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**CAN CONGRESS REGULATE FIREARMS?:
PRINTZ v. UNITED STATES AND THE INTERSECTION OF
THE COMMERCE CLAUSE, THE TENTH AMENDMENT, AND
THE SECOND AMENDMENT¹**

The recent U.S. Supreme Court decision in Printz v. United States restricted congressional legislative authority by striking down the interim provisions of the Brady Handgun Violence Prevention Act. The decision followed United States v. Lopez, in which the Court struck down the Gun-Free School Zones Act. In both cases, the Court restricted the congressional Commerce Power and renewed the strength of the Tenth Amendment in protecting states' rights from federal intrusion.

Because both cases involved statutes regulating firearms, however, they also raised important questions regarding the Second Amendment. Following the Lopez decision, some commentators argued that both the Tenth and Second Amendments restrict Congress' ability to regulate firearms. Now, after Printz, commentators are likely to argue again that the Court has placed a further significant restriction on federal firearms regulation.

This Note argues that, while Printz raised important questions about the Commerce Power, the Tenth Amendment, and the Second Amendment, Congress' authority to regulate firearms remains substantially intact. The Note demonstrates this by examining the Printz case in the context of the Court's developing Tenth Amendment/Commerce Clause jurisprudence and its longstanding Second Amendment jurisprudence. The Note also proposes that the Supreme Court should reaffirm clearly its "states' rights" interpretation of the Second Amendment to settle the debate over Congress' authority to regulate firearms.

* * *

With its decision in *Printz v. United States*,² the United States Supreme Court continued to pare back congressional lawmaking authority under the Commerce Clause and to affirm the Tenth Amendment as a renewed force in the constitutional law of the United States. The Court's decision in *Printz* stands primarily as an extension of the holding in *New York v. United States*,³ which established that Congress cannot issue direct mandates to state governments to enact laws. The *Printz* holding prevents the federal government from circumventing the *New York*

¹ This Note benefited from the thoughtful criticism of Professor Kathryn R. Urbonya of the William and Mary School of Law, and the helpful guidance of Ms. Colleen N. Kotyk, Student Note Editor of the *William & Mary Bill of Rights Journal* in 1997-1998.

² 117 S. Ct. 2365 (1997).

³ 505 U.S. 144 (1992).

decision by co-opting state and local officials to enforce federal laws.⁴ The limitation imposed by *Printz* came in the wake of *United States v. Lopez*,⁵ another important decision restricting congressional legislative authority under the Commerce Clause. Although *Lopez* and *Printz* broadly apply to a range of Commerce Clause and Tenth Amendment questions, the area of federal law with which both cases dealt directly was the Gun Control Act of 1968.⁶ With *Lopez*, the Court struck down the Gun Free School Zones Act,⁷ and with *Printz*, it struck down the interim provisions of the Brady Handgun Violence Prevention Act ("Brady Act").⁸ *Lopez* drew considerable commentary as potentially heralding a Supreme Court affirmation that Congress fundamentally was restricted in its ability to regulate firearms due to restrictions on the commerce power and to the Second Amendment as well.⁹ *Printz* is certain to draw similar attention and, in conjunction with *Lopez*, to be heralded as a "sea change" in the Court's jurisprudence on firearms regulation.¹⁰

This Note argues that no such sea change has taken place. *Printz* and *Lopez* do raise some serious questions about Congress' power to regulate firearms, both in terms of Congress' commerce authority vis-a-vis the newly muscular Tenth Amendment, and in terms of what rights the Second Amendment actually guarantees. Justice Thomas's concurring opinion in *Printz* specifically invoked the spectre of the latter.¹¹ An analysis of *Printz* and *Lopez*, however, reveals not only that Congress' authority to regulate firearms remains intact, but that the established jurisprudence of the federal judiciary continues to stand.

Part I of this Note examines the *Printz* and *Lopez* opinions with particular focus on the firearms statutes at issue in each. Part II examines the Commerce Clause and Tenth Amendment implications of firearms regulation and concludes with an appraisal of the way in which the *Lopez* and *Printz* opinions have altered Congress' power to regulate firearms in the stream of commerce. Part III explores four Second Amendment issues in controversy: (1) the debate over the proper understanding of

⁴ See *Printz*, 117 S. Ct. at 2384.

⁵ 514 U.S. 549 (1995).

⁶ 18 U.S.C. §§ 921-30 (1994).

⁷ 18 U.S.C. § 922(q) (1994). See *Lopez*, 514 U.S. at 551.

⁸ 18 U.S.C. § 922(s)(2) (1994). See *Printz*, 505 U.S. at 2368, 2384.

⁹ See *infra* note 83 (relaying reactions to *Lopez* "individual rights" proponents).

¹⁰ See, e.g., Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 62 (1997) ("[C]onstitutional law heavyweights like Texas' Sanford Levinson, writing in the YALE LAW JOURNAL, and Duke's William Van Alstyne, writing in his school's law review, [are] taking arguments seriously that previously had been regarded as constitutional curiosities. . . . This sea change in scholarly attitude makes it plausible to analogize the right to keep and bear arms to the right to free expression" (citations omitted)); see also *infra* note 107 (citing pro-gun reactions to the *Printz* decision).

¹¹ See *Printz*, 117 S. Ct. at 2385 (Thomas, J., concurring).

the Second Amendment, particularly the “states’ rights” view of the Second Amendment versus the “individual rights” view; (2) the jurisprudential construction of the Second Amendment to date; (3) the limited way in which *Printz* and *Lopez* bear upon the Second Amendment; and (4) the need for a modern statement by the Supreme Court as to the scope and proper understanding of the Second Amendment. Part IV reemphasizes that Congress’ authority to regulate firearms remains substantially intact, even though the *Lopez* and *Printz* decisions have affected that authority considerably.

I. *PRINTZ*, *LOPEZ*, AND FEDERAL REGULATION OF FIREARMS

The holdings in *Printz* and *Lopez* have little in common except the questions raised in each about the proper extent of congressional authority to regulate firearms pursuant to the Commerce Clause. *Printz* requires particular examination because of its recent vintage and the consequent paucity of commentary on it to date.

A. *Printz v. United States*

In *Printz*, local sheriffs in Arizona and Montana challenged the constitutionality of the interim provisions of the Brady Act.¹² The Brady Act required the United States Attorney General to establish a national, instant system for checking the backgrounds of prospective handgun buyers.¹³ The Brady Act also required that the Attorney General command the chief law enforcement officers (“CLEOs”) of each local jurisdiction in the country to conduct such background checks and related tasks until such time as the national system was to be put into place.¹⁴ Sheriffs *Printz* and *Mack* were CLEOs of counties in Montana and Arizona. They filed separate actions challenging the constitutionality of the interim provision. In each case, the district court held that the background check provision was unconstitutional, but concluded that it was severable from the remainder of the Brady Act,¹⁵ effectively leaving a voluntary background check system in place until the national system should become operative. Upon appeal, the Ninth Circuit considered the two cases together and reversed to uphold the interim provisions as constitutional.¹⁶ The Supreme Court granted certiorari and reversed the holding of the Ninth Circuit, agreeing with the district courts that the interim provisions of the Brady Act were unconstitutional.¹⁷

¹² See *Printz*, 117 S. Ct. at 2369.

¹³ See 18 U.S.C. 922(s) (1994).

¹⁴ See *id.*

¹⁵ See *Printz v. United States*, 854 F. Supp. 1503, 1519 (D. Mont. 1994); *Mack v. United States*, 856 F. Supp. 1372, 1382-83 (D. Ariz. 1994).

¹⁶ See *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995).

¹⁷ See *Printz*, 117 S. Ct. at 2384.

Writing for the majority, Justice Scalia found the interim provisions unconstitutional based on three principal grounds. He noted that no constitutional provision directly speaks to the power of Congress to compel state officers to execute federal laws.¹⁸ Therefore, for Justice Scalia, the question of whether the interim provisions were constitutional required consideration of the Framers' intent and of historical practice, the Constitution's structure, and the Supreme Court's jurisprudence.¹⁹ Justice Scalia then set forth the majority's reasoning in concluding that Congress' early enactments revealed no such authority to have been assumed by the federal government.²⁰ The majority also concluded that neither the Constitution's structure²¹ nor the Court's established jurisprudence²² supported such a proposition.

