PRESERVING LIBERTY: *UNITED STATES V. PRINTZ* AND THE VIGILANT DEFENSE OF FEDERALISM

> *If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this; you must first enable the government to control the governed; and in the next place oblige it to control itself.*[1]

The Framers of the United States Constitution designed a governmental structure so exceptional, it has endured for over two centuries, longer than any other written constitution.[2] An essential reason why the Constitution has proved so durable is that the government established by it has fostered an atmosphere of liberty by protecting the people's basic freedoms from interference by both citizens and government. The Framers recognized that government posed as great a threat to liberty as did individuals, and successfully created a government that would control the people and itself by dividing the governmental powers between the States and the Federal Government. This division of powers has safeguarded liberty in America since the Constitution was adopted.

In 1993, Congress passed the Brady Handgun Violence Prevention Act (Brady Act),[3] amending the Gun Control Act of 1968.[4] An interim provision of the Brady Act required the chief law enforcement officer (CLEO) of the locality where the purchaser lived[5] to perform a background check on persons wishing to purchase a handgun.[6] During the October 1996 Term the United States Supreme Court, in *Printz v. United States*,[7] held by a vote of 5-4 that the interim provision of the Brady Act was unconstitutional on state sovereignty grounds.

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1. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).
2. Richard L. Nygaard, *A Bill of Rights for the Twenty-First Century*, 21 HASTINGS CONST. L.Q. 189, 191 (1994).
3. Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. § 922(s) (1994)).
4. Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified as amended at 18 U.S.C. §§ 921-30 (1994)).
5. 18 U.S.C. § 922(s)(2) (1994). The statutory definition of "'chief law enforcement officer' means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." 18 U.S.C. § 922(s)(8) (1994).
6. 18 U.S.C. § 922(s)(1) (1994).
7. 117 S. Ct. 2365 (1997).

Printz originated when Jay Printz, Sheriff of Ravalli County, Montana, sought an injunction preventing enforcement of the Brady Act's requirement that he perform background checks for handgun purchases.[8] The federal district court granted the injunction[9] but the Ninth Circuit Court of Appeals reversed.[10]

The Supreme Court reversed the Ninth Circuit, holding that the "Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[11] The dissent believed that Congress may require State officers to assist in implementing its programs when it has properly exercised its delegated power in enacting such programs.[12]

Printz is not a case about gun control. It is about power—the division of power between the States and the Federal Government. Sheriff Printz argued that the interim provision of the Brady Act was unconstitutional because it required state officials to enforce a federal regulatory program.[13] According to Printz, this was an unconstitutional encroachment into the State's sovereign sphere of control by the Federal Government.[14] The Supreme Court agreed. However, the Government argued that it is reasonable for the Federal Government to impose minimal obligations on state officials to help implement a policy that is as important as keeping handguns out of the hands of criminals.[15] According to the Government and the dissent, the Federal Government has done this since the early days of the Republic and such mandates are properly within its powers.[16]

Printz is a case about federalism. It addresses the division of powers between the States and the Federal Government. The issue of federalism may not arouse the passions of people, as vigorously as a of discussion of the regulation of firearms, but it is of equally vital importance to how a free citizenry governs itself.

The Court in *Printz* correctly understood that under the Federal system of our Republic, the States are sovereign within their own

8. 18 U.S.C. § 922(s) (1994).
9. Printz v. United States, 854 F. Supp. 1503 (D. Mont. 1994).
10. Mack v. United States, 66 F.3d 1025 (9th Cir. 1995).
11. Printz v. United States, 117 S. Ct. 2365, 2384 (1997).
12. *See id.* at 2386 (Stevens, J., joined by Souter, Ginsburg and Breyer, JJ., dissenting).
13. Brief for Petitioner at 8, Printz v. United States, 117 S. Ct. 2365 (1997) (No. 95-1478).
14. *Id.*
15. Brief for Respondent at 42, Printz v. United States, 117 S. Ct. 2365 (1997) (No. 95-1478).
16. *Printz*, 117 S. Ct. at 2390 (Stevens, J., joined by Souter, Ginsburg and Breyer, JJ., dissenting).

sphere of power.[17] Allowing the Federal Government to exercise control over State officials by making them involuntarily implement programs of the Federal Government is a tremendous usurpation of the States' sovereign power that upsets the delicate balance of power the Framers of the Constitution devised.[18] Part I of this comment examines the *Printz* decision, beginning with the factual and procedural history of the case. It also analyzes the rationale of the majority and dissenting opinions in *Printz*, focusing primarily on the differences between each opinion's conception of federalism. Part II begins by analyzing federalism as a principle of government, examining the origins and purposes of the doctrine. It then examines the Framers' understanding of federalism and the importance they placed upon the doctrine. Part II concludes by comparatively assessing the two major opinions in *Printz* vis-a-vis the Framers' rationale for federalism.

I. ANALYSIS OF *PRINTZ V. UNITED STATES*

A. The Brady Handgun Violence Prevention Act

The Gun Control Act of 1968[19] made it a crime to transfer any firearm or ammunition to a person believed to be within a broad class of persons including, among many others, convicted felons, users of controlled dangerous substances, persons dishonorably discharged from the Armed Services and persons convicted of domestic violence.[20] The Gun Control Act was amended by Congress in 1993 to include the Brady Act.[21] Congress passed the Brady Act "to address the national 'epidemic of gun violence' by enhancing enforcement of existing federal regulation of gun dealers."[22] The Brady Act, which became effective on February 28, 1994,[23] required the United States Attorney General to establish a national, computer-based system for performing instant background checks.[24] The

17. *Id.* at 2378 (citing THE FEDERALIST NO. 51, at 323 (James Madison) (C. Rossiter ed., 1961)).
18. *Id.* (citing THE FEDERALIST NO. 28, at 180-81 (Alexander Hamilton) (C. Rossiter ed., 1961)).
19. Pub. L. No. 90-618, 82 Stat. 1213 (1968), 18 U.S.C. § 921 et seq. (1996).
20. 18 U.S.C. § 922(d) (1994).
21. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1968).
22. Brief for Respondent at 3, Printz v. United States, 117 S. Ct. 2365 (1997) (No. 95-1503) (citing H.R. Rep. No. 344, 103d Cong., 1st Sess. 7-8 (1993)).
23. Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. § 922(s) (1994)).
24. *See Printz*, 117 S. Ct. at 2368 (citing Pub. L. No. 103-159, *as amended by* Pub. L. No. 103-322, 103 Stat. 2074).

proposed system would enable firearms dealers to access the system and immediately ascertain whether a prospective handgun purchaser falls within one of the prohibited classes. The Brady Act contained an interim provision that immediately became effective for States that did not have an instant background check system in place. This provision was to remain effective until the national instant check system was operational.[25] The interim provision prohibited a licensed firearms dealer from transferring a handgun to anyone other than a federally licensed firearms dealer unless the dealer first obtained a statement of personal information from the purchaser and transmitted a copy of it to the CLEO of the locality where the purchaser resided.[26] The dealer could then transfer the handgun after five business days unless the CLEO provided notice that the purchaser was ineligible to receive a handgun.[27]

The Brady Act imposed a duty on the CLEO to "make a reasonable effort to ascertain whether [handgun] receipt or possession would be in violation of the law within [five] business days. This required research in whatever State and local record-keeping systems were available and in a national system designated by the Attorney General."[28] Unless the CLEO determined that a transfer would be illegal, he was required to destroy the statement and any information derived from it.[29] If the CLEO determined the transfer would be illegal, the individual who attempted to purchase the handgun could request an explanation for why the purchase was denied.[30] If such a request was made, the CLEO was required to provide the reason for denying the purchase within twenty business days after the request was received.[31] The CLEO would face fines and/or imprisonment if he knowingly violated any of these mandates.[32]

B. Factual Background

Sheriff Jay Printz was the CLEO for Ravalli County, Montana, and was required by the Brady Act to perform background checks on persons who sought to purchase handguns.[33] Ravalli County covers 2,400 square miles and has an estimated 30,000 residents.[34] In 1994,

25. 18 U.S.C. § 922(t) (1994).
26. *Id.*
27. *Id.*
28. 18 U.S.C. § 922(s)(2) (1994).
29. 18 U.S.C. § 922(s)(6)(B)(i) (1994).
30. 18 U.S.C. § 922(s)(6)(C) (1994).
31. *Id.*
32. *Printz*, 117 S. Ct. at 2369 (citing 18 U.S.C. § 924(a)(5) (1994)).
33. 18 U.S.C. § 922(s) (1994).
34. Brief for Petitioner at 3, Printz v. United States, 117 S. Ct. 2365 (1997) (No. 95-1478).

