The Brady Bill Comes Due:

The *Printz* Case and State Autonomy

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The starred page numbers (such as *190) indicate the beginning of a new page on the printed text.

Other writings by Kopel on the Brady Bill.

Other writings by Kopel on federalism and the 10th Amendment.

On the last day of the 1996-97 term, the Supreme Court issued a harshly divided 5-4 decision [1] which gutted the Brady Act. [2] Enacted in 1993, this act ordered sheriffs and police chiefs in 28 states to conduct background checks on handgun purchasers. Handgun sales were to be delayed for five working days while checks were conducted.

Sheriffs all over the United States sued, arguing that Congress had no authority to order state and local officials to perform investigations. The Circuit Courts of Appeal split, with the Fifth Circuit Court holding for the sheriffs, and the Second and Ninth Circuits ruling for the federal government. The cases that came to the Supreme Court were appeals from the Ninth Circuit by Montana Sheriff Jay Printz and Arizona Sheriff Richard Mack, consolidated with other cases.

Working with the Colorado Attorney General's Office, I was the lead author of the amicus brief submitted to the Supreme Court by Colorado and seven other states.

While almost all media discussion of the Brady Act has focused on the gun control issue, an even more important story has been overlooked--the radical change in the state/federal relationship which the Brady Act attempted to effect. Had the Brady Act been upheld, the Court's ruling would have been one of the most devastating blows ever suffered by the states. Conversely, the five-Justice opinion holding Brady unconstitutional is a watershed in judicial protection of federalism.

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In this article, I discuss several federalism issues raised by *Printz*. First, I discuss the burden imposed on states by the Brady Act, and arguments that minor burdens are of no constitutional significance. I then show how the Brady Act struck directly at our republican form of government. Third, I

discuss the implications of the Brady Act's failed attempt to expand radically the scope of Congressional power over interstate commerce. Fourth, I detail the failures of the political process which led to the Brady Act's gross violations of the principles of federalism. I conclude the article with a brief analysis of the judicial role in upholding federalism as part of the Constitutional structure of freedom. Parts of the article include material from the states' amicus brief.

I. The Substantial Size of the Brady Act Burden on State and Local Law Enforcement

Gun control advocates attempted to portray the Brady Act as imposing only minor burdens on state and local government. [3] This portrayal is incorrect.

Under the Brady Act, state and local law enforcement officers had been forced to spend literally millions of hours investigating handgun buyers. A Brady check usually began with contacting the FBI's National Criminal Investigative Center (NCIC), which maintains a partially accurate database of felony arrests and (in some cases) convictions.

If the NCIC data about an individual showed an arrest, but not the disposition of the arrest, the law enforcement investigator would have to contact whatever state or local source might have knowledge of the case's outcome.

Assuming that the NCIC revealed no felony, the law enforcement investigator was then required by the Brady Act to conduct "research in whatever State and local recordkeeping systems are available."[4] This research would be necessary to discover whether the prospective handgun buyer fit under any of the federally disqualifying categories which are not tracked by the NCIC: an unlawful user of or addict to controlled substances; anyone adjudicated a "mental defective" or *191 who "has been committed to any mental institution"; [5] an illegal alien; anyone dishonorably discharged from the armed forces; anyone who has renounced citizenship; or anyone subject to certain court orders related to domestic violence. A 1995 amendment to federal gun laws added an additional disqualifying category not tracked by the NCIC: conviction of any misdemeanor involving domestic violence (including purely verbal altercations).[6]

The Brady Act was a massive unfunded mandate. As a result of bipartisan reform legislation enacted early in 1995, laws such as the Brady Act would, if enacted today, have to undergo special legislative procedures; the federal government must now fully fund new mandates, absent a Congressional vote not to fund a given mandate.[7] But the important fact of *Printz* was not that the Brady Act was an unfunded mandate. The problem was the mandate itself.

Like the federal Gun Free School Zones Act declared unconstitutional in *United States v. Lopez* [8], the Brady Act represented a "sharp break" from previous federal gun legislation. Before the Brady Act, all federal gun legislation had depended on the federal executive branch for its implementation. The Brady Act was the first and only federal gun law to conscript state employees.

