STRONG-ARMING THE STATES TO CONDUCT BACKGROUND CHECKS FOR HANDGUN PURCHASERS: AN ANALYSIS OF STATE AUTONOMY, POLITICAL ACCOUNTABILITY, AND THE BRADY HANDGUN VIOLENCE PREVENTION ACT

From 1987, when the Brady Bill was first introduced,[1] until November 1993, when President Bill Clinton signed the Brady Handgun Violence Prevention Act[2] ("Brady Act"), people used handguns to kill more than 150,000 Americans.[3] Supporters of the Brady Act heralded it as the "commencement of a heartfelt crusade for a safer and saner country," and "the end of unchecked madness."[4] Commentators referred

1. Former Representative Edward Feighan of Ohio introduced the first version of the Brady Handgun Violence Prevention Act on February 4, 1987. 133 Cong. Rec. 2737 (1987).

2. Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. §§ 921-925A (Supp. V 1994); 42 U.S.C. § 3759 (Supp. V 1993)).

3. This number exceeds the number of Americans killed during World War I, the Korean War, and the Vietnam War combined. 139 CONG. REC. H10716 daily ed. Nov. 22, 1993 (statement of Rep. Derrick).

4. Ann Devroy, *Brady Bill Is Signed Into Law — Gun Control Backers Hail Reagan, Clinton*, WASH. POST, Dec. 1, 1993, at A8 (quoting James S. Brady, former White House press secretary, for whom the legislation is named); *see also infra* note 14 and accompanying text (describing the events which ultimately precipitated the Brady Act).

to the Brady Act as the "most far-reaching nationwide gun control measure enacted in at least a decade."[5] The Brady Act mandates a five-day waiting period for all handgun[6] purchases from federally-licensed sellers, during which time a local law enforcement officer must make a reasonable effort to check the purchaser's personal history.[7]

Within five months after the Brady Act took effect,[8] however, five United States district courts heard arguments by sheriffs that the background check provision[9] violated the Tenth Amendment of the United States Constitution.[10] Four of these five courts held that the

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5. Pierre Thomas, *Checks on Gun Buyers Foil Some Criminals: Laws Like Brady Bill Found to Be Effective*, WASH. POST, Nov. 30, 1993, at A1.

6. The Brady Act defines handgun as "a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and . . . any combination of parts from which [such a] firearm . . . can be assembled." 18 U.S.C. § 921(a)(29) (Supp. V 1993).

7. 18 U.S.C. § 922(s) (Supp. V 1933). A discussion of the Brady Act's provisions appears in part I, *infra*. Some states that oppose a waiting period, such as Georgia, are considering legislation to provide for instant background check systems. *Gun Control A Local Right*, ATLANTA J. CONST., Feb. 15, 1995, at A8 [hereinafter *Gun Control*]. The Georgia legislation provides that in the event the Brady Act is "ever overturned in court or repealed by Congress," the instant background check legislation will become void immediately. *Id.*

The Brady Act does not affect states with laws that have the same or more stringent requirements than the Brady Act. *See* H.R. REP. 103-344, 103rd Cong., 1st Sess. 12 (1993) [hereinafter H.R. REP. 344]. This exemption applies to 23 states that have a waiting period system, an instant check system, or a permit to purchase system. *Id.* Pierre Thomas, *Brady Gun Law Contains No Penalties, Little Money for States*, WASH. POST, Dec. 3, 1993, at A3. According to Congress, "The following states currently require either a background check or a permit to purchase a handgun: California, Connecticut, Delaware, Florida, Hawaii, Iowa, Illinois, Indiana, Massachusetts, Maryland, Michigan, Minnesota, Missouri, Nebraska, North Carolina, New Jersey, New York, Oregon, Rhode Island, Tennessee, Virginia, Wisconsin." H.R. REP. 344, *supra*, at 9 n.16 (citation omitted). Utah also requires a background check of handgun purchasers. UTAH CODE ANN. § 76-10-526 (1995).

8. The Brady Act took effect ninety days after President Clinton signed the bill into law. 18 U.S.C. § 922(s)(1) (Supp. V 1993).

9. 18 U.S.C. § 922(s)(2) (Supp. V 1993).

10. *See infra* parts II, III & IV (discussing the case law concerning the constitutionality of the background check provision).

The Tenth Amendment provides: "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.

provision did in fact violate the Tenth Amendment.[11] After holding the provision unconstitutional, these four courts held the background check provision severable from the Brady Act's other provisions.[12]

This Recent Development examines the constitutionality of the background check provision under recent United States Supreme Court precedent on the Tenth Amendment and the proper separation of power between Congress and the States. Part I discusses the purpose and relevant provisions of the Brady Act. Part II defines the principle of

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11. For a discussion of those decisions, see *infra* part II. In addition to the four decisions holding the background check provision unconstitutional that are discussed in this Recent Development, a United States district court in Louisiana also recently found the same provision unconstitutional. Romero v. United States, No. Civ. A 94-0419, 1994 WL 794098 (W.D. La. Dec. 8, 1994). Sheriffs in North Carolina and New Mexico have also challenged the provision. A lawsuit had been filed in Wyoming, but the Wyoming district court dismissed the case because the plaintiff-sheriff lost a reelection bid. *U.S. Judge Strikes Down Gun Checks*, THE NEW ORLEANS TIMES-PICAYUNE, Dec. 13, 1994, at B1 [hereinafter *Judge Strikes Down Gun Checks*]; *see* Tom Diemer, *Brady Law Stands Despite Lawsuits*, PORTLAND OREGONIAN, Feb. 12, 1995, at A26.