As for the Constitution's structure, the majority determined that the Constitution reveals the principle of "dual sovereignty," wherein both the state and federal governments govern citizens.²³ Although the states surrendered many of their powers to the newly created federal government when they ratified the Constitution, they retained what the Court termed a "residuary and inviolable sovereignty" reflected throughout the Constitution.²⁴ This residual sovereignty forbade the federal government from asserting control over state officers *qua* state officers.²⁵ Moreover, federal co-option of state officers also would tend to disrupt the balance of powers within the federal government itself.²⁶ The Brady Act effectively transferred the President's responsibility to administer a law enacted by Congress to the CLEOs of the fifty states, who were then left to implement the program "without meaningful Presidential control."²⁷ Such a result, reasoned the Court, "shatter[s]" the unity of the federal executive: Congress could reduce unconstitutionally the President's power if the Constitution permitted Congress to require state officers to execute federal laws.²⁸ Thus, when a law violates the principle of dual sovereignty it cannot be said to be valid as a law "necessary and proper" for the execution of Congress' Commerce Clause power to regulate, *inter alia*, handgun sales.²⁹

In reviewing its jurisprudential treatment of the dual sovereignty principle, the majority in *Printz* took particular note of the Court's recent holding that the federal government may not compel the states to enact or administer a federal regulatory

¹⁸ See *id.* at 2370.

¹⁹ See *id.* at 2369.

²⁰ See *id.* at 2370-71.

²¹ See *id.* at 2376-79.

²² See *id.* at 2379-83.

²³ See *id.* at 2376.

²⁴ *Id.* at 2376-77.

²⁵ See *id.*

²⁶ See *id.* at 2378.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *id.* at 2378-79.

program.³⁰ The *Printz* majority's jurisprudential argument focused almost solely on *New York v. United States*,³¹ and stated that the *New York* majority's concern with mandates issued to state legislatures did not distinguish it from the mandates issued directly to state officers at issue in *Printz*, which the federal government had argued merely were "ministerial" and, therefore, not violative of the ruling in *New York*.³² Thus, on this basis, as well as that of dual sovereignty, *Printz* stands as another important pronouncement in the Supreme Court's recent series of holdings tending to reinvigorate the Tenth Amendment.³³

Both Justice O'Connor and Justice Thomas wrote concurring opinions, neither of which was joined by any other justice.³⁴ Justice O'Connor emphasized that the Court's holding did not spell out the end of The Brady Act's objective of better regulating the sale of handguns, and that once the national background check system came online, nothing would have been removed from the Brady Act.³⁵ Justice O'Connor also emphasized that, even though Congress lawfully could not compel state officers to enforce the interim provisions of the Brady Act, Congress could amend the Act to provide for continuation of the interim provisions on a strictly contractual basis with the states.³⁶ Thus, gun control advocates may derive a certain measure of hope from Justice O'Connor's concurrence: there presently appears to be a majority of justices on the Court who are unwilling to question whether Congress has the *general* authority, pursuant to the Commerce Clause, to regulate firearms as articles of commerce.

Conversely, Justice Thomas's concurrence offered inspiration, though perhaps not hope, to opponents of firearms regulation. Justice Thomas openly questioned, even if the Court had found that the interim provisions of the Brady Act did not violate the Tenth Amendment, whether Congress would have constitutional authority to regulate firearms.³⁷ After making reference to his concurring opinion in *Lopez*, in which he advocated a strict and somewhat archaic understanding of the term "commerce" that effectively would deny Congress the authority to regulate anything but the shipment of goods across state lines,³⁸ Justice Thomas discussed what he perceived to be an important Second Amendment question in *Printz*:

³⁰ See *id.* at 2380 (citing *New York v. United States*, 505 U.S. 144, 188 (1992)).

³¹ 505 U.S. 144 (1992).

³² See *Printz*, 117 S. Ct. at 2382.

³³ See *id. passim*; see also *New York v. United States*, 505 U.S. 144 (1997); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun Free School Zones Act exceeded Congress' Commerce Clause authority and therefore violated the Tenth Amendment).

³⁴ See *Printz*, 117 S. Ct. at 2385-86 (O'Connor & Thomas, JJ., concurring).

³⁵ See *id.* at 2385 (O'Connor, J., concurring).

³⁶ See *id.*

³⁷ See *id.* at 2385-86 (Thomas, J., concurring).

³⁸ See *Lopez*, 514 U.S. at 584-602 (Thomas, J., concurring).

Even if we construe Congress' authority to regulate interstate commerce to encompass those intrastate transactions that "substantially affect" interstate commerce, I question whether Congress can regulate the particular transactions at issue here. . . . The Second Amendment . . . appears to contain an express limitation on the government's authority. . . . If . . . the Second Amendment is read to confer a *personal* right to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections.³⁹

Justice Thomas's opinion indicated strongly that he viewed the Second Amendment as conferring a personal right to bear arms, and that he interpreted the Constitution to mean that the regulation of firearms was not one of the "enumerated, hence limited, powers" granted to the federal government.⁴⁰

In his *Printz* concurrence, Justice Thomas interpreted *United States v. Miller*,⁴¹ the Court's last real pronouncement on the meaning of the Second Amendment, very narrowly to mean only that the Second Amendment does not protect a citizen's right to possess a sawed-off shotgun because that weapon had not, in the language of *Miller*, been shown to be "ordinary military equipment" that could "contribute to the common defense."⁴² He supported his individual rights view of the Second Amendment by briefly reviewing recent scholarship advocating that theory.⁴³ Moreover, Justice Thomas issued what amounted to a plea for the Court to revisit the issue of what right or rights the Second Amendment actually guarantees.⁴⁴

It is noteworthy that no other justice joined Justice Thomas's concurring opinion. Not even Justice Scalia, the author of the majority opinion and, of all the justices on the Court, the one ideologically closest to Justice Thomas, was willing to support the individual rights view propounded in the concurrence. Also worth noting is the failure of any justice to join Justice Thomas in calling for the Court to revisit the issue of the Second Amendment's meaning.⁴⁵

³⁹ *Printz*, 117 S. Ct. at 2385-86 (Thomas, J., concurring) (citations omitted).

⁴⁰ *Id.* at 2385.

⁴¹ 307 U.S. at 174 (1939).

⁴² *Printz*, 117 S. Ct. at 2386 n.1 (Thomas, J., concurring) (quoting *Miller*, 307 U.S. at 178).

⁴³ *See id.* at 2386 n.2 (Thomas, J., concurring).

⁴⁴ *See id.* at 2386 (Thomas, J., concurring) ("Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms 'has justly been considered, as the palladium of the liberties of a republic.'" (quoting 3 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1890, at 746 (1833))).

⁴⁵ *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term Foreword: Implementing*

Justice Thomas's concurring opinion stands in sharp contrast to his concurrence in *Lopez*,⁴⁶ another case dealing with Congress' Commerce Clause authority to regulate firearms.⁴⁷ Because of the extent to which partisans in the debate over federal firearms regulation have sought to portray *Lopez* as a limitation on the power of the federal government to regulate the flow of firearms in commerce,⁴⁸ *Lopez* deserves careful review.

B. United States v. Lopez

The facts of *Lopez* dealt with the Gun Free School Zones Act of 1990,⁴⁹ which forbade "any individual knowingly to possess a firearm . . . at a place that [he] knows . . . is a school zone."⁵⁰ In *Lopez*, school officials caught Alfonso Lopez, Jr., a twelfth grade student in San Antonio, Texas, carrying a concealed handgun at school.⁵¹ Lopez was charged under the Gun Free School Zones Act and, at trial, made a motion to dismiss the indictment on the ground that the Act was an unconstitutional exercise of Congress' commerce power. The district court denied his motion and upheld the statute.⁵² On appeal, the Fifth Circuit reversed, holding that in light of what it characterized as insufficient congressional findings and legislative history, the Gun Free School Zones Act was an invalid ultra vires statute that the commerce power did not support.⁵³ The Supreme Court affirmed the Fifth Circuit's decision, holding that the Act indeed did exceed Congress' Commerce Clause authority.⁵⁴

In the majority opinion, Chief Justice Rehnquist observed that the mere possession of a gun in a school zone, which the Act very narrowly addressed, was in no sense an "economic activity" that might have a "substantial effect" on interstate commerce.⁵⁵ Rather, the statute in question was "a criminal statute that by its terms

the Constitution, 111 HARV. L. REV. 54, 108-09 & n.313 (1997) (citing Justice Thomas's concurring opinion in *Printz* as an example of "[a] . . . category of potentially extraordinary [case law] [that] probably reflects nothing more than the views, interests, or agendas of justices who happen to sit on the Court at a particular time," wherein "Justices may press . . . to persuade their colleagues to reconsider seemingly settled issues" (citing *Printz*, 117 S. Ct. at 2386 & nn.1-2)).

⁴⁶ See *infra* notes 64, 167 and accompanying text.

⁴⁷ See *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun Free School Zones Act for exceeding the authority of the Congressional Commerce Clause).

⁴⁸ See *infra* note 83 (citing reactions to *Lopez* by pro-gun individual rights theorists).

⁴⁹ 18 U.S.C. § 922(q) (1994).

⁵⁰ *Id.* § 922(q)(2)(A) (1994).

⁵¹ See *Lopez*, 514 U.S. at 551.