Indeed, the overwhelming mass of man-hours necessary to implement Brady were supplied by state employees. Federal employees had a much more minor role. Federal employees could prosecute private citizens who violated the Act (there have been only seven prosecutions, as of November 1997), provide limited assistance to the sheriff or police chief by operating certain federal databases and prosecute, or threaten to prosecute, state employees who refused to perform federal service.

Enforcement of the federal mandate was the most coercive sort possible: ultimately, at the barrel of a gun, state officers who failed to comply with this federal command were subject to criminal penalties. [9] Once the Brady litigation began, the Department of Justice (DOJ) said that it would not prosecute state and local law enforcement officials *192 who disobeyed the Brady mandate. [10] But the Department of Justice's policy, almost certainly influenced by litigation tactics in the Brady suits, would continue only as long as DOJ wanted it to. There was no guarantee that a future Department of Justice would follow a similar policy, especially in regard to any new laws (which would inevitably have been enacted if the Brady Act were allowed to stand), that would impose more criminal penalties on more state employees for failure to carry out new federal laws at state expense.

To make the conscription of state officials worse, the Brady Act did not limit itself to conscripting low-level, line employees, such as clerks in a motor vehicle licensing bureau. Instead, the act conscripted chiefs of police, who are expected to exercise substantial discretion in performing important policy-making decisions.

And even more so than police chiefs, sheriffs are charged by the people with exercising policy-making discretion, for sheriffs are generally elected directly by the people.

As for the lower-ranking officers and deputies who were indirectly conscripted by the Brady Act, "[p]olice officers in the ranks do not formulate policy, per se, but they are clothed with authority to exercise an almost infinite variety of discretionary powers." [11] Thus, "[p]olice officers very clearly fall within the category of 'important nonelective . . . officers who participate directly in the . . . execution . . . of broad public policy." ' [12] As a whole, "[t]he police function fulfills a most fundamental obligation of government to its constituency.[13]

The Brady Act did much more than simply divert important policy-making state officers from performing their fundamental duties under state law. Sheriffs Printz and Mack were ordered to perform acts which state law expressly forbade. [14] Not only did state law forbid the sheriffs to do what the Brady Act compelled, Sheriff Mack's violation *193 of state law made himpersonally liable for civil suit under state law, for every public dollar spent in violation of the state law. [15]

If the Brady mandate had truly been minimal, it would have been a mistake for the Supreme Court to create some kind of "de minimis" exception to the Tenth Amendment. (The Tenth Amendment reserves to the states and the people all powers not granted to the federal government.)
The Ninth Circuit had asserted that Congress could impose extensive mandates on the states, so long as the sum of all the burdens did not thoroughly disable the states from carrying out government functions. [16] This is analogous to a First Amendment rule in which newspapers could be ordered to print large amounts of Congressionally-written content, so long as there was still some room in the newspaper for the paper's owners to print content of their own choosing. Yet, "[e]ven if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply," mandated content is a per se interference with a newspaper's editorial decision. "[T]he exercise of editorial control and judgment," free of government mandates, is a part of the protected core of the First Amendment. [17] Analogously, the exercise of control and judgment by policy-making officials in the fundamental, traditional state function of law enforcement is part of the protected core of the Tenth Amendment. There must be no "de minimis" exception to the First Amendment or to the Tenth Amendment.

Constitutional freedoms are rarely destroyed all at once. "Of course, no one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions--in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell."[18]

Despite the fervid rhetoric about gun violence, there was no Constitutional significance to the Department of Justice's claims about the *194 supposedly benign objectives behind the Brady Act. As Justice Brandeis warned, "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[19]

Indeed, to the extent that intentions matter, they cut against the Brady Act. While some naive persons supported it in hopes that it would reduce gun crime, the large body of criminological evidence both before and after the

enactment of Brady demonstrated that laws like Brady have no statistically discernable impact on crime. For example, University of Maryland criminologist David McDowall, a supporter of gun control, performed before and after analyses of the effects of new or extended waiting periods in Cincinnati, St. Louis, Los Angeles, and San Francisco on intentional deaths in those cities.[20] McDowall concluded that 'waiting periods have no influence on either gun homicides or gun suicides.'[21] Analysis of crime data from every county in the United States, over a fifteen year period, found state Brady-type laws and the Brady Act itself to have no beneficial impact on any category of violent crime.[22]

