

## Federal Gun Control in the United States: Revival of the Tenth Amendment

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# FEDERAL GUN CONTROL IN THE UNITED STATES: REVIVAL OF THE TENTH AMENDMENT<sup>1</sup>

Despite an overall decline in crime rates in the United States,<sup>2</sup> crime remains the foremost concern of most Americans.<sup>3</sup> One reason for this is that easy access to handguns<sup>4</sup> has led to growth in the use of violence<sup>5</sup> among an increasingly younger criminal sub-

<sup>1</sup> U.S. CONST. amend. X. 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." *Id.*

<sup>2</sup> See James Flanigan, *Social Change Cheaper than \$30-Billion Crime Bill*, L.A. TIMES, Aug. 28, 1994, at D1 (reporting that statistics from Federal Bureau of Investigations show decline in burglaries, homicides, rapes, and robberies after three decades of increases); *Handgun Waiting Period Goes Into Effect Today*, THE RECORD (Bergen, N.J.), Feb. 28, 1994, at A6 [hereinafter *Handgun Waiting Period*] (citing decline in overall violent crime rate from report by Bureau of Justice Statistics).

<sup>3</sup> See Celinda Lake, *Voters Want Action on Crime*, USA TODAY, Aug. 25, 1994, at 11A. "As the recession receded, crime became voters' top concern and it remains there today with 35% - 43% of voters saying it is the thing they worry about the most." *Id.*; see also Littice Bacon-Blood, *Crime Tops Worries in Parish Poll*, THE TIMES-PICAYUNE (New Orleans), Sept. 10, 1994, at A1 (reporting that despite 5% drop in reported crimes, crime remained top concern of voters polled Aug. 31 and Sept. 1); Sharon Schmickle, *Crime Experts See Flaws in Bill's Focus; "Get Tough" Efforts Won't Stem Violence, They Say*, STAR TRIBUNE (Minneapolis), Aug. 14, 1994, at 1A. "[T]he number of crimes Americans deeply fear—the murders and shootouts that make the evening news—has risen, the Bureau of Justice Statistics said." *Id.*; Gordon Witkins, *Should You Own a Gun?*, U.S. NEWS AND WORLD REPORT, Aug. 15, 1994, at 24 (arguing that increased randomness of crime, including carjackings, drive-by shootings, and abductions, has caused people to be afraid); Charles V. Zehren, *House Struggles for Consensus*, N.Y. NEWSDAY, Aug. 21, 1994, at A3. "Surveys show that crime is one of the nation's highest concerns . . ." *Id.*

<sup>4</sup> See 131 CONG. REC. S9101 (1985) (identifying growth of handguns over 35-year period with 9.7 handguns per 100 people in 1945 and 23.9 handguns per 100 people in 1980); *Pistol Crimes Near 1 Million Mark*, AP, May 16, 1994, available in LEXIS, Nexis Library, AP File (citing FBI statistics that showing handguns were used in increasing number of crimes, totaling 1 million in 1992); see also Witkins, *supra* note 3, at 24 (reporting existence of 216 million privately-owned firearms, which more than doubles 1970 statistics).

<sup>5</sup> See Flanigan, *supra* note 2, at D1 (observing that gang violence and drive-by shootings, typically juvenile crimes, are on rise); *Handgun Waiting Period*, *supra* note 2, at A6 (noting offense rate increased from 9.2% in 1979 to 12.7% in 1992); Indira A.R. Lakshmanan, *Ominous Trends Undercut Dip in City's Crime Figures*, THE BOSTON GLOBE, Aug. 15, 1994, at 1 (noting national statistics for murders committed by people under 25 have risen significantly); Tom Morganthau, *Gun Control: Too Many Guns? Or Too Few? Just as Congress Starts to Get Serious, an Old Debate Revives*, NEWSWEEK, Aug. 15, 1994, at 44. The author quotes Rep. Charles Schumer of New York, who stated: "The reason that gun violence has gone up is just how available guns are." *Id.*; Lea Sitton, *Move Seeks to Regulate Gun as Consumer Product*, THE TIMES-PICAYUNE (New Orleans), May 8, 1994, at A7 (reporting that handguns account for 25% to 30% of all firearms in American homes, but about 75% of all firearm deaths and injuries).

culture.<sup>6</sup> Frustration with ineffective local efforts to combat crime and stop the spread of illegal weapons,<sup>7</sup> coupled with the constant pressures on elected officials to be publicly perceived as being "tough on crime,"<sup>8</sup> have inspired numerous congressional initiatives to expand the federal role in attacking criminal activity, particularly in the area of gun control.<sup>9</sup> On March 1, 1994, for example, Senator Howard Metzenbaum and Congressman Charles Schumer proposed the Gun Violence Prevention Act,<sup>10</sup> otherwise

<sup>6</sup> See Flanigan, *supra* note 2, at D1 (noting that nationally "[o]nly about 6% of young people commit more than half the serious juvenile crime"); see also Anne Adams Lang, *One in Three City Youths Packs Heat*, NEW YORK POST, Sept. 23, 1994, at 11 (citing New York City Council study which found that one in three young people in city were likely to be carrying gun); Rod Nordland, *Deadly Lessons: Kids and Guns*, NEWSWEEK, Mar. 9, 1992, at 22 (discussing increasing gun-related violence and deaths in New York City Public Schools).

<sup>7</sup> See H.R. CONF. REP. NO. 120, 103d Cong., 2d Sess. 8860 (1994). Congress found that "[s]tates, localities, and school systems find it impossible to handle gun-related crime by themselves." *Id.*; *Taming the Gun Monster: Doing It Right*, L.A. TIMES, Nov. 8, 1993, at 6 (arguing state or community approaches to problem have not worked); see also Thomas Ferraro, *House Vote Shoots Down Assault Guns, Weapons Ban Passes by a Slim Margin*, N.Y. POST, May 6, 1994, at 7 (attributing passage of crime bill to "pleas from crime-weary citizens"); see *supra* note 3 and accompanying text.

<sup>8</sup> See *United States v. Ornelas*, 841 F. Supp. 1087, 1093 (D. Colo. 1994) (discussing politics as driving force in passage of federal criminal laws); see Andrew J. McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53, 73 (1992) (noting supporters of Brady Bill appeared with police organizations to prevent criticism they are "soft on crime"); Chief Justice William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 7 (discussing "political appeal" of passing tough federal criminal laws); see also David B. Kopel, *On the Firing Line: Clinton's Crime Bill*, HERITAGE FOUND. REPORTS, Sept. 24, 1993, at 1 (arguing that although Clinton was elected because he appeared "tough on crime," his proposed crime bill is unlikely to be effective).

<sup>9</sup> See Deborah Pines, *U.S. Judges Vote to Extend Cameras Experiment*, N.Y. L.J., Mar. 17, 1994, at 1 (reporting on letter from N.J. Dist. Judge Maryanne Trump Barry expressing concern about "the federalization of crimes traditionally prosecuted by state and local authorities"); *Federalization of State Crimes*, MASS. LAWYERS WKLY., Nov. 4, 1991, at 4 (arguing against trend toward federalization); Rehnquist, *supra* note 8, at 7 (observing that Congress experiences frequent attempts to add to federal criminal code); see also Flanigan, *supra* note 2, at D1 (noting 1994 Crime Bill, with \$30 billion to build prisons, hire police, and increase crime prevention programs, was passed, in part, in response to "[p]ublic anxiety"); Julie Gould, *Making the Federal Case of Customary State Crimes Seen by Some as a Worrisome Trend*, CHICAGO DAILY LAW BULL., Sept. 21, 1993, at 1. Gould discussed the problems associated with the federalization of crime, including prolonging civil trials. *Id.* The author explained the opposition to such federalization by groups such as the Chicago Bar Association's Federal Civil Procedure Committee and the National Association of Criminal Defense Lawyers Inc. *Id.*; Andrew Grene, *States Still Key to Law and Order, Federal Officials Say*, CHICAGO DAILY LAW BULL., Jul. 9, 1993, at 3 (reporting comments of Deputy U.S. Attorney General Philip Hegmann, who said Attorney General Janet Reno "has a strong suspicion of the federalization of new crimes"); Tom Smith, *Section Lets Prosecutors, Defense Air Differences*, THE NAT'L L.J., Aug. 9, 1993, at 55 (reporting that American Bar Association, along with coalition of 30 national organizations, recommended that Clinton Administration "halt the growing trend toward federalization of state crimes").

<sup>10</sup> S. 1882, 103d Cong., 2d Sess. (1994). The Gun Violence Prevention Act was originally proposed by Senator Metzenbaum on March 1, 1994 and was cosponsored by Senators Kennedy (Mass.), Bradley (N.J.), Lautenberg (N.J.), Boxer (Cal.), Pell (R.I.), and Chafee (R.I.). *Id.*

known as "Brady II," which would make it illegal to purchase a gun without a nationally uniform, state-issued handgun license.<sup>11</sup>

As debate continues on Brady II,<sup>12</sup> questions about its constitutionality, as well as the constitutionality of future gun control laws, can be foreseen. Contrary to what one might expect, the Second Amendment,<sup>13</sup> which concerns the right to bear arms, is unlikely to play a significant role in any challenge to these laws.<sup>14</sup> Judicial review of federal gun control laws typically has involved the issue of whether Congress has properly exercised its authority under the Commerce Clause.<sup>15</sup> Despite the Supreme Court's well-established history of upholding federal legislation enacted under the Commerce Clause,<sup>16</sup> a considerable split has developed among lower courts reviewing these laws.<sup>17</sup>

Many have found that federal gun control efforts like the Gun-Free School Zones Act,<sup>18</sup> Firearms Owners' Protection Act,<sup>19</sup> and

<sup>11</sup> *Id.* As it is currently written, the Handgun Control and Violence Prevention Act requires the following, with respect to the creation of a national licensing system:

That all handgun buyers possess a handgun card, a nationally uniform license issued through the states. This card will be issued after a thorough background check, including fingerprints. The cards will be renewed every 2 years. Applicants must demonstrate that the address used on the card is in fact their principal residence. They must also complete a basic firearms safety course, and must pass a test on the subject. The national handgun cards will be issued by the states following uniform minimum standards issued by the Secretary of the Treasury. These standards will ensure that the cards are secure against forgery, and that each state's system for issuing the cards is secure against fraud.

*Id.*

<sup>12</sup> See 140 CONG. REC. S2172, 2181 (daily ed. Feb. 28, 1994) (statement of James Brady). "And today, I begin the campaign for 'Brady II,' a comprehensive legislative plan to end America's epidemic of gun violence." *Id.*; *Handgun Control Inc. Applauds Assault Weapon Ban; Gun Control Advocates Turn Attention to Brady 2*, U.S. Newswire, May 5, 1994, available in LEXIS, Nexis Library, Wires File (noting start of debate on Brady II).

<sup>13</sup> U.S. CONST. amend. II. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." *Id.*

<sup>14</sup> See Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 247 (1989) (noting *United States v. Miller*, 307 U.S. 174 (1939), was Supreme Court's only extended examination of Second Amendment). *But see* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989) (suggesting that despite inadequate attention given Second Amendment by constitutional scholars, it still presents barrier to some gun control legislation).