⁵² See *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993).

⁵³ See *id.* at 1367-68.

⁵⁴ See *Lopez*, 514 U.S. at 551.

⁵⁵ *Id.* at 560-61.

[had] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. [The Gun Free School Zones Act was] not an essential part of a larger regulation of economic activity. . . ."⁵⁶ As such, no nexus between the statute and interstate commerce was evident "to the naked eye."⁵⁷

Moreover, the statute did not contain a jurisdictional element that would ensure, through case-by-case inquiry, that the firearms possession in question had the requisite nexus with interstate commerce.⁵⁸ Under the specific facts of *Lopez*, there was no indication that the student had moved recently in interstate commerce; whether the firearm in question had done so was irrelevant, because the language of the statute focused on the individual in possession of the weapon, not on the firearm itself.⁵⁹ Therefore, the Court ruled "[t]o uphold the government's contentions" that the Gun Free School Zones Act is justified because firearms possession in a local school zone indeed does substantially affect interstate commerce would require the Court "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states."⁶⁰

In other words, in regulating mere firearms *possession*, Congress simply went too far; only the states hold such authority. Justice Kennedy wrote a concurring opinion in *Lopez* which Justice O'Connor joined.⁶¹ Although Justice Kennedy never directly addressed the issue of congressional authority to regulate firearms, he did suggest that gun control fundamentally was a state prerogative, subject to specific instances in which the Constitution authorizes Congress to regulate firearms under the commerce power.⁶² Justice Kennedy's reasoning, although specifically aimed at interpreting the

⁵⁶ *Id.* at 561 (citation omitted).

⁵⁷ *Id.* at 563.

⁵⁸ *See id.* at 561.

⁵⁹ *See* 18 U.S.C. § 922(q)(2)(A) (making it unlawful for "any individual knowingly to possess a firearm at a place [he] knows . . . is a school zone" (emphasis added)).

⁶⁰ *Lopez*, 514 U.S. at 567.

⁶¹ *See id.* at 568-83 (Kennedy, J., concurring).

⁶² *See id.* at 583.

The statute now before us forecloses the States from experimenting and exercising their own judgment *in an area to which States lay claim by right of history and expertise* The tendency of this statute [is] to displace State regulation in areas of traditional State concern Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce.

Id. (emphasis added). The apparent echo of the "traditional areas of State regulation" holding from *National League of Cities v. Usery*, 426 U.S. 833 (1976), is striking. Whether this wording implies that Justices Kennedy and O'Connor would advocate some form of rejection or modification of the Court's holding in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which overruled *National League of Cities*, is an intriguing

Commerce Clause and the Tenth Amendment, suggests that he may adhere to the states' rights view of the Second Amendment.⁶³

Justice Thomas also wrote a concurring opinion, which no other justice joined.⁶⁴ This concurrence stands somewhat at odds with his concurrence in *Printz*,⁶⁵ in that the *Lopez* concurrence suggests that the Constitution does not prohibit firearms regulation, at least not for the states.⁶⁶ Insofar as the two concurring opinions are at odds, Justice Thomas's concurrence in *Printz* might be taken as more indicative of his current views by virtue of the case's recency. If true, however, it would appear that Justice Thomas's advocacy of state authority over matters "traditionally" left to state regulation is not now as firm as it was in 1995.

II. CONGRESS AUTHORITY TO REGULATE FIREARMS IN COMMERCE

A. *The Brave New World of Lopez*

In *United States v. Lopez*, the Supreme Court laid out a tripartite schema for commercial activities that Congress may regulate under its Commerce Clause authority.⁶⁷ This schema allows Congress to regulate: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) intrastate activities that *substantially affect* interstate commerce.⁶⁸ The court decided *Lopez*

question. See Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 43-44 (1995) (noting that Justice Kennedy's proposal in *Lopez*, like the "traditional government functions" test of *National League of Cities*, may be "doomed to failure because it is unworkable and unnecessary"). The majority opinion echoed Justice Kennedy's reasoning somewhat. See *Lopez*, 514 U.S. at 564.

⁶³ See *Lopez*, 514 U.S. at 567. For further discussion of the states' rights view of the Second Amendment, see *infra* text accompanying notes 111-15.

⁶⁴ See *id.* at 584-602 (Thomas, J., concurring).

⁶⁵ See *Printz v. United States*, 117 S. Ct. 2365, 2385-86 (1997) (Thomas, J., concurring) (noting that the Second Amendment appears to contain an express limitation on the government's authority to regulate firearms).

⁶⁶ See *id.* at 584.

[I]t seems to me that the power to regulate "commerce" can by no means encompass authority over mere gun possession Our Constitution quite properly *leaves such matters to the individual States*, notwithstanding [their] effects on interstate commerce. Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination.

Id. at 585 (emphasis added). Whether Justice Thomas actually would reject the view of many individual rights theorists that the Second Amendment should be considered incorporated against the States via the Fourteenth Amendment's Equal Protection clause is unclear from this concurrence.

⁶⁷ See *Lopez*, 514 U.S. at 558.

⁶⁸ See *id.* at 558; see also Fried, *supra* note 62, at 39-40.

under the third category, and determined that the *possession* of a firearm within 1,000 feet of a school—an intrastate activity—did not “substantially affect” interstate commerce and was not properly construable as a “commercial activity.”⁶⁹ The majority observed that there were no congressional findings to support the judgment that gun possession in a school zone substantially affected interstate commerce.⁷⁰ The Court disagreed with that judgment and, thus, found no jurisdictional element to establish Congress’ right to legislate in this area.⁷¹ For this reason, the Court in *Lopez* struck down the Gun Free School Zones Act.

Only in the category of intrastate activities having a substantial effect upon interstate commerce did the Court advocate consideration of criteria using *degree* rather than kind; that is, an intrastate activity’s effect on commerce must be “substantial” to warrant congressional legislation, in contrast to “channels” and “instrumentalities” of interstate commerce which Congress may regulate as such.⁷² Thus, as applied to guns, Congress has the authority to continue to regulate firearms as *instrumentalities* of interstate commerce, provided that the firearms in question actually move across state lines. Congress, likewise, may regulate intrastate trafficking in firearms so long as there is some showing, preferably in the legislative record, that the intrastate trade in firearms has a substantial effect on interstate commerce.⁷³ Congressional regulation of mere “possession” of a firearm likely is per se unconstitutional in the wake of *Lopez*.⁷⁴

The key principle that *Lopez* represents in demarcating the bounds of congressional legislative authority under the Commerce Clause is that Congress’ powers are not all-encompassing or plenary; rather, they are enumerated and limited. Consequently, the rationales offered for congressional regulation on any subject must recognize some bounds on federal power.⁷⁵ In this respect, *Lopez* arguably limits only the type of arguments advanced by Congress for regulation under the Commerce Clause, not Congress’ actual capacity to legislate on a broad range of matters,⁷⁶ though this is not to say that Congress’ legislative authority effectively is unlimited.

⁶⁹ See *Lopez*, 514 U.S. at 561-63.

⁷⁰ See *id.* at 562-63.

⁷¹ See *id.* at 567. Because of the § 922(q) prohibition of gun *possession*, rather than trafficking, near schools, there was no reason to question whether the firearm itself had moved in interstate commerce. See *supra* note 59 and accompanying text; Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 694-700 (1995).

⁷² See Merritt, *supra* note 71, at 694-700.

⁷³ See *id.* at 689.

⁷⁴ See *Lopez*, 514 U.S. at 561-62; see also Merritt, *supra* note 71, at 700-01 (“[While] *Lopez* did not challenge the statute under the Second Amendment, . . . [t]he statute’s focus on gun possession . . . may have affected the Court’s decision.”).

⁷⁵ See Merritt, *supra* note 71, at 684-85.

⁷⁶ See *id.* at 689.

In fact, if any of the following four factors are present, Congress likely will find it difficult to regulate an intrastate activity:

- (1) the activity is *non-commercial*;
- (2) the statute in question lacks a jurisdictional element requiring a case-by-case determination of the interstate commercial nexus;
- (3) there is a lack or absence of congressional findings supporting its claim of substantial effect upon interstate commerce; or
- (4) the justifications offered for the claimed connection with interstate commerce are so broad that they impose no limit on federal power.⁷⁷

Thus, the “substantial effect” analysis is qualitative rather than quantitative, amounting to a “toughened rational basis” standard of review for this type of congressional regulation.⁷⁸ Indeed, the Chief Justice stated in the majority opinion that “[t]hese are not precise formulations, and in the nature of things they cannot be.”⁷⁹

The majority in *Lopez* allowed that Congress would be able to continue regulating many areas of governmental activity traditionally reserved to the states—such as education—thereby undercutting any suggestion that the Commerce Clause now preserves specific enclaves of state power.⁸⁰ Whether it is true that “[t]he limit embraced by *Lopez* is more likely to constrain the rationales offered for congressional action than the ends of that action”⁸¹ remains to be seen. However, at least some of the language in *Printz* appears to point in that direction.⁸²

Although the Court in *Lopez* did not address directly the question of congressional power to regulate firearms, the fact that the Court struck down the Gun

⁷⁷ See *id.* at 685.