In addition, the Maine State Legislature adopted a joint resolution that recommended the Attorney General of the State of Maine "initiate a lawsuit soon as possible [sic] that specifically challenges the continuing practice of enacting unfunded federal mandates . . . . " 140 CONG. REC. S5937 (daily ed. May 18, 1994). The Maine State Legislature identified the Brady Act as an "unfunded federal mandate that is leading the State of Maine and its municipalities to incur new expenses related to conducting criminal background checks . . . ." *Id.*

12. The courts declared the background check provision severable from the Brady Act for a variety of reasons: they found the unconstitutional provision "functionally independent" from the rest of the Act; the unconstitutional provision did not affect the reach of the Act; the courts did not have to rewrite the Act to allow the remaining provisions to function; and Congress would have enacted the Act without the unconstitutional provision because the Gun Control Act, which the Brady Act amends, contains a severability clause. *E.g.*, Printz v. United States, 854 F. Supp. 1503, 1518-19 (D. Mont. 1994). Also, the unconstitutional background check requirement only provides a "stop gap" measure until the national background check system becomes operational. McGee v. United States, 863 F. Supp. 321, 327 (S.D. Miss. 1994). Severing the background check provision has the effect of making the provision optional for CLEOs. *E.g.*, Frank v. United States, 860 F. Supp. 1030, 1044 (D. Vt. 1994). The rest of the Brady Act's provisions remain in effect. *Id.*

Unlike the Montana, Arizona, and Vermont courts, which held the severable provision did not apply to any law enforcement officer in the state, the Mississippi court held the provision severable only for the particular CLEO challenging the provision. *McGee*, 863 F. Supp. at 328. The court ruled that the decision only applied to Sheriff McGee because he had "standing to bring this lawsuit only insofar as it affect[ed] him in his official capacity." *Id.* He lacked standing to bring the suit on the behalf of other Mississippi law enforcement officials. *Id.* The court named the Attorney General as the "appropriate official to bring action of statewide import." *Id.*

political accountability under the Tenth Amendment and its relationship to federalism, relying on Justice O'Connor's opinion in *New York v. United States*.[13] Part III reviews decisions that hold the background check provision unconstitutional and analyzes those courts' application of the principle of political accountability. Part IV critiques the reasoning of the only district court that has held the background check provision constitutional. Part V concludes that the background check requirement of the Brady Act violates the Tenth Amendment of the Constitution, and offends the proper intergovernmental division of power in our federal system, because it blurs the political accountability of federal and state elected officials and consequently threatens the interests of the people.

I. THE BRADY HANDGUN VIOLENCE PREVENTION ACT

The 1981 assassination attempt on President Ronald Reagan seriously wounded White House Press Secretary James S. Brady and inspired the Brady Act.[14] The Brady Act is designed to prevent persons not legally permitted to purchase handguns from obtaining these weapons from federally-licensed gun dealers, importers, or manufacturers.[15] To accomplish this goal the Brady Act requires a chief law enforcement officer (CLEO)[16] to perform a background check during the mandatory five-day waiting period for all handgun purchasers.[17]

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13. 112 S. Ct. 2408 (1992).

14. H.R. REP. 344, *supra* note 7, at 8. *See generally* Devroy, *supra* note 4 (discussing the efforts of the Brady family leading to passage of the Brady Act).

15. H.R. REP. 344, *supra* note 7, at 7. The Act is specifically aimed at preventing handgun purchases by "convicted felons and other persons who are barred by law from purchasing guns . . . ." *Id.* According to Bureau of Alcohol, Tobacco, and Firearms estimates, the Brady Act prevents about 2% (roughly 70,000) of all handgun sales from occurring. Diemer, *supra* note 11.

16. The Act defines a CLEO as the "chief of police, the sheriff, or an equivalent officer or the designee of any such individual." 18 U.S.C. § 922(s)(8) (Supp. V 1993).

17. The background checks are mandatory for CLEOs because the Brady Act allows persons erroneously denied the ability to purchase a gun to sue CLEOs in order to compel the approval of the transfer or to correct erroneous information. 18 U.S.C. § 925A (Supp. V 1993); *see* McGee v. United States, 863 F. Supp. 321, 325 (S.D. Miss. 1994) (stating that the Brady Act "directs sheriffs (as chief law enforcement officers) to ascertain if obtaining a gun is in violation of the law"). CLEOs are exempt from civil liability for obstructing a lawful transfer or failing to prevent an unlawful one. 18 U.S.C. § 922(s)(7) (Supp. V 1993).

To purchase a handgun, a person must follow procedures listed in the Brady Act.[18] The Act requires a licensed seller[19] to obtain a

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Under the Brady Act, 18 U.S.C. § 924(a)(5) (Supp. V 1993), four out of five federal district courts have held that CLEOs are not subject to criminal liability. Printz v. United States, 854 F. Supp. 1503, 1510 (D. Mont. 1994) (reasoning that legislative silence indicates that Congress did not intend CLEOs to be liable for criminal penalties, and noting that it makes no sense to subject CLEOs to the more severe criminal penalties but not civil damages); Koog v. United States, 852 F. Supp. 1376, 1388 (W.D. Tex. 1994) (reasoning that Congress failed to clearly indicate its intent to hold CLEOs criminally liable); *McGee*, 863 F. Supp., at 324 n.3 (agreeing with the government's interpretation that criminal liability under § 924(a)(5) does not apply to CLEOs due to the doctrine of leniency, and precedent holding that interpretations of statutes that are arguably either constitutional or unconstitutional should be treated by courts as constitutional unless contrary to congressional intent); Frank v. United States, 860 F. Supp. 1030, 1036 (D. Vt. 1994) (reasoning that criminal sanctions are unlikely because the government interprets the Brady Act as not subjecting CLEOs).

In contrast, the Federal District Court in Arizona held that the Brady Act unequivocally subjects CLEOs to criminal liability. Mack v. United States, 856 F. Supp. 1372, 1376 (D. Ariz. 1994). The *Mack* court concluded that congressional application of criminal liability to "whoever" clearly subjected CLEOs to criminal liability. *Id.* at 1376-77. The court supported its position by noting that Congress specifically excluded CLEOs from civil liability. *Id.* at 1375-76 n.4.

Assuming that CLEOs are liable only for injunctive relief, this liability alone is enough to constitute a mandate. *See* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 776-97 (1982) (O'Connor, J., concurring in part and dissenting in part) (implicitly recognizing that liability for injunctive relief created a mandate). The Public Utilities Regulatory Policies Act of 1978 (PURPA), the statute at issue before the Court, required state regulatory authorities and nonregulatory utilities to consider certain approaches to structural rates, 16 U.S.C. § 2621(d) (1982), and certain standards, 16 U.S.C. § 2623 (1982), within specific time frames. *See* 456 U.S. at 746-50. Although the statute required states to consider these approaches, the statute did not impose any penalty for noncompliance. *Id.* at 749-50. Despite the lack of a penalty provision, Justice O'Connor described the procedures as those the state authority "must" follow. *Id.* at 776-77 (O'Connor, J., concurring in part and dissenting in part). PURPA permitted "[a]ny person" to bring an injunctive suit "to enforce the agency's obligation to consider the federal standards." *Id.* at 779 n.5 (citing 15 U.S.C. § 3207(b)(1) (Supp. IV 1976); 16 U.S.C. § 2633(c)(1) (Supp. IV 1976)).