Sheriff Printz's staff consisted of approximately twelve officers; only two of which were on patrol at any given time.[35] Every time a background check was requested, the deputies would have to stop their routine duties until the check was completed.[36] Inaccessible records meant it could take several days to complete the search required for one transaction.[37] The requirements of the Brady Act, combined with a small number of police personnel, made it difficult for the Ravalli County Sheriff's Department to execute its regular duties.[38]

Sheriff Printz sought a temporary restraining order and preliminary injunction to enjoin enforcement of the interim provision of the Brady Act because of the burden the mandate imposed on the resources of his office.[39] A federal district court in Montana held the interim provision of the Brady Act unconstitutional because it commandeered state officials to enforce a federal program.[40] The court concluded that Congress had exceeded its delegated powers enumerated in Article One, Section Eight of the United States Constitution and violated the Tenth Amendment of the United States Constitution.[41] However, the District Court held the interim provision was severable and upheld the remainder of the Brady Act; accordingly, CLEOs were no longer required to perform background checks but could voluntarily perform them.[42]

Both parties appealed the case to the Ninth Circuit where it was heard on a joint appeal with *Mack v. United States*.[43] The Ninth Circuit Court of Appeals reversed the District Court, holding the interim provision of the Brady Act constitutional on the rationale that "the federal government is permitted to secure the assistance of state authorities in achieving federal legislative goals."[44]

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35. Oral Argument for Petitioner at 6, Printz v. United States, 117 S. Ct. 1265 (1997) (No. 95-1478).

36. Brief for Petitioner at 3-4, Printz v. United States, 117 S. Ct. 2365 (1997) (No. 95-1478).

37. *Id.* at 4. For example, the required county court criminal records had to be hand searched and it would take nearly six hours of one way driving time to get to the place where the records were located. The mental and drug records were required to be searched and it would take three hours of one way driving time to get to the place where they were located and there was still a possibility they would be inaccessible. *Id.*

38. *Id.* at 5.

39. Printz v. United States, 854 F. Supp. 1503, 1507 (D. Mont. 1994).

40. *Id.* at 1519.

41. *Id.* at 1512.

42. Printz v. United States, 854 F. Supp. 1503 (D. Mont. 1994).

43. 856 F. Supp. 1372 (D. Ariz. 1994). Sheriff Richard Mack, of Graham County, Arizona brought an action challenging the interim provisions of the Brady Act on the same grounds as Sheriff Printz. The District Court in that case also held the interim provisions unconstitutional and concluded that it was severable. *Id.* at 1374, 1384.

44. Mack v. United States, 66 F.3d 1025, 1029 (9th Cir. 1995).

The United States Supreme Court granted certiorari on the question of whether the interim provisions of the Brady Act "commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks, violate the Constitution."[45]

C. The Decision

The United States Government defended the Ninth Circuit's holding, arguing the Brady Act is a constitutional exercise of Congress's power that "contravenes no constitutional principle of federalism . . . [and that] [t]he Court has never held that Congress is absolutely barred from requiring local officials to assist in the application of federal law to private parties."[46] Printz argued "that compelled enlistment of state executive officers for the administration of federal programs"[47] is unconstitutional because "Congress has no power under Article I, § 8 of the Constitution to issue these commands, which violate the Tenth Amendment."[48] This view was enunciated by the Court in *New York v. United States,*[49] where it held "Congress cannot order States to enact or administer a federal regulatory program."[50]

In an opinion by Justice Scalia, the Supreme Court accepted Sheriff Printz's argument, reversing the Ninth Circuit. Chief Justice Rehnquist, Justices O'Connor, Kennedy and Thomas joined in the opinion.[51] The Court held that the Federal Government could not command the States or the States' officers to implement federal regulatory programs.[52] Justice Stevens wrote the dissenting opinion, in which Justices Souter, Ginsburg and Breyer joined.[53] The dissent believed the Federal Government had sufficient authority to command State officers to implement the required provisions of the Brady Act. The Court's decision effectively negated the mandate on CLEOs that had forced them to perform the background checks under the Brady Act, while still allowing them to voluntarily perform such checks.[54]

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45. Printz v. United States, 117 S. Ct. 2365, 2368 (1997).
46. Brief for Respondent at 10, Printz v. United States, 117 S. Ct. 2365 (1997) (No. 95-1478).
47. *Printz*, 117 S. Ct. at 2370.
48. Brief for Petitioner at 7, Printz v. United States, 117 S. Ct. 2365 (1997) (No. 95-1478).
49. 505 U.S. 144 (1992).
50. Brief for Petitioner at 7, Printz v. United States, 117 S. Ct. 2365 (1997) (No. 95-1478).
51. *Printz* , 117 S. Ct. at 2365.
52. *Id.* at 2384.
53. *Id.* at 2386.
54. *Id.* at 2385 (O'Connor, J., concurring).

1. Majority Opinion

The Court agreed that the Brady Act forced Sheriff Printz and his officers to involuntarily participate in executing a federal regulatory scheme.[55] Because the text of the Constitution does not expressly resolve the issue presented, the Court looked to the "historical understanding and practice," constitutional structure, and the Court's prior jurisprudence.[56]

(a) Historical Understanding and Practice

The Supreme Court has held that early Congressional enactments provide persuasive evidence of the original meaning of the Constitution.[57] Printz produced evidence that early Congresses did not use state executives in implementing federal laws: from this, he argued that an absence of historical use of such an attractive power indicates that the power does not exist.[58] Persuaded by this argument, the Court ultimately distinguished several examples the Government cited as supporting its claim for the existence of such a power.[59]

The Government had argued that early state courts were required to send citizenship applications and naturalization records to the Secretary of State of the United States.[60] The Court found this non-persuasive, determining that those state courts had essentially consented to those duties because they were only imposed upon courts wishing to perform naturalization proceedings.[61] The Government presented three other examples of federal control, including requirements that state courts 1) resolve "controversies between a captain and the crew of his ship concerning the seaworthiness of the vessel," 2) hear claims regarding the forced removal of captured fugitive slaves, and 3) "tak[e] proof of the claims of Canadian refugees who had assisted the United States during the Revolutionary War."[62] The Court distinguished these examples based upon two implicit Constitutional principles that impose a duty on state *judges* but not on state *legislators* or *executives*.[63] The first principle was the

55. *Id.* at 2370.
56. *Id.*
57. Bowsher v. Synar, 478 U.S. 714, 723 (1986).
58. *Printz*, 117 S. Ct. at 2370.
59. *Id.* at 2376.
60. *Id.* at 2370.
61. *Id.*
62. *Id.*
63. *Id.* at 2371.