⁷⁸ See *id.* at 677.

⁷⁹ *Lopez*, 514 U.S. at 567.

⁸⁰ See *id.* at 565. Merritt suggests that “[i]f Congress . . . abide[s] by this limit in future cases, the Court may not care whether the states retain exclusive control over any pockets of regulatory authority. Once Congress has finished counting its enumerated powers, it may have invaded every enclave of State regulation.” Merritt, *supra* note 71, at 690. While this view may be somewhat extreme, nothing in the *Lopez* opinion seems to contradict it.

⁸¹ Merritt, *supra* note 71, at 690.

⁸² See *Printz*, 117 S. Ct. at 2385 (O’Connor, J., concurring) (arguing that the Court’s decision in *Printz* did not “spell the end of the objectives of the Brady Act,” and implying that Congress had due authority to regulate firearms transactions in the way that it did in the Brady Act); see also *id.* at 2379 (Scalia, J.) (“[T]he Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate State governments’ regulation of interstate commerce.” (quoting *New York v. United States*, 505 U.S. 144, 166 (1992))). By incorporating language from a prominent pre-*Lopez* decision, Justice Scalia implied, more indirectly than did Justice O’Connor in her concurrence, that Congress’ effective authority to regulate interstate commerce remains broad.

Free School Zones Act has caused many opponents of firearms regulation to claim that the *Lopez* holding supports the idea that every individual has a right to bear arms.⁸³ *Lopez* did not overrule previous Commerce Clause jurisprudence regarding firearms regulation, however, which leads to the conclusion that neither the Commerce Clause nor the Tenth Amendment provide a defense to individuals running afoul of federal firearms regulations.⁸⁴ Indeed, the *Lopez* decision suggests that congressional action of the type used in the Brady Act would be constitutional under the Commerce Clause.⁸⁵

In fact, lower courts that have confronted questions of the constitutionality of federal firearms regulation in the wake of *Lopez* have continued to find guidance in pre-*Lopez* precedent.⁸⁶ Thus, lower courts have upheld federal statutes prohibiting

⁸³ See Harold S. Herd, *A Re-Examination of the Firearms Regulation Debate and Its Consequences*, 36 WASHBURN L.J. 196, 227 (1997); see also, e.g., Randy E. Barnett, *Foreword: Guns, Militias, and Oklahoma City*, 62 TENN. L. REV. 443, 449 (1995) (arguing that the *Lopez* decision, at a minimum, makes it more difficult for those who favor a broad commerce power to dismiss arguments against the constitutionality of such powers); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 40 n.96 (1996) (noting that the Fifth Circuit's decision, *United States v. Lopez*, 2 F.3d 1342, 1364 n.46 (5th Cir. 1993), suggests that "some applications of [the statute] might raise Second Amendment concerns"); Gregory Lee Shelton, Comment, *In Search of the Lost Amendment: Challenging Federal Firearms Regulation Through the "States' Right" Interpretation of the Second Amendment*, 23 FLA. ST. U.L. REV. 105, 106 n.1, 123 n.114 (1995) (noting that the *Lopez* decision "casts doubt on the constitutionality of federal regulation of the mere possession of firearms").

⁸⁴ See Herd, *supra* note 83, at 225; see also *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring).

[T]he [Supreme] Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. Stare decisis operates with great force in counselling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature.

Id. at 574.

⁸⁵ See Amy Marie Pepke, Note, *The Brady Bill: Surviving the Tenth Amendment*, 48 VAND. L. REV. 1803, 1804 n.4 (1995).

⁸⁶ See *Scarborough v. United States*, 431 U.S. 563 (1977); *Barrett v. United States*, 423 U.S. 212 (1976); *United States v. Glover*, No. 94-3131, 1995 U.S. App. LEXIS 15113 (10th Cir. June 19, 1995) (reversing a conviction under the Gun-Free School Zones Act in conformity with *Lopez*); *United States v. Walker*, 59 F.3d 1196 (11th Cir. 1995) (finding a defendant's conviction under the Gun-Free School Zones Act to be plain error); *United States v. Ornelas*, No. 94-1134, 1995 U.S. App. LEXIS 19574 (10th Cir. June 2, 1995) (reversing a conviction under the Act); *United States v. Edwards*, 55 F.3d 428 (9th Cir. 1995) (reversing a conviction under the Act); *United States v. Murphy*, 53 F.3d 93 (5th Cir. 1995) (upholding a district court order refusing to file criminal information charging a defendant with violating the Act).

the possession of guns by convicted felons⁸⁷ and the possession and transfer of machine guns⁸⁸ against challenges to Congress' power to enact them under the Commerce Clause.⁸⁹ By its broad interpretation of the jurisdictional element made in *Scarborough v. United States*⁹⁰ and *Barrett v. United States*,⁹¹ the Supreme Court has implied that Congress has the power to legislate in the comprehensive manner that the felon and machinegun bans suggest.⁹² In his *Lopez* concurrence,⁹³ Justice Kennedy emphasized *stare decisis* to prevent the Court from pushing *Lopez* far enough to undo well-settled—and, in these cases, highly popular—precedent.⁹⁴ The holding in *Printz* confirms the Court's adherence to *stare decisis* in the area of federal firearms regulation.

⁸⁷ See *United States v. Chesney*, 86 F.3d 564, 568 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 2470 (1997) ("Thus, all ten courts of appeals that have considered the constitutionality of [the statute prohibiting firearms by felons] since *Lopez* have upheld the statute.").

⁸⁸ See *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995) (upholding the federal machine gun ban in the wake of *Lopez* on the basis that Congress' prohibition of *possession* was to "control [firearms'] interstate movement").

⁸⁹ With respect to the federal ban on possession of firearms by felons, one scholar has noted that, of all the statutes considered by lower courts in the wake of *Lopez*, this one "cuts closest to the constitutional line." Merritt, *supra* note 71, at 717. In both *Scarborough v. United States*, 431 U.S. 563 (1977), and *Barrett v. United States*, 423 U.S. 212 (1976), the Supreme Court upheld the ban for felons even though such possession is *non-commercial* in character, the guns in question may be used lawfully in other contexts, and only a tenuous relationship to interstate commerce may be shown to satisfy the jurisdictional nexus emphasized in *Lopez*. Whether the Court would have decided *Scarborough* and *Barrett* similarly had it heard them after *Lopez* is an intriguing question. Given the emphasis Justice Kennedy placed on *stare decisis* in his concurring opinion, however, it appears likely that the federal ban on gun possession by felons—as well as the general ban on machine guns—will stand.

⁹⁰ 431 U.S. 563 (1977).

⁹¹ 423 U.S. 212 (1976).

⁹² See Merritt, *supra* note 71, at 717-18. *Wilks*, 58 F.3d 1518, which upheld the machine gun ban, is the most significant lower federal court decision to be issued since *Lopez*, which considers the scope of the Commerce Clause with regard to federal firearms regulation. See Herd, *supra* note 83, at 226-27. The key distinction between *Wilks* and *Lopez* is that the firearm in *Lopez* generally was not outlawed under Congress' authority to regulate the instrumentalities of interstate commerce, whereas machine guns *are* so banned. See *Wilks*, 58 F.3d at 1520-21. The Court in *Wilks* specifically noted that it did not consider the Second Amendment issue because it was not raised by the parties. *Id.* at 1519 n.2.

⁹³ See *Lopez*, 514 U.S. at 574.

⁹⁴ See Merritt, *supra* note 71, at 717-18.