18. *See* 18 U.S.C. § 922 (Supp. V 1993).

19. The Act only applies to handgun sales made by a federally "licensed importer, licensed manufacturer, or licensed dealer." 18 U.S.C. § 922(1)(s)(1) (Supp. V 1993).

Because the Brady Act only applies to federally licensed gun dealers, unlicensed gun dealers can sell to whomever they wish without complying with the criminal background check requirements of the Act. Erik Larson, *Brisk Trade: Private Gun Sales Go Unregulated at Shows and at Flea Markets*, WALL ST. J., July 12, 1994, at A1. "In fact, many law-enforcement officers believe private sales will attract even more criminals now that the Brady law's provisions . . . have made retail purchase of handguns uniformly tougher." *Id.*

statement from the purchaser.[20] The seller must then provide this statement to the CLEO for the purchaser's place of residence.[21] The seller then must wait five days before transferring the gun to the purchaser,[22] during which time the CLEO must make a "reasonable effort," through a background check, to determine whether the handgun transfer will violate the law.[23] If, within that five-day period, the CLEO provides no information to the seller or informs the seller that the transfer is legal, the seller may transfer the handgun to the purchaser.[24]

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20. The Brady Act defines a "statement" from a purchaser as:
(A) the name, address and date of birth appearing on a valid identification document . . . of the [purchaser] containing a photograph of the [purchaser] and a description of the identification used;
(B) a statement that the [purchaser] —
(i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year;
(ii) is not a fugitive from justice;
(iii) is not an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act);
(iv) has not been adjudicated as a mental defective or been committed to a mental institution;
(v) is not an alien who is illegally or unlawfully in the United States;
(vi) has not been discharged from the Armed Forces under dishonorable conditions; and
(vii) is not a person who, having been a citizen of the United States, has renounced such citizenship;
(C) the date the statement was made; and
(D) notice that the [purchaser] intends to obtain a handgun from the [seller].
18 U.S.C. § 922(s)(3) (Supp. V 1993).

21. 18 U.S.C. § 922(s)(1)(A)(i)(IV) (Supp. V 1993).
Under certain circumstances a CLEO need not perform a background check. *See* 18 U.S.C. § 922(s)(1)(B)-(F) (Supp. V 1993).

22. 18 U.S.C. § 922(s)(1)(A)(ii)(I) (Supp. V 1993). The waiting period applies unless the CLEO notifies the seller sooner that the transfer will not violate federal, state, or local law. 18 U.S.C. § 922(s)(1)(A)(ii)(II) (Supp. V 1993).

23. A chief law enforcement officer to whom a [seller] has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a *reasonable effort* to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.
18 U.S.C. § 922(s)(2) (Supp. V 1993) (emphasis added).

24. 18 U.S.C. § 922(s)(1)(A)(ii) (Supp. V 1993).
If a CLEO determines that the transfer would not violate any local, state, or federal law, the CLEO must destroy the statement, and any records related to the handgun purchaser created or obtained during the background check, within twenty days after receiving a handgun purchaser statement. 18 U.S.C. § 922(s) (6)(B)(i) (Supp. V 1993). If a CLEO

The requirement that CLEOs perform background checks is a temporary measure, valid until the United States Attorney General establishes a "national criminal background check system."[25] Congress provided for the creation of such a system within five years after enactment of the Brady Act.[26] The new national system will replace background checks performed by CLEOs by requiring licensed transferrers of handguns to access the national database and check the purchaser's background.[27]

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finds a purchaser ineligible to purchase a handgun and the purchaser requests the reasons for the denial, the CLEO must furnish the purchaser with a written statement of the reasons within twenty days from the time of the request. 18 U.S.C. § 922(s)(6)(C) (Supp. V 1993).

25. The two phase aspect to the Brady Act is distinguishable from the interim-permanent phases contained in the Surface Mining Control and Reclamation Act of 1977 ("Surface Mining Act"), the statute at issue in *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981). The interim provisions of the Surface Mining Act withstood a Tenth Amendment challenge because the Court held that the statute only regulated individual companies rather than the states. *Id.* at 293. The statute provided that during the interim period, the federal government would enforce the new federal regulations and the states would have the option to continue enforcing some of the regulations. *Id.* at 268. Upon reaching the permanent phase, the Surface Mining Act provided that the states have the choice whether to regulate according to the federal standards or have the federal government regulate. *Id.* at 271-72.

Regarding the roles of the federal and state government, the Brady Act differs from the Surface Mining Act in two respects. First, the Brady Act requires state regulation of the federal program in the interim phase. Second, the Brady Act gives the states no discretion whether to carry out the federal regulatory program or not. *See supra* notes 6-7 and accompanying text.

26. Pub. L. No. 103-159, § 103(b), 107 Stat. 1536, 1541 (1993) provides:

> (b) ESTABLISHMENT OF SYSTEM — Not later than 60 months after the date of the enactment of this Act, the Attorney General shall establish a national instant criminal background check system that any licensee may contact, by telephone or by other electronic means in addition to the telephone, for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee would violate section 922 of title 18, United States Code, or State law.

Id.

27. 18 U.S.C. § 922(t)(1) (Supp. V 1993). Transferrers covered by the national system provision include licensed importers, licensed manufacturers, and licensed dealers. *Id.*

II. THE PRINCIPLE OF POLITICAL ACCOUNTABILITY AND THE TENTH AMENDMENT

In our federal system, the Tenth Amendment reflects the division of power[28] between federal and state governments.[29] Federalism creates a zone of state autonomy, which the federal government should respect in certain areas, even if the federal government may constitutionally regulate in those areas.[30] This allocation of power between the federal

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28. The Tenth Amendment provides: "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.

29. *See* Texas v. United States, 730 F.2d. 339, 356 (1984) ("The Supreme Court has affirmed the concept of federalism as a structural assumption of the Constitution."), *cert. denied*, 469 U.S. 892 (1984).

In *United States v. Darby*, the Supreme Court opined that "[t]he [Tenth] [A]mendment states but a truism that all is retained which has not been surrendered." 312 U.S. 100, 124 (1941). Justice O'Connor referred to the Tenth Amendment as a "tautology." New York v. United States, 112 S. Ct. 2403, 2418 (1992).

