁷ DEL. CODE ANN. tit. 11, § 1448A (Supp. 1990); VA. CODE ANN. § 18.2-308.2:2 (Michie Supp. 1994).

available and in a national system designated by the Attorney General."¹⁸ It is this congressional mandate to local authorities that has created legal controversy.

Opponents of gun control laws, and the Brady Act in particular, are challenging the Act's constitutionality in the courts.¹⁹ Instead of contesting the Brady Act on Second Amendment grounds²⁰ as they have done in the past,²¹ the NRA and some rural law

¹⁸ 18 U.S.C. § 922(s)(2).

¹⁹ *Frank v. United States*, 860 F. Supp. 1030 (D. Vt. 1994); *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994); *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994); *Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994); *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994).

²⁰ The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

In the court challenges to the Brady Act to date, none have asserted that the Brady Act violates the Second Amendment. *See, e.g., McGee v. United States*, 863 F. Supp. 321, 327 (S.D. Miss. 1994) ("This lawsuit . . . does not implicate the Second Amendment. This lawsuit involves only the Tenth Amendment and Article I, § 8 of the Constitution."); *Printz v. United States*, 854 F. Supp. 1503, 1507 (D. Mont. 1994) ("This is not a case about the Second Amendment. 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 to the states.").

²¹ *See, e.g., United States v. Miller*, 307 U.S. 174, 178-82 (1939) (upholding a federal statute which prohibited transportation of a firearm through interstate commerce and rejecting the objection that the statute usurps states' police power); *Miller v. Texas*, 153 U.S. 535, 538 (1894) (holding that the Second Amendment only restricts the federal government and not the states); *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (reaffirming *Cruikshank*); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (holding that there was no absolute constitutional right to "bear arms for a lawful purpose"); *see also Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980); *Konigsberg v. Bar of Cal.*, 366 U.S. 36, 49-50 n.10 (1961).

For articles exploring the Second Amendment and the gun control debate, see CLAYTON E. CRAMER, *FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS* (1994); Daniel Abrams, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL'Y REV. 488 (1992); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989);

enforcement officials are contending that the Brady Act violates the Tenth Amendment.²² According to gun control opponents, the Tenth Amendment's limitations on the powers of the federal government prevent it from "commandeering" local authorities to administer a federal regulatory program without providing an incentive, such as federal funding.²³ According to critics of the Brady Act, the federal government is taking "control of state and local police from the communities they serve . . . divert[ing] them from their primary duties . . . [a]nd tell[ing] state and local officials, 'Oh, by the way, it's our program, but you foot the bill.'"²⁴

By challenging the Brady Act on Tenth Amendment grounds, the NRA is reintroducing a controversy "as old as the Constitution,"²⁵ which has been the focus of many of the Court's "most difficult and celebrated cases."²⁶ The controversy surrounds

Laurel Loomis, *A New Look at Gun Control Legislation: Responding to A Culture of Violence*, 27 BEVERLY HILLS B.A. J. 160 (1993); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994).

²² The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

²³ Robert K. Corbin, "*Brady*" is Unconstitutional, U.S.A. TODAY, May 20, 1994, at 10A. Mr. Corbin, president of the National Rifle Association of America ("NRA") argues: "The U.S. Congress didn't just roll another unfunded federal mandate down the Capitol steps. The U.S. Congress violated the U.S. Constitution. Knowingly." *Id.*

²⁴ Corbin, *supra* note 23, at 10A.

²⁵ *New York v. United States*, 112 S. Ct. 2408, 2414 (1992).

²⁶ *Id.* at 2417. In *New York*, Justice Sandra Day O'Connor commented, "At least as far back as *Martin v. Hunter's Lessee*, the Court has resolved questions 'of great importance and delicacy' in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States." *Id.* (citing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324 (1816)); see, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (overruling *National League of Cities v. Usery* and holding that Congress may pass laws which are generally applicable to state sovereigns and the private sector); *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (holding that the Tenth Amendment prohibits Congress from regulating the states in areas of traditional government functions); *United States v. Darby*, 312 U.S. 100, 116-17 (1941) (overruling *Hammer v. Dagenhart*,

the determination of where Congress' powers pursuant to Article I, section 8 of the Constitution end,²⁷ and where the powers reserved to the states pursuant to the Tenth Amendment begin. Because of the Court's expansive interpretation of the Commerce Clause,²⁸

arguing that the commerce power is plenary and rejecting *Dagenhart's* limit on Congress' authority to "articles which in themselves have some harmful or deleterious property"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (finding that because the corporation had operations in many states, a labor strike of the Pennsylvania intrastate manufacturing operations would have a substantial effect on interstate commerce); *Hammer v. Dagenhart*, 247 U.S. 251, 271-74 (1918) (striking down a federal statute which forbid the interstate transportation of articles manufactured by companies which employed children because regulation of manufacturing was a state concern); *Houston E. & W. Tex. Ry. Co. v. United States* ("The Shreveport Rate Cases"), 234 U.S. 342, 351-52 (1914) ("Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule . . ."); *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824) (holding that the states do not limit Congress' power to regulate interstate commerce because the Commerce power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution"); *McCulloch v. Maryland*, 17 U.S. 316, 402-03 (1819) (rejecting the argument that the powers of the national government were delegated to it by the states).

²⁷ Article I, § 8 of the U.S. Constitution provides in pertinent part:

The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. I, § 8, cl. 1, 3, 18.

²⁸ The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. The Court's landmark decision in *United States v. Darby*, 312 U.S. 100 (1941), is indicative of its broad reading of the Commerce Clause. The Court upheld the Fair Labor Standards Act of 1938 ("FLSA"), which set the minimum hourly and overtime wage requirements for employees who produced goods for interstate commerce. 29 U.S.C. §§ 201-207 (1988). The Court dismissed a Tenth Amendment argument made by Darby, a lumber manufacturer:

the exact delineation of authority between the federal government and the states remains unclear.

Two different approaches to the federalism debate have emerged.²⁹ In some cases, the Court examined whether a congressional act was authorized by a power expressly delegated to Congress in Article I of the Constitution.³⁰ In others, the Court

The [Tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers From the beginning and for many years the amendment has been construed as not depriving the national 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.

Darby, 312 U.S. at 124. The reasoning advanced in *Darby* dominated judicial interpretation of the Tenth Amendment for over three decades. During this period, the Court interpreted the Commerce Clause as allowing Congress to "choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities." *Id.* at 120. This expansive reading of the Commerce Clause, coupled with the Court's narrow view of the Tenth Amendment, left the amendment meaningless for thirty years following *Darby*. See, e.g., *Perez v. United States*, 402 U.S. 146, 156-57 (1971) (holding that anti-loansharking provisions of the Consumer Credit Protection Act covered illegal loansharking activities which occurred entirely within one state); see also *Katzenbach v. McClung*, 379 U.S. 294, 298, 300 (1964) (upholding Title II of the Civil Rights Act of 1964, which mandated that a local, rural restaurant in Alabama serve African Americans because the restaurant obtained 46% of its food from an out-of-state supplier); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 247 (1964) (upholding Title II of the Civil Rights Act of 1964, which required hotel or motel accommodations for African Americans by stating that any hotel, motel "or other establishment which provides lodging to transient guests' affects commerce per se").

²⁹ *New York v. United States*, 112 S. Ct. at 2417.