The chief supporters of the Brady Act, such as Mrs. Sarah Brady (for whom the bill was originally named [23]) intended the Brady Act as a "first step" in building a national gun licensing system in which people could only have a gun if the government thought they had a need, and self-defense would not be considered a legitimate need. [24] The next step in implementing this system was intended to be "Brady II," *195 a Congressional bill forcing state governments to set up handgun licensing and registration systems according to federal mandate. Printz has made Brady II a Constitutional impossibility.

II. Republican Form of Government Clause and the Appropriations Clause

Printz implicated not only the Tenth Amendment's reservation of state powers, but also the Republican Form of Government clause in Article IV of the Constitution. Under that clause, the federal government must guarantee to each state a republican form of government.[25]

The "distinguishing feature" of a republican form of government "is the right of the people . . . to pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves." [26] Under the Brady Act, the acts of a sheriff in Arizona would no longer be the acts of the people of Arizona, but instead would be acts of the Congress.

Ohio State University law professor Deborah Merritt (a scholar cited by Justices Scalia and O'Connor [27]) observes that "[s]ince at least the eighteenth century, political thinkers have stressed that republican government is one in which the people control their rulers." [28]
As Professor Merritt explains,

[f]ederal attempts to appropriate state governmental resources in this manner deny the states a republican form of government . . . if the national government compels the states to enforce federal regulatory programs, state budgets and executive resources reflect federal priorities rather than the wishes of local citizens. These results are antithetical to the popular control exerted in a republican form of government If the federal government could order states to implement federal programs, the state power to tax would be

dissociated from the power to spend, and "would encourage few even casually acquainted with the *196 writings of Montesquieu and the Federalist Papers to assert that the States enjoyed a Republican Form of Government . . . ." [29]

At the federal level, one of the safeguards which helps protect a republican form of government is the Constitution's Appropriations Clause: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . ." [30] The clause protects republican government by requiring that federal money only be spent (or financial obligations imposed) by the Congress, which is the body with the exclusive authority to raise revenues, and the only branch with the authority to impose taxes. The power to appropriate funds and the responsibility to raise funds to be appropriated are vested in the same body. Thus, the Appropriations Clause upholds the principle of fiscal accountability.

The Brady Act violated the accountability principle. Congress ordered the expenditure of funds by imposing an immense unfunded mandate, yet Congress was not the body that would have to raise the taxes or cut spending to carry out that mandate. During the ratification debates, not even the most dire anti-Federalists predicted that Congress would evade the Appropriations Clause so wildly that it would, in essence, appropriate funds belonging to state governments. Telling someone else's employees how to occupy their labor is no different, in practice, than taking the money that is used to pay for that labor.

While control of government spending is an essential feature of a republican form of government, it is not the only feature undermined by the Brady Act. One of the important traditional safeguards of civil liberty in America has been the subordination of law enforcement to republican control. Explaining why federal law enforcement is so much less accountable than local enforcement, former Attorney General Edwin Meese points out that "[i]f voters are dissatisfied with their sheriff, district attorney, or local police force, they can vote the appropriate officials out of office." [31] The ability of voters to change local law *197 enforcement behavior through republican means is nullified if local law enforcement must spend its time carrying out federal directives, rather than programs chosen by the local electorate.

When federal officials make choices that state officials must enforce against the will of the local electorate, another form of accountability is impaired--that the federal government bear the entire brunt of public disapproval for federal programs which may turn "out to be detrimental or unpopular." [32] Accountability is diminished "when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate." [33] Or as Professor Merritt put it, "The body that reaps electoral credit for an initiative should also bear the risk of any political fall-out; otherwise the representatives do not have the appropriate incentives for weighing the costs and benefits of a program." [34]

In *Mack*, the Ninth Circuit side-stepped the accountability problem by hypothesizing that since the Brady Act received a great deal of national publicity, the public knew that the federal government was responsible, and assigned all relevant blame accordingly. [35] Under the Ninth Circuit's theory, everyone would simply accept the local sheriff's or police chief's excuse, "I was just following orders."