<sup>15</sup> See, e.g., *United States v. Lopez*, 2 F.3d 1342, 1365 (5th Cir. 1993), cert. granted, 114 S. Ct. 1536 (1994); *United States v. Trigg*, 842 F. Supp. 450, 453 (D. Kan. 1994) (holding Congress did not properly articulate nexus to interstate commerce to utilize Commerce Clause powers).

<sup>16</sup> See discussion *infra* part I.

<sup>17</sup> See *infra* parts II.A., II.B., II.C.

<sup>18</sup> 18 U.S.C. § 922(q)(1)(A) (1990). The statute states, in pertinent part: "It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe is a school zone." *Id.* The original section 922

the Brady Act,<sup>20</sup> to some degree, lack the constitutional underpinning necessary for such an expansion of federal authority.<sup>21</sup> Courts examining these laws focused on one of two concerns: whether Congress had articulated a nexus between the gun control legislation and interstate commerce,<sup>22</sup> and whether Congress could impose an unfunded mandate on local officials to implement a federal gun law.<sup>23</sup> Central to these decisions is an express recognition that Congress's Commerce Clause power is not unlimited and an implied understanding that certain governmental functions are still reserved for the states under the Tenth Amendment.<sup>24</sup>

This Note will address several constitutional obstacles which the proposed national gun licensing system may encounter. Part One will focus on the historical development of the Tenth Amendment, with particular attention given to judicial interpretation of

was enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351 § 902, 82 Stat. 197, 26-35 (1968); *see also* discussion *infra* part II.A.

<sup>19</sup> 18 U.S.C. § 922(o)(1) (1986). The statute provides, in pertinent part: "It shall be unlawful for any person to transfer or possess a machine-gun." *Id.*; *see also* discussion *infra* part II.B.

<sup>20</sup> 18 U.S.C. § 922(s)(2) (1993). The Brady Act provides, in pertinent part:

A chief law enforcement officer . . . shall make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun by the prospective buyer] would be in violation of the law, including research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General.

*Id.* The penalty for one who knowingly violates subsection (s) of § 922 is a fine of up to \$1000, imprisonment of up to one year, or both. 18 U.S.C. § 924(a)(5); *see also* discussion *infra* part II.C.

<sup>21</sup> *See infra* parts II.A, II.B, II.C.

<sup>22</sup> *See* United States v. Bownds, No. 3:94-CR-50BN, 1994 U.S. Dist. LEXIS 11738, at \*13 (S.D. Miss. Aug. 18, 1994) (holding federal law banning possession of machine guns, 18 U.S.C. § 922(o) (1986), to be unconstitutional since Congress did not articulate nexus between gun ownership and interstate commerce); *cf.* Perez v. United States, 402 U.S. 146, 152-53 (1971). The Court held that an antiloansharking statute was constitutional since the proscribed activity fell within a "class of activity" which affected interstate commerce. *Id.* As such, Congress could regulate this activity under the Commerce Clause. *Id.*

<sup>23</sup> *See* Printz v. United States, 854 F. Supp. 1503, 1513 (D. Mont. 1994) (holding Congress could not mandate state enforcement of federal gun control legislation); *cf.* New York v. United States, 112 S. Ct. 2408, 2414 (1992) (holding while Congress has substantial power to regulate interstate commerce, it could not force states to regulate in manner it had chosen for disposal of low-level radioactive waste).

<sup>24</sup> *See* Printz, 854 F. Supp. at 1513 (holding federal gun control law requiring background checks to be unconstitutional because it violated state legislative process); *see also* Kenneth May, Annotation, *Supreme Court's Views as to Validity of Federal Legislation under Tenth Amendment, Providing that Powers not Delegated to United States by Constitution nor Prohibited by it to the States are Reserved to the States or the People*, 72 L. Ed. 2d 956, 959 (1982) (noting that Tenth Amendment requires federal government to share substantial sovereign authority with states).

congressional powers emanating from the Commerce Clause.<sup>25</sup> Part Two will analyze the constitutional problems encountered by recent federal gun control legislation, including an examination of cases ruling on the Gun-Free School Zones Act, Firearm Ownership Protection Act, and the Brady Act. Part Three will consider the specific constitutional problems a national gun license system will face. Part Four will offer suggestions so that such a system will be able to withstand constitutional challenges.

## I. HISTORICAL BACKGROUND

The federalist debate over the proper and intended roles of federal and state governments in American governance provides the jurisprudential framework for courts deciding the numerous cases<sup>26</sup> which have arisen as a result of gun control laws.<sup>27</sup> When examining these laws, it does not matter if one frames the issue as defining the reach of federal power expressly granted under the Constitution or one of determining what rights have been reserved for the states under the Tenth Amendment.<sup>28</sup> In either

<sup>25</sup> U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause provides, in relevant part: "[t]he Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." *Id.*

<sup>26</sup> See, e.g., *United States v. Edwards*, 13 F.3d 291, 293 (9th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 2424 (U.S. Mar. 25, 1994) (No.93-8487). The *Edwards* court diverged from the opinion of the court in *Lopez*, ruling that the Gun-Free School Zones Act was constitutional, since "it was reasonable for Congress to conclude that possession of firearms represents a class of activities which affects interstate commerce." *Id.*; *United States v. Lopez*, 2 F.3d 1342, 1367 (5th Cir. 1993) (ruling Gun-Free School Zones Act unconstitutional because Congress lacked authority to enact it under commerce clause), *cert. granted*, 1145 S. Ct. 1536 (1994); *United States v. Evans*, 928 F.2d 858, 862 (9th Cir. 1991) (holding Firearms Owners' Protection Act to be constitutional exercise of congressional power under commerce clause); *United States v. Glover*, 842 F. Supp. 1327, 1337 (D. Kan. 1994) (ruling that rational nexus to interstate commerce could be found for prohibitions on possession of firearms in school zones); *United States v. Trigg*, 842 F. Supp. 450, 453 (D. Kan. 1994) (ruling Gun-Free School Zones Act unconstitutional because it was beyond Congress's power under commerce clause); *United States v. Ornelas*, 841 F. Supp. 1087, 1092 (D. Colo. 1994) (upholding Gun-Free School Zone Act since "Congress reasonably could have found that a nexus exists between the class of activity regulated . . . and interstate commerce").

<sup>27</sup> See *New York v. United States*, 112 S. Ct. 2408, 2417-19 (1992) (discussing framework of government's division of authority and its constitutional implications); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425-36 (1819) (deciding states do not have power to tax federal bank); see also Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 14 (1950) (arguing that Tenth Amendment was not intended to affect division of power between federal and state governments and when laws of each conflicted, Constitution should be read as whole in interpretation).

<sup>28</sup> See *New York v. United States*, 112 S. Ct. 2408, 2419 (1992) (holding unconstitutional challenged provisions of Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240, 99 Stat. 1842 (codified at 42 U.S.C. § 2021B)).

case, one must determine whether the law crosses the division between federal and state authority.<sup>29</sup>

The Tenth Amendment's<sup>30</sup> force derives from Article I of the Constitution, which grants Congress numerous powers, including the power to tax<sup>31</sup> and to regulate interstate commerce.<sup>32</sup> Congress has used these powers to legislate on a constantly expanding list of topics.<sup>33</sup> History shows, however, that the Framers of the Constitution envisioned a far more restricted role for the federal government.<sup>34</sup> Within a federalist structure, state governments were to have "dual sovereignty"<sup>35</sup> with the federal government. Accordingly, the power of each level of government would be balanced against the other, although each would be supreme within its sphere.<sup>36</sup> The Tenth Amendment was passed to preserve the

<sup>29</sup> *New York v. United States*, 112 S. Ct. 2408, 2419 (1992). The Court ascertained that the affirmative provisions of the Constitution in conjunction with the core sovereignty which States are to retain under the Tenth Amendment, should be a severe limitation on the scope of federal authority. *Id.* Application of this theory to the Low-Level Radioactive Waste Policy Amendments Act of 1985 led the Court to its determination that the federal government had overstepped the boundary of its delegated power. *Id.*

<sup>30</sup> U.S. CONST. amend. X; see *United States v. Darby*, 312 U.S. 100, 124 (1941) (stating that Tenth Amendment is "but a truism that all is retained which has not been surrendered").

<sup>31</sup> U.S. CONST. art. I, § 8, cl. 1 (granting Congress "Power to lay and collect Taxes").

<sup>32</sup> U.S. CONST. art. I, § 8, cl. 3 (granting Congress power "[t]o regulate Commerce . . . among the several States").

<sup>33</sup> See 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, 496 (1993). "The federal government is omnipresent and all powerful, regulating virtually every aspect of our social and economic life." *Id.*; see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964) (upholding congressional regulation of private motel); *Amesbach v. City of Cleveland*, 598 F.2d 1033, 1037-38 (6th Cir. 1979) (upholding operation of municipal airport); *Gold Cross v. Kansas City*, 538 F. Supp. 956, 968 (W.D. Mo. 1982) (upholding federal regulation of ambulance services).

<sup>34</sup> See *New York v. United States*, 112 S. Ct. 2408, 2418 (1992) (noting that Congress now legislates in areas never intended by Framers); *Gregory v. Ashcroft*, 501 U.S. 452, 452 (1991) ("The states retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.") *Id.*; Corwin, *supra* note 27, at 22 (arguing that restrictive effect of American federalism on national government inspired both "westward expansion of population" and later "laissez faire" attitude toward business at turn of century); cf. LEWIS D. EIGEN & JONATHAN P. SEGAL, *THE MACMILLAN DICTIONARY OF POLITICAL QUOTATIONS* 362 (1992). From a speech by former U.S. Congressman and Senator Stephen A. Douglas in Chicago, Illinois on July 9, 1858:

[There is] no right of Congress . . . to force a good thing upon a people who are unwilling to receive it. The great principle is the right of every community to judge and decide for itself whether a thing is right or wrong, whether it would be good or evil to adopt it . . . . Whenever you put a limitation upon the right of any people to decide what laws they want, you have destroyed the fundamental principle of self-government.

*Id.*

<sup>35</sup> See *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). The Court stated: "[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government."

*Id.*

<sup>36</sup> See *Gregory*, 501 U.S. at 458. In *Gregory*, the Court noted in dictum:

division of authority and to limit Congress to its enumerated powers.<sup>37</sup> To some degree, the Tenth Amendment implicitly played this role during its first 150 years as the United States Supreme Court struggled to define the reach of congressional powers under the Commerce Clause.<sup>38</sup>

The Supreme Court underwent a dramatic shift in judicial philosophy in 1937, becoming more permissive of federal regulations.<sup>39</sup> As a result, many of its earlier decisions were abandoned or overturned.<sup>40</sup> This marked a historical low point for the restrictive effect of the Tenth Amendment,<sup>41</sup> as federal efforts to combat

Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

*Id.*; Levy, *supra* note 33, at 493 (discussing supremacy of federal enumerated powers).