³⁰ *Id.* (citing *Perez v. United States*, 402 U.S. 146 (1971); *McCulloch v. Maryland*, 17 U.S. 316 (1819)); see also *Maryland v. Wirtz*, 392 U.S. 183, 187-92 (holding that the Commerce Clause allowed Congress to impose federal minimum wage and overtime requirements on state-run schools, hospitals, and institutions); *Wickard v. Filburn*, 317 U.S. 111, 119-29 (1942) (holding that the

looked to determine whether a congressional act infringed upon the state sovereignty that is reserved by the Tenth Amendment.³¹ However, the two approaches are “mirror images of each other”.³² if a power is granted to Congress by Article I, then the Tenth Amendment does not retain that power for the states; if a power is reserved for the states through the Tenth Amendment, then it is a power not delegated by the Constitution to Congress.³³ Thus, the question is simply whether the Brady Act is “an incident of state sovereignty [that] is protected by a limitation on an Article I power.”³⁴

This Note argues that the Brady Act infringes upon state sovereignty that is guaranteed by the Tenth Amendment. This Note presents the pertinent provisions of the Brady Act and then argues that the Act violates the Tenth Amendment by requiring local authorities to perform duties that are not required of them by their state governments.³⁵ Five federal district courts have addressed the issue of whether the Brady Act violates the Tenth Amendment.³⁶

Commerce Clause permits Congress to regulate a self-sustaining wheat farmer).

³¹ *New York v. United States*, 112 S. Ct. 2408, 2417 (1992) (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) and *Lane County v. Oregon*, 74 U.S. (74 Wall.) 71 (1869)); *see also* *South Carolina v. Baker*, 485 U.S. 505, 511-15 (1988) (holding that § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 does not violate the Tenth Amendment); *EEOC v. Wyoming*, 460 U.S. 226, 235-36 (1983) (“The appellees have not claimed . . . that Congress exceeded the scope of its affirmative grant of power under the Commerce Clause . . . rather, . . . appellees argue that . . . application of the [Age Discrimination in Employment Act] to the States is precluded by virtue of external constraints imposed on Congress’s commerce powers by the Tenth Amendment.”).

³² *New York v. United States*, 112 S. Ct. at 2417.

³³ *Id.*

³⁴ *Id.* at 2418.

³⁵ This Note examines the constitutionality of the Brady Act in the context of the Tenth Amendment and not the soundness of gun control. For analyses of gun control, see *Abrams*, *supra* note 21, at 488; *Dole*, *supra* note 11, at 135; Monica Fennell, *Missing the Mark in Maryland: How Poor Drafting and Implementation Vitiates a Model State Gun Control Law*, 13 *HAMLIN J. PUB. L. & POL’Y* 37 (1992); *Loomis*, *supra* note 21, at 160; *McClurg*, *supra* note 11, at 53.

³⁶ *Frank v. United States*, 860 F. Supp. 1030 (D. Vt. 1994); *Mack v. United*

Four out of the five courts have determined that portions of the Brady Act violate state sovereignty;³⁷ this Note examines these cases and their holdings before concluding that the Brady Act is unconstitutional.

I. PROVISIONS OF THE BRADY ACT

The Brady Act includes a background check provision which requires that, before a federally licensed firearms dealer can transfer a handgun to a purchaser, he or she must transmit a copy of the completed background statement to the local chief law enforcement officer ("CLEO") located in the purchaser's county.³⁸ The Brady Act defines a CLEO as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual."³⁹ The CLEO "shall make a reasonable effort to ascertain within five business days whether receipt or possession would be in violation

States, 856 F. Supp. 1372 (D. Ariz. 1994); *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994); *Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994); *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994).

³⁷ *Frank*, 860 F. Supp. at 1043; *Mack*, 856 F. Supp. at 1381; *McGee*, 863 F. Supp. at 327-28; *Printz*, 854 F. Supp. at 1519.

³⁸ 18 U.S.C. § 922(s)(1). The statement contains the name, address and date of birth appearing on a valid photo identification and a description of the identification used, as well as the date on which the statement is made and notice that the buyer intends to obtain a handgun from the dealer. 18 U.S.C. § 922(s)(3)(A), (C), (D). The statement must also indicate that the buyer (1) is not under indictment for or convicted of a crime punishable by imprisonment for a term exceeding one year; (2) is not a fugitive from justice; (3) is not an unlawful user or addict of any controlled substance; (4) has not been adjudicated to be a mentally-defective or committed to a mental institution; (5) is not an illegal alien; (6) has not been dishonorably discharged from the Armed Forces; and (7) is not a person who has renounced his or her United States citizenship. 18 U.S.C. § 922(s)(3)(B)(i)-(vii).

Prior to the enactment of the Brady Act, firearms dealers were only required to have buyers complete the Bureau of Alcohol, Tobacco and Firearms Form 4473. 27 C.F.R. § 178.124 (1994). The form required the buyer to certify that he or she was not prohibited by law from receiving or possessing a firearm. *Id.* This self-certification was the only federally prescribed method by which a firearms dealer could ascertain whether a transfer was prohibited. *See Frank*, 860 F. Supp. at 1033.

³⁹ 18 U.S.C. § 922(s)(8).

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.”⁴⁰ This provision will remain in effect until the federal government provides a national instant background check system.⁴¹

The Brady Act forbids the dealer from transferring the handgun until either the CLEO advises him or her that the transfer is legal or five days have passed since the CLEO received the transfer statement—whichever occurs earlier.⁴² If the buyer passes the background check, then the CLEO shall destroy the statement, any record containing information derived from the statement and any

⁴⁰ 18 U.S.C. § 922(s)(2). An example of a federal law that the chief law enforcement officer (“CLEO”) is required to review is 18 U.S.C. § 922(g), which states that:

It shall be unlawful for any person

- 1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
- 2) who is a fugitive from justice;
- 3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. § 802 [1988]));
- 4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
- 5) who, being an alien, is illegally or unlawfully in the United States;
- 6) who has been discharged from the Armed Forces under dishonorable conditions; or
- 7) who, having been a citizen of the United States, has renounced his citizenship; to . . . possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

⁴¹ One should recognize at the outset that the controversial provisions of the Brady Act are only interim; a national instant background check is slated to be established by 1998. 18 U.S.C. 922(t)(1) (1988 & Supp. V 1993). Regardless of the length of time the relevant provisions are in effect, this Note demonstrates that the provisions are unconstitutional and should not be tolerated even for a minimum of five years (the time between its passage (1993) and the targeted date of the national system (1998)).

In addition, the author doubts the ability of the government to meet the set deadline of 1998, as well as the feasibility of creating a database of the necessary size and accuracy.

⁴² 18 U.S.C. § 922(s)(1)(A)(ii).

record created as a result, within twenty days after the CLEO receives the statement.⁴³ If a CLEO determines that a buyer is not eligible to purchase a handgun, the buyer can request the CLEO to provide the reason for the determination, and the CLEO "shall provide such reasons to the individual in writing within 20 business days after receipt of the request."⁴⁴ The Brady Act does not specify exactly what the CLEO must check—it only broadly requires the CLEO to ascertain that receipt or possession of the handgun by the transferee does not violate federal, state, or local law. Consequently, the check requires scrutiny of numerous records.⁴⁵

The Brady Act contains a penalty provision which subjects any person who knowingly violates the Act to a fine, imprisonment, or both.⁴⁶ The penalty provision is ambiguous regarding whether the CLEOs can be sentenced to jail or only dealers, who sell guns without complying with the Brady Act, can be sanctioned. However, the Brady Act does exempt the CLEO from civil liability for "failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful" and also for "preventing such a sale or transfer to a person who may lawfully receive or possess a handgun."⁴⁷

The CLEOs will be relieved of their obligation to perform background checks in 1998 when a national instant criminal background check is scheduled to be instituted by the U.S.

⁴³ 18 U.S.C. § 922(s)(6)(B)(i).

⁴⁴ 18 U.S.C. § 922(s)(6)(C).