"Madisonian Compromise,[64] which established only a Supreme Court, and gave Congress the option of creating lower federal courts—even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States."[65] Because the Constitution created only one federal court,[66] the Court inferred that the Framers must have intended for state courts to hear cases arising under federal law.[67] The second principle was found in the Supremacy Clause[68] of the Constitution which states that "the Laws of the United States . . . [are] the supreme Law of the Land; and the *Judges* in every State shall be bound thereby."[69] The Court agreed that these distinctions coupled with the absence of Congressional use of such an attractive power, suggested the power did not exist.[70] The Court believed this was indicative that Congress did not have the power to compel the State's compliance.

Additionally, the Court found further support for its finding in one of the Government's cited examples. The First Congress sought assistance from the State of Georgia to house federal prisoners, but Georgia refused to cooperate. Congress offered to pay for the State's services, but Georgia did not acquiesce. Congress did not attempt to compel compliance; rather, it authorized the marshal of the state to rent a temporary facility.[71]

The Court disagreed with the Government's argument that *The Federalist Papers*[72] indicated Congress would probably use State officers to collect federal taxes.[73] The Court noted that none of the statements even addressed the critical issue and not one statement necessarily implied that "Congress could impose [those] responsibilities without the consent of the States."[74] Moreover, the Court observed that Federalist 36 was probably not an accurate statement of the intent of the Framers: that paper was written by Alexander

64. U.S. CONST. art. III, § 1.
65. *Printz*, 117 S. Ct. at 2371.
66. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, §1, cl. 1.
67. *Printz*, 117 S. Ct. at 2371.
68. U.S. CONST. art. VI, cl. 2 (emphasis added).
69. *Printz*, 117 S. Ct. at 2371 (alterations in original) (quoting *Id.*) (emphasis added).
70. *Id.* at 2371.
71. *Id.* at 2372.
72. "*The Federalist Papers* comprises eighty-five essays written by Alexander Hamilton, James Madison, and John Jay between October, 1787, and May, 1788, under the pseudonym "Publius" to help secure ratification of the proposed Constitution in New York state." GEORGE W. CAREY, THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC xi (1989).
73. *Id.* (quoting THE FEDERALIST NO. 36, at 221 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).
74. *Id.*

Hamilton who "was 'from first to last the most nationalistic of all nationalists in his interpretation of the clauses of our federal Constitution.'"[75] In addition, it observed that James Madison and Alexander Hamilton disagreed on matters of federalism[76] and "it was Madison's—not Hamilton's [view] that prevailed, not only at the Constitutional Convention and in popular sentiment,[77] but in the subsequent struggle to fix the meaning of the Constitution by early congressional practice."[78]

Finally the Court addressed the Government's argument that "federal statutes enacted within the past few decades"[79] requiring state or local officials to participate in implementing federal regulations are indicative of the existence of such a power. The Court summarily dismissed these examples from consideration,[80] however, as it considered them to be of too recent vintage to carry any persuasive weight regarding the original meaning of the Constitution.

The Court found the historical record persuasively, though not conclusively, indicated an absence of the power claimed by the Federal Government. The Court then proceeded to examine the structure of the Constitution to determine if a dispositive principle could be discerned from "among its 'essential postulate[s].'"[81]

(b) Structure of the Constitution

The Court analyzed the structure of the Constitution by deducing basic principles from "the overall structure of the government created by the Constitution"[82] to ascertain the Framers' original intent.[83] It found three structural principles in the Constitution that were persuasive. First, the principle of federalism demonstrated that the States retained their sovereignty where they did not expressly surrender power.[84] Second, the principle of separation of powers demonstrated that Congress could not delegate the Federal Executive's powers to the States.[85] Third, the necessary and proper

75. *Id.* at 2375 n.9 (quoting CLINTON ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 199 (1964)).
76. *Id.* (citing D. BRAVEMAN ET AL., CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM 198-99 (3d ed. 1996)).
77. *Id.* (citing CLINTON ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 44-47, 194, 196 (1964)).
78. *Id.*
79. *Id.* at 2376.
80. *Id.*
81. *Id.* (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934)).
82. Daniel Hays Lowenstein, *Are Congressional Term Limits Constitutional?* 18 HARV. J.L. & PUB. POL'Y 1, 42 n.167 (1994).
83. *Printz*, 117 S. Ct. at 2377.
84. *Id.* at 2376.
85. *Id.* at 2378.

principle did not authorize Congress to issue mandates to the States where the mandates intruded on State sovereignty.[86]

Looking first at the doctrine of federalism,[87] the Court found that "[a]lthough the States surrendered many of their powers to the new Federal Government, they retained a residuary and inviolable sovereignty."[88] Thus, the Federal Government had no authority over the States in those spheres of power in which the States remained sovereign. The text of the Constitution indicated both explicitly and implicitly that this was the intended design for the two levels of governments.[89] Numerous constitutional provisions describing a system of dual sovereignty contributed to persuading the Court that the Federal Government lacked the power to issue commands to the States.[90]

The Court recognized that the Framers encountered problems with a government that acted through the States under the Articles of Confederation. It reasoned that the Framers, therefore, explicitly chose to create a government that would not act upon the States, but upon the people directly.[91] The Court explained that "[t]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people."[92] The Framers devised the Constitution to solve the problems they had experienced under the Articles of Confederation. One of the prevalent problems under the Articles was the National Government "using the States as the instruments of federal governance."[93] The Court believed that the Framers did not intend to imbue into the new Constitution one of the very problems they were trying escape.[94]

Looking at both the text of the Constitution and the Framers' experiences which motivated them to create the Constitution, the Court concluded the States were intended to be independent of the Federal Government in those spheres of power which had not been delegated to the Federal Government: "As James Madison expressed it: '[T]he local or municipal authorities form distinct and independent

86. *See id.* at 2378-79.
87. The Court defined federalism as the division of power between the State and Federal Governments. *Id.* at 2378.
88. *Id.* at 2376 (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).
89. *Id.*
90. *Id.*
91. *Id.* at 2377.
92. *Id.* (quoting THE FEDERALIST NO. 15, at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).
93. *Id.*
94. *Id.*

portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'"[95] Because "[t]his separation of the two spheres is one of the Constitution's structural protections of liberty,"[96] the Court found that allowing such an incursion by the Federal Government into State sovereignty would upset the delicate balance of power between the two governments.[97]

The Court next considered the separation of powers principle, which describes the Constitution's separation of the Federal Government into three branches, each with separate and distinct powers. The Court was persuaded that the Constitution explicitly mandates that the President execute the laws passed by Congress.[98] Therefore, it reasoned that permitting Congress to instead give this responsibility to State executives is contrary to the Framers' intent because it effectively reduces the power of the President.[99] In particular, the Court stated "[t]he Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed,' personally and through the officers whom he appoints."[100] However, "[t]he Brady Act effectively transfers this responsibility to thousands of CLEOs in the [fifty] States, who are left to implement the program without meaningful Presidential control."[101] Allowing Congress the power to shift responsibility from the President to the States executives would subject the power of the President to reduction by Congress, at Congress' will. This obviates the very purpose of the separation of powers doctrine which offsets the powers of each branch of the Federal Government.[102]

The last argument the Court considered in its structural analysis was the Government's claim that the Necessary and Proper Clause[103] provides Congress the power to properly command the States to implement federal regulation.[104] The Government's argument was relatively simple: First, Congress has the power to regulate handguns

95. *Id.* (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).
96. *Id.* at 2378.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* (quoting U.S. CONST. art. II, § 3).
101. *Id.*
102. *Id.*
103. "The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.
104. *See Printz*, 117 S. Ct. at 2378-79.

under the Commerce Clause[105] which is an authority delegated to it by the States; second, the Necessary and Proper Clause gives Congress the power to "make all Laws, which shall be necessary and proper"[106] to execute laws made under its delegated authority; and third, the Tenth Amendment[107] does not limit this authority because it imposes no limitations on the exercise of delegated powers.[108] In summary, since Congress has the power to regulate handguns, it can pass any law it deems necessary to aid in the regulation of handguns, without regard to State sovereignty.