<sup>37</sup> See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (holding Congress had right to establish national bank, while noting, in dicta, that government was one of enumerated powers); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803) (discussing that federal government was to be limited to its enumerated powers); *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *cert. granted*, 114 S. Ct. 1536 (1994). Federal powers are intended to be "few and defined," while the powers "to remain in the [state] governments are numerous and indefinite." *Id.* (quoting THE FEDERALIST No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961)); see also GERALD GUNTHER, CONSTITUTIONAL LAW 78 (12th ed. 1991). "[T]he Tenth Amendment was designed to allay fears . . . frequently expressed in the ratification debates . . . of an excessively powerful, excessively centralized national government." *Id.*

<sup>38</sup> See *Houston E. & W. Texas Ry. Co. v. United States*, 234 U.S. 342, 354 (1914) (sustaining federal legislation regulating rail rates which discriminated against interstate railroad traffic); *United States v. E.C. Knight Co.*, 156 U.S. 1, 16-17 (1895). Striking down use of the Sherman Act against sugar refineries, the Court stated that Congress did not have authority under the Commerce Clause to reach a monopoly in manufacturing. *Id.*

In the New Deal Era of the 1930's, Congress responded to a severe economic crisis with legislation on issues once considered strictly state responsibilities. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 303-04 (1936) (invalidating Bituminous Coal Conservation Act of 1936, in part, on Commerce Clause grounds); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935) (striking down application of National Industrial Recovery Act of 1933, 15 U.S.C. § 703 (1933), to interstate activity as beyond Congress's Commerce Clause powers).

<sup>39</sup> See *United States v. Darby*, 312 U.S. 100, 118 (1941) (upholding Congress's power to regulate goods through imposition of minimum wage); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (expanding Congress's power under Commerce Clause to intrastate activities that have close and substantial relation to interstate commerce).

<sup>40</sup> See Levy, *supra* note 33, at 495 (discussing Court's dramatic shift in 1937 leading to expansion of federal power after *Jones & Laughlin Steel*, 301 U.S. at 46, which upheld the National Labor Relations Act). See generally Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 676-85 (1946) (arguing that President Roosevelt's court-packing plan prompted Supreme Court to validate expansion of federal regulation).

<sup>41</sup> See William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1713 (1985). The Supreme Court has found legislation enacted by Congress under the Commerce Clause to be unconstitutional only three times since 1936. See *New York v. United States*, 112 S. Ct. 2408, 2435 (1992) (holding Low-Level Radioactive Waste Policy Amendments Act of 1985 was unconstitutional); *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985);



national problems repeatedly superseded conflicting states' interests.<sup>42</sup> The Court further expanded congressional authority in *Perez v. United States*,<sup>43</sup> when it ruled that an antiloansharking statute was constitutional.<sup>44</sup> The Court found that the prohibited activity belonged to a "class of activity" which had a substantial effect on interstate commerce, despite the fact that the activity in question was itself local and did not involve any interstate commerce.<sup>45</sup>

In 1976, Chief Justice William Rehnquist heralded a change in the Supreme Court's approach to such cases in *National League of Cities v. Usery*.<sup>46</sup> The majority opinion struck down the application of the Fair Labor Standards Act ("FLSA")<sup>47</sup> to state employees, ruling that the intended use of the federal minimum wage law was an impermissible attempt to encroach upon an area of "traditional state function."<sup>48</sup> When the Court determined that the FLSA violated the Tenth Amendment, it seemed to indicate a return to its earlier appreciation of state sovereignty.<sup>49</sup>

*Oregon v. Mitchell*, 400 U.S. 112 (1970), *reh'g denied sub nom.*, *Texas v. Mitchell*, 401 U.S. 903 (1971); see also *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (expanding Congress's power under Commerce Clause to local activity "if it exerts a substantial economic effect on interstate commerce"); *Darby*, 312 U.S. at 115 (1941) (holding that Commerce Clause provides Congress with plenary power so long as constitutional prohibitions are not infringed); *Jones & Laughlin Steel*, 301 U.S. at 43 (upholding National Labor Relations Act).

<sup>42</sup> See *Levy*, *supra* note 33, at 496. The determinative factor in many decisions reviewing congressional legislation from the post-New Deal era was whether the proscribed federal action fell within the scope of federal powers, most typically the Commerce Clause. *Id.* at 495-96. The legislation's detrimental effect on state sovereignty was typically not considered; the Court's inquiry at that time was limited to "whether the federal action was within the scope of federal power." *Id.* at 496; William A. Hazeltine, *New York v. United States: A New Restriction on Congressional Power Vis-a-Vis the States?*, 55 Ohio St. L.J. 237, 237 (1994). The author stated: "From 1937 until present, the Supreme Court has interpreted the Commerce Clause as a plenary grant of power to Congress, subject only to other constitutional restraints." *Id.*

<sup>43</sup> 402 U.S. 146 (1971).

<sup>44</sup> *Id.* at 156.

<sup>45</sup> *Id.* at 153. The Court noted that defendant is a "member of the class which engages in 'extortionate credit transactions'" and that this group has the requisite definiteness to be considered a class for regulatory purposes by Congress. *Id.*

<sup>46</sup> 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

<sup>47</sup> Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1938).

<sup>48</sup> *National League*, 426 U.S. at 851-52. The FLSA violated the Tenth Amendment's preservation of states' rights under a traditional state functions test. *Id.* at 845-52. Justice Rehnquist wrote that the congressional exercise of power under the Commerce Clause in this case was not permissible since it impaired the states' ability to "structure employer-employee relationships" in traditional areas of state government like "fire prevention, police protection, sanitation, public health and parks and recreation." *Id.* at 851.

<sup>49</sup> *National League*, 426 U.S. at 845 (holding Congress could not regulate "States as States" in areas of traditional state function).

As it turned out, the *National League* decision marked the start of an uncertain path for the Supreme Court, while the Court struggled to find a workable test for cases involving challenges to state sovereignty.<sup>50</sup> The “traditional state functions” test<sup>51</sup> was used to invalidate the FLSA because the Act regulated states as states,<sup>52</sup> addressed matters that indisputably concerned state sovereignty,<sup>53</sup> and impaired states’ “freedom to structure integral operations in areas of traditional government functions.”<sup>54</sup> This test soon ran into difficulty,<sup>55</sup> and it was eventually overturned in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>56</sup>

For many, *Garcia* represented two important realizations by the Court: that federalism issues were to be left for Congress to de-

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 845-52.

<sup>52</sup> *Id.* at 845.

<sup>53</sup> *Id.* at 845-49.

<sup>54</sup> 426 U.S. at 852.

<sup>55</sup> See, e.g., *FERC v. Mississippi*, 456 U.S. 742, 764 (1982). The Court found it unnecessary to address the question of competing federal and state powers when upholding federal legislation. *Id.*; *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 287-88 (1981). The Court upheld the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 (1976 & Supp. III 1991), and distinguished this decision from the Court's decision in *National League* as a law that regulates individuals and not a state. *Id.*

<sup>56</sup> 469 U.S. 528 (1985). In *Garcia*, the Supreme Court decided that the federal minimum wage law could be applied to a municipal mass transit authority. *Id.* at 537-57. The Court reasoned that it was within Congress's commerce powers, *id.* at 546-47, to legislate with respect to states in the same manner in which it regulated private parties. *Id.* at 554. Justice Harry Blackmun noted that the states' role in the political process will prevent unduly burdensome laws from being passed in the first place, *id.*, and that the states' role in the federal system would be protected by the political process. *Id.* at 551.

According to *Garcia*, the most significant limitation on congressional power under the Commerce Clause is the requirement that the regulating activity have a substantial impact on interstate commerce. *Id.* at 546-47. This has been interpreted to require two parts. *Id.* First, there must be a significant number of “interstate transactions.” *Id.* Second, “the regulated activity . . . must have a direct causal nexus to interstate commerce. It is not sufficient that the regulated activity affect another activity which, in turn, has a substantial interstate commerce effect.” *Id.*

Courts have recognized an expanding reach for the Commerce Clause. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824). In *Gibbons*, the Court recognized that Congress can regulate activity “if it exerts a substantial economic effect on interstate commerce.” *Id.* at 196; see also *Wickard v. Filburn*, 317 U.S. 111, 120 (1942) (stating that modern definition of commerce power is at breadth of *Gibbons*); *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1471-72 (9th Cir. 1983) (ruling that Tenth Amendment did not bar FLSA's minimum wage provisions since federal power to regulate commerce did not undermine role of states); *Molina-Estrad v. Puerto Rico Highway Auth.*, 680 F.2d 841, 845-46 (1st Cir. 1982) (concerning state operation of highway authority); *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1037-38 (6th Cir. 1979) (upholding operation of municipal airport); *Gold Cross v. Kansas City*, 538 F. Supp. 956, 968 (W.D. Mo. 1982) (upholding federal regulation of ambulance service). See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 158 (1990). “[T]he expansion of Congress's commerce, taxing and spending powers has reached a point where it is not possible to state that, as a matter of articulated doctrine, there are any limits left.” *Id.*

cide,<sup>57</sup> and that the Commerce Clause was an essentially unlimited source of congressional power.<sup>58</sup> Despite the "virtual blank check"<sup>59</sup> to legislate that Congress had been given by judicial interpretation of the Commerce Clause,<sup>60</sup> states' rights were not entirely forgotten by the Supreme Court.<sup>61</sup> Justice William Rehnquist predicted in his dissent to the five-to-four *Garcia* decision that the federalist principles protected in *National League*<sup>62</sup> would "in time again command the support of a majority of this court."<sup>63</sup>

Rehnquist's prophecy was significantly fulfilled in *New York v. United States*,<sup>64</sup> when the Supreme Court recognized the need to preserve a greater level of state sovereignty.<sup>65</sup> In *New York*, Congress worked closely with states to create a scheme of deadlines and penalties for states to facilitate the disposal of low-level radioactive waste, either singularly or through regional compacts.<sup>66</sup> Writing for the majority, Justice Sandra Day O'Connor sought to reconcile the different approaches taken in *National League* and *Garcia*.<sup>67</sup> She avoided a direct confrontation with the *Garcia* precedent and the cases following it, by categorizing those cases as

<sup>57</sup> See Hazeltine, *supra* note 42, at 243 (gleaning from *Garcia* that state sovereignty would be better protected by political safeguards and not judicial system); Levy, *supra* note 33, at 498 ("[T]he *Garcia* Court concluded that the framers did not intend for the Supreme Court to police the limits of federal power . . ."). See generally Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 908 (1994) (arguing that federalism remains in United States only because it is part of our "collective psychology" and that it is no longer needed).

<sup>58</sup> See Hazeltine, *supra* note 42, at 237. The author interpreted *Garcia*'s holding to be "that there was no judicial role in supervising the scope of the federal commerce power." *Id.*; Levy, *supra* note 33, at 498 (arguing that Framers did not intend for Supreme Court to monitor Congress's power, since political safeguards would prevent abuse).

<sup>59</sup> *United States v. Ornelas*, 841 F. Supp. 1087, 1092 (D. Colo. 1994) (noting that Congress's nearly unrestricted power under the Commerce Clause is repugnant to "separation of powers doctrine").