⁴⁵ *See, e.g.*, 18 U.S.C. §§ 922(s)(1)(A)(ii)(I), (II), 922(s)(2), (4). Among the records that must be searched to complete a background check are all arrest, conviction and appellate records, as well as records regarding pardons, expungements and restorations of civil rights. These records are necessary because a CLEO must determine whether a person has been convicted of "a crime punishable by imprisonment for a term exceeding one year." *See* 18 U.S.C. § 921(a)(20) (1988). Medical, hospital, drug treatment and police investigatory records must also be examined to ascertain if a person is an unlawful user of or addicted to a controlled substance. *See* 18 U.S.C. § 922(g).

⁴⁶ 18 U.S.C. § 924(a)(5) (1988 & Supp. V 1993) states that "[w]hoever knowingly violates subsection (s) or (t) of section 922 shall be fined not more than \$1,000, imprisoned for not more than 1 year, or both."

⁴⁷ 18 U.S.C. § 922(s)(7)(A), (B).

Department of Justice ("DOJ").⁴⁸ The DOJ will then maintain the national system, which will consist of a computerized database of information linking state and federal background check systems.⁴⁹ Gun dealers will be able to contact the database either by telephone or by other electronic means, and will be able to receive information, within three days, on whether receipt of a firearm by a prospective buyer would violate the Brady Act.⁵⁰ Once the national database is functioning, the CLEOs will not be required to perform background checks.⁵¹ Until that time, however, the Brady Act does not provide funding, compensation, or other assistance to cover the costs and resources for executing a reasonable background check.

II. THE TENTH AMENDMENT AND THE BRADY ACT

The past century marks a turbulent history for the Tenth Amendment. In less than twenty years, the U.S. Supreme Court has reversed itself twice, by narrow margins, on the issue of whether state sovereignty restricts the scope of Congress' power.⁵² After decades of ambiguity, the Court announced a bright-line rule in *New York v. United States*⁵³ when it declared that Congress could not commandeer the states by directly compelling them to enact or

⁴⁸ 18 U.S.C. § 922(t)(1).

⁴⁹ See 18 U.S.C. § 922(t)(1)(B)(ii).

⁵⁰ *Id.*

⁵¹ See 18 U.S.C. § 922(t)(1).

⁵² See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985) (5-4) (overruling *National League of Cities v. Usery* and holding that Congress can impose federal requirements on state employers so long as the same requirements are imposed upon employers in the private sector); *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (5-4 vote) (overruling *Maryland v. Wirtz* and holding that Congress cannot interfere with states' ability to structure the relationship between employer and employee in traditional government functions such as wages); *Maryland v. Wirtz*, 392 U.S. 183, 187-92 (1968) (7-2 vote) (holding that Congress could constitutionally apply the minimum wage and overtime pay requirements of the Fair Labor Standards Act to employees in state-run hospitals, institutions and schools).

⁵³ 112 S. Ct. 2408 (1992).

administer a federal regulatory program.⁵⁴ Despite *New York*, Congress passed the Brady Act, which directly conflicts with this precedent. Accordingly, the Brady Act will give the U.S. Supreme Court an opportunity to reexamine the Tenth Amendment and affirm its holding in *New York*.

A. Supreme Court Precedent: New York v. United States

In *New York v. United States*, the Court held that the take-title provision of the Low-Level Radioactive Waste Policy Act of 1985 ("LLRWPA")⁵⁵ violated the Commerce Clause and the Tenth Amendment.⁵⁶ The take-title provision offered states, as an alternative to regulating according to the dictates of Congress, the choice of "taking title to and possession of low-level radioactive waste generated within their borders and becoming liable for all damages waste generators suffer as a result of the State's failure to do so promptly."⁵⁷ The Court concluded that Congress overstepped the boundary between federal and state authority,⁵⁸ the take-title provision had crossed "the line distinguishing

⁵⁴ *Id.* at 2420 (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 288 (1981)). In *New York*, Justice O'Connor expanded the principles set forth in *Hodel*:

In *Hodel*, the Court upheld the Surface Mining Control and Reclamation Act of 1977 precisely because it did not "commandeer" the States into regulating mining. The Court found that "the States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government."

Id.

⁵⁵ Pub. L. No. 99-240, 99 Stat. 1842 (codified as amended at 42 U.S.C. § 2021(b)-(i) (1988)).

⁵⁶ *New York v. United States*, 112 S. Ct. at 2429.

⁵⁷ *Id.* at 2427-28.

⁵⁸ *Id.* at 2428-29.

encouragement from coercion,”⁵⁹ where Congress had no constitutional authority to offer either choice to the states.⁶⁰

The Court proclaimed that the LLRWPA violated both the Commerce Clause and the Tenth Amendment because it “‘commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,’ an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.”⁶¹ Where the federal interest is sufficiently important, Congress must legislate directly—it “may not conscript [the] state governments as its agents.”⁶² The Court discussed at length the issue of political accountability to constituents:

If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people.⁶³

Thus, the Tenth Amendment prohibits the federal government from imposing costs on states through mandatory federal regulation such as the Brady Act. Congress may not place the states in the position of having to sacrifice state programs, which their electorate prefers, to fund a federal program. Moreover, the Tenth Amendment prevents Congress from shifting the brunt of unpopular federal regulations and policies to the states. Although the Court did not articulate the reach of the Tenth Amendment in *New York*, it

⁵⁹ *Id.* at 2428.

⁶⁰ *Id.*

⁶¹ *Id.* (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 288 (1981)).

⁶² *Id.* at 2429.

⁶³ *Id.* at 2424.

precluded the federal government from compelling the states "to enact or administer a federal regulatory program."⁶⁴

B. The Brady Act Violates the Tenth Amendment

Since its enactment, five federal district courts have examined the constitutionality of the Brady Act. The courts in *Frank v. United States*,⁶⁵ *Mack v. United States*,⁶⁶ *McGee v. United States*,⁶⁷ and *Printz v. United States*,⁶⁸ ruled that the mandatory background check provisions are analogous to the take-title provision in *New York*. These courts held that the mandatory background check exceeds the powers delegated to Congress by the U.S. Constitution and violates the Tenth Amendment because it commandeers state authorities to administer a federal unfunded program.⁶⁹ The court in *Koog v. United States*,⁷⁰ however, deemed the Brady Act constitutional on the grounds that the Tenth Amendment does not prohibit the federal government from imposing minimal duties on state officials.⁷¹ The court in *Koog* based its holding on the precedent established in *Federal Energy Regulatory Commission v. Mississippi* ("FERC"),⁷² a Supreme Court precedent which is distinguishable from *New York*.

⁶⁴ *Id.* at 2435. The Court also rejected the federal government's argument that a statute cannot be an unconstitutional infringement on state sovereignty when state officials consent to the statute's enactment. *Id.* at 2431. The Court pointed out that the U.S. Constitution does not protect state sovereignty for the benefit of the states, but rather protects individuals from tyranny. *Id.* Congress is not justified in exceeding its authority relative to the states on the basis of consent by state officials. *Id.* at 2432.

⁶⁵ 860 F. Supp. 1030 (D. Vt. 1994).

⁶⁶ 856 F. Supp. 1372 (D. Ariz. 1994).

⁶⁷ 863 F. Supp. 321 (S.D. Miss. 1994).

⁶⁸ 854 F. Supp. 1503 (D. Mont. 1994).

⁶⁹ *Frank*, 860 F. Supp. at 1043; *Mack*, 856 F. Supp. at 1381; *McGee*, 863 F. Supp. at 327-28; *Printz*, 854 F. Supp. at 1519.

⁷⁰ 852 F. Supp. 1376 (W.D. Tex. 1994).

⁷¹ *Id.* at 1388.

⁷² 456 U.S. 742 (1982).