It is dubious to presume that this excuse--which is often rejected in other contexts--would prove persuasive to all persons harmed by the Brady Act. While well-informed newspaper readers may know the Brady Act is an unfunded federal mandate, it is hardly true that almost all--or even a majority--of the public knows this. In 1993, the year the Brady Bill was enacted, the Luntz Weber firm conducted a poll which found that twenty seven percent of respondents knew nothing about the Brady Bill and thirty percent could only identify it as a "gun control" bill.[36]

Moreover, the Ninth Circuit's hypothesis applies, at best, to persons who were unhappy with the way sheriffs or police chiefs were enforcing the Brady Act. However, there is an entirely different group of unhappy citizens--crime victims and other persons concerned *198 about the underenforcement of state laws. It is implausible that these citizens would all recognize that the underenforcement here was the result of local law enforcement being burdened with the Brady Act, and that they should direct their legitimate anger at Congress, rather than toward local law enforcement.

III. Interstate Commerce Clause

From 1937 through 1994, the Supreme Court always upheld assertions by Congress of the power to "regulate Commerce . . . among the several States." [37] But in 1995, the Supreme Court took an important step to resume enforcing the boundaries of Congressional authority; the Court struck down a federal law setting up thousand-foot radius "gun free zones" around every school in the United States, because the law had no real relation to interstate commerce. [38]

In *Printz*, the Court was able to find the Brady Act unconstitutional without determining whether the Act was within the interstate commerce power. Justice Thomas suggested in his concurrence that the Brady Act's regulation of in-state retail sales of handguns might not be a proper exercise of the power to regulate interstate commerce. [39] Had the Brady Act survived the Supreme Court challenge, the Act would have resulted in an unprecedented expansion of the scope of the interstate commerce power.

Even assuming Congress can properly use its power over interstate commerce to regulate the intrastate sale of handguns, the sheriffs and police chiefs were nonetheless strangers to the handgun transaction. They would have no role in the sale, except to the extent made necessary by the Brady Act. The interstate commerce power should not include the power to force

strangers to a commercial transaction to participate as a third party in that transaction. For example, it is well established that Congress may use the interstate commerce power to regulate how a white hotel clerk deals with a black customer at a hotel that serves many interstate customers. [40] This interstate commerce power does not mean that Congress may order private citizens or state employees to mediate or supervise the clerk-customer dialogue.

*199 The connection between a voluntary two-party commercial transaction and a third party who has never attempted to participate in that transaction is very remote. Had the Court upheld the Brady Act, the interstate commerce power would have ballooned to nearly infinite proportions, a result that "would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." [41]

Put another way, the fact that a given subject may come under the interstate commerce power does not mean that Congress may mandate how a state should enforce the law regarding the subject. "The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." [42] Thus, even if Congress may use the interstate commerce power to regulate the sale of handguns by federally licensed firearms dealers, Congress does not have the power to order state governments to regulate handgun sales according to a federal statute.

The Brady Act contained another commerce power violation. The Act used the interstate commerce power to create a cause of action against state employees in federal court. [43]Overruling a 1989 case, the Supreme Court in 1996 ruled that the Eleventh Amendment bars use of the interstate commerce power to create a civil cause of action against state officers in federal court. [44]

IV. Brady and the Failure of the Political Process

The most important purpose of the judiciary in the American system of checks and balances is to rectify failings in the political process, especially when those failings result in violations of the Constitution. The Brady Act was a textbook case of failure in the political process. A closer examination reveals other failures in the system.

The first failure of the system was the intense political pressure on Congress to enact "get tough" criminal legislation, regardless of whether such legislation was within Congress's enumerated powers. *200 This led Congress to its second failing--using state resources to pay for programs that Congress wanted the credit for enacting, but not the burden of enforcing. Finally, the Brady bill sponsors subverted the chances of a fair fight in Congress in which state interests would be protected by drafting the

legislation so that some state delegations could vote to impose burdens that would not be borne by their own state.