<sup>60</sup> See *United States v. Morrow*, 834 F. Supp. 364, 365 (N.D. Ala. 1993). District Court Judge William M. Acker, Jr. used hyperbole to note that the expansion of congressional power under the Commerce Clause could lead to regulation of the "air in the soccer ball used on the school playground, or a molecule or two of the milk dispensed in the school cafeteria (especially if the milk is homogenized)." *Id.*

<sup>61</sup> *Id.* (referring to Chief Justice Rehnquist's dissent in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)).

<sup>62</sup> 426 U.S. 833, 852 (1976) (striking down application of federal minimum wage law, Court noted it would have displaced states' authority guaranteed in Constitution).

<sup>63</sup> *Garcia*, 469 U.S. at 580 (Rehnquist, C.J., dissenting).

<sup>64</sup> 112 S. Ct. 2408 (1992).

<sup>65</sup> *Id.* at 2428 (recognizing that it is beyond authority of Congress to directly order states to dispose of waste as Congress directs).

<sup>66</sup> *Id.* at 2415.

<sup>67</sup> *Id.* at 2420. Justice O'Connor characterized *National League* and *Garcia* as congressional attempts to subject states to the same legislation that applied to private individuals

instances in which legislation affecting states was applied to private parties.<sup>68</sup> Instead, *New York* involved a congressional attempt to regulate the states themselves in a specific way, which the Court decided was not within Congress's power.<sup>69</sup> The congressional scheme that developed<sup>70</sup> was ruled an improper usurpation of state power.<sup>71</sup>

Two important themes emerged from the Court's decision in *New York*: a renewed protection for state sovereignty,<sup>72</sup> and the importance of political accountability for public policy decisions.<sup>73</sup> As previously discussed,<sup>74</sup> even with the expansion of federal powers in the postindustrialized era, the legislative intent behind the Tenth Amendment justifies the imposition of restraints on federal legislative authority.<sup>75</sup> Thus, although Justice O'Connor referred to the Tenth Amendment as a mere "tautology,"<sup>76</sup> reminiscent of the Court's Tenth Amendment views in *Garcia*, she nonetheless preserved the Amendment's power to work with other constitutional grants of authority to restrict congressional action if certain

or entities. *Id.* The statute in *New York* differs, since it is an attempt by Congress to direct states "to regulate in . . . a particular way." *Id.* at 2408.

<sup>68</sup> *Id.*

<sup>69</sup> *New York v. United States*, 112 S. Ct. 2408, 2423 (1992) (noting that Commerce Clause "does not authorize Congress to regulate state governments' regulation of interstate commerce").

<sup>70</sup> *Id.* at 2416-17. Congress's plan to eliminate waste under the Low-Level Radioactive Waste Policy Amendment Act of 1985, Pub. L. 99-240, 99 Stat. 1842, included three incentives to encourage states to provide for waste disposal within their borders: monetary incentives, access incentives, and a take-title provision. *Id.*

<sup>71</sup> *Id.* at 2434-35. "State governments are neither regional offices nor administrative agencies of the Federal Government." *Id.* at 2434. In so ruling, Justice Sandra Day O'Connor pointed out that while there may be constitutional ways for the federal government to legislate for the disposal of radioactive waste, the plan chosen is not one of them. *Id.* at 2435.

<sup>72</sup> *Id.* at 2418. In the Court's view, the Tenth Amendment requires inquiry as to "whether an incident of state sovereignty is protected by a limitation on an Article I power." *Id.* "If a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *Id.*

<sup>73</sup> *Id.* at 2424 (noting that since state government officials "will bear the brunt of public disapproval," accountability will be diminished if states act at will of federal officials).

<sup>74</sup> See *supra* notes 39-45 and accompanying text.

<sup>75</sup> *New York v. United States*, 112 S. Ct. 2408, 2421-23 (1992). In considerable detail, Justice O'Connor considered the arguments presented at the Constitutional Convention from which the government's structure developed. *Id.* She noted that the Convention participants settled on the Virginia Plan, which permitted Congress to directly legislate the people and did not require them to legislate through the states with the states approval. *Id.*; see also *supra* notes 37, 42, 47-51, and accompanying text.

<sup>76</sup> *New York*, 112 S. Ct. at 2418. The power of Congress is not restrained by the text of the Tenth Amendment, per se, but rather "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the states." *Id.*

states' rights were infringed.<sup>77</sup> Even the *Garcia* decision, which upheld the application of the Fair Labor Standards Act to municipal workers,<sup>78</sup> acknowledged that the federal legislation in that case would not have been upheld if the *Garcia* Court had determined that it was destructive of state sovereignty.<sup>79</sup>

The *New York* Court also reinforced the idea that political accountability is fundamental and necessary in a democratic system.<sup>80</sup> Permitting federal policy to dictate state actions, which in *New York* involved the politically charged issue of radioactive waste disposal,<sup>81</sup> would, in some cases, force state officials to be accountable for the results of federally mandated policies over which they had no control.<sup>82</sup> If these policies later failed, the federal officials who had devised them would presumably face no repercussions since such policies are typically implemented at the state or local level.<sup>83</sup> Justice O'Connor's concern over this issue also found unlikely support from the *Garcia* case.<sup>84</sup> While the Court in *Garcia* believed the political consequences of the election booth would prevent power-seeking federal politicians from destroying state sovereignty,<sup>85</sup> it did concede the possible need for judicial intervention to correct defects in the political system.<sup>86</sup>

## II. CONSTITUTIONAL PROBLEMS WITH GUN CONTROL LEGISLATION

By not expressly overruling *Garcia*, the Court in *New York* left unsettled the extent of the Tenth Amendment's impact on future cases. Courts reviewing federal gun control laws have interpreted these and other Supreme Court cases differently and, as a result,

<sup>77</sup> *Id.* at 2418.

<sup>78</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985).

<sup>79</sup> *Id.* at 540.

<sup>80</sup> *New York v. United States*, 112 S. Ct. 2408, 2424 (1992); see also Hazeltime, *supra* note 42, at 251 (arguing that without political accountability, citizens will not know who is ultimately responsible for legislation of which they disapprove).

<sup>81</sup> See *New York*, 112 S. Ct. at 2414-15.

<sup>82</sup> See *id.* at 2427. The Court stated: "Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate . . ." *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 (1985); see also *South Carolina v. Baker*, 485 U.S. 505, 512 (1988) (citing *Garcia's* discussion of Tenth Amendment limits on Congress's authority).

<sup>85</sup> See *Garcia*, 469 U.S. at 551 (arguing that through elections disenfranchised voters could throw out politicians with whom they disagreed).

<sup>86</sup> *Id.* at 554; see *Baker*, 485 U.S. at 512 (noting that Court in *Garcia* left open door for possibility of invalidating legislation on Tenth Amendment claim).

the Federal Courts of Appeals disagree as to the constitutionality of these laws.<sup>87</sup> Nonetheless, congressional authority to regulate guns is well established,<sup>88</sup> although the parameters of such legislation are unclear.<sup>89</sup> The following analysis of the judicial interpretation of three federal gun control laws—Gun-Free School Zones Act,<sup>90</sup> Firearm Owners' Protection Act,<sup>91</sup> and the Brady Act<sup>92</sup>—illustrates a renewed appreciation for federalist principles

<sup>87</sup> See *United States v. Lopez*, 2 F.3d 1342, 1348 (5th Cir. 1993) (recognizing restrictions on federal government announced in *New York*, 112 S. Ct. at 2408, court required congressional findings which show nexus between prohibited activity and interstate commerce), *cert. granted*, 1145 S. Ct. 1536 (1994); see discussion *infra* parts II.A., II.B., II.C. But see *United States v. Edwards*, 13 F.3d 291, 294-95 (9th Cir. 1993) (relying on *Perez v. United States*, 402 U.S. 146, 156 (1971), court ruled that Congress did not have to make specific finding of connection to interstate commerce), *petition for cert. filed*, 62 U.S.L.W. 2424 (U.S. Mar. 25, 1994) (No. 93-8487).

<sup>88</sup> See *Huddleston v. United States*, 415 U.S. 814, 833 (1974) (noting that Congress has power to regulate sale of handguns since they affect interstate commerce); *United States v. Lopez*, 2 F.3d 1342, 1347-50 (5th Cir. 1993), *cert. granted*, 114 S. Ct. 1536 (1994). In *Lopez*, the bench reviewed four major crime bills regulating the ownership of certain types of firearms: 1) National Firearms Act of 1934, I.R.C. § 5801-5872, 48 Stat. 1236-40 (imposing \$200 tax on transfer of certain weapons based on Congress's power to tax under U.S. CONST. art. I, § 8, cl. 1); 2) Federal Firearms Act of 1938, 52 Stat. 1250 (repealed 1968) (requiring firearm dealers to get federal license and prohibiting interstate shipment of firearms to felons, persons under indictment for felonies, and persons lacking permits, if such were required by state laws); 3) Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351 (requiring federal license "for any person . . . to engage in business of importing, manufacturing, or dealing in firearms, or ammunition" even though business did not operate in interstate commerce); and 4) Crime Control Act of 1990, Pub. L. No. 101-647 (quoting H.R. Rep. No. 101-681(I), 101st Cong., 2d Sess. 106, *reprinted in* 1990 U.S.C.C.A.N. 6472, 6510) (prohibiting transfer of firearms to "an alien or transient who does not reside in the State in which the transferor resides"). 2 F.3d at 1348-60; *Mack v. United States*, 856 F. Supp. 1372, 1379 (D. Ariz. 1994) (discussing Congress's "raw power to regulate the transfer of handguns"); cf. Ann-Marie White, *A New Trend in Gun Control: Criminal Liability for the Negligent Storage of Firearms*, 30 Hous. L. Rev. 1389, 1393 (1993) (commenting that common law restrictions on right to bear arms have existed since 1328).

<sup>89</sup> See, e.g., *United States v. Bownds*, No. 3:94-CR-50BN, 1994 U.S. Dist. LEXIS 11738, at \*12 (S.D. Miss. Aug. 18, 1994). Chief Judge William H. Barbour, Jr. explained: "This Court is concerned over the increasing federalization of crime by Congress, when such federalization occurs in apparent disregard of the Tenth Amendment mandate that rights not delegated to the federal government be reserved to the states." *Id.* Compare 140 CONG. REC. H67, 2 (daily ed. Jan. 26, 1994) (statement of Rep. Owens: "[T]he Federal Government has the right to regulate the ownership of guns by individuals in any way they see fit. They can regulate guns, they can require licensing, they can place taxes on them.") with 140 CONG. REC. S6078, 63 (daily ed. May 16, 1994) (statement of Sen. Hatch) "Now they want an assault weapons ban . . . to take away the rights of American citizens, as defined in the Second Amendment to keep and bear arms, which is certainly more than a militia right as defined by some today." *Id.*

<sup>90</sup> The Gun-Free School Zones Act, 18 U.S.C. § 922(q) (Supp. II 1990).

<sup>91</sup> The Firearm Owners Protection Act, 18 U.S.C. § 922(o) (1988).