All five suits were brought by local sheriffs with jurisdictions located in rural, sparsely populated counties.⁷³ The sheriffs did not have large staffs⁷⁴ and generally were elected by the county constituents.⁷⁵ They primarily performed duties such as providing court security, transporting state prisoners and mental health patients, serving process and writs, investigating crime, patrolling the jurisdiction and supervising the detention center and inmates.⁷⁶ Most of the sheriff departments were funded by the state, county and other local groups.⁷⁷

All five sheriffs found difficulty fulfilling the obligations of the Brady Act. The time that most of the sheriffs spent performing each background check ranged from fifteen minutes to several days.⁷⁸ In addition, the sheriffs' budgets did not cover the costs of

⁷³ *Frank*, 860 F. Supp. at 1031 (992 square miles, 26,000 population); *Mack*, 856 F. Supp. 1375 (4,500 square miles, 28,000 population); Mem. Supp. Def.'s Prelim. Inj. Mot. at 11, *McGee* (No. 2:94-CV-67PS) (469 square miles, 68,000 population); Pl. Koog Aff. at ¶ 7, *Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994) (No. DR 94 CA 08) (3,241 square miles, 55,000 population); Pl. Printz Aff. and Decl. at ¶ 7, *Printz* (No. CV-94-35-M-CCL) (2,400 square miles, 30,000 population).

⁷⁴ *Frank*, 860 F. Supp. at 1031 (2 full-time staff members); *Mack*, 856 F. Supp. at 1375 (12 full-time staff members); Mem. Supp. Def.'s Prelim. Inj. Mot. at 11, *McGee* (No. 2:94-CV-67PS) (45 full-time staff members); Pl. Koog Aff. at ¶ 7, *Koog* (No. DR 94 CA 08) (13 full-time staff members); Pl. Printz Aff. and Decl. at ¶ 7, *Printz* (No. CV-94-35-M-CCL) (15 full-time staff members).

⁷⁵ Telephone Interview with J.R. Koog, sheriff of Val Verde County, Tex. (Jan. 13, 1994) [hereinafter *Koog Interview*] (Val Verde County has elected Sheriff Koog to his fifth four-year term); see also *Frank* Aff. at ¶ 1, *Frank* (No. 2:94-CV-135); Pl. Printz Aff. and Decl. at ¶ 1, *Printz* (No. CV-94-35-M-CCL).

⁷⁶ *Frank*, 860 F. Supp. at 1032; Compl. at ¶ 10, *McGee* (No. 2:94-CV-67PS); see also *Mack*, 856 F. Supp. at 1375; Compl. at ¶ 10, *Printz* (No. CV-94-35-M-CCL); Compl. at ¶ 10, *Koog* (No. DR 94 CA 08).

⁷⁷ See, e.g., *Frank*, 860 F. Supp. at 1032 (funded by state, county and private security contracts); Compl. at ¶ 2, *McGee* (No. 2:94-CV-67PS); Pl. Koog Aff. at ¶ 3, *Koog* (No. DR 94 CA 08) (funded by the county Commissioners' Court); Pl. Printz Aff. and Decl. at ¶ 3, *Printz* (No. CV-94-35-M-CCL) (funded by the county).

⁷⁸ See *Frank*, 860 F. Supp. at 1032; *McGee*, 863 F. Supp. at 326; Compl. at ¶¶ 14, 17, *Koog* (No. DR 94 CA 08); Pl. Printz Aff. and Decl. at ¶ 6, *Printz* (No. CV-94-35-M-CCL).

the checks⁷⁹ and many were forced to use money budgeted for other programs.⁸⁰ Faced with these problems, they challenged the Brady Act in court.

The sheriffs contended that the Brady Act violates the principles established in *New York* because it commandeers them to administer a federal program.⁸¹ The sheriffs argued that "a federal statute may not direct . . . a local official to perform background checks or otherwise implement a federal program."⁸² Some sheriffs also asserted that by not funding the background checks, Congress shifts accountability from itself onto the local authorities and CLEOs.⁸³

Despite the sheriff's arguments, the district court in *Koog* held that the Brady Act did not unconstitutionally commandeer local authorities.⁸⁴ The court interpreted the Brady Act as imposing minimal duties on local authorities which were not in violation of the Tenth Amendment.⁸⁵ Rather than giving *New York* a "broad reading," the court interpreted *New York* as only prohibiting the federal government from commandeering state legislatures.⁸⁶ By aligning the case with *FERC*, the *Koog* court declared that the "minimal duties" imposed on the sheriff were constitutionally permissive.⁸⁷

⁷⁹ *Mack*, 856 F. Supp. at 1375; *Frank* Aff. at ¶ 7, *Frank* (No. 2:94-CV-135); Compl. at ¶ 12, *McGee* (No. 2:94-CV-67PS); Pl. *Koog* Aff. at ¶ 7, *Koog* (No. DR 94 CA 08); Pl. *Printz* Aff. and Decl. at ¶ 8, *Printz* (No. CV-94-35-M-CCL).

⁸⁰ *Printz*, 854 F. Supp. at 1515; *Frank* Aff. at ¶¶ 7-8, *Frank* (No. 2:94-CV-135); Compl. at ¶¶ 9, 11-12, *McGee* (No. 2:94-CV-67PS); Compl. at ¶ 11, *Koog* (No. DR 94 CA 08).

⁸¹ *Frank*, 860 F. Supp. at 1040; *Mack*, 856 F. Supp. at 1380; *McGee*, 863 F. Supp. at 326; *Koog*, 852 F. Supp. at 1387; Mem. Supp. Pl.'s Prelim. Inj. Mot. at 13-17, *Printz* (No. CV-94-35-M-CCL).

⁸² *Frank*, 860 F. Supp. at 1040; *see also Mack*, 856 F. Supp. at 1378; *McGee*, 863 F. Supp. at 326; *Koog*, 852 F. Supp. at 1387; Mem. Supp. Pl.'s Prelim. Inj. Mot. at 13-17, *Printz* (No. CV-94-35-M-CCL).

⁸³ *See, e.g., Mack*, 856 F. Supp. at 1380; *Printz*, 854 F. Supp. at 1514-15.

⁸⁴ *Koog*, 852 F. Supp. at 1389.

⁸⁵ *Id.* at 1388-89.

⁸⁶ *Id.* (citing *New York v. United States*, 112 S. Ct. 2408 (1992)).

⁸⁷ *Id.* at 1388.

At issue in *FERC* were Titles I and III and section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"),⁸⁸ which Congress enacted to combat the nationwide energy crisis.⁸⁹ Titles I and III of PURPA related to regulatory policies for electricity and gas utilities.⁹⁰ These titles, administered by the Secretary of Energy, were designed to "encourage the adoption of certain retail regulatory practices"⁹¹ by directing "state utility regulatory commissions and nonregulated utilities to 'consider' the adoption and implementation of specific 'rate design' and regulatory standards."⁹² Although the federal proposals were detailed and extensive, the state authorities and nonregulated utilities were neither required to adopt nor implement the federal suggestions.⁹³

The Court held that Titles I and III did not violate the Tenth Amendment because they required only consideration of federal standards—the states were not mandated to enact the regulations. The Court declared that

[t]here is nothing in PURPA "directly compelling" the States to enact a legislative program. In short, because the two challenged Titles simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals, they do not threaten the States' "separate and independent existence," and do not impair the ability of the States "to function effectively in a federal system."⁹⁴

The Court emphasized that PURPA represented Congress' attempt to create a less intrusive scheme that allowed the states to continue

⁸⁸ Pub. L. No. 95-617, 92 Stat. 3117 (codified at 46 U.S.C. §§ 2601-2645 (1988)).

⁸⁹ *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 745 (1982) [hereinafter *FERC*].

⁹⁰ *Id.* at 746.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 749-50.