A. Symbolic Criminal Law

As Colorado federal district judge John Kane pointed out in 1994, "[A]pparently irresistible political pressures to be perceived as 'tough on crime' are driving Congress to federalize crimes. . .in circumstances where clear- minded, objective analysis can discern no meaningful effect on interstate commerce in the sense intended by the Commerce Clause." [45] In a related context, Chief Justice Rehnquist observed how political dynamics result in Congress enacting mandatory minimum sentences which make for useful soundbites, but have little serious justification: "Mandatory minimums. . .are frequently the result of floor amendments to demonstrate emphatically that legislators want to 'get tough on crime.' Just as frequently they do not involve any careful consideration of the effect they might have on the sentencing guidelines as a whole." [46]

B. Use of State Resources as a "Free Good" in Order to Respond to Political Pressure

Brady was enacted in a year when the annual federal deficit was 203 billion dollars. [47] Fiscal pressures therefore made it difficult to find the additional federal money to enforce new federal laws. Hence, the temptation for Congress to "do something" about crime, and to help itself to state resources in order to do so, was particularly strong. In an obvious failing of the national political process, Congress was enacting legislation, but using other people's money to implement the legislation:

*201 If Congress is allowed gratuitously to order the states to perform federal tasks, it will not have to pay for what it gets. As ideas for federal projects grow but resources lessen, the incentives will grow stronger for Congress to command the state government to perform federal programs for free. [48]

Conversely, requiring Congress to use only federal revenues for federal projects helps ensure that Congress will consider whether the benefits are worth the burden. "If the federal government is willing to assume the full burdens of direct regulation it will not impose regulations without carefully considering the costs involved." [49]

The Congressional conversion of state resources endangers the function of states as social laboratories. For

[i]f the state's governmental resources can be tapped for federal purposes, its will overborne by federal directives, and its new ideas replaced with more nationally accepted ideas, we will have fifty states that are mere reflections of the federal government. The virtue of diversity should be guarded, when not at the expense of the civil rights of state citizens. [50]

The function of States as social innovators is one of their sources of strength in the federal system. To diminish their ability to set their own policies--including their own policies on controversial social issues like gun control--is to diminish one of the important sources of citizen affection for their states. States will thereby be less able to defend their rights effectively in the national political arena.

C. Unequal Distribution of the State Burdens

Why should Congress vote to impose the Brady Act's heavy burden on the states? Because the Brady Act drafted the law so that legislators could impose the burden on other states, while leaving their own state unharmed. The Brady Act was drafted in a manner such that twenty-two states were exempted. [51]

*202 While the bill was being debated on the floor of Congress, one legislator after another would rise in support of the bill, proclaiming his satisfaction that the bill would not apply to his State. [52] In the House of Representatives, 75 percent (179 of 238) of votes to pass the bill came from delegations whose States were exempted from the Brady Act. In the Senate-supposedly the primary guardian of states' rights--two-thirds of the "aye" votes came from exempted delegations. Of the state delegations from which both senators voted "aye," 18 of the 19 delegations represented states exempted from the bill. In contrast, of the state delegations which unanimously voted "no," eleven of the twelve states were not exempt.

Unjustifiably, the Brady Act burden that fell on the non-exempt states was significantly heavier than the burden which the exempted states had voluntarily assumed. Many state exemptions were based on state laws requiring inquiry into fewer subjects than did the Brady Act, or laws which did not even require a sheriff or police chief to perform any inquiry at all before approving the handgun sale.

For example, Alabama and Tennessee were exempt because they required handgun purchase notifications to be sent to the police; the Alabama and Tennessee police were not required to conduct any investigation of the handgun purchaser. [53] Many other exempt states did not require the police to investigate handgun purchasers at all, or required investigations much less extensive than the Brady investigation.

Thus, the Brady Act was not a law in which some states were brought up to a standard already achieved by other states. To the contrary, Brady imposed an onerous burden on some states, while other states were exempted from the burden, in exchange for voting to burden their sister states.

The general problem of Congress using state financial means to accomplish Congressional ends was acutely aggravated. By selectively imposing the burdens of the law on only some states, the sponsors of the bill executed a

successful, calculated plan to undermine ordinary state solidarity against large unfunded federal mandates.