B. *Printz v. United States: Holding the Lopez Line*

As Justice O'Connor noted in her concurrence, the Court in *Printz* flatly declined to restrict Congress from regulating firearms through its Commerce Clause power.⁹⁵ Justice O'Connor emphasized that only the interim provisions of the Brady Act were unconstitutional and that the remainder of the Act passed constitutional muster.⁹⁶ Only Justice Thomas suggested that firearms deserved separate consideration under the Commerce Clause—apart from his Second Amendment concerns—and that such separate consideration might restrict Congress' ability to regulate them.⁹⁷

The majority in *Printz*, however, focused exclusively on the constitutional strictures forbidding Congress to issue mandates to state officers.⁹⁸ The fact that the underlying statute giving rise to the case dealt with firearms was incidental;⁹⁹ even more so, perhaps, than was the statute in question in *Lopez*. The holding in *Printz*, therefore, has even less of a direct impact on Congress' authority to regulate firearms than did that in *Lopez*, except that in attempting to regulate intrastate firearm use under the "substantial effects" prong of *Lopez*, Congress either must rely upon federal law enforcement officers to enforce its regulations, or else it must make contractual provisions with the states for their respective law enforcement officers to enforce federal laws.¹⁰⁰

Perhaps more noteworthy in *Printz* is what the Court chose *not* to say regarding federal regulation of firearms under the commerce power. Lower court decisions following *Lopez*—such as *United States v. Wilks*,¹⁰¹—have raised certain important questions regarding the application of *Lopez*'s principles to federal statutes regulating firearms. In *Wilks*, for example, the court upheld the federal statute banning possession of machine guns on the basis that Congress' prohibition of mere possession of such weapons prevented their shipment across state lines¹⁰²—an undeniably shaky rationale. None of the justices, however, not even Justice Thomas, have mentioned the lower court's application of *Lopez*'s principles to firearms regulation since 1995. The Court's silence does not amount to an adoption of the reasoning of the *Wilks* decision; but neither should it encourage advocates of gun

⁹⁵ See *Printz v. United States*, 117 S. Ct. 2365, 2385 (1997) (O'Connor, J., concurring); *supra* text accompanying notes 35-36.

⁹⁶ See *Printz*, 117 S. Ct. at 2385 (O'Connor, J., concurring) ("Our holding . . . does not spell the end of the objectives of the Brady Act.").

⁹⁷ See *id.* at 2385-86 (Thomas, J., concurring).

⁹⁸ See *id.* at 2368-85 (Scalia, J.).

⁹⁹ See *id.* at 2376-77, 2378-83.

¹⁰⁰ See *id.* at 2385 (O'Connor, J., concurring).

¹⁰¹ 58 F.3d 1518 (10th Cir. 1995).

¹⁰² See *id.*

proliferation and deregulation who have beheld wistfully in *Lopez* the morning star of a new jurisprudential dawn in federal firearms regulation.¹⁰³

The holding in *Printz* thus appears to have kept to the straight-and-narrow stare decisis path that Justice Kennedy propounded in his concurrence in *Lopez*,¹⁰⁴ and allowed established precedent to stand insofar as possible within the bounds set by *Lopez*. These decisions did not cast the net of judicial review any farther than the facts of each case demanded. Indeed, the Court now may be eager to return to the somnambulance in its Commerce Clause jurisprudence—now under the *Lopez* paradigm—that it has cultivated for so long with regard to the Second Amendment. The Court's long silence on the latter, however, has prompted a growing din in legal commentary which *Printz* almost surely will whip into a fresh frenzy.

III. THE SECOND AMENDMENT

If the *Printz* holding meets with the same discussion and analysis that *Lopez* has met,¹⁰⁵ the simple fact that *Printz* addressed a federal statute regulating firearms will guarantee that it becomes a *cause célèbre* for opponents of federal gun control. Just as a few commentators have attempted to manipulate *Lopez* to support the claim that the Second Amendment provides—or should be deemed to provide—for an individual right to bear arms,¹⁰⁶ *Printz* is being invoked already as the harbinger of a new, pro-gun Second Amendment jurisprudence by the Supreme Court.¹⁰⁷ Not

¹⁰³ Admittedly, the *Printz* holding specifically dealt with the issue presented to the Court by the litigants: the constitutionality of the provisions of the Brady Act that required local CLEOs to enforce federal laws. If any of the justices were concerned with the application of *Lopez* by lower courts in firearms regulation cases, however, one might expect some dicta to that effect in the opinion. Justice Thomas saw fit to grind his Second Amendment axe in his concurrence and vaguely questioned whether Congress' commerce authority could apply with full force to firearms. Yet, he never voiced any concern over lower courts' application of *Lopez*; nor did he issue a clarion call for the Court to review its Tenth Amendment jurisprudence vis-a-vis firearms as he did with regard to the Second Amendment. See *Printz*, 117 S. Ct. at 2385-86 (Thomas, J., concurring).

¹⁰⁴ See *United States v. Lopez*, 514 U.S. 549, 574-75 (1975) (Kennedy, J., concurring).

¹⁰⁵ See *supra* note 83 (citing articles by individual rights theorists claiming that *Lopez* supports the idea that every individual has a right to bear arms).

¹⁰⁶ See *id.*

¹⁰⁷ The tide of scholarly rhetoric over the Second Amendment ramifications of *Printz* already has begun approaching flood stage. See, e.g., Frank Espohl, *The Right to Carry Concealed Weapons for Self-Defense*, 22 S. ILL. U. L.J. 151, 161 (1997) (citing Justice Thomas's concurring opinion in *Printz* as suggestive of a desire by the Court to recast its Second Amendment jurisprudence); David Harmer, *Securing a Free State: Why the Second Amendment Matters*, 1998 BYU L. REV. 55, 98-99 (making much of Justice Thomas's comment in his *Printz* concurrence that the Court in *United States v. Miller*, 307 U.S. 174 (1939), never defined the substantive right guaranteed by the Second Amendment and that no other case ever has defined this right ostensibly); David E. Johnson, Note, *Taking a*

only does *Printz* fail to address the Second Amendment question—even though Justice Thomas makes clear in his concurrence that he believes it should—it goes some way toward affirming the jurisprudence of the lower federal courts that has developed over the nearly sixty years since the Supreme Court’s last pronouncement on the Second Amendment.¹⁰⁸ This consistently held and developed jurisprudence stands contrary to the policy goals of the “gun lobby.” Thus, a proper understanding of *Printz* should prevent the case from becoming yet another rallying point for those who advocate increasing the proliferation of firearms under the auspices of the Second Amendment.

A. *The Debate Over the Meaning of the Second Amendment*

Although the Second Amendment contains only twenty-seven words, it arguably is one of the most ambiguous and least understood provisions in the entire Constitution.¹⁰⁹ The Amendment’s very purpose has become the subject of intense debate among jurists, historians, and the general public.¹¹⁰ This debate has

Second Look at the Second Amendment and Modern Gun Control Laws, 86 KY. L.J. 197, 199 & n.10, 216 (1998) (citing *Printz* generally in support of the individual rights view); Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97, 128 & n.141 (1997) (citing *Printz* to argue against the states’ rights view); David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously: Lopez and the Partial Birth Abortion Ban Act*, 30 CONN. L. REV. 59, 85-86 & n.109 (1997) (citing Justice Thomas’s *Printz* concurrence to suggest that the time may be ripe for a plaintiff to press the “individual rights” interpretation upon the Court); Sanford Levinson, *Is the Second Amendment Finally Becoming Recognized as Part of the Constitution? Voices from the Courts*, 1998 BYU L. REV. 127, 130-32 (citing *Printz* as a sign that the Court may be on the verge of reconsidering its Second Amendment jurisprudence). See also the critique of the “insurrectionist” wing of gun deregulation partisans offered by Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 318-21 (1998) (noting that Justice Thomas’s concurring opinion in *Printz* may provide evidence that “insurrectionist” gun deregulation partisans are succeeding in winning at least some support on the Court).

¹⁰⁸ See *Miller*, 307 U.S. 174; see also *infra* notes 149-62 and accompanying text (discussing *Printz* in the context of the Second Amendment debate).

¹⁰⁹ The Second Amendment reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

¹¹⁰ Scholarly opinion of the clarity or ambiguity of this Amendment appears to be split sharply along the divide between gun control advocates and proponents of gun proliferation. See, e.g., Herd, *supra* note 83, at 208 (“[The Second Amendment] is generally considered by scholars to be one of the most ambiguous provisions in the Constitution.” (citing Kevin D. Szczepanski, *Searching for the Plain Meaning of the Second Amendment*, 44 BUFF. L. REV. 197 (1996), who concludes that, at most, the Amendment gives only a *selective right* to bear arms, not an unrestricted one)); cf. Lund, *supra* note 83, at 1 (“The Second Amendment . . . is among the most well drafted provisions of the Bill of Rights.”).

concentrated on two contrasting views of the Second Amendment's meaning: the "states' rights" view and the "individual rights" view.

Although this Note will explore the contours of these views further, the respective interpretations of the Second Amendment are relatively straightforward. The states' rights view, which the federal judiciary has upheld consistently, claims that the Second Amendment protects the right of the individual states to maintain their respective state militias without interference from the federal government, especially from the federal government's disarmament of the citizens of a state.¹¹¹ The individual rights view interprets the Second Amendment as guaranteeing a virtually absolute right for all citizens to possess firearms for any purpose, whether hunting, self-defense, antique collection, target shooting, or preparation for the armed overthrow of the government.¹¹² According to this view, the federal government is prohibited absolutely from preventing citizens' possession of firearms. Many of its adherents argue vociferously that the Supreme Court soon should hold that the Equal Protection Clause of the Fourteenth Amendment incorporates the Second Amendment against state governments.¹¹³ The states' rights and individual rights views roughly define the two distinct factions into which this debate has devolved.