The Court recognized the intrusiveness of this notion on State sovereignty and rejected it,[109] explaining that when a law made under the Necessary and Proper power intrudes on the sovereignty of the States, it is invalid and is "'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'"[110] The Court looked to its earlier decision in *New York v. United States*[111] where it determined that, notwithstanding the power to enact laws under the Necessary and Proper Clause, that power is insufficient "to compel the States to require or prohibit those acts."[112] This indicated to the Court that even if Congress had the power to regulate an activity and does so itself, it lacked the power to force a state to do so. The Court recognized that the logical ending point of the Government's argument would virtually annihilate the sovereignty of the States. The Necessary and Proper Clause used in conjunction with an expansive reading of the Commerce Clause would be an unconstrained vehicle for the Federal Government to usurp State sovereignty.[113]

Thus, the structure of the Constitution provides significant evidence that Congress lacks the power to command States to perform the background checks required by the Brady Act. The Court reached three conclusions in this regard. First, the doctrine of federalism—the division of power between the States and Federal Government—indicates that this kind of mandate violates States' sovereignty. Second, the doctrine of separation of powers—the division of the

105. "The Congress shall have 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.

106. U.S. CONST. art. I, § 8, cl. 18 (*see supra* note 103 for full quotation).

107. "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.

108. *Printz*, 117 S. Ct. at 2379.

109. *Id.*

110. *Id.* (quoting THE FEDERALIST No. 33, at 204 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

111. 505 U.S. 144 (1992).

112. *Id.* at 166.

113. *Printz*, 117 S. Ct. at 2379.

power of the Federal Government into three branches—prevents Congress from diminishing the power of the President by delegating it to the States. Finally, the Necessary and Proper Clause does not allow Congress to impose this mandate on the States because an act—claimed to be necessary and proper—that intrudes on State sovereignty is invalid.

The structure of the Constitution provided the Court with solid evidence that the Federal Government lacked the power to issue commands to the States, as was done in the Brady Act. However, the Court believed that the most conclusive answer to this issue would come from its prior jurisprudence.[114]

(c) Prior Jurisprudence of the Court

The Court commented that its jurisprudence regarding this issue is of relatively recent vintage as "[f]ederal commandeering of state governments is such a novel phenomenon that th[e] Court's first experience with it did not occur until the late 1970's."[115] Though the cases were recent, the Court found they were sufficient to support its finding that the Federal Government lacked the power to issue commands to the States. The Court began by analyzing the cases which arose out of the Environmental Protection Agency's regulations in the 1970's, requiring States to enact procedures for reducing auto emissions.[116] In one of those cases, *Brown v. EPA*,[117] the District of Columbia Circuit Court invalidated the regulations as unconstitutional and the Supreme Court granted certiorari to review the validity of the regulations.[118] The Government, however, declined to defend the regulations before the Court, conceding they were invalid.[119]

Next, the Court considered *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.* and *FERC v. Mississippi*[120] in which it sustained the constitutionality of the challenged statutes only after it was convinced they "did not require the States to enforce federal law."[121] In both cases, the Federal Government had properly occupied the field of regulating surface mining, thus preempting any regulation by the States. However, the statute allowed States to regulate within that field as long as they did so in accordance with the Federal regulations. The Court allowed this command to the States because it

114. *Id.*
115. *Id.*
116. *Id.*
117. 431 U.S. 99 (1977).
118. *Id.* at 102.
119. *Printz*, 117 S. Ct. at 2379-80 (citing Brown v. EPA, 431 U.S. 99 (1977)).
120. 456 U.S. 742 (1982).
121. *Printz*, 117 S. Ct. at 2380.

was "a precondition to continued state regulation" within a field in which the state otherwise had no right to regulate.[122]

Prior to *Printz*, the most recent case examined by the Supreme Court regarding this issue was *New York v. United States*.[123] In *New York*, the Court found a federal law unconstitutional because it required States to participate in executing it. The statute "required States either to enact legislation providing for the disposal of radioactive waste generated within their borders, or to take title to, and possession of the waste."[124] The Court invalidated the statute because "[t]he Federal Government . . . may not compel the States to enact or administer a federal regulatory program."[125]

The Government attempted to distinguish *New York* by arguing that the statute at issue required the States to make policy, whereas the statute at issue in *Printz* only required States to enforce the law.[126] The Court did not believe that this distinction would make the law any less intrusive on State sovereignty, observing that "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."[127]

The Court's review of its prior jurisprudence conclusively demonstrated that Congress does not have the power to issue commands to the States to enforce federally enacted laws. The Government admitted it lacked such power in 1977. It had declined to defend a statute before the Supreme Court that had placed the same type of requirements on the States as did the Brady Act.[128] In the *Hodel* and *FERC* cases, the Court implicitly affirmed that the Federal Government does not possess such a power where it upheld the constitutionality of a statute only after it was convinced that the statute "did not require the States to enforce federal law."[129] In *New York v. United States*,[130] the Court explicitly confirmed what the earlier cases had implicitly established: "The Federal Government may not compel the States to enact or administer a federal regulatory program."[131]

The Court explained that even though the Brady Act may have been perceived to be a necessary policy at the time it was enacted,[132] it

122. *Id.* (citing FERC v. Mississippi, 456 U.S. 742, 761-62 (1982)).
123. 505 U.S. 144 (1992).
124. *Printz*, 117 S. Ct. at 2380.
125. *Id.* (quoting *New York*, 505 U.S. at 188).
126. *Id.*
127. *Id.* at 2381 (citing Texas v. White, 7 Wall. 700, 725 (1869)).
128. *Id.* at 2379-80 (citing Brown v. EPA, 431 U.S. 99 (1977)).
129. *Id.* at 2380.
130. 505 U.S. 144 (1992).
131. *Id.* at 188.
132. *Printz*, 117 S. Ct. at 2383.

must nevertheless be held unconstitutional because it offends "the very *principle* of separate state sovereignty" found in the Constitution.[133] Allowing the Federal Government to exercise the power to issue commands beyond its delegated powers to the States could lead to a concentration of power in the hands of the Federal Government. Though such a concentration of power may seem favorable for solving perceived problems, "the Constitution protects us from our own best intentions."[134] The Framers knew that such a concentration of power in either government could ultimately result in the loss of liberty because "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[135] The Court then held "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program . . . [because] such commands are fundamentally incompatible with our constitutional system of dual sovereignty."[136] Therefore, since "[t]he mandatory obligation imposed on CLEOs to perform the background checks on prospective handgun purchasers plainly runs afoul of that rule,"[137] the interim provision of the Brady Act was unconstitutional.[138]

2. Dissenting Opinion

The dissenting justices believed that Congress could issue mandates to State officers whenever it exercised its delegated powers.[139] They found this view to be supported by the "text of the Constitution, the early history of the Nation, decisions of th[e] Court . . . and the structure of the Federal Government."[140]

The dissent began by looking to the Necessary and Proper Clause for textual support for Congress' authority to require States to perform the mandatory background checks.[141] It found support for its belief in three steps: First, the Commerce Clause gave Congress the authority to regulate handguns. Second, the Necessary and Proper Clause gave Congress the authority to enact all laws needed to accomplish the regulation. Third, the Necessary and Proper Clause "[was] surely

133. *Id.*
134. *Id.* at 2383 (quoting *New York*, 505 U.S. at 187).
135. *Id.* at 2378 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).
136. *Id.* at 2384.
137. *Id.* at 2383.
138. *Id.* at 2384.
139. *Id.* at 2386 (Stevens, J., dissenting).
140. *Id.*
141. *Id.* at 2387.

adequate to support the temporary enlistment of local police officers."[142] Therefore, it concluded the regulation must be proper.