<sup>92</sup> 18 U.S.C. § 922(s) (Supp. V 1993).

in some courts<sup>93</sup> and continued affinity for congressional expansionism in others.<sup>94</sup>

### A. Gun-Free School Zones Act

Designed to address the rising problem of violence in schools and the increased gun use linked to the national drug problem,<sup>95</sup> the Gun-Free School Zones Act<sup>96</sup> was passed in 1990. This Act made it a federal crime to possess a firearm within 1000 feet of a school.<sup>97</sup> The United States Court of Appeals for the Fifth Circuit provided the forum for the first challenge to this law's constitutionality after Alfonso Lopez Jr. was arrested at Edison High School in San Antonio, Texas for carrying an unloaded .38 caliber handgun and five bullets.<sup>98</sup>

The court in *United States v. Lopez*<sup>99</sup> echoed the sentiments of Justice O'Connor in *New York v. United States*<sup>100</sup> when it concluded that a state's sovereignty traditionally dictates regulation of the possession of guns and such state authority could not be infringed upon by the congressional mandate of section 922(q) of

<sup>93</sup> See *United States v. Lopez*, 2 F.3d 1342, 1367-68 (5th Cir. 1993) (holding that state sovereignty was infringed upon by Gun-Free School Zone Act), *cert. granted*, 114 S. Ct. 1536 (1994); *United States v. Bownds*, No. 3:94-CR-50BN, 1994 U.S. Dist. LEXIS 11738, at \*13 (S.D. Miss. Aug. 18, 1994) (ruling that Firearm Owners' Protection Act, 18 U.S.C. § 922(o) (1986), which made it federal crime to possess machine gun, was unconstitutional because Congress failed to articulate connection between gun ownership and interstate commerce); *Mack v. United States*, 856 F. Supp. 1372, 1375 (D. Ariz. 1994) (ruling Brady Act unconstitutional since Congress had exceeded authority under Art. I, § 8 of the U.S. Constitution); *United States v. Cortner*, 834 F. Supp. 242, 242 (M.D. Tenn. 1993) (determining that federal carjacking statute, 18 U.S.C. § 2119 (1992), was unconstitutional because it exceeded Congress's commerce power); *cf. DON B. KATES, JR., FIREARMS AND VIOLENCE, ISSUES OF PUBLIC POLICY* 16 (1984) (arguing that because crime control is state issue, federal action needs some affirmative constitutional authority).

<sup>94</sup> See *United States v. Edwards*, 13 F.3d 291, 292 (9th Cir. 1993) (holding that Gun-Free School Zones Act was constitutional exercise of congressional power).

<sup>95</sup> See H.R. Rep. No. 1015, 101st Cong., 2d Sess. 249 (1990) (subcommittee discussing gun violence in schools); 135 CONG. REC. E3988, 164 (1989) (statement of Rep. Feighan). When the Gun-Free School Zones Act of 1990 was introduced, Representative Feighan noted specific acts of violence in schools in Illinois, California, and New York. *Id.* He also stated that "because guns and drugs often are found in close proximity, eliminating guns will contribute to the war against drugs." *Id.*

<sup>96</sup> 18 U.S.C. § 922(q) (Supp. II 1990).

<sup>97</sup> 18 U.S.C. § 922(q)(1)(A) (Supp. II 1990) (making it federal crime to "knowingly possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone").

<sup>98</sup> See *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *cert. granted*, 114 S. Ct. 1536 (1994); Marcia Coyle, *Justices Tackle Term Limits, Guns and Beer*, NAT'L L.J., Oct. 3, 1994, at A1 (describing facts of case, Ms. Coyle reported that Alfonso Lopez was arrested for violating federal law when he arrived at Edison High School in San Antonio, Texas).

<sup>99</sup> 2 F.3d 1342 (5th Cir. 1993), *cert. granted*, 114 S. Ct. 1536 (1994).

<sup>100</sup> See *supra* notes 76-79 and accompanying text.

the Gun-Free School Zones Act.<sup>101</sup> The court reasoned that Congress had failed to properly invoke its powers under the Commerce Clause when it enacted this legislation.<sup>102</sup> Absent a clear nexus between the possession of a gun within 1000 feet of a school and interstate commerce, the court ruled that the Gun-Free School Zones Act was unconstitutional.<sup>103</sup> The court in *Lopez* distinguished the rationale of earlier rulings from the courts of the Eighth<sup>104</sup> and Ninth<sup>105</sup> Circuits, which upheld a different provision of section 922, stating that those courts seemed to rely on weak congressional findings and legislative history of bills that never became law.<sup>106</sup>

In stern language, the *Lopez* court demanded that in the future, Congress clearly articulate the constitutional basis for its actions when it endeavors to expand its powers.<sup>107</sup> Apparently acknowl-

<sup>101</sup> *Lopez*, 2 F.3d at 1364. "[T]he general control of simple firearms possession by ordinary citizens, [has] traditionally been a state responsibility, and section 922(q) indisputably represents a singular incursion by the Federal Government into territory long occupied by the States." *Id.*

<sup>102</sup> *Id.* at 1365.

<sup>103</sup> *Id.* (discussing that in order to expand congressional authority in manner this act intends, there must be clear expression of Congress's intent); see also *United States v. Morrow*, 834 F. Supp. 364, 365 (N.D. Ala. 1993) (noting that "Commerce Clause [power] is not infinite," so Congress must articulate nexus to interstate commerce in order to expand its authority). *But see* *United States v. Holland*, 841 F. Supp. 143, 144 (E.D. Pa. 1993) (finding Gun-Free School Zone Act to be proper exercise of Congress's authority under Commerce Clause, since "Congress need not make specific findings" of connection to interstate commerce).

<sup>104</sup> *United States v. Hale*, 978 F.2d 1016, 1018 (8th Cir.), *cert. denied*, 113 S. Ct. 1614 (1993). "We conclude, as did the Ninth Circuit on similar grounds, that 18 U.S.C. § 922(o) (1988) is within the authority granted to Congress by the Commerce Clause." *Id.*

<sup>105</sup> *United States v. Evans*, 928 F.2d 858, 862 (9th Cir. 1991). The court stated:

Congress need not make specific findings of fact to support its conclusion that a class of activity affects interstate commerce. It was . . . reasonable for Congress to conclude that the possession of firearms affects the national economy, if only through the insurance industry. . . . [T]his rather tenuous nexus between the activity regulated and interstate commerce is sufficient.

*Id.*

<sup>106</sup> See *Lopez*, 2 F.3d at 1356. *Evans* and *Hale* sustained the Firearm Owners Protection Act § 922(o), "in reliance on Congressional findings that appear to us to be inapplicable in the present context . . ." *Id.* For example, *Hale* notes the legislative history of H.R. 3155 and H.R. REP. No. 495, 99th Cong., 2d Sess. 1-5 (1986), reprinted in 1986 U.S.C.C.A.N. 1327, 1327-31, which were to outline the possession of machine guns. *Lopez*, 2 F.3d at 1350. However, the court felt "it would be entirely inappropriate to consider [this bill and report] as having any relevance beyond machine guns . . ." *Id.* at 1356-57.

<sup>107</sup> See *Lopez*, 2 F.3d at 1359-64. "Courts cannot properly perform their duty to determine if there is any rational basis for a Congressional finding if neither the legislative history nor the statute itself reveals any such relevant finding." *Id.* The court pointed to H.R. Rep. No. 101-681 (I), 101st Cong., 2d Sess. 69 (1990), the report accompanying the Crime Control Act of 1990, Pub. L. No. 101-647, 101st Cong., 2d Sess., 104 Stat. 4789-4968, which made no mention of the impact of the Gun Free School Zone Act on interstate commerce. *Id.* at 1359. In addition, the court noted that when President George Bush signed



edging its omission, Congress later amended the Gun-Free School Zones Act with an express statement articulating the bill's nexus to interstate commerce.<sup>108</sup> It remains to be seen if the Supreme Court will give any weight to this postenactment action.

The Ninth Circuit Court of Appeals rejected the *Lopez* court's approach in *United States v. Edwards*<sup>109</sup> when it found the Gun-Free School Zones Act to be "a permissible exercise of congressional authority under the Commerce Clause."<sup>110</sup> Fundamental to the *Edwards* court's divergence from the earlier ruling was a narrow interpretation of two earlier decisions—*Perez v. United States*,<sup>111</sup> which upheld a federal antiloansharking statute, and *United States v. Evans*,<sup>112</sup> a Ninth Circuit gun control case that followed the *Perez* rationale.<sup>113</sup>

The court in *Edwards* cited the *Perez* decision for the proposition that specific congressional findings of a connection between the regulated activity and interstate commerce are not required for the court to determine that a "reasonable" Congress would find such a nexus.<sup>114</sup> Yet, despite the Court's holding in *Perez*, legislative history of the antiloansharking law involved in that case

the bill, he remarked that it lacked the necessary connection to interstate commerce to be constitutional. *Id.* at 1360.

<sup>108</sup> See 18 U.S.C. § 922(q) (Supp. II 1990). The amendment stated in relevant part: (1)(A) Crime, particularly crime involving drugs and guns, is a pervasive nationwide problem; (B) Crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs; (C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools . . . ; (D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce . . . ; (G) [a] decline in the quality of education has an adverse impact on interstate commerce . . . .

*Id.*; see also 1994-95 Term Opens; Breyer Seated; Other Developments, FACTS ON FILE WORLD NEWS DIGEST, Oct. 6, 1994, at 727 C3 [hereinafter 1994-95 Term Opens]. "Congress had amended the language of a crime bill that was passed in August to link the movement of guns in interstate commerce with the impact the resulting violence had on the quality of education." *Id.*

<sup>109</sup> 13 F.3d 291 (9th Cir. 1993).

<sup>110</sup> *Id.* at 292. The court recognized the conflict between a previous Ninth Circuit decision, *United States v. Evans*, 928 F.2d 858 (9th Cir. 1991), and the Fifth Circuit decision in *Lopez*, but decided to follow their decision in *Evans*. 13 F.3d at 294; see *supra* notes 113-23 and accompanying text.

<sup>111</sup> 402 U.S. 146 (1971).

<sup>112</sup> 928 F.2d 858, 862 (9th Cir. 1991).

<sup>113</sup> *Id.* at 862 (agreeing with *Perez*, 402 U.S. at 152-56, that court must determine if reasonable Congress would find that class of activity regulated affects interstate commerce).

<sup>114</sup> *Edwards*, 13 F.3d at 295 ("Congress need not make particularized findings in order to regulate"); see also *United States v. Perez*, 402 U.S. 146, 154 (1971) (citing *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119). The Court noted that under the Commerce Clause, Congress has the power to regulate "those activities intrastate which so affect in-

reveals a well-discussed connection by Congress between the regulated activity and interstate commerce.<sup>115</sup> Thus, the *Edwards* court's reliance on *Perez* suggests an implicit recognition of the importance of articulating a connection to interstate commerce. It must be noted, however, that *Perez* upheld the federal statute in that case because it determined that loansharking belonged to a "class of activity" that, due to market or competitive forces as determined by Congress, would affect interstate commerce.<sup>116</sup> Similar congressional findings do not exist for the Gun-Free School Zones Act.<sup>117</sup> Absent such findings, as the *Lopez* court noted, it is injudicious for the bench to determine that the mere possession of a weapon will affect market forces in the way loansharking did.<sup>118</sup>

The court in *Edwards* also relied heavily upon *United States v. Evans*,<sup>119</sup> which upheld a federal statute prohibiting the possession of machine guns.<sup>120</sup> The *Edwards* bench stated that it was compelled to do so absent an intervening Supreme Court decision preventing Congress from so expanding federal powers.<sup>121</sup> The *New York* case, however, seemed to provide the Fifth Circuit with the judicial intervention it required—a strong statement of the

terstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end . . . ." 402 U.S. at 151.