B. *Judicial Construction of the Second Amendment*

Notwithstanding Nelson Lund's view that the meaning of the Second Amendment is clear and unambiguous,¹¹⁴ the intensity of debate over its interpretation provides ample demonstration of the ambiguity of the Amendment's wording. Attempts at determining its plain meaning and the Framers' original intent have become quite sophisticated and involved, and will not be explored here.¹¹⁵ Of principal importance is the fact that the Supreme Court,¹¹⁶ and the lower federal courts in its wake,¹¹⁷ consistently have adhered to the states' rights view, and have

¹¹¹ See Herd, *supra* note 83, at 224. The states' rights view frequently is referred to in scholarly literature as the "collectivist" view. This Note will not use that term so as to avoid confusion with another related interpretation of the Second Amendment which holds that the right provided by the Amendment inheres in the "people" defined most broadly, but does not guarantee a right to bear arms to any particular individual. Few scholars support this collectivist view and this Note will give it no further consideration.

¹¹² See, e.g., Donald B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 268 n.12 (1983).

¹¹³ See Lund, *supra* note 83, at 52-53.

¹¹⁴ See *id.* at 1.

¹¹⁵ See Herd, *supra* note 83, at 208-09; see also Lund, *supra* note 84, at 20 (discussing plain meaning analysis of the Second Amendment); Herd, *supra* note 83, at 211-14 (discussing original intent analysis of the Second Amendment).

¹¹⁶ See *infra* notes 118-42 and accompanying text.

¹¹⁷ See *infra* notes 143-48 and accompanying text.

interpreted the Second Amendment as preserving a right on the part of the states to regulate their respective militias free from federal interference.

The Supreme Court first began to address the Second Amendment in earnest in the late nineteenth century. The first case in which the Court dealt squarely with the Amendment was *United States v. Cruikshank*,¹¹⁸ which originated as a federal prosecution of a group of white bigots who conspired to prevent two black men from enjoying their right of peaceful assembly.¹¹⁹ In *Cruikshank*, the Court held that the Second Amendment restricted only the federal government, not the states, and that the Constitution neither guaranteed a right to bear arms nor denied such a right.¹²⁰ The right to bear arms was, in effect, a matter strictly within the general police power of the states.¹²¹

The Court carried its reasoning further in *Presser v. Illinois*,¹²² a case arising from a challenge from a group of German nationalists residing in Illinois to a state statute prohibiting armed military drill except by units duly authorized by the governor.¹²³ The Court followed *Cruikshank* in holding that the Second Amendment did not guarantee to any individual the right to bear arms, nor was there any right for companies of men not in the officially organized state militia to form up and drill.¹²⁴ The Court reapplied this decision in *Miller v. Texas*,¹²⁵ and upheld it, in dictum, in *Maxwell v. Dow*.¹²⁶

The Court's next occasion to consider the Second Amendment was also its last, at least insofar as it issued a serious pronouncement concerning the ostensible "right to arms." This case was *United States v. Miller*,¹²⁷ which, like the Second Amendment itself, was far from a model of clarity. Nevertheless, this sixty-year-old

¹¹⁸ 92 U.S. 542 (1876).

¹¹⁹ See *id.* at 548.

¹²⁰ See *id.* at 553.

¹²¹ See *id.* The Court's states' rights reasoning was succinct:

The right . . . of "bearing arms for a lawful purpose" . . . is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this . . . means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation . . . of the rights it recognizes, to what [has been] called . . . "internal police," "not surrendered or restrained" by the Constitution of the United States.

Id. (citations omitted).

¹²² 116 U.S. 252 (1886).

¹²³ See *id.* at 253.

¹²⁴ See *id.* at 265-68.

¹²⁵ 153 U.S. 535 (1894) (applying *Cruikshank* and *Presser* in upholding a Texas gun control statute).

¹²⁶ 176 U.S. 581, 597 (1900) (citing with approval *Presser*).

¹²⁷ 307 U.S. 174 (1939).

case established the federal judiciary's modern Second Amendment jurisprudence and remains the only Supreme Court decision of the twentieth century to deal directly with the Second Amendment.

The facts of *Miller* concerned a challenge to the National Firearms Act of 1934¹²⁸ by a man caught transporting a sawed-off shotgun across state lines, an act prohibited under the statute.¹²⁹ In answering *Miller*'s claim that the Second Amendment protected his possession of the shotgun and its transportation across state lines, the Court held that the Amendment's effect was not to guarantee any personal, individual right to possess a firearm. It acted, rather, to provide a base of armed men to embody the "militia"¹³⁰ that Congress was authorized by the Constitution to summon with the cooperation of the states.¹³¹ Of particular note in the *Miller* decision was the Court's focus on the nature of the weapon itself in making its assessment of whether the Second Amendment would provide a right to possess it. The Court stated that "[i]n the absence of any evidence tending to show that possession or use of a [sawed-off shotgun] . . . has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."¹³² One possible interpretation of the

¹²⁸ See *id.* at 174-75; 28 U.S.C. §§ 5801-72 (1994).

¹²⁹ See *Miller*, 307 U.S. at 174-75.

¹³⁰ A considerable area of debate over the original intent behind the Second Amendment concerns the meaning of militia. It appears that consensus as to the proper modern meaning of the Amendment is vexed by the evolution and redefinition of the word militia in the eighteenth, nineteenth, and twentieth centuries. See Sayoko Blodgett-Ford, *The Changing Meaning of the Right to Bear Arms*, 6 SETON HALL CONST. L.J. 103 (1995); Chuck Dougherty, Note, *The Minutemen, the National Guard, and the Private Militia Movement: Will the Real Militia Please Stand Up?*, 28 J. MARSHALL L. REV. 959 (1995). A dictionary from the nineteenth century gives the following definition of "militia":

The body of soldiers in a state enrolled for discipline, but not engaged in actual service except in emergencies; as distinguished from regular troops, whose sole occupation is war or military service. The militia of a country are the able bodied men organized into companies, regiments, and brigades, with officers of all grades and required by law to attend military exercises on certain days only

2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828), quoted in Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995); The OXFORD ENGLISH DICTIONARY gives two slightly distinct definitions of militia as operative in British North America in the latter half of the eighteenth century: (1) "the distinctive name of a branch of the . . . military service, forming, together with the volunteers, what [were] known as the 'auxiliary forces'"; (2) "[t]he whole body of men declared by law amenable to military service, without enlistment, whether armed and drilled or not." 9 OXFORD ENGLISH DICTIONARY 768 (2d ed. 1991).

¹³¹ See *Miller*, 307 U.S. at 178; U.S. CONST. art. I, § 8, cls. 14, 15.

¹³² *Miller*, 307 U.S. at 178.

Court's holding thus was that as long as the defendant proffered evidence showing that the weapon in question was viable equipment for a militiaman, the Second Amendment preserved a right to its possession. This interpretation, however, was rejected in the very first appellate decision after *Miller* to treat the Second Amendment and it has never met with favor in the courts.¹³³

Only three decisions since *Miller* have touched upon the Second Amendment to any degree, and none directly. In *Adams v. Williams*,¹³⁴ Justice Douglas mentioned, in dictum, that in *Miller* the Court had held explicitly that the Second Amendment protected a right inhering in the states.¹³⁵ Nothing in the majority opinion contradicted this statement or addressed the Second Amendment at all. Eight years later in *Lewis v. United States*,¹³⁶ the Court reaffirmed that certain federal firearms regulations do not violate the Second Amendment.¹³⁷ Finally, in *United States v. Verdugo-Urquidez*,¹³⁸ Chief Justice Rehnquist stated tentatively—in dictum about which gun advocates have made much ado—that the Second Amendment *might* provide an individual right.¹³⁹ The Court's use of the term "the people" in *Verdugo-Urquidez*, however "does not even begin to address the central question of the Second Amendment's scope: whether the right to bear arms applies to 'the people' for all purposes, or only in connection with militia service."¹⁴⁰ Recent claims that

¹³³ See *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943). As one scholar has noted recently:

"[When] a written constitution has been judicially construed, such construction, accepted and acquiesced in for many years, is as much a part of the instrument as if it had been written into it at its origin." Thus, the Second Amendment does not prevent Congress . . . from regulating individual ownership of firearms. It does not recognize or grant an individual right to bear arms.

Herd, *supra* note 84, at 224-25 (quoting 16 C.J.S. CONSTITUTIONAL LAW § 33 (1984)).

¹³⁴ 407 U.S. 143 (1972).

¹³⁵ See *id.* at 151 (Douglas, J., dissenting) ("Critics say that proposals [like that advocated in *Miller* holding that the Second Amendment serves only to protect State militias] water down the Second Amendment. Our decisions belie that argument, for the Second Amendment . . . was designed to keep alive the militia.").