Over the years, the Supreme Court has interpreted the Tenth Amendment's implications for state sovereignty in various ways. During the pre-New Deal era, the Court viewed the Tenth Amendment as protecting certain sovereign powers of the states, such as the police power, from federal encroachment. Richard E. Levy, New York v. United States: *An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 KAN. L. REV. 493, 494 (1993). The Court asked "whether the activity regulated was within the realm of reserved state power and thus protected from federal interference." *Id.* The New Deal era brought an "explosion of federal power." *Id.* Following the New Deal, the Supreme Court referred to the Tenth Amendment as a "truism," and held that state sovereignty was irrelevant to determining federal power. *Id.*; *see also* Richard S. Myers, *The Burger Court and the Commerce Clause: An Evaluation of the Role of State Sovereignty*, 60 NOTRE DAME L. REV. 1056, 1058 (1985) (discussing the successes and failures of the Court in protecting state sovereignty); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 634 (1993).

30. Powell, *supra* note 29, at 639; *see also* Martin H. Redish, *Doing It with Mirrors:* New York v. United States *and Constitutional Limitations on Federal Power To Require State Legislation*, 21 HASTINGS CONST. L.Q. 593, 596 (1994).

Lawyers, scholars and judges continue to debate the Framers' intent regarding state autonomy. *Compare* Joseph Lipner, *Imposing Federal Business on Officers of the States: What the Tenth Amendment Might Mean*, 57 GEO. WASH. L. REV. 907 (1989) (arguing that the language and history of the Tenth Amendment indicate the Amendment was intended to protect state autonomy) *with* Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993) (arguing that the framers intended national power to trump state autonomy). *See also* Terrence M. Messonnier, *A Neo-Federalist Interpretation of the Tenth Amendment*, 25 AKRON L. REV. 213 (1991). Other scholars argue that the Guarantee Clause of the Constitution contains mechanisms to protect state autonomy. John Minor Wisdom, *Foreword: The Ever-Whirling Wheels of American Federalism*, 59 NOTRE DAME L. REV. 1063 (1984); *see* Deborah Jones Merritt, *The Guarantee Clause and State*

and state governments protects individuals from the danger of abuse by a single sovereign.[31] Federalism enhances and protects individual political liberty by localizing government, and thereby encouraging communication between elected officials and the electorate.[32] When voters are in close contact with elected officials, voters have greater control over policy decisions and resource allocation because the officials are politically accountable.[33] "Political accountability, a necessary feature of democratic federalism, is the 'answerability' of representatives to the represented."[34] Because elected officials must answer to the local electorate, this dialogue gives the electorate power to influence political choices to reflect majority voter preference.[35]

Autonomy: Federalism for a Third Century, 88 COLUM. L. REV. 1 (1988); *The Supreme Court, 1991 Term - Leading Cases*, 106 HARV. L. REV. 163, 178 (1992) ("[T]he Guarantee Clause provides a superior textual home for the theory of political accountability that the *New York* Court unveiled.").

Basically limited only by the political process, Congress has broad powers to regulate state functions. Note, *Federalism, Political Accountability, and the Spending Clause*, 107 HARV. L. REV. 1419, 1427 (1994) [hereinafter *Federalism*]. For congressional limitations on state autonomy to pass constitutional muster, Congress must demonstrate that the political system functioned effectively and empowered Congress to impose those limitations. *Id.* Congress must assume accountability "for disturbing the ordinary, constitutionally presumed balance of power between the federal and state governments." *Id.*

31. *E.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458-59 (1991).

32. *See* Lewis B. Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 853-857 (1979) (arguing that localization of power enhances an individual's opportunities for participation both quantitatively and qualitatively).

33. *See New York*, 112 S. Ct. at 2424.

34. D. Bruce La Pierre, *Political Accountability in the National Political Process — The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 640 (1985).

35. *Id.*

In *New York v. United States*,[36] Justice O'Connor[37] applied the principle of political accountability to a Tenth Amendment analysis to determine whether Congress had unconstitutionally limited state autonomy.[38] In *New York*, the Supreme Court held that the take-title provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985[39] violated the Tenth Amendment because it forced states to enact and enforce regulations.[40] The take-title provision was part of a scheme Congress devised to induce states to open low-level radioactive waste disposal facilities.[41] Congress provided various incentives to states to open disposal sites, and allowed states that did so to exclude

36. 112 S. Ct. 2408 (1992).

37. Justice O'Connor is a consistent supporter of state autonomy. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580-89 (1984) (O'Connor, J., dissenting) (arguing that the judiciary must protect state autonomy, the "essence" of federalism, from the abusive power of the federal government); Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 776-79 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part) (arguing that the Constitution's Framers intended a system of separate state and federal legislative sovereignty); *see also* Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979 (1993) (discussing Justice O'Connor's approach to federalism).

38. 112 S. Ct. 2408 (1992); *see* Powell, supra note 29, at 650 (referring to a Tenth Amendment analysis in *New York*). *But see* David M. O'Brien, *The Supreme Court and Intergovernmental Relations: What Happened to "Our Federalism"?*, 9 J. L. & POL. 609, 614 (1993) (stating that Justice O'Connor "dismissed the Tenth Amendment" in *New York*).

If the federal government infringes on state autonomy, the Tenth Amendment directs the judiciary to scrutinize the means employed by the federal government. *New York*, 112 S. Ct. at 2418; *see* Powell, *supra* note 29, at 650.

39. 42 U.S.C. § 2021e(d)(2)(C) (1988).

40. *New York*, 112 S. Ct. at 2429. More specifically, the Court declared that "the provision is inconsistent with the federal structure of our Government established by the Constitution." *Id.* at 2429; *cf.* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 766 (1982) (*FERC*) (stating that the state could either consider federal regulations or stop regulating in the field, even though the federal government had no "alternative regulatory mechanism"). *New York* and *FERC* are distinguishable. In *New York*, Congress required states to carry out a federal initiative, although it gave the state schoices. 112 S. Ct. at 2415-16. In *FERC*, Congress allowed states to shift the cost of regulation to the federal government. 456 U.S. at 749-50.

New York, 112 S. Ct. at 2428-2429. Justice O'Connor based her majority opinion on "constitutional history and precedent." *New York*, 112 S. Ct. 2408. *But see* Prakash, *supra* note 30, at 1960 (criticizing Justice O'Connor's historical analysis of federal power to compel states to enforce federal laws); Levy, *supra* note 29, at 500 (criticizing Justice O'Connor's reading of the Framers' intent regarding the Tenth Amendment).