<sup>115</sup> *Perez*, 402 U.S. at 155-56. The Supreme Court decided that an activity regulated by states, such as loansharking, is a national concern and within Congress's power to regulate. *Id.* Legislative history included the McDade Amendment, see 114 CONG. REC. 14,391 (1967), which was based upon a report that found that loansharking was "one way by which the underworld obtains control of legitimate businesses." *Perez*, 402 U.S. at 155. Congress also knew about a report entitled *New York's Report, An Investigation of the Loan Shark Racket*, see 114 CONG. REC. 1428-31 (1965), which found that although the loansharking transactions may have been purely local in nature, "they nevertheless directly affect interstate and foreign commerce." *Perez*, 402 U.S. at 155-56.

<sup>116</sup> *Perez*, 402 U.S. at 155-56.

<sup>117</sup> See 135 CONG. REC. E3988, 164 (1989) (announcing intention of bill "to address the devastating tide of firearm violence in our nation's schools," without noting connection to interstate commerce). *Id.*

<sup>118</sup> Cf. 1994-95 Term *Opens*, *supra* note 108, at 727 C3 (noting that National Conference of State Legislators and National Governors Association were opposed to bill); Coyle, *supra* note 98, at A1. According to Anthony T. Case of Sacramento, California's Pacific Legal Foundation, an amicus party supporting Mr. Lopez: "This is an issue of local crime. We think there are some limits to congressional power and hope the court will recognize that." *Id.*

<sup>119</sup> 928 F.2d 858 (9th Cir. 1991).

<sup>120</sup> *Id.* at 862.

<sup>121</sup> See *Edwards*, 13 F.3d at 294 (citing *United States v. Frank*, 956 F.2d 872, 882 (9th Cir. 1991)) ("In the absence of an intervening Supreme Court decision or an Act of Congress that nullifies Ninth Circuit precedent, we must adhere to the law of the circuit . . .").

Supreme Court's recognition of the need for restraints on federal authority vis-a-vis the states.<sup>122</sup>

Notwithstanding the effect of *New York*, the *Edwards* court's purported reliance on the stare decisis effect of *Evans*<sup>123</sup> is still misplaced. It is well established in judicial history that a court may depart from a prior court's ruling if it finds significant reasons for doing so.<sup>124</sup> *Evans* based its decision to uphold the Firearms Owners Protection Act,<sup>125</sup> in part, on the connection it found between regulating guns and the effect violence has on the national economy.<sup>126</sup> This connection was based, however, on the general finding that firearms have been used to kill people.<sup>127</sup> The court in *Edwards* seems unjustified in relying on that decision since this overly-broad legislative intention does not indicate how this specific activity sought to be regulated affects interstate commerce.<sup>128</sup>

Judicial confusion on this issue and improper reliance on precedent has led to a related dichotomy of opinion among federal district courts in the Tenth Circuit as well.<sup>129</sup> A week after one dis-

<sup>122</sup> See generally *New York v. United States*, 112 S. Ct. 2408, 2423 (1992) (discussing restraints on congressional power under Commerce Clause).

<sup>123</sup> 928 F.2d 858 (9th Cir. 1991). Creed Evans was arrested for selling machine gun parts in violation of 18 U.S.C. § 922(o) (1986). *Id.* at 859.

<sup>124</sup> See *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2808-09 (1992). Justice O'Connor commented that stare decisis does not require blind adherence to past cases. *Id.* The Court's pragmatic test for examining prior holdings included: whether the court's ruling is still workable; whether the prior court's ruling had been relied upon; whether new rules of law had developed since the past case; whether facts have changed, making the rule insignificant. *Id.*; *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). "Stare decisis is not an inexorable command . . . [w]hen governing decisions are unworkable or are badly reasoned," courts are not required to follow precedent. *Id.*; *Smith v. Allwright*, 321 U.S. 649, 665 (1944) (noting that throughout its history Supreme Court has been free to abandon precedent with which it disagrees); see also Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wisc. L.Rev. 467, 492 (arguing that "absolutely rigid adherence to stare decisis might be inappropriate even where the law is fairly consistent").

<sup>125</sup> 18 U.S.C. § 922(o) (1988).

<sup>126</sup> See *Evans*, 928 F.2d at 862 (noting congressional finding that 750,000 had been killed in United States by firearms since turn of century, "[i]t was thus reasonable for Congress to conclude that the possession of firearms affects the national economy").

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (noting since no specific Constitutional rights are implicated, "tenuous nexus" between national homicides and Act are sufficient); see also *New York*, 112 S. Ct. at 2423. In *New York*, the Court recognized limitations on Commerce Clause powers when it held that Congress could legislate in this area, but not in the manner it had chosen. *Id.*

<sup>129</sup> Compare *United States v. Trigg*, 842 F. Supp. 450, 453 (D. Kan. 1994) (ruling § 922(q) unconstitutional) with *United States v. Glover*, 842 F. Supp. 1327, 1336 (D. Kan. 1994) (holding that § 922 is constitutional) and *United States v. Ornelas*, 841 F. Supp. 1087, 1092 (D. Colo. 1994) (ruling § 922(q) constitutional).

district court in Kansas struck down section 922(o),<sup>130</sup> another district court in the same state ruled that it was a proper exercise of congressional power.<sup>131</sup> In the latter decision, the bench followed the reasoning of the courts in *Perez* and *Edwards*,<sup>132</sup> although it acknowledged that the decision in *Lopez* was persuasive.<sup>133</sup> The Supreme Court is expected soon to rule on the *Lopez*<sup>134</sup> case, which should provide needed guidance to courts considering this statute.

### B. Firearm Owners' Protection Act

The Firearm Owners' Protection Act ("FOPA")<sup>135</sup> makes it unlawful for any person to transfer or possess a machine gun.<sup>136</sup> This Act has been subject to similarly inconsistent judicial interpretation; consider the recent cases of Wendell Ardoin<sup>137</sup> and Charles M. Bownds.<sup>138</sup> Mr. Ardoin, an avid gun dealer and collector, made his living in Louisiana through the purchase and sale of automatic

<sup>130</sup> See *Trigg*, 842 F. Supp. at 453 (D. Kan. 1994). The court ruled § 922(q) unconstitutional since Congress had failed to articulate a nexus between the prohibition and interstate commerce. *Id.* Adhering to the values of federalism, the court followed the *Lopez* rationale from the 5th Circuit and rejected the approach of the court in *Edwards*. *Id.* at 452-53. The court also noted the need to eradicate weapons around schools, but only in a manner consistent with congressional power. *Id.* at 453.

<sup>131</sup> See *Ornelas*, 841 F. Supp. at 1092 (upholding constitutionality of § 922(q) based upon *Perez*, 402 U.S. 146, 152-56, court noted that "Congress need not make new particularized findings of an interstate commerce nexus in order to legislate"); see also *Glover*, 842 F. Supp. at 1336 (upholding constitutionality of § 922(q) since "a rational basis supports a finding that guns affect interstate commerce").

<sup>132</sup> See *Ornelas*, 841 F. Supp. at 1089.

<sup>133</sup> *Id.* at 1094 n.11. The court expressed its frustration that "Congress is stretching the commerce power far beyond its intended scope . . . [to] conduct that does not affect interstate commerce to the states and the people. *Id.* The *Ornelas* court similarly relied on Supreme Court's decision in *Perez* to conclude that a finding of a connection with interstate commerce was not necessary. *Id.* at 1089. Instead "a court must determine whether Congress reasonably could have found a nexus between the class of regulated activity and interstate commerce." *Id.* (citing *Perez*, 402 U.S. at 152 (1971)); see also *Glover*, 842 F. Supp. at 1336. Judge Kelly decided that no congressional hearing was needed to pronounce a nexus between the legislation and interstate commerce because of the seriousness of the problem of guns near schools. *Id.*

<sup>134</sup> 2 F.3d 1342 (5th Cir. 1993), cert. granted, 114 S. Ct. 1536 (1994).

<sup>135</sup> 18 U.S.C. § 922(o) (1988) (enacted as new section to Firearm Owners' Protection Act § 102(a), 100 Stat. 452-53 (1988)).

<sup>136</sup> 18 U.S.C. § 922(o) (1988); see also *United States v. Rock Island Armory, Inc.*, 773 F. Supp. 117, 119 (C.D. Ill. 1991) (interpreting § 922(o) as prohibition on private citizens from possession or transferring machine gun that was not made and registered before May 19, 1986, unless such transfer or possession is authorized by federal or state governments).

<sup>137</sup> *United States v. Ardoin*, 19 F.3d 177, 178 (5th Cir.), cert. denied, 115 S. Ct. 327 (1994).

<sup>138</sup> *United States v. Bownds*, No. 3:94-CR-50BN, 1994 U.S. Dist. LEXIS 11738, at \*2 (S.D. Miss. Aug. 18, 1994).

and semiautomatic weapons to local police departments.<sup>139</sup> On November 6, 1991, he was indicted on fourteen counts of violating FOPA, including charges of possession of machine guns.<sup>140</sup> At about the same time in nearby Jackson, Mississippi, Charles Bownds was arrested for a similar violation of FOPA.<sup>141</sup> It was alleged that Mr. Bownds purchased two Sten machine guns at a gun show in New Jersey for \$300 and later sold them to Randy and Danny Hammond for \$1500.<sup>142</sup>

As with the Gun-Free School Zones Act cases, courts reviewing these unrelated events and other alleged violations of FOPA have focused mainly on the *Perez*-type question: whether a congressionally articulated nexus to interstate commerce is required for legislation enacted under the Commerce Clause.

The general confusion surrounding the interpretation of the gun control statutes is illustrated by the Fifth Circuit's treatment of FOPA in the *Ardoin*<sup>143</sup> and *Bownds*<sup>144</sup> cases. Coming only several weeks after the *Lopez* decision and its favorable treatment of federalist principles,<sup>145</sup> the court in *United States v. Ardoin*<sup>146</sup> found section 922(o) of FOPA to be constitutional, based in part, upon Congress's authority under the Commerce Clause.<sup>147</sup> But the court's assertion that "no one could seriously contend that the regulation of machine guns could not also be upheld under Congress's power to regulate interstate commerce,"<sup>148</sup> seems to ignore the Supreme Court's current federalist sympathies expressed in *New York v. United States*.<sup>149</sup> The reasons for the Fifth Circuit's apparent shift towards the more liberal jurisprudence of the Ninth Circuit are unclear, but the court in *Ardoin* did limit the effects of

<sup>139</sup> *Ardoin*, 19 F.3d at 178-79.