¹³⁶ 445 U.S. 55 (1980).

¹³⁷ *Id.* at 65 n.8.

¹³⁸ 494 U.S. 259 (1990).

¹³⁹ See *id.* at 265. The Chief Justice was discussing the meaning of the term "the people" as understood in the Fourth and Fifth Amendments, and he drew on the use of that term in other Amendments to elucidate its meaning. He wrote, "The Second Amendment protects 'the right of the people to keep and bear arms,'" and that the Tenth Amendment reserves certain rights to "the people," but admitted that "this textual exegesis is by no means conclusive." *Id.*

¹⁴⁰ See Herz, *supra* note 130, at 73 n.56.

Verdugo-Urquidez represents a new, pro-gun turn in the Court's jurisprudence¹⁴¹ thus amount to little more than "sound and fury, signifying nothing."¹⁴²

In the wake of *Miller*, lower federal courts have adhered to and further developed the states' rights jurisprudence that the Supreme Court began to fashion with *Cruikshank*. The foremost of these lower court decisions is *Cases v. United States*.¹⁴³ *Cases* was decided just three years after *Miller*, and was the first application by an appellate court of the *Miller* holding to a different set of factual circumstances. The First Circuit Court of Appeals recognized that an overly literal application of *Miller*'s focus upon the characteristics of the firearm under consideration would allow private citizens to own such heavy military ordnance as machine guns, tanks, or anti-aircraft guns.¹⁴⁴ The *Cases* court responded with a slight adaptation of the *Miller* holding: not only must the weapon in question have a military application, but its possessor's use of the weapon must bear a *reasonable relationship* to militia purposes.¹⁴⁵ This explication of *Miller* thus limited Second Amendment defenses to federal firearms violations by persons in "'military organizations' whose use or possession of a firearm furthers a state's militia purposes."¹⁴⁶

In *Cases*, the Court established a tripartite analysis for cases involving such Second Amendment defenses. As the federal courts have interpreted *Cases*, such claims require consideration of (1) whether the party claiming the Second Amendment defense has standing to assert Second Amendment rights, that is, whether that party is in a military organization or his possession of the firearm is reasonably related to state militia purposes; (2) what rights, if any, the state in issue has conferred upon the party asserting Second Amendment protection; and (3) whether the Second Amendment protects possession of the type of firearm in question.¹⁴⁷ This interpretation of *Cases* in the federal judiciary in effect has become the interpretation of *Miller*, the First Circuit's explication of *Miller* having been regarded as authoritative virtually since the *Cases* decision first appeared.¹⁴⁸

¹⁴¹ See, e.g., Shelton, *supra* note 83, at 124 (citing *U.S. v. Hale*, 978 F.2d 1016 (8th Cir. 1992), *cert. denied*, 507 U.S. 997 (1993)). In *Hale*, the defendant argued that the *Verdugo-Urquidez* Court classified the Second Amendment as an individual right and, thus, allowed him to possess a machine gun. Shelton notes that "the *Hale* Court dismissed the *Verdugo-Urquidez* language as dicta." Shelton, *supra* note 83, at 124 n.119.

¹⁴² WILLIAM SHAKESPEARE, *THE TRAGEDY OF MACBETH*, act 5, sc. 5.

¹⁴³ 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943).

¹⁴⁴ See *United States v. Miller*, 307 U.S. 174, 178 (1939) (holding that the federal government could not prohibit the possession or use of any weapon with any reasonable relationship to the preservation or efficiency of a well regulated militia).

¹⁴⁵ See *Cases*, 131 F.2d at 922-23; see also Shelton, *supra* note 84 at 119 (discussing the court's adaptation, in *Cases*, of the *Miller* holding).

¹⁴⁶ Shelton, *supra* note 83, at 119.

¹⁴⁷ See *id.* at 129.

¹⁴⁸ Other important lower court decisions which have followed *Miller* and *Cases* include *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942) (holding that because the defendant's

The federal judiciary's extremely consistent construction of the Second Amendment thus traces its roots back more than a century, with the Supreme Court and circuit courts invariably holding that the Second Amendment guarantees a right to the states, not to individuals. It is within the context of this longstanding federal jurisprudence that one must consider *Printz*.

C. *Printz in the Context of the Second Amendment Debate*

Insofar as the *Printz* holding raised Second Amendment considerations, it did so as a result of Justice Thomas's concurrence¹⁴⁹ and due to the nature of the federal statute addressed in the case. In his concurrence, Justice Thomas mounted a plea for the Court to take up the issue of whether the Second Amendment guarantees an individual the right to bear arms,¹⁵⁰ a plea especially notable for the stony silence with which it was met in Justice Scalia's opinion for the majority.¹⁵¹ Taken in conjunction with Justice O'Connor's concurring opinion—which emphasized that, except for its interim provisions requiring local officials to enforce federal law, the Brady Act remains fully in force¹⁵²—and with the dissenting opinions of Justices Stevens¹⁵³ and Souter,¹⁵⁴ *Printz* amounted to a tacit endorsement of the federal judiciary's longstanding construction of the Second Amendment. Far from being the next nail in the coffin of more than a century of federal jurisprudence on the Second Amendment, *Printz* demonstrated that the Court saw no reason to bring into question

possession of a pistol did not have a reasonable relationship to a militia, the defendant could not invoke Second Amendment protection); *United States v. Warrin*, 530 F.2d 103 (6th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976) (agreeing with the court in *Cases* that *Miller* did not lay down a general rule concerning the right to bear arms, and rejecting a Second Amendment defense claimed by a member of a private citizen militia); *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992), *cert. denied*, 507 U.S. 997 (1993) (rejecting a Second Amendment defense because the defendant's possession of a submachine gun was not reasonably related to a well regulated militia); *Love v. Pepersack*, 47 F.3d 120 (4th Cir. 1995), *cert. denied*, 516 U.S. 813 (1995) (holding that the defendant "failed to show how her possession of handgun would preserve or ensure . . . [the] militia, so as to support" a Second Amendment defense); *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 276 (1996) (holding that the Second Amendment confers a right upon the states, not individuals); *Gillespie v. City of Indianapolis*, 13 F. Supp. 811, 821-22 (S.D. Ind. 1998) (upholding legislation preventing a law enforcement official with a conviction for a violent domestic misdemeanor from possessing a firearm on the basis that Congress has a compelling interest in preventing such possession).

¹⁴⁹ See *Printz v. United States*, 117 S. Ct. 2365, 2385 (1997) (Thomas, J., concurring).

¹⁵⁰ See *id.* at 2385-86 (Thomas, J., concurring).

¹⁵¹ See *id.* at 2365-84 (Scalia, J.).

¹⁵² See *id.* at 2385 (O'Connor, J., concurring).

¹⁵³ *Id.* at 2386-2406 (Stevens, J., dissenting) (joined by Justices Souter, Ginsburg, and Breyer).

¹⁵⁴ *Id.* at 2401-04 (Souter, J., dissenting).

that which consistently has been held by the nation's most learned jurists to be the proper constitutional understanding of the right to bear arms.

Indeed, the major effect of both *Printz* and *Lopez* has been to strengthen and expand state prerogatives vis-a-vis the federal government. Both cases emphasized rights "reserved to the states" under the Tenth Amendment and held that Congress' Commerce Clause authority does not grant it carte blanche to invade areas of governmental power that the Framers left under state control when they formulated the Constitution's dual sovereignty principle.¹⁵⁵ Considering the clear holdings of each case—that Congress cannot conscript state officers for the enforcement of federal laws,¹⁵⁶ and that in order for Congress to regulate intrastate activity the activity in question must substantially affect interstate commerce¹⁵⁷—*Printz* and *Lopez* thus seem more in conformity with the established federal jurisprudence on the Second Amendment, which holds it to preserve rights *to the states*. In light of the recent trend in the Court's decisions to enhance state rights, it is questionable that the Court would make a sharp break with a line of jurisprudence that no federal appellate court ever has questioned, particularly considering the emphasis placed upon stare decisis by one of the two justices whose vote generally is looked upon as controlling in close cases.¹⁵⁸ If the dissenting opinions in *Printz* and *Lopez* are any indication, the dissenting justices, the same four in each case,¹⁵⁹ will be unlikely to support any such shift in the Court's Second Amendment jurisprudence. Justice O'Connor's concurrence in *Printz* suggests that she also may be unwilling to support a change,¹⁶⁰ and Justice Kennedy's concurrence in *Lopez* may offer a similar indication of his view.¹⁶¹ At least five, and perhaps six, justices thus appear unwilling to adopt the view that the Second Amendment guarantees an individual the right to bear arms. Of the remaining three justices on the Court, only Justice Thomas clearly has indicated his preference for the individual rights interpretation.¹⁶² The failure of any justice, particularly Justice Scalia and Chief Justice Rehnquist, to join in Justice Thomas's dissent strongly suggests that the long-established construction of the Second Amendment has nothing to fear from *Printz*.