Like the Court, the dissent then looked to history in an effort to support its positions.[143] The first of its historical arguments was based upon the fact that the Constitution was designed to augment the power of the national government under the Articles of Confederation.[144] From this it reasoned that because the National Government already possessed authority to issue commands directly to the States under the Articles, and the intent of the Framers was "to enhance the power of the national government, not to provide some new, unmentioned immunity for [States],"[145] the national government retained the power over the States that it possessed under the Articles.[146] This assertion provided the basis for concluding that the new Constitution simply supplemented the power the National Government possessed under the Articles of Confederation by giving the new Federal Government the authority to issue commands to individuals while retaining the power to issue commands directly to the States.[147]

The dissent also saw the Court's historical examples as supportive of the Government's position. It was not moved by the shortage of instances in which Congress had exercised its alleged power over the States. According to the dissent, the fact that Congress has not often exercised a power does not support an inference that the power does not exist.[148] Furthermore, when it examined the early cases, it found the Court's distinction between state judiciaries and other branches to be "empty formalistic reasoning of the highest order."[149] Finally, in dismissing the Court's reasoning, the dissent neglected to address the conspicuous text of the Supremacy Clause which explicitly binds State judges but does not mention State legislators or executives.[150]

The dissent's historical analysis failed to offer any concrete evidence supporting the Government's claim. Nonetheless, where examples cited by the Government were ambiguous, the dissent reverted to its initial presumption that the Federal Government possesses the power to issue commands to the States.[151]

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142. *Id.*
143. *Id.* at 2389.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 2391.
149. *Id.* at 2392.
150. "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 . . . ." U.S. CONST. art. VI, cl. 2. (emphasis added).
151. *Printz*, 117 S. Ct. at 2393-94 (Stevens, J., dissenting).

The dissent's structural analysis also lacked significant evidence to support its position, apparently preferring to defer to Congress by granting it a "presumption of validity" for all congressional enactments.[152] First, it cited *Garcia v. San Antonio Metropolitan Transit Authority*[153] to support its position that the judgment of Congress should be given deference regarding matters of federalism.[154] The dissent then resorted to policy arguments for why it would be more beneficial to the States to have the Federal Government regulate in this area.[155] Following its structural analysis, the dissent made a final attempt to justify its position by looking to the prior jurisprudence of the Court.[156]

The primary objective of the dissent's examination was to undermine the Court's reliance on *New York v. United States*.[157] The dissent attempted to distinguish *New York* by stressing that it concerned commands issued to a State legislature while *Printz* addressed commands issued to a State executive.[158] This formal distinction was ostensibly important to the dissent; however, it seemed inconsistent with its earlier criticism of the "empty formalistic reasoning"[159] of the Court's historical analysis. The dissent, unlike the Drafters of the Constitution, did not see the merit in distinguishing between state courts, legislatures or executives.[160] Here, however, the dissent found it very important to demonstrate that the *New York* Court, which held "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program"[161] really intended that to be limited to State *legislatures*, not State *executives*.[162]

The dissent's examination of the text, history and structure of the Constitution as well as the prior jurisprudence of the Court, did not dissuade it from its belief that the Federal Government may compel States and State officers to perform certain duties. It maintained this position even though supporting evidence was inconclusive.

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152. *Id.* at 2395.
153. 469 U.S. 528 (1985).
154. *Printz*, 117 S. Ct. at 2394 (Stevens, J., dissenting).
155. *Id.* at 2396.
156. *Id.* at 2397.
157. 505 U.S. 144 (1992).
158. *Printz*, 117 S. Ct. at 2398 (Stevens, J., dissenting).
159. "The majority's insistence that this evidence of federal enlistment of state officials to serve *executive* functions is irrelevant simply because the assistance of '*judges*' was at issue rests on empty formalistic reasoning of the highest order." *Printz*, 117 S. Ct. at 2392 (Stevens, J., dissenting) (emphasis added).
160. "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 . . . ." U.S. CONST. art. VI, cl. 2. (emphasis added).
161. New York v. United States, 505 U.S. 144, 188 (1992).
162. *Printz*, 117 S. Ct. at 2398 (Stevens, J., dissenting).

II. FEDERALISM: THEORY AND ANALYSIS

A. Theory of Federalism

"Federalism, generally, is that form of government 'in which a union of states recognizes the sovereignty of a central authority while retaining certain residual powers of government.'"[163] Federalism was a unique discovery by the Framers of the Constitution. According to Justice Anthony Kennedy, "[t]hey split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal."[164]

The term federalism, as originally understood by the Framers, had a different meaning than it does today. They understood federalism to mean a system of government organized as a confederation of states,[165] with a weak central government and sovereign states.[166] The Framers were also aware of a form of government known as a "consolidation of states," in which there was a central government that was sovereign over the constituent states.[167] The system of government they created with the Constitution was neither of these, but a hybrid that incorporated principles from each.[168]

Under the Constitution, specific powers were delegated to the newly formed National government,[169] which was sovereign within a limited sphere.[170] The national government was given the power it would have possessed under a consolidated government, but limited to only the delegated sphere.[171] Therefore, the States retained their sovereignty in all spheres not *exclusively* delegated to the national government, thus retaining the powers possessed in a confederation, but only within those spheres not delegated to the national government.[172] Publius[173] referred to this new government in *The*

163. William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in The Cellophane Sea*, 1987 DUKE L.J. 769, 770 (1987) (quoting AMERICAN HERITAGE DICTIONARY 494 (2d College ed. 1982)).

164. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1872 (1995) (Kennedy, J., concurring).

165. GEORGE W. CAREY, THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC 97 (1989).

166. *Id.*

167. *Id.*

168. THE FEDERALIST NO. 39, at 240 (James Madison) (C. Rossiter ed., 1961).

169. Today this level of government is called the Federal Government.

170. THE FEDERALIST NO. 32, at 198 (Alexander Hamilton) (C. Rossiter ed., 1961).

171. THE FEDERALIST NO. 51, at 323 (James Madison) (C. Rossiter ed., 1961).

172. THE FEDERALIST NO. 39, at 245 (James Madison) (C. Rossiter ed., 1961).

173. "Publius" is the pseudonym used by Alexander Hamilton, James Madison and John Jay in writing *The Federalist Papers*. GARY WILLS, THE FEDERALIST PAPERS BY ALEXANDER HAMILTON, JAMES MADISON AND JOHN JAY ix (1982).

Federalist Papers as being a "compound republic."[174] Today, this principle of division of powers between the States and the Federal Government is commonly known as federalism.[175]

B. Purpose And Origination of Division of Powers

Federalism divided the powers surrendered by the people into two governments[176] so that "[t]he different governments [would] control each other."[177] In this division, federalism is much like the doctrine of separation of powers,[178] because it "reflects the fear that too much unrestricted power corrupts."[179] The objective of both doctrines is to prevent power from becoming "concentrated in the hands of any single class or group."[180] This division of power provides protection against a fundamental defect in all governments—they are composed of sinful men.[181]

The origins of the division of powers theory is deeply rooted in the Christian faith. An important tenet of Christianity is the belief that man is sinful, having an inherent tendency to do evil.[182] The understanding of man's sinfulness was the impetus that caused two

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174. THE FEDERALIST NO. 51, at 323 (James Madison) (C. Rossiter ed., 1961).

175. Martin Diamond, *The Federalist on Federalism: "Neither a National Nor a Federal Constitution, But a Composition of Both,"* 86 YALE L.J. 1273 (1977). The use of the term federalism in this comment is intended to carry its modern understanding.

176. Federalism has many useful functions other than diffusing the power of government. However, for the purpose of this comment, the main emphasis will be on the principle of division of power.