⁹⁴ *Id.* at 765-66 (citing *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976); *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975); *Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911); *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)).

regulating in a preemptible field on the condition that they consider adopting the outlined federal standards.⁹⁵

In a separate analysis, the Court upheld section 210 on both Tenth Amendment and Supremacy Clause⁹⁶ grounds.⁹⁷ The provision directed the Federal Energy Regulatory Commission (the "Commission") to promulgate rules which state regulatory authorities and nonregulated utilities must implement.⁹⁸ Although the regulations which the Commission adopted gave the state authorities and nonregulated utilities freedom in determining the methods to implement the regulations,⁹⁹ section 210 required Mississippi authorities to adjudicate disputes arising under PURPA, a federal statute.¹⁰⁰

The Court determined that requiring the Mississippi authorities to entertain federal claims was constitutional because it was not burdensome on state authorities.¹⁰¹ Before PURPA, Mississippi law provided citizens with the right to judicial action for state rate-making laws that were similar to PURPA.¹⁰² Because the Commission has jurisdiction to adjudicate claims similar to those arising under PURPA, "it can satisfy [section] 210's requirements simply by opening its doors to claimants"¹⁰³ and making "its administrative tribunals available for federal as well as state-created rights."¹⁰⁴ The Court interpreted PURPA's duties as minimal because requiring the authorities to resolve disputes that arose

⁹⁵ *Id.* at 763-64.

⁹⁶ The Supremacy Clause states: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." U.S. CONST. art. VI, § 2.

⁹⁷ FERC, 456 U.S. at 759-61, 768-70.

⁹⁸ *Id.* at 751.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 760.

¹⁰¹ *Id.* at 768.

¹⁰² *Id.*

¹⁰³ *Id.* at 760.

¹⁰⁴ *Id.* at 769 (citing *Testa v. Katt*, 330 U.S. 386 (1947)).

under PURPA only imposed duties that they normally conducted; therefore, section 210 did not violate the Tenth Amendment.¹⁰⁵

In *Koog v. United States*, the district court interpreted *FERC* to support the Brady Act, asserting that the Tenth Amendment does not inhibit Congress "from imposing minimal duties on state executive officers."¹⁰⁶ The court determined that the duties imposed by the Brady Act are both minimal and discretionary because the CLEO can determine what is a reasonable background search under the circumstances and can even decide that no check is necessary.¹⁰⁷ The *Koog* court based its decision on a letter issued to CLEOs by the Bureau of Alcohol, Tobacco, and Firearms ("BATF"), which declared that the Brady Act is discretionary.¹⁰⁸ The BATF letter indicated that the CLEO will set his or her own standards, and implied that in rural counties "where many handgun purchasers are personally known to the CLEO," he or she will not need to conduct a check.¹⁰⁹ Thus, the Brady Act requires the CLEO merely *to consider* whether to perform a background

¹⁰⁵ *Id.* at 768. The Court based this portion of its argument on the Supremacy Clause as well as the Tenth Amendment. See *supra* note 96 and accompanying text.

¹⁰⁶ *Koog v. United States*, 852 F. Supp. 1376, 1388 (W.D. Tex. 1994).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1379. The Bureau of Alcohol, Tobacco and Firearms' ("BATF") letter, which interpreted the Brady Act, stated in pertinent part:

Each law enforcement agency serving as the CLEO will have to set it [sic] own standards based on its own circumstances, i.e., the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction. The law is designed so that the law enforcement authority who is doing the check, is the one who is most likely to have to deal with the consequences of the buyer obtaining a handgun. Therefore, the CLEO of the buyer's residence has a vested interest in conducting an appropriate check and ultimately is in the best position to determine what is reasonable In rural, sparsely populated counties where many handgun purchasers are personally known to the CLEO, little or no research may be necessary in many cases.

Id. (quoting Open Letter from BATF to state and local law enforcement officials 10 (Jan. 21, 1994) (on file with *Journal of Law and Policy*)).

¹⁰⁹ *Id.*

check.¹¹⁰ If the CLEO decides to perform a background check, his or her duties are minimal.

The *Koog* court's conclusions lack merit. First, the background check provision of the Brady Act is distinguishable from the provisions of PURPA that were at issue in *FERC*. Second, the court has no basis to conclude that the duties imposed upon the CLEOs are minimal when in fact they are quite burdensome.¹¹¹ Finally, by determining that the Brady Act is discretionary, the court disregards the Act's congressional history.

The court in *Koog* draws a mistaken analogy between the Brady Act and PURPA. In *FERC*, the duties imposed on the Mississippi authorities by the federal government were no different from the duties that they already performed under state law.¹¹² In contrast, the Brady Act imposes duties upon CLEOs which they do not normally perform. The state laws which prescribe the CLEOs' duties and obligations do not generally include the execution of background checks as the Brady Act requires.¹¹³ For those CLEOs who already perform background checks under state law, it is not as simple as the situation in *FERC* where all that the Commission needed to do was open "its doors to claimants."¹¹⁴ The CLEOs do not have the necessary staff, resources, or time to meet the burdens imposed by the Brady Act.¹¹⁵ Accordingly, the obligations under the Brady Act are easily distinguished from the duties under PURPA.

¹¹⁰ *Id.* at 1388.

¹¹¹ *Printz v. United States*, 854 F. Supp. 1503, 1517 (D. Mont. 1994); Compl. at ¶¶ 16-17, *Koog* (No. DR 94 CA 08).

¹¹² *FERC*, 456 U.S. 742, 759 (1982).

¹¹³ *Mack v. United States*, 856 F. Supp. 1372, 1375 (D. Ariz. 1994); Compl. at ¶¶ 10-12, *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994) (No. 94 CV-67PS); *see also* Compl. at ¶ 11, *Koog* (No. DR 94 CA 08). *But see supra* notes 15-17 (citing state statutes enacted prior to the Brady Act which require background checks).

¹¹⁴ *FERC*, 456 U.S. at 760.

¹¹⁵ For example, before the Brady Act, Sheriff Frank would occasionally perform a criminal record check; however, the sheriff's department workload with respect to background checks approximately doubled after the Brady Act became effective. *Frank v. United States*, 860 F. Supp. 1030, 1032 (D. Vt. 1994).

In contrast to the duties imposed on the Mississippi authorities in *FERC*, the duties imposed upon CLEOs under the Brady Act are burdensome.¹¹⁶ The CLEOs responsibilities include performing a background check on the buyer, analyzing the applicable law on which the determinations are made and ascertaining whether each transfer is legal.¹¹⁷ Because the statute is ambiguous¹¹⁸—it does not specify exactly what the CLEO is checking for nor the particular records necessary to constitute a complete search—CLEOs are forced to guess what records are relevant and whether failure to examine them would be considered “reasonable” or “unreasonable” under the Brady Act.¹¹⁹ The Brady Act also does not specify what the CLEO should do if the relevant record is not “available.”¹²⁰ Each background check requires the CLEO to review numerous categories of records, which have varying degrees of accessibility.¹²¹

¹¹⁶ *Printz v. United States*, 854 F. Supp. 1503, 1517 (D. Mont. 1994).

¹¹⁷ See 18 U.S.C. § 922(s)(2), which states that a CLEO “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 recordkeeping systems are available* and in a national system designated by the Attorney General.” (emphasis added).

¹¹⁸ Legislative history does not clarify the statute. For example, Congress indicated that “[l]ocal law enforcement officials are required to use the waiting period to determine whether a prospective handgun purchaser has a felony conviction or is otherwise prohibited by law from buying a gun.” H.R. REP. NO. 344, 103d Cong., 1st Sess. 7 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984.

¹¹⁹ *Frank Aff.* at ¶ 4, *Frank* (No. 2:94-CV-135). The reasonableness standard originates in § 922(s)(2) of the Brady Act. See *supra* note 117.

¹²⁰ 18 U.S.C. § 922(s)(2); see also *Frank Aff.* at ¶ 4, *Frank* (No. 2:94-CV-135).