¹⁵⁵ See *id.* at 2379; *United States v. Lopez*, 514 U.S. 549, 567-68 (1995).

¹⁵⁶ See *Printz*, 117 S. Ct. at 2384.

¹⁵⁷ See *Lopez*, 514 U.S. at 559.

¹⁵⁸ See *id.* at 574 (Kennedy, J., concurring).

¹⁵⁹ Justices Breyer, Ginsburg, Souter, and Stevens dissented in both *Printz* and *Lopez*.

¹⁶⁰ See *Printz*, 117 S. Ct. at 2385 (noting that the holding focuses on Tenth Amendment issues and does not "spell the end of the objectives of the Brady Act").

¹⁶¹ See *Lopez*, 514 U.S. at 568-83 (focusing on the Federal intrusion of state sovereignty, while failing to address an individual right to bear arms).

¹⁶² See *id.* at 2386.

D. *The Need for a Modern Statement on the Meaning of the Second Amendment*

The hollowness of gun advocates' claims of a major break in the Supreme Court's view of the Second Amendment evidenced by *Lopez* notwithstanding, the fact that so many learned jurists and scholars engage almost monthly in sophisticated guesswork over the meaning—not just the specific meaning, but the *general* meaning—of one of the primary freedoms guaranteed in the Bill of Rights illustrates the dire need for the Supreme Court to make a modern ruling on the scope and meaning of the Second Amendment. Justice Thomas effectively issued a call for the Court to do just that.¹⁶³ The Court should heed his call. The Court's most recent pronouncement on the issue is sixty years old and is one of the Court's more opaque explications of a Constitutional right. Thus it seems high time for the Court to make a clear statement as to "what the law is," in the words of Chief Justice John Marshall.¹⁶⁴ Opportunities to do just that have arisen indeed, but the Court thus far has not granted review in such cases.¹⁶⁵ Already at least one federal district court has admitted to some confusion when it sought to apply the Supreme Court's Second Amendment jurisprudence in the wake of *Printz*.¹⁶⁶ The Court should and, indeed, must clarify the meaning of the Second Amendment in the near future, lest the nation enter the twenty-first century in a state of utmost confusion over one of the fundamental rights guaranteed by the Constitution. Only the Supreme Court can begin to quiet the increasingly shrill din of this debate.¹⁶⁷

The Court should issue a clear statement, as soon as an appropriate case arises for review, reaffirming that the Second Amendment guarantees a right to the states, not to individuals, and, as such, that the Court's longstanding jurisprudence treating the Second Amendment holds firm under the umbrella of *stare decisis*. Although gun

¹⁶³ See *Printz*, 117 S. Ct. at 2386.

¹⁶⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁶⁵ Of particular note was *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983), which upheld a local ordinance banning handguns. At the time, many opponents of gun regulation touted *Quilici* as providing a long-overdue opportunity for the Supreme Court to establish that the Second Amendment provides an absolute right for individuals to bear arms. The Court's denial of review in that case has left the question open, especially in light of the recent flood of law review articles and treatises seeking to undermine the long-held construction of the Second Amendment. See *supra* note 108 (citing supporters of the individual rights view and their reactions to the *Printz* decision).

¹⁶⁶ See *Doe v. Bureau of Alcohol, Tobacco, and Firearms*, No. 3:94CV1699 JBA, 1997 WL 852086 (D. Conn. Sept. 12, 1997) at *5, *17 (reciting federal case law construing the Second Amendment, but noting that following Justice Thomas's concurring opinion in *Printz* there may be some doubt as to the law in this area).

¹⁶⁷ See *Adams v. Williams*, 407 U.S. 143, 150-51 (1972) (Douglas, J., dissenting) ("A powerful lobby dins into the ears of our citizenry that [bearing arms is a] constitutional right[] . . . protected by the Second Amendment. . . . Our decisions belie that argument, for the Second Amendment was designed to keep alive the militia.").

control opponents have come to believe lately that historical scholarship relevant to the origins of the Second Amendment lies wholly on their side,¹⁶⁸ the Court should recognize that this area of debate is by no means so one-sided.¹⁶⁹ Even if the weight of historical scholarship—when “weight” is measured in reams of paper rather than in terms of persuasive force—favors critics of federal firearms jurisprudence, the equally persuasive historical arguments supporting that jurisprudence, coupled with the doctrine of *stare decisis* and the Court’s complementary Tenth Amendment/Commerce Clause jurisprudence as it bears upon firearms, dictate that the Court clarify, once and for all, that the Second Amendment does not guarantee any individual right to bear firearms. Both the federal and state governments, therefore, have broad power to regulate the transfer and possession of such weapons. The holding in *Printz* supports that proposition even more clearly than did the holding in *Lopez*. The Court now only need sketch in the gray areas left by these recent Tenth Amendment decisions touching upon firearms regulation. By linking this recently developed doctrine with its well-established Second Amendment doctrine, the Court can clarify that Congress does have authority under the Commerce Clause to regulate firearms in commerce, and that the states are vested with an even broader authority to regulate firearms generally.

IV. CONCLUSION

Opponents of federal gun control will herald the Supreme Court’s decision in *Printz* to strike down certain provisions of the Brady Act as increasing evidence that the Court inevitably will declare Congress, and perhaps even the states themselves,¹⁷⁰ unable to regulate most kinds of commonly available firearms. Careful examination of the case in the context both of the Court’s developing Tenth Amendment/Commerce Clause jurisprudence and of its longstanding Second Amendment jurisprudence, however, demonstrates that both *Printz* and *Lopez* uphold Congress’ continuing ability to regulate virtually all firearms under the commerce power. As established in *Lopez*, Congress may regulate firearms as instrumentalities of interstate commerce;¹⁷¹ or, upon satisfying the various factors of analysis required to show a substantial effect upon interstate commerce, Congress also may regulate intrastate firearms transactions.¹⁷² While *Printz* prevents Congress from co-opting state officers

¹⁶⁸ See, e.g., *Printz v. United States*, 117 S. Ct. 2365, 2386 n.2 (Thomas, J., concurring) (citing a veritable laundry-list of pro-gun historiography).

¹⁶⁹ See, e.g., Bogus, *supra* note 107; Herd, *supra* note 83, at 206 (examining the Second Amendment under several different methods of Constitutional analysis); Herz, *supra* note 130, at 63-67 (criticizing the “broad view” of the Second Amendment by the “gun lobby”).

¹⁷⁰ See Lund, *supra* note 83, at 52-53.

¹⁷¹ See *Lopez v. United States*, 514 U.S. 549, 558-59 (1995).

¹⁷² See *id.*

for the enforcement of federal laws, it makes evident that Congressional authority to regulate firearms is unquestionable.¹⁷³ If one pays careful attention to what the nine justices said (and, significantly, to what they did *not* say) in both opinions, it also becomes evident that the Court likely will not overturn the settled federal jurisprudence on the Second Amendment, which holds that the Amendment guarantees no individual right to keep and bear arms.

Such a course is appropriate. As Justice Kennedy's concurring opinion in *Lopez* expressed so well, stare decisis provides a crucial stability to our legal system.¹⁷⁴ Moreover, for over one hundred years the federal courts have adhered to the very reasonable—and historically defensible—view that the Second Amendment protects the rights of the states to regulate their own militias (however one may wish to define that term). Such a lengthy body of judicial precedent itself has constitutional weight and authority that merits considerable deference.¹⁷⁵ The Court, therefore, was correct not to reach further in deciding *Printz* than to reject the interim provisions of the Brady Act on the grounds cited. Justice O'Connor's emphasis, in her concurring opinion, that the rest of Brady remains good law underscores the Court's commendable adherence to the federal judiciary's long and entirely consistent construction of the Second Amendment.¹⁷⁶ This construction has left the ultimate authority to regulate firearms firmly where it belongs: within the general police power of the states, supplemented by Congressional authority to regulate firearms as articles of commerce.

The Court should, however, take the earliest possible opportunity to clarify this long-standing interpretation of the Second Amendment. As the shrill character of the debate over firearms regulation increasingly has made evident, the Court needs to reaffirm clearly and forcefully the federal judiciary's longstanding construction of the Second Amendment for a generation that has, in the words of one scholar, gone "gun crazy."¹⁷⁷

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¹⁷³ See *Printz v. United States*, 117 S. Ct. 2365 (1997) (striking down the interim provisions of the Brady Act, but leaving the Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.* (1994), intact).

¹⁷⁴ See *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring).

¹⁷⁵ See 16 C.J.S. *Constitutional Law* § 33 (1984).

¹⁷⁶ See *Printz*, 117 S. Ct. at 2385 (O'Connor, J., concurring).

¹⁷⁷ Herz, *supra* note 130, at 57.