<sup>140</sup> *Id.* at 179.

<sup>141</sup> *Bownds*, 1994 U.S. Dist. LEXIS, at \*1-2.

<sup>142</sup> *Id.* at \*2.

<sup>143</sup> 19 F.3d at 180 (upholding National Firearms Act, 26 U.S.C. §§ 5861(d), (e), (l) and § 7201 (1988), "on the preserved, but unused, power to tax or on the power to regulate interstate commerce").

<sup>144</sup> No. 3:94-CR-50BN, 1994 U.S. Dist. LEXIS 11738 (S.D. Miss. Aug. 18, 1994).

<sup>145</sup> See *supra* note 103 and accompanying text. But see *FERC v. Mississippi*, 456 U.S. 742, 757 (1982) (upholding Public Utilities Regulatory Policies Act even though some of its provisions were not directly related to purpose of fostering interstate commerce).

<sup>146</sup> 19 F.3d 177 (5th Cir.), *cert. denied*, 115 S. Ct. 327 (1994).

<sup>147</sup> *Id.* at 180. *Contra* *United States v. Bownds*, No. 3:94-CR-50BN, 1994 U.S. Dist. LEXIS 11738, at \*13 (S.D. Miss. Aug. 18, 1994) (holding § 922(o) unconstitutional since it would not be "difficult for Congress to find an interstate nexus as a part of its legislative history process").

<sup>148</sup> *Ardoin*, 19 F.3d at 180.

<sup>149</sup> 112 S. Ct. 2408 (1992).

this change by noting in dictum that Congress's power to regulate under the Commerce Clause is not without restrictions.<sup>150</sup>

Interpretation of section 922(o) is likely to be revisited because of the vastly different approaches taken by the district court's adjudication of Mr. Bownds's case. By adhering to the *Lopez* rationale, Chief Judge William H. Barbour, Jr. created a split in the reasoning among the lower courts with his decision in *United States v. Bownds*.<sup>151</sup> Judge Barbour disregarded the *Ardoin* opinion, instead requiring Congress to articulate a nexus between interstate commerce and the regulated activity, and absent such, found the Act beyond Congress's power.<sup>152</sup> The court was notably concerned about threats to state sovereignty caused by the federalization of crime regulations in disregard of the Tenth Amendment.<sup>153</sup>

### C. *The Brady Act*

The Brady Act<sup>154</sup> was enacted in 1993 behind tremendous popular support.<sup>155</sup> Inspired by the assassination attempt on President Ronald Reagan<sup>156</sup> and the "cold, stark figures" of gun-related vio-

<sup>150</sup> *Ardoin*, 19 F.3d at 180 n.5 (noting *Lopez*, court acknowledges some limitations exist on Commerce Clause, but does not explain what limitations are).

<sup>151</sup> *Bownds*, 1994 U.S. Dist. LEXIS 11738, at \*13 (S.D. Miss. Aug. 18, 1994). *Contra* *United States v. Hale*, 978 F.2d 1016, 1018 (8th Cir. 1992) (holding § 922(o) to be constitutional and within Congress's Commerce Clause power since Congress did indicate nexus between regulation of guns and interstate commerce), *cert. denied*, 113 S. Ct. 1614 (1993); *United States v. Evans*, 928 F.2d 858, 862 (9th Cir. 1991) (finding § 922(o) constitutional within Congress's Commerce Clause power, since "Congress need not make specific findings of fact to support its conclusion that a class of activity affects interstate commerce").

<sup>152</sup> *United States v. Bownds*, No. 3:94-CR-50BN, 1994 U.S. Dist. LEXIS 11738, at \*13 (S.D. Miss. Aug. 18, 1994). Chief Judge William H. Barbour, Jr. was unsatisfied with the bill's sparse legislative history, noting that the bill's sponsor, Representative Hughes, provided the only explanation for it. *Id.* at \*4. Hughes had commented that "I do not know why anyone would object to the banning of machine guns." *Id.* at \*4. Judge Barbour concluded it would not have been difficult for Congress to have found the requisite connection to interstate commerce." *Id.* at \*13.

<sup>153</sup> *Id.* at \*12. "[T]he fact that an item is dangerous does not signify, without more, that regulation of that item meets constitutional requirements for avoidance of the mandate of the Tenth Amendment." *Id.* at \*7; see also *Heath v. Alabama*, 474 U.S. 82, 89 (1985) (holding that state is separate sovereign entity from federal government); *Abbate v. United States*, 359 U.S. 187, 195 (1959) (holding primary responsibility for defining crimes lies with state).

<sup>154</sup> 18 U.S.C. § 922(s) (Supp. V 1993).

<sup>155</sup> See H.R. REP. No. 102, 102d Cong., 2d Sess. 47 (1991) (noting Sept. 1990 Gallup poll which found "95 percent of those surveyed support a seven-day waiting period").

<sup>156</sup> *Id.* After the attempt on President Reagan's life on March 30, 1981, "America's collective memory will be forever seared with the images of James Brady and two law enforcement officers lying wounded and bleeding on the sidewalk . . ." *Id.*

lence,<sup>157</sup> the Brady Act nevertheless took seven years to get through Congress, hindered by extraordinarily partisan rhetoric.<sup>158</sup> In part, the law requires the "chief law enforcement officer" ("CLEO") to make a reasonable effort to perform a background check of prospective gun buyers within five days of the request.<sup>159</sup> While public debate focused largely on the waiting period requirement and possible violations of the Second Amendment, it is the background check provision<sup>160</sup> and its Tenth Amendment implications that have been the focus of constitutional scrutiny.<sup>161</sup> The "congressional findings" requirement, which had been the center of debate on the Gun-Free School Zones Act and the Firearm Owners Protection Act,<sup>162</sup> has not been at issue in cases ruling on the Brady Act's constitutionality. Brady decisions have placed more emphasis on the *New York v. United States*<sup>163</sup>-type question:

<sup>157</sup> *Id.* (citing Bureau of Justice Statistics, Department of Justice, July 8, 1990) (reporting that between 1979 and 1987 "criminals armed with handguns assaulted 693,000 people"). *Id.*

<sup>158</sup> See McClurg, *supra* note 8, at 55 (illustrating how both sides in Brady Bill debate resorted to rhetorical fallacies to advance agendas); William A. Rossbach, *Brady Gun Bill Passes in House*, L.A. TIMES, May 15, 1991, at B6 (pointing out that, while Brady Bill is accomplishment, it is only small one, and will hardly bring end to gun-related violence in America); see also Philip Weiss, *A Hoplophobe Among the Gunnies*, N.Y. TIMES, Sept. 11, 1994, § 6 (Magazine), at 66 (stating that partisan rhetoric played prominent part in Crime Bill debate).

<sup>159</sup> 18 U.S.C. § 922(s)(2) (Supp. V 1993); see *supra* note 20 (citing relevant provision of Brady Act).

<sup>160</sup> 18 U.S.C. § 922(s)(2). The statute provides in relevant part:

A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraphs (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever state and local record keeping systems are available and in a national system designated by the Attorney General.

*Id.*

<sup>161</sup> See, e.g., *Mack v. United States*, 856 F. Supp. 1372, 1381-82 (D. Ariz. 1994). The court struck down § 922(s)(2) as violative of the Fifth and Tenth Amendments. *Id.* In addition to the plaintiff's arguments in *McGee*, the plaintiff in *Mack* unsuccessfully argued a violation of the Thirteenth Amendment on the grounds that Brady's enforcement constitutes "involuntary servitude." *Id.* at 1382; *McGee v. United States*, 863 F. Supp. 321, 324 (S.D. Miss. 1994). The plaintiff in *McGee* argued that the Brady Bill violated both Article I, § 8 and the Tenth Amendment "in that it 'commandeers' a state sheriff to administer a federal act regulating gun purchases." *Id.* Moreover, he argues that the penalty section of the Brady Bill is too vague and therefore, violative of the Due Process Clause of the Fifth Amendment. *Id.*; cf. Kimberly Stallings, Book Review, 31 HARV. J. ON LEGIS. 529, 530-31 (1993) (reviewing ERIC LARSON, *LETHAL PASSAGE: HOW THE TRAVELS OF A SINGLE HANDGUN EXPOSE THE ROOTS OF AMERICA'S GUN CRISIS* (1994)). Stallings agreed with the book's author that an "instant" background check may be difficult to implement, considering that "only seventeen percent of United States criminal records were ready to go into the system as of February 1994." *Id.*

<sup>162</sup> See discussion *supra* parts II.A., II.B.

<sup>163</sup> 112 S. Ct. 2408 (1992).

whether Congress has the authority to require local law enforcement officials to perform background checks.<sup>164</sup>

*Printz v. United States*<sup>165</sup> was the first of four decisions in which a portion of the Brady Act was ruled unconstitutional.<sup>166</sup> As with the other cases, a local sheriff brought an action to seek injunctive relief against enforcement of the Brady Act's provision requiring him to perform a background check on individuals seeking to purchase a firearm.<sup>167</sup> The plaintiff, Sheriff Jay Printz, argued that he did not have sufficient resources to perform the background checks.<sup>168</sup> Under the statute, Sheriff Printz faced personal liability for failure to comply.<sup>169</sup>

The *Printz* court found that the Brady Act transgressed the proper "division of authority between the federal and state governments."<sup>170</sup> The bench pointed out that Congress had rejected efforts to make the sheriff-performed background check optional.<sup>171</sup> Although the court did not go so far as to say so, this suggests that the court viewed this legislation to be in violation of the Commerce Clause.<sup>172</sup> The court stated that although Congress can enlist the judicial branch to enforce its policies, it may not directly

<sup>164</sup> See *McGee*, 863 F. Supp. at 324; *Mack v. United States*, 856 F. Supp. 1372, 1382 (D. Ariz. 1994).

<sup>165</sup> 854 F. Supp. 1503 (D. Mont. 1994).

<sup>166</sup> See *McGee v. United States*, 863 F. Supp. 321, 324 (S.D. Miss. 1994) (striking down § 922(s)(2) of Brady Law as violative of Tenth Amendment); *Frank v. United States*, 860 F. Supp. 1030, 1044 (D. Vt. 1994) (holding that § 922(s)(2) violates Tenth Amendment); *Mack*, 856 F. Supp. 1372, 1381-82 (striking down § 922(s) of Brady Act as violative of both Fifth and Tenth Amendments); *Printz*, 854 F. Supp. at 1511-12 (holding that since background check was intended to be mandatory, it was unconstitutional).

<sup>167</sup> See *McGee*, 863 F. Supp. at 324; *Frank*, 860 F. Supp. at 1030; *Mack*, 856 F. Supp. at 1374; *Printz*, 854 F. Supp. at 1506.

<sup>168</sup> See *Printz*, 854 F. Supp. at 1507 (noting testimony of plaintiff "that enforcement of the [Brady] Act forces him to reallocate already limited resources such that he is unable to carry out certain duties prescribed by state law").