41. *See New York*, 112 S. Ct. at 2415-16.

waste from other states.[42] The take-title provision required states unable to provide for disposal of waste generated within their borders, after a certain time, to assume ownership of the waste.[43]

Writing for the majority, Justice O'Connor noted that prior cases held that Congress "lack[ed] the power directly to compel the States to require or prohibit [certain] acts."[44] However, she stated that Congress may regulate private activity directly or may enlist the aid of states by urging, rather than forcing, them to adopt a federal program.[45] Under the Constitution, Congress may regulate private activity pursuant to its Spending Power[46] or under the Commerce Clause.[47] Furthermore, if Congress regulates an activity directly it may preempt state regulation of the activity.[48] Thus, Congress can offer two choices to the States: first, regulate according to federal standards, or have state standards preempted by federal regulations;[49] or second, regulate according to federal standards or forego federal funds.[50] According to Justice O'Connor, both options preserve state officials' political accountability and allow state electorates to influence state policy decisions.[51] State officials remain politically accountable because they make decisions, and are then answerable to their electorates for their decisions. Political accountability ensures the continued political liberty of the people.[52]

When Congress creates incentives for states to enforce federal programs, Justice O'Connor emphasized, state residents retain the ability

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42. 42 U.S.C. § 2021e(d)(2) (1988); *see New York*, 112 S. Ct. at 2415-16.

43. *See* 42 U.S.C. § 2021e(d)(2)(C) (1988).

44. 112 S. Ct. at 2423.

45. *Id.* at 2423-24.

46. "The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . ." U.S. CONST. art. I, § 8, cl. 1.

47. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

48. 122 S. Ct. at 2424.

49. *Id.* at 2424 (citing Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981) and *FERC*, 456 U.S. at 764-65).

50. 112 S. Ct. at 2423.

51. *Id.* at 2424.

52. *See* Kaden, *supra* note 32, at 856-57. Political liberty is "the freedom to participate in the community's political life." *Id.* at 856.

to choose whether to undertake regulation.[53] State officials, accountable to the state electorate, will make a decision in accordance with state voter preference.[54] In making that decision, state officials must balance the benefits to the state against the costs to the state if the state chooses to implement the federal program.[55]

Justice O'Connor implied that if federal officials could force states to regulate federal programs, voters would hold state officials accountable for the reallocation of state resources needed to operate the federal programs.[56] In addition, Justice O'Connor pointed out that federal officials would "remain insulated" from the political ramifications of their decision to force states to regulate according to a federal program.[57] As a result, "accountability of both state and federal officials [would be] diminished."[58] Loss of political accountability undermines the federal system by sabotaging the "Constitution's intergovernmental allocation of authority."[59] Justice O'Connor implied further that loss of

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53. 112 S. Ct. at 2424.

54. *Id.*

55. *Id.*

56. *Id.* In an earlier case, Justice O'Connor expressed the belief that Congressional coercion of states limited the political accountability of state and federal officials leaving citizens feeling that their state officials did not represent their interests. FERC v. Mississippi, 456 U.S. 742, 779 (1982) (O'Connor, J., concurring in part and dissenting in part).

57. *New York*, 112 S. Ct. at 2424. State officials bear the cost of federally-mandated state regulations, when it is the federal government that should have to answer for its actions. *See* Althouse, *supra* note 37, at 1017-19.

58. *New York*, 112 S. Ct. at 2424.

59. *Id.* at 2432. Justice O'Connor reasoned that federalism should protect individuals from domination by a single sovereign by splitting sovereignty between the national government and the state government. *Id.* at 2431. Laws that result in a lack of official accountability run counter to "the Constitution's intergovernmental allocation of authority," and federalism. *Id.* at 2432. *But cf.* La Pierre, *supra* note 34, at 639. Professor La Pierre argues that the national political process holds federally elected officials politically accountable to the national electorate for any federal laws that reduce state autonomy. *Id.* Therefore, as long as the democratic process checks congressional legislation that intrudes on state interests, the judiciary should not intervene in the political process. *Id.* at 642. According to La Pierre, these political checks on federal intrusion into state interests are twofold: the electorate judges the substantive policy towards private activity and then judges the financial and executive expenditure to administer and enforce the national policy. *Id.* at 643-44. Because Congress must face these two checks by the national electorate, Congress becomes politically accountable to the national electorate for the decision to limit state autonomy. *Id.* at 644. If the voters support the federal officials who impose these burdens, then the voters also support federal reduction of state autonomy.

accountability undermined the essence of democracy — a government responsive to the preferences of its citizens.[60]

III. DECISIONS HOLDING THE BACKGROUND CHECK PROVISION UNCONSTITUTIONAL

Federal district courts in Montana,[61] Mississippi,[62] Arizona,[63] and Vermont[64] declared that the background check provision of the Brady Act unconstitutionally undermines Tenth Amendment protection of state autonomy in the federal system.[65] While supporters of the Brady Act might perceive these decisions as "frontier justice rather than

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Id.

Professor Kaden, however, argues that changes in the internal political structure of the U.S. government reduce congressional "sensitivity" to the problems of preserving state autonomy. *See* Kaden, *supra* note 32, at 857-68. Professor Kaden also implies that the electorate's proximity to local government increases accountability of local elected officials, and consequently, increases individual political liberty. *Id.* at 854-57. The implication of Professor Kaden's theory is that Congress, sitting a distance from the electorate, may not be as accountable to the people as a local government. Thus, congressional decisions to limit state autonomy may not reflect the national preference. Professor Kaden's theory also applies to local-state division of authority. The National Rifle Association ("NRA") implicitly supports Professor Kaden's theory. The NRA wants to take authority to regulate guns away from local governments, which are more accountable to their electorate, and give the power to state governments. *See Gun Control*, *supra* note 7.

60. *New York*, 112 S. Ct. at 2424.

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

62. McGee v. United States, 863 F. Supp. 321 (S.D. Miss. 1994).

63. Mack v. United States, 856 F. Supp. 1372 (D. Ariz. 1994).

64. Frank v. United States, 860 F. Supp. 1030 (D. Vt. 1994).

65. The original version of the Brady Act, introduced in 1987, made background checks on purchasers optional, rather than mandatory. HR. 975, 110th Cong., 1st Sess. (1987).

McGee, the Mississippi case, and *Koog*, the Texas case, in which the Texas district court held the background check constitutional, were consolidated for appeal to the Fifth U.S. Circuit Court of Appeals. *Judge Strikes Down Gun Checks*, *supra* note 11. The Department of Justice is allegedly "concerned about the potential adverse impact [of the cases] on the legality of other state/federal arrangements." Pierre Thomas, *The Brady Law Sheriffs Challenging Federal Authority*, WASH. POST, Sept. 19, 1994, at A1.