¹²¹ Because the records may be available in different areas throughout the state and many recordkeeping systems are manual, it is difficult to retrieve all of the necessary documents for a complete background check. See *Mack v. United States*, 856 F. Supp. 1372, 1375 (D. Ariz. 1994); *Compl. at* ¶ 15, *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994) (No. 94-CV-67PS); *Compl. at* ¶¶ 17-25, *Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994) (No. DR 94 CA 08); *Pl. Printz Aff. and Decl. at* ¶ 5, *Printz v. United States*, 854 F. Supp. 1503 (1994) (No. CV-94-35-M-CCL).

One example of the intolerable burden that the Brady Act places on CLEOs is illustrated in the *McGee* complaint.¹²² Mississippi Code Section 97-37-5 states, in pertinent part:

1) It shall be unlawful for any person who has been convicted of a felony under the laws of this state, any other state, or of the United States to possess any firearm . . . unless such person has received a pardon for such felony, has received a relief from disability pursuant to Section 925(c) of Title 18 of the U.S. Code, or has received a certificate of rehabilitation pursuant to subsection (3) of this section.

. . . .

3) A person who has been convicted of a felony under the laws of this state may apply to the court in which he was convicted for a certificate of rehabilitation. The court may grant such certificate in its discretion¹²³

Sheriff McGee criticized the demands of the Brady Act, arguing that he would have to review each state's felony conviction records, and disability records; in addition, he must check the Mississippi courts' records to determine if a person convicted of a crime was granted a certificate of rehabilitation.¹²⁴

After he locates the information outlined in the Mississippi Code, Sheriff McGee would have completed only one-half of his task—he would still be required to check whether receipt or possession would be in violation of federal law.¹²⁵ Consequently,

¹²² Compl. at ¶ 16, *McGee* (No. A.94-CV-67PS).

¹²³ MISS. CODE ANN. § 97-37-5 (1972), *see also id.*

¹²⁴ *Id.*

¹²⁵ The Mississippi Code only requires the CLEO to review federal felony convictions. MISS. CODE ANN. § 97-37-5 (1972). Under the Brady Act, the task of ascertaining whether the purchase of a handgun violates federal law is a lofty chore. *See supra* note 40 for a description of 18 U.S.C. § 922(g). To ascertain all seven stipulations of § 922(g), the CLEOs are required to examine countless records located throughout the country. For example, medical, drug treatment, police and judicial records must be examined to ascertain whether a person has

the time needed to complete a background check is burdensome.¹²⁶ Because many of the records are not accessible by computer searches, CLEOs are required to travel to the location of the record and manually search the files.¹²⁷ The time necessary to complete a search may vary from one day to several days; with numerous licensed firearms dealers in each county, CLEOs may receive several requests each day, all with five-day deadlines for completion.¹²⁸ Thus, the Brady Act imposes duties on CLEOs that are far from minimal, requiring the CLEO to perform a background check at the expense of other important duties.

The *Koog* court and the BATF misread the Brady Act as discretionary; their interpretation ignores the legislative intent, the plain meaning of the words found in the provision and the nature of the

been adjudicated mentally defective or committed to a mental institution. Compl. at ¶ 17, *Koog* (No. DR 94 CA 08). The CLEO must also scrutinize the Federal Register to determine "whether the person has received a relief from disabilities by the Secretary of the Treasury pursuant to 18 U.S.C. § 925(c) [1988]." *Id.* ¶ 18. In addition, because 18 U.S.C. § 925(c) allows a person who is denied disability relief to petition the federal district court for review, a CLEO must search the records of the district courts. *Id.* These are time-consuming and burdensome endeavors. *See also supra* note 45 (describing other federal laws and relating records which a CLEO must examine to complete a check).

¹²⁶ For example, Sheriff Frank "spent approximately six hours on a single search of a [National Crime Information Center] records check in which a 1963 felony conviction was discovered, but was not complete enough for a final decision for the pending gun sale." Frank Aff. at ¶ 4, *Frank v. United States*, 860 F. Supp. 1030 (D. Vt. 1994) (No. 2:94-CV-135).

¹²⁷ *Id.*

¹²⁸ In April 1994, Sheriff Frank received 29 requests. *Id.* ¶ 5. Sheriff Printz also explained how his office is susceptible to numerous requests for background checks:

With 169 licensed firearm dealers in Ravalli County, I may receive several requests per day involving intracounty firearms transfers. In addition, Ravalli County residents are known to regularly involve themselves in firearm transfers which originate in the other 55 counties in Montana. Since the "residence of the transferee" in these instances is Ravalli County, under 18 U.S.C. § 922(s)(1)(A)(IV) requires [sic] I perform the background check. Under 18 U.S.C. § 922(s), I am subject to a five-day deadline on each.

Pl. Printz Aff. and Decl. at ¶ 6, *Printz v. United States*, 854 F. Supp. 1503 (1994) (No. CV-94-35-M-CCL).

check. The Brady Act states that CLEOs "shall make a reasonable effort" to determine whether a transfer is legal.¹²⁹ Congress rejected an amendment that proposed to make the execution of a background check an option rather than a requirement by substituting "shall" with "may",¹³⁰ thus, it appears that Congress' intent was to enact a mandatory provision.¹³¹ The Summary and Purpose section of the House report also reveals Congress' mandatory intent: "Local law enforcement officials are required to use the waiting period to determine whether the prospective purchaser has a felony conviction or is otherwise prohibited by law from buying a gun."¹³² By asserting that CLEOs are "required" to use the waiting period for checks, Congress demands the execution of background checks. Furthermore, the phrase, "including research in whatever State and local recordkeeping systems are available and a national system designated by the Attorney General"¹³³ indicates that Congress intended a reasonable effort will include, at a minimum, research in the systems specified.¹³⁴ The *Koog* court's and BATF's interpretations of the Brady Act,¹³⁵ therefore, ignore the congressional record.

The Brady Act is also not discretionary because the duties imposed on CLEOs are not activities which CLEOs normally perform. Under the Brady Act, CLEOs are required to determine whether the purchase of a handgun would be in violation of federal law.¹³⁶ "Making determinations based upon federal law is a discretionary function and not a type of activity in which CLEOs regularly engage."¹³⁷ Although section 922(s)(1)(A)(ii) of the Brady Act stipulates that the transferor may transfer the handgun at the earlier of the expiration of five days or a response from the

¹²⁹ 18 U.S.C. § 922(s)(2).

¹³⁰ H.R. REP. NO. 344, 103d Cong., 1st Sess. 39 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984 (dissenting view of Congressman Steve Schiff).

¹³¹ *Frank*, 860 F. Supp. at 1040.

¹³² H.R. REP. NO. 344, 103d Cong., 1st Sess. 7 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984; *see also Frank*, 860 F. Supp. at 1041.

¹³³ 18 U.S.C. § 922(s)(2).

¹³⁴ *Frank*, 860 F. Supp. at 1041.

¹³⁵ *See supra* text accompanying note 108.

¹³⁶ 18 U.S.C. § 922(s)(2).

¹³⁷ *Printz v. United States*, 854 F. Supp. 1503, 1517 (D. Mont. 1994).

CLEO,¹³⁸ this conditional provision does not mean that the CLEOs are not required to execute checks. To interpret the Brady Act as not imposing duties is implausible in light of the language contained in section 922(s)(2), which states that the CLEO "shall make a reasonable effort to ascertain within [five] business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General."¹³⁹

By stating that the CLEO *shall* perform the checks in section 922(s)(2), Congress mandates CLEO action, despite the seemingly contradictory language in section 922(s)(1)(A)(ii)(I). According to the language in section 922(s)(1)(A)(ii)(I), the CLEO's timely action is one of two possibilities, whereas in section 922(s)(2) it is a mandated inevitability. In other words, the language which specifically directs the CLEO and outlines the measures that he or she must take describes mandatory action, but Congress uses conditional language to explain the legal obligations of the transferor.