<sup>169</sup> See 18 U.S.C. § 924(a)(5) (Supp. V 1993). The statute provides: "Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined not more than \$1,000.00, imprisoned for not more than 1 year, or both."

<sup>170</sup> *Printz v. United States*, 854 F. Supp. 1503, 1513 (D. Mont. 1994); see *United States v. Cortner*, 834 F. Supp. 242, 244 (M.D. Tenn. 1993) (noting that historically, law enforcement has been responsibility of state and local governments, particularly since "we as a nation deplored the idea of a national police force"), *rev'd sub nom. United States v. Osteen*, 30 F.3d 135 (6th Cir. 1994), *petition for cert. filed* (U.S. Oct. 24, 1994) (No. 94-6640); Gould, *supra* note 9, at 1 (discussing federalization of state crimes, including carjacking).

<sup>171</sup> *Printz*, 854 F. Supp. at 1512 (noting that Rep. Steve Schiff's amendment to make performance of background optional was rejected).

<sup>172</sup> *Id.*; see also *McGee v. United States*, 863 F. Supp. 321, 326 (discussing that despite defendant's contentions, Congress intended bill to be mandatory, since it had earlier refused to change statute's wording to allow for nonmandatory checks).



compel states to legislate to "enforce a federal regulatory program."<sup>173</sup>

Federal district courts in Arizona,<sup>174</sup> Mississippi,<sup>175</sup> and Vermont<sup>176</sup> similarly have ruled that the Brady Act exceeded congressional authority. These cases have found that Congress has the authority to legislate on the general subject of guns, but not in the manner which it has chosen.<sup>177</sup>

The political accountability concerns raised in *New York v. United States* are revisited in these cases.<sup>178</sup> The Brady Act requires sheriffs to direct potentially scarce resources toward performance of background checks and away from areas that might be considered a greater priority in their jurisdictions.<sup>179</sup> The court in *Printz* noted that this mandate would force the local sheriff to provide fewer services, for which locally-elected officials would be held unjustly accountable.<sup>180</sup> An Arizona district court, in *Mack v. United States*,<sup>181</sup> expanded on this point, by noting that such a seizure will undermine the purpose of federalism, namely "to ensure that interests of the citizens are adequately represented."<sup>182</sup>

<sup>173</sup> *Printz*, 854 F. Supp. at 1513 (citing *New York v. United States*, 112 S. Ct. 2408, 2420 (1992)).

<sup>174</sup> See *Mack*, 856 F. Supp. 1372, 1379-81 (D. Ariz. 1994). The *Mack* court used a two-prong test to examine the Brady Law. *Id.* First, the court noted that Congress indisputably has the authority to regulate the sale of handguns because they affect interstate commerce. *Id.* at 1379. On the second prong, however, the court questioned the "rational connection" between the background check and the type of regulation desired. *Id.* On the latter point, the court found that Congress did not have the authority to regulate in the manner it had chosen. *Id.* at 1379-80. Therefore, the Brady Law's provision mandating state law enforcement performance exceeded congressional power and violated the Tenth Amendment. *Id.* at 1381. The court also found that the provision violated the Fifth Amendment's Due Process Clause. *Id.* at 1381-82. *Contra* *Koog v. United States*, 852 F. Supp. 1376, 1389 (W.D. Tex. 1994) (ruling that government mandated duties are only temporary and minimal).

<sup>175</sup> See *McGee*, 863 F. Supp. at 326-27. Relying heavily upon *New York v. United States*, 112 S. Ct. 2408 (1992), the court held that Congress could not mandate Sheriff McGee to perform a background check. *McGee*, 863 F. Supp. at 326-27.

<sup>176</sup> See *Frank v. United States*, 860 F. Supp. 1030, 1042-43 n.13 (D. Vt. 1994). In ruling the Brady Law unconstitutional, the court noted that Sheriff Frank's exclusive reliance on the *New York* decision was justified: "[I]f a party is going to rely exclusively on one case, the most recent Supreme Court case discussing the issue at hand is not a bad choice." *Id.*

<sup>177</sup> See *Mack*, 856 F. Supp. at 1379-80 (noting that Congress has "raw power to regulate the transfer of handguns," but did not exercise this power properly in Brady Act).

<sup>178</sup> *Printz*, 854 F. Supp. 1503, 1514-15 (D. Mont. 1994).

<sup>179</sup> *Id.* at 1515 (noting that local governments will be left with choice to divert resources for background checks or raise taxes).

<sup>180</sup> *Id.*

<sup>181</sup> 856 F. Supp. 1372 (D. Ariz. 1994).

<sup>182</sup> *Id.* at 1380.

### III. PROSPECTS FOR A NATIONAL GUN LICENSING SYSTEM: AVOIDING THE PROBLEMS OF *NEW YORK* AND *PEREZ*

Since local efforts to regulate guns have been ineffective in reducing gun trafficking between states and in stemming the tide of gun-related violence,<sup>183</sup> calls for national action do not seem unreasonable. But if the history of gun control legislation serves as any guide to its future, a number of necessary obstacles stand in the way of a national licensing system.<sup>184</sup>

In a general sense, as many of the abovementioned cases reflect, there is a growing concern among judges about the increase in federal criminal legislation,<sup>185</sup> particularly since many of these acts may be illegal under state law or are traditionally regulated by states.<sup>186</sup> These laws place considerable power in federal prosecutors, including discretion to decide which criminals will be prosecuted in state courts and which will face the tougher penalties of federal courts.<sup>187</sup> Thus, in areas where state laws criminalize the same activity, defendants may not be prosecuted in an equal and fair manner.<sup>188</sup>

One constitutional obstacle that has developed to prevent these dangers is the congressional findings requirement discussed in *Perez*<sup>189</sup> and its progeny.<sup>190</sup> Although the Supreme Court is expected to rule on this in the *Lopez* case,<sup>191</sup> at present, the dispute between the Fifth and Ninth Circuits over the need to articulate a nexus with interstate commerce remains unresolved. Since *Brady II* seems "designed to build upon the foundations of the *Brady Act*,"<sup>192</sup> which did not encounter constitutional questions of this

<sup>183</sup> See Mayor Rudolph W. Giuliani, Press Release #171-94, Mayor Giuliani Hails Passage of Assault Weapons Ban (May 5, 1994) (on file with Mayor's Office) (offering support for national gun licensing).

<sup>184</sup> See *supra* parts II.A., II.B., II.C.

<sup>185</sup> See *supra* note 15 and accompanying text (discussing judicial review of gun control laws).

<sup>186</sup> See *Pines*, *supra* note 9, at 1 (noting increase in federal criminal laws traditionally regulated by states).

<sup>187</sup> See *United States v. Ornelas*, 841 F. Supp. 1087, 1094 (D. Colo. 1994) (discussing vast power given to federal prosecutors under federal criminal laws).

<sup>188</sup> *Id.*

<sup>189</sup> *Perez v. United States*, 402 U.S. 146, 153 (1971).

<sup>190</sup> See *United States v. Ardoin*, 19 F.3d 177, 180 (5th Cir.), *cert. denied*, 115 S. Ct. 327 (1994); *United States v. Edwards*, 13 F.3d 291, 295 (9th Cir. 1993); *United States v. Evans*, 928 F.2d 858, 862 (9th Cir. 1991).

<sup>191</sup> 2 F.3d 1342 (5th Cir. 1993), *cert. granted*, 114 S. Ct. 1536 (1994).

<sup>192</sup> See 140 CONG. REC. S2172 (daily ed. Mar. 1, 1994) (statement of Sen. Metzbaum introducing *Brady II* on day *Brady Act* went into effect).

sort, it can be presumed that review of this legislation will produce the same result.

Another, more troublesome, concern is raised by *New York v. United States*,<sup>193</sup> and illustrated in the Brady cases, regarding congressional use of state and local government to implement federal policy.<sup>194</sup> Such mandates weaken the current law enforcement operations, run best at the local level, and diminish the political accountability necessary from leaders at every level of a democratic government.<sup>195</sup> Directing states to issue licenses and administer a safety course, as Brady II would require,<sup>196</sup> could reasonably be construed as an impermissible federal mandate of state action.

#### IV. CONCLUSION

To avoid the pitfalls of earlier gun control legislation, sponsors of the national gun licensing system should explain the connection between the proposed regulations and gun trafficking, which affects interstate commerce. There should be little difficulty in accomplishing this through congressional hearings. Next, the source of funding for the mandates described in Brady II is unclear. The federal government could finance all or part of the license program, although this is unlikely due to the expense. This would avoid the problem of the allocation of limited resources described in *Printz*.<sup>197</sup> Otherwise, state participation could be voluntary, but encouraged by monetary incentives, perhaps linking this

<sup>193</sup> 112 S. Ct. 2408, 2423 (1992) (recognizing Congress has authority to regulate radioactive waste, but not in manner they had chosen).

<sup>194</sup> See *id.* at 2423. Congress has the power to regulate interstate commerce directly, but may not force state governments to legislate on Congress's behalf. *Id.*; *Printz v. United States*, 854 F. Supp. 1503, 1513 (D. Mont. 1994) (holding that federal government could not require state or local officials to perform functions required to enforce Brady Act).

<sup>195</sup> See *Printz*, 854 F. Supp. at 1514-15. The court discussed how the local law enforcement officer is still accountable to his constituents even though the federal official is not. *Id.* The *Printz* court raised the importance of accountability for two reasons: to ensure that politicians take responsibility for unpopular decisions and in the use of legislative resources, to address problems important to state citizens. *Id.* at 1514. Law enforcement officers will still be accountable for their resources, even after they have been diverted by congressional mandates. *Id.* at 1515. See generally Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 Nw. U. L. Rev. 577, 639-65 (1985) (discussing, at length, wisdom behind theory of political accountability).

<sup>196</sup> S. 1882, 103d Cong., 2d Sess. § 101(a) (1994) (obtaining state handgun license conditioned upon receiving handgun safety certificate from state's chief law enforcement officer).

<sup>197</sup> 854 F. Supp. at 1515; see also *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) ("Congress may attach conditions on the receipt of funds.").

requirement to an existing grant program.<sup>198</sup> In either case, it seems clear from the Supreme Court's current trend towards a more federalist jurisprudence that a direct mandate to implement a national licensing system will not pass constitutional muster.

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<sup>198</sup> See *Dole*, 483 U.S. at 206 (noting that Congress may add conditions to receipt of federal funds, such as linking federal highway funds to enactments of minimum drinking age); *Linton v. Commissioner of Health and Env't*, 973 F.2d 1311, 1313 (6th Cir. 1992) (discussing how Tennessee is required to conform to federal rules under Title XIX if it wants to receive subsidies); *Massachusetts Dep't of Pub. Welfare v. Yeutter*, 947 F.2d 537, 546 (1st Cir. 1991) (stating that U.S.D.A. had authority to withhold funds for noncompliance); *Milwaukee City Pavers Ass'n. v. Fielder*, 710 F. Supp. 1532, 1545 (W.D. Wis. 1989). The court held that "[w]here . . . a state program is enacted to implement federal legislation imposing specified requirements on the state . . . the state program should be considered a subsidiary part of the federal legislation." *Id.*