177. THE FEDERALIST NO. 51, at 323 (James Madison) (C. Rossiter ed., 1961).

178. *Black's Law Dictionary* defines separation of powers as follows:

> The governments of states and the United States are divided into three departments or branches: the legislative, which is empowered to make laws, the executive, which is required to carry out the laws, and the judicial, which is charged with interpreting the laws and adjudicating disputes under the laws. Under this constitutional doctrine of "separation of powers," one branch is not permitted to encroach on the domain or exercise the powers of the other branch.

BLACK'S LAW DICTIONARY 1365 (6th ed. 1990).

179. The Honorable William T. Coleman, Jr., *Federalism, The Great Vague Clauses and Judicial Supremacy: Their Constitutional Role in the Liberty of a Free People*, 49 U. PITT. L. REV. 699, 704 (1988).

180. Malcolm P. Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. R. 385 (1934).

181. *See* Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 994 (1996) (Professor Dreisbach explains that scholars have observed "features in the Constitution designed to tame the self-interests and ambitions of fallen men").

182. The term "original sin" is describes how man's spirit was damaged when he turned away from God by breaking God's command not to eat the fruit of the tree of knowledge in the Garden of Eden. Because of this damaged spirit, man has "a tendency to do evil." PAT ROBERTSON, ANSWERS TO 200 OF LIFE'S MOST PROBING QUESTIONS 57 (1984).

Christian philosophers, John Locke and Baron Charles Montesquieu, to develop a theory of government that would control that defect in man's nature.

John Locke, an English philosopher, had a profound influence on the Framers of the Constitution.[183] Locke's Christian beliefs regarding the sinful nature of man provided a significant foundation for his understanding of man's nature in general.[184] Locke described the pervasiveness of this defect: "he that thinks absolute power purifies men's blood, and corrects the baseness of human nature, need read but the history of this, or any other age, to be convinced of the contrary."[185] He knew that a government composed of sinful men would require some internal constraints to restrain those in power from imposing tyranny on their subjects. According to Friedrich Hayek, Locke's "main practical safeguard against the abuse of authority" is division of governmental powers.[186]

Baron Charles Montesquieu was a French legal philosopher whose influence on the Framers was so great that "he was the most frequently quoted source [by the Framers], next to the Bible."[187] As with Locke, Montesquieu's Christian beliefs provided him with insight toward understanding man's defective nature.[188] "Montesquieu believed all law has its source in God"[189] and that Christian principles would improve governments.[190] Montesquieu "advocated

183. WILLIAM J. FEDERER, AMERICA'S GOD AND COUNTRY: ENCYCLOPEDIA OF QUOTATIONS 396-97 (1994) (citing Donald S. Lutz & Charles S. Hyneman, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, AMERICAN POLITICAL SCIENCE REVIEW 189-97 (1984).

184. *See* JOHN LOCKE, REASONABLENESS OF CHRISTIANITY AND A DISCOURSE OF MIRACLES (1958). *See also* CHRISTOPHER HILL, THE ENGLISH BIBLE AND THE SEVENTEENTH-CENTURY REVOLUTION 177 (1993) (Many of Locke's ideas have been traced to the Bible); JOSEPH LOSCO & LEONARD WILLIAMS, POLITICAL THEORY: CLASSIC WRITINGS, CONTEMPORARY VIEWS 275 (1992) (Locke's works contained extensive references to God and numerous citations to the Bible indicating that he was well versed in the Bible).

185. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 5 §92 (1823).

186. FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 171 (1960) (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT, Second Treatise, chap. xiii).

187. WILLIAM J. FEDERER, AMERICA'S GOD AND COUNTRY: ENCYCLOPEDIA OF QUOTATIONS 453 (1994) (citing Donald S. Lutz & Charles S. Hyneman, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, AMERICAN POLITICAL SCIENCE REVIEW 189-97 (1984).

188. *Id.* (citing DAVID BARTON, THE MYTH OF SEPARATION 196 (1992)). The Bible explains this defect in man's nature in *Jeremiah*: "The heart *is* deceitful above all *things*, and desperately wicked; Who can know it?" *Jeremiah* 17:9 (New King James) (emphasis in original).

189. JOHN EIDSMOE, CHRISTIANITY AND THE CONSTITUTION: THE FAITH OF OUR FOUNDING FATHERS 54 (1987).

190. DAVID BARTON, THE MYTH OF SEPARATION 196 (1992). *See* VERNA M. HALL, CHRISTIAN HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 138 (Joseph Allen Montgomery ed., The American Christian Constitution Press 1960) (quoting 5 GEORGE BANCROFT, GEORGE BANCROFT'S HISTORY OF THE UNITED STATES 24 (1859)).

separation of powers by which power checks power"[191] as a control for governments which are infused with man's defective nature.

The theory of dividing governmental powers is a biblically based concept,[192] with its roots found in the book of *Isaiah*. There, the Bible identifies "three branches of government"[193] which are identical to the branches the Framers created in the Constitution. Montesquieu's writings are generally regarded as expounding a more extensive doctrine of separation of powers from that of Locke.[194] Montesquieu feared the vesting of too much power in any department because of the possibility that unrestrained power would lead to tyranny. He explained, "[w]hen legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically."[195] The lesson of Montesquieu's teachings is very clear: where the governmental powers are not divided, liberty cannot exist.

Though Locke and Montesquieu did not devise the theory of federalism, they created its foundation. Through their writings, they developed the idea of dividing governmental powers to allow the different branches of government to control each other. The lesson of their teachings is clear: where the governmental powers are not divided, liberty cannot remain. The Framers were gifted students who learned the lesson very well and embodied it in the theory of federalism.

C. Framers' Understanding of Division of Powers

The Framers of the Constitution relied on Locke and Montesquieu for their understanding of human nature.[196] They "realized that rulers, not to mention all the rest of us, have sinful natures, and if given too much power, will use it to advance themselves at the expense of their subjects."[197] Moreover, the Framers

191. EIDSMOE, *supra* note 189, at 56.

192. DAVID BARTON, THE MYTH OF SEPARATION 196 (1992).

193. *Id. See* WILLIAM J. FEDERER, AMERICA'S GOD AND COUNTRY: ENCYCLOPEDIA OF QUOTATIONS 453 (1994). The Bible establishes the theory of having different branches in government in *Isaiah*: "For the LORD *is* our Judge, The LORD *is* our Lawgiver, The LORD *is* our King." *Isaiah* 33:22 (New King James).

194. *See* Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52, 58 n.34 (1985).

195. BARON DE, CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF THE LAWS Part 2, chpt. 6 (1748).

196. "[M]en are ambitious, vindictive and rapacious . . . ." THE FEDERALIST NO. 6, at 54 (Alexander Hamilton) (C. Rossiter ed., 1961).

197. Senator Dan Coats, *From Liberty to Dependence: Public Policy and the American Family*, 69 NOTRE DAME L. REV. 1027, 1032 (1994).

also realized that men will act worse collectively than each will individually,[198] meaning that a government of men will have a strong inclination to do evil.