When Congress passed the Brady Act, it disregarded the Supreme Court's lengthy discussion in *New York* regarding political accountability.¹⁴⁰ Like the unconstitutional take-title provision, the Brady Act shifts responsibility for the popularity or unpopularity of the Brady Act from the federal government to the local authorities. "Under the [Brady] Act, CLEOs make up the visible front line of administrators of the [Brady] Act. Thus, they could become associated with the [Brady] Act and bear the brunt of its unpopularity. CLEOs will also bear the brunt of any incorrect determinations they make."¹⁴¹ Many of the sheriffs are elected officials,¹⁴² if they do not prevent the transfer of a handgun to a

¹³⁸ See 18 U.S.C. § 922(s)(1)(A)(ii)(I), (II).

¹³⁹ 18 U.S.C. § 922(s)(2). For an example of a federal law that the CLEO must review to complete a reasonable background check, see *supra* note 40 (describing 18 U.S.C. § 922(g)).

¹⁴⁰ See *supra* page 651.

¹⁴¹ *Printz*, 854 F. Supp. at 1514-15.

¹⁴² See *supra* note 75 and accompanying text.

prohibited person, members of the community might hold sheriffs accountable at the next election.¹⁴³

By not providing the funds for the background check, the Brady Act also shields the federal government from fiscal responsibility. Because Congress provides no funding, compensation, or other assistance to support the costs and human resources incurred by executing background checks, local legislative bodies and CLEOs are responsible for these costs. CLEOs budgets may be increased by the raising of taxes.¹⁴⁴ CLEOs may also take resources that were earmarked for areas of constituent concern and spend them on checks which the community might not find as important.¹⁴⁵ In either case, the federal government avoids being financially accountable.

In the court challenges to the Brady Act, the federal government has argued that the Act is analogous to *Garcia v. San Antonio Metropolitan Transit Authority*.¹⁴⁶ In *Garcia*, the Court examined the Fair Labor Standard Act's ("FLSA")¹⁴⁷ imposition of minimum wage and overtime requirements on state governments. The Court declared that the San Antonio Metropolitan Transit Authority "faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet."¹⁴⁸ The Court announced that the states' proper recourse against unsatisfactory legislation is not the judicial process, but the political process through state participation in the Congress.¹⁴⁹ *Garcia*, therefore, established the principle that laws generally applicable to both state and private actors

¹⁴³ *Printz*, 854 F. Supp. at 1515.

¹⁴⁴ *Id.* at 1515, 1517.

¹⁴⁵ *Id.* at 1515.

¹⁴⁶ 469 U.S. 528 (1985); *see, e.g.*, *Frank v. United States*, 860 F. Supp. 1030, 1043 (D. Vt. 1994); *Mack v. United States*, 856 F. Supp. 1372, 1380 (D. Ariz. 1994); *Printz*, 854 F. Supp. at 1515; *Mem. Supp. Def.'s Prelim. Inj. Mot.* at 20, 25, *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994) (No. 2:94-CV-67PS).

¹⁴⁷ 29 U.S.C. §§ 206, 207 (1988).

¹⁴⁸ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985).

¹⁴⁹ *Id.* at 556.

are constitutional, and the political process will control Congress better than the courts.¹⁵⁰

¹⁵⁰ *Id.* at 554. *Garcia* fundamentally altered the checks and balances of federalism by empowering Congress to regulate state activities in the same manner that it regulates private actors. *Id.* The decision also promoted the political process as the proper restraint on federal authority in relation to state and local governments rather than judicial review. *Id.* at 550-52. Because the period between *National League of Cities v. Usery*, 426 U.S. 833 (1976), and *Garcia* was marked with ambiguity and uncertainty, the *Garcia* decision serves as a clear precedent for lower courts to follow. *See, e.g.,* EEOC v. Wyoming, 460 U.S. 226, 238-39 (1983) (holding that the Age Discrimination in Employment Act of 1967 did not directly impair the state's ability to structure integral operations in areas of traditional governmental function. The Court based its conclusion on the fact that "the degree of federal intrusion is sufficiently less serious than it was in [*National League of Cities v. Usery*] so as to make it unnecessary for [the Court] to override Congress's express choice to extend its regulatory authority to the States"); *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 287-88 (1981) (developing a three-part test for striking down legislation on Tenth Amendment grounds: (1) the statute must regulate the "States as States"; (2) the statute must pertain to matters that are indisputable "attribute[s] of state sovereignty"; and (3) it must be clear that the states' compliance with the statute "would impair their ability to structure integral operations in areas of traditional governmental functions"); *see also supra* note 52 and accompanying text.

States' rights supporters decried the *Garcia* decision, ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, M-147, REFLECTIONS ON *GARCIA* AND ITS IMPLICATIONS FOR FEDERALISM 5-6 (1986), and Chief Justice William Rehnquist was foremost among them as he declared that he would once again command a majority to restore the Tenth Amendment. *Garcia*, 469 U.S. at 580 (Rehnquist, C.J., dissenting). *But cf.* Jesse H. Choper, *Law Before and After Garcia*, in PERSPECTIVES ON FEDERALISM 13 (Harry N. Scheiber ed., 1987). In his essay, Choper suggests a federal proposal:

The Court should not decide constitutional questions respecting the power of the national government vis-à-vis the states; rather, the issue of whether federal action is beyond the authority of the national government and thus violates states' rights should be treated as nonjusticiable, final resolution to be relegated to the political branches.

Id. at 17.

For a more in-depth discussion of this formidable area of Tenth Amendment jurisprudence, see generally William T. Barrante, *States Rights and Personal Freedom Breathing Life Into the Tenth Amendment*, 63 CONN. B.J. 262 (1989); Murray Dry, *Federalism and the Constitution: The Founders' Design and Contemporary Constitutional Law*, 4 CONST. COMMENT. 233 (1987); Martha A.

The federal government argued that the Brady Act is generally applicable to both CLEOs and private citizens, and it is primarily directed at firearms purchasers and vendors to limit the transfer of handguns at the time of sale.¹⁵¹ The government contended that because the Brady Act applies to both private and public sectors, it does not intrude upon state sovereignty.¹⁵² The courts that addressed the government's argument rejected it as "disingenuous."¹⁵³ Unlike the FLSA, where identical minimum and maximum wages were imposed on all employers (state or private individuals), the numerous duties imposed by the Brady Act are specifically aimed at CLEOs.¹⁵⁴ The Brady Act imposes no corresponding duties on private individuals to perform background checks, and therefore, cannot be categorized as a generally applicable law exempt from the restrictions imposed by the Tenth Amendment.

Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985); Phillip P. Frickey, *Lawnnet: The Case of the Missing (Tenth) Amendment*, 75 MINN. L. REV. 755 (1991); David M. O'Brien, *The Supreme Court and Intergovernmental Relations: What Happened to "Our Federalism"?*, 9 J.L. & POL. 609 (1993).

¹⁵¹ Frank v. United States, 860 F. Supp. 1030, 1043 (D. Vt. 1994); Mack v. United States, 856 F. Supp. 1372, 1380 (D. Ariz. 1994); Printz v. United States, 854 F. Supp. 1503, 1515 (D. Mont. 1994); Mem. Supp. Def.'s Prelim. Inj. Mot. at 20, 25, McGee v. United States, 863 F. Supp. 321 (S.D. Miss. 1994) (No. 2:94-CV-67PS).

¹⁵² See, e.g., Frank, 860 F. Supp. at 1043; Mack, 856 F. Supp. at 1380; Printz, 854 F. Supp. at 1515; Mem. Supp. Def's Opp'n at 20, 25, McGee (No. 2:94-CV-67PS).