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V. Federalism as a Civil Liberties Guarantor

For most of American history the Supreme Court has paid careful attention to the limits on federal power. But in recent decades, some Supreme Court majorities have considered federalism to be of no importance. The highpoint of Supreme Court rejection of federalism was the majority opinion in *Garcia v. San Antonio Metropolitan Transit Authority*. [54] The *Garcia* majority declared, in effect, that the Court would refuse to enforce the Tenth Amendment. [55] Supposedly, Congress was already so concerned about states' rights that judicial review was not needed. [56] As shown by *Printz*, *Lopez*, and other recent cases, several Justices of the Supreme Court (currently a three or four vote minority) continue to reject any role for the Court in enforcing constitutional limits on congressional power.

To place any item included in the Bill of Rights beyond the scope of serious judicial review is to disrespect the separation of powers by failing to perform the essence of judicial duty: to enforce the Constitution. To declare the Tenth Amendment off-limits from judicial protection is to abandon the first principle of federal jurisprudence, that "[i]t is emphatically the province and duty of the judicial department to say what the law is." [57]

As the *Garcia* dissent recognized, "[t]he Tenth Amendment also is an essential part of the Bill of Rights." [58] The Tenth Amendment cannot be shunted into some kind of inferior class of constitutional citizenship under the rationale that the first nine amendments guarantee individual rights, while the Tenth Amendment guarantees state rights. Protection of the sovereignty of the state governments means protection of the right of the individuals in every state to govern themselves, rather than be governed by legislators chosen by people from other states.

More fundamentally, the doctrine of enumerated powers (Congress may only legislate on subjects over which the Constitution grants Congress authority), of which the Tenth Amendment is the cornerstone, is an essential element in the protection of all the Bill of Rights. *204 As University of Tennessee law professor Glenn Harlan Reynolds explains:

> With the demise of the doctrine of enumerated powers as a restraint on federal power, the only protection remaining for the liberties of citizens not sheltered by powerful lobbying groups is that provided by the positive limitations on government embodied in the Bill of Rights. Those provisions were inserted by pessimists who did not believe--rightly, as it turns out--that the doctrine of enumerated powers would be enough to restrain the federal government over the long term. There is no reason to believe, however, that the Bill of Rights itself will survive over the long term if the rest of the plan is

abandoned. As National Aeronautics and Space Administration engineers say, once you start relying on the backup systems, you are already in trouble. To take one current example, the pressure to ignore enumerated rights brought about by increased federal responsibilities can already be seen in the calls for 'sweeps' of federally funded public housing projects, sweeps that surely violate Fourth Amendment rights. (citation omitted.)

What rights will be next? A federal government with unlimited responsibilities is likely to demand unlimited power to discharge them and is unlikely to be restrained for long by the Bill of Rights. The Framers anticipated that. We should remember it.[59]

While the Tenth Amendment, by ensuring the division of political power, plays a significant role in protecting individual liberty, the protection of freedom is not the only benefit conferred by the amendment's defense of federalism. As Steven Calabresi notes, the principle of federalism makes a substantial contribution to domestic tranquility in the United States, by assuring that many contentious, divisive moral issues may have a multiplicity of resolutions, rather than a winner-take-all decision at the national level. [60]

The Brady Act was the antithesis of the pro-diversity approach inherent in the Constitution. A gun control law rejected by the people and legislatures of 28 states was forced on those states by congressional fiat.

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VI. Conclusion

The most important effect of *Printz* was not on handgun sales. Post-*Printz*, many local law enforcement officials chose to continue doing handgun checks voluntarily. More and more states are setting up their own "instant-check" system for handgun buyers (similar to a credit card verification), and thereby exempting themselves from the Brady Act. Yet *Printz* was still a very important case.

Hanging in the balance in the *Printz* case was the survival of states as states, rather than as administrative subdivisions of the federal government.