The Framers also understood that simply writing limits on the power of rulers into the document would be of little use.[199] The Framers knew it was insufficient to rely on philosophical principles alone to restrain sovereigns. They believed, rather, that "[s]overeignty had to be split and checked and degraded to the point where it was obviously a servant of the people's God-given rights. The constitutional system put together by the Founding Fathers was devised to keep this governmental servant in its place."[200]

The belief that man "is a fallen, sinful, and depraved creature" was an impetus for our constitutional safeguards.[201] The Framers' "conception of human nature stated, reiterated, and depended upon in The Federalist is pessimistic or, in the most usual sense of the word, realistic."[202] They had learned from both education and experience that

> Men are not to be trusted with power, because they are selfish, passionate, full of whims, caprices, and prejudices. Men are not fully rational, calm, or dispassionate. Moreover, the nature of man is constant; it has had these characteristics throughout recorded history. To assume that it will alter for the better would be a betrayal of generations unborn.[203]

Because the Framers were "convinced of man's fallen nature (and the concept of original sin) . . . [they] devised a system of civil government committed to the diffusion and separation of powers, checks and balances, and limited, enumerated, and strictly delegated powers only."[204] James Madison was very clear on the need for a government of divided powers: "The accumulation of all powers

198. THE FEDERALIST NO. 15, at 110 (Alexander Hamilton) (C. Rossiter ed., 1961).

199. THE FEDERALIST NO. 48, at 308 (James Madison) (C. Rossiter ed., 1961).

200. Clarence Manion, *The Founding Fathers and the Natural Law: A Study of the Source of Our Legal Institutions*, 35 A.B.A. J. 461, 464 (1949).

201. John Witte, Jr., *How to Govern a City on a Hill: The Early Puritan Contribution To American Constitutionalism*, 39 EMORY L.J. 41, 58 (1990). *See generally* Roscoe Pound, *Puritanism and the Common Law*, 45 AM. L. REV. 811, 826 (1916) (observing that the Puritan belief in the sinfulness of human nature has impacted our laws).

202. Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 596 (1986) (quoting Benjamin Fletcher Wright, *Introduction to The Federalist* 1, 27 (John Harvard Library ed. 1961)).

203. *Id.*

204. Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 994 (1996).

legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[205] The Framers knew there needed to be a division of power within the government to provide a check on the authority of the rulers.[206]

The doctrine of federalism is one of the primary vehicles the Framers used in the Constitution to divide governmental powers. The actual word "federalism" is not used in the Constitution, nevertheless, the doctrine of federalism is woven throughout its fabric. Federalism is implicit in Article I, § 8,[207] which specifically enumerates the limited powers of Congress. Moreover, it is most explicitly found in the text of the Tenth Amendment,[208] which provides that the States retain all powers not delegated to the Federal Government.

The doctrine of federalism was so evident to early constitutional scholars that Justice Joseph Story wrote that the Tenth Amendment was "a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the Constitution."[209] Story explained that, because the Constitution is "an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the [States]."[210] Justice Story clearly understood that the principle of federalism was such an integral part of the Constitution that its existence did not even need to be stated. Unfortunately, that which was once so obvious to Justice Story is no longer as clearly understood.

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205. THE FEDERALIST NO. 47, at 301 (James Madison) (C. Rossiter ed., 1961).

206. The Framers' understanding of this issue was best summarized by Madison in Federalist 51:

> It may be a reflection on human nature, that such devices [division of power] should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

THE FEDERALIST NO. 51, at 322 (James Madison) (C. Rossiter ed., 1961).

207. U.S. CONST. art. I, § 8.

208. "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.

209. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, Book III. chap. xliv § 1009 (1833).

210. *Id.*

D. Supreme Court's Understanding of Federalism

The conclusions of both the majority and dissenting opinions in *Printz v. United States* can be traced back to the Justices' basic understanding of federalism. Their perspectives on federalism are clearly manifested when either side reaches an impasse where the evidence is inconclusive. At this juncture, each Justice recedes to his own basic beliefs, finding that the evidence fails to disprove that which he already believes. Consequently, the *Printz* decision provides tremendous insight into the Justices' beliefs regarding the role of federalism in the Constitution and their commitment to adhering faithfully to it.

The Court approached the case with the belief that States entered the Republic as independent sovereigns, delegating *only* a portion of that sovereignty to the Federal Government and retaining all that was not delegated.[211] With this sovereignty, came the independence to resist commands by the Federal Government. Though the Court's view was strongly supported by the historical record, constitutional structure and prior jurisprudence, the evidence was not conclusive. Consequently, the Court's decision manifested its views on State Sovereignty by revealing a foundational belief that the Federal Government is not omnipotent and therefore, the Government had the burden of proving the existence of non-delegated powers.

The dissent's contrary belief can be synthesized into one statement: The States did not enter the Republic as independent sovereigns; rather, they brought with them the duty owed under the Articles of Confederation, to act as agents of the National Government, thus, obliging them to accept commands from the Federal Government. Though this is not explicitly stated by the dissent, it may be inferred from its arguments. The dissent found that the Federal Government has the power to command the States to implement federal laws. There was significantly less evidence supporting the dissent's view than there was supporting the Court's view. Nonetheless, the dissent adhered rigidly to its position because it found nothing in the text, history or structure of the Constitution, or in the jurisprudence of the Court to dissuade it from its basic belief.

One such manifestation of the dissent's view of federalism can be seen in Justice Stevens' analysis of the Necessary and Proper Clause. The dissent reached its conclusion based upon the assumption that the Necessary and Proper Clause gives Congress the authority to issue commands to State officials. It concluded that the Necessary and

211. Specifically, they argued "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz*, 117 S. Ct. at 2381 (citing Texas v. White, 7 Wall. 700, 725 (1869)).

Proper Clause "is surely adequate to support the temporary enlistment of local police officers" because it found no evidence to the contrary.[212] This was the ultimate issue upon which the *Printz* case would be resolved; yet, the dissent simply accepted it without any supporting evidence. The dissent also observed that the Tenth Amendment does not limit Congress' use of its delegated powers,[213] but this proves nothing. The dissent assumed that the Necessary and Proper Clause gives Congress the authority to issue commands to State officials. It failed to offer any reasonable support for this assumption because it springs from the underlying belief that the States retained no sovereignty independent of the Federal Government.

This belief was again manifested in the dissent's historical analysis, where it examined the transition from the Articles of Confederation to the ratification of the Constitution. From this, it concluded that the National Government's power under the Articles of Confederation, to issue commands to the States, was inherited by the Federal Government. It reasoned that since the purpose of the Constitution was to increase the power of the National Government, the new Federal Government must have retained the power possessed by the National Government under the Articles. Furthermore, it concluded this residual power was augmented with additional power under the Constitution. Though this conclusion may rest on sound logic, it is historically inaccurate.

The Constitution did not simply augment the Articles of Confederation with additional power for the National Government; rather, it significantly altered the existing "relationship between the States and the National Government."[214] Moreover, the Federal Government's power under the Constitution was not derived from the Articles of Confederation.[215] James Madison, the Father of the Constitution,[216] wrote, "[i]n the compound republic of America, the power surrendered by the people, is *first divided between two distinct governments* . . . ."[217] This indicates that with the ratification of the new Constitution, the Articles of Confederation were effectively rescinded. Accordingly, the powers the people had surrendered under

212. *Printz*, 117 S. Ct. at 2387 (Stevens, J., dissenting).
213. *Id.*
214. GEORGE W. CAREY, THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC 96 (1989).
215. William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in The Cellophane Sea*, 1987 DUKE L.J. 769, 772 (1987).
216. Chief Justice William H. Rehnquist, *The Impeachment Clause: A Wild Card In The Constitution*, 85 NW. U.L. REV. 903, 918 (1991).
217. THE FEDERALIST NO. 51, 323 (James Madison) (C. Rossiter ed., 1961) (emphasis added).

the Articles were theoretically returned to the people and then allocated between the States and Federal government.

The States retained sovereignty within all spheres of control not delegated to the Federal Government.[218] According to Alexander Hamilton, the most nationalist of all the Framers, under the Constitution "the State Governments would clearly retain all rights of sovereignty which they before had and which were not . . . *exclusively* delegated to the United States" by the Constitution.[219] Madison reinforced this by explaining that the power of the Federal Government "extends to certain enumerated objects *only*, and leaves to the several States a residuary and inviolable sovereignty over all other objects."[220]

The Constitution does not explicitly or even implicitly give the Federal Government the power being asserted over the States. Therefore, the dissent's conclusion that such a power exists must rest on its presumption that the States did not retain any sovereignty independent of the Federal Government. Based upon these beliefs, the dissent discovered support for its view that the Brady Act is constitutional. It found that the Federal Government has the power to issue commands to the States.