As of September 19, 1994, enforcement of the background check provision in those jurisdictions where the provision was held unconstitutional has not been affected because other law enforcement officials, such as state police, performed the background check duty. *Id.*

sound legal thinking,"[66] all four courts based their decisions on the Supreme Court's decision in *New York v. United States*[67] Three courts specifically mentioned Justice O'Connor's political accountability rationale.[68]

All four courts applied the holding in *New York* to the Brady Act background check provision because they concluded that the background check provision constitutes a federal mandate imposed on state officials, specifically, CLEOs.[69] In *New York*, the Supreme Court held that Congress may not "compel the States to enact or administer a federal regulatory program."[70] Although the Brady Act does not compel state legislatures to act affirmatively, the Brady Act does require elected state officials to act as agents of the federal government by requiring CLEOs to perform background checks.[71] A clear analogy exists between *New York*'s prohibition of congressional commandeering of state legislatures and a congressional mandate that state officials act as federal agents. The same principle underlying the *New York* holding thus applies to the Brady mandate — the principle of political accountability.[72]

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66. Jerome L. Wilson, *State Sovereignty Case Shoots at Brady Law*, NAT'L L.J., July 11, 1994, at A21.

67. 112 S. Ct. 2408 (1992); *see supra* notes 36-60 (discussing the *New York* decision).

68. *Frank*, 860 F. Supp. at 1042; *Mack*, 856 F. Supp. at 1380; *Printz*, 854 F. Supp. at 1514-15. Although the *McGee* court did not refer specifically to the principle of political accountability, one can infer that the court took the principle into account as its opinion relied solely on *New York* as the basis of its decision. *See McGee*, 863 F. Supp. at 325-27.

69. *See McGee*, 863 F. Supp. at 326; *Frank*, 860 F. Supp. at 1041; *Mack*, 856 F. Supp. at 1381; *Printz*, 854 F. Supp. at 1512.

70. *New York*, 112 S. Ct. at 2435.

71. *See supra* part I. Under the Brady Act, the state acts as an agent of the federal government because the state becomes a "tool of federal policy." *See* Texas v. United States, 730 F.2d. 339, 356 (5th Cir. 1984), *cert. denied*, 469 U.S. 892 (1984). The Brady Act regulates a state as a state because the law directs state action and determines the "agenda" of the CLEOs, who are essentially state officials. *See* Federal Energy Regulatory Comm'n v. United States, 456 U.S. 742, 778-79 (1982) (O'Connor, J., dissenting).

72. *See supra* part II (discussing the principle of political accountability as applied in *New York*). The Brady Act probably diminishes political accountability of local elected officials even more than the legislation at issue in *New York*. In *New York*, state officials could choose which federal mandate to follow and then massage federal policy to reflect state interests. Although the state legislatures were not free to refuse to adopt the federal goal, they were free to decide how the state would accomplish the federal goal.

Regardless of the preferences of the CLEO's constituents, the CLEO must perform a background check on all handgun purchasers in order to fulfill the duty imposed by the federal government. The background check mandate, therefore, undermines political accountability in three distinct, but interrelated, ways. First, the federal mandate diminishes the political accountability of CLEOs, and state or locally elected bodies that fund the CLEOs. These officials might be forced to divert local resources for conducting the background checks[73] from programs their electorates would prefer.[74] Alternatively, elected officials might raise taxes in order to meet the resource demands of the federal mandate.[75] Either way, the political accountability of CLEOs and other elected officials is diminished because the background check provision restricts CLEOs, state and locally elected officials, from pursuing the policy preferences of their own electorate. Second, to comply with the Brady Act, CLEOs must bear the burden of voter dissatisfaction due to resource diversion, and face responsibility for any incorrect approvals of handgun transfers.[76] Third, Congress, state, and locally elected officials become less politically accountable because their respective electorates will not know who to hold politically answerable — Congress, which enacted the Brady Act, or the CLEOs and other local officials, who must reallocate resources to comply with the mandatory background check.[77]

Grounding their holdings on the *New York* case, the four district courts concluded that the background check provision violated the Tenth Amendment.[78] These courts reached this conclusion because Congress mandated that state elected officials carry out the provision.[79] Even if Congress has "laudable" goals, it is never justified in requiring the states

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73. *See* Printz v. United States, 854 F. Supp. 1503, 1515 (D. Mont. 1994).

74. *Id.* The preference is assumed because if the background check was the preferred program, the state would have already had a background check system in place.

75. *Id.*

76. *See Printz*, 854 F. Supp. at 1514-15; *see also New York*, 112 S. Ct. at 2424.

77. *See e.g.* Kaden, *supra* note 32, at 870. Local or state officials will likely suffer the consequences of voter dissatisfaction because they are allocating the state and local resources. *See New York*, 112 S. Ct. at 2424.

78. *See* Frank v. United States, 860 F. Supp. 1030, 1043 (D. Vt. 1994); Mack v. United States, 856 F. Supp. 1372, 1381 (D. Ariz. 1994); *Printz*, 854 F. Supp. at 1517-18; McGee v. United States, 863 F. Supp. 321, 327 (S.D. Miss. 1994).

79. *See supra* notes 69-71 and accompanying text (describing the four courts' reasoning).

to enforce federal legislation.[80] Such legislation "undermine[s] the purpose of federalism — to ensure that the interests of citizens are adequately represented."[81]

IV. THE DECISION HOLDING THE BACKGROUND CHECK CONSTITUTIONAL

Only the United States District Court for the Western District of Texas, in *Koog v. United States*, has held that the background check provision of the Brady Act is consistent with the Tenth Amendment.[82] The court began its analysis by reviewing the Supreme Court's prior Tenth Amendment case law[83] and concluded that no single case provided the rule of decision.[84] While the court noted that *New York v. United States* held that the federal government could not commandeer state legislatures, the court claimed that the *Federal Energy Rregulatory Comm'n v. Mississippi* (FERC) allowed the federal government to impose "minimal duties on state executive officers."[85] The court focused on the FERC[86] decision in holding the background check provision constitutional because "the duties imposed on [CLEOs] . . . resemble more the

80. *E.g., Frank*, 860 F. Supp. at 1043 ("[T]he 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.") (quoting *New York*, 112 S. Ct. at 2434).