"No one will take the Constitution seriously if Congress and the courts refuse to do so," observes Professor Merritt. [61] The Brady Act's unprecedented assault on the states and on constitutional federalism was the result of decades of Supreme Court refusal to take federalism seriously. *Printz*, like *Lopez* and other 1990s cases in which a slender Court majority has begun to enforce constitutional limits on federal power, is welcome not just because an unconstitutional law was stricken. Just as the Supreme Court's consistent and commendable attention to the First Amendment has raised popular consciousness about the importance of free speech, the Court's renewed attention to the limits of federal power will remind both citizens and legislators that the powers that the People granted to Congress in the

Constitution are specific and finite. And those powers surely do not include the power to dragoon state employees into federal service.

Endnotes

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[1]. Printz v. United States, 521 U.S. 898 (1997).

[2]. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (current version at 18 U.S.C. §§ 921-930 (1998)).

[3]. Respondent's Brief at 32-40, Printz v. United States, 521 U.S. 898 (1997) (Nos. 95-1478, 95-1503). See also, Mack v. United States, 66 F.3d 1025, 1029-30 (9th Cir. 1995), rev'd, 521 U.S. 898 (1997).

[4]. 18 U.S.C.A. § 922(s)(2) (West 1993).

[5]. 18 U.S.C.A. § 922(d)(4) (West 1993).

[6]. 18 U.S.C. § 922(d)(9) (1998).

[7]. 2 U.S.C. §1501-1504 (1998).

[8]. 514 U.S. 549 (1995).

[9]. 18 U.S.C. § 924(a)(5) (1998).

[10]. Respondent's Brief at 13, Printz v. United States, 521 U.S. 898 (1997) (Nos. 95-1478, 95-1503).

[11]. Foley v. Connelie, 435 U.S. 291, 297 (1978).

[12]. Id. at 300, quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

[13]. Id. at 297.

[14]. See Ariz. Rev. Stat. § 13-3108 (1989); Op. Ariz. Att'y. Gen. No. I78-274 (1989) (Sheriffs and other local officials forbidden to involve themselves in handgun purchases); Mont. Code Ann. § 45-8-351(1)(1991) (same).

[15]. See Ariz. Rev. Stat. § 11-641(1990) (imposing personal liability for ultra vires expenditures of funds).

[16]. Mack v. United States, 66 F. 3d 1025 (9th Cir. 1995), rev'd, 521 U.S. 898 (1997).

[17]. Miami Herald Publ'g. Co. v. Tornillo, 418 U.S. 241, 258 (1974).

[18]. Joseph Lipner, Imposing Federal Business on Officers of the States: What the Tenth Amendment Might Mean, 57 Geo. Wash. L. Rev. 907, 913, quoting Laurence H. Tribe, American Constitutional law 381 (1988).

[19]. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

[20]. David McDowall, Preventive Effects of Firearms Regulations on Injury Mortality, presented at the Annual Meeting of the American Society of Criminology (1993) (on file with George Mason University Civil Rights Law Journal).

[21]. Id.

[22]. John R. Lott, Jr. & David B. Mustard, Crime, Deterrence, and Right- to-Carry Concealed Handguns, 26 J. Legal Stud. 1 (1997).

[23]. See Handgun Control, Inc., What You Should Know About the Brady Bill (brochure 1987) ("Handgun Control's flagship bill, the Handgun Violence Prevention Act known as the 'Brady Bill' for Sarah Brady, requires a seven-day waiting period for handgun purchases for both dealers and individuals.") Later, the "Brady Bill" was said to be named for Mrs. Brady's husband, James Brady.

[24]. See Erik Eckhom, A Little Gun Control, a Lot of Guns, N.Y. Times, Aug. 15, 1993, at B1 (interview with Mrs. Brady); Tom Jackson, Keeping the Battle Alive, Tampa Tribune, Oct. 21, 1993. (Mrs. Brady states, 'To me, the only reason for guns in civilian hands is for sporting purposes.'); In Step With: James Brady, Parade Magazine, June 26, 1994, at 18 (Asked if handgun ownership was defensible, Mr. Brady replied, "For target shooting, that's okay. Get a license and go to the range. For defense of the home, that's why we have police departments.").

[25]. U.S. Const. art. IV, § 4.

[26]. Baker v. Carr, 369 U.S. 186, 222-23 n.48 (1962), quoting In re Duncan, 139 U.S. 449, 461 (1891).