Neither party in the *Printz* case was able to provide the Court with evidence that could conclusively resolve the issue in dispute. Sheriff Printz's historical evidence and the evidence of the structure of the Constitution provided a sound basis for the Court's holding. However, it is still probable that the decision was as much influenced by the Justices' personal views as it was by the evidence. Conversely, there was very little evidence to support the holding of the dissent. Yet, the dissent still managed to justify its holding, though it is probable that the dissenting Justices' personal beliefs played a larger role in their decision.

Does the absence of conclusive evidence supporting a particular position justify deciding a case based on a Justices' own personal beliefs? No. It is not necessary for the Justices to so quickly resort to using their personal views to decide the cases before them.

Each fall, students across the nation commence the study of law. One of the most important things students are taught about studying law is to learn the rationale for the legal rules—the reason for the existence of the rule. This is more important than learning the actual rules because using legal rules without understanding their purpose

218. RAOUL BERGER, FEDERALISM: THE FOUNDER'S DESIGN 53 (1987).

219. THE FEDERALIST NO. 32, 198 (Alexander Hamilton) (C. Rossiter ed., 1961) (emphasis in original).

220. THE FEDERALIST NO. 39, 245 (James Madison) (C. Rossiter ed., 1961) (emphasis added).

often leads to absurd results. This occurs because, many legal issues fall into gray areas between existing rules, rendering them unresolvable by the rules alone. However, understanding the rationale behind the rules permits students to bring to bear basic principles from which they may utilize their reasoning skills to resolve the issue more accurately.

The issue before the Court in the *Printz* case was much like the issues that plague many first year law students: it was within the gray area of the evidence where there was no obvious answer. However, as is true with other legal issues in the gray area of the law, this issue was one that could have been resolved by simply looking at the rationale for the doctrine of federalism.

In *Printz*, the applicable rule was the doctrine of federalism and the issue was whether it prohibited the Federal Government from issuing mandates to the States. The basic purpose for the doctrine of federalism is to divide the governing powers between the States and the Federal Government so that each will offset the other in a way that will keep both governments within their proper spheres of authority. This was clearly the intent of the Framers of the Constitution and is a principle woven throughout the fabric of the Constitution.

In addition to the fact that the Court's holding was supported by stronger evidence, it comports better than the dissent's view with the rationale for the doctrine of federalism. The Court's view is founded upon the premise that the States are sovereign within their sphere of authority. This sovereignty allows the States to operate independently of the Federal Government within that sphere. It is this independence that allows the States to offset the power of the Federal Government, thus fulfilling the purpose of the doctrine of federalism.

The dissent failed to acknowledge the very purpose of federalism. The dissent's view was based on the premise that the States retained their obligations from the Articles of Confederation when they ratified the Constitution and, consequently, lack individual sovereignty. Even if the *Printz* Court had seen no evidence demonstrating the inaccuracy of this view, it could still be discerned by examining the effect of this view on federalism, one of the most basic and sacred principles in our government.

According to the dissent, the States retained no true sovereignty and continue to be obliged to accept mandates from the Federal Government. This leaves the States virtually powerless in relation to the power of the Federal Government. Assuming the States are powerless vis-à-vis the Federal Government, it is illogical to believe they could serve the purpose the Framers intended for them to serve. Can an impotent government offset and restrain omnipotent government? It is nearly impossible to conceive of how such an inept

government could fulfill such a charge. To believe the Framers intended for the States to be submissive and weak in relation to the Federal government would relegate the doctrine of federalism to nothing more than a rule without a reason — an absurdity.

The dissent attempted to justify this problem by arguing that Congress itself would ensure that it stayed within its proper delegated sphere of authority. Unfortunately, the dissent's optimistic faith in the virtue of Congress does not comport with reason or experience. In fact, the Framers designed the Constitution to prevent this kind of unrestricted power from accumulating in one area of government.

Because of the disastrous effect the dissent's view would have on the basic doctrine of federalism, it is virtually inconceivable that it could have reached its conclusion, had it faithfully adhered to the rationale for federalism.

III. CONCLUSION

The drafting of the Constitution "was an act of organization and of government with which . . . no other in the history of mankind is comparable."[221] The doctrine of federalism contributed to the greatness of the Constitution[222] by providing a structure to allow each of the governments to offset the power of the other. This limitation on government is an essential protection against the abuse of power.[223] The dissent did not accept this. Its suggestion, that in times of crisis the Court should give deference to Congressional decisions with respect to federalism,[224] is contrary to the very purpose of the doctrine. Allowing Congress to exercise discretion over whether it will respect a limitation on itself makes about as much sense as the Queen of Hearts calling for the execution of the Knave before the jury returned its verdict—it is an exercise in futility.[225] Justice O'Connor explained the concern for such improvident justifications in *New York v. United States,*[226] which the Court re-emphasized in *Printz*:

> Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that

221. Thomas M. Cooley, *Comparative Merits of Written and Prescriptive Constitutions*, 2 HARV. L.R. 341 (1889).

222. Martin Diamond, *The Federalist on Federalism: "Neither a National Nor a Federal Constitution, But a Composition of Both,"* 86 YALE L. J. 1273 (1977).

223. THE FEDERALIST No. 47, at 300 (James Madison) (Clinton Rossiter ed., 1961).

224. *Printz*, 117 S. Ct. at 2387 (Stevens, J., dissenting).

225. LEWIS CARROL, THE COMPLETE ILLUSTRATED WORKS OF LEWIS CARROL 78 (1982).

226. 505 U.S. 144 (1992).

> form. The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.[227]

Protecting the security of its citizens is a duty of all governments. When the threat of crime inhibits people from exercising their liberties, the government should use whatever means it legitimately has available to repress the threat to its citizens. However, governments also threaten citizens' liberties. When the Framers drafted the Constitution, they recognized this and struck a fine balance that created two governments capable of protecting citizens against threats to their liberties from both individuals and governments.

For over two centuries, the constitutional government in America has fostered an atmosphere of liberty because the governmental structure controls both, individuals and itself.[228] Maintaining these controls is essential to the continued existence of liberty. The theory of federalism is designed to control the Federal Government. However, this is possible only as long as the States retain the independent sovereignty the Framers endowed them with. This fails when they are made subservient to the Federal Government by allowing the Federal Government to issue commands to them at will.

Congress' passage of the Brady Act was perceived as necessary to increase the citizens' protection against threats to their liberties from individuals. However, by disregarding the principle of federalism, it increased the threat to the citizens' liberties by government. No longer would the State and Federal Governments offset each other; now one would grow stronger at the expense of the other. This was exactly what the Framers feared and federalism was intended to protect against this fear.

Had the dissent prevailed, the doctrine of federalism would have been pushed further down the path of irrelevance. Along with it, would have gone one of the most crucial safeguards of liberty.

227. Printz v. United States, 117 S. Ct. 2365, 2383 (1997) (quoting New York v. United States, 505 U.S. 144, 187 (1992)).

228. *See* THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

"Eternal vigilance is the price of liberty."[229] The battle over federalism will wage on. The outcome may determine the continued existence of liberty in America. Fortunately, for now, the Court recognized the vital role of federalism and vigilantly defended this safeguard of liberty.

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229. JOHN BARTLETT, FAMILIAR QUOTATIONS 479 n.2 (Emily M. Beck ed., 14th ed. 1968) (Attributed to Thomas Jefferson).