81. *Mack*, 856 F. Supp. at 1380 (citing *New York*, 112 S. Ct. at 2431-32).

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

83. *Id.* at 1381-87. The district court characterized the Supreme Court decisions on the Tenth Amendment as "a series of shifting perspectives on the nature and breadth of the powers reserved to the states under the Tenth Amendment . . . ." *Id.* at 1381.

84. *Id.* at 1387.

85. *Id.* at 1388; *cf.* Printz v. United States, 854 F. Supp. 1503, 1517 (D. Mont. 1994). The *Printz* court concluded that the duties required of the CLEO in the Brady Act were not de minimis. *Id.* The CLEO's duties under the Act could not be regarded as de minimis because the CLEO must perform a background check on every transfer applicant; the CLEO must determine the applicable law regarding the eligibility to receive a handgun; and the CLEO must decide if the handgun transfer is legal. *Id.* The *McGee* Court also distinguished *FERC* by concluding that the background check mandate was "more than de minimis." McGee v. United States, 863 F. Supp. 323, 326-27 (S.D. Miss. 1994).

The *Printz* court also concluded that *FERC*'s holding did not apply to the Brady Act, because the *FERC* decision relied on the Supremacy Clause. *Printz*, 854 F. Supp. at 1516. The sheriff did not claim a violation of the Supremacy Clause in *Printz*.

86. 456 U.S. 742 (1982).

duties created under [the statute at issue in *FERC*] than the command to legislate created by the Low-Level Waste Act."[87]

According to the *Koog* court, the Public Utility Regulatory Policies Act (PURPA) required "state utility regulatory bodies [to] consider federal standards imposed by PURPA and upheld in *FERC*."[88] Specifically, the *Koog* court referred to Titles I and III of PURPA, which "direct[ed] state utility regulatory commissions and nonregulated utilities to 'consider' the adoption and implementation of specific [federal] rate designs and regulatory standards."[89] However, PURPA did not require state utility commissions or nonregulated utilities to adopt or implement PURPA's federal rate design or regulatory standards.[90] More importantly, PURPA did not require consideration of the federal standards if the state did not have a utilities commission or if the state stopped regulating the utilities within its borders.[91]

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87. *Koog*, 852 F. Supp. at 1388.

88. *Id.*

89. *FERC*, 456 U.S. at 746. In *FERC*, Mississippi challenged the provisions of Title I, Title III, and § 210 of Title II of PURPA, Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified as amended at 16 U.S.C. § 2601) (1988), on the grounds that they violated the Tenth Amendment of the Constitution. *FERC*, 456 U.S. at 759. The Supreme Court identified PURPA as an attempt by the federal government to "use State regulatory machinery to advance federal goals." *Id.* at 759.

The Supreme Court first looked at § 210 of Title II, 16 U.S.C. § 824a-3(f)(1), concerning state implementation of FERC standards, and implied that the Supremacy Clause, U.S. CONST., art. VI, § 2, enabled Congress to expand the jurisdiction of the Mississippi Commission. *FERC*, 456 U.S. at 760-61 (citing Testa v. Katt, 330 U.S. 386 (1947)). The Court held that "state agencies, like state courts, have a duty to adjudicate claims arising under federal law." La Pierre, *supra* note 34, at 660, n.424. The Court pointed out that the type of adjudication at issue was the same type as that "customarily engaged in" under Mississippi law. *FERC*, 456 U.S. at 760.

The Supreme Court then declared that the second challenged provision of PURPA, mandatory consideration of federal standards by the States in Titles I and III, also did not violate the Tenth Amendment. *FERC*, 456 U.S. at 769-70. The Court held that state consideration of federal standards was not "mandatory," because states could still choose not to have a utility commission or could stop regulating in the field. *Id.* at 764.

The final challenged provision of PURPA in Titles I and III "require[d] State commissioners to follow certain notice and comment procedures when acting on the proposed federal standards." *FERC*, 456 U.S. at 770. The Supreme Court held this procedural requirement constitutional and implied the requirement was "procedural minima." *Id.* at 771.

90. *FERC*, 456 U.S. at 750.

91. *Id.* at 764.

The distinguishing feature between PURPA and the Brady Act is not the number of state duties created, but the manner in which Congress directed the accomplishment of those duties. Congress did not force the minimal duties imposed by PURPA on the states. Justice Blackmun, the author of the majority opinion in *FERC*, explained that states could choose whether to implement the federal policy under PURPA.[92] Under PURPA, the states could discontinue regulating the utilities within the state and leave the regulatory responsibility in the hands of the federal government.[93] The important point is that the states retained a choice. Only if federal laws give state and local officials a choice do all officials remain politically accountable, because the electorate can identify the party responsible for a given decision.[94] The fact that the states had a choice under PURPA distinguishes the PURPA provisions at issue in *FERC* from the background check provision of the Brady Act.

The background check provision of the Brady Act does not give states a choice; it imposes a mandate on the states.[95] The *Koog* court erroneously concluded that the background check provision was optional for CLEOs. The *Koog* court held that the CLEO has great discretion in defining a "reasonable" background check, including determining that not conducting a background check is "reasonable."[96] But Congress intended to require affirmative action by CLEOs when it used the word "shall" in the statute.[97] An amendment to replace the language "shall

92. *Id.* at 766.

93. *Id.* at 766-67. According to Justice Blackmun, Congress may enact legislation to induce states to participate as actors in federal legislation. *Id.*

94. Kaden, *supra* note 32, at 856-57.

95. *See supra* note 69 and accompanying text.

96. *Koog*, 852 F. Supp. at 1388. No other court ruling on this issue found that a CLEO could choose not to conduct a background check. *See supra* part III (discussing the other court rulings on the constitutionality of the Brady Act's background check provision).

The *Koog* court based its conclusion on an Open Letter to State and Local Law Enforcement Officials issued by the Bureau of Alcohol, Tobacco, and Firearms (BATF). *Koog*, 852 F. Supp. at 1379. The Vermont District Court in *Frank* dismissed this Open Letter because courts only give weight to agency interpretation of a statute when the intent of Congress is unclear. Frank v. United States, 860 F. Supp. 1030, 1037 (D. Vt. 1994) (citing Chevron v. NRDC, 467 U.S. 837, 844-45). The *Frank* court found Congress' intent clear — the background checks were not optional. 860 F. Supp at 1040.