[27]. See Printz, 521 U.S. at 930 (citing Merritt in Scalia Opinion); see also New York v. United States, 505 U.S. 144, 157, 169, 185 (1992) (citing Merritt in O'Connor Opinion); Gregory v. Ashcroft, 501 U.S. 452, 458, 463 (1991); South Carolina v. Baker, 485 U.S. 505, 531 (1988) (O'Connor, J., dissenting) (citing Merritt in O'Connor dissent).

[28]. Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 23 (1988).

[29]. Id. at 61 (quoting Brown v. EPA, 521 F.2d 827, 840 (9th Cir. 1975), vacated and remanded for consideration of mootness sub nom EPA v. Brown, 431 U.S. 99 (1977)) (following Solicitor General's admission that federal EPA requirement that states enforce particular pollution laws was indefensible under the Tenth Amendment).

[30]. U.S. Const. art I, § 9, cl. 7.

[31]. Edwin Meese III & Rhett DeHart, How Washington Subverts Your Local Sheriff, Pol'y. Rev., Jan./Feb. 1996, at 53.

[32]. New York v. United States, 505 U.S. 144, 168 (1992).

[33]. Id. at 169.

[34]. Deborah Jones Merritt, Republican Governments and Autonomous States: A New Role for the Guarantee Clause, 65 U. Colo. L. Rev. 815, 825 (1994).

[35]. See Mack, 66 F.3d at 1031.

[36]. Luntz & Weber Research & Strategic Services, A National Survey on Crime, Violence, and Guns, June 1993.

[37]. U.S. Const. art.,I § 8, cl. 3.

[38]. See United States v. Lopez, 514 U.S. 549, 594 (1995).

[39]. Printz, 521 U.S. at 937-38.

[40]. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[41]. NRLB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

[42]. New York v. United States, 505 U.S. 144, 166 (1992).

[43]. A cause of action was allowed for erroneous denial of a firearms purchase application. 18 U.S.C. § 925A (1998).

[44]. Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114 (1996), overruling Pennsylvania v. Union Gas Co, 491 U.S. 1 (1989).

[45]. United States v. Ornelas, 841 F. Supp. 1087, 1093 (D. Colo. 1994), rev'd 56 F.3d 78 (10th Cir. 1995).

[46]. William H. Rehnquist, Luncheon Address, in U.S. Sentencing Commission, Drugs and Violence in America 283, 286-87 (1993).

[47]. David J. Weidman, Comment, The Real Truth About Campaign Financing, 63 Tenn. L. Rev. 775, 781 (1996) (citing Budget of the United States Gov't. 2 (1995)).

[48]. Joseph Lipner, Imposing Federal Business on Officers of the States: What the Tenth Amendment Might Mean, 57 Geo. Wash. L. Rev. 907, 928 (1989).

[49]. Ronald Rotunda, The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions, 132 U. Pa. L. Rev. 289, 312-13 (1984).

[50]. Lipner, supra note 48, at 927.

[51]. Under 18 U.S.C. § 922(t)(3), a state may be exempt if there are few officers in the area. See 18 U.S.C. § 922(t)(3) (1998).

[52]. E.g. 139 Cong. Rec. H9101, 9108, 9111, 9112, 9113 (Nov. 10, 1993) (Reps. Fish, Fowler, Hoekstra, Ford, Smith, Lloyd).

[53]. Ala. Code § 13A-11-77 (1998); Tenn. Code Ann. § 39-17-1316 (1998).

[54]. 469 U.S. 528 (1985)

[55]. Id. at 554.

[56]. Id. at 551.

[57]. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-79 (1803); see also William Van Alstyne, The Second Death of Federalism, 83 Mich. L. Rev. 1709, 1724 (1985) ("Stripped of its elegance," Garcia amounts to "the piecemeal repeal of judicial review.")

[58]. Garcia, 469 U.S. at 565 n.8 (Powell, J., dissenting).

[59]. Glenn Harlan Reynolds, Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government? (Wash.: Cato Institute, 1995).

[60]. Steven G. Calabresi, A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez, 94 Mich. L. Rev. 752, 762, 768 (1995).

[61]. 94 Mich. L. Rev. 674, 691.