¹⁵³ Mack, 856 F. Supp. at 1380; see also Frank, 860 F. Supp. at 1043 (stating that "references to Tenth Amendment cases that discuss the authority of Congress to subject state governments to generally applicable laws . . . are inapposite because the Brady background check provisions are not generally applicable but are directed solely at local law enforcement officials"); Printz, 854 F. Supp. at 1516 ("[T]he Act does not subject the states to the same requirement as private actors. Instead, CLEOs are singled out to perform distinct duties. Thus, the mandatory provisions of the Act do not constitute a generally applicable law.").

¹⁵⁴ See *supra* notes 38-45 and accompanying text. Although the Brady Act imposes several duties on the handgun dealers and purchasers, the obligations and burdens imposed on CLEOs are vastly different and do not allow the Act to be labeled a generally applicable law.

C. *The Mandatory Background Check Provision Is Severable*

Even though the Supreme Court should find the Brady Act unconstitutional on the grounds outlined above, it does not need to strike down the entire Act. If the purpose and effect of a statute remain intact, the offending provision may be severed from the constitutional sections. For example, in *New York*, Justice Sandra Day O'Connor determined that the unconstitutional take-title provision was severable from the LLRWPA.¹⁵⁵ The Court applied the standard recently reaffirmed in *Alaska Airlines, Inc. v. Brock*,¹⁵⁶ which states: "Unless it is evident that the Legislature would have not enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative at law."¹⁵⁷ Justice O'Connor decided in *New York* that since Congress enacted a statutory scheme for the purpose of addressing the problems of radioactive waste with a series of incentives designed to achieve that purpose, the "invalidation of one of the incentives should not ordinarily cause Congress's overall intent to be frustrated."¹⁵⁸ Accordingly, just as the take-title provision was severed without defeating the purpose of the LLRWPA or damaging the remainder of the statute, the mandatory provision of the Brady Act¹⁵⁹ may be severed without damaging the entire Act.

First, the Gun Control Act, which the Brady Act amends, includes a severability clause which presumes that any provisions

¹⁵⁵ *New York v. United States*, 112 S. Ct. 2408, 2434 (1992).

¹⁵⁶ 480 U.S. 678, 684 (1987). The Supreme Court in *Alaska Airlines* declared that the severability test for unconstitutional provisions was well established; for support, the Court cited *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) and *Champlin Refining Company v. Corporation Commission of Oklahoma*, 286 U.S. 210, 234 (1932).

¹⁵⁷ *New York v. United States*, 112 S. Ct. at 2434 (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)). Congress' failure to include a clause stating whether provisions are severable does not raise a presumption against a statute's severability. *Id.* (citing *Alaska Airlines, Inc.*, 480 U.S. at 686).

¹⁵⁸ *Id.*

¹⁵⁹ 18 U.S.C. § 922(s)(2).

deemed unconstitutional are severable.¹⁶⁰ Notwithstanding the severability clause, section 922(s)(2) is severable by the common law standard established in *Alaska Airlines*.¹⁶¹ Although removing the mandatory nature of the check will weaken and suspend a portion of Congress' objective, Congress would still have enacted the remaining provisions of the Brady Act despite the omission of section 922(s)(2).¹⁶² The five-day waiting period remains functional and the opportunity for CLEOs to conduct a reasonable background check remains optional instead of mandatory.¹⁶³ Without mandating the CLEOs to perform background checks on every purchase, the CLEO may now opt to perform a check at his or her own discretion or at the discretion of his or her community. The information and notification obligations imposed on federally licensed firearms dealers and purchasers also remain fully operational.¹⁶⁴ A purchaser must still disclose the information on a statement as required by the Brady Act,¹⁶⁵ and the vendor must still verify the identity of the transferee and send the transferee's statement to the CLEO.¹⁶⁶ In addition, section 922(t), which provides for the establishment of a national background check, remains applicable without section 922(s)(2).¹⁶⁷

By severing the mandatory background check provision, the requirements of the other provisions which impose duties upon the

¹⁶⁰ 18 U.S.C. § 928 (1988) provides: "If any provision of this chapter . . . is held invalid, the remainder of the chapter . . . shall not be affected thereby."

¹⁶¹ *Alaska Airlines, Inc.*, 480 U.S. at 684.

¹⁶² *McGee v. United States*, 863 F. Supp. 321, 327 (S.D. Miss. 1994) (recognizing that deletion of § 922(s)(2) will "weaken and eliminate a part of the total Congressional statutory scheme for dealing with handgun purchases," but finding that Congress would have enacted the Brady Act despite this provision; the balance of the Act is fully operative without it).

¹⁶³ See, e.g., *Frank v. United States*, 860 F. Supp. 1030, 1044 (D. Vt. 1994) (holding that § 922(s)(2) is severable from the Brady Act); *Mack v. United States*, 856 F. Supp. 1372, 1383 (D. Ariz. 1994) (same); *McGee*, 863 F. Supp. at 327 (S.D. Miss. 1994) (same); *Printz v. United States*, 854 F. Supp. 1503, 1519 (D. Mont. 1994) (same).

¹⁶⁴ 18 U.S.C. § 922(s)(1), (3)-(6).

¹⁶⁵ 18 U.S.C. § 922(s)(1)(A)(i)(I).

¹⁶⁶ 18 U.S.C. § 922(s)(1)(A)(i)(II), (III).

¹⁶⁷ 18 U.S.C. § 922(t)(1).

CLEOs become optional rather than compulsory. These provisions lose their mandatory nature and will apply only to those CLEOs who elect to comply with section 922(s)(2).¹⁶⁸ By removing section 922(s)(2), states properly retain the authority to decide whether to require the performance of background checks by CLEOs. Accordingly, by removing section 922(s)(2), the Brady Act no longer commandeers the states and the remaining provisions remain fully operational.¹⁶⁹

CONCLUSION

In 1992, the Supreme Court determined that Congress could not commandeer the states by directly compelling them to enact or administer a federal regulatory program.¹⁷⁰ In 1993, Congress chose to ignore the Court's precedent when it passed the Brady Act. The Brady Act shifts the administrative burden of executing a law enacted by Congress onto the states. The federal government must assume the political and fiscal accountability which stems from the passage of a law such as the Brady Act. Despite the steady deterioration of federalism and the seemingly vacant powers embedded in the Tenth Amendment, one tenet prevails: Congress

¹⁶⁸ For example, 18 U.S.C. § 922(s)(6)(B) requires CLEOs to destroy records of the background check if the transfer is approved and 18 U.S.C. § 922(s)(6)(c) directs the CLEO to provide a written explanation upon request to a denied purchaser. These statutes will no longer be mandatory; however, a CLEO may opt to follow these procedures. *See Frank*, 860 F. Supp. at 1044 ("No CLEO is compelled to comply with [provisions § 922(s)(6)(B) and (s)(6)(c)] because he or she can choose not to participate in background checks at all."). To deter unfounded refusals of transfers, the Court should require that if the CLEO chooses to perform background checks, then he or she must comply with all aspects of the Brady Act, including providing a written statement for the reasons for denial if requested by the purchaser.

¹⁶⁹ *Mack v. United States*, 856 F. Supp. 1372, 1384 (D. Ariz. 1994). In the alternative, the Brady Act may retain its mandatory nature if Congress enacts provisions to fund local authorities for the performance of the background checks.

¹⁷⁰ *New York v. United States*, 112 S. Ct. 2408, 2434 (1992).

must legislate directly—it may not force the states to implement unfunded, federal mandates.¹⁷¹

By acting without any power pursuant to Article I of the Constitution, Congress violated the Tenth Amendment when it passed the Brady Act. By mandating that local law enforcement agents perform background checks without providing funding, assistance, or compensation, Congress crossed the boundary between its federal powers under the Constitution and state sovereignty as protected by the Tenth Amendment. Because the Brady Act is unconstitutional, Congress faces two choices: it must either provide funds for the implementation of the Brady Act or it must repeal the portions of the Brady Act that mandate local action.

¹⁷¹ See generally *New York v. United States*, 112 S. Ct. 2408 (1992).