97. *See Frank*, 860 F. Supp. at 1040.

make a reasonable effort" with "may make a reasonable effort,"[98] in order to make the background check provision optional, was defeated.[99] Courts have also pointed out that the clause "including available criminal history records" implies that checking available records is a minimal requirement.[100] The background check provision is a mandate on the states, and as such, is distinguishable from *FERC*. Rather, it is *New York* that provides the proper analysis of the background check provision. Thus the *Koog* court's holding that the background check is optional runs counter to the plain meaning of the statute and the import of the legislative history.

V. EVALUATION

Although no Supreme Court precedent speaks directly to whether Congress may require states to enforce federal legislation,[101] the rationale exists for declaring such mandates inconsistent with the Tenth Amendment.[102] In *New York*, Congress violated the Tenth Amendment when it compelled states to legislate under the Low-Level Radioactive Waste Policy Act.[103] The *New York* Court based its holding in part on

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98. H.R. REP. 344, *supra* note 7, at 38-39. Congressman Steve Schiff endorsed making the background check optional "if Congress is unwilling to conduct the check federally, or reimburse local law enforcement agencies for doing it." *Id.* at 39 (dissenting views of Rep. Steve Schiff).

99. H.R. REP. 344, *supra* note 7, at 14-15. The *Printz* court concluded that the background check is mandatory based on other legislative history. *See* Printz v. United States, 854 F. Supp. 1503, 1512 (D. Mont. 1994).

100. Frank v. United States, 860 F. Supp. 1030, 1041 (D. Mont. 1994); McGee v. United States, 863 F. Supp. 323, 326 (S.D. Miss. 1994).

101. The Low-Level Radioactive Waste Disposal Amendments Act in *New York* essentially required states to regulate the disposal of low-level radioactive waste generated within their borders or take-title to the waste. *New York*, 112 S. Ct. at 2416. That Act did not require states to simply enforce federal legislation, as the Brady Act's background check provision does.

102. *See* La Pierre, *supra* note 34, at 660, n.423. Professor La Pierre states:

> The argument that mandatory state enforcement of national regulatory programs is unconstitutional is completely consistent with the lessons of history. Since the first administration of President Washington, Congress has relied on state assistance in the implementation of national law. Congress, however, has sought voluntary state cooperation and only in rare instances has it attempted to impose a duty directly on the states.

Id.

103. *New York*, 112 S. Ct. at 2435; *see supra* notes 44-60 and accompanying text (discussing Justice O'Connor's rationale in *New York*).

the principle of accountability.[104] That principle also applies to the Brady Act's background check provision, under which Congress forced the states to act as agents of the federal government.[105] Requiring states to enforce federal law makes all elected officials less politically accountable and undermines representative democracy.[106]

Like the take-title provision at issue in *New York*, the background check provision forces state officials to act affirmatively under congressional mandate.[107] Under the Brady Act, state and local officials bear the primary political responsibility for the acts of federal decision-makers,[108] contrary to the plan of our federalist democracy.[109] Due

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104. *See New York*, 112 S. Ct. at 2424.

105. According to *New York*, the federal government avoids accountability for federal programs by compelling the states to legislate according to Congress' direction. *Id.* Conversely, state and local officials become politically accountable for programs compelled by the federal government. *Id.* When forced to carry out federal programs, the state and local officials must redirect resources from programs their constituents support.

106. *Cf.* La Pierre, *supra* note 34, at 663. Professor La Pierre argues that because the political process usually polices incursions on state power by Congress the situation generally does not warrant judicial intervention. Under Professor La Pierre's analysis, however, the Brady Act's background check provision falls under an exception justifying judicial intervention. *Id.* at 656-63. According to Professor La Pierre, congressional action warrants judicial intervention to protect state autonomy when (1) the congressional action does not substantively affect private activity and (2) Congress bears no administrative or financial cost for its action. *Id.* at 657. Under these circumstances, the national electorate will not hold Congress accountable for limiting state autonomy, and the courts must intervene. *Id.* at 660.

The application of national standards to handgun purchases is a political check on the substantive policy, but it fails to protect against the decrease in state autonomy caused by the congressional action. *See id.* at 660. Additionally, although Congress did allot certain money to the states to fund the establishment of state criminal databases, the purpose of the funds is to facilitate the final national database of criminal records. *See* 42 U.S.C. § 3759(b)(4) (Supp. V 1993). Thus, the funds do not alleviate the administrative and financial burden on CLEOs to comply with the background check provision. *Id. See also* H.R. REP.344, *supra* note 7, at 36 (dissenting views of Congressman Steve Schiff). Congressman Schiff stated that, although the Congress authorized funds to assist states in creating a computer database of state criminal records, these funds "cannot be used by state or local law enforcement agencies to offset the cost of performing the individual personal background checks." *Id.* He had previously offered an amendment to provide funding for the background check mandate, but it was defeated. *Id.* at 36-37.

107. *See New York*, 112 S. Ct. at 2424.

108. *Id.*

109. *Cf.* La Pierre, *supra* note 34 at 665 (stating that "if Congress is not politically accountable . . . judicially imposed restrictions on Congress' powers are necessary to protect the states").

to the principle of accountability, the Brady Act's mandate for states to enforce federal regulations is a clearer violation of the Tenth Amendment than the take-title provision. At least in requiring states to carry out federal regulatory programs the constituents may legitimately hold the state officials accountable for *how* the federal program is implemented in the state.

VI. CONCLUSION

Considering the Supreme Court's protection of state autonomy through the principle of political accountability, the mandatory background check provision of the Brady Act will not survive. The courts must protect state autonomy when the federal government compels state officials to enforce federal legislation, and thereby diminishes the political accountability of elected officials. By forcing state officials to implement a federal program without allocating any national resources for the states to use, federal officials simply pass the hard decisions of resource allocation to state officials and avoid political accountability to the national electorate.[110] Unable to identify the decisionmakers, voters lose the benefit of political accountability and the ability to influence elected officials about resource allocation.[111] If the federal government wants state officials to enforce the background check provisions of the Brady Act, Congress must give states the choice of whether or not to enforce the background check provision. Only this way will Congress follow the Tenth Amendment and maintain political accountability, the foundation of our federalist system of government.

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110. *See* Kaden, *supra* note 32, at 857-68 (describing how changing the internal and external relationships of Congress contributed to a "decline of states' influence upon the federal government"). If liberty and political participation continue to thrive, Professor Kaden believes protection of state autonomy may adjust to the "needs and habits of the nation." *Id.* at 897.

111. *See* Kaden, *supra* note 32, at 